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New Mexico Bar Residency As An Unconstitutional Penalty on Applicant's right to Travel--A projected Reversal of suffling v. Boudrant, 339 F. Supp. 257 (D.N.M. 1972) 252

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NEW MEXICO'S BAR RESIDENCY AS AN UNCONSTITUTIONAL PENALTY ON APPLICANT'S RIGHT TO TRAVEL—A PROJECTED REVERSAL OF *SUFFLING v. BONDURANT* 339 F. SUPP. 257 (D.N.M. 1972).

Any state has an understandably great concern in maintaining the fairness and efficiency of its judicial system. Insuring that only high caliber attorneys practice within its territory is a partial solution.[1] A state is empowered to impose certain bar admission prerequisites which commonly screen applicants for three qualities: knowledge of the law, moral character, and residency.[2] Although residency bears a questionable relationship to the state's legitimate interest in insuring the admission of only high caliber applicants, 45 of the 51 jurisdictions have some type of residence requirement.[3] New Mexico's rule requires that an unlicensed candidate reside in the state for six months, commencing no later than the date of the bar examination.[4]

Recently, in the case of *Suffling v. Bondurant*[5] the constitutionality of this rule was challenged—particularly in its post-examination application. Plaintiffs alleged that a durational residence rule creates two classes of bar candidates: one class which is allowed to practice law after passing the bar examination; the other class which, after passing the same examination, is prohibited from prac-

1. In Florida State Bar v. Sperry, 140 So.2d 587, 595 (Fla. 1962) the Florida Supreme Court gave the proper reason for regulating the practice of law:

> The reason for prohibiting the practice of law by those who have not been examined and found qualified is frequently misunderstood. It is not done to aid or protect the members of the legal profession either in creating or maintaining a monopoly or closed shop. It is done to protect the public from being advised and represented in legal matters by unqualified persons. . . .

See generally, Dalton & Williamson, *State Barriers Against Migrant Lawyers,* 25 U. Kan. City L. Rev. 144 (1957); Bard & Bamford, *The Bar: Professional Association or Medieval Guild?,* 19 Catholic U.L. Rev. 393 (1970); Note, *Attorneys: Interstate and Federal Practice,* 80 Harv. L. Rev. 1711 (1967); Note, *Restrictions on Admissions to the Bar: By-Product of Federalism,* 98 U. Pa. L. Rev. 710 (1950); Note, *Residence Requirements for Initial Admission to the Bar: A Compromise Proposal for Change,* 56 Cornell L. Rev. 831 (1971) (hereinafter cited as *Residence*).

2. *See Residence, supra* note 1, at 833.

3. The National Conference of Bar Examiners, The Bar Examiners' Handbook 15 (1968).

4. N.M. Stat. Ann. § 18-1-8, Rule II.A.8 (1953):

> An applicant for admission to the Bar upon examination, except an attorney duly admitted to the Bar in another state and actually engaged in the practice of law therein, must be an actual bonafide resident of the State of New Mexico at the time of examination. An applicant for admission to the Bar . . . must be a citizen of the United States, an actual bona-fide resident of the State of New Mexico for at least six months prior to admission, 21 years of age and of good moral character. . . .

5. Suffling v. Bondurant, 339 F. Supp. 257 (D.N.M. 1972).

ticing pending completion of a six-months' residence. Such a classification does not reasonably serve the state's legitimate interest of character investigation. This investigation is commenced no later than the deadline for registration—50 to 90 days before the examination is given.[6] By the time of the examination, the Board of Bar Examiners has usually been able to review all the out-of-state data and material available,[7] and the remaining residency period becomes arbitrary for its lack of purpose.

At the time the suit was filed, plaintiffs Suffling, Fayhe and intervenor Schmidt were residents of New Mexico,[8] and recent graduates of A.B.A. accredited law schools.[9] They had taken and passed the August, 1971 bar exam.

The essence of their claim was that Rule II(A)(8) violated the fourteenth amendment's equal protection clause as tested by two standards: the traditional standard of proving a "rationally connected" state interest set out in *Schware v. Board of Bar Examiners*[10]; and the more stringent test announced in *Shapiro v. Thompson*[11] of proving a "compelling state interest" since the fundamental freedom of interstate movement was being penalized. The action was brought as a class action for declaratory and injunctive relief against enforcement of Rule II(A)(8).

Within the fourteen months prior to the convocation of this three judge panel, four others had been convened to rule on similar pro-

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6. N.M. Stat. Ann. § 18-1-8, Rule II.B.15 (1953).

7. *See* Suffling v. Bondurant, 339 F. Supp. 257, 260 (D.N.M. 1972) (dissenting opinion).

8. N.M. Stat. Ann. § 18-1-8, Rule II.A.8 (1953). Plaintiff Rose was not a resident at the time the suit was filed. He had taken the bar exam in August, 1970, claiming New Mexico residency. The court, however, found this claim "impermissible" because Rose was already a resident of California when he had graduated from Loyola Law School several months before. He was still a California resident one week later when he took and passed the California Bar exam.

9. N.M. Stat. Ann. § 18-1-8, Rule II.A.9 (1953). Schmidt was a resident and inhabitant of New Mexico until 1968 when he graduated from the University of New Mexico Law School. Before taking the New Mexico Bar exam, however, he became a California resident. He took the New Mexico Bar exam for the first time in August, 1971, as a California resident.

10. Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957):
> A state can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law.

11. Shapiro v. Thompson, 394 U.S. 618, 634 (1969):
> At the outset, we reject the appellant's argument that a mere showing of a rational relationship between the waiting period and . . . admittedly permissible state objectives will suffice to justify the classification. . . . [I]n moving from State to State . . . appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to promote a compelling governmental interest, is unconstitutional.

visions.[12] These courts uniformly concluded that the pre-condition of bar residency was violative of the equal protection clause.[13] The *Suffling* court was the fifth panel to entertain the challenge.

Held: Shapiro's compelling interest standard was inapplicable to the facts before the court; and using the traditional test, that residency of six months "to be commenced either any time before the bar examination or as late as the day of the bar examination is a reasonable period in which to afford the Board of Bar Examiners an opportunity to investigate the morals and character of those persons who seek to become members of the New Mexico Bar."[14]

A strong dissent by Judge Bratton focused on the objection that any residency period required after the bar examination was "not contemplated by the Board's own rules for the purpose of evaluation of character."[15] Hence, new residents were being denied equal protection measured by the traditional standard. He made no objection, however, to the majority's decision not to apply the *Shapiro* standard.

Plaintiffs have appealed to the United States Supreme Court.[16] The purpose of this note is twofold: (1) to predict a reversal of *Suffling* in light of *Dunn v. Blumstein,*[17] the Supreme Court's most

12. North Carolina's rule required one year of residence before a candidate was allowed to take the bar examination which was given but once a year. The candidate could be required to reside in state for two years before being allowed to practice under such a rule. Under both the traditional and the compelling interest tests this rule was held to be violative of the Equal Protection Clause. Keenan v. Board of Law Examiners, 317 F. Supp. 1350 (E.D.N.C. 1970).

Georgia's statute required no residence qualification for the examination if the candidate graduated from an American Bar Association approved law school. Before being admitted to the bar a residence of one year was required. This pre-admission statute could result in a post-examination residence requirement similar to that required by New Mexico's Rule II.A.8. The one-year statutory residence requirement was held to violate the constitutional guarantee of equal protection only on the traditional ground. Webster v. Wofford, 321 F. Supp. 1259 (N.D. Ga. 1970).

Mississippi's rule required one year of residence before a candidate was allowed to apply for examination. In that there was also a 90-day deadline for receiving applications prior to the exam, the rule's effect was a 15-month residency requirement. The court held that the strict *Shapiro* test should not be applied, and the rule was stricken for denying the traditional standard of equal protection. Lipman v. Van Zant, 329 F. Supp. 391 (N.D. Miss. 1971).

Hawaii's rule required residence of six months after the candidate's fifteenth birthday. Co-existent with this rule was a sixty-day registration period prior to the bar exam for the express purpose of educational and character verification. The six-month rule was held unconstitutional only by the traditional rational connection standard. Potts v. Honorable Justices of the Supreme Court of Hawaii, 332 F. Supp. 1392 (D. Hawaii 1971).

13. Only Keenan v. Board of Law Examiners, 317 F. Supp. 1350 (E.D.N.C. 1970) held that the *Shapiro* strict test was applicable. The other courts relied exclusively on the traditional standard.

14. Suffling v. Bondurant, 339 F. Supp. 257, 260 (D.N.M. 1972).

15. *Id.* at 261 (dissenting opinion).

16. Notice of Appeal filed May 12, 1972.

17. Dunn v. Blumstein, 40 U.S.L.W. 4269 (U.S. Mar. 21, 1972).

recent ruling on the validity of residence requirements; and (2) to offer the Board of Bar Examiners a durational residence requirement which will be a constitutionally valid professional licensing measure.

SUFFLING V. BONDURANT WILL BE REVERSED ON APPEAL

It is unclear from the language and findings whether the court did not apply the strict compelling interest test, or whether, after improperly applying it, the court found that Rule II(A)(8) satisfied this more stringent standard.

A. The Strict Test was not Applied

Some of the court's language expresses a categorical and absolute refusal to apply *Shapiro:*

> *Shapiro* held that the classification created by the imposition of a one-year waiting period for welfare benefits did not promote a compelling state interest and was unconstitutional. The *holding of Shapiro is not applicable here however, as that case specifically excludes persons seeking professional licenses.* (Emphasis added.)[18]

Further, the majority emphatically "reject[s] application of the stricter test of Equal Protection in this case . . .",[19] and more significantly it cites the case of *Lipman v. Van Zant,*[20] where the court unambiguously refused to apply the *Shapiro* standard.[21]

Apparently, the *Suffling* court accepted defendants' arguments[22] that the right to travel announced in *Shapiro* was limited as a matter of law to *Shapiro's* facts because of the Supreme Court's statement therein:

> We imply no view of the validity of waiting-period or residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, etc. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel.[23]

18. Suffling v. Bondurant, 339 F. Supp. 257, 259 (D.N.M. 1972).
19. *Id.* at 260.
20. Lipman v. Van Zant, 329 F. Supp. 391 (N.D. Miss. 1971).
21. *Id.* at 403-04:
> The *Shapiro* court . . . had no occasion to apply the more stringent standard to eligibility requirements for obtaining a license to practice a profession, and expressly pretermitted the question. In view of the Supreme Court's continuing reliance on *Schware's* standards in late bar admission cases, we deem the rational test to be the only one applicable, and that it would be incorrect to judge any aspect of this case in terms of the stricter standard. . . .

22. Memorandum Brief for Defendants at 3, 4, Suffling v. Bondurant, 339 F. Supp. 257 (D.N.M. 1972).
23. Shapiro v. Thompson, 394 U.S. 618 at n. 21 (1969).

Since *Shapiro,* however, the Supreme Court has ruled on the validity of residence requirements in some of these "specifically excluded" areas. *Dunn v. Blumstein,*[24] its most recent decision, deals with voting residency as an unconstitutional penalty on freedom to move interstate.

James Blumstein, a native of New York, moved to Nashville in June, 1970, to join the faculty of Vanderbilt Law School. Almost immediately upon arrival, he registered to vote in the up-coming August and November elections. The voting officials refused to register him since Tennessee required residency in the State for one year and in the county for three months as prerequisites for voting registration. Tennessee asserted that the durational residence requirements were needed to insure a knowledgeable vote and the "purity of the ballot box."

Held: The requirements were violative of the equal protection clause of the fourteenth amendment as tested by the *Shapiro* standard.

For a fair comparison, the distinctions between *Blumstein* and *Suffling* must be noted. First, the state interests to be protected were different. Arguably, Tennessee may protect itself from fraudulent dual-voting in less time than New Mexico could screen and investigate would-be officers of its courts. Second, the nature of the personal rights penalized was different. *Blumstein* found that not only was the right to move interstate impaired, but also that the fundamental first amendment right to vote was denied. *Suffling* involved the penalizing of only the right to travel, the right to work being protected only generally under the equal protection or due process clauses of the fourteenth amendment.[25] Third, *Blumstein* makes numerous references to the 1970 Federal Voting Rights Act,[26] in which Congress outlawed state durational residence requirements for presidential and vice-presidential elections. In *Suffling*, there is no such undertone of federal intervention.

Despite these distinctions, the type of classification challenged–discrimination by durational residency–is identical, and *Blumstein* unequivocally rules that "... durational residence laws must be measured by a strict equal protection test."[27] Further, as noted by Justice Blackmun, concurring in the result, "much of the opinion seems to be couched in absolute terms" indicating that the majority

24. Dunn v. Blumstein, 40 U.S.L.W. 4269 (U.S. Mar. 21, 1972).

25. *Cf.* Truax v. Raich, 239 U.S. 33 (1915); Smith v. Texas, 233 U.S. 630 (1914); Keenan v. Board of Law Examiners, 317 F. Supp. 1350, 1362 (E.D.N.C. 1970).

26. Federal Voting Rights Act, § 202, 42 U.S.C. § 1973 aa-1 (1970).

27. Dunn v. Blumstein, 40 U.S.L.W. 4269, 4273 (U.S. Mar. 21, 1972).

had "taken a position broader than . . . necessary for the disposition of this case."[28]

Suffling refused to apply the strict test because *Shapiro* "specifically excluded" its application to professional licensing. However, as for the simultaneously excluded requirement for voting, *Blumstein* held to the contrary.

> Although in *Shapiro* we *specifically did not decide* whether durational residence requirements could be used to determine voting eligibility, we concluded that since the right to travel was a constitutionally protected right, "any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling state interest, is unconstitutional." . . . *Shapiro* and the compelling state interest test as articulated control this case. (Emphasis added.)[29]

B. The Strict Test was Improperly Applied

Despite the court's explicit rejection of *Shapiro's* strict test, the opinion contains language which indicates an attempted application:

> Considered under the traditional test of reasonable classification which is the standard we hold applicable, the six-month residency is reasonable and *does not unduly penalize petitioner's right to interstate travel.* While rejecting application of the stricter test of Equal Protection in this case, *Lipman v. Van Zant,* we express the view that *a state does have a compelling interest* in the quality and integrity of the persons whom it licenses to practice law and may *impose regulations which promote that interest.* (Emphasis added.)[30]

If the court did not apply *Shapiro,* then its recitation of *Shapiro* test findings is dictum—not only irrelevant but confusing. Conceding, from the mere existence within the opinion of the key words—"absence of penalty" and "presence of compelling state interest"—that the strict test was applied, the results were erroneous due to improper application.

The *Shapiro* test requires, as a prerequisite for finding a statute constitutional, a finding of no penalty on interstate movement, or that such penalty is justified by being necessary to promote a compelling state interest. It is at the first stage of analysis—determination of no penalty—that the *Suffling* court commits its most serious error. It concluded that the six-month residency requirement does not

28. *Id.* at 4279.
29. *Id.* at 4272.
30. Suffling v. Bondurant, 339 F. Supp. 257, 260 (D.N.M. 1972).

"unduly penalize" the right of interstate movement. Use of the word "unduly" indicates faulty reasoning. A "penalty" arises from the simple act of discriminatory or unequal treatment. It is not mysteriously set in motion by a defined *quantum* of impingement.[31]

Blumstein is directly in point and clarifies the law:

> In Tennessee's view, the compelling state interest test is appropriate only where there is "some evidence to indicate a deterrence of or infringement on the right to travel . . ." . . . In essence, Tennessee argues that *the right to travel is not abridged here in any constitutionally relevant sense.* This view represents a fundamental misunderstanding of the law. . . . *Shapiro* did not rest upon a finding that denial of welfare actually deterred travel. . . . In *Shapiro* we explicitly stated that the compelling state interest test would be triggered by "any classification which served to penalize the exercise of the right [to travel] . . . (Emphasis added.)[32]

Areas of the *Suffling* opinion which point to this improper balancing of the actual deterring effect of Rule II(A)(8) include:

> None of the cases in which residency requirements have been held unconstitutional deals with requirements as liberal as those of New Mexico.[33]

And, more blatantly:

> All of the Petitioners except Rose have been gainfully employed in New Mexico since having passed the bar examination in positions requiring legal training although not as admitted lawyers. None have undergone any economic hardship since passing the bar examination, although Suffling, Fayhe and Schmidt could have earned more as members of the New Mexico Bar.[34]

Suffling held the durational residence requirement did not penalize interstate movement. Proper analysis would have yielded results similar to the following:

> . . . [D]urational residence laws classify bona fide residents on the basis of recent travel, penalizing those persons, and only those persons, who have gone from one jurisdiction to another during the qualifying period. Thus, the durational residence requirement directly impinges on the exercise of a . . . fundamental right, the right to travel.[35]

The *Suffling* court's additional finding "that a state does have a

31. *Id.*, Brief for the Legal Aid Society of Albuquerque and the New Mexico Chapter of the American Civil Liberties Union as Amici Curiae at 6, 7.
32. Dunn v. Blumstein, 40 U.S.L.W. 4269, 4272-73 (U.S. Mar. 21, 1972).
33. Suffling v. Bondurant, 339 F. Supp. 257, 259 (D.N.M. 1972).
34. *Id.* at 258.
35. Dunn v. Blumstein, 40 U.S.L.W. 4269, 4272 (U.S. Mar. 21, 1972).

compelling interest in the quality and integrity of the attorneys it licenses"[36] is at best superfluous. State justification can be found either from a determination of "no penalty on travel" *or* from a finding that the requirement "furthers a compelling state interest." A finding of both indicates distorted reasoning.

Also indicative of the court's uncertainty in applying *Shapiro's* standard is its recitation of the test.[37] It omits the key words "is *necessary* to" promote that compelling interest. Those words are the crucial limitations on the state's regulatory power, requiring the state to choose the least onerous alternative in promoting its legitmate purpose. Such a view of the law—that a compelling interest without the added mandate that the state's law which promotes the interest be very narrowly designed—is in error.

The *Suffling* court's dilemma is clear. If the stringent test was not applied, as some of its opinion states, or if it was applied improperly, as indicated by other language, reversible error was committed. *Blumstein* all but dictates that Rule II(A)(8) is to be measured by *Shapiro:*

> In sum, durational residence laws must be measured by a strict equal protection test: they are unconstitutional unless the State can demonstrate that such laws are "necessary to promote a compelling governmental interest."[38]

2. *The Parties' Positions and the Court's Holding*

Judge Bratton clearly adopts the Plaintiffs' position, concisely stated in his dissent.

> By the terms of Rule II(A)(10),[39] the Board is required to find an applicant to be of good moral character *prior* to the applicant being allowed to take the bar examination. In the face of this rule, the Board's contention that it is necessary to evaluate a non-resident applicant's character by a residency *after* the examination is untenable.[40]
>
> . . . The evidence in this case was that in actual practice the Board had no procedure for affirmative action or evaluation by it of applicants during the post-examination residency period, relying instead on the attorney certificates required by Rule VI(38), and on

36. Suffling v. Bondurant, 339 F. Supp. 257, 260 (D.N.M. 1972).
37. *Id.*
38. Dunn v. Blumstein, 40 U.S.L.W. 4269, 4273 (U.S. Mar. 21, 1972).
39. N.M. Stat. Ann. § 18-1-8, Rule II.A.10 (1953):
The Board of Bar Examiners shall not permit any applicant to take an examination . . . unless such applicant shall satisfy the Board of his good moral character.
40. Suffling v. Bondurant, 339 F. Supp. 257, 261 (D.N.M. 1972) (dissenting opinion).

> information which might be volunteered to it. There was no evidence that anyone had ever actually been denied admission at the end of such period on the ground of moral character.[41]

The Defendants argued that the six-month residency requirement was a reasonable measure for insuring the quality and integrity of new lawyers:

> ... [R]eports especially on practicing attorneys are often not received until after [the bar] examination has been held. As to former non-resident law school graduates, available information is sufficiently sparse that the waiting period is particularly valuable in *affording an opportunity for the public in the state to observe the conduct and character of an applicant, and to communicate to the Board of Bar Examiners any character deficiencies thus observed.* (Emphasis added.)[42]

The court accepted Defendants' arguments and concluded that Rule II(A)(8)'s six-month residency requirement was constitutional in that it reasonably serves two legitimate state functions. It "afford[s] the Board of Bar Examiners an opportunity to investigate the morals and character" of the candidates, and "also provides a realistic time period in which three members of the bar residing in applicant's locality can certify regarding his moral character as required by Rule VI(38)."[43]

The court avoided Judge Bratton's argument—that the rule of a post-examination residence for a character evaluation was patently invalid—by what appears to be a restatement of the Plaintiffs' challenge of arbitrary and unreasonable classification:

> *While the regulations require that* residence and *good moral character be established before taking the bar examination, the Commissioners have allowed* the residence period to be filled out after the examination . . . and *good moral character [to] be established after the examination.* (Emphasis added.)[44]

The meaning of this language is unclear. The court appears to have disposed of Judge Bratton's argument by circumvention.

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41. *Id.* at n. 3, dissenting opinion.
42. *Id.*, Memorandum Brief for Defendants at 21.
43. *Id.* at 6. N.M. Stat. Ann. § 18-1-8, Rule VI.38 (1953) provides:
> No applicant will be recommended for license until he has completed the period of 6 months actual bona-fide residence in the State nor until he has submitted certificates of three members of the Bar of New Mexico residing in the locality where applicant lives that applicant has maintained his residence in this state for the period of 6 months preceding and that he is a person of good moral character. . . .
44. Suffling v. Bondurant, 339 F. Supp. 257, 259 (D.N.M. 1972).

D. Results of a Proper Application of Shapiro's Strict Test

Had *Shapiro* been properly applied, Rule II(A)(8) would have been more closely scrutinized:

> It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means which unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with "precision" . . . and must be "tailored" to serve their legitimate objectives . . . [I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose "less drastic means."[45]

The post-examination restriction imposed on the right to travel by Rule II(A)(8) is not *necessary* to provide the Board of Bar Examiners an opportunity to investigate the applicant's character, the evidence revealing that the Board has no procedure for affirmative action during this period and that no candidate has ever been denied admission when the period terminated.[46]

Receiving certifications as to good moral character as provided by Rule VI(38) appears to be the only investigating the Board does after the bar examination. Even if such a community observation and reporting device is found to be a reasonable measure as an investigative aid to the Board, can it be argued that such a rule is necessary—that there are no "other, reasonable ways to achieve" the Board's evaluation of the candidate? The late Dean Horack faced this question:

> Of course the reason given for a period of residence prior to admission is that it will thus prevent an unknown lawyer of bad moral or professional character from gaining admission, because during this period he will have an opportunity to establish his good moral character where he will be under the observation of local people. Practically this is of little or no protection to the state and the bar. A mere year of residence does not go far to establish a man's character and *only careful investigation at the applicant's former place of residence is apt to disclose those habits or qualities which would make him an undesirable member of the local bar.*[47]

In an increasingly urban and mobile society, the state's assertion

45. Dunn v. Blumstein, 40 U.S.L.W. 4269, 4273 (U.S. Mar. 21, 1972).

46. *See* Suffling v. Bondurant, 339 F. Supp. 257, 260 (D.N.M. 1972) (dissenting opinion).

47. Horack, *"Trade Barriers" to Bar Admission,* 28 J. Am. Jud. Soc'y 102-03 (1944).

that community observation is a *necessary* screening device is unacceptable.

Under *Shapiro's* standards it is incumbent upon New Mexico to show more than that the six-month durational residency requirement of Rule II(A)(8) is "reasonably connected" to a governmental goal. It must show that simpler or more direct ways to the same result, less burdensome on the applicant's right to travel, are not available. Less onerous alternatives exist, even within the present Rules for Bar Examiners: Rule II(B)(13) requires pre-examination application to be accompanied by a local attorney's certification that the applicant is of good moral character; Rule II(B)(15) sets the application deadline at 90 days before the examination, or 50 days for applicants graduating from A.B.A. approved law schools. Investigation as a practical matter starts on receipt of an application. This period is sufficient to check character qualification.[48] Numerous other provisions exist within the Rules for a more efficient, less taxing morality investigation.[49]

Durational residency to be completed from the date of examination to six months thereafter is not a necessary means of achieving the governmental goal of investigating and evaluating an applicant's character. There exist alternative means to that end proven to be less restrictive on the applicant's fundamental freedom to move interstate.

PROPOSALS FOR AN ALTERNATIVE RULE

If as projected, New Mexico's Rule II(A)(8) is unconstitutional, what alternatives are available?

A. Absolute Abolition of any Residence Requirements

The most obvious, least painstaking alternative is to dispense with the residency requirement. The six jurisdictions which have done so investigate entirely by out-of-state communication with the National

48. *Cf.* Keenan v. Board of Law Examiners, 317 F. Supp. 1350, 1361 (E.D.N.C. 1970):
> The plaintiffs concede, and we agree, that some reasonable period of time may be necessary to delve into the character qualifications of all applicants set sufficiently before the examination. If the Board be concerned that out-of-state applicants may not fully cooperate in the determination of their fitness, reasonable cooperation can be assured by requiring it for admission.

49. N.M. Stat. Ann. § 18-1-8, Rule III. 23 (1953) provides that "administrative machinery shall be set up where applicant's questionnaires or interviews warranted." Rle III.23 also requires the Board to use the investigatory services of the National Conference of Bar Examiners. These services are nationwide and thorough enough to be exclusively relied on for accurate and responsible character checks; Rule IV. 26 provides for individual notification and further meetings concerning particular applicants. Such a rule would be useful in the rare instances where investigation has not been completed before the bar examination.

Conference of Bar Examiners[50] which conducts a thorough, nationwide check with particular emphasis on the candidate's old residences.

B. Pre-Examination Residency

Another view is that a state, responsible for its public's protection, is bound to police those it accepts as bar members by more "human" devices than an out-of-state law school record, a computer processed punchcard account of his disciplinary and criminal records, and the results of a three day standardized bar examination. Arguably, a required waiting-period of sustained personal contact and observation reveals character flaws and screens unprofessional conduct not traceable through "paper" evaluation.

Justice Blackmun appears to sanction this view:

> . . . The State, in granting the authority to practice law, with what surely is the true privilege, not the right, to be entrusted with a client's confidences, aspirations, freedom, life itself, property, and the very means of livelihood, demands something more of the applicant than a formal certificate of completion of a course of legal study and the ability acceptably to answer a series of questions on a Bar examination. It presumably demands what fundamentally is character. And it is character which a State holds out to the public when it authorizes an applicant to practice law.[51]

A state may insist that the attorneys it licenses be bona fide residents, not only at the time they are admitted, but for a reasonble period beforehand, "according to [the state] a chance to conduct in each case a meaningful and careful investigation . . . into the character of a bar applicant. . . ."[52]

At present, New Mexico relies almost exclusively on out-of-state centralized character sources.[53] The required in-state waiting period is a character screen is effectively dormant and in this dormancy, particularly its post-examination phase, lies its constitutional defect. Of the four residency requirements previously challenged in federal courts, only Georgia's was similar to New Mexico's in this post-examination aspect. In that case, *Webster v. Wofford*,[54] the requirement was stricken for precisely this defect as being violative of traditional equal protection:

50. The National Conference of Bar Examiners, The Bar Examiners' Handbook 79-90 1968).

51. Baird v. Arizona, 401 U.S. 1, 20 (1971).

52. Lipman v. Van Zant, 329 F. Supp. 391, 402-03 (N.D. Miss. 1971).

53. *See* Suffling v. Bondurant, 339 F. Supp. 257, 260 (D.N.M. 1972) (dissenting pinion).

54. Webster v. Wofford, 321 F. Supp. 1259 (N.D. Ga. 1970).

> Having established residency and taken the bar examination, the applicant is not required to physically remain in Georgia prior to the fulfillment of his residency requirement. Having become a permanent resident he may sojourn elsewhere. The situation might be different if applicant's acts or achievements in the interim were under investigation or *in some constructive fashion were made a condition of his ultimate admission.* All investigations into his background, moral character, etc., are completed and reviewed however, prior to the bar examination. The statute as drawn therefore serves absolutely no purpose save delay. Indeed, so far as appears, the applicant could remain in a self-induced coma for the entire period and still demand admission at the appointed time. (Emphasis added.)[55]

To provide the missing constitutional link of purpose to period, New Mexico could amend its rule to require residency on application date, or to require a 90-day pre-examination residency. *Lipman v. Van Zant* expressly upheld the length and structure of such a residency law.[56] Adoption of this proposal, however, would sacrifice the present rule's commendable facility for interstate movement–its "minimal risk" quality.

Under the present regulation, an out-of-state resident, graduating from law school, may take the bar examination in August or March, establishing his residency the day before or even the day of the examination. By the fifth day after he has arrived and established residency, he knows if he has passed the examination,[57] and if he has "cleared" the National Conference character check.

C. Post-examination Residency

A third alternative which will retain the "minimal risk" feature of the present rule, and simultaneously supply and equate state purpose to residence period, is to require a post-examination durational residency.[58] The proposed rule would provide that all applicants for bar admission must complete a six-month residency in probationary practice as "conditional licensees." By the time the bar examination has been graded, most applicants are minimally fit and capable to

55. *Id.* at 1261-62.

56. Lipman v. Van Zant, 329 F. Supp. 391, 402-03 (N.D. Miss. 1971):
> Thus a requirement of residence at date of application does not force any citizen to become a Mississippi resident for a period of time very little more than three months prior to his taking the examination. These are, without doubt, reasonable requirements. . . .

57. Memorandum Brief for Defendants at 6, Suffling v. Bondurant, 339 F. Supp. 257 (D.N.M. 1972):
> Results of New Mexico Bar examinations are released on the first or second day following completion of the bar examination by the applicant.

58. *See Residence, supra* note 1.

practice law. At this time the State would admit all passing applicants to the New Mexico Bar on a conditional basis. Although the probationary license would entitle the applicant to counsel clients, litigate cases and charge payment for his services according to the minimum fee scale, there would be limitations and regulatory measures imposed by such a rule. The three attorneys who presently are required to certify as to the six-month residence and good moral character of the applicant [Rule VI(38)] under the modified rule would be appointed by the Board of Bar Examiners to fill a much more active role as the licensee's "sponsors." Their function would be to observe the licensee on the job, as advocate, counsellor and legal advisor, and to keep the Board advised of his work by periodic, informal reports. During this period of probationary practice, the applicant's license would be subject to suspension by the Board on its own findings, through newly available information from an outside source, or upon the request of any one of the three sponsors for cause shown.

The strength of this proposal is that it serves as a more realistic final screen for the protection of the bar and the public without discriminatory treatment of recent arrivals. The state would be better able to detect character deficiency by on-the-job observation of its bar applicants. The applicants would immediately be able to practice law at full salary.

How would the new rule fare under constitutional challenge? It is reasonable to expect the Supreme Court to reverse and remand *Suffling* with instructions to the district court panel to apply the *Shapiro* test since deciding in *Blumstein* that "durational residence laws must be measured by a strict equal protection test."[59] For the same reason that Rule II(A)(8) will be subjected to the more stringent test, the proposed rule must also hold up under that measure. The fatal defect of Rule II(A)(8) is the Board of Bar Examiners' actual inactivity in checking a candidate's character after the bar examination. Under the third alternative this flaw is remedied. New Mexico's compromise residence rule would survive because it is "tailored" with "precision" to promote the compelling state interest of licensing only capable attorneys.

V. HENRY ROTHSCHILD III

59. Dunn v. Blumstein, 40 U.S.L.W. 4269, 4273 (U.S. Mar. 21, 1972).