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a full "due process" proceeding, it will also have insured that many will never get on the rolls, or at least that they will remain destitute during the lengthy proceedings followed to determine initial eligibility.\textsuperscript{130} 

Hopefully, this will not happen.

Finally, Chief Justice Burger dissented on the ground that the majority's decision is an infringement on a legislative function. "I am baffled as to why we should engage in 'legislating' via constitutional fiat."\textsuperscript{131} The Chief Justice's point is well taken, for in holding not only that due process requires an evidentiary hearing on the question of a recipient's eligibility \textit{before} any welfare payments may be stopped, but also specifically detailing what the content of such hearing, the Supreme Court has successfully pre-empted legislative action. In a rapidly changing area such as welfare administration, why should the Supreme Court, rather than state legislatures, create rigid procedural requirements for the varied welfare problems of fifty different states? In so doing the Court comes very close to becoming a court of legislative revision; a role the Court was thought to have abandoned in 1937. The result of this is a limiting of state's abilities to experiment with new and creative approaches to the administration of welfare.

\textit{John Henely}

\textbf{CONSTITUTIONAL LAW—RIGHT TO CONSULT WITH ACCOUNTANT—AN ADDITION TO FIFTH AMENDMENT LIBERTIES}

On January 4, 1965, Special Agent John Trager, accompanied by a Revenue Agent of the Internal Revenue Service, conducted an interview with Walter Tarlowski at the home-office of his accountant, Michael Coppins. Trager, before proceeding with the questioning, gave Tarlowski some of the warnings required by \textit{Miranda v. Arizona},\textsuperscript{1} including the warning of the right to counsel. He then requested and in fact succeeded in having Coppins leave the room while Tarlowski was being interrogated. In his interview Tarlowski made several damaging admissions.

In July, 1967, Special Agent Trager again met with Tarlowski, who had

\textsuperscript{130} 397 U.S. at 278-79 (dissenting opinion).
\textsuperscript{131} 397 U.S. at 283 (dissenting opinion).
\textsuperscript{1} 384 U.S. 436 (1966).
by this time changed accountants. By now Trager was contemplating initiating prosecution, so at this interview he requested that Tarlowski produce certain books and records. Almost in the same breath, the Special Agent warned Tarlowski of his rights to silence and to counsel, while denying his expressed desire to consult with an accountant.

Tarlowski was subsequently tried for tax evasion. At the trial, the defendant, Tarlowski, made a motion to suppress the statements and records thus obtained. His contention was that both interviews from which his accountant-advisers were excluded violated his rights as guaranteed by the due process clause of the fifth amendment. The District Court for the Eastern District of New York agreed. The court held that a representative of the federal government may not limit an individual's right to demand the presence of others at an interrogation. Hence, the right to associate with, and be accompanied by, one in whom confidence and reliance is reposed is part of the "liberty" guaranteed by the fifth amendment, which a person may not be deprived of without due process of law. United States v. Tarlowski, 69-2 USTC ¶9554 (E.D.N.Y. 1969).

Since the 1930's the federal government, with good reason, has expanded until today it engulfs almost every phase of life within its sphere of influence. This expansion has not been without growing pains, most noticeably evinced by the reduction of the individual to something less than that term suggests and something slightly more than a cog in a gear. Today one is born, numbered, categorized, taxed, fed, judged, retired, and finally laid to rest under some form of governmental guardianship. Concomitant to this reduction, however, has been a distinct recognition on the part of the judicial system of the necessity of protecting the integrity of the individual by giving him "a fair shake" when facing governmental intrusion. The Tarlowski case represents another step in this direction. The purpose of this casenote, then, is threefold: to examine the reasoning behind the Tarlowski decision, to review the sources or direction from whence it came, and to speculate on its possible effects. Simply stated, this note will examine the continuum in which Tarlowski must be placed.

Succinctly, Tarlowski posed the issue of whether a representative of the

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2. U.S. Const. amend. V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."
federal government may deprive an individual of the presence of another at an investigation without depriving him of his liberty under the fifth amendment. Answering in the negative, the court pursued two lines of thought: first, what is liberty and how far does it extend, and second, what due process is necessary to allow a deprivation of this same liberty?

A definition of liberty then, is the cornerstone of this discussion. But even before attempting to define liberty, it is necessary to take a cursory glance at the political philosophy against which this definition must be laid. Broadly speaking, American political philosophy evolved from the thought of theorists who may be properly called naturalists. These men, Hobbes, Burke, Locke, and others started with the view that man, in the beginning, existed in a state of nature. In that state all men were equal and all men had complete freedom. Having such freedom, the only law was that of self-preservation. It is not surprising, therefore, that the state of nature often became a state of war where notions of right and wrong, justice and injustice, had no place. As a result, man was forced to seek some sort of peace and solitude and, therefore, he left the horrendous state of nature and entered society.

How was this departure accomplished? The most common answer is that men would covenant among themselves to create a sovereign in whom they vested all power. In this manner, man relinquished the absolute freedom which was his in nature for the conditional liberties guaranteed by the sovereign. Hence, it would seem that men united "for the mutual preservation of their lives, liberties, and estates," and only so long as the sovereign protected these things would man remain in society.

This is the naturalist, or positivist, theory of politics. But what

5. See Hobbes, supra note 4, at 105-08; Locke, supra note 4, at §§ 21, 123; Rousseau, supra note 4, at 8-9.
6. See Hobbes, supra note 4, at 112-73; Locke, supra note 4, at §§ 21, 123; Rousseau, supra note 4, at 14-16.
7. Rousseau, supra note 4, at 19: "Man loses by the social contract his 'natural' liberty, and an unlimited right to all which tempts him, and which he can obtain; in return he acquires 'civil' liberty."
8. Locke, supra note 4, at § 123.
9. Locke, supra note 4, at §§ 229-32.
10. The positivist theory of politics is based upon a hedonist view of man's nature, and it is generally opposed by the natural law theory which views man as inherently good. The natural law theory is often given much lip service but little
application does it have to present political circumstances? From the foregoing it should be clear that the sovereign or government is the protector of all our rights as well as the source. Being the source of what may or may not be done, the state or sovereign provides the guidelines for what we define as "liberty." Because these guidelines are never absolute, liberty is never truly absolute, but may "vary with times and circumstances and admit of infinite modifications . . . [and] cannot be settled upon any abstract rule." Although we may not with mathematical precision define liberty, it is "not impossible to discern." To do this, one must look at what has and what has not been ruled to be liberty.

To rephrase, liberty is subject to authority; hence, where authority ends, liberty begins. Further, since liberty is the absence of opposition, it is when the sovereign or state declares that a certain action is privileged from opposition that a liberty becomes a right. Liberty, therefore, is merely the absence of opposition to an act, whereas the rights we so often call liberties become so only when defined as such. Once a liberty is defined as a right by the sovereign, it becomes in effect, absolute, subject only to the reasonable and just power of the sovereign, i.e., government or legislature. As a result, it is by a process of inclusion and exclusion that liberties become rights. In this manner, the civil liberties which we have are made enforceable as rights.

If this be the case, then liberty is bound to be only that which is defined as such in the Constitution, and the argument becomes tautological; for, if liberty is that which the sovereign says it is, and the sovereign simply says it is "liberty," we are nowhere. Such is not the case, though, for the government, or legislature, is not the sole interpreter of the meaning of liberty. The courts, like the legislature, discern what liberty is—they draw the guidelines. Therefore, it is to the courts one must look to find a more inclusive definition of liberty. However, the courts have been generally reluctant to determine the boundaries specifically:

Although the court has not assumed to define "liberty" with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law

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application. It is, simply stated, based upon the notion that there are certain immutable laws of nature which may not be contravened by any of man's laws. Further, it is asserted that these natural laws exist and may be ascertained by some form of teleological reasoning. For a background of this theory, see the writings of Edmund Burke and Jacques Maritain and especially Maritain, THE RIGHTS OF MAN AND NATURAL LAW (New York, 1943). For a summary of its current application in the law, see Comment, Natural Rights, The Social Compact and Procreation: A Modern Application of An Abandoned Doctrine, 18 De Paul L. Rev. 703 (1969).

12. Id. at 71.
extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective.\textsuperscript{13}

Similarly, in the case of \textit{Meyer v. Nebraska}, the United States Supreme Court said:

While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.\textsuperscript{14}

Categorically, liberty has been said to include the right to marry whomsoever one wishes,\textsuperscript{15} the right to privacy and intimate marital relationships,\textsuperscript{16} the right to travel,\textsuperscript{17} the right to conduct and to attend the school of one's choice,\textsuperscript{18} the right to teach and to learn foreign languages,\textsuperscript{19} the right to choose the employment one wishes,\textsuperscript{20} the right to contract,\textsuperscript{21} and the right to picket.\textsuperscript{22}

Obviously then, the term "liberty" is not confined within the bounds which that term commonly signifies. But does it encompass the freedom to have with you whomsoever you wish at an interrogation? Clearly, there must be other liberties not set forth in the Constitution—nor defined by the courts—which are nonetheless guaranteed to the people. Rousseau came to a similar conclusion when he said: "All which an individual alienates by the social compact is only that part of his power, his property, and his liberty the use of which is important to the community."\textsuperscript{23}

Therefore, there are inherent liberties which are not expressly enumerated within the Constitution or its amendments which are guaranteed to the individual.

\begin{itemize}
  \item \textsuperscript{13} Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954).
  \item \textsuperscript{14} 262 U.S. 390, 399 (1923). \textit{See also} Allegeyer v. Louisiana, 165 U.S. 578, 589 (1897).
  \item \textsuperscript{15} Loving v. Virginia, 388 U.S. 1 (1967).
  \item \textsuperscript{16} Griswold v. Connecticut, 381 U.S. 479 (1965).
  \item \textsuperscript{17} Aptheker v. Secretary of State, 378 U.S. 500 (1964); Kent v. Dulles, 357 U.S. 116 (1958).
  \item \textsuperscript{18} Pierce v. Society of Sisters, 268 U.S. 510 (1925).
  \item \textsuperscript{19} Meyer v. Nebraska, \textit{supra} note 14.
  \item \textsuperscript{20} Greene v. McElroy, 360 U.S. 474 (1959).
  \item \textsuperscript{21} Addyston Pipe and Steel Co. v. United States, 175 U.S. 211 (1899); Allegeyer v. Louisiana, \textit{supra} note 14.
  \item \textsuperscript{22} Senn v. Tile Layers Protective Union, 301 U.S. 468 (1937).
  \item \textsuperscript{23} ROUSSEAU, \textit{supra} note 4, at 28.
\end{itemize}
In order to determine the extent to which those liberties or rights not enumerated are guaranteed, it is necessary to look first to the common law and then to judicial decisions involving the Bill of Rights. The English common law appears to have recognized that the freedom to pursue a particular course of action was to be permitted unless statutorily prohibited. For example, in *Entick v. Carrington*\(^{24}\) the court stated that there must be some justification to allow a trespass, and that a searcher is bound to show that some positive law has empowered his actions or excused his trespass, for otherwise the trespass is not to be allowed.\(^{25}\) Thus, the early law and writings embodied a belief that an individual had certain rights which could not be restrained.

The founders of the Constitution adopted the view expressed in the English common law. Alexander Hamilton, for instance, stated that there were certain immunities upon which the government was not granted the power to intrude.\(^ {26}\) The ninth amendment tends to lend credence to this contention, as it provides that: "The enumeration within the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." If there are other rights retained by the people, it is certainly conceivable that one of these is the right to have a witness present at an interrogation, for "nothing would be better calculated to prevent misuse of official power in dealing with a . . . suspect than the scrutiny of his lawyer or friends or even of disinterested bystanders."\(^ {27}\)

There have been a multitude of decisions under the Bill of Rights which have recognized the principle that without express authority by the government, they may not intrude upon a citizen unless in pursuit of an independent liberty. By surveying some of these decisions, it will become clear to what extent the individual is free from intrusion. For example, the fourth amendment grants security against unwarranted searches and seizures.\(^ {28}\) In addition, it has been recognized that without statutory authorization, wiretapping is an illegal search and seizure in violation of this amendment.\(^ {29}\)

The fifth amendment prohibition against self-incrimination is one of the most basic rights.\(^ {30}\) Under it, compulsion in any form is forbidden, and

\(^{24}\) 19 How. St. Tr. 1030 (1765).

\(^{25}\) *Id.* at 1044.

\(^{26}\) *The Federalist*, No. 84 at 578 (Cooke ed. 1961).

\(^{27}\) *In re Groban*, 352 U.S. 330, 342, 343 (1957) (Black, J. dissenting).


\(^{29}\) *Katz v. United States*, *supra* note 28.

only uncoerced and voluntary testimony has been allowed. Many of the
decisions in this area present facts concerning interrogations and evidence
which were determined to have been ascertained unlawfully. In *Massiah v. United States*, for example, the defendant, lulled into a false sense of
security by his co-defendant while in the latter's "bugged" car, made sev-
eral damaging statements. The Supreme Court reversed his conviction,
holding that Massiah should have been allowed to have counsel present
even though he was unaware he was being interrogated.31

Similarly, in *Escobedo v. Illinois*32 the confession of Danny Escobedo
was deemed inadmissible because he had been questioned for hours with-
out being informed of his right to remain silent, without being allowed to
see his lawyer, and without being formally indicted. The Court, in re-
versing that once the "adversary system begins to operate . . . the ac-
cused must be permitted to consult with his lawyer"33 because that is
when the government begins to intimidate.

In *Miranda v. Arizona*34 and in the prior decision of *Jackson v. Denno*,35 the Supreme Court emphasized the importance of uncoerced
confessions and admissions by witnesses which are therefore more credible.
In an effort to "assure that the individual is accorded his privilege under
the fifth amendment to the Constitution not to be compelled to incrimi-
nate himself,"36 the Court in *Miranda* laid down four positive prescrip-
tions, including an absolute right to silence, and to have counsel as soon as
the investigation becomes "accusatorial."37 These prescriptions were
brought closer to home in *Mathis v. United States*, where they were deemed
to apply to tax investigations.38 In *Mathis*, the Court expressly "re-
jected the contention that tax investigations are immune from the *Miranda*
requirements for warnings to be given a person in custody."39

Another manifestation of the length and breadth of the individual's
rights is rooted in the sixth amendment, under which a speedy and fair
trial has been guaranteed.40 More importantly, the right to assistance of

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33. *Id.* at 492.
34. *Supra* note 1.
36. *Supra* note 1, at 439.
37. *Supra* note 1, at 436.
39. *Id.* at 4.
counsel has been held to mean "effective assistance" beginning long before the actual trial. Similarly, under the eighth amendment, no man may be deprived of liberty by cruel and unusual punishment.

The guarantee of these rights has enabled "the citizen to create a zone of privacy which government may not force him to surrender to his detriment." In attempting to invade this "zone," the government, in addition to denying an accused his right to counsel, has also at times denied him access to relatives or friends. This too has been struck down.

In one case, a court phrased it:

Alone or together, neither the unlawful detention for many hours nor the deceit would suffice to vitiate the confessions as unconstitutionally obtained. But they kept [the defendant] incommunicado, refusing to allow his lawyer and friends to consult with him.

The court concluded that keeping one incommunicado in this manner was an unconstitutional practice.

Would it be too much of a leap from this point to say that the intentional exclusion of a witness—a friend and consultant of the accused—from an interview conducted by the Internal Revenue Service is also an "unconstitutional practice?" Perhaps not. As already documented, cases as far back as Old English law have recognized that of those civil liberties not surrendered to the sovereign, many are expressly enumerated and many are not. Yet they all have one common denominator—the sanctity of one's person. For if man is the goal of the state and not its means, then the sanctity of his person is inviolable without some express authorization.

No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.

In Tarlowski, the defendant sought to exercise what he believed was a freedom he possessed. He requested the presence of his accountant dur-

42. Supra note 32; supra note 1.
46. United States ex rel. Caminito v. Murphy, 222 F.2d 698, 700-01 (2d Cir. 1955).
47. Id. at 700.
ing questioning by the Internal Revenue Service, and this request was denied. Clearly, Tarlowski was deprived of a liberty within the purview of the fifth amendment. The freedom of a prospective defendant to have with him at an interrogation one in whom he reposes trust and confidence must be included within the rights guaranteed by the term “liberty,” if only for the fact that during an interrogation

[t]he witness has no effective way to challenge his interrogator’s testimony as to what was said and done at the secret inquisition. The officer’s version frequently may reflect an inaccurate understanding of an accused’s statements or, on occasion, may be deliberately distorted or falsified. While the accused may protest against these misrepresentations his protestations will normally be in vain. . . . But when the public, or even the suspect’s counsel, is present the hazards . . . are greatly reduced.

The presence of legal counsel or any person who is not an executive officer bent on enforcing the law provides still another protection to the witness.49

Previously it was noted that the courts have often been the arbitrators of what is, or is not liberty; they have laid down the guidelines. Logically then, it is completely within their power to define any act as within the liberty covered by the fifth amendment, except those specifically excluded by the legislature or by a court of higher authority. Therefore, it must be concluded that it was well within the power of the court in Tarlowski to expand the term liberty as it did.

If it be conceded that the right to be accompanied by another in whom one reposes trust and confidence at an interrogation is within the liberties guaranteed by the fifth amendment, then the next consideration must be to decide what authority is necessary to deprive one of this liberty. More precisely, has a special agent of the Internal Revenue Service the power to exclude others from an interrogation? A priori to a general discussion of this question, it should be pointed out that a special agent is in essence a law enforcement officer whose duty is not that of auditing tax returns but rather of investigating and arresting violators of the fraud statutes of the Internal Revenue Code.50

It has already been seen that whatever liberty is granted by the state or “discerned” by the courts is subject to limitations. These limitations stem from three possible authorities: (1) general statutes; (2) the Internal Revenue Code; and (3) the common law. Despite the fact that limitations on liberty are permitted, they are tolerated only if reason-

49. Supra note 27, at 340-41.

50. United States v. Viale, 312 F.2d 595 (2d Cir. 1963); See also Hewitt, The Constitutional Rights of the Taxpayer in a Fraud Investigation, 44 Taxes 660 (1966).
able;51 if related to a "proper government objective";52 if not arbitrary;53 and if they do not "sweep unnecessarily broadly . . . the area of protected freedoms."54 Limitations which exceed these criteria will be, and have been, struck down. Clearly, a liberty within the bounds of the fifth amendment may be infringed upon and prohibited if that prohibition is neither arbitrary nor unreasonable and is directed to a clearly specific and proper purpose. Unable to locate such a statute, the court in Tarlowski was forced to conclude that "[n]o statutory authorization provides the basis for the decision of the Special Agent to exclude the defendant's accountant from his interview with the defendant."55

Section 7608 of the Internal Revenue Code grants special agents the power to search and arrest under a warrant, to issue subpoenas and summonses, and to seize certain property. Nowhere in the Code is an agent given the power to exclude whomever he wishes from an interrogation, nor is there any provision specifying that interrogations be conducted with the accused alone.

Absent some express authorization granting exclusion one must look for an implied sanction. But the search is in vain. It is elementary that if a right is a claim upon the conduct of other persons, the corresponding conduct is a duty. Consequently, the duties or limitations placed upon rights in addition to those expressly imposed correspond to the very liberties already discussed. Put another way, until a right is granted or defined, its limitations are not defined; ergo there can be no implied authorization to limit the right of an accused to the presence and aid of another at an interrogation until it is determined to be a right.

The only conclusion that may be reached is that such an invasion of the individual's right to determine the conditions under which he will deal with agents of the federal government when under criminal investigation as is present here can be considered to be nothing less than a denial of liberty without due process of law. When an agent of the IRS or any administrative body acts on his own authority to set the limits of an individual's power to associate, this constitutes an invasion of the liberties guaranteed by the due process clause.56

Thus, in Tarlowski there evolved a new dimension to the word "liberty." For the first time, an individual was deemed to possess the right to have present with him at an interrogation by "the IRS or any administrative

52. Supra note 13, at 500.
56. Id. at 85,467.
body"57 "friends," "witnesses," "counsel," or "advisors."58

The decision is important not only because of what it said but also because of what it did not say. The distinction becomes evident if considered in conjunction with the definition of liberty. Previously it was noted that liberty is essentially the absence of opposition to a particular act and that once government, through the legislature or the courts, declares that a certain act may not be opposed, an individual acquires a right to perform that act free from interference. The duty of the state then becomes negative, that is, not to oppose. It is not the state's duty to implement the particular liberty or even to provide an opportunity to exercise it.

In Tarlowski, the court makes it permissible for an individual to be accompanied by whomever he wishes at an interrogation—if it is requested. But it is not mandatory for the court or the officials involved to supply these people. In effect, under Tarlowski one cannot be told he may not, for example, have an accountant present at an interrogation by the Internal Revenue Service, but by the same token one is not required. The distinction is relevant only because the court could conceivably have held that the right to have an accountant or an advisor at an interrogation is a procedural requirement.

To elucidate the above, in recent years the courts have made certain rights procedural requirements. As a result, these rights are positive guarantees and the state must implement them and must provide the opportunity to exercise them. The relevant cases in this connection are those concerned with the right to counsel. They are relevant for two reasons: First, both represent essentially criminal prosecutions; and second, both invoke a limitation on government by effectively prohibiting involuntary self-incrimination. Thus, an examination of these cases should provide the basis for making the right to have an accountant present at an interrogation by the Internal Revenue Service a procedural requirement.

For example, in the early cases, Powell v. Alabama59 and Johnson v. Zerbst,60 the Supreme Court held that there was a right to counsel as a matter of due process of law, and that this right meant assistance. The Escobedo and Miranda cases elaborated on when this right began and how it was to be implemented. Escobedo held that an accused had a right to effective assistance of counsel as early as the interrogation.61

57. Id.
58. Id. at 85,462, 85,468.
60. Johnson v. Zerbst, supra note 41.
61. Supra note 32.
Miranda then said that an accused had the right to know of these guarantees and it was the duty of the law enforcement official to so warn him.\(^{62}\) Gideon v. Wainwright represented a further step in the line by its holding that the right to effective assistance of counsel was required even though the defendant was indigent and could not afford one.\(^{63}\) The gist of these cases is that due process of law requires that an accused, even before an interrogation begins and even though he be a pauper, be informed of his rights, and, if necessary, be supplied with the effective assistance of counsel.

However, in recent years it has been argued unsuccessfully that in complicated tax fraud cases, the right to effective assistance of counsel includes the right to have an accountant.\(^{64}\) In United States v. Brodson,\(^{65}\) the defendant was prosecuted for filing false and fraudulent tax returns. The prosecution based its case on the net worth method of computing tax fraud.\(^{66}\) Prior to trial, federal tax liens were filed and all of the defendant's assets were tied up. His liquid assets were levied upon so that, in effect, he became indigent. An attorney was appointed, but Brodson claimed this was not enough. His argument was that the very nature of the case called for the services of a trained accountant—which the court would not appoint. The district court agreed with this contention, stating:

Net worth income tax prosecutions present new, difficult and complex problems.

\(^{62}\) Miranda v. Arizona, supra note 1.

\(^{63}\) 372 U.S. 335 (1963).


\(^{66}\) The net worth technique is the most frequently employed of the three common methods of proving tax evasion: the net worth method; the bank deposits method; and the expenditures methods. This was the means first used against gangsters in the 1930's. See Guzik v. United States, 54 F.2d 618 (7th Cir. 1931); Capone v. United States, 51 F.2d 609 (7th Cir. 1931). One simple way of expressing the formula involved is: Increase in Net Worth plus Non-Deductible Expenditures less Non-Taxable Receipts equals the Taxable Net Income. From there the IRS simply compares their computed Taxable Net Income with what was actually reported on the return. This technique is extremely beneficial to the government for it shifts the burden of proof to the taxpayer to show how and where he got the additional monies. Because of this "the defense team is not complete without the full-time participation of a good accountant." Avakian, Techniques in the Preparation and Trial of a Fraud Case, N.Y.U. 15TH INST. ON FED. TAX. 1249, 1250 (1957). For a detailed analysis of the net worth method and its implications see, Avakian, Id.; Duke, Prosecutions for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid, 76 YALE L.J. 1 (1966); and Byer, The Net Worth Technique for Determining Income, N.Y.U. 13TH INST. ON FED. TAX. 1055 (1955).
They must be met within the constitutional guarantees. Here, a defense counsel, assigned by the court and without compensation, no matter how able, is not in a position to adequately defend without the assistance of an accountant.67

The court thereupon concluded that: "Without the assistance of an accountant the defendant is denied effective assistance of counsel."68

The appellate court subsequently reversed,69 but on the ground that whether or not Brodson would be deprived of the effective assistance of counsel must be decided after the fact:

Whether the defendant is correct in his contention that the constitution requires that one indicted for income tax evasion is entitled to the services of an accountant to assist his attorney we do not now decide. . . . If there is such a constitutional requirement at all, a defendant's right to invoke it must depend upon the particular circumstances of his case. A consideration of the circumstances must necessarily encompass the occurrences at the trial. Of course such occurrences can be judged only in retrospect. . . . It is illogical for a court to speculate in advance of a trial on the question of whether a defendant will or will not receive a fair trial without the assistance of an accountant.70

The reasoning of the appellate court is somewhat specious. It is obviously paradoxical to say that an attorney on appeal can show he was ineffective by finding the very facts he is claiming he needed expert assistance to uncover. Also, today under the authority of Escobedo and Miranda, the right to effective assistance of counsel begins at the "accusatorial" stage. Clearly, if it be conceded that an accountant may be necessary to effective assistance of counsel in a complicated tax fraud case, then that right must be available before the trial and conceivably at an interrogation.

The argument in Brodson was that as a matter of law a procedural requirement existed for the state to provide expert assistance in certain cases as a requisite of due process. Tarlowski, on the other hand, sought only the privilege to acquire expert assistance. The distinction is clear. In the first instance there is a positive duty upon the state to act, and in the latter, there is a negative duty to refrain from action. Obviously, Brodson could not have argued along the latter lines as his freedom to procure an accountant was never impaired—only his financial ability. Conversely, Tarlowski was not unable to acquire an accountant (he had one in his permanent employ), but rather he was denied access to one. Whether Tarlowski could have presented an argument along the lines of Brodson and won in view of the right-to-counsel cases is unknown. In-

67. Supra note 65, at 164.
68. Supra note 65, at 164.
69. United States v. Brodson, supra note 64.
70. United States v. Brodson, supra note 64, at 109.
evitably the situation will present itself, and the indications are that the courts will find it more palatable to provide expert assistance where necessary as a matter of due process of law.\textsuperscript{71}

As noted earlier, Tarlowski presents both positive and negatives aspects. The negative aspects are derived chiefly from what it did not say. The positive aspects are derived from the fact that Tarlowski defines "liberty" to include the absolute right to have an advisor present at an interrogation. Making this right absolute raises several implications. Primarily, it means that if, during the course of an interview by a special agent, a taxpayer demands to have his accountant present, he must be so permitted. In addition, it would seem that the interrogation must be halted until the accountant is present. It must be remembered though that the onus is upon the taxpayer to request his accountant or advisor. It is only after the request is made that a duty arises to go no further until the person being interrogated has had an opportunity to secure this help. Likewise, an audit by a revenue agent could conceivably be construed to be within the bounds of Tarlowski and, therefore, a request by a taxpayer for his accountant or attorney would, of necessity, have to be allowed.

Another positive aspect of the decision is that it was not restricted to investigations by the Internal Revenue Service. The court stated that "[a] representative of the federal government, [may not] at his own behest, limit the right of an individual to demand the presence of others at an interrogation."\textsuperscript{72} Hence the decision may well extend to any administrative body.

One possible application is at Selective Service Board hearings. The Administrative Procedure Act provides that a person who is compelled to appear in person before an agency of the federal government is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representatives.\textsuperscript{73} Since the Selective Service System is an agency of the federal government, it would seem to be a proper subject of this Act. However, the Military Selective Service Act of 1967 provides that "all functions performed under this title shall be excluded from the operation of the Administrative Procedure Act."\textsuperscript{74}

\begin{itemize}
  \item \textsuperscript{71} In Cornell v. Superior Court, 52 Cal. 2d 99, 338 P.2d 447 (1959), it was held that a lawyer has a right to interview his client in private with psychiatric aid. Obviously interpreting effective assistance of counsel to include expert advice they stated that "[t]he basic right involved is not limited simply to meeting between the client and his counsel. If necessary, third persons may accompany counsel during his consultations with his client." \textit{Id.} at 103, 338 P.2d at 449.
  \item \textsuperscript{72} \textit{Supra} note 55, at 85,462.
  \item \textsuperscript{73} 5 U.S.C. \$ 555(b) (1964).
  \item \textsuperscript{74} 50 U.S.C. \$ 436(b) (1964).
\end{itemize}
Acting pursuant to this Act, the Selective Service System promulgated a regulation which provides that "no registrant may be represented before the local board by anyone acting as an attorney or legal counsel." Most of the decisions have adhered strictly to this rule, basing their conclusions upon the fact that the board is administrative and investigative—not prosecutorial—in nature. Tarlowski's holding may destroy this basis and supply the authority for contrary rulings.

Similarly, civil service employees are subject to hiring and firing "for such cause as will promote the efficiency of the service." The procedures utilized are interesting in view of the Tarlowski decision. These procedures stipulate that an accused employee is entitled to have the reason for his firing in writing, notice of the action sought against him, a copy of the charges with affidavits, and a written decision at the earliest possible date. However, there is the additional stipulation that "[e]xamination of witnesses, trial, or hearing is not required but may be provided in the discretion of the individual directing the removal or suspension without pay." This being the situation, the provision within the Administrative Procedure Act entitling one to counsel or help before a hearing by a federal government agency would not apply since here the employee is not compelled to appear. Nevertheless, the ruling in Tarlowski would seem to fill this void and provide an adequate authority for an employee to request whatever additional help or counsel he believes he needs at his hearing.

The additional implications of Tarlowski are numerous, but for present purposes it should suffice to say that the decision has three general results: (1) It adds a new and additional facet to the term liberty, reiterating the pronouncement that liberty means more than freedom from bodily restraint; (2) it implies a legal requirement to allow expert assistance, including accountants and advisors, at an interrogation and perhaps even beyond the interrogation stage; and (3) it brings the Internal Revenue Service and, by implication, many other so-called administrative agencies of the government, within the purview of the fifth and sixth amendments.

Admittedly, there are unanswered questions: How reasonable must the request for the presence of another be? May one request the presence of an accountant who lives in another town or state or country? Must the

75. 32 C.F.R. § 1624.1(b) (1970).
76. United States v. Capson, 347 F.2d 959 (10th Cir. 1965); United States v. Sturgis, 342 F.2d 328 (3d Cir. 1965); Niznik v. United States, 173 F.2d 328 (6th Cir. 1949); United States v. Pitt, 144 F.2d 169 (3d Cir. 1944).
77. 5 U.S.C. § 7501(a) (Supp. IV 1964).
78. 5 U.S.C. § 7501(b) (1964) (emphasis added).
interrogation be delayed until the advisor arrives? Should the government advise a potential defendant or even a taxpayer being audited that he may be accompanied by his accountant or his attorney? The list could go on. *Tarlowski* represents but one decision on a continuum, and certainly these questions will eventually be answered. The importance of *Tarlowski* is in its extension of the term "liberty" to a new right for individuals under our adversary theory of justice. Today a man who is being interrogated by a representative of the federal government may request the presence of his attorney, accountant, psychiatrist, or even his best friend and expect that request to be fulfilled.

Arthur H. Boelter

**DOMESTIC RELATIONS—**

**ABROGATION OF INTERSPOUSAL IMMUNITY—**

**AN ANALYTICAL APPROACH**

On April 12, 1968, Jacqueline Beaudette was injured while a passenger in an automobile driven by Garry H. Frana. Miss Beaudette subsequently filed a complaint alleging that the accident and the resulting injuries to her person were caused by the negligence of Frana. After the action commenced, but prior to the entry of judgment, Miss Beaudette and Mr. Frana were married. The trial court, upon motion by the defendant-husband, entered a summary judgment in his favor based upon the absolute defense of interspousal immunity.¹ The Supreme Court of Minnesota reversed, abrogating the absolute defense of interspousal immunity in tort actions. *Beaudette v. Frana,* — Minn. —, 173 N.W.2d 416 (1969).²

This decision is significant because it represents the most recent effort by a state court of last resort to dismantle the defense of marital immunity—a doctrine which prevents an injured spouse from receiving due satisfaction for injuries caused by the tortious conduct of the other spouse,

¹. See Hovanetz v. Anderson, 276 Minn. 543, 148 N.W.2d 564 (1967); Karalis v. Karalis, 213 Minn. 31, 4 N.W.2d 632 (1942); Kyle v. Kyle, 210 Minn. 204, 297 N.W. 744 (1941); Patenaude v. Patenaude, 195 Minn. 523, 263 N.W. 546 (1935); Woltman v. Woltman, 153 Minn. 217, 189 N.W. 1022 (1922); Drake v. Drake, 145 Minn. 388, 177 N.W. 624 (1920); Strom v. Strom, 98 Minn. 427, 107 N.W. 1047 (1906).

². The case under analysis was consolidated for trial with the case of Green v. Green, — Minn. —, 173 N.W.2d 416 (1969). Since both cases involved substantially the same facts, the Minnesota Supreme Court made no distinction between the two and held the same in both.