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Access to the Printed Media by Political Candidates: Miami Herald Publishing Company v. Tornillo

Don C. Stephenson

NOTES

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Plaintiff was seeking election to the Florida House of Representatives and defendant newspaper editorially attacked his candidacy. Plaintiff asked the newspaper to print his reply to the editorial. When the newspaper refused, plaintiff sought an injunction to compel it to publish the response, basing his suit on Florida's "right of reply" statute[1] which allowed a political candidate the right to answer, free of charge, newspaper articles critical of his candidacy. The Florida circuit court ruled that the reply statute was unconstitutional as it infringed on the freedom of the press.[2] On appeal the Florida Supreme Court reversed and upheld the statute.[3] The newspaper appealed to the United States Supreme Court. *Held, reversed*: Florida's "right of reply" statute unduly intrudes into the discretion of newspaper editors in determining content for publication and, therefore, violates the first amendment guarantee of a free press. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

I. A Changing Communications Media

The first amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[4] Under the due process clause of the fourteenth amendment, freedom of speech and of the press are protected from abridgment by the states.[5] Though first amendment rights stand "in a preferred position,"[6] forming the foundation of all our civil and political institutions,[7] the United States Supreme Court has never interpreted the first amendment as an absolute restraint on Congress or the states.[8]

At a minimum, the first amendment, as enacted in 1791, meant that every freeman should have the right to publish and distribute any materials he desired without having to procure a license.[9] The first amendment was also

1. Fla. Stat. Ann. § 104.38 (1973).
2. Tornillo v. Miami Herald Publishing Co., 38 Fla. Supp. 80 (Cir. Ct. 1972).
3. Tornillo v. Miami Herald Publishing Co., 287 So. 2d 78 (Fla. 1973).
4. U.S. Const. amend. I.
5. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).
6. *See* Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).
7. *See* Hebert v. Louisiana, 272 U.S. 312, 316 (1926).
8. There are two principal areas where the Court has not considered the first amendment an absolute restraint. First, the right of free speech and press ceases where it presents a clear and present danger to the government. *See, e.g.*, Scales v. United States, 367 U.S. 203, 228-29 (1961); Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1, 88-105 (1961); Dennis v. United States, 341 U.S. 494, 502-11 (1951); Schenck v. United States, 249 U.S. 47, 52 (1919). Second, obscene material is not protected by the first amendment. *See, e.g.*, Kaflan v. California, 413 U.S. 115, 120 (1973); Miller v. California, 413 U.S. 15, 23 (1973); United States v. Thirty-Seven (37) Photographs, 402 U.S. 363, 376-77 (1971); Ginsberg v. New York, 390 U.S. 629, 641 (1968); Roth v. United States, 354 U.S. 476, 484-85 (1957).
9. *See* Lovell v. Griffin, 303 U.S. 444, 451 (1938).

designed to ensure that the press should be free from any other form of previous restraint, especially that of prior censorship.[10] Today, however, our means of communication are not limited to that of the conventional press of 1791. Most dramatic of the changes in the communications media is the development of the broadcast industry[11] which falls within the general protection of the first amendment.[12] Moreover, the characteristics of the printed media itself have changed in the past two hundred years.[13] Entry into the publishing industry was relatively inexpensive in 1791, whereas today the daily newspaper industry is characterized by conglomerates[14] and is limited to those with large capital fortunes.[15]

II. A RIGHT OF ACCESS VERSUS FREEDOM OF THE PRESS

As a result of changes in both the means and characteristics of communication, many have been led to question the proper structure[16] and purpose of the entire communications media and suggest appropriate revisions. The most controversial of the answers is the proposal providing for a first amendment right of access.[17] Premised on the assumption that those individuals who control the communications industry are the actual sources of suppression and censorship in America,[18] the proponents of access have concluded that unless some form of access to the media is established the public will have lost its ability to participate effectively in debate on issues of public importance.[19] Accordingly, this proposal would interpret the first amendment not only as supplying a traditional restraint on government, but also as granting an affirmative right of access by the public to the communications media.

A limited form of access to the broadcast media was held constitutional

10. *See, e.g.*, Near v. Minnesota, 283 U.S. 697 (1931), in which the Court determined that a state statute which permanently enjoined the publishing and distribution of newspapers containing scandalous or defamatory material was unconstitutional. The remedy is for those persons defamed to bring proceedings under the libel laws rather than restrain publication of the newspapers. *Id.* at 719.

11. For an in-depth discussion of the changing communications media and the role of government, see 2 Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS (1965).

12. United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948).

13. For an excellent summary of the changes which have taken place in the printed media, see Note, *Media and the First Amendment in a Free Society*, 60 GEO. L.J. 867, 891-902 (1972).

14. A. BALK, BACKGROUND PAPER, TWENTIETH CENTURY FUND TASK FORCE REPORT FOR A NATIONAL NEWS COUNCIL, A FREE AND RESPONSIVE PRESS 18 (1973).

15. "[I]t would be virtually impossible for a competitor to enter the [daily newspaper industry] due to the financial exigencies of this era." Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 159 (1973) (Douglas, J., concurring); Barron, *Access—The Only Choice for the Media?*, 48 TEXAS L. REV. 766, 772 (1970).

16. J. BARRON, FREEDOM OF THE PRESS FOR WHOM? (1973); Barron, *Access—The Only Choice for the Media?*, 48 TEXAS L. REV. 766 (1970); Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 GEO. WASH. L. REV. 487 (1969); Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment*, 52 N.C.L. REV. 1 (1973).

17. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

18. Lange, *supra* note 16, at 9.

19. *Id.*

by the United States Supreme Court in *Red Lion Broadcasting Co. v. FCC.*[20] The specific access provision tested was the fairness doctrine, which requires broadcasters to present discussion of public issues on their stations while ensuring that each side of those issues receives fair coverage.[21] In *Red Lion* an author was criticized during a radio program discussing his newly released book.[22] The author asked the radio station to allow him to reply, free of charge, on the basis of the personal attacks clause of the fairness doctrine.[23] The FCC held that free reply time should be granted the author[24] and the Supreme Court upheld the ruling.[25] In justifying its decision, the Supreme Court relied on the theory of the limited availability of broadcast stations,[26] and emphasized that legislation affirmatively providing for access to the broadcast media "enhance[d] rather than abridge[d] the freedoms of speech and press protected by the First Amendment."[27] In supporting a limited form of access to the broadcast media the Court noted that it is the right of the viewers and listeners, not the broadcasters, which is of chief importance.[28] The Court further stated that the first amendment does not sanction private censorship in a communications medium not open to everyone[29] anymore than it sanctions government censorship. In summary, the fairness doctrine was held not to abridge freedom of speech and press since it maximizes opportunities for expression.[30]

The hope that the decision in *Red Lion* could be applied to newspapers was strengthened by the Supreme Court's decision in *Pittsburgh Press Co. v. Human Relations Commission.*[31] The Pittsburgh Commission on Human Relations complained that the defendant newspaper was using an advertising

20. 395 U.S. 367 (1969).

21. The fairness doctrine developed early in a long series of rulings by the FCC. *See Editorializing by Broadcast Licensees,* 13 F.C.C. 1246 (1949). It was approved by Congress in the 1959 amendments to the Federal Communications Act. *See* 47 U.S.C. § 315(a) (Supp. 1974). *See generally Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance,* 29 Fed. Reg. 10416 (1964).

22. Since the Supreme Court's decision in *Red Lion* does not adequately relate the facts, see Red Lion Broadcasting Co. v. FCC, 381 F.2d 908, 910-17 (D.C. Cir. 1967).

23. The personal attacks rule is a sub-part of the fairness doctrine, which requires that whenever a broadcast personally attacks an individual or organization, the broadcast licensee must notify the person or group of the broadcast and transmit to the person or group a copy of the text of the broadcast no later than one week after the attack, along with an offer of his station's facilities for an adequate reply. *See* 47 C.F.R. §§ 73.123, .300, .598, .679 (1973) (all identical).

24. The author complained to the FCC that the station had broadcast a personal attack on his character without notifying him of the attack and without sending him a copy of the text of the program. The Commission then notified the station of the complaint and requested an answer within 20 days. After an exchange of several letters between the radio station and the Commission, the Commission notified the station that it must give the author free broadcast time to reply. 381 F.2d at 911-17.

25. 395 U.S. 367 (1969).

26. This theory was originally expressed in National Broadcasting Co. v. United States, 319 U.S. 190 (1943), where the Court stated that since the facilities of radio are not available to all who may desire to use them, regulation is necessary to control the development of radio and ensure its efficient operation in accordance with the "public interest." *Id.* at 212-18.

27. 395 U.S. at 375.

28. *Id.* at 390.

29. *Id.* at 392. *See also Editorializing by Broadcast Licensees, supra* note 21, at 1257.

30. *See* Barron, *supra* note 15, at 770.

31. 413 U.S. 376 (1973).

layout that subdivided employment opportunities into categories designating job preference by sex.[32] Contending that such categorization violated a city ordinance forbidding any advertising that indicated sex discrimination[33] the commission issued a cease-and-desist order. In upholding the commission's cease-and-desist order and barring the defendant newspaper from indicating sex preference in its advertising section, the Supreme Court relied on *Valentine v. Chrestensen*[34] where a unanimous Court had held that the first amendment does not apply to purely commercial advertising.[35] Admitting that the city ordinance did tell the newspaper editors how to arrange the contents of their paper, the Court stated that any first amendment rights were outweighed by the illegality of the commercial activity.[36] Despite the commercial advertising theory, *Pittsburgh Press* stands as "the first case [allowing] a government agency to . . . dictate to the publisher the layout and makeup of the newspaper's pages."[37]

While the combination of *Red Lion* and *Pittsburgh Press* provided a foundation for a limited form of access to the printed media, that foundation was weakened somewhat by the Supreme Court's decision in *Columbia Broadcasting System, Inc. v. Democratic National Committee.*[38] When a broadcasting station refused to carry a paid political advertisement, the Democratic National Committee brought suit to compel the station to broadcast it. Rejecting the argument that the refusal to carry the advertisement was a violation of the first amendment, the Supreme Court stated that Congress did not intend the fairness doctrine to mean that the broadcast media must serve as a common carrier giving every person a direct right of access to speak out on public issues.[39]

III. MIAMI HERALD PUBLISHING CO. V. TORNILLO

In *Tornillo* the Supreme Court held Florida's "right of reply" statute unconstitutional as a prior restraint on the press.[40] There is no difference, according to the Court, between censoring newspaper content and telling newspaper editors what they must print. Although the Court viewed a responsible press as being desirable, it found nothing in the Constitution requiring the press to be responsible.[41] Chief Justice Burger, writing for the Court, considered a right of access[42] to newspapers as contrary to the opinion in *Democratic National Committee*[43] in which it was noted that while a broadcast licensee's programming is subject to regulation under the Communica-

32. *Id.* at 397.
33. *Id.* at 379-80.
34. 316 U.S. 52 (1942).
35. *Id.* at 54.
36. 413 U.S. at 389.
37. *Id.* at 402 (Stewart, J., dissenting).
38. 412 U.S. 94 (1973).
39. *Id.* 103-14.
40. 418 U.S. at 256.
41. *Id.*
42. The Court treated the question of *Tornillo* as a general right of access for everyone, not just candidates for election.
43. *See* note 38 *supra* and accompanying text.

tions Act,[44] newspaper content is a product of the editors' "journalistic integrity" and not government fiat.[45] The Court was not willing to expand interference into the organization of a newspaper's pages beyond the peculiar facts of *Pittsburgh Press*.[46]

It is significant that the opinion in *Tornillo* did not mention the holding in *Red Lion*[47] since the facts supporting the rationale for a limited right of access are stronger in *Tornillo* than in *Red Lion*. Just as it was the right of the viewers and listeners, not the broadcasters, that was paramount in *Red Lion*,[48] it would seem to follow that it is the right of the readers, not the newspaper publishers, that is protected by the first amendment.[49] If the first amendment does not protect private censorship in the broadcast media,[50] neither should such be protected in the printed media.[51]

Moreover, since private censorship is equated with limited entry into a communications media,[52] the problem seems more acute in the newspaper industry,[53] for there are far more broadcasting stations than newspapers in the United States.[54] *Democratic National Committee* explained limited entry into the broadcast media in terms of the "inherent physical limitation[s]"[55] of the airwaves, resulting in a need for government licensing. The economic barriers to entry into the printed media, however, are even more forbidding.[56] Furthermore, while the physical limitations of the broadcast media seem to be dissipating with such technological advancements as cable television,[57] the same cannot be said of the economic barriers in the printed media.[58] Finally, if a limited right of access in the broadcast media (the fairness doctrine) maximizes opportunities for expression and thereby enhances first amendment rights,[59] it would inevitably follow that Florida's "right of reply" statute enhances first amendment rights.

The Supreme Court has acknowledged differing first amendment standards in the treatment of the broadcast media and the printed media.[60] Yet, applying either the limited entry theory or the maximization of opportunities for expression theory of *Red Lion* to the facts in *Tornillo*, the results in the two cases seem to indicate the application of differing first amendment stand-

44. 412 U.S. at 117-18.
45. 418 U.S. at 255.
46. *Id.; see* notes 31-37 *supra* and accompanying text.
47. *See* notes 20-29 *supra* and accompanying text.
48. *See* note 28 *supra* and accompanying text.
49. 2 Z. CHAFEE, *supra* note 11, at 546.
50. *See* note 29 *supra* and accompanying text.
51. Barron, *supra* note 15, at 767.
52. 395 U.S. at 389.
53. 418 U.S. at 249 n.13.
54. Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 144 nn. 13-14 (1973) (Stewart, J., concurring); Barron, *supra* note 15, at 773; Comment, *Constitutional Law: The Right of Access to the Press*, 50 NEB. L. REV. 120, 133 (1971).
55. 412 U.S. at 101.
56. *Id.* at 159 (Douglas, J., concurring).
57. *See* Note, *supra* note 13, at 970-72; *accord*, Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 75-76 (D.C. Cir. 1972) (Bazelon, C.J., dissenting), *cert. denied*, 412 U.S. 922 (1973); Barron, *supra* note 15, at 780.
58. *See* Barron, *supra* note 15, at 772; Note, *supra* note 13, at 895-96.
59. *See* note 27 *supra* and accompanying text.
60. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969).

ards without any sound justification. The characteristics of the broadcast media that furnished a basis for upholding the fairness doctrine are equally present in the printed media. The Supreme Court seems to have more faith in the journalistic integrity of newspaper editors than it does broadcasters.

IV. CONCLUSION

The first amendment was enacted out of fear that liberty of the press would be endangered as soon as the government attempted to control the contents of newspapers.[61] Essentially, the idea was to leave the newspapers free to discuss public issues and public officials. The first amendment, as originally interpreted, did not require that discussion to be fair or representative of both sides.[62] *Tornillo* supports the original intent of the first amendment.

The first amendment interpretation in *Red Lion*, however, is inconsistent with that in *Tornillo*. While licensing is necessary in the broadcast industry because of the limited availability of broadcast frequencies, government interference should be limited to the assignment of wavelengths and the promotion of technological developments that will open up new broadcasting channels.[63] As to editing, either by government censorship or compelling the broadcasting of certain issues through access provisions, the broadcast industry should be put on the same footing as the printed media is in *Tornillo*. While deregulation of the broadcast media is unlikely,[64] the inconsistent treatment of the broadcast media and printed media will become more acute as scarcity of airwaves disappears in the former, and economic barriers to entry remain in the latter.

David R. Norton

Gertz v. Robert Welch, Inc.: Defamation and Freedom of the Press—The Struggle Continues

Plaintiff, a prominent attorney, had represented the victim's family in a civil suit against a Chicago policeman previously convicted of murdering their son. The defendant published an allegedly defamatory article in its monthly magazine, *American Opinion*, which is operated as an outlet for the views of the John Birch Society. The article stated that the plaintiff was a "Leninist" and a "Communist-fronter," who had orchestrated a frame-up of the policeman in the criminal action. Further, the article implied that the plaintiff had been involved in illegal activities during the 1968 Democratic con-

61. 2 Z. CHAFEE, *supra* note 11, at 633. *See also* New York Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring).
62. *See* Near v. Minnesota, 283 U.S. 697, 719-20 (1931).
63. 412 U.S. at 157-58 (Douglas, J., concurring).
64. Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J. LAW & ECON. 15, 30 (1967).

vention. The plaintiff instituted his libel action against the defendant in the United States District Court for the Northern District of Illinois. The district court entered a judgment *non obstante veredicto* for the defendant on the grounds that the discussion of any public issue, regardless of the status of the person involved, is privileged unless there is a showing of actual malice in the publication.[1] The Seventh Circuit affirmed.[2] The United States Supreme Court granted certiorari. *Held, reversed and remanded*: The states may develop appropriate standards of liability for publishing defamatory falsehoods regarding private individuals, so long as liability is not imposed without fault. *Gertz v. Robert Welch, Inc.*, 94 S. Ct. 2997, 41 L. Ed 2d 789 (1974).

I. THE LAW OF DEFAMATION

The present web of defamation law is the product of an illogical and mercurial common law development.[3] Today, defamation is generally understood to mean that which tends to injure reputation in the popular sense; to diminish the esteem, respect, good will, or confidence in which the plaintiff is held.[4] The two branches of defamation are libel and slander. Libel is a malicious written publication[5] tending to disparage the memory of one who is dead, or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule.[6] On the other hand, slander is the publication of defamatory matters by the spoken word.[7]

Courts make further distinctions based on evidentiary differences between libel *per se* and libel *per quod*. The former is a written publication which is indisputably actionable on its face without the aid of extrinsic evidence.[8]

1. Gertz v. Robert Welch, Inc., 322 F. Supp. 997 (N.D. Ill. 1970). The Court held that even though the plaintiff had (1) a following in the press and the media, (2) written books, articles, and reviews, (3) made public speeches and radio and television appearances, and (4) been a civic leader, he was not a public figure. However, since the murder trial of the Chicago policeman was of public interest, the plaintiff would have to show actual malice in the defendant's publication in order to establish liability.

2. Gertz v. Robert Welch, Inc., 471 F.2d 801 (7th Cir. 1972). The majority doubted that the plaintiff was not a public figure, but held that New York Times v. Sullivan, 376 U.S. 254 (1964), was controlling as the article involved a matter of public concern. Since the plaintiff had not proven actual malice in the defendant's publication, the Court sustained the findings of the trial court.

3. *See* W. PROSSER, LAW OF TORTS § 111 (4th ed. 1971); Carr, *The English Law of Defamation: With Especial Reference to the Distinction Between Libel and Slander*, 18 L.Q. REV. 255 (1902); Donnelly, *History of Defamation*, 24 WIS. L. REV. 99 (1949).

4. Wolfson v. Kirk, 273 So. 2d 774 (Fla. 1973); Williams v. Gulf Coast Collection Agency Co., 493 S.W.2d 367 (Mo. 1973); Farnsworth v. Hyde, 512 P.2d 1003 (Ore. 1973).

5. Publication is a legal word of art meaning communication. Burney v. Southern Ry., 276 Ala. 637, 165 So. 2d 726 (1964); Lewis v. Readers Digest Ass'n Inc., 512 P.2d 702 (Mont. 1973); Emo v. Milbank Mut. Ins. Co., 183 N.W.2d 508 (N.D. 1971).

6. *See, e.g.*, Time, Inc. v. Hill, 385 U.S. 374 (1967); Viera v. Kwik Homes Serv., Inc., 263 La. 368, 266 So. 2d 732, *writ denied*, 268 So. 2d 258 (1972); Burke v. Triangle Publications, Inc., 225 Pa. Super. 272, 302 A.2d 408 (1973).

7. Pierce v. Burns, 55 Del. 166, 185 A.2d 477 (1962); Beane v. Weiman Co., 5 N.C. App. 276, 168 S.E.2d 236 (1969); Butler v. Central Bank & Trust Co., 458 S.W.2d 510 (Tex. Civ. App.—Dallas 1970), *error dismissed*.

8. Gomba v. McLaughlin, 30 Colo. App. 315, 493 P.2d 684, *rev'd*, 504 P.2d 337 (1972) (defendant charged plaintiff with an act which would have made him subject of odium); Harwood v. Bush, 223 So. 2d 359 (Fla. 1969) (allegory printed in newspaper about plaintiff); McCuddin v. Dickinson, 226 Iowa 304, 283 N.W. 886 (1939) (ad in newspaper addressed to plaintiff stating "I don't think that you can tell the truth on or

However, where extrinsic evidence is necessary to prove the defamatory publication, it is termed libel *per quod*.[9] The importance of the distinction lies in the fact that a majority of the states hold that in cases of libel *per se* damage to the plaintiff is conclusively presumed.[10] In cases of libel *per quod* or slander the plaintiff must either prove special damages,[11] or show that the defamation relates to (1) a crime involving moral turpitude,[12] (2) a loathsome disease,[13] (3) the plaintiff's business or trade,[14] or (4) the unchastity of a woman.[15]

In all defamation cases the plaintiff must show that the words of the defendant were in fact communicated to a party other than the plaintiff,[16] that the words were understood in a defamatory sense,[17] and that the defamatory

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off the witness stand."); Rose v. Koch, 278 Minn. 235, 154 N.W.2d 409 (1967) (statement in defendant's newspaper that the plaintiff was a Communist-fronter); Reed v. Melnick, 31 N.M. 608, 471 P.2d 178 (1970) (defendant's letter stated, in reference to the plaintiff, "People can't get any money out of him."); McGaw v. Webster, 79 N.M. 104, 440 P.2d 296 (1968) (defendant published that plaintiff was a Communist).

9. Interstate Detective Bureau, Inc. v. Denver Post, Inc., 29 Colo. App. 313, 484 P.2d 131 (1971) (article printed by defendant about a theft which did not identify the plaintiff by name); Danias v. Fakis, 261 A.2d 529 (Del. Super. Ct. 1969) (defendant's charge that plaintiff informed federal immigration authorities of suspected illegal alien, did not, on its face, constitute an illegal act); Robinson v. Nationwide Ins. Co., 273 N.C. 391, 159 S.E.2d 896 (1968) (defendant's letter which stated that plaintiff's automobile insurance had been cancelled because of his personal habits, was not obviously defamatory); Redding v. Carlton, 223 Pa. Super. 136, 296 A.2d 880 (1972) (defendant's letter that plaintiff's dual role as property owner and township supervisor constituted a conflict of interest was held not to be actionable without extrinsic proof); Brown v. National Home Ins. Co., 239 S.C. 488, 123 S.E.2d 850 (1962) (letter from plaintiff demanding payment from defendant); Western States Title Ins. Co. v. Warnock, 18 Utah 2d 70, 415 P.2d 316 (1966) (letter by defendant which used phrase "slander of title" with regard to plaintiff's property, was not libelous on its face, as it was sent to nonattorney).

10. Myers v. Mobile Press-Register, Inc., 266 Ala. 508, 97 So. 2d 819 (1957); Farnum v. Colbert, 293 A.2d 279 (D.C. App. 1972); Reed v. Melnick, 81 N.M. 608, 471 P.2d 178 (1970); Williams v. Rutherford Freight Lines, Inc., 10 N.C. App. 384, 179 S.E.2d 319 (1971); Beecher v. Montgomery Ward & Co., 517 P.2d 667 (Ore. 1973); Waechter v. Carnation Co., 5 Wash. App. 121, 485 P.2d 1000 (1971).

11. Libel *per quod*: Piver v. Hoberman, 220 So. 2d 408 (Fla. App. 1969); Haynes v. Alverno Heights Hosp., 515 P.2d 568 (Okla. 1973); Barrett v. Barrett, 108 R.I. 15, 271 A.2d 825 (1970). Slander: Gurtler v. Union Parts Mfg. Co., 1 N.Y.2d 5, 132 N.E.2d 889, 150 N.Y.S.2d 4 (1956); Oston v. Hallock, 55 Wis. 2d 687, 201 N.W.2d 35 (1972).

12. Munafo v. Helfand, 140 F. Supp. 234 (S.D.N.Y. 1956); Roscoe v. Schoolitz, 105 Ariz. 310, 464 P.2d 333 (1970); Pierce v. Burns, 5 Del. 166, 185 A.2d 477 (1962); Rhodes v. Star Herald Printing Co., 173 Neb. 496, 113 N.W.2d 658, *cert. denied*, 371 U.S. 822 (1962).

13. Modla v. Parker, 17 Ariz. App. 54, 495 P.2d 494, *cert. denied*, 409 U.S. 1038 (1972); Miami Herald Pub. Co. v. Brautigam, 127 So. 2d 718 (Fla. 1961), *cert. denied*, 369 U.S. 821 (1962); Cook v. Safeway Stores, Inc., 511 P.2d 375 (Ore. 1973).

14. Diplomat Elec., Inc. v. Westinghouse Elec. Supply Co., 378 F.2d 377 (5th Cir. 1967); Wegner v. Rodeo Cowboys Ass'n, Inc., 417 F.2d 881 (10th Cir. 1969), *cert. denied*, 398 U.S. 903 (1970); Danias v. Fakis, 261 A.2d 529 (Del. 1969); Vojak v. Jensen, 161 N.W.2d 100 (Iowa 1968); Swagman v. Swift & Co., 7 Mich. App. 608, 152 N.W.2d 562 (1967); Demers v. Meuret, 512 P.2d 1348 (Ore. 1973).

15. Munafo v. Helfand, 140 F. Supp. 234 (S.D.N.Y. 1956); Tonsmeire v. Tonsmeire, 281 Ala. 102, 199 So. 2d 645 (1967); Vigil v. Rice, 74 N.M. 693, 397 P.2d 719 (1964).

16. McGuire v. Adkins, 284 Ala. 602, 226 So. 2d 659 (1969); Burney v. Southern Ry., 276 Ala. 637, 165 So. 2d 726 (1964); Tyler v. Garris, 292 So. 2d 427 (Fla. App. 1974); Lewis v. Readers Digest Ass'n, Inc., 512 P.2d 702 (Mont. 1973).

17. Quinones v. United States, 492 F.2d 1269 (3d Cir. 1974); Blowers v. Lawyers Co-op Pub. Co., 44 App. Div. 2d 760, 354 N.Y.S.2d 239 (1974); Beecher v. Montgomery Ward & Co., 517 P.2d 667 (Ore. 1973).

meaning attaches to the plaintiff.[18] Words are taken in the sense in which they are reasonably understood under the circumstances and are to be presumed to have the meaning ordinarily attached to them by those familiar with the language used.[19]

II. THE CONSTITUTIONAL PRIVILEGE

At common law the courts generally recognized a conditional privilege of fair comment regarding the affairs of public officials and employees, and any topic within the scope of public concern.[20] The majority of states prior to 1964 held that this privilege was limited to opinions and could not shield a publisher from liability for any misstatement of fact.[21] However, a minority of states held that the scope of the privilege was not limited, so long as the publication was made in good faith.[22]

In 1964 the United States Supreme Court granted certiorari in *New York Times v. Sullivan*,[23] a libel action instituted in an Alabama state court by a city commissioner against the publisher of an advertisement which de-

18. Quinones v. United States, 492 F.2d 1269 (3d Cir. 1974); Paris v. Division of State Compensation Ins. Fund, 517 P.2d 1353 (Colo. 1973); Alpar v. Weyerhauser Co., 20 N.C. App. 340, 201 S.E.2d 503 (1974); MacFadden's Publications v. Turner, 95 S.W.2d 1027 (Tex. Civ. App.—Waco 1936), *error ref. n.r.e.*

19. Scott v. McDonnell Douglas Corp., 37 Cal. App. 3d 277, 112 Cal. Rptr. 609 (1974); MacLeod v. Tribune Publishing Co., 52 Cal. 2d 536, 343 P.2d 36 (1959).

20. Bishop v. Wometco Enterprises, Inc., 235 So. 2d 759 (Fla. 1970); Hoeppner v. Dunkirk Printing Co., 254 N.Y. 95, 172 N.E. 139 (1930); Yancey v. Gillespie, 242 N.C. 227, 87 S.E.2d 210 (1955); Michlin v. Roberts, 318 A.2d 163 (Vt. 1974). Courts also recognized several other privileges. *See* W. PROSSER, *supra* note 3, § 114.

21. Porcella v. Time, Inc., 300 F.2d 162 (7th Cir. 1962); Utah State Farm Bureau Federation v. National Farmers Union Serv. Corp., 198 F.2d 20 (10th Cir. 1952); Washington Times Co. v. Bonner, 86 F.2d 836 (D.C. Cir. 1936); Post Publishing Co. v. Hallam, 59 F. 530 (6th Cir. 1893); Starks v. Comer, 190 Ala. 245, 67 So. 440 (1914); Star Publishing Co. v. Donahoe, 58 A. 513 (Del. 1904); Metropolis Co. v. Croasdell, 145 Fla. 455, 199 So. 568 (1941); Kirkland v. Constitution Pub. Co., 38 Ga. App. 632, 144 S.E. 821 (1928); Ogren v. Rockford Star Printing Co., 288 Ill. 405, 123 N.E. 587 (1919); Smith v. Pure Oil Co., 278 Ky. 430, 128 S.W.2d 931 (1939); Miller v. Capitol City Press, 142 So. 2d 462 (La. 1962); A.S. Abell Co. v. Kirby, 277 Md. 267, 176 A.2d 340 (1961); Hubbard v. Allyn, 200 Mass. 166, 86 N.E. 356 (1908); Krebs v. McNeal, 222 Miss. 560, 76 So. 2d 693 (1955); Kleinschmidt v. Johnson, 183 S.W.2d 82 (Mo. 1944); Mencher v. Chesley, 297 N.Y. 94, 75 N.E.2d 257 (1947); Murphy v. Farmers Educational & Co-op Union, 72 N.W.2d 636 (N.D. 1955); Westropp v. E.W. Scripps Co., 148 Ohio St. 365, 74 N.E.2d 340 (1947); Holway v. World Pub. Co., 171 Okla. 306, 44 P.2d 881 (1935); Marr v. Putnam, 196 Ore. 1, 246 P.2d 509 (1952); Reed v. The Patriot Co., 45 Dauph. Co. Rep. 1 (Pa. 1937); Jackson v. Record Pub. Co., 175 S.C. 211, 178 S.E. 833 (1935); Banner Pub. Co. v. State, 84 Tenn. 176 (1885); Fitzjarrald v. Panhandle Pub. Co., 149 Tex. 87, 228 S.W.2d 499 (1950); Carpenter v. Meredith, 122 Va. 446, 96 S.E. 635 (1918); Cohen v. Cowles Pub. Co., 45 Wash. 2d 262, 273 P.2d 893 (1954). *See also* Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875 (1949); Titus, *Statement of Fact Versus Statement of Opinion—A Spurious Dispute in Fair Comment*, 15 VAND. L. REV. 1203 (1962).

22. Connor v. Timothy, 43 Ariz. 517, 33 P.2d 293 (1934); Snively v. Record Pub. Co., 185 Cal. 565, 198 P. 1 (1921); Charles Parker Co. v. Silver City Crystal Co., 142 Conn. 605, 116 A.2d 440 (1955); Salinger v. Cowles, 195 Iowa 873, 191 N.W. 167 (1922); Steenson v. Wallace, 144 Kan. 730, 62 P.2d 907 (1936); Robbins v. Evening News Ass'n, 373 Mich. 589, 130 N.W.2d 404 (1964); Clancy v. Dailey News Corp., 202 Minn. 1, 277 N.W. 264 (1938); Blanchard v. Claremont Eagle, 95 N.H. 375, 63 A.2d 791 (1949); Coleman v. Newark Morning Ledger Co., 29 N.J. 357, 149 A.2d 193 (1959); Lewis v. Carr, 178 N.C. 578, 101 S.E. 97 (1919); McLean v. Merriman, 42 S.D. 394, 175 N.W. 878 (1920); Otten v. Schutt, 15 Wis. 2d 497, 113 N.W.2d 152 (1962).

23. 376 U.S. 254 (1964).

scribed the mistreatment of black students protesting segregation. The Court held that the guarantee of freedom of the press as prescribed by the first amendment[24] conferred a qualified privilege for the publication of comment, opinion, and false statements of fact regarding a public official and his official conduct.[25] This privilege existed unless it could be shown that the statements were made with actual malice,[26] such statements being defined as those made with knowledge that they were false, or with reckless disregard as to their truth or falsity.[27] The Court justified its holding on the grounds that the decision would prevent self-censorship by the press.[28]

In *Associated Press v. Walker*[29] and *Curtis Publishing Co. v. Butts*[30] the Supreme Court granted certiorari to clarify issues concerning the applicability of the *New York Times* rule to public figures as distinguished from public officials. In *Walker* a retired general in the United States Army, who had commanded federal troops during the school segregation confrontation in Little Rock, Arkansas in 1952, alleged that the defendant published an article claiming that he had taken charge of a mob and encouraged a riot at the University of Mississippi.[31] The plaintiff in *Curtis* was a well-known college football coach and athletic director who charged that the defendant published a false article which said that the plaintiff had fixed the University of Georgia-Alabama football game.[32] The Court held that both plaintiffs were public figures,[33] and stated further that public figures, who by position

24. U.S. CONST. amend. I states that "Congress shall make no law . . . abridging the freedom of speech or of the press."

25. 376 U.S. at 281-82. Justices Black, Douglas, and Goldberg concurred in the result, but expressed the view that the United States Constitution confers an absolute, unconditional privilege to criticize official conduct despite any harm which may flow from excesses and abuses. *Id.* at 293-305.

26. *Id.* at 279-80.

27. *Id.* The Court, therefore, adopted the minority rule. *See* note 22 *supra.* In several cases subsequent to *New York Times*, the Supreme Court clarified the definition of actual malice. Time Inc. v. Pape, 401 U.S. 279 (1971) (mere error in judgment does not constitute actual malice); Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971) (defendant is protected from liability if he publishes in good faith, for a justified purpose, and with a belief founded on reasonable grounds of the truth of the matter published); Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970) (rhetorical hyperbole does not constitute actual malice); St. Amant v. Thompson, 390 U.S. 727 (1968) (plaintiff must show that the defendant in fact entertained serious doubts as to the truth of his publications); Beckley Newspaper Corp. v. Hanks, 389 U.S. 81 (1967) (bad or corrupt motive constitutes actual malice); Rosenblatt v. Baer, 383 U.S. 75 (1966) (plaintiff can not recover for showing mere ill will, evil motive, or intent to injure); Henry v. Collins, 380 U.S. 356 (1965) (malice does not necessarily mean hatred or ill will but may consist merely of culpable recklessness or a willful and wanton disregard of the rights and interests of the defamed person); Garrison v. Louisiana, 379 U.S. 64 (1964) (false statements made with a high degree of awareness of their possible falsity).

28. 376 U.S. at 279. See Levine, *Times to Rosenbloom: A Press Free from Libel—The Editors Speak*, 27 MIAMI L. REV. 109 (1972), for a discussion of *New York Times*' impact on self-censorship by the press.

29. 388 U.S. 130 (1967).

30. *Id.*

31. *Id.* at 140.

32. *Id.* at 135.

33. *Id.* at 155. The Supreme Court has applied the public official-figure test in a variety of situations. Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971) (city mayor and candidate for tax assessor); Time, Inc. v. Pape, 401 U.S. 279 (1971) (police official); Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971) (candidate for U.S. Senate); Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler, 398 U.S. 6 (1970) (prominent local real estate developer and builder, and a state legislator); St. Amant v. Thompson, 390 U.S. 727 (1968) (deputy sheriff); Beckley Newspaper Corp. v. Banks, 389 U.S. 81

or activities had thrust themselves into the vortex of an important public controversy, would have to show actual malice in publications regarding such controversies, in order to establish liability.[34]

The United States Supreme Court further expanded the scope of the *New York Times* privilege in *Rosenbloom v. Metromedia, Inc.*[35] In this case the plaintiff was an obscure distributor of nudist magazines who sued a radio station for referring to him as a smut merchant, and to his magazines as obscene, in a broadcast regarding the city's enforcement of its obscenity statute.[36] The Court held that the *New York Times* standard should apply to all discussions and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.[37] If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not "voluntarily" choose to become involved.[38] The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety.[39] The Court reasoned that this rule was necessary to insure the robust debate of public issues.[40]

III. GERTZ V. ROBERT WELCH, INC.

The principal issue presented to the Court in *Gertz* was whether a newspaper or broadcaster who publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements.[41] In the majority opinion[42] Justice Powell recognized that the United States Supreme Court has struggled for nearly a decade to define the proper accommodations which must be made between the law of defamation and the first amendment's freedoms of speech and press.[43] The resolution of this issue, according to the majority, involved the balancing of two legitimate interests—avoiding self-censorship of the press and compensation of individuals for

(1967) (clerk of a state court); Rosenblatt v. Baer, 383 U.S. 75 (1966) (county recreation director); Henry v. Collins, 380 U.S. 356 (1965) (city police chief and county attorney); Garrison v. Louisiana, 379 U.S. 64 (1964) (state judges).

34. 388 U.S. at 155.

35. 403 U.S. 29 (1971).

36. *Id.* at 33.

37. *Id.* at 44. The Court held that the report of matters of public or general interest was common to all Supreme Court decisions since *Walker*. *Id.* at 30-32.

38. *Id.* at 43. The Court pointed out that certain areas of a person's life fall outside the scope of public and general interest. *Id.* at 44.

39. *Id.* at 43. The Court stated that the public's primary interest in this case was the proper enforcement of criminal laws, particularly obscenity statutes. *Id.*

40. *Id.*

41. 94 S. Ct. at 3003, 41 L. Ed. 2d at 801. The Court stated that it had previously considered this issue on a rather different set of facts in Rosenbloom v. Metromedia, 403 U.S. 29 (1971). 94 S. Ct. at 3003, 41 L. Ed. 2d at 801.

42. Justice Powell was joined in his opinion by Justices Stewart, Marshall, and Rehnquist. Justice Blackmun concurred on the grounds that his vote was necessary to create a majority. If this had not been necessary, he stated that he would have adhered to his view in *Rosenbloom* that the *New York Times* standard extended to defamatory cases brought by private individuals. 94 S. Ct. at 3013, 41 L. Ed. 2d at 813.

43. *Id.* at 3000, 41 L. Ed. 2d at 797.

harm inflicted upon them by defamatory falsehoods.[44] In libel actions instituted by public officials and public figures, *New York Times* reflects an appropriate accommodation between these two interests in defining the actual malice requirement.[45] However, the Court correctly concluded that the states' interest in protecting a private individual was more important than their interest in protecting public officials or public figures,[46] and therefore, the private individual's burden of establishing liability should be less stringent than that of a public official or public figure.[47]

In reaching this conclusion the majority reasoned that public officials and public figures usually enjoy significantly greater access to channels of effective communication, and hence, have a better opportunity to counteract false statements than do private individuals.[48] Further, since a necessary consequence of entering the arena of public affairs is closer public scrutiny and increased public comment regarding their activities, public officials and figures are considered to have voluntarily exposed themselves to increased risk of injury from defamatory falsehoods.[49] On the other hand, a private individual has not waived his right to the state's protecton of his reputation.[50] Accordingly, the Court held that the states may develop appropriate standards of liability for publishing defamatory falsehoods regarding private individuals, so long as the states do not impose liability without fault.[51]

With this decision, the Court has restricted the application of *New York Times* to public officials and public figures.[52] If there is clear and convincing evidence of the plaintiff's general fame or notoriety in the community and pervasive involvement in the affairs of society, then *New York Times* will apply.[53] If not, the states may develop and apply new standards to establish liability.[54] For example, the states might develop a two-tier system of liability. If a private individual could establish ordinary negligence, he could recover the compensatory damages which were proximately caused thereby. Ordinary negligence would be an acceptable standard to the Supreme Court because, on a continuum, it falls between strict liability and actual malice. However, there are other possible standards such as slight negligence, recklessness, and gross negligence. Second, states could permit a private individ-

44. *Id.* at 3008, 41 L. Ed. 2d at 806. In accommodating these values, the Court asserted that a tension necessarily exists to preserve a vigorous press and redress wrongful injury from defamation. *Id.*

45. *Id.* at 3008, 41 L. Ed. 2d at 807.

46. *Id.* at 3009, 41 L. Ed. 2d at 807.

47. *Id.* at 3010, 41 L. Ed. 2d at 808.

48. *Id.* at 3009, 41 L. Ed. 2d at 808. The Court pointed out that an opportunity for rebuttal, standing alone, is insufficient to redress the harm of defamation. *Id.*

49. *Id.* The Court relied on Garrison v. Louisiana, 379 U.S. 64 (1964), which held that the public is justifiably interested in anything that touches upon an official's fitness for office. *Id.* at 77.

50. 94 S. Ct. at 3010, 41 L. Ed. 2d at 808.

51. *Id.* at 3010, 41 L. Ed. 2d at 809. The Court noted that this standard provided a more equitable accommodation between the competing concerns. *Id.* at 3011, 41 L. Ed. 2d at 809.

52. *Id.* at 3008, 41 L. Ed. at 807.

53. *Id.* at 3013, 41 L. Ed. 2d at 812. The Court stated that the public figure question should be resolved within the context of the event which gave rise to the alleged defamation. *Id.*

54. *Id.*

ual to recover punitive damages if he establishes actual malice. The Court did not rule out this possibility in *Gertz* since it stated only that states may not permit recovery of punitive damages when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.[55]

Justice Douglas criticized the majority opinion because of his belief that there is an unconditional privilege for publication of public issues. Therefore, according to Justice Douglas, the first amendment bars Congress or the states from passing any libel law which inhibits the freedom of the press.[56] However, this view would result in the total sacrifice of an individual's right to enjoy a good reputation. The dissent of Justice Brennan is grounded on the contention that *Rosenbloom*, which he authored, should control.[57] Since the plaintiff failed to establish actual malice in the publication of an item of public concern, he argued that the case should be affirmed.[58] However, Justice Brennan's position failed to protect the private individual who had not voluntarily entered into the public arena. Chief Justice Burger dissented on the grounds that he preferred to allow the law of defamation to evolve along traditional lines, rather than fashion a new rule, which had no jurisprudential ancestry;[59] but, he failed to suggest whether the *Rosenbloom* or the *Gertz* rule was a better accommodation between the law of defamation and the first amendment. Finally, Justice White dissented, believing the states should be free to impose a strict liability standard for the publication of defamatory falsehoods.[60] However, a strict liability standard would be an undue burden on the media.

IV. CONCLUSION

With this decision the United States Supreme Court has restricted the application of the *New York Times* doctrine to public officials and public figures. The states are free to adopt appropriate standards for private individuals, as long as those standards do not include liability without fault. It is doubtful that the decision will produce a dramatic increase in the number of defamation suits instituted by private citizens, for litigation is expensive and time consuming. However, there should be an increase in the percentage of successful private citizen litigants in this area, if the states promulgate less stringent standards for establishing liability.

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55. *Id.* at 3011, 41 L. Ed. 2d at 810.
56. *Id.* at 3015, 41 L. Ed. 2d at 815. Justice Douglas feared that by allowing the states to adopt a negligence standard, even reasonable men would refrain from speaking. *Id.* at 3017, 41 L. Ed. 2d at 817.
57. *Id.* at 3018, 41 L. Ed. 2d at 818. Justice Brennan stated that the rule announced in *Gertz* did not allow the press adequate breathing space. *Id.* at 3017, 41 L. Ed. 2d at 817.
58. *Id.* at 3021, 41 L. Ed. 2d at 822.
59. *Id.* at 3014, 41 L. Ed. 2d at 814. Additionally, Chief Justice Burger asserted that by including attorneys within the public figure definition, the constitutional right to counsel would be undermined. *Id.*
60. *Id.* at 3031-33, 41 L. Ed. 2d at 833-35. Justice White stated that in *Gertz* the Court is discarding the judgment of the fifty states. *Id.* at 3031, 41 L. Ed. 2d at 833.

The Indigent's Right to Counsel in Discretionary Appeals

The respondent, an indigent, was convicted of forgery in two counties of North Carolina and was represented by court-appointed counsel at both trials. His convictions were both affirmed on appeal of right by the North Carolina Court of Appeals.[1] In one case the respondent's application for certiorari to the North Carolina Supreme Court, filed with the assistance of counsel, was denied,[2] and in the other case, in which the respondent was denied the appointment of counsel to assist in his appeal, the state supreme court dismissed the appeal on the grounds of tardiness.

Following the denial of certiorari in the first case, the respondent unsuccessfully sought the appointment of counsel to assist him in preparing a writ of certiorari to the United States Supreme Court. He then filed a writ of habeas corpus in the middle and western federal district courts of North Carolina alleging that the denial of assistance of counsel on a discretionary appeal to the state supreme court and on application for certiorari to the United States Supreme Court was in each instance a denial of respondent's federal rights under the sixth amendment. The district courts denied relief, but these holdings were reversed on appeal by the Fourth Circuit, which held that the states have a constitutional obligation to provide counsel to an indigent on a discretionary appeal to a state supreme court or the United States Supreme Court.[3] The United States Supreme Court granted certiorari.[4] *Held, reversed*: Neither the due process clause nor the equal protection clause of the fourteenth amendment require a state to appoint counsel for an indigent on a discretionary appeal either to the state supreme court or for the preparation of a writ of certiorari to the United States Supreme Court. *Ross v. Moffitt*, 417 U.S. 600 (1974).

I. Right to Counsel: Its Development

The sixth amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."[5] This constitutional mandate was first applied narrowly by the United States Supreme Court in *Powell v. Alabama*.[6] In *Powell* the Court held that in capital cases the defendant has a right to representation of counsel, despite

1. State v. Moffitt, 181 S.E.2d 184 (N.C. App. 1971); State v. Moffitt, 177 S.E.2d 324 (N.C. App. 1970).
2. State v. Moffitt, 279 N.C. 396, 183 S.E.2d 247 (1971).
3. Moffitt v. Ross, 483 F.2d 650 (4th Cir. 1973); Note, *Right to Counsel on All Appeals*, 11 Hous. L. Rev. 725 (1974).
4. 414 U.S. 1128 (1974).
5. U.S. Const. amend. VI.
6. 287 U.S. 45 (1932). Mr. Justice Sutherland, writing for the Court in *Powell*, provided a policy argument for the sixth amendment right to counsel: "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Id.* at 68-69.

his impoverishment. Since *Powell*, the questions which the Court has been faced with can be divided into three categories: the standard which should be applied by the Court in determining an alleged denial of constitutional right to counsel;[7] the constitutional basis which should be used in deciding a right to counsel question;[8] and the most encompassing of all, the extent to which the right to counsel is constitutionally guaranteed in our criminal process.[9]

A Standard for Right to Counsel. Although the Court in *Powell* was careful to emphasize the importance of guaranteeing the right to counsel, it did not imply that this right was a blanket guarantee which must be provided in all types of cases. Ten years later this limitation of *Powell* was explained by the Court in *Betts v. Brady*[10] where the petitioner, an indigent indicted of robbery, went to trial without the aid of counsel. The Court rejected the incorporation theory, which would have made the sixth amendment mandate of right to counsel applicable to the states through the due process clause of the fourteenth amendment, and held that the states were not constitutionally obligated to provide counsel in all types of cases. The Court pointed to the fact that the defendant in this case "was a man forty-three years old, of ordinary intelligence, and ability to take care of his own interests on the trial of that narrow issue,"[11] thus implying that there were no special circumstances in this case which made counsel an absolute prerequisite to a fair trial. The Court in *Betts* articulated the "special circumstances and fundamental fairness" test,[12] which, for a time was employed in right to counsel cases. In essence, this test stated that a court should look closely at the facts of each right to counsel case and determine whether special circumstances existed such that assistance of counsel was an absolute necessity in assuring fundamental fairness at trial. Requiring a case-by-case analysis, the test thus left the states free to advance and develop their own standards and legislative policies on the right to counsel issue.[13]

In 1963 the United States Supreme Court decided *Gideon v. Wainwright*,[14] wherein it formulated the "critical stage in the prosecution" test,[15]

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7. *See* notes 11-18 *infra* and accompanying text.
8. *See* notes 19-21 *infra* and accompanying text.
9. *See* notes 23-57 *infra*. *See generally* Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal Policy Observations*, 48 MINN. L. REV. 1 (1964); Steele, *The Doctrine of Right to Counsel: Its Impact on the Administration of Criminal Justice and the Legal Profession*, 23 SW. L.J. 488 (1969).
10. 316 U.S. 455 (1942).
11. *Id.* at 472.
12. The special circumstances and fundamental fairness test promulgated in *Betts* was further defined in Uveges v. Pennsylvania, 335 U.S. 437, 441 (1948): "Where the gravity of the crime and other factors—such as the age and education of the defendant, the conduct of the court or prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair, . . . the accused must have legal assistance . . . ." *See also* Chewning v. Cunningham, 368 U.S. 443 (1962); Gryger v. Burke, 334 U.S. 728 (1948).
13. In reaching his conclusion that the right to counsel ought to be a matter of state choice and legislative policy, Mr. Justice Roberts emphasized that over half of the states did not consider providing counsel an essential element of a fair trial. 316 U.S. at 471.
14. 372 U.S. 335 (1963).
15. *See* notes 23-30 *infra* and accompanying text.

which incorporated the sixth amendment right to counsel into the fourteenth amendment and made it obligatory on the states. Relying on numerous decisions in the area of right to counsel,[16] the Court concluded that the *Betts* decision was "an abrupt break with . . . well-considered precedents."[17] By reestablishing the constitutional principles which had been followed prior to the *Betts* decision, the Court concluded that since Gideon had been denied the right to counsel at his trial, such a deprivation was in fact a denial of a fundamental right at a critical stage in his prosecution.

The Constitutional Basis for Right to Counsel. Once the constitutional guarantee had been made applicable to the states by incorporation into the fourteenth amendment, the Court was free to turn to the provisions of the fourteenth amendment for a standard, as well as a means of expanding and developing this constitutional guarantee.[18] Using the standards[19] and meaning set forth in the due process and equal protection clauses, the Court has narrowed its consideration to two factors. The first is whether a critical stage in the prosecution is involved, such that failing to provide counsel would in effect deny the defendant his fundamental rights to a fair trial and due process of law. Secondly, the Court has considered whether the inability of the indigent to employ counsel at this stage in the proceedings effectively denies him equal protection under the law.

II. Expansion of the Right to Counsel Doctrine: From Arrest to Appeal

Since the establishment of standards for the right to counsel doctrine, the Court has been faced with the problem of defining the actual and practical meaning of "critical stage in the prosecution." Through this interpretation, the doctrine of right to counsel has experienced tremendous expansion and growth. This development has been based on the prevailing theory and philosophy that there is no rational relation between a party's ability to pay and his guilt or innocence, and "a State can no more discriminate on account of poverty than on account of religion, race or color."[20] The expansion of the meaning and scope of "critical stage" and, thus, the constitutional guarantee of right to counsel, has been witnessed in three basic areas, the pretrial stage, the trial stage, and the post-conviction and appellate stage.

16. The Court particularly relied on its decisions in Grosjean v. American Press Co., 297 U.S. 233, 243-44 (1936), where it had said: "We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution." *See also* Johnson v. Zerbst, 304 U.S. 458 (1938).

17. 372 U.S. at 344.

18. As recognized by Professor Steele, the language of the sixth amendment is not sufficient in and of itself to supply a standard to be used in judging right to counsel issues. He explains that at the time the sixth amendment was written the duties and role of an attorney were in a rather primitive, undeveloped stage. For this reason, he concludes that the words in the sixth amendment, including "criminal prosecution," "accused," and "defense," are too narrow to provide a meaningful standard or a "vehicle" for developing the right to counsel doctrine, and thus the courts had to turn to the fourteenth amendment. Steele, *supra* note 9.

19. *See* notes 11-18 *supra* and accompanying text.

20. Griffin v. Illinois, 351 U.S. 12, 17-18 (1956).

The Pretrial Stage. In numerous landmark cases, including *Escobedo v. United States*,[21] *Miranda v. Arizona*,[22] and *Massiah v. United States*,[23] the court stated that both pre-indictment and post-indictment interrogation represented critical stages in the criminal prosecution such that there was a constitutional right to have counsel present. In the pretrial area of arraignments the Court decided in *Hamilton v. Alabama* that an arraignment was a critical stage in the criminal process and stated, "When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted."[24] On the question of preliminary hearings the Court concluded in *Coleman v. Alabama*[25] that the denial of counsel at a preliminary hearing was a constitutional deprivation at a critical stage in the prosecution.

Relying on these earlier cases, the Court, four years after *Gideon*, turned its full focus and attention to the question of pretrial critical stages in the case of *United States v. Wade*.[26] In that case the Court was faced with the issue of whether the right to counsel was constitutionally guaranteed at a post-indictment lineup. Reasoning that this lineup was a critical stage in the prosecution, the Court concluded that there was a substantial potential for prejudice and that the "presence of counsel . . . [could] often avert prejudice and assure a meaningful confrontation at trial."[27] In *Wade* the Court articulated an important, precedential standard for pretrial confrontation issues: "It is central to that [*Powell v. Alabama*] principle, that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the state at any stage of the prosecution, formal or informal, in Court or out, where counsel's absence might derogate from the accused's right to a fair trial."[28] Thus, it is clear from the numerous pretrial cases, that the Court has a duty in every pretrial situation to scrutinize and evaluate the confrontation and determine whether the absence of counsel will in fact prejudice the defendant's constitutional right to a fair trial.

The cases of *Powell v. Alabama*[29] and *Gideon v. Wainwright*[30] stand as the landmarks which established the basic standards of right to counsel at the trial stage. However, the potential breadth and scope of the right to

21. 378 U.S. 478 (1964). In this case the Court stated that once the focus of the interrogation turns to the defendant, the sixth and fourteenth amendments require that counsel be provided if the defendant requests it and the defendant must be informed of his right to have an attorney present.

22. 384 U.S. 436 (1966). In *Miranda* the Court slightly modified its holding in *Escobedo* but brought about the same ultimate result. The Court stated that once the questioning takes on the aspects of a custodial interrogation, the defendant's right to counsel arises.

23. 377 U.S. 201 (1964). Mr. Justice Stewart writing for the majority held that the petitioner's sixth amendment right to counsel was violated when incriminating statements, made by petitioner after indictment, without the aid of counsel, were introduced as evidence against him at trial. *See also* Spano v. New York, 360 U.S. 315 (1959).

24. 368 U.S. 52, 55 (1961). This decision was reaffirmed two years later in a per curiam decision where a defendant pleaded guilty to a charge during a preliminary hearing without the aid of counsel, White v. Maryland, 373 U.S. 59 (1963).

25. 399 U.S. 1 (1970).

26. 388 U.S. 218 (1967).

27. *Id.* at 236.

28. *Id.* at 226.

29. 287 U.S. 45 (1932); *see* notes 5-7 *supra* and accompanying text.

30. 372 U.S. 335 (1963); *see* notes 15-18 *supra* and accompanying text.

counsel at trial was left limitless by the Court in *Powell*, which concluded a defendant "requires the guiding hand of counsel at every step in the proceedings against him."[31] Thus, numerous questions were left unanswered; for while it was clear from *Gideon* that in all felony trials the defendant had a right to counsel, the question of right to counsel for misdemeanor offenses remained a hazy and poorly defined area. An answer to this question was finally provided in *Duncan v. Louisiana*, which held that the right to court-appointed counsel extended only to trial for non-petty offenses punishable by more than six months imprisonment.[32] The six-month imprisonment rule of *Duncan* was, however, specifically overruled by the Supreme Court in *Argersinger v. Hamlin*[33] when the Court held that absent a knowing and intelligent waiver no one could be imprisoned for an offense without representation by counsel.[34] The Court concluded that there is nothing inherent either in the nature or complexity of a misdemeanor trial which makes the need of counsel any less of a prerequisite to the guarantee of a fair trial.[35]

In addition to misdemeanor trials, another important expansion of the right to counsel doctrine at the trial stage occurred in 1967 when the Court held that there was a constitutionally guaranteed right to counsel at the trial of juveniles.[36] Discarding the distinction between an adult felony trial and a juvenile trial, the Court reasoned that in any case where the juvenile might be deprived of his liberty, the due process clause of the fourteenth amendment mandated that he be provided with counsel.[37] Thus the Court, relying specifically on *Powell* and *Gideon*, stressed both the constitutional and practical need for counsel in misdemeanor and juvenile trials.

The Post-Conviction and Appellate Stages. On numerous occasions the Court has evaluated and relied on the principles articulated in cases concerning earlier stages in the prosecution, and concluded that many of these standards are equally applicable to post-conviction and appellate stages. In *Mempa v. Rhay*[38] the Supreme Court unanimously concluded that whether

31. Powell v. Alabama, 287 U.S. 45, 69 (1932). *See also* Argersinger v. Hamlin, 407 U.S. 25 (1972); *In re* Gault, 387 U.S. 1 (1967); Douglas v. California, 372 U.S. 353 (1963).

32. 391 U.S. 145, 161-62 (1968).

33. 407 U.S. 25 (1972).

34. *Id.* at 37. In reaching its decision in *Argersinger*, the Court first took note of two cases, Pointer v. Texas, 380 U.S. 400 (1965) (right of confrontation), and Washington v. Texas, 388 U.S. 14 (1967) (compulsory process for obtaining witnesses in one's favor), and concluded that in neither of these cases were the rights discussed limited to felonies, but were held to apply generally to all criminal trials.

35. *See generally* Allison & Phelps, *Can We Afford To Provide Trial Counsel for the Indigent in Misdemeanor Cases?*, 13 WM. & MARY L. REV. 75, 76 (1971); Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685, 705 (1968); Note, *Right to Counsel: A New Standard*, 27 SW. L.J. 406 (1973).

36. *In re* Gault, 387 U.S. 1 (1967).

37. The Court rejected the claim that the probation officer or the parents or even the judge could fairly represent a child's interest at a hearing. *Id.* at 36. In discussing the practical need of counsel, the Court noted that attendant with the natural problems of the legal process, a juvenile particularly needs a counsel's assistance, "to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it." *Id.*

38. 389 U.S. 128 (1967). For a detailed analysis of the *Mempa* decision see Cohen, *Sentencing, Probation, and the Rehabilitative Ideal: The View from Mempa v. Rhay*, 47 TEXAS L. REV. 1 (1968).

a post-conviction hearing is labeled a deferred sentencing or probation revocation hearing, the right to have counsel present is constitutionally guaranteed.[39] However, six years later the Court in *Gagnon v. Scarpelli*[40] distinguished the *Mempa* case on a procedural point and concluded that there was no constitutionally guaranteed right to counsel at probation revocation hearings.[41] By its decision in that case, the Court greatly limited the *Mempa* rule and dealt its first substantial blow to the development of the right to counsel doctrine.

Another post-conviction stage which has experienced considerable growth and development is the dual area of right to a free transcript and right to counsel on appeal.[42] In *Griffin v. Illinois*[43] the Court concluded that the due process and equal protection clauses dictate that an indigent must be provided with a free copy of his trial transcript in preparing his appeal. In directing a considerable amount of attention to the problem of indigency and the law, Mr. Justice Black, writing for the majority, emphasized that "[p]roviding equal justice for poor and rich, weak and powerful alike is an age-old problem."[44] He concluded that to deny an indigent the right to have a transcript of his trial would be an "invidious discrimination" and asserted that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[45]

Relying on the *Griffin* principle, the Court, in reviewing various state procedures, developed a line of "transcript and filing fee cases" in which it further expanded the rights of the indigent in the appellate process. In *Burns v. Ohio*[46] an indigent was deprived of the right to apply for a discretionary review by the Ohio Supreme Court because of his inability to pay the filing fees. The Court concluded that this state action was a deprivation of the defendant's constitutional rights and promulgated the rule that once a state has established an appellate review system for its criminal cases, an indigent may not be deprived of access to any part of that process by reason of his poverty.[47] Expanding the right to a free transcript to its logical con-

39. Mr. Justice Marshall particularly emphasized that such a hearing was unquestionably a critical stage in the criminal process in that "the [parole] [b]oard places considerable weight on these recommendations [for the defendant]." 389 U.S. at 135.

40. 411 U.S. 778 (1973).

41. Concluding that a probation revocation hearing is not a critical stage in the criminal process, the Court distinguished *Mempa* on the grounds that sentencing also occurred at the hearing in that case. *Id.* at 781. The Court reasoned that the states are not under a constitutional duty to provide counsel at all probation revocation hearings, but rather the need for such counsel ought to be decided on a case-by-case basis. *Id.* at 788. The need for informality, flexibility, and economy, the Court determined, overrides the potential prejudice to the defendant by not having counsel present. *Id.* at 790.

42. See, Boskey, *The Right to Counsel in Appellate Proceedings*, 45 MINN. L. REV. 783 (1961); Day, *Coming: The Right To Have Counsel at All Appellate Stages*, 52 A.B.A.J. 135 (1966).

43. 351 U.S. 12 (1956).

44. *Id.* at 16.

45. *Id.* at 19. This standard of "invidious discrimination" and its rule concerning the right of free transcripts for indigents was reaffirmed two years later in a per curiam decision in which the Court held that by failing to provide a trial record to an indigent, the State of Washington had deprived the defendant of his fourteenth amendment rights. Eskridge v. Washington, 357 U.S. 214 (1958).

46. 360 U.S. 252 (1959).

47. *Id.* at 257. Chief Justice Warren, writing for the majority, emphasized that the

clusion, the Court in *Mayer v. City of Chicago*[48] relied on the principles of *Griffin* and *Burns* in concluding that even on a discretionary appeal, the indigent must be provided with a free transcript.

Tied closely to the "transcript" cases is a second aspect of appellate development, namely, the right to counsel on indigent appeal. This constitutional guarantee was extensively developed in the area of federal courts by the Supreme Court's holding in *Johnson v. United States*[49] that an indigent's appeal may not be dismissed until he has been provided with counsel to assist him in preparing it.

Turning its attention for the first time to state appellate procedures, the Court considered the standards which had been promulgated by numerous federal procedure cases and held in its landmark decision of *Douglas v. California*[50] that denial of counsel on appeal in a state proceeding was a direct violation of an indigent's due process and equal protection rights. Applying the "invidious discrimination" standard of *Griffin*, the Court overturned a California rule of criminal procedure, by which an indigent was afforded counsel on appeal only after a determination that counsel would be helpful to either the defendant or the court, and reasserted its standard that "there can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.' "[51]

The *Douglas* principle of right to counsel on first appeal was further defined and interpreted in several subsequent cases. In *Swenson v. Bosler*[52] the Court overturned a Missouri rule of criminal procedure and held that despite a defendant's failure to request counsel on appeal, his right to an attorney was constitutionally guaranteed and, therefore, must be provided. Expounding on the role of an attorney on appeal, the Court in *Anders v. California*[53] emphasized that an attorney representing an indigent on appeal must perform his duty and responsibility to the best of his capability and could withdraw from the case only upon a documented finding that the appeal was wholly frivolous. It is important to emphasize, however, that the *Douglas* line of cases and the principles promulgated therein did not apply beyond the first appeal as of right, for the Court in *Douglas* specifically reserved the question of whether this constitutional guarantee should be expanded to discretionary appellate review.[54]

III. Ross v. Moffitt

Relying primarily on an analysis of due process and equal protection rights, the Court in *Ross v. Moffitt* held that the constitutionally protected right of

principle of equal appellate review is no less applicable where a state has provided equal appellate review for the first stage but has foreclosed the indigent from the second stage (the discretionary stage) simply because of his poverty. *See* Entsminger v. Iowa, 386 U.S. 748 (1967); Lane v. Brown, 372 U.S. 477 (1963); Coppedge v. United States, 369 U.S. 438 (1962); Smith v. Bennett, 365 U.S. 708 (1961).

48. 404 U.S. 189 (1971).
49. 352 U.S. 565 (1957).
50. 372 U.S. 353 (1963).
51. Griffin v. Illinois, 351 U.S. 12, 19 (1956).
52. 386 U.S. 258 (1967).
53. 386 U.S. 738 (1967).
54. 372 U.S. at 356.

counsel does not extend to discretionary appeals but instead is limited to the first appeal as of right. The Court rejected the rationale of Chief Judge Haynsworth of the Fourth Circuit that "[a]s long as the state provides such procedures and allows other convicted felons to seek access to the higher court with the help of retained counsel, there is a marked absence of fairness in denying an indigent the assistance of counsel as he seeks access to the same court."[55] Mr. Justice Rehnquist writing for a six-man majority concluded that the denial of counsel in a discretionary appeal, which is not a critical stage in the prosecution, does not amount to an "invidious discrimination." However, the dissent of Mr. Justice Douglas relied on the reasoning of Chief Judge Haynsworth and came to the opposite conclusion, that "[t]he state's highest court remains the ultimate arbiter of the rights of its citizens,"[56] and thus there was a constitutional need for counsel at a discretionary appeal.

The majority, in reversing the Fourth Circuit, reanalyzed the meaning and scope of the fourteenth amendment due process and equal protection clauses. It emphasized the basic principle of *McKane v. Durston*[57] that a state is under no constitutional obligation to provide any appellate review procedure. However, the majority cited several earlier Supreme Court decisions which demonstrate the Court's perpetual concern with financial barriers and appellate state procedures which in fact violate an indigent's fourteenth amendment rights.[58] The Court concluded that "a state cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons."[59] Characterizing the Court's decision in *Douglas* as a departure from the "limited doctrine of the transcript and fee cases," the Court emphasized that *Douglas* was specifically limited to right to counsel on first appeal.[60] However, the dissent read *Douglas* as standing for the

55. 483 F.2d at 654.

56. 417 U.S. at 620, quoting 483 F.2d at 653. Mr. Justice Douglas, writing the dissenting opinion, emphasizes the procedural differences between filing a brief on appeal and applying for a writ of certiorari, which was a major rationale of the court of appeals' decision. Chief Judge Haynsworth of the Fourth Circuit stressed the fact that an indigent could file a brief on appeal containing the simple elements of his case without a need of going into all the legal aspects. An application for writ of certiorari, on the other hand, by the very nature of the proceeding requires the skill and guidance of counsel to present the claims properly.

57. 153 U.S. 684 (1894). The majority stated: "An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeals. A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted was not at common law and is not now a necessary element of due process of law." *Id.* at 687.

58. Draper v. Washington, 372 U.S. 487 (1963) (a procedure by which an indigent was entitled to a free transcript only after a judge determined that his appeal was not frivolous was held invalid); Lane v. Brown, 372 U.S. 477 (1963) (an Indiana statute providing that only a public defender could obtain a free transcript was held invalid): Smith v. Bennett, 365 U.S. 708 (1961) (in a collateral proceeding the refusal of the state to docket an indigent's case because of his inability to pay the filing fees was held to be a fourteenth amendment violation); Burns v. Ohio, 360 U.S. 252 (1959) (a defendant, having already been afforded one appellate review of his case, should not be denied the opportunity to invoke the discretionary appellate review). Note, however, that the Court in *Ross* neglected to mention the most recent development in the *Griffin* line of cases, namely, Mayer v. City of Chicago, 404 U.S. 189 (1971), in which the Court extended the right to a trial transcript to all appeals.

59. 417 U.S. at 607.

60. Note however that the majority in *Ross* failed to mention the pre-*Douglas* decisions of Johnson v. United States, 352 U.S. 565 (1957), and Ellis v. United States, 356 U.S. 674 (1958), both dealing with the rights of counsel on appeal. Also omitted in

somewhat different principle of "fairness and equality" and thus concluded that the right to counsel which was guaranteed in *Douglas* ought also to be extended to a discretionary appeal.[61]

Mr. Justice Rehnquist emphasized for the majority that neither due process nor equal protecton was sufficient in and of itself to provide a true standard for the right to counsel doctrine. Each focuses on different aspects and factors and for that reason each clause ought to be analyzed separately and then used together in reaching a decision.[62] In considering the due process guarantee, the Court cited *Gideon v. Wainwright* in emphasizing that the right to counsel at trial is a fundamental aspect of due process, but concluded that there were important distinctions between the trial and appellate stages, thus warranting different constitutional treatment.[63] Reemphasizing the *McKane v. Durston* principle, the majority concluded that simply because a state has chosen to establish an appellate review structure it "does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way."[64]

The Court then turned its attention to a consideration of the equal protection clause. In citing *San Antonio Independent School District v. Rodriguez*[65] the majority emphasized that a state is not required under the fourteenth amendment to provide complete equality or precisely equal economic conditions to its citizens. States may develop various civil and criminal procedures which do not amount to a violation of the parties' equal protection rights even though different results may occur under the provisions. However, the Court concluded that in the area of criminal appellate procedure the equal protection clause mandates that once a state has established an appellate system it must be maintained in such a manner that it is free of unreasoned distinctions and provide an indigent with a fair opportunity to present his case before it.[66]

Reviewing the North Carolina appellate procedure pertinent to this case,[67] the Court noted that unlike the first appeal as a matter of right, where the major question is whether the defendant's conviction was proper, in a discretionary appeal the Court is primarily concerned with such issues as whether the appeal has particular public interest, whether the issues on appeal raise important legal questions of significance to the legal community, or whether

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the discussion in *Ross* were the cases of Swenson v. Bosler, 386 U.S. 258 (1967), and Anders v. California, 386 U.S. 738 (1967), which further advanced and interpreted the *Douglas* rule.

61. 417 U.S. at 621.

62. Mr. Justice Rehnquist noted fundamental differences between the due process and equal protection guarantees: " 'Due Process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. 'Equal protection,' on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable." *Id.* at 609.

63. In emphasizing the differences between the trial and appellate stages, the Court stated: "The defendant needs an attorney on appeal not as a shield to protect him against being 'haled into court' by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt." *Id.* at 610-11.

64. *Id.*

65. 411 U.S. 1 (1973).

66. 417 U.S. at 611-12.

67. N.C. GEN. STAT. §§ 7A-27 (Supp. 1974), 7A-30, -31 (1969).

the conviction in the lower court is at odds with the trend of the law or previous Supreme Court rulings.[68] The Court emphasized that following an affirmance of a defendant's conviction on first appeal, the indigent defendant will have a transcript of his trial, the brief that was filed in his case on the first appeal, and, in some instances, an opinion by the lower court affirming his conviction. With all of these to aid the indigent in preparing to file for a discretionary appeal, an attorney, though he might be quite useful and beneficial, is not constitutionally required.[69] Thus, the Court reasoned, it is not necessary under the Constitution for the State to provide counsel either on discretionary appeals to the state supreme court or to aid the indigent in preparing a writ of certiorari to the United States Supreme Court. It is, the Court concluded, and should remain, a matter of legislative policy and choice.[70]

Ross v. Moffitt has three definite and immediate effects on the constitutional issue of right to counsel. First, it has brought the growth and development of the right to counsel doctrine in appellate review to an abrupt halt. The *Ross* decision has definitely established the parameters and limits of the *Douglas* principle; the indigent has a right to counsel in one appeal and one appeal only.

Secondly, *Ross* will ultimately have an enormously limiting effect on earlier decisions in both the *Douglas* and *Griffin* line of cases. The *Burns* principle that a defendant should not be foreclosed from any phase of a state's appellate procedures merely because he is an indigent, will be severely restricted by the *Ross* abolishment of right to counsel beyond the first appeal. In a similar manner, the holding in *Mayer v. City of Chicago* that an indigent is entitled to a free transcript at *all* levels of appeal, has, by the *Ross* decision, left the indigent in a precarious position in a discretionary appeal. While he is constitutionally entitled to have a trial transcript under his arm when he walks into a state supreme court, he has been deprived the right of having a lawyer at his side. The *Mayer* decision, which a few years ago appeared to be a logical extension of the right to counsel doctrine, now stands as the most liberal outgrowth of the *Griffin-Douglas* development. In short, the *Griffin* line of transcript and filing fee cases has been permitted to expand to its logical conclusion, while the *Douglas* development has been abruptly curtailed.

The third and undoubtedly most significant change brought on by the *Ross* decision is the emergence of new standards in the area of due process and equal protection rights. Gone is the era when the Court's concern and sensitivity for the defendant's needs led them to the conclusion that the type of justice and trial a person gets should not depend on the size of his pocketbook. A new era in the right to counsel doctrine has begun, with the Court viewing an attorney on appeal as a "sword" to be used in trying to reverse

68. 417 U.S. at 613-14. It is open to question whether an indigent unaided by counsel can properly evaluate his case and be able to conclude whether his case is of public interest, of important legal significance, or in conflict with other Supreme Court decisions.

69. *Id.* at 616-18.

70. *Id.* at 618-19.

a conviction, and holding a philosophy concerning the needs of indigents that "the fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required."[71] Indeed, by *Ross v. Moffitt* the Court has altered and redirected a long line of well-considered precedent in the area of right to counsel and through that alteration has dealt a substantial blow to the expansion of the right to counsel doctrine.

IV. CONCLUSION

At this point most of the implications and potential changes brought on by the *Ross* decision are quite speculative. The true force and underlying meaning of *Ross v. Moffitt* will be neither clearly seen nor totally appreciated until the Court is again faced with an indigent right to counsel case. For the present time, we only know that the progressive expansion of the right to counsel in indigent appeals has been retarded. With that constriction, the development and growth of the right to counsel on appeal and the concern of the Court in protecting the indigent's equality in the appellate process has also been greatly restricted. By means of the *Ross* decision, the Supreme Court has told the indigent that once the benefit of counsel has been granted on the first appeal, he must then rely on his own resources and talents in all subsequent hearings on his case.

Patricia A. Stevenson

Internal Revenue Code Section 6851, Deficiency Notice Required: Clark v. Campbell

On June 11, 1969, agents of the Federal Bureau of Narcotics and Dangerous Drugs and local officials conducted a search of two buildings, believing that narcotics belonging to plaintiff were concealed therein. Plaintiff was arrested and a substantial amount of his personal property was seized. About one month after the search the Internal Revenue Service notified plaintiff that his taxable period had been terminated pursuant to section 6851 of the Internal Revenue Code[1] and that a tax of $104,697.20 had been assessed which was immediately due and payable. The Service served notices of levy on several institutions which were believed to possess money or property of plaintiff and also posted notices of levy on real estate owned by plaintiff. Plaintiff brought suit in federal district court, seeking to remove clouds on the title to the real property and to enjoin collection of the taxes, insisting that the Service had erroneously failed to issue him a formal notice of deficiency.[2] The district court agreed that the deficiency no-

71. *Id.* at 616.

1. INT. REV. CODE OF 1954, § 6851.
2. The deficiency notice is a jurisdictional prerequisite of the Tax Court. *Id.* §§

tice was required and, because it had not been timely issued, granted the requested relief.[3] On appeal *held, affirmed*: The liability created pursuant to a section 6851 termination is a statutory deficiency, assessable under section 6861,[4] entitling plaintiff to a notice of deficiency, and upon the Service's failure to issue the notice timely, plaintiff may seek injunctive relief. *Clark v. Campbell*, 501 F.2d 108 (5th Cir. 1974).

I. THE STATUTORY FRAMEWORK

The Internal Revenue Code provides the "ordinary taxpayer"[5] with a choice of forums in which to contest an alleged tax deficiency[6] which has been determined and assessed by the Internal Revenue Service pursuant to section 6201,[7] the general assessment section. He may pay the full amount of the tax[8] as determined by the Service, file a mandatory claim for refund or credit,[9] and bring a suit for refund in district court.[10] Alternatively, he may elect under section 6213[11] to withhold payment of the deficiency and file a petition with the Tax Court for a redetermination of the amount of the deficiency. The Code expressly conditions the jurisdiction of the Tax Court upon the mailing of a notice of deficiency to the taxpayer,[12] making the notice of paramount importance.[13]

While this procedure is sufficient to handle the great majority of cases, it was recognized that the collection of taxes might be jeopardized in some

6213(a), 6214(a). *See also* Mason v. Commissioner, 210 F.2d 388 (5th Cir. 1954). The Tax Court provides the taxpayer with a forum to review the Service's determination of his tax liability before payment of the tax.

3. Clark v. Campbell, 341 F. Supp. 171 (N.D. Tex. 1972).

4. INT. REV. CODE OF 1954, § 6861.

5. The term "ordinary taxpayer" is used herein to mean the taxpayer who files his return with the Internal Revenue Service, but does not include the taxpayer who has had his taxable period terminated pursuant to § 6851, or the taxpayer whose payment of the tax has been accelerated under § 6861.

6. INT. REV. CODE OF 1954, § 6211 provides in part:

> [T]he term 'deficiency' means the amount by which the tax imposed . . . exceeds the excess of—
>
> (1) the sum of
>
> (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus
>
> (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—
>
> (2) the amount of rebates . . . made.

The existence of the deficiency triggers § 6212(a), authorizing the Service to send the taxpayer a formal notice of the deficiency by registered or certified mail. Section 6213(a) prohibits the assessment of the deficiency, levy, or proceeding to collect the deficiency until the deficiency notice has been mailed to the taxpayer. The failure of the Service to issue the deficiency notice permits the taxpayer to institute suit to enjoin the assessment, levy, or any judicial proceeding to collect the tax, notwithstanding the anti-injuntion statute, § 7421. *Id.* § 6213(a).

7. *Id.* § 6201.

8. *See* Flora v. United States, 362 U.S. 145 (1960), wherein the Court held that 28 U.S.C. § 1346(a)(1) (1970), the jurisdictional statute for suits for a refund in the district court, required full payment of the assessment as a prerequisite to suit.

9. INT. REV. CODE OF 1954, § 7422.

10. 28 U.S.C. § 1346 (Supp. 1971). The district court's original jurisdiction is concurrent with the Court of Claims.

11. INT. REV. CODE OF 1954, § 6213.

12. *See* note 2 *supra*.

13. The failure of the Service to issue a deficiency notice enables the taxpayer to take affirmative judicial action. *See* note 6 *supra*.

unusual circumstances.[14] Consequently, Congress enacted two code sections, now sections 6861 and 6851, which provided procedures to help assure the collection of taxes under such circumstances. Section 6861 enables the district director to accelerate payment of the tax after the taxpayer's tax year has run but before it would otherwise be due,[15] and section 6851 permits the district director to terminate the taxpayer's taxable period.

Section 6861—Jeopardy Assessments. Section 6861 had its origin in section 274(d) of the Revenue Act of 1924.[16] Section 6861 permits the district director to assess a deficiency immediately, give notice, and make demand for its payment if he believes that the assessment or collection of the deficiency will be jeopardized by delay.[17] This power is tempered by several valuable procedural safeguards. Under section 6861(b) the Service is required to mail a formal deficiency notice to the taxpayer within sixty days after the making of the jeopardy assessment. The notice provides the jeopardy taxpayer[18] with the same choice of forums as is available to the ordinary taxpayer. Thus, as an alternative to his action for refund in the district court, the taxpayer may petition the Tax Court for a prepayment redetermination of his tax liability. Section 6213(a) permits the jeopardy taxpayer, like the ordinary taxpayer, upon the failure of the Service timely to comply with the deficiency notice requirement, to bring suit in the district court to enjoin assessment and levy or seizure of taxpayer's property by the Service. If the notice requirement is satisfied, the taxpayer is permitted to stay the collection of the jeopardy assessment by filing an adequate bond with the Service.[19] If he is unable to file the bond, the Service still cannot sell the taxpayer's property to satisfy the alleged deficiency, absent specified conditions.[20] In addition, the Service may abate the jeopardy assessment upon a finding that jeopardy does not exist.[21]

14. *See, e.g.*, Laing v. United States, 496 F.2d 853 (2d Cir. 1974) (taxpayer attempting to take $300,000 in cash out of the United States in a suitcase hidden in his car); Irving v. Gray, 479 F.2d 20 (2d Cir. 1973), discussed in text accompanying notes 49-53 *infra*; Yannicelli v. Nash, 354 F. Supp. 143 (D.N.J. 1973) (taxpayer failed to report income realized from "gambling operations").

15. An individual's return must be filed and the tax paid, absent an extension, on or before the fifteenth day of the fourth month following the close of taxpayer's calendar or fiscal year. INT. REV. CODE OF 1954, § 6072.

16. Revenue Act of 1924, ch. 234, § 274(d), 43 Stat. 297. *See also* notes 28-32 *infra* and accompanying text.

17. This delay would result from the lapse of time between the date of assessment and the date when the taxpayer would ordinarily pay his tax. *See also* note 15 *supra* and accompanying text.

18. Although both § 6851 and § 6861 involve situations where the collection of the tax is in jeopardy, the term "jeopardy taxpayer" is used herein to mean only those taxpayers who come within the ambit of § 6861.

19. The bond should generally be in an amount equal to the amount of the jeopardy assessment. The amount may be less than the amount assessed but in such event the bond operates only to stay the collection of the bond's principal amount. INT. REV. CODE OF 1954, § 6863.

20. The seized property may not be sold during the period in which the taxpayer may petition the Tax Court. *Id.* § 6863(b)(3)(A)(i). If the taxpayer files a petition with the Tax Court, sale is further stayed during the pendency of that proceeding. *Id.* § 6863(b)(3)(A)(ii). The property may be sold, however, if the taxpayer consents to the sale or the Service determines that the expenses of conservation and maintenance will greatly reduce the net proceeds or the property is liable to perish. *Id.* § 6863(b)(3)(B).

21. *Id.* § 6861(g).

Section 6851—Termination of Taxable Year. The second mechanism available to the Service in circumstances where the collection of tax revenue is in jeopardy exists in section 6851. This section permits a district director to terminate the taxable period of a taxpayer immediately and demand payment of the tax imposed if he makes certain factual determinations. A finding that the taxpayer plans quickly to depart or to remove his property from the country, to conceal himself or his property within the country, or "to do any other act tending to prejudice or to render wholly or partially ineffectual proceedings to collect the income tax,"[22] will result in termination of taxpayer's year.

Section 6851 can be traced to section 250(g) of the Revenue Act of 1918.[23] A taxpayer whose year had been terminated pursuant to section 250(g) was compelled, as was the ordinary taxpayer, first to pay the deficiency determined and assessed by the Service and then bring a suit for refund. In 1924, in order to alleviate the "inherent harshness of the pay first —litigate later scheme,"[24] Congress established the Board of Tax Appeals, a forum serving in essentially an advisory capacity, where the taxpayer could obtain an adjudication of liability before payment of the tax.[25] Thereafter, the Service was required to send a notice of deficiency to all ordinary taxpayers,[26] but the notice was not required in those cases where taxpayers' years had been terminated[27] nor where the assessment or collection of the deficiency would be jeopardized by delay.[28] The Revenue Act of 1926 expanded the jurisdiction of the Board of Tax Appeals and gave the ordinary and jeopardy taxpayer the option of forums to determine his tax liability,[29] a procedure carried forward to the present tax structure.[30] The 1926 Act, however, did not expressly give the termination taxpayer[31] the right to a prepayment redetermination of his liability in the Board of Tax Appeals.[32]

Section 6851 provides only one of the safeguards available to the jeopardy taxpayer, a stay of enforcement proceedings upon taxpayer's furnishing a

22. *Id.* § 6851(a)(1). The collection process is set in motion by the district director's determination under the § 6851 criteria that a taxpayer's year should be terminated. The taxable year is then formally declared terminated and a return is prepared for the abbreviated period by the Service. On the return, the district director reconstructs the taxpayer's income for the abbreviated period and estimates a tax thereon. An assessment of the tax is made and notice is mailed to the taxpayer. The notice demands immediate payment of the tax. Upon the taxpayer's failure to pay the tax the Service will seek to satisfy the liability by sale of the taxpayer's property. *See* Comment, *Code Section 6851—"Termination of Taxable Year"—Application and Function Within the Internal Revenue Code of 1954*, 9 WAKE FOREST L. REV. 381, 382 (1974).

23. Revenue Act of 1918, ch. 18, § 250(g), 40 Stat. 1084.

24. Schreck v. United States, 301 F. Supp. 1265, 1269 (D. Md. 1969).

25. *See* note 70 *infra.*

26. Revenue Act of 1924, ch. 234, § 274(a), 43 Stat. 297.

27. *Id.* § 282, 43 Stat. 302.

28. *Id.* § 274(d), 43 Stat. 297.

29. Revenue Act of 1926, ch. 27, § 274(a), 44 Stat. 55.

30. *See* notes 5-13 *supra* and accompanying text.

31. The term "termination taxpayer" is used herein to mean the taxpayer whose year has been terminated pursuant to § 6851.

32. Section 274(a) of the 1926 Act, dealing with the issuance of the notice of deficiency, listed five exceptions to the general requirement of notice. Section 6851's predecessor, § 285, was not listed among the exceptions. This omission leads to the inference that Congress intended the notice requirement to apply in the termination case.

bond.[33] Further, there is no express requirement that a notice of deficiency be issued upon termination of the taxpayer's year. Finally, unlike section 6861, section 6851 has no express assessment authority, intrinsically or extrinsically.[34] Until recently, section 6851 was seldom used by the Service and consequently presented only a limited opportunity for judicial review.[35] However, litigation on the subject has mushroomed in the last five years with the Service's alleged use of the section as a tool to control illicit narcotics and gambling activity.[36]

II. CASE LAW DEVELOPMENTS

The controversy in the recent section 6851 termination cases has been whether the taxpayer has the right to petition the Tax Court for a prepayment redetermination of the tax liability computed in the first instance by the district director. This question has turned on whether the taxpayer is statutorily entitled to receive a notice of deficiency from the Service.[37]

Three circuits have passed on the issue of whether a taxpayer, after a section 6851 termination, may petitition the Tax Court for a redetermination of his tax liability.[38] The Sixth Circuit has reasoned that because of the nexus between section 6851 and section 6861 the formal notice requirement of the latter is applicable to the former; thus the Service must issue a deficiency notice in section 6851 cases.[39] The Second and Seventh Circuits have concluded that the Service need not issue a notice of deficiency in the section 6851 termination case, and consequently access to the Tax Court is denied.[40]

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33. INT. REV. CODE OF 1954, § 6851(e).

34. Section 6851 does not mention the term "assessment" nor does it link the section with any other assessment authority. Further, no section of the Code expressly grants assessment authority in the termination case.

35. The only significant cases decided under § 6851 or its predecessors before 1967 were Rinieri v. Scanlon, 254 F. Supp. 469 (S.D.N.Y. 1966); Puritan Church—The Church of America v. Commissioner, 10 CCH Tax Ct. Mem. 485 (1951), *aff'd per curiam*, 209 F.2d 306 (D.C. Cir. 1953), *cert. denied*, 347 U.S. 975 (1954); and Ludwig Littauer & Co. v. Commissioner, 37 B.T.A. 840 (1938).

36. *See* note 90 *infra*.

37. *See* note 6 *supra*. Generally, there is no question but that the taxpayer has actual notice, in that he is aware that some action is being taken by the Service against him or his property. The Service mails notice of the imposed tax to the taxpayer and demands its payment. However, notice in this context means the formal notice of deficiency issued pursuant to § 6212(a).

38. Laing v. United States, 496 F.2d 853 (2d Cir.), *cert. granted*, 95 S. Ct. 39 (1974) (No. 73-1808); Hall v. United States, 493 F.2d 1211 (6th Cir.), *cert. granted*, 95 S. Ct. 40 (1974) (No. 74-75); Rambo v. United States, 492 F.2d 1060 (6th Cir. 1974); Irving v. Gray, 479 F.2d 20 (2d Cir. 1973); Williamson v. United States, 31 Am. Fed. Tax R.2d 800 (7th Cir. 1971).

39. Hall v. United States, 493 F.2d 1211 (6th Cir.), *cert. granted*, 95 S. Ct. 40 (1974) (No. 74-75); Rambo v. United States, 492 F.2d 1060 (6th Cir. 1974).

40. Laing v. United States, 496 F.2d 853 (2d Cir.), *cert. granted*, 95 S. Ct. 39 (1974) (No. 73-1808); Irving v. Gray, 479 F.2d 20 (2d Cir. 1973); Williamson v. United States, 31 Am. Fed. Tax R.2d 800 (7th Cir. 1971). The Seventh Circuit was the first appellate court to decide the deficiency notice issue. In *Williamson* the Service had terminated plaintiff's taxable year pursuant to § 6851 and seized a sum of money from his safety deposit box after his arrest for illegally selling narcotics. The court concluded that the deficiency notice was not required in § 6851 cases. It was determined that what was assessed was not a "deficiency" as defined in § 6211 since no return had been filed at the date of assessment. The court also noted that § 6851, not § 6861, provided the assessment authority.

The most frequently cited case requiring the notice of deficiency is *Schreck v. United States*.[41] In that case, the taxpayer, after a termination of his taxable year, brought suit in the district court seeking to have his property, which had been seized by the Service, returned to him on the ground that no deficiency notice had been issued. The Government contended that notice was not required. It argued that, by the repeated reenactment of section 6851's predecessors without change during the period from 1918 to 1926, Congress intended to leave the Service with an assessment authority independent of other Code sections. According to the Government's position there were three sections granting assessment authority: section 6201 in the ordinary case, section 6861 in the jeopardy case, and section 6851 in the termination case. Finally, no notice was required because section 6851 failed to provide such a safeguard.

In rejecting this argument, the court noted that, under the Revenue Act of 1918, assessments in termination cases were to be made under the general assessment section of the Code.[42] However, the court found that the assessment authority for termination cases was shifted to the jeopardy section with the enactment of the Revenue Act of 1926 which provided for prepayment suits and the notice requirement.[43] Consequently, the procedural safeguards, including notice, of the jeopardy section were available to the termination taxpayer. The Government also contended that the termination of taxpayer's year did not result in a statutory deficiency because a deficiency could not arise until the close of taxpayer's full tax year.[44] Further, section 6861 could not apply in the termination case since it applied only to deficiencies. The court found, however, that the termination of taxpayer's period created a deficiency.[45] Finding that the Service had failed to comply with the notice requirement, the court granted the injunctive relief requested.

Confronted with a fact situation similar to that of *Schreck*, the Sixth Circuit in *Rambo v. United States*[46] unanimously affirmed the district court's grant of an injunction prohibiting the Service from selling taxpayer's seized property. The court rejected the Government's contention that section 6201 provided the assessment authority for section 6851, and followed the *Schreck* rationale, finding the source of assessment authority in termination cases to be section 6861. The Sixth Circuit also declined to follow the Government's reasoning that no deficiency could exist in the absence of a tax return filed by the taxpayer.[47] Having placed the assessment authority in sec-

41. 301 F. Supp. 1265 (D. Md. 1969), *aff'd on rehearing*, 375 F. Supp. 742 (1973), *appeal docketed*, No. 74-1566, 4th Cir., May 16, 1974.
42. *See* note 7 *supra* and accompanying text.
43. 301 F. Supp. at 1272.
44. *See* note 6 *supra*.
45. The court resorted to the 1926 Treasury Regulations in determining that a statutory deficiency in fact was created by the termination of taxpayer's year. 301 F. Supp. at 1274-75.
46. 492 F.2d 1060 (6th Cir. 1974).
47. Relying on the Treasury Regulations the court determined that the taxpayer need not file a return in order for a deficiency to exist. Treas. Reg. § 301.6211-1(a) (1971) provides in part: "If no return is made, or if the return . . . does not show any tax, for the purpose of the definition 'the amount shown as the tax by the taxpayer

tion 6861 and having determined that a statutory deficiency existed, the court concluded that the taxpayer had been denied the procedural safeguards provided by section 6861, most notably the mandatory notice of deficiency. The district court's grant of injunctive relief was consequently affirmed.[48]

The leading authority for the Internal Revenue Service's view that no notice of deficiency is required under section 6851 is the Second Circuit's decision in *Irving v. Gray*[49] involving the infamous Howard Hughes biography hoax. As the Irvings' scheme began to crumble, the Service became fearful that they would flee the country without paying their income tax. Accordingly, the Service terminated the couple's taxable year, declared the tax assessed to be immediately due and payable, and thereupon served a notice of levy on their brokerage account. The Second Circuit agreed with *Schreck* that section 6851 was not the proper source of assessment authority but disagreed that section 6861 necessarily furnished that authority since the former section existed prior to the latter. Instead, the court deemed the assessment authority to be in the general assessment provision, section 6201.[50] The court also considered the *Schreck* conclusion requiring notice to be based on the erroneous determination that a deficiency had been determined and assessed. A deficiency, by definition, is the amount by which the "tax imposed" exceeds the amount shown on the return.[51] The appellate court determined that no deficiency existed in this instance since the assessment was not of an imposed tax, "but merely an amount which the I.R.S. believed justified the termination of the taxable year."[52] Concluding that notice was not required, the court effectively stripped the taxpayers of their Tax Court option, leaving them only an action for refund in the district court. The plaintiffs' request for injunctive relief was denied because such course of action provided an adequate remedy at law.[53]

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upon his return' shall be considered as zero. Accordingly, in any such case . . . the deficiency is the amount of tax imposed by [the Code]."

48. The Sixth Circuit subsequently reaffirmed its holding in *Rambo* without additional comment. Hall v. United States, 493 F.2d 1211 (6th Cir.), *cert. granted*, 95 S. Ct. 40 (1974) (No. 74-75).

49. 479 F.2d 20 (2d Cir. 1973).

50. Although the Second Circuit held that the assessment authority for § 6851 was in § 6201, the court went on to say that it was in accord in this respect with the Seventh Circuit's decision in Williamson v. United States, 31 Am. Fed. Tax R.2d 800 (7th Cir. 1971). The Seventh Circuit, however, had determined that the source of assessment authority was in § 6851. The Seventh Circuit had stated: "[T]he deficiency notice requirement cannot be read into § 6851 because the assessment *made under the section* is not a deficiency as defined in § 6211." 31 Am. Fed. Tax R.2d at 800 [emphasis added]. The result is that the Second Circuit, by relying on *Williamson*, contradicted itself in determining the source of assessment authority. It is interesting to note that the Service subsequently changed its position on the source of the assessment authority and adopted the Second Circuit's view. This may be in part due to that court's favorable response and in part due to the absence of any reference to assessment authority in § 6851.

51. *See* note 6 *supra*.

52. 479 F.2d at 24.

53. The Second Circuit upheld its position in Laing v. United States, 496 F.2d 853 (2d Cir. 1974). Plaintiff subsequently appealed and certiorari was granted, oral argument to be heard in tandem with *Hall v. United States*. 95 S. Ct. 39 (1974) (No. 73-1808).

III. CLARK V. CAMPBELL

Despite its most recent setback in *Rambo*, the Government relied on substantially the same arguments in *Clark v. Campbell*.[54] It first contended that section 6861 could not be the basis of authority for assessment in section 6851 cases because section 6861 permitted only assessments of a deficiency. The Service's argument was that a deficiency, by definition, could not exist absent a return showing a lesser amount of tax than that imposed.[55] Further, section 6851 fails to mention the term "deficiency," providing only for a termination of the taxable period upon the requisite finding of the district director.[56] Thus, according to the Government's view, a section 6851 termination does not result in a deficiency but rather a provisional statement of the amount which must be presently paid as a protection against the impossibility of collection.

Following the *Rambo* rationale, the Fifth Circuit determined that a deficiency might exist in the absence of the filing of a return. This conclusion was supported by the Treasury Regulations under section 6211 which provide that if the taxpayer fails to make a return then it will be considered that the taxpayer determined that he had no tax liability and the deficiency will be the amount of the tax imposed by the Service.[57] Additionally, the court deemed the liability created by section 6851 to be sufficiently analogous to the liability of the ordinary taxpayer at the close of his taxable period, thus bringing the section 6851 liability within the Code's definition of deficiency.[58] In so doing, the Fifth Circuit necessarily rejected the Second Circuit's conclusion in *Irving* that no deficiency existed in favor of a more expansive reading of the term as supported by the Regulations.[59]

The Source of Assessment. Determination of the basis for the assessment authority in termination cases was critical. The Fifth Circuit noted that "if assessment of the section 6851 tax due is indeed grounded sufficiently in section 6861 it would be impossible to avoid the conclusion that the deficiency notice procedure so carefully prescribed in section 6861 is likewise applicable to section 6851."[60] The Government's assessment argument posed two significant obstacles to such a finding. First, the Code provided an ap-

54. 501 F.2d 108 (5th Cir. 1974). The Fifth Circuit on the same day decided Aguilar v. United States, 501 F.2d 127 (5th Cir. 1974). In *Aguilar* plaintiff's truck was searched by local authorities and $11,270 in cash was uncovered. Suspecting that plaintiff was involved in illicit narcotics activity the Service terminated his taxable year and assessed a tax of $12,774. The liability was satisfied from the cash and proceeds amounting to $750 from the sale of the truck, which had been seized by customs agents. When the Service refused to issue a notice of deficiency or to disclose its basis for determining the assessment, plaintiff instituted suit in district court seeking to enjoin the assessment and to recover the cash seized and proceeds from the sale of the truck. The district court dismissed the suit for lack of jurisdiction pursuant to § 7421. Aguilar v. United States, 359 F. Supp. 269 (S.D. Tex. 1973). On appeal the Fifth Circuit reversed, holding that appellant was entitled to the notice based on *Clark*.

55. *See* note 6 *supra*.

56. *See* note 22 *supra* and accompanying text.

57. *See* note 47 *supra*.

58. *See* note 6 *supra*.

59. *See* note 47 *supra*.

60. 501 F.2d at 120.

pealing general assessment authority, section 6201, and secondly, the predecessors of section 6851 predated those of section 6861.

The court found the *Schreck* determination convincing and held that the authority must be found in section 6861 for three reasons. First the court noted that sections 6851 and 6861 are "analogous,"[61] "equally potent and similarly oriented provisions"[62] and both appear in the subchapter of the Code entitled "Jeopardy." To treat these two sections in a dissimilar manner, requiring notice in the section 6861 case and denying it under section 6851, would be unsound statutory construction in "complete derogation of the obvious and carefully considered pattern of the Code."[63] An attempt to bypass section 6861, the *only* jeopardy assessment authority, in favor of section 6201, would be a convoluted and strained interpretation. Secondly, the court observed that section 6201 is the assessment authority for taxes which generally are paid without contest and hence there was no compelling need for a forum to adjudicate prepayment redeterminations. Once a dispute arises in the case of the non-jeopardy taxpayer, the Code requires the notice of deficiency and an opportunity to litigate the matter before payment much the same as in the section 6861 case. Although the notice in the latter case issues after the assessment, prepayment relief is provided by suit in the Tax Court. Finally, Chief Judge Brown, who delivered the opinion of the court, feared that an interpretation finding the assessment authority to be under section 6201 would allow the Service to circumvent section 6861 in favor of section 6851. Thus, by using section 6851 in all cases, the Service could effectively deprive the taxpayer of his right to a prepayment redetermination in section 6861 as well as section 6851 situations.

In *Campbell*, as in previous termination cases, the Government pressed the argument that section 6861 could not be the assessment authority for termination cases because the original version of section 6851 predated section 6861's predecessor provision by six years.[64] Thus, if section 6861 was the source of assessment authority, as the taxpayer argued, there would have been no power to assess in a termination case during the six years before the jeopardy provision was enacted. Chief Judge Brown disposed of this contention, specifically adopting the determination in *Schreck* that although the Service originally relied upon the general assessment section for authority in such cases, the changes brought about by the Revenue Act of 1926 shifted the assessment authority to section 279(a), section 6861's predecessor.[65]

The Right to Prepayment Litigation. The Fifth Circuit was apparently influenced by several non-statutory considerations in its decision to provide the section 6851 taxpayer with a forum for a prepayment redetermination

61. *Id.* at 121.
62. *Id.*
63. *Id.*
64. *See* notes 16, 23 *supra* and accompanying text.
65. The court stated: "[T]he evolution of our revenue system from an unintegrated collection of separate revenue acts through two careful codifications, may well create new affiliations between long existent, but formerly disparate provisions." 501 F.2d at 120.

of his tax liability. These considerations included the strong intent of Congress to provide such a forum,[66] the inadequacy of post-payment review,[67] the lack of prejudice to the Government's interest,[68] and the awesome effect of the termination provision.[69] Chief Judge Brown noted that Congress long ago realized the need for a procedure whereby all taxpayers could contest the Government's determination of their tax liability before payment of the tax. The necessity gave rise to the creation of the Board of Tax Appeals in 1926 and the right to petition the Board whether the tax arose pursuant to an ordinary deficiency or jeopardy assessment.

The Fifth Circuit also noted that to preclude the taxpayer from suing for a redetermination in the Tax Court would relegate him to suit in the federal district court after full payment of the tax.[70] This remedy would require the taxpayer to wait six months before instituting suit[71] and would probably involve the contemporaneous seizure and sale of the taxpayer's assets to provide funds to pay the tax.[72] As an additional policy consideration, the court failed to perceive how the Government's interest would be prejudiced by allowing the taxpayer to petition the Tax Court before payment. As Chief Judge Brown stated, "[T]he opportunity for prompt review will hardly dry up the sources of revenue or stop the Government in its tracks since virtually all other taxpayers who desire to contest income tax liability prior to payment are allowed to do so."[73]

The court was impressed with the power which section 6851 affords the Service.[74] A close examination of the Code disclosed that the only procedural relief provided, over which the taxpayer has control, is in the form of an action to stay any proceeding to enforce the tax.[75] Such action, however, is conditioned on the posting of a sufficient bond.[76] The court took ju-

66. *Id.* at 122-23.
67. *Id.* at 124-25.
68. *Id.* at 126.
69. *Id.* at 122-24.
70. *See* H.R. REP. No. 179, 68th Cong., 1st Sess. 7 (1924), reprinted in 1939-1 (pt. 2) CUM. BULL. 246-47:

> The right of appeal after payment of the tax is an incomplete remedy, and does little to remove the hardship occasioned by an incorrect assessment. The payment of a large additional tax on income received several years previous and which may have, since its receipt, been either wiped out by subsequent losses, invested in nonliquid assets, or spent, sometimes forces taxpayers into bankruptcy, and often causes great financial hardship and sacrifice. These results are not remedied by permitting the taxpayer to sue for the recovery of the tax after this payment. He is entitled to an appeal and to a determination of his liability for the tax prior to its payment.

71. INT. REV. CODE OF 1954, § 6532.
72. The court stated: "[T]he IRS may levy on the taxpayer's property without applying the property seized to the tax liability assessed or the property seized may not cover the full amount of the assessment." 501 F.2d at 125. The court further noted that in either event the taxpayer may be barred from his postpayment remedy because he had not fully paid his tax liability before instituting suit, citing Flora v. United States, 362 U.S. 145 (1960). If, in fact, the Service is permitted to seize the taxpayer's property without applying such to mitigate his tax liability, as the Fifth Circuit stated, serious fifth amendment problems would be presented.
73. 501 F.2d at 126.
74. The court termed the power "awesome," 501 F.2d at 122, and "summary," *id.*, with the effect on the "victim," *id.* at 110, described as "disastrous," *id.* at 126.
75. INT. REV. CODE OF 1954, § 6851(e).
76. *Id.*

dicial notice that a substantial portion of the taxpayer's assets usually have been frozen by the Service's seizure and as a result, the section 6851 taxpayer is rarely financially capable of procuring the bond. Consequently the Fifth Circuit viewed this relief as illusory. The remaining statutory protection, including the Service's option to abate the assessment if excessive or if jeopardy does not exist,[77] was deemed to be too discretionary to be of any value to the taxpayer. By discounting the value of these procedural safeguards found to be available to the section 6851 taxpayer, the *Clark* court essentially designated the notice of deficiency and subsequent access to a reasonably speedy and effective forum for a prepayment redetermination of his tax liability as the salient safeguard for the jeopardy taxpayer. The court concluded that Congress must therefore have intended this valuable protection be available to the termination taxpayer.[78]

The correctness of the court's statutory and historical analysis on the notice issue may be subject to doubt. Section 6851 and section 6861 take different postures within the statutory framework; the former is a somewhat independent provision[79] while the latter is integrated with the remainder of the Code.[80] The Code leaves undeveloped the termination taxpayer's procedural safeguards, including notice, while it clearly provides the jeopardy taxpayer with procedural protection and, in particular, notice. It is this amorphous nature of section 6851 that has created the difficult problems of interpretation. Further, the legislative history of the two sections does not lend itself to a satisfactory analysis of congressional intent. Although the Fifth Circuit attempted to link the two sections together, they have distinct origins[81] and there is no clear indication of a legislative tie. The best that could be done with this complicated problem was to draw inferences from Congress' actions in the formative stages of the statutory framework.[82] The inferences drawn by the court are not necessarily wrong but may be suspect.

The Fifth Circuit's non-statutory considerations seem to provide a better approach to solving the complexities of the problem in the face of the statutory stalemate. It is clear that Congress intended to create a prepayment

77. *Id.* §§ 6861(c), (g). Although the court assumed that these safeguards were available to the taxpayer whose year has been terminated, it is doubtful whether they would be available if the assessment authority in such cases was outside of § 6861.

78. The court expressly declined to comment on the constitutionality of the statute on due process grounds. This may be due in part to the federal judiciary's reluctance to decide cases upon constitutional grounds if there exist other bases upon which a decision may be substantiated. The recent case of Lewis v. Sandler, 498 F.2d 395 (4th Cir. 1974), along with Schreck v. United States, 301 F. Supp. 1265 (D. Md. 1969), discussed *supra* at notes 41-45, are the authoritative sources for due process discussion.

79. *See, e.g.*, note 34 *supra* and accompanying text.

80. *See* text accompanying note 18 *supra.*

81. *See* text accompanying notes 16, 23 *supra.*

82. *See* Schreck v. United States, 301 F. Supp. 1265, 1271-72 (D. Md. 1969):

> There is certainly logic in each of the conflicting inferences which the plaintiff and the Government draw from the chronology of legislation during the 1918-1926 period. Unfortunately, neither the research of counsel nor of this Court has uncovered any legislative history which compels a solution of this problem. Thus, in the main, there are available only the limited inferences which can be drawn from the four corners of the statute books themselves.

forum and it is also clear that this forum was created as a consequence of the failure of the district court procedure to handle satisfactorily the problems created by postpayment litigation.[83] The primary question is whether Congress intended to permit the termination taxpayer access to the Tax Court. Again there is an absence of clear congressional intent but the factors considered by Congress to be compelling in the creation of such a forum are documented[84] and are certainly as applicable to the termination taxpayer as they are to the ordinary or jeopardy taxpayer.[85]

The decision to allow the termination taxpayer to petition the Tax Court would not appear to prejudice any governmental or public interest. Congress created significant safeguards to protect the taxpayer's and the Government's interest in jeopardy cases. Thus, if the safeguards of section 6861 protecting both the taxpayer and the Government attach in the termination case, it would seem that there would be no unusual prejudice to the Government's position.[86] The court's observations relating to the power that section 6851 vests in the district director lends further support to its holding. The mere existence of the power would not ipso facto warrant judicial action, but as the Fifth Circuit noted, the statute on its face fails to provide any effective protection to the taxpayer.[87] Consequently, there is apparently no boundary to the Service's power, a result which Congress surely did not intend. The court's incorporation of the safeguards of section 6861 into section 6851 seems to be a pragmatic response to this virtually unchecked power. In attaching this protection to section 6851 the court manages to give effect to a strong congressional intent to provide a prepayment forum without prejudice to any governmental interest.

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83. *See* note 70 *supra.*

84. *Id.*

85. Although the termination taxpayer faces essentially the same problems of the ordinary and jeopardy taxpayer discussed in note 70 *supra,* there may have been an implied congressional intent to distinguish the two sections. In Ludwig Littauer & Co. v. Commissioner, 37 B.T.A. 840, 842 (1938), the Board made such a distinction stating:

> Since section 146, subdivision (a) [now § 6851], presupposes a more exigent situation of jeopardy than that covered by section 273 [now § 6861]—a situation so critical as to require immediate protective action rather than to await the close of the normal taxable year and the determination of a statutory deficiency—it can not be supposed that Congress intended to be more lenient, by permitting the taxpayer to avoid payment during litigation, than under the less perilous circumstances denoted by the jeopardy assessment of section 273 [§ 6861].

86. If indeed the grant of the § 6861 safeguards to the termination taxpayer would leave the Government's interest in termination cases as secure as it is in § 6861 cases, one might wonder why the Government is pressing such a vigorous defense in the termination cases. There does not appear to be any strong administrative reason to deny the termination taxpayer the notice. Further, there apparently are no special considerations related to § 6851, not involved in § 6861, which would prejudice a governmental interest. One explanation of the Government's intensive defense in these cases has been suggested. This is the Government's interest in using the statute against a taxpayer who is suspected of involvement in illicit narcotics activity. *See* Clark v. Campbell, 501 F.2d 108, 110 (5th Cir. 1974) (describing the § 6851 mechanism as an "effective tool in the relentless struggle against the traffic in drugs"). *See also* Aguilar v. United States, 501 F.2d 127 (5th Cir. 1974); Willits v. Richardson, 497 F.2d 240, 246 (5th Cir. 1974) (criticizing the Service's use of § 6851 "not as [a] tax collection device but as [a] summary punishment to supplement or complement regular criminal procedures").

87. *See* notes 79, 81 *supra* and accompanying text.

IV. CONCLUSION

Although the Fifth Circuit's extensive statutory analysis in *Clark* is well reasoned, it is not totally convincing. The decision undertakes to draw an inference of congressional intent to intertwine two Code sections from a statutory maze and early tax act amendments. An equally strong inference is that Congress, by completely isolating section 6851 and omitting any provision for notice therefrom, intended to deny the termination taxpayer access to the Tax Court. The most significant portion of the Fifth Circuit's decision deals with the equities evident in the court's extra-statutory considerations. Given the balance of statutory inferences which may be drawn, these considerations would seem to tip the scales in favor of notice.

The Supreme Court has recently agreed to decide the notice issue.[88] Thus, in addition to its controlling effect in the Fifth Circuit, the *Clark* decision may also influence the Supreme Court's resolution of the issue. Based solely on a statutory analysis there is significant authority to support whichever reading the Court decides to give the Code. Hopefully the Court will not confine its decision to a purely statutory determination but will give strong consideration to Chief Judge Brown's carefully reasoned discussion in *Clark* of the extra-statutory factors involved.

Ben Admire

The Recognition of Gain in Property Settlements Pursuant to Divorce—Wiles v. Commissioner

In anticipation of their divorce, the Kansas petitioner and his wife negotiated a property settlement which was subsequently incorporated in the divorce decree.[1] The agreement provided for an equal division of property acquired during coverture regardless of title ownership. To effectuate the equal division of their holdings, petitioner transferred to his wife corporate securities owned by him having an assigned value[2] of $550,000. The Commissioner of Internal Revenue assessed a deficiency[3] on the grounds that the

88. Laing v. United States, 496 F.2d 853 (2d Cir.), *cert. granted*, 95 S. Ct. 39 (1974) (No. 73-1808); Hall v. United States, 493 F.2d 1211 (6th Cir), *cert. granted*, 95 S. Ct. 40 (1974) (No. 74-75).

1. Kansas law requires upon divorce an equitable division of property of the marriage, regardless of legal title, either by decree or private agreement. KAN. STAT. ANN. § 60-1610(b) (Supp. 1973). Such division made by voluntary agreement is subject to judicial supervision for fairness. *Id.* § 60-1610.

2. To achieve this equal division of property, the parties agreed to assign values to the securities which had no readily ascertainable fair market value, particularly the shares of the family-owned corporations. The parties stipulated that the value of the regularly traded securities would be the average of the market high and low thereof from January 1, 1966 through May 21, 1966.

3. The petitioner's basis in the securities transferred was slightly over $83,100, thereby creating a recognized gain of $467,000. The Commissioner assessed a deficiency in the amount of $109,650.54.

transaction was a taxable event resulting in a gain from the exchange of property under sections 1001 and 1002 of the Internal Revenue Code.[4] Petitioner contended that the transfer was not a taxable exchange but rather a mere division of property between co-owners. The Tax Court ruled in favor of the Commissioner[5] and the petitioner appealed. *Held affirmed*: Under pertinent Kansas statutes and decisions, the wife has no vested co-ownership in the property of her husband during marriage, and consequently, the transfer of some of that property pursuant to a divorce settlement constitutes a taxable event. *Wiles v. Commissioner*, 499 F.2d 255 (10th Cir. 1974).

I. TAXATION OF PROPERTY TRANSFERRED IN EXCHANGE FOR MARITAL RIGHTS OF SPOUSE IN HUSBAND'S PROPERTY

The law has long been settled in community property states that an equal division of marital property represents nothing more than a division between co-owners, and hence, is not a taxable event.[6] The wife has a present, vested, one-half interest equal to that of her husband in the property of the marital community.[7] When the one-half interest of the wife is set apart to her in a separation or settlement agreement, she receives nothing more than that which was hers already, and consequently, there is no transfer of a taxable nature.[8]

In common-law jurisdictions the tax consequences of property settlement agreements have created a great deal of confusion among lawyers drafting such agreements.[9] Until 1962 the courts in these jurisdictions were divided on the issue of whether the taxpayer must recognize a gain as a result of a property transfer pursuant to a settlement agreement.[10] The Supreme Court in *United States v. Davis*[11] resolved the dispute by recognizing that the state law which determined the substantive property rights of the parties

4. INT. REV. CODE OF 1954, § 1001(a) provides in part: "The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis . . . and the loss shall be the excess of the adjusted basis . . . over the amount realized." *Id.* § 1002 provides in pertinent part, as follows: "[O]n the sale or exchange of property the entire amount of the gain or loss, determined under section 1001, shall be recognized."

5. Wiles v. Commissioner, 60 T.C. 56 (1973).

6. United States v. Davis, 370 U.S. 65, 71 (1962).

7. Hopkins v. Bacon, 282 U.S. 122 (1930); Poe v. Seaborn, 282 U.S. 101 (1930).

8. Cofield v. Koehler, 207 F. Supp. 73 (D. Kan. 1962); Davenport v. Commissioner, 12 CCH Tax Ct. Mem. 856, 859 (1953); Walz v. Commissioner, 32 B.T.A. 718, 719 (1935). *But see* Rouse v. Commissioner, 159 F.2d 706 (5th Cir. 1947), holding that if one spouse receives more than one-half of the community property and the other receives less than one-half plus separate property of the first spouse there has been a sale of property and a taxable event. *Accord*, Johnson v. United States, 135 F.2d 125 (9th Cir. 1943); Edwards v. Commissioner, 22 T.C. 65 (1954).

9. For a detailed analysis of the tax implications and consequences of divorce property settlements, see Ducanto, *Negotiating and Drafting Property Settlements in the Reflected Light of the Davis and Lester Cases*, 19 DE PAUL L. REV. 717 (1970); Note, *Property Transfer Pursuant to Divorce—Taxable Event?*, 17 STAN. L. REV. 478 (1965).

10. *Compare* Commissioner v. Mesta, 123 F.2d 986 (3d Cir.), *cert. denied*, 316 U.S. 695 (1941) (transfer of property in satisfaction of wife's support claims taxable event to husband), *and* Commissioner v. Halliwell, 131 F.2d 642 (2d Cir. 1942), *cert. denied*, 319 U.S. 741 (1943) (transfer of property for release of wife's marital rights taxable event to husband), *with* Commissioner v. Marshman, 279 F.2d 27 (6th Cir.), *cert. denied*, 364 U.S. 918 (1960) (an agreement that husband give up any interest he had in an option in exchange for release of wife's marital rights not taxable event to husband).

11. 370 U.S. 65 (1962).

during marriage would control the characterization of the transfer for federal tax purposes. Thus, whether the transfer of property between spouses resulted in a taxable event was held to depend upon whether the state law considered the spouses to be co-owners of the property.

In *Davis* a Delaware taxpayer, pursuant to a property settlement agreement, transferred to his former wife appreciated corporate securities which were solely his property subject to certain inchoate marital rights of the wife, including a right of intestate succession and a right upon divorce to a reasonable share of the husband's property. The Court concluded that under Delaware law the inchoate marital rights of the wife did not reach the dignity of co-ownership, but rather were more appropriately categorized as a personal liability of the husband.[12] Accordingly, the Court held that the transfer of appreciated property to satisfy that debt resulted in a taxable event and that the husband recognized a taxable gain to the extent that the fair market value of the appreciated property exceeded its basis.[13]

The *Davis* rule, though succinct in its reasoning, is not without shortcomings in its application in common-law jurisdictions. Most illustrative of this deficiency is *Collins v. Commissioner*,[14] where an Oklahoma taxpayer transferred stock to his wife pursuant to a settlement agreement similar to that in *Davis*. The Tenth Circuit recognized that under *Davis* the state law must be consulted to determine the nature of the disposition for tax purposes.[15] Accordingly, the court affirmed[16] the Tax Court's holding[17] that the applicable statute[18] did not vest in the wife any interest in the property of the husband prior to divorce. However, this statute[19] shortly thereafter received a contrary construction by the Oklahoma Supreme Court in *Collins v. Oklahoma Tax Commission*.[20] The Oklahoma Supreme Court analogized the vested interest afforded the wife under the statute in property jointly acquired during marriage as "similar in conception to community property of commun-

12. *Id.* at 70.

13. *See* note 3 *supra*. INT. REV. CODE OF 1954, § 1001(b) provides: "The amount realized from the sale or other disposition of the property shall be the sum of any money received plus the fair market value of the property (other than money) received." The Court, confronted with the difficulty of attaching a value to the marital rights given up by the wife, assumed that the parties were bargaining at arm's length and that, absent evidence to the contrary, the marital rights were equal in value to the property for which they were exchanged. Other courts have applied this assumption when the value of the property received is difficult to ascertain but the value of the property released is determinable. *See* United States v. General Shoe Corp., 282 F.2d 9 (6th Cir. 1960); Philadelphia Park Amusement Co. v. United States, 126 F. Supp. 184, 189 (Ct. Cl. 1964).

14. 412 F.2d 211 (10th Cir. 1969).

15. Collins v. Commissioner, 388 F.2d 353, 355 (10th Cir.), *rev'd*, 393 U.S. 215 (1968).

16. *Id.* at 353.

17. Collins v. Commissioner, 46 T.C. 461 (1966), *aff'd*, 388 F.2d 353 (10th Cir.), *remanded*, 393 U.S. 215 (1968).

18. OKLA. STAT. ANN. tit. 12, § 1278 (1961) provides in part:

> As to such property, whether real or personal, as shall have been acquired by the parties jointly during their marriage, whether the title thereto be in either or both of said parties, the court shall make such division between the parties respectively as may appear just and reasonable by a division of the property in kind, or by setting the same apart to one of the parties, and requiring the other thereof to pay such sum as may be just and proper to effect a fair and just division thereof.

19. *Id.*

20. 446 P.2d 290 (Okla. 1968).

ity property states,"[21] and thus the wife could be regarded as a co-owner of the property. Following this decision, the United States Supreme Court vacated the judgment of the Tenth Circuit and remanded the case for reconsideration.[22] The Tenth Circuit correspondingly reversed the decision of the Tax Court, and held that the transfer was a non-taxable division of property between co-owners.[23] The difficulty of application of the *Davis* rule, as displayed by the circuitous litigation in *Collins*, is now compounded by the court's opinion in *Wiles*.

II. WILES V. COMMISSIONER

The underpinnings of the *Wiles* opinion lie in the Tenth Circuit's strict application of the *Davis* rule requiring consultation of state law to ascertain whether the transfer necessitated by divorce is in recognition of property rights or whether it is to obtain a release of an independent obligation.[24] The domestic relations law of Kansas,[25] which is almost identical to that of Oklahoma,[26] requires that an equitable division of property accompany a decree of divorce. However, the court in *Wiles*, antithetical to its final decision in *Collins*, concluded that this statutory requirement failed to vest in the wife an interest in the property of the husband during coverture. The court recognized that under Kansas law a wife has a right to intestate succession if she survives her husband[27] and that she is also entitled to one-half of all her deceased husband's realty, the sale of which she did not consent to during marriage.[28] But the court nevertheless placed considerable emphasis on a decision by the Supreme Court of Kansas[29] which recognized that although these rights possess some of the elements of a property interest, they rise no higher than inchoate rights contingent upon the wife's survival.

The Tenth Circuit misinterprets Kansas law. The concept of a Kansas wife's property interest in a divorce proceeding was explained by the Kansas Supreme Court in the leading case of *Putman v. Putman*,[30] where the court recognized that "[a] wife has certain rights and interests in property acquired by the husband during the existence of the marriage relation which . . . the courts upon proper occasion will recognize and protect."[31] The court stated, "If their marital partnership—for the joint accumulations of property by a

21. *Id.* at 295.
22. Collins v. Commissioner, 393 U.S. 215 (1968).
23. Collins v. Commissioner, 412 F.2d 211 (10th Cir. 1969).
24. United States v. Davis, 370 U.S. 65, 71 (1962).
25. KAN. STAT. ANN. § 60-1610(b) (Supp. 1973) provides:
(b) *Division of property.* The decree shall divide the real and personal property of the parties, whether owned by either spouse prior to marriage, acquired by either spouse in his or her own right after marriage, or acquired by their joint efforts, in a just and reasonable manner, either by a division of the property in kind, or by setting the same or a part thereof over to one of the spouses and requiring either to pay such sum as may be just and proper . . . .
26. *See* note 18 *supra.*
27. KAN. STAT. ANN. § 59-504 (1964).
28. *Id.* § 59-505.
29. *In re* Williams Estate, 158 Kan. 734, 150 P.2d 336, 338 (1944). *See also* Bates v. State Savings Bank, 136 Kan. 767, 18 P.2d 143, 145 (1933); Murray v. Murray, 102 Kan. 184, 170 P. 393, 394 (1918).
30. 104 Kan. 47, 177 P. 838 (1919).
31. 177 P. at 840.

husband and wife are slightly analogous to that of a partnership—is wrecked by marital discord . . . , the court may equitably divide the property accumulated during the marriage relation."[32] In *Garver v. Garver*[33] the Kansas Supreme Court distinguished between alimony and a division of property, and concluded that the doctrine of alimony is based on the common law obligation of a husband to support his wife, while a division of property, on the other hand, has for its basis the wife's right to an equitable share of that property which has been accumulated by the joint efforts of the parties during marriage. These and other Kansas decisions[34] describing the wife's interest in marital property are clearly indicative of co-ownership during marriage which would allow a non-taxable division of property upon divorce.

The court's interpretation of the Kansas law can be criticized on yet another ground. The Oklahoma statute[35] interpreted by the Tenth Circuit in *Collins* was adopted from the law of Kansas. In *Vanderslice v. Vanderslice*[36] the Oklahoma Supreme Court, interpreting the Oklahoma statute, stated, "Our statute, section 1278, was adopted from the State of Kansas. The decisions of the Supreme Court of that state are therefore peculiarly persuasive in this jurisdiction, the statutory provision being the same."[37] The statutes of Oklahoma and Kansas requiring division of marital property were identical until 1964, when Kansas amended its statute to subject the wife's separate property to division by the court as jointly acquired property.[38] This amendment, however, does not affect the concept of co-ownership between spouses of marital property. The similarities of these statutes were further noted in the court's first opinion in *Collins*.[39] Thus, the court in *Wiles* could have easily applied simple syllogistic reasoning in deciding the case. Recognizing that the wife has a vested interest in the husband's property in Oklahoma, and that the applicable Oklahoma and Kansas statutes are, for all practical purposes, identical, then it would logically follow that the wife should have a vested interest in the husband's property in Kansas. However, the Tenth Circuit in *Wiles* chose to confine itself to Kansas statutes and cases, refusing to attach any significance to the highly analogous case of *Collins*. This self-restriction to Kansas law represents a contrary approach to that adopted by the court in its first decision in *Collins*.

In its first decision in *Collins* the Tenth Circuit analogized the applicable Colorado statute[40] to that of Oklahoma,[41] and failing to discern any distinction

32. *Id.* at 841.
33. 184 Kan. 145, 334 P.2d 408 (1959).
34. *See* Zeller v. Zeller, 195 Kan. 452, 407 P.2d 478 (1965), *and* Perkins v. Perkins, 154 Kan. 73, 114 P.2d 804 (1941), where property was set apart to the wife even though the court refused to grant her a divorce. *See also* Cummings v. Cummings, 138 Kan. 359, 26 P.2d 440 (1933), where the court stated, "The law of this state recognizes that a wife has an interest in property accumulated by husband and wife while the marriage relation existed."
35. OKLA. STAT. ANN. tit. 12, § 1278 (1961).
36. 195 Okla. 496, 159 P.2d 560 (1945).
37. 159 P.2d at 562.
38. *Compare* KAN. STAT. ANN. § 60-1610(b) (Supp. 1973) *with* OKLA. STAT. ANN. tit. 12, § 1278 (1961). *See* notes 18, 25 *supra*.
39. 388 F.2d at 357.
40. COLO. REV. STAT. ANN. § 46-1-5 (1963).
41. OKLA. STAT. ANN. tit. 12, § 1278 (1961).

between the two, it readily adopted its earlier opinion of *Pulliam v. Commissioner*[42] as controlling. The court stated, "It is difficult for us to see any distinction between Oklahoma and Colorado law sufficient to justify a different characterization of the property division."[43] In *Pulliam* the Tenth Circuit, in the absence of a controlling state court adjudication, interpreted the applicable Colorado law, holding that the wife's interest in the property of her husband did not vest prior to divorce, and therefore, the transfer was a taxable event to the husband.

In light of the court's holding in *Pulliam*, contra to its final holding in *Collins*, one could argue that the Tenth Circuit in *Wiles* could have analogized Kansas law with its interpretation of the law of Colorado, and thereby adopted *Pulliam* as controlling. However, the case of *Imel v. United States*,[44] decided by the United States District Court in Colorado, strongly suggests that the *Pulliam* decision is no longer representative of the law of Colorado. In *Imel* the Colorado taxpayer transferred appreciated property pursuant to a divorce settlement similar to that in *Wiles, Collins,* and *Davis.* The district court certified to the Supreme Court of Colorado the question whether the transfer was a recognition of a "species of common ownership" of the marital estate resembling a division of property between co-owners, and upon receiving an affirmative response, held that the transfer was not a taxable event.[45] The court also placed considerable emphasis on *Collins,* recognizing that the Tenth Circuit in its first opinion in *Collins* failed to find any substantive differences between Oklahoma and Colorado law. Thus the court concluded, "[E]ven with *Pulliam v. Commissioner of Internal Revenue* in mind, I think that *Davis* and *Collins*, when coupled with the Colorado Supreme Court's answers to the certified questions, mandate that judgment here enter in favor of the plaintiff . . . ."[46] Thus *Collins* and *Imel* illustrate not only that the Tenth Circuit has searched outside the state in interpreting state law, but also that other federal courts have considered this to be proper procedure.

III. CONCLUSION

The Tenth Circuit in *Wiles,* absent a Kansas decision directly on point,

42. 329 F.2d 97 (10th Cir. 1964).
43. 388 F.2d at 357.
44. 375 F. Supp. 1102 (D. Colo. 1974).
45. The District Court invoked rule 21.1 of the Colorado Revised Statutes which allows the Supreme Court of Colorado to answer questions of law certified to it by a federal court when the questions of law before the certifying court may be determinative of the pending action, and it appears to the certifying court that there is no controlling precedent in the decisions of the Colorado Supreme Court. COLO. APP. R. 21.1(a). Similar certification statutes have been enacted in other states, including Florida, FLA. APP. R. 4.61; Hawaii, HAWAII REV. STAT. § 602-36 (1968); Maine, ME. CIV. PROC. R. 76B; Montana, MONT. SUP. CT. R. 1; New Hampshire, N.H. APP. R. 21; and Washington, WASH. REV. CODE ANN. §§ 2.60.010-.030 (Supp. 1973). For thorough discussions of certification procedure, see Kaplan, *Certification of Questions from Federal Appellate Courts to the Florida Supreme Court and Its Impact on the Abstention Doctrine,* 16 U. MIAMI L. REV. 413 (1962); Kurland, *Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine,* 24 F.R.D. 481 (1959); McKusick, *Certification: A Procedure for Cooperation Between State and Federal Courts,* 16 MAINE L. REV. 33 (1964). *See also* 1 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 64 (C. Wright ed. 1961); C. WRIGHT, FEDERAL COURTS § 52 (1970).
46. 375 F. Supp. at 1118.

could have adopted *Collins* for controlling precedent, thereby holding that a Kansas wife has a present, vested interest in the property of her husband during coverture, and thus a division of marital property pursuant to a decree of divorce would not result in a taxable event. By its strict and seemingly unwarranted construction of *Davis*, the court has undoubtedly invited circuitous litigation similar to that in *Collins*. In light of the evident difficulty of application of the *Davis* rule, combined with the inherent disparity in tax consequences between common-law and community property states,[47] a question necessarily arises as to whether the recognition of gain in property transfers should hinge on the state-created rights of the wife.[48] *Wiles* illustrates that the tax consequences of such property transfers can turn on subtle statutory verbiage, in contradiction to Congress' long-pronounced general policy of equality of taxation. If the courts are unwilling or unable to provide consistent application of federal taxation statutes, then legislative reform is clearly necessitated. Perhaps the decision in *Wiles* will provide the impetus for such action.

Don C. Stephenson

47. In *Davis* the Court noted that in community property jurisdictions an equal division of community property is a division among co-owners and thus not taxable, but it did not consider itself compelled to equate the tax consequences of such property transfers in common-law jurisdictions with those in community property jurisdictions, in view of the substantive differences between the systems. The Court, obviously dodging the issue, said, "To be sure Congress has seen fit to alleviate this disparity in many areas . . . but in many areas the facts of life are still with us." United States v. Davis, 370 U.S. 65, 71 (1962).

48. For thorough discussions concerning the effect of state law in federal taxation, see Cahn, *Local Law in Federal Taxation*, 52 YALE L.J. 799 (1943); Fried, *External Pressures on Internal Revenue: The Effect of State Court Adjudications in Tax Litigation*, 42 N.Y.U.L. REV. 647 (1967); Oliver, *The Nature of the Compulsive Effect of State Law in Federal Tax Proceedings*, 41 CALIF. L. REV. 638 (1953); Stephens & Freeland, *The Role of Local Law and Local Adjudications in Federal Tax Controversies*, 46 MINN. L. REV. 223 (1961).