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Criminal Law - Abortion Statute - Due Process

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union is an instrumentality whose existence is justfied when it is utilized to strengthen the bargaining status of its members vis-a-vis the employer so that it may obtain those terms of employment conducive to its members' welfare in the give and take of collective bargaining.[33] Where, then, union action crosses the boundary beyond which a valid weapon of self defense becomes a weapon of offense when applied against a member, that member's Section 7 rights are violated and such action must be proscribed.

The Board's holding that fining a member for filing a decertification petition is a union unfair labor practice was a proper interpretation of the relationship between the member's Section 7 rights and the union's Section 8(b)(1)(A) proviso right. It is believed, nonetheless, that the Board should not have relied on it's holding in *Tawas Tube*, but should have grasped the opportunity to correct the possibly injurious effect on the union member's rights of that decision by stating that suspension, not expulsion, was the proper union remedy.

Leonard Zapler

CRIMINAL LAW—ABORTION STATUTE—DUE PROCESS—The Supreme Court of California has held that a statute prohibiting abortions not "necessary to preserve" the mother's life is so vague and uncertain as to be violative of the Fourteenth Amendment's Due Process Clause.

People v. Belous, 80 Cal. Rptr. 354, 458 P.2d 194 (1969).

Appellant-defendant, a physician and surgeon considered eminent in the field of obstetrics and gynecology, was convicted of abortion in violation of section 274[1] and conspiracy to commit an abortion, a viola-

Act states in part: "It is the purpose and policy of this chapter . . . *to protect the rights of individual employees in their relations with labor organizations. . . .*" (Emphasis added.).

33. Mr. Justice Black stated for the dissent in *Allis-Chalmers*:

> Section 7 and 8 together bespeak a strong purpose of Congress to leave workers wholly free to determine in what concerted labor activities they will engage or decline to engage. This freedom of workers to go their own way in this field, completely unhampered by pressures of employers or unions, is and always has been a basic purpose of the labor legislation now under consideration.

338 U.S. 175, 216.

1. CAL. PEN. CODE § 274 (West 1955). This statute was amended in 1967 by what has come to be called "The Therapeutic Abortion Act." This new enactment authorizes an abortion if it takes place in an accredited hospital, is approved by a hospital staff

tion of section 182 of the California Penal Code.[2] When the abortion of concern was performed, section 274 read as follows:

> Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in state prison not less than two nor more than five years.[3]

Appellant's conduct consisted of tendering to an unmarried couple the phone number of a fellow physician, who although licensed to practice in Mexico, had not secured a California license and had disclosed to the appellant that he would perform abortions. In defense the appellant maintained that he had given the phone number only because he believed the couple would stop at nothing in an attempt to terminate the pregnancy. In substantiating this belief he testified that the couple had threatened to go to Tijuana, Mexico, to have the abortion performed, and that at one point in their discussion they had stated that an abortion would be obtained "one way or another." Apprehensive that any such action would endanger the woman's life, the phone number was given by the appellant.

In a 4-3 decision, the California Supreme Court held that the abortion statute was invalid as it was unconstitutionally vague and indefinite. Justice Peters, speaking for the majority, concluded that

> . . . the term "necessary to preserve" in section 274 of the Penal Code is not susceptible of a construction that does not violate legislative intent and that is sufficiently certain to satisfy due process requirements without improperly infringing on fundamental constitutional rights.[4]

Relying on the accepted principle of statutory construction that a statute, particularly a criminal enactment, must be of such certainty and definiteness as to enable one to prejudge his conduct in confor-

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committee consisting of at least three licensed physicians, and there is a "substantial risk that continuance of pregnancy would gravely impair the physical or mental health of the mother"; if the pregnancy resulted from rape or incest or if the woman is under 15 years of age. CAL. HEALTH & SAF. CODE §§ 25950-25954 (West 1967). Dr. Belous was convicted under Section 274 because the new law was not in effect when he was convicted.

2. CAL. PEN. CODE § 182 (West 1955).
3. *Id.* § 274.
4. People v. Belous, 80 Cal. Rptr. 354, 357, 458 P.2d 194, 197 (1969).

mity with the requirements of the law,[5] the majority concluded that in this respect section 274 was deficient, and therefore was violative of the Fourteenth Amendment's due process clause. Analyzing the phrase "necessary to preserve" semantically, the court deduced that taken together these words expressed no clear meaning; and taken separately they denoted nothing more definite. The primary contention of the State was that the phrase should be interpreted so that an abortion could be performed only in instances where the woman would die if it were not performed. In rebuttal the majority first concluded that such a definition had not been recognized by the courts of California, Iowa or Minnesota. Secondly, it was decided that even if such an interpretation were conceded, it would violate a woman's constitutional rights to life and to choose whether or not to bear children.

Prior to this decision the California Supreme Court twice had occasion to rule on the validity of this statute, and in each instance it was reasoned that the argument of unconstitutionality due to vagueness and uncerainty was untenable. In *People v. Rankin*[6] the vagueness issue was dismissed and validity affirmed. The portion of section 274 attacked in that case was "procuring miscarriage." One of the allegations made by the defendant was that these words lacked certainty and definiteness. However, after revealing various dictionary definitions the court concluded that ". . . the phrase as used in the statute was sufficiently explicit to inform persons of common intelligence and understanding of the acts which were prohibited."[7] Again in *People v. Gallardo*[8] the statute was not challenged solely on the vagueness issue; however, the court did direct itself to the question and summarily concluded that the statute was not invalid for uncertainty of meaning ". . . when its words and phrases are construed according to the context and approved usage, and technical words are given their peculiar meaning . . ."[9]

As the preceding brief history reveals, the unconstitutionality of section 274 has *not* been a challenge greatly litigated. The predominant thrust of California decisional law, regardless of whether deliberate or inadvertent, with respect to the abortion statute in comparatively recent times has been toward a general "elucidation" and resultant

5. State v. Hill, 91 A.L.R.2d 750, 189 Kan. 403, 369 P.2d 365 (1962); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); Connally v. General Const. Co., 269 U.S. 385, 391 (1926); Smith v. California, 361 U.S. 147, 151 (1959).
6. 10 Cal. 2d 198, 74 P.2d 71, 73 (1937).
7. *Id.* at 200, 74 P.2d 73.
8. 41 Cal. 2d 57, 243 P.2d 532, *m.*257 P.2d 29 (1952).
9. *Id.* at 62, 243 P.2d at 537.

"liberalization" of the meaning of "necessary to preserve." The initial, and most significant, holding in this regard was *People v. Ballard.*[10] It was established that "necessary to preserve" as used in the statute did not mean the risk or peril to life had to be imminent but that it must have been such that it was ". . . potentially present, even though its full development might be delayed . . . Nor was it essential that the doctor should believe that the death of the patient would be otherwise certain . . ."[11] In the *Ballard* case a woman had gone to a doctor and stated that she thought she was pregnant; and if she was, it was the result of illicit intercourse since her husband had had no access to her. The woman was extremely nervous and upset and reported having headaches and irregular menstrual periods. She had three children and had suffered two miscarriages previously. Upon examination of the patient the doctor further disclosed that the condition of the cervix indicated that a situation of "inevitable abortion" was present; that it was almost standard procedure to remove the tissue in such situations since further complications could well have arisen had not the medical abortion been performed. The consequence of this decision was that a doctor could now abort a pregnancy if he could show that the termination of the pregnancy was necessary for health reasons. In light of this the phrase "necessary to preserve her life" consequently had been expanded. *People v. Abarbanel*[12] extended this more liberal approach even further. Under the circumstances of that case the court acquitted the doctor where he had performed the abortion only after the abortee had been examined by two psychiatrists who had indicated that an interruption of the pregnancy would be necessary to "save her life from the possibility of suicide." There was some question as to whether, in fact, the reports made by the psychiatrists concerning the suicidal inclinations were well founded; however, the court reasoned that:

> When it is remembered that in *People v. Ballard,* the doctor alone determined the subject's nervous and mental condition was such as to justify the abortion although no special psychiatric skill on his part appears, while here the record discloses that two qualified psychiatrists recommended the therapeutic abortion and there is no evidence that appellant disbelieved or doubted the validity of

10. 167 Cal. App. 2d 803, 335 P.2d 204 (1959).
11. *Id.* at p. 811, 335 P.2d at 212. In this case the doctor was convicted of performing two abortions; however, only one is of concern since the other involved the issue of poice entrapment.
12. 239 Cal. App. 2d 31, — P.2d —, 48 Cal. Rptr. 336 (1965).

these recommendations, we feel that *People v. Ballard,* requires a reversal. . . .[13]

Although legal periodicals in recent years have been replete with articles respecting the arrant imperfections of existing abortion laws and the need for reform,[14] the response from state legislative bodies has been no more than slightly encouraging.[15] The approach initiated by the California Supreme Court could well set a precedent for further affirmative judicial action in an attempt to accelerate legislative reform.[16] Currently there are 37 states which authorize abortion only where it is "necessary to preserve" the woman's life.[17] In addition, 2 states imply the same license through decisional law; the respective statutes being silent on the issue.[18] It would appear obvious that the

13. *Id.* at 34, — P.2d —, 48 Cal. Rptr. 339.

14. *See:* Sands, *The Therapeutic Abortion Act: An Answer to the Opposition,* 13 U.C.L.A.L. REV. 285 (1966); Montjoy, *Abortion and the Law: A Proposal for Reform in Louisiana,* 43 TUL. L. REV. 834 (1969); Diller, *The Unborn Child: Consistency in the Law?,* 2 SUFFOLK U.L. REV. 228 (1968); Packer and Gampell, *Therapeutic Abortion: A Problem in Law and Medicine,* 11 STAN. L. REV. 417 (1959); Kutner, *Due Process of Abortion,* 53 MINN. L. REV. 1 (1969); Lucus, *Federal Constitutional Limitation on the Enforcement and Administration of State Abortion Statutes,* 46 N.C.L. REV. 730 (1968); Quay, *Justifiable Abortion—Medical and Legal Foundations,* 49 GEO. L.J. 395 (1961); Morris, *Criminal Law—Abortion—The Need for Legislative Reform,* 57 KY. L.J. 555 (1969); Byrn, *Abortion in Perspective,* 5 DUQUESNE L. REV. 125 (1966).

15. Although several states have newly proposed legislation pending on the subject, only California—CAL. HEALTH & SAF. CODE §§ 25950-25954 (1967); Colorado—COLO. REV. STAT. ANN. ch. 40, art. 2 § 50 (1967); North Carolina—N.C. GEN. STAT. § 44.45 (1967); Maryland—MD. ANN. CODE art. 27, § 3 (as amended July 1968); Georgia—GA. CODE ANN. § 26-1101, 1102 (as amended July 1, 1968) have actually enacted reform. Mississippi enacted a minor reform measure by adding rape to the existing "preservation of life" defense, as situations in which abortion is permitted. MISS. CODE § 2223 (1966).

16. Since the decision in the *Belous* case, the United States District Court for the District of Columbia has held that the District of Columbia Code provision proscribing the producing of an abortion unless "necessary for the preservation of the mother's life or health" is also invalid for its failure to give that certainty which due process considers essential to a criminal statute. U.S. v. Vuitch, 305 F. Supp. 1032 (D.D.C. 1969). *See,* D.C. CODE ANN. § 22-201 (1961).

17. ALASKA STAT. § 11.15.060 (1962); ARIZ. REV. STAT. ANN. § 13-211 (1956); ARK. STAT. ANN. § 41-301 (1964); CONN. REV. STAT. ANN. § 53-29 (1958); DEL. CODE ANN. tit. 11, § 301 (1953); FLA. STAT. ANN. §§ 782.10, 797.01 (1965); HAWAII REV. LAWS §§ 309-3, -4 (1955); IDAHO CODE ANN. § 18-601 (1948); ILL. ANN. STAT. ch. 38, § 23-1 (1964); IND. ANN. STAT. § 10-105 (1956); IOWA CODE ANN. § 701.1 (1950); KAN. STAT. ANN. § 21-410 (1964); KY. REV. STAT. § 436.020 (1962); ME. REV. STAT. ANN. tit. 17, § 51 (1965); MICH. STAT. ANN. § 28.204 (1962); MINN. STAT. ANN. § 617.18 (1964); MO. ANN. STAT. § 559.100 (1953); MONT. REV. CODES ANN. § 94-401 (1947); NEB. REV. STAT. §§ 28-404, -405 (1965); NEV. REV. STAT. § 201-120 (1963); N.H. REV. STAT. ANN. § 585:13 (1955); N.Y. PEN. LAW § 80-81 (1951); N.D. CENT. CODE § 12-25-01 (1960); OHIO REV. CODE ANN. § 2901.16 (1953); OKLA. STAT. ANN. tit. 21, § 861 (1967); R.I. GEN. LAWS ANN. § 11-3-1 (1956).

18. Actually there are four states—Pennsylvania, Massachusetts, New Jersey and Louisiana—which have no express provision within their respective statutes which indicates an exception to the general prohibition of abortion. However, only Massachusetts and New Jersey have case law which clarifies their position in regard to permissible abortions. In both these states the courts have concluded that abortions can be performed in certain situations. *State v. Siciliano,* 21 N.J. 249, 121 A.2d 490 (1956) is generally cited as authority for the interpretation that "or without lawful justification . . ." as used in

instant decision has, to some extent, cast the "shadow of constitutional doubt" on all these enactments. Essentially, if this approach is adhered to by the courts of other jurisdictions, the judiciary would act as a catalyst in hastening reform. By invalidating existing legislation a void is created which can only be filled, hopefully, by the passage of reform measures. This would be the desire and expectation of reformers; however, it is obvious that this entire theory is premised on the subsequent passage of true reform.

Pennsylvania is among the states whose abortion statutes are silent concerning how and in which situations permissible therapeutic abortion may be performed.[19] The only conduct proscribed is that which is "unlawfully" performed; however, the statutes are entirely devoid of a definition of what "unlawfully" means, as is also the decisional law.[20] Under such circumstances it would appear that the Pennsylvania law

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the statute permits abortion where it is necessary to avoid the death or permanent, serious injury to the mother. *See* N.J. REV. STAT. ANN. § 2A:87-1 (1953). *Commonwealth v. Wheeler*, 315 Mass. 394, 395, 53 N.E.2d 4, 5 (1944) and *Commonwealth v. Brunnelle*, 341 Mass. 675, 171 N.E.2d 850, 852 (1961) concluded that "unlawfully" as used in the Massachusetts statute allows abortion where the physician in good faith believes it to be necessary to save the patient's life or to prevent serious impairment of her mental or physical health. *See* MASS. GEN. LAWS ANN. ch. 272, § 19 (1956).

Louisiana has been excluded since although the abortion statute is completely silent as to the performance of any lawful abortions, the general Louisiana licensing provision states that a physician who performs an abortion on a woman whose life is in peril cannot be convicted if such is accomplished after consultation with another physician. *See* LA. REV. STAT. § 37:1285 (1950) and LA. REV. STAT. § 14:87 (Supp. 1964).

19. There are two Pennsylvania statutes on abortion. Section 4718 makes it a felony to merely attempt an abortion. PA. STAT. ANN. tit. 18, § 4718 (1963). Commonwealth v. Willard, 179 Pa. Super. 568, 116 A. 2d 751, 1955. Section 4719 does nothing more than impose a greater punishment in the event the attempt results in the death of the woman or the unborn child. PA. STAT. ANN. tit. 18, § 4719 (1963).

Section 4718 provides that:

> Whoever, with intent to procure the miscarriage of any woman, unlawfully administers to her any poison, drug, or substance, or *unlawfully* uses any instrument, or other means, with the like intent, is guilty of felony, and upon conviction thereof, shall be sentenced to pay a fine not exceeding three thousand dollars ($3,000), or undergo imprisonment by separate or solitary confinement at labor not excluding five (5) years, or both. [Emphasis added.]

Section 4719 states:

> Whoever unlawfully administers to any woman, pregnant with child, or supposed and believed to be pregnant or quick with child, any drug, poison, or other substance, or *unlawfully* uses any instrument or other means, with the intent to procure the miscarriage of such woman, resulting in the death of such woman, or any child with which she may be quick, is guilty of felony, and upon conviction thereof shall be sentenced to pay a fine not exceeding six thousand dollars ($6,000), or undergo imprisonment by separate or solitary confinement at labor not exceeding ten (10) years, or both. [Emphasis added.]

20. A review of the Pennsylvania case law disclosed no decision establishing in which instances an abortion may be performed with impunity. However, 1 C.J.S. *Abortion* § 13 states that ". . . it has been intimated that an exception of necessity to save the mother's life exists although the statute expressly makes no such exception." *See* Trout, *Therapeutic Abortion Laws Need Therapy*, 37 TEMP. L.Q. 172, 184-86 (1964) for a discussion on the status of the Pennsylvania abortion law.

on abortion is far more vague and less definite than even the California statute nullified in the instant decision.

Whether the California Supreme Court stands on firm ground in basing its decision on the vagueness or certainty and definiteness "principle" is debatable. That such a rule of statutory construction exists and is well recognized as a guarantee of due process is unequivocal;[21] however, such an approach is vulnerable to the argument that few words, if any, really have fixed, certain and definite meanings. The test of definiteness and certainty, itself, as a constitutional requirement of due process might be considered indefinite and uncertain in that the final determination of the rule as it is applied to any words or phrases will be directly dependent upon the subjective opinions and prejudice of the judges before whom the issue is raised.[22]

Although perhaps of secondary significance in the court's holding, but possibly of equal or greater importance in future considerations of the constitutional invalidity of abortion laws, is the recognition by the majority of a woman's fundamental right to choose whether to bear children.[23] In acknowledging this right the court has extended a legal trend of relatively recent genesis that a right of privacy exists which places certain matters related to marriage, family and sex beyond the permissible interference of the state.[24] It was upon this "right

21. *Supra* note 5.

22. For a thorough discussion of the certainty requirement *see* Collings, *Unconstitutional Uncertainty—An Appraisal*, 194 CORNELL L. REV. 195 (1955).

23. People v. Belous, 80 Cal. Rptr. 354, 359, 458 P.2d 194, 199 (1969).

24. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965); Loving v. Virginia, 388 U.S. 1 (1967); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942).

The recognition of the constitutional right of a woman to choose whether or not she desires to bear children, came to the forefront in *Griswold v. Connecticut*, 381 U.S. 479 (1965). In this case the appellants were the executive secretary of the Planned Parenthood League of Connecticut and its medical director, a licensed physician. They had been convicted as accessories for giving married people information and medical advice on how to prevent conception and, following an examination, prescribing a contraceptive device for the wife's use. The Connecticut abortion statute makes it a crime for anyone to use any drug or article to prevent conception. CONN. GEN. STAT. ANN. §§ 53-32 and 54-196 (1958). The United States Supreme Court, Justice Douglas speaking for the Court, concluded that the statutes violated the right of marital privacy which exists within the penumbra of the First, Third, Fourth, Fifth and Ninth Amendments which are made applicable to the states through the Fourteenth Amendment's Due Process Clause. It has been contended that:

> [T]he only factual difference between the acts forbidden by the Connecticut statute and acts forbidden by abortion laws is that ovum and spermatozoön which can be kept apart under Griswold's holding have come together and have begun to grow into an embryo. Lucus, *Federal Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C.L. REV. 730, 763 (1968).

To many this factual distinction is of major consequence, and more than a slight triviality. Whether this fundamental right is to attain major significance in the "pudge" of other abortion statutes in the future, will undoubtedly depend on whether the individual judges involved are willing to "bridge" the factual "gap" between abortion and contra-

of privacy" that the California Supreme Court intimated the constitutional right of the woman to choose whether or not to bear children. This right was raised as dictum in the majority opinion, and therefore its immediate significance was not controlling.[25] It is submitted, however, that in view of the recent preoccupation of the judiciary with individual right, the more concrete and readily defendable approach in invalidating abortion statutes, is the "fundamental right" argument. Should this approach be adopted there is no abortion law that would not be susceptible to constitutional scrutiny and resultant abrogation.

[*Author's Note*:

Subsequent to the writing of this note, but prior to publication, activity has increased markedly in the field of abortion law. This recent development has been experienced on both the legislative and judicial levels of influence. The United States District Court of the District of Columbia in *United States v. Vuitch,* 305 F. Supp. 1032 (D.D.C. 1969), held D.C.'s ban on abortion invalid for vagueness, citing *People v. Belous,* in support of such conclusion. The statute in this jurisdiction prohibited abortion in all situations except where ". . . the same were done as necessary for the preservation of the mother's life or health . . . ," D.C. CODE ANN. § 22-201 (1961). As in the California case the court in its discussion raises the issue of the woman's constitutional right to decide for herself whether to bear children. However, once again it was not the point upon which the court chose to "hang its hat." Regarding the vagueness issue it was noted that "[t]he physician in this instance is placed in a particularly unconscionable position under the conflicting and inadequate interpretations of the D.C. abortion statute now prevailing."

The U.S. District Court for Eastern Wisconsin in another recently decided case, declared the Wisconsin abortion law invalid on the basis of the court's belief that, under the Ninth Amendment, the de-

ception. For other discussions and analysis of the Griswold case *see,* Emerson, *Nine Justices in Search of a Doctrine,* 64 MICH. L. REV. 219 (1966); Leavy and Kummer, *Abortion and the Population Crisis, Therapeutic Abortion and the Law; Some New Approaches,* 27 OHIO S. L.J. 647, 672 (1966); Allan, *Constitutional Aspects of Present Criminal Abortion Law,* 3 VAL. U.L. REV. 102, 111 (1968).

25. The majority raised the right of a woman to choose whether or not to bear children in answer to the State's contention that the phrase "necessary to preserve her life" should be construed to mean there would be certainty of death otherwise. However, this answer was only proposed after the Court had already resolved that the law was invalid for vagueness.

cision whether to abort an unquickened fetus is the woman's and not the state government's. It was held that the state does not have enough of an interest in preventing abortions to justify the invasion of privacy of the individual involved. The statute examined was worded similarly to those found unconstitutionally vague in *People v. Belous* and *U.S. v. Vuitch*; however, here the court expressly stated that it did not find the law unconstitutionally vague. As thus analyzed the case would appear to lend credence to the theory proposed in the body of this article that this constitutional right of the individual is the better basis for future judicial invalidation. While obviously one case does not make a trend, it would appear that the seed sewed in *Belous* and *Vuitch* has sprouted in the Wisconsin decision. *Babbitz v. McCann*, 38 U.S.L.W. 2498 (March 5, 1970). *See also* WIS. STAT. § 940.04 (1963).

Recent activity has developed in the respective state legislatures throughout the country. Whether as a coincidence or consequence, following *People v. Belous* various legislative bodies have been very active in proposing, and in at least two instances enacting, real reform. As of this writing Maryland and Arizona are close to enacting new legislation, and New York and Hawaii have, in fact, enacted new reform. The new Hawaiian statute makes abortion strictly a matter between a woman and her doctor; imposes no need to satisfy criterion such as threat to life, health, etc.; but does impose a ninety day residency requirement. N.Y. Times, March 12, 1970, at 21. New York went a step further than Hawaii in its new law in that there is no requirement of residency whatsoever. Under this recent measure abortion remains strictly a matter between a woman and her doctor up to the twenty-fourth week of pregnancy. After the twenty-fourth week abortion would be allowed only to save the woman's life. N.Y. Times, April 11, 1970 at 1.

As stated in the article, the judicial and legislative reaction to the mounting tide for abortion reform prior to the Belous decision was marked by indifference at best. It is submitted that the rapid and rather sudden developments in this area in recent months have been the result of the impetus provided by this holding. In this respect the case represents the proverbial hole in the dike; and if this subsequent five month history is any indication, the resulting break is growing rapidly.]

Gary R. Cassavechia

FEDERAL INCOME TAX—SCHOLARSHIPS AND FELLOWSHIP GRANTS—The Supreme Court of the United States has held that payments received by an employer based on salary and family size during an "educational leave" to complete a Ph.D. dissertation on a topic approved by the employer are not excludable from gross income as "scholarships or fellowships" under Section 117 of the Internal Revenue Code.

Bingler v. Johnson, 394 U.S. 741 (1969).

Respondent-taxpayers, employees of Westinghouse Electric Corporation, participated in a Ph.D. fellowship program sponsored by their employer. They were permitted to take an educational leave[1] and devote full attention to fulfilling the dissertation requirement[2] for their doctorates. As students, respondents received tuition, incidental expenses[3] and a percentage[4] of their prior salaries plus "adders", depending upon the size of their respective families from Westinghouse. They also retained their seniority status at Westinghouse and received all employee benefits. In order to take advantage of the fellowship program, the respondents were required to sign a written agreement by which they became obligated to return to their former employment for a period of at least two years.[5]

The respondents filed a claim for refund of the taxes withheld from their monthly family allowance which was paid under the written agreement by their employer. The claim was based on the grounds that the payments were excludable from gross income as a scholarship under the Internal Revenue Code of 1954, Section 117.[6] Upon rejec-

1. Respondents Johnson and Pomerantz took nine months leave and Respondent Wolfe took twelve months.

2. The dissertation topic was required to be approved by the employer. It was approved if the topic had at least some general relevance to the work done by the employer.

3. Tuition and incidental fees were also paid by the employer, but no withholding was made from those payments, and their tax status is not at issue in the case. See Treas. Reg. § 1.162-5 (1956).

4. Respondents Johnson and Pomerantz received 80 percent of their prior salaries—$5,670 each and Respondent Wolfe received 90 percent amounting to $9,698.90.

5. Respondent Wolfe began his leave at a time when the employer did not require an agreement in writing to the two year return commitment. He was formally advised before he went on leave, however, that he was "expected" to return to his employment for a period of time equal to the duration of the leave, and in fact honored that obligation.

6. INT. REV. CODE of 1954 provides in part that:
(a) In the case of an individual, gross income does not include—
(1) any amount received—
(A) as a scholarship at an educational institution, or
(B) as a fellowship grant . . .
(b) Limitations—
(1) Individuals who are candidates for degrees.—In the case of individuals who

tion of the claims, respondents instituted a suit against the District Director of Internal Revenue. At the trial, the jury was instructed in accordance with the interpretation given to Section 117 by the Internal Revenue Service.[7] The jury returned a verdict against the respondents and review was then sought. On appeal to the third circuit,[8] the verdict of the trial court was reversed and the regulation was held invalid.

The court of appeals reasoned that since Section 117(b) contained certain limitations, no additional restrictions could be put on the basic exclusion from income granted by subsection (a).[9] In addition, it was held that the legislative history underlying Section 117 indicated that Congress wished to eliminate the case by case determination of the treatment to be afforded to scholarships and that the primary purpose

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> are candidates for degrees at an educational institution subsection (a) shall not apply to that portion of any amout received which represents payment for . . . services in the nature of part-time employment required as a condition to receiving the scholarship or the fellowship grant. . . .

7. Treas. Reg. § 1.117-4 (1956) reads as follows:

> The following payments or allowances shall not be considered to be amounts received as a scholarship or a fellowship grant for the purpose of section 117:
>
> (a) Educational and training allowances to veterans. Educational and training allowances to a veteran pursuant to section 400 of the Servicemen's Readjustment Act of 1944 (58 Stat. 287) or pursuant to 38 U.S.C. 1631 (formerly section 231 of the Veterans Readjustment Assistance Act of 1952.)
>
> (b) Allowances to members of the Armed Forces of the United States. Tuition and subsistence allowances to members of the Armed Forces of the United States or approved by the United States for their education and training, such as the United States Naval Academy and the United States Military Academy.
>
> (c) Amounts paid as compensation for services or primarily for the benefit of the grantor.
>
> (1) Except as provided in paragraph (a) of § 1.117-2, any amount paid or allowed to, or on the behalf of, an individual to enable him to pursue studies or research, if such amount represents either compensation for past, present, or future employment services or represents payment for services which are subject to the direction or supervision of the grantor.
>
> (2) Any amount paid or allowed to, or on behalf of, an individual to enable him to pursue studies or research primarily for the benefit of the grantor. However, amounts paid or allowed to, or on behalf of, an individual to enable him to pursue studies or research are considered to be amounts received as a scholarship or fellowship grant for the purpose of section 117 if the primary purpose of the education and training of the recipient in his individual capacity and the amount provided by the grantor for such purpose does not represent compensation or payment for the services described in subparagraph (1) of this paragraph. Neither the fact that the results of his studies or research may be of some incidental benefit to the grantor shall, of itself, be considered to destroy the essential character of such amount as a scholarship or fellowship grant.

8. Johnson v. Bingler, 396 F.2d 258 (3d Cir. 1968).

9. The court of appeals relied on a canon of construction—*expressio unius est exclusio alterius*. Under this maxim, if a statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded.

of the section was the encouragement of financial aid to education through tax relief.[10]

The United States Supreme Court granted certiorari to resolve the conflict and to examine for the first time Section 117 of the Internal Revenue Code and the interpretation given to it by Treasury Regulation 1.117-4(c). It was found that the decision of the court of appeals was in direct conflict with the decisions of other circuits.[11] The Court admitted that Congress' express reference to the limitations in Section 117(b) lends some support to the respondents' position.[12] Nevertheless, the court pointed out the flaw in that position and said:

> The difficulty with that position, however, lies in its implicit assumption that those limitations are limitations on an exclusion of all funds received by students to support them during the course of their education. Section 117 provides, however, only that amounts received as "scholarships" or "fellowships" shall be excludable.[13]

The Supreme Court clearly stated that before the Section 117(b) limitations will be applied it must first be determined that the amounts in question are scholarships. At this point some difficulty arises since Section 117 does not define scholarships or fellowships. However, Treasury Regulations 1.117-3[14] and 1.117-4[15] supply the necessary definitions. The instant case is an attack upon the definitions supplied by the Commissioner in 1.117-3 and more specifically upon the limitations set out

10. H.R. REP. No. 1337, 83d Cong., 2d Sess. 17 (1954); *See also*, S. REP. No. 1622, 83d Cong., 2d Sess. 18 (1954).

11. *See*, Reese v. Commissioner, 373 F.2d 742 (4th Cir. 1967); Stewart v. U.S., 363 F.2d 355 (6th Cir. 1966); Woddail v. Commissioner, 321 F.2d 721 (10th Cir. 1963); Ussery v. U.S., 296 F.2d 582 (5th Cir. 1961).

12. Note 9 *supra*.

13. Bingler v. Johnson, 394 U.S. 741, 743 (1969).

14. Treas. Reg. § 1.117-3 (1956) reads as follows:

(a) Scholarship. A scholarship generally means an amount paid or allowed to or for the benefit of, a student whether an undergraduate or a graduate, to aid such individual in pursuing his studies. The term includes the value of contributed services and accommodations (see paragraph (d) of this section) and the amount of tuition, matriculation, and other fees which are furnished or remitted to a student to aid him in pursuing his studies. The term also includes any amount received in the nature of a family allowance as a part of a scholarship. However, the term does not include any amount provided by an individual to aid a relative, friend, or other individual in pursuing his studies where the grantor is motivated by family or philanthropic considerations. If an educational institution maintains or participates in plan whereby the tuition of a child of a faculty member of such institution is remitted by any other participating educational institution attended by such child, the amount of the tuition so remitted shall be considered to be an amount received as a scholarship.

15. Note 7 *supra*.

in section 1.117-4(c).[16] The Court upheld the validity of the attacked Regulations holding:

> Here, the definition supplied by the Regulation clearly are prima facie proper, comporting as they do with the ordinary understanding of "scholarships" and "fellowships" as relatively disinterested, "no strings" educational grants, with no requirement of any substantial quid pro quo from the recipients.[17]

The Court pointed out that the Regulation represents an effort by the Commissioner to define "scholarships" and "fellowships." Furthermore, since the Commissioner is charged with the administration of the Code, the Regulations "must be sustained unless unreasonable and plainly inconsistent with the revenue statutes," and "should not be overruled except for weighty reasons."[18] The Court also cited *Ussery v. United States*,[19] in which Treasury Regulation 1.117-4(c) was explicitly sustained in a situation in which the payments were similar to those received by the respondents.

The Court did not accept respondent's argument that the legislative history underlying section 117 of the Internal Revenue Code indicates a Congressional intent to eliminate a case by case determination with respect to scholarships and fellowships. The primary purpose of section 117 as announced by the court of appeals was also rejected.[20] In answer to those contentions the Supreme Court said that the legislative history underlying section 117 is "far from clear." The Court went on to resolve the conflict between the legislative history and Treasury Regulation 1.117-4 by saying that no conflict really existed. The Court said:

> One may justifiably suppose that the Congress that taxed funds received by "part-time" teaching assistants, presumably on the ground that the amounts received by such persons really represented compensation for services performed, would also deem proper a definition of "scholarship" under which comparable sorts of compensation—which often, as in the present case, are significantly greater in amount—are likewise taxable.[21]

16. Note 7 *supra*.
17. Bingler v. Johnson, 394 U.S. 741, 743 (1969). That the Commissioner is charged with administration of the code and that the Regulations must be sustained unless unreasonable and plainly inconsistent with the revenue statute *see*, Commissioner v. South Texas Lumber Co., 333 U.S. 496, 501 (1948), and U.S. v. Correll, 389 U.S. 299, 307 (1967).
18. *Id.*
19. 296 F.2d 582 (5th Cir. 1961).
20. The court of appeals said: ". . . the primary purpose of the section 117 exclusion is to encourage financial aid to education through tax relief." 396 F.2d 258, 260 (3d Cir. 1968) 394 U.S. 744 (1969).
21. The House version of § 117(b)(1) taxed only amounts received as payment for

The Court in effect said that section 117b(1)[22] indicates a Congressional intent to tax amounts received as compensation. This section excludes payments received for teaching, research, or other services in the nature of part time employment *required as a condition to receiving the scholarships or fellowship grant* unless such services are required of all candidates *as a condition to receiving a degree.* The reasoning of the court is that since the services are required as a condition to receiving a scholarship, the grant is compensation because it is given in exchange for a *quid pro quo* and therefore the grant should be in gross income.

Despite the attacks on section 117 by legal scholars,[23] the Court stamps its imprimatur upon the pre-1954 gift-compensation test. If compensation can be found, the grant will be held includable in gross income. As a result of this decision the courts will continue to use the tests applied in *Ussery.* It is submitted that the problem of determining which grants are taxable and which are not taxable is not governed by a satisfactory standard. Treasury Regulation Section 1.117-4(c) further confuses the issue in providing for a primary purpose test. How is the primary purpose to be determined? Many grants can be to the benefit of the grantor and the grantee and in equal proportions. Such a situation seems to strip the primary purpose test of its effect. Thus, the need for a case by case determination must continue and certainty and predictability will be severely limited.

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teaching and research services. The Senate amended the provision, however, to include payments for other services as well. *See* S. REP. No. 1622, 83d Cong. 2d Sess. 18 (1954).

22. Note 13 *supra.*

23. *See,* Gordon, *Scholarship and Fellowship Grants as Income: A Search for Treasury Policy,* 1960 WASH. U.L.Q. 144 (1960); Heckerling, *The Federal Taxation of Legal Education: Past, Present and Proposed,* 27 OHIO S.L.J., 117, 131 (1966); Tabac, *Scholarships and Fellowship Grants: An Administrative Merry-Go-Round,* 46 TAXES 485 (1968); Weiss, *Taxability of Scholarships and Fellowship Grants,* 1963 DUKE L.J. 488 (1963); Comment, *Exclusion of Fellowship Grants from Gross Income,* 1967 U. OF ILL. L.F. 326 (1967).