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A New Balance--Foreword

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FOREWORD—A NEW BALANCE

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INTRODUCTION

Consistent with the trend discernible in the early part of this decade, the Supreme Court in its 1975–76 term continues to move away from the liberalism of the Warren years and has struck a long-overdue and more delicate balance between the rights of citizens and defendants. This balance is best exemplified by the Court's long-awaited decisions in the death penalty cases.[1] It is in those decisions that the Court has articulated its concern that, although punishment must accord with "the dignity of man,"[2] the legitimate views and purposes of society as to a given form of punishment must be taken into consideration.

The death penalty decisions, however dramatic in effect and impact, were not the only opinions handed down this term that reflect the Court's movement toward greater protection of society. Thus, with its decisions in *Fisher v. United States,*[3] *United States v. Miller,*[4] and *Andresen v. Maryland,*[5] the Court has taken substantial steps toward alleviating the confusion that has existed—particularly for government investigators and prosecutors—concerning the procedure to be employed, consistent with the fourth and fifth amendments, to obtain documents from potential defendants. As prosecutors throughout the nation intensify their efforts in the investigation and prosecution of white collar and official corruption crimes, these decisions should prove to be particularly significant. Additionally, street level law enforcement against the traffic in illicit drugs was given a boost by the Court's ruling in *Hampton v. United States*[6] that entrapment is not necessarily established as a matter of law when government agents and a predisposed defendant act in concert with one another.

Not all of this term's decisions went against defendants. In *Doyle* v. *Ohio,*[7] the Court declined to read *Miranda v. Arizona*[8] as permitting the impeachment use of a defendant's post-arrest silence. And *Goldberg v. United States*[9] flatly rejected the government's position that a "work product" exception exists under the Jencks Act.[10] Finally, in a particularly significant case, *Nebraska Press Association v. Stuart,*[11] the Court has made new law in the area of fair trial-free press by ruling that prior restraints on pre-trial publicity are unconstitutional.

FIFTH AMENDMENT DEVELOPMENTS

The Court was particularly productive this term in the area of the fifth amendment privilege against self-incrimination. Its decisions ranged from the nature of a defendant's fifth amendment rights during both custodial and non-custodial interrogation to the issue of the interaction between the fourth and fifth amendments in connection with efforts of law enforcement authorities to obtain documents.

In two cases of particular significance to government investigators and prosecutors, the Court declined to enlarge an accused's rights under *Miranda v. Arizona.*[12] It held in *Beckwith v. United States*[13] that a taxpayer, questioned in a non-custodial setting by Special Agents of the Internal Revenue Service who were investigating him for possible criminal tax violations, need not be given the warnings mandated by *Miranda.* Accordingly, statements made to the agents and records obtained during the course of the interview were deemed admissible into evidence in the taxpayer's subsequent trial for tax fraud.

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[1] Gregg v. Georgia, 96 S.Ct. 2909 (1976); Proffitt v. Florida, 96 S.Ct. 2960 (1976); Jurek v. Texas, 96 S.Ct. 2950; Woodson v. North Carolina, 96 S.Ct. 2978 (1976); Roberts v. Louisiana, 96 S.Ct. 3001 (1976).

[2] Gregg v. Georgia, 96 S.Ct. at 2925, *quoting* Trop v. Dulles, 356 U.S. 86, 100 (1958).

[3] 425 U.S. 391 (1976).

[4] 425 U.S. 394 (1976).

[5] 96 S.Ct. 2737 (1976).

[6] 425 U.S. 484 (1976).

[7] 96 S.Ct. 2240 (1976).

[8] 384 U.S. 436 (1966).

[9] 425 U.S. 94 (1976).

[10] 18 U.S.C. §3500 (1970).

[11] 96 S.Ct. 2791 (1976).

[12] 384 U.S. 436 (1966).

[13] 425 U.S. 341 (1976).

The Court's decision in *Beckwith* can hardly be termed unexpected since, except for *Dickerson v. United States*[14] and its progeny,[15] it accords with the weight of authority on the issue.[16] Moreover, as the Court stressed, acceptance of the taxpayer's argument—that the principle of *Miranda* was applicable because the taxpayer was the "focus" of an investigation and was therefore during the interview in the functional and thus legal equivalent of the classic *Miranda* situation—would require the Court to ignore the central point on which *Miranda* turned: the coercive aspect of custodial interrogation. Justice Brennan, dissenting, viewed the interrogation at issue as having the "practical consequence" of compelling the taxpayer to make disclosures and as therefore fully comparable to the formal custody situation involved in *Miranda.* The majority, however, pointed out that "custodial interrogation," as specifically defined in *Miranda,* means "questioning initiated by law enforcement officers *after* a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[17] From the record, which disclosed that the taxpayer was interviewed in a private home, concededly was not under arrest or otherwise detained and was advised of his rights to remain silent and to confer with counsel,[18] the Court could find no evidence of a custodial situation such as that upon which *Miranda* was bottomed. Quite properly, however, the Court did not lay down a blanket rule that would preclude all challenges to the admissibility of evidence obtained during the course of a non-custodial interview. Rather, recognizing that in some non-custodial interviews an interrogation nonetheless may be coercive, the Court noted that it would be the duty of a reviewing court to examine the entire record and make an independent determination of the issue of voluntariness. In such a case, the presence or absence of warnings would be relevant to the issue of whether the interrogation was in fact coercive.

United States v. Mandujano,[19] one of the Court's few unanimous decisions in the criminal law area this term,[20] further defined *Miranda's* limits. In *Mandujano,* the Court ruled that *Miranda* warnings need not be given to a grand jury witness who is in the position of a "virtual" or "putative" defendant. As in *Beckwith,* the Court stressed the lack of custodial coercion envisioned in *Miranda.* In the Court's view, *Miranda* "simply did not perceive judicial inquiries and custodial interrogation as equivalents."[21] To extend the *Miranda* focus on police interrogation in a custodial setting "to questioning before a grand jury inquiring into criminal activity under the guidance of a judge is an extravagant expansion never remotely contemplated by this Court in *Miranda*; the dynamics of constitutional interpretation do not compel constant extension of every doctrine announced by the Court."[22]

While the Court plainly held that a grand jury witness is not entitled to be given the *Miranda* warnings at the inception of his testimony, it failed to provide much guidance on what warnings, if any, need be given. Since the witness in *Mandujano* was in fact warned of his fifth amendment privilege, the Court deemed it unnecessary to consider whether this warning is required.

Justice Brennan, joined by Justice Marshall, concurred in the plurality opinion but would have held that the government may not call before the grand jury an individual whom it has probable cause to suspect committed a crime and, absent a knowing and intelligent waiver, use "judicial compulsion" to cause him to testify with regard to that crime. In Justice Brennan's view, such a waiver would be demonstrated by proof that the individual was warned of his fifth amendment privilege and his status as a putative defendant prior to being questioned. As a practical matter, the question left open by the plurality opinion is not a critical one, for prudent prosecutors at both the state and federal level consistently make it a practice to warn a grand jury witness of the fifth amendment privilege prior to questioning.

In *Harris v. New York*[23] the Court held in 1971

[14] 413 F.2d 1111 (7th Cir. 1969).

[15] United States v. Oliver, 505 F.2d 301 (7th Cir. 1974).

[16] *See, e.g.,* United States v. Robson, 477 F.2d 13, 16 (9th Cir. 1973); United States v. Stribling, 437 F.2d 765, 771 (6th Cir.), *cert. denied,* 402 U.S. 973 (1971); United States v. MacLeod, 436 F.2d 947, 950 (8th Cir.), *cert. denied,* 402 U.S. 907 (1971); United States v. Jaskiewica, 433 F.2d 415, 417–20 (3d Cir. 1970), *cert. denied,* 400 U.S. 1021 (1971); United States v. Prudden, 424 F.2d 1021, 1027–31 (5th Cir.), *cert. denied,* 400 U.S. 831 (1970); United States v. Mackiewicz, 401 F.2d 219, 221–22 (2d Cir.), *cert. denied,* 393 U.S. 923 (1968).

[17] 425 U.S. at 347, *quoting* Miranda v. Arizona, 384 U.S. at 444.

[18] Mr. Justice Marshall concurred in the judgment on the ground that the warnings actually given to the taxpayer satisfied the requirements of the fifth amendment.

[19] 425 U.S. 564 (1976).

[20] *Mandujano* was an 8–0 decision. Mr. Justice Stevens took no part in the decision.

[21] 425 U.S. at 579.

[22] *Id.* at 580.

[23] 401 U.S. 222 (1971).

that post-arrest statements taken from a defendant in violation of the dictates of *Miranda* could be used at trial for impeachment purposes. In *Doyle v. Ohio,*[24] decided this term, the Court declined to view the *Harris* rationale as supportive of the impeachment use of a defendant's post-arrest silence.[25] More specifically, the Court ruled that a prosecutor may not seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining him about his failure to have told that story at the time of his arrest and after receiving *Miranda* warnings. Justice Powell, writing for the majority, reasoned that an arrestee's silence following the warnings may be nothing more than his exercise of *Miranda* rights; accordingly, "every post-arrest silence is insoluably ambiguous."[26] Since the *Miranda* warnings carry an implicit assurance that silence will incur no penalties, it would be fundamentally unfair to allow the arrested person's silence to be used to impeach an explanation offered at trial.

Doyle, then, clearly is a firm response to those who have assailed the Burger Court for what they have perceived as the Court's steady erosion of the principle of *Miranda.* Ironically, it comes in a case where the defendants' silence was so totally inconsistent with their trial testimony that, as Justice Stevens correctly points out in dissent, their silence plainly was tantamount to a prior inconsistent statement and thus admissible for purposes of impeachment. In the dissenters' view, which is unassailably rational under the particular facts of the case, the *Miranda* warnings provided the only plausible explanation for the defendants' silence at the time of their arrest; therefore, on cross-examination, the logical response to questions about why they remained silent would have been that they relied on the warning that they had the right to remain silent. Since that was not their response, the Court's due process rationale fails.

While *Doyle* may be viewed as a refusal to cut back on *Miranda,* the Court nonetheless will undoubtedly continue to be criticized by civil libertarians for its decision in *Michigan v. Mosley.*[27] Looking at the two cases, there are those who will view them as a simultaneous giving and taking away. A more rational approach, however, suggests that the Court has engaged in some fine line drawing, and while line drawing does not necessarily reflect good judgment or result in good judgments, the one drawn, at least in *Mosley,* is a rational one. There, the defendant was arrested by one police officer for suspicion of robbery. At the police station, he was advised of his rights under *Miranda.* When he indicated he did not want to answer any questions about the robberies, the arresting officer ceased interrogation. Two hours later, however, a different officer, after first advising the defendant of his rights, began questioning him about a different crime, a murder. The defendant shortly thereafter implicated himself in the murder. At no time did the defendant indicate that he did not wish to discuss the murder, nor did he ask to consult with a lawyer. The Court held that the defendant's assertion of his privilege as to one line of questioning by the first police officer did not prohibit, under the principle of *Miranda,* questioning by the second officer about a different criminal matter. In reaching its decision, the Court reasoned that *Miranda* must be read in light of its intention to permit one in custody to cut off questioning at any time. The requirement that law enforcement authorities respect the exercise of that right was seen as counteracting the "coercive pressures of the custodial setting."[28] The Court concluded that under the facts of the case, the defendant's right to cut off questioning was "scrupulously honored."[29]

Mr. Justice Brennan, in dissent, argued that:

> [T]he task confronting the Court is not whether voluntary statements will be excluded, but whether the procedures approved will be sufficient to assure with reasonable certainty that a confession is not obtained under the influence of the compulsion inherent in interrogation and detention.[30]

In Justice Brennan's view, the procedures approved by the Court failed to provide that assurance because the issue of compulsion was not faced directly. He thus concluded that Mosley's rights had been violated because his failure to opt to remain silent upon renewed questioning was "presumptively the consequence of an overbearing in which detention and that subsequent questioning played central roles."[31]

Justice Brennan's thesis relies upon the premise that detention, however brief, together with a very short period of questioning, is irrebuttably coercive.

[24] 96 S.Ct. 2240 (1976).

[25] In United States v. Hale, 422 U.S. 171 (1975), the Court decided on evidentiary grounds that the prosecution's use of the defendant's post-arrest silence was impermissibly prejudicial. By the Court's decision in *Doyle,* that ruling has achieved constitutional status.

[26] 96 S.Ct. at 2244.

[27] 423 U.S. 96 (1975).

[28] *Id.* at 104.

[29] *Id.*

[30] *Id.* at 113 (Brennan, J., dissenting).

[31] *Id.* at 115.

But surely *Miranda* did not mean that, for, as Justice White noted in his concurring opinion, *Miranda* said that if a statement is taken outside the presence of an attorney and after the suspect has indicated a desire to remain silent, the government bears a heavy burden to demonstrate a knowing and intelligent waiver. As the facts demonstrate, that burden was certainly satisfied in this case. Moreover, as Justice White noted, the holding in the case is a limited one, presumably circumscribed by its facts.

A third custodial interrogation case before the Court this term which presented a significant fifth amendment issue was left undecided for the time being. In *Ohio v. Gallagher*[32] the issue was whether the admission into evidence of statements made by an accused in response to custodial interrogation by his parole officer violated the dictates of *Miranda*. The facts of *Gallagher* disclosed that the accused was arrested, charged with armed robbery and advised of his *Miranda* rights by two detectives. Four days later, while he was still in jail, Gallagher's parole officer sought to question him about the robbery as a possible parole violation. Although Gallagher declined to discuss the matter at that time, he gave a detailed statement to the parole officer a week later during the officer's return visit. At no time did the parole officer advise Gallagher of his rights under *Miranda*. At Gallagher's trial, the parole officer testified as to the incriminating statement made by Gallagher. A majority of the Court remanded the case to the Ohio Supreme Court, which had reversed Gallagher's conviction, for clarification as to whether that court had relied on the federal Constitution, state law, or both, in rendering its decision. Resolution of the issue raised in *Gallagher* should reveal whether the Court's holding in *Mosley* is, in fact, a limited one.

Two other cases in the fifth amendment area which were decided this term, *Fisher v. United States*[33] and *Andresen v. Maryland,*[34] should prove to be highly significant and will be warmly welcomed by government investigators and prosecutors, particularly those working on documents cases in the official corruption and white collar crimes areas.

In *Fisher* the Court held that an attorney's production, pursuant to a lawful Internal Revenue Service summons, of his client's tax records prepared by the taxpayer's accountant and transferred to the attorney by the taxpayer, did not violate the taxpayer's fifth amendment privilege. This is so, according to Mr. Justice White, because: (1) enforcement of the summons against the taxpayers's attorney would not compel the taxpayer since the documents sought were not the taxpayer's, were not prepared by the taxpayer and did not contain his testimonial declarations; (2) insofar as the documents sought contained private information, the fifth amendment could not be invoked since it protects compelled testimony, not the disclosure of private information, and enforcement of the summons did not involve compelled testimony; (3) the attorney-client privilege could not be relied upon by the taxpayer because the documents were not privileged in the hands of the taxpayer and thus were not protected in the attorney's hands; and (4) the pronouncement in *Boyd v. United States*[35] that "seizure, under warrant or otherwise, of any purely evidentiary materials violated the Fourth Amendment and that the Fifth Amendment rendered these seized materials inadmissible"[36] is no longer good law because, under cases decided after *Boyd,* purely evidentiary though non-testimonial evidence may be searched for and seized under appropriate circumstances. Therefore, since the documents sought did not compel the taxpayer's own testimonial communications, the fifth amendment privilege could not be invoked.

A question left open in *Fisher*—whether the fifth amendment would protect an individual from producing his own records in his possession—was answered in *Andresen.* There, the Court ruled that the forcible law enforcement seizure of an individual's business records from his offices did not violate that person's fifth amendment privilege against self-incrimination. Although the seized records clearly contained incriminating information, including statements made by their owner, he nonetheless was not compelled to be a witness against himself because the statements contained in the records were voluntarily committed to writing; the records were not produced by their owner, but rather were seized by law enforcement authorities; and at trial, they were authenticated by a handwriting expert, not by the owner.

In addition to the practical impact of *Fisher* and *Andresen* for investigators and prosecutors, the legal ramifications are great, for the *Boyd* rule—that the compelled production of "mere evidence," including private documents, by seizure or subpoena violates the fourth amendment and therefore the fifth amend-

[32] 425 U.S. 257 (1976).
[33] 425 U.S. 391 (1976).
[34] 96 S.Ct. 2737 (1976).
[35] 116 U.S. 616 (1886).
[36] 425 U.S. at 407.

ment—no longer can be considered either the seminal pronouncement on fourth amendment law or a correct statement regarding the interaction of the fourth and fifth amendments.

It should also be noted that in addition to its fifth amendment pronouncements in *Fisher* and *Andresen,* the Court further defined the fifth amendment privilege as it relates to grand jury witnesses. In *Mandujano,* while holding that the failure to advise a witness of his *Miranda* rights neither entitles the witness to commit perjury nor bars the introduction of his false answers at a later perjury trial, the Court stressed that a witness must claim the privilege where appropriate or he will not be considered to have been compelled. We are thus left with the implication that, absent some evidence of prosecutorial misconduct, a witness who incriminates himself by his answers or through the requested production of his private papers will be deemed to have waived his privilege even though he was not warned of it. It was this implication that Justice Brennan found disturbing.[37]

Fourth Amendment Developments

Any discussion of the importance to law enforcement authorities of *Fisher* and *Andresen* would not be complete without mentioning the Court's decision in *United States v. Miller*[38] and certain fourth amendment aspects of *Andresen.* In *Miller,* the Court held that the fourth amendment does not protect a bank customer from a government subpoena duces tecum directing the bank to produce its records of its transactions with the customer because, even though the Bank Secrecy Act requires the maintenance of a bank's transactions with its customers, the compulsion embodied in the Act does not create a fourth amendment interest in the customer. This holding is based upon the grounds that a bank customer can have no legitimate expectation of privacy in records which (1) are the business records of the bank, (2) are not confidential communications but negotiable instruments, and (3) contain information voluntarily conveyed to the bank and exposed to its employees. *Miller* thus resolves an issue left unanswered in the 1974 case of *California Banker's Association v. Schultz,*[39] a decision which has made government personnel hesitant about seeking to obtain bank records of one suspected of engaging in criminal activity.

Finally, the Court resolved an issue that should aid law enforcement personnel in the execution of search warrants. In *Andresen,* the petitioner asserted that his fourth amendment rights were violated because the language of the warrants to search his offices was so broad as to make them impermissible "general" warrants. More specifically, he objected to the phrase added to each warrant at the end of a long list of particularly described documents, "together with other fruits, instrumentalities and evidence of crime at this [time] unknown." The Court read the phrase, not as a separate sentence, but as only authorizing the search for and seizure of evidence relating to the particular crime for which the petitioner was then a suspect and for which he was later indicted and convicted. Since the phrase did not authorize the executing officers to search for and seize evidence of other crimes, the warrants were not impermissibly general.

Other Significant Developments

Entrapment

The Court's decision this term in *Hampton v. United States*[40] reflects a recognition of the difficulties which face law enforcement officers in combatting narcotics offenses. Consistent with its ruling in *United States v. Russell*[41] the Court in *Hampton* held that a defendant who is predisposed to commit the offense with which he is charged cannot avail himself of an entrapment defense even where government agents are significantly involved. In *Hampton,* the facts disclosed that the government was both the supplier and the buyer of the narcotics which Hampton was accused of distributing. Thus, the government's involvement in the offense clearly was more extensive than it was in *Russell.*[42] A plurality of the Court, rejecting Hampton's due process argument,[43] nonetheless found *Russell* controlling because, as in *Russell,* the government agents were acting in concert with the defendant who concededly was predisposed to commit the crime. The plurality

[37] United States v. Mandujano, 425 U.S. 564 (1976).

[38] 425 U.S. 435 (1976).

[39] 416 U.S. 21 (1974).

[40] 425 U.S. 484 (1976).

[41] 411 U.S. 423 (1973).

[42] In *Russell,* the government was involved to the extent that it supplied a legal but difficult to obtain ingredient of the contraband that was the subject of the *Russell* indictment.

[43] In *Russell,* the Court said:

> [W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.

411 U.S. at 431–32.

opinion suggests that the prosecution of a predisposed defendant never can be prohibited, regardless of the "outrageousness" of the government's conduct:

> If the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of the state or federal law.[44]

Concurring Justice Powell, joined by Justice Blackmun, believed that *Russell* and other predisposition cases did not go so far and was unwilling to conclude that "an analysis other than one limited to predisposition would never be appropriate under due process principles."[45]

Hampton thus settles an issue that has been raised in an increasing number of cases since the Fifth Circuit's decision in *United States v. Bueno,*[46] which held that where the government supplies the contraband allegedly distributed by the defendant, entrapment is established as a matter of law. Although government involvement of the sort disclosed in *Hampton* is to many distasteful in the extreme, it is not illegal for, as *Hampton* noted, the due process clause may be invoked only when government activity "violates some protected right of the *defendant.*"[47] In addition to helping to combat the traffic in narcotics at the street level, *Hampton* should significantly reduce the confusion regarding the defense of entrapment which was left in the wake of *Russell.*

Discovery and Disclosure

In an opinion of particular significance to prosecutors, the Court ruled in *United States v. Agurs*[48] that a prosecutor's failure to provide unrequested material that is helpful to the defense does not deprive a defendant of a fair trial under the rule of *Brady v. Maryland.*[49] The majority opinion, written by the Court's newest member, Mr. Justice Stevens, clarified two questions that long have troubled both prosecutors and defense counsel: (1) the significance of the failure of defense counsel to request certain material; and (2) the standard by which the failure of the prosecutor to volunteer exculpatory material is to be tested.

As to the first question, the Court declared that there was no significant difference between cases in which there is only a general request for *Brady* material and one in which there has been no request at all. This is so because in a general request situation, in which exculpatory material may be unknown to defense counsel, a prosecutor is given no better notice by a general request than if no request is made. On the other hand, if the material is so obviously exculpatory that it necessarily puts the prosecutor on notice of a duty to produce, that duty arises even if no request is made.

As to the second question, the standard which governs the prosecutor's failure to volunteer exculpatory material is not the good or bad faith of the prosecutor, but rather the materiality of the undisclosed information as it pertains to the guilt or innocence of the defendant. This is to be determined by examining the entire record with a view toward whether the omission creates a reasonable doubt about guilt.

This term also brought further definition of what constitutes a "statement" of a government witness under the Jencks Act.[50] In *Goldberg v. United States,*[51] the government declined to turn over to defense counsel certain writings of government lawyers of conversations with the government's key prosecution witness. The government's argument in refusing to produce the writings following a defense Jencks Act request was that the writings were the work product of government counsel. The Court unanimously agreed that the Jencks Act requires government counsel upon appropriate request to produce any writing relating to the subject matter of a prosecution witness' testimony if the statement has been "signed or otherwise adopted or approved"[52] by the witness. The Court also agreed that there is no work product exception for government lawyers for statements that are otherwise producible under the Jencks Act. According to Justice Brennan, writing for the Court, any matter contained in the writings that could not fairly be said to be the witness' own statements or that constituted government counsel's selection, interpretations and interpolations may properly be excised under the Act.[53] Thus, "the primary policy underlying the work product doctrine—*i.e.,* protection of the privacy of an attorney's mental processes . . . is adequately safeguarded by the Jencks Act itself."[54]

[44] 425 U.S. at 490.
[45] *Id.* at 493.
[46] 447 F.2d 903 (5th Cir. 1971).
[47] 425 U.S. at 490 (emphasis in the original).
[48] 96 S.Ct. 2392 (1976).
[49] 373 U.S. 83 (1963).
[50] 18 U.S.C. §3500 (1970).
[51] 425 U.S. 94 (1976).
[52] 18 U.S.C. §3500(e)(1) (1970).
[53] See 18 U.S.C. §3500 (c) (1970).
[54] 425 U.S. at 106.

Pre-Trial Publicity

In deciding *Nebraska Press Association v. Stuart,*[55] the Court resolved a fair trial—free press conflict in favor of the right of the press to be free of prior restraints. The conflict arose in a highly publicized murder case in which the trial court had entered a pre-trial gag order which substantially restricted press coverage of the trial.[56] Emphasizing that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights,"[57] the Court determined that the gag order was not justified because there were alternative measures, such as those enunciated in *Sheppard v. Maxwell,*[58] which adequately would have protected the defendant's right to a fair trial. Moreover, the gag order was found to be an unworkable method of protecting the defendant's right to a fair trial because of the problems inherent in managing and enforcing a pre-trial restraining order. Finally, the Court also found part of the order to be vague and overbroad.

Nebraska Press Association is particularly significant because it is the first prior restraint case to be considered by the Court which involved restrictive orders entered to protect a defendant's right to a fair trial. Unanswered, however, is the question of whether a prior restraint in a situation similar to that involved in *Nebraska Press Association* might ever be justifiable.

Capital Punishment

In a series of cases that will have a substantial impact on the administration of justice in the United States, the Court ruled this term that capital punishment, at least for the crime of murder, does not invariably violate the Constitution. In *Gregg v. Georgia,*[59] *Proffitt v. Florida*[60] and *Jurek v. Texas,*[61] all of which involved defendants charged with murder, the Court declared that the particular state capital punishment statutes passed constitutional muster, while the statutes involved in *Woodson v. North Carolina*[62] and *Roberts v. Louisiana*[63] were held violative of the eight and fourteenth amendments. The Court ruled in *Gregg* that capital punishment is not *per se* unconstitutional.[64] After reviewing the death penalty cases that had been before the Court over the years, including its ruling in *Furman v. Georgia,*[65] the plurality[66] pointed out that the constitutionality of capital punishment long had been both assumed and asserted. The Court then directed its attention toward an "assessment of contemporary values," to be determined by "objective indicia that reflect the public attitude toward a given sanction."[67] Such an assessment was necessary, according to the plurality, because the "Eighth Amendment has not been regarded as a static concept."[68]

In analyzing contemporary values, the Court concluded that, in light of the enactment in the wake of *Furman* of death penalty statutes in at least thirty-five states, it was evident that a large proportion of American society believed capital punishment to be an appropriate and necessary sanction. Additionally, the actions of juries in continuing to impose the death penalty following *Furman* was seen as another objective index of contemporary values.

In addition to assessing contemporary values, the Court deemed it necessary to decide whether the death penalty accorded with the "dignity of man"[69] in that it was not excessive. "Excessiveness" was defined as unnecessary and wanton infliction of pain and as a sanction grossly unproportionate to the severity of the crime. Considering this issue, the Court looked to what it believed to be the two main social purposes of capital punishment: retribution and deterrence. Retribution, the Court found, was essential to an ordered society. Although studies of the deterrent value of capital punishment disclosed

[55] 96 S.Ct. 2791 (1976).

[56] The gag order which the Court reviewed was a modification by the Nebraska Supreme Court of the trial court's order.

[57] 96 S.Ct. at 2802.

[58] 384 U.S. 333 (1966).

[59] 96 S.Ct. 2909 (1976).

[60] 96 S.Ct. 2950 (1976).

[61] 96 S.Ct. 2950 (1976).

[62] 96 S.Ct. 2978 (1976).

[63] 96 S.Ct. 3001 (1976).

[64] That ruling was reaffirmed in the other four death penalty cases.

[65] 408 U.S. 238 (1972). *Furman* barred executions under state capital punishment statutes which were in existence at the time of the decision.

[66] In each case, a plurality composed of Justices Stewart, Powell and Stevens wrote the lead opinion. Justice White, joined by Chief Justice Burger and Justice Rehnquist, concurred in *Gregg v. Georgia, Proffitt v. Florida,* and *Jurek v. Texas,* and dissented in *Woodson v. North Carolina* and *Roberts v. Louisiana.* Justice Blackmun, in one-line statements, concurred in the judgments in *Gregg, Profitt* and *Jurek* and dissented in *Woodson* and *Roberts.* Justices Brennan and Marshall dissented in *Gregg, Proffitt* and *Jurek* and concurred in the judgments in *Woodson* and *Roberts.*

[67] 96 S.Ct. at 2925.

[68] *Id.*

[69] *Id.*

inconclusive results, the Court suggested that deterrence is an issue which should properly be resolved by the various state legislatures. As to the second aspect of excessiveness, the Court found that, at least for the crime of murder, the death penalty was not disproportionate because "it is an extreme sanction, suitable to the most extreme of crimes." [70] Accordingly, the Court held that:

> [T]he death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it. [71]

The precise holding with respect to the *per se* constitutionality of capital punishment reflects the essential concerns of the plurality in its consideration of the capital sentencing statutes involved respectively in *Gregg, Proffitt, Jurek, Woodson* and *Roberts*. Essentially, the Court found the Georgia, Florida and Texas statutes to be constitutionally sound because each statute contained procedures that would require the sentencing tribunal, whether jury or judge, to consider the circumstances of the crime and the criminal before imposing sentence, and to focus on the characteristics of the convicted defendant. Moreover, each statute provided for review in a manner that would ensure that similar results were reached in similar cases. Because the procedures set forth in the statutes carefully controlled the sentencing tribunal's discretion by providing objective standards to guide its use of information relevant to the imposition of sentence, the concern expressed in *Furman*—that the death penalty not be imposed in an arbitrary or capricious manner—had been met by the Georgia, Florida and Texas statutes.

On the other hand, the mandatory death penalty statutes of North Carolina and Louisiana were deemed violative of the eighth and fourteenth amendments because: (1) analysis of the actions of legislatures and juries revealed that mandatory imposition of the death penalty did not reflect contemporary values; (2) North Carolina's and Louisiana's statutes did not eliminate the vice of unbridled jury discretion which was the central concern of *Furman*; and (3) neither statute provided for "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." [72]

Conclusion

Clearly, the decisions of the Supreme Court this term reflect a tougher stance on law enforcement. This is as it should be, for numerous decisions rendered in the 1960's resulted in the freeing of obviously guilty defendants on technicalities which were not constitutionally mandated. The return of the pendulum toward stricter law enforcement promises the beginning of a new and more appropriate balancing between societal rights and due process toward persons accused of transgressing those rights.

[70] *Id.* at 2932.
[71] *Id.*
[72] 96 S.Ct. at 2991.