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Confronting the True Meaning of the Establishment of Religion Clause

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CONFRONTING THE TRUE MEANING OF THE ESTABLISHMENT OF RELIGION CLAUSE

In *Walz v. Tax Commission*[1] the Supreme Court for the first time considered the constitutionality of a state law which exempted real property used exclusively for religious purposes from ad valorem taxation. Walz, a New York City property owner, attacked the validity, under the first and fourteenth amendments, of certain provisions of New York's Constitution[2] and real property tax laws.[3] He asserted that, by virtue of these property tax exemptions for religious institutions, he was being forced to support the establishment of religion.

On appeal, the Supreme Court affirmed the lower court judgment[4] against Walz. In an opinion by Mr. Chief Justice

[1] 397 U.S. 664 (1970).

[2] N. Y. CONST., art. XVI, §1 provides in part:
> Exemptions from taxation may be granted only by general laws. Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more such purposes and not operating for profit.

[3] N. Y. REAL PROP. TAX LAWS, § 420 (1) (McKinney Supp. 1960) provides in part:
> Real property owned by a corporation or association organized exclusively for the moral or mental improvement of men and women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, public playground, scientific, literary, bar association, medical society, library, patriotic, historical or cemetery purposes . . . and used exclusively for carrying out thereupon one or more of such purposes . . . shall be exempt from taxation as provided in this section.

[4] Walz v. Tax Comm'n, 24 N.Y.2d 30, 246 N.E.2d 517, 298 N.Y.S. 2d 711 (1969), *aff'd*, 397 U.S. 664 (1970).

Burger, expressing the view of five members, the New York exemption was upheld because: (1) the exemption was not limited to religious activities, but was granted to a broad class of non-profit organizations; and (2) the exemption granted to religious organizations created only a minimal church-state involvement which was more desirable than the involvement which would result if religious organizations were taxed.

The limited and well-defined factual basis for the attack by Walz presented the most potent challenge yet made against the establishment clause of the first amendment. Each of the Court's first amendment religion cases, subsequent to the incorporation of the first amendment religion clauses into the fourteenth amendment,[5] had contained broad factual situations which allowed the Court a degree of latitude in formulating its decisions.[6] There had always been a basis for the argument that religion was an incidental beneficiary while the public at large was the primary beneficiary. However, the tax provisions challenged by Walz exempted property used exclusively for religious purposes; thus, religion was the sole beneficiary.

The absence of any prior decisions specifically ruling on

[5] Cantwell v. Connecticut, 310 U.S. 296 (1940).

[6] These cases primarily involved the various aspects of direct and indirect public support for parochial schools and religious instruction in public schools. Everson v. Board of Educ., 330 U.S. 1 (1947) (use of tax funds to pay costs of transportation to parochial schools); McCollum v. Board of Educ., 333 U.S. 203 (1948) (religious instruction in public schools); Zorach v. Clauson, 343 U.S. 306 (1952) (permissive "released time" religious instruction in public schools); Engel v. Vitale, 370 U.S. 421 (1962) (voluntary in-school prayer); School Dist. v. Schempp, 374 U.S. 203 (1963) (mandatory in-school religious exercises); Board of Educ. v. Allen, 392 U.S. 236 (1968) (use of public funds to furnish books for students attending parochial schools).

the constitutionality of religious tax exemptions[7] forced the Court to rely on earlier cases which had interpreted the general meaning of the first amendment religion clauses.[8] In adjudicating the controversies which had arisen under the first amendment religion clauses, the Court traditionally had adhered to a course of constitutional neutrality. In so doing, the Court had maintained a delicate balance between inhibiting the free exercise of religion and preventing its establishment. The Court had refrained from applying a literal meaning to the religion clauses by viewing their purpose as merely stating an objective to be achieved, not as a mandate which must be followed strictly. This approach had resulted in what appeared to be internal inconsistencies in the Court's decisions. These decisions had been further complicated by the absence of a universal criteria by which the cases could be reconciled. These problems were recognized by the Court in *Walz*.

> The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could

[7] Two cases previously had been dismissed by the Court for failure to present a substantial federal question. Lundberg v. County of Alameda, 46 Cal. 2d 644, 298 P.2d 1, *appeal dismissed sub nom.* Heisey v. County of Alameda, 352 U.S. 921 (1956) (tax on real property); General Fin. Corp. v. Archetto, 93 R.I. 372, 176 A.2d 73 (1961), *appeal dismissed,* 369 U.S. 423 (1962) (tax on tangible and intangible property). Certorari was denied in a third case. Murray v. Comptroller of the Treasury, 241 Md. 383, 216 A.2d 897, *cert. denied,* 385 U.S. 816 (1966).

[8] In Everson v. Board of Educ., 330 U.S. 1, 15 (1947), Mr. Justice Black, speaking for the five-four majority, stated:

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. *Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.* (emphasis added)

Yet, within the same opinion, the Court upheld the use of tax-raised public funds to pay the costs of transporting children to parochial schools.

> well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion.[9]

By refusing to adopt a literal interpretation of the first amendment religion clauses which would have precluded any interrelationship between church and state, the Court had acknowledged that the coexistence of the two clauses necessarily required some nexus. However, the demarcation line between permissible and impermissible governmental actions could be determined only on a case-by-case basis. Accordingly, any general principles which the Court had formulated in this area were developed in a series of cases. Any attempted extraction of isolated language within a single opinion could lead to an apparent inconsistency in the findings of the Court in a subsequent case.[10]

In deciding the *Walz* case, the Court utilized the *primary effect* test which it had formulated in earlier religion cases.[11] This test considers two aspects of each legislative enactment: (1) the purpose of the enactment; and (2) the *primary effect* of the enactment. If either the purpose or the *primary effect*

[9] 397 U.S. at 669.

[10] The danger of possible constitutional contradiction was recognized by the Court in the *Walz* opinion. Mr. Chief Justice Burger, speaking for the majority, stated:

> The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these [religion] clauses that seemed clear in relation to the particular cases but have limited meaning as general principles.

397 U.S. at 668.

[11] McGowan v. Maryland, 366 U.S. 420 (1961); School Dist. v. Schempp, 374 U.S. 203, 222 (1963).

"is the advancement or inhibition of religion", the enactment is proscribed by the establishment clause.[12]

Including property used exclusively for religious purposes within a broad class of tax-exempt property owned by nonprofit and quasi-public corporations indicated a legislative intent to exempt selectively from taxation those institutions which are regarded as beneficial to the community. This exemption was viewed as a historical right designed to foster the moral or mental improvement of the community. This right existed independent of the "good works" theory for exempting church property from taxation which had been developed by numerous state courts.[13] Adoption of the "good works" rationale, the Court reasoned, would foster a subjective basis for the exemption of church property. Because the scope of the activities of the various churches varies greatly, a subjective standard necessarily would result in "producing the kind of day-to-day-relationship which the policy of neutrality seeks to minimize."[14]

The Court's examination of the effect of the exemption required a determination of whether the legislation operated as a direct subsidy. Numerous authors who have advanced various theories on this subject have reached dissimilar con-

[12] Board of Educ. v. Allen, 392 U.S. 236, 243 (1968), *quoting* School Dist. v. Schempp, 374 U.S. 203, 222 (1963).

[13] In affirming the judgment against Walz, the New York Court of Appeals, citing numerous cases, noted that "courts throughout the country have long and consistently held that the exemption of such real property from taxation does not violate the Constitution of the United States." 24 N.Y.2d 30, 31, 246 N.E.2d 517, 518, 298 N.Y.S.2d 711, 712 (1969); *See also* Fellman, *Separation of Church and State in the United States: A Summary View*, 1950 WIS. L. REV. 427, 454; Stimson, *The Exemption of Property from Taxation in the United States*, 18 MINN. L. REV. 411, 416 (1934).

[14] 397 U.S. at 674.

clusions.[15] Since an unrestricted allocation of tax-raised funds to religious organizations clearly would be unconstitutional,[16] a tax exemption for church property would be equally unconstitutional if there were not a significant distinction between an appropriation and an exemption. The Justices were divided on whether such a distinction existed. The majority concluded that an exemption was not a subsidy, reasoning that a subsidy requires the transfer of public funds while an exemption is only an abstention from collection at the source. Thus, according to the majority, churches were being permitted merely to retain undiminished the contributions which they had received from their memberships. On the other hand, Mr. Justice Douglas, who strongly dissented, argued that the exemption is in actuality a subsidy because the economic result is identical. Answering this argument, the majority considered the economic effect of an exemption to be indirect and therefore not violative of the first amendment.

The Court conceded that both taxation and exemption would give rise to a degree of church-state involvement. Upholding the constitutionality of the tax exemption was considered desirable in order to prevent the direct involvement which would naturally follow through "tax valuation of church property, tax liens, tax foreclosures and the direct confronta-

[15] *See generally* Bitker, *Churches, Taxes and the Constitution,* 78 YALE L. J. 1285 (1969); Cohen, *Constitutionality of Tax Exemptions Accorded American Church Property,* 30 ALBANY L. REV. 58 (1966); Giannella, *Religious Liberty, Non-Establishment, and Doctrinal Development,* 81 HARV. L. REV. 513, 551 (1968); Korbel, *Do the Federal Income Tax Laws Involve an "Establishment of Religion"?,* 53 A.B.A.J. 1018 (1967); Wolder, *Income and Real Estate Tax-Exemption Problems of Churches and Associations,* 45 TAXES 613 (1967); Note, *The Establishment Dilemma: Exemption of Religiously Used Property,* 4 SUFFOLK L. REV. 533 (1970).

[16] In McCollum v. Board of Educ., 333 U.S. 203 (1948) and Engel v. Vitale, 370 U.S. 421 (1962), the Court declared unconstitutional a direct tax subsidy for religious purposes.

tions and conflicts that follow in the train of those legal processes."[17] This conclusion was reached by considering two factors: (1) whether the involvement would be excessive; and (2) whether the nature and duration of the involvement would ultimately lead to an "impermissible degree of entanglement."[18]

The Court realized that the granting of tax exemptions to religious organizations resulted in indirect economic benefits, but concluded that:

> The hazards of churches supporting government are hardly less in their potential than the hazards of government supporting churches; each relationship carries some involvement rather than the desired insulation and separation.[19]

By upholding the exemption, the Court reasoned that it could avoid the entanglements which may result if the exemption were denied. In summary the Court stated:

> The exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches. It restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other.[20]

Perhaps the most important result of the *Walz* decision is the Court's recognition that the wall beween church and state is a legal fiction. The height, breadth and composition

[17] 397 U.S. at 674. Furthermore, as noted by Mr. Justice Brennan in his concurring opinion, the denial of the exemption could conflict with the mandate of the free exercise clause. 397 U.S. at 680. *Cf.* Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969); Maryland & Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367, 368 (1970) (Brennan, J., concurring).

[18] 397 U.S. at 675.

[19] *Id.*

[20] *Id.* at 676.

of the wall has been the central topic of a lively debate which has raged for more than two decades. *Everson v. Board of Education*[21] established a wall of gigantic proportions. Subsequent decisions diminished the strength of the wall by granting exceptions to the basic doctrine which required absolute separation between church and state. One writer has noted:

> The wall has done what walls usually do: it has obscured the view. It has lent a simplistic air to the discussion of a very complicated matter. Hence it has caused confusion whenever it has been invoked. Far from helping to decide cases, it has made opinions and decisions unintelligible. The wall is offered as a reason. It is not a reason; it is a figure of speech.[22]

If, in fact, the wall has become a "permeable membrane,"[23] what guidelines are left to lend predictability to what the Court will do in the future? How can a state avoid an impermissible involvement between church and state when granting tax exemptions to religious organizations? In light of the *Walz* decision, one obvious answer is a broadly-worded exemption statute. Another method would be a proper application of the test set out in *School District v. Schempp*.[24]

The broadly worded statute in *Walz* allowed the Court to adroitly sidestep the basic establishment issue. Religion was only one of many activities covered by the statute. By considering the statute as a whole, the Court was not forced to rule on the constitutionality of a statute exempting from taxation only church property. As long as the Court is able to discern a valid secular purpose for a legislative enactment, it probably will not examine its separate parts. To do otherwise would force a direct confrontation between church and state which the Court apparently seeks to avoid. The Court fully

[21] 330 U.S. 1 (1947).
[22] Hutchins, *The Future of the Wall*, in THE WALL BETWEEN CHURCH AND STATE 17, 19 (D. Oaks ed. 1963).
[23] *Id.* at 20.
[24] 374 U.S. 203 (1963).

appreciates the fact that church and state must cooperate in many joint endeavors in which each aids the other, including church-state weddings, tax exemptions, chaplains in the military services.[25] When the words of a particular statute are not pointed clearly in one direction it has been asserted that the the statutory language may have "a far greater influence upon the decision than theoretical doctrines of interpretation."[26] As noted by the Court, "it is an essential part of adjudication to draw distinctions, including fine ones, in the process of interpreting the Constitution."[27]

The *Schempp* test for church-state neutrality possesses the same irresistible element of simplicity which prolonged the existence of the wall doctrine. The *Schempp* test, as it is presently advanced, can serve safely only as a general guideline and not as an absolute standard for determining the proper bounds of church-state relationships. According to the *Schempp* test, a law must have a central secular purpose which clearly outweighs any incidental religious purpose. It is a misnomer to label a religious purpose as incidental, because, although the religious purpose may be incidental to the state, it may have overwhelming religious significance for the church. When this condition is present, both church and state purposes co-exist, but the state's secular purpose must be clearly and overwhelmingly dominant. Also, the method by which the secular purpose is achieved must be secular in nature. It was the use of a religious method, religious exercises, to accomplish a secular

[25] For a more extensive list of governmental accommodations to religion, see Paulsen, *Constitutional Problems of Utilizing A Religious Factor In Adoptions and Placement of Children,* in THE WALL BETWEEN CHURCH AND STATE 117 (D. Oaks ed. 1963); School Dist. v. Schempp, 374 U.S. 203, 299-304 (1963) (Brennan, J., concurring); Kurland, *The School Prayer Cases,* in THE WALL BETWEEN CHURCH AND STATE 142 (D. Oaks ed. 1963).

[26] Van Alstyne, *Tax Exemption of Church Property,* 20 OHIO ST. L.J. 461, 504 (1959).

[27] 397 U.S. at 679.

goal, moral development, which led to the Court's adverse ruling in at least one school prayer case.[28] If the secular purpose of a statute is subservient to its religious purpose because of the method selected to implement it, the statute will be unconstitutional.

The difficulty in applying the *Schempp* test lies in determining the effect of the statute. This test does not contain criteria by which it can be determined objectively whether a statute advances or inhibits religion. It is obvious from even a casual examination of the Court's earlier decisions that what the Court says and does in any one case may conflict.[29] Apparently, the only requirement is that the church not receive a greater share of the benefits than the state. If a statute proportionately increases the influence of both church and state, so that their respective influence remains constant, the Court probably will hold that the religious effect is neutral. It is irrelevant that, when the religious effect is viewed separately, it clearly appears that religion has benefited. As long as religion does not benefit more than the state, religion has not been advanced, and the statute will be constitutional.

Perhaps the two walls theory, advanced by one writer,[30] should be adopted by the Court. At the very least, this device would serve as an illustrative aid to reconcile the Court's decisions which appear to be in hopeless conflict. Under this theory there are two parallel walls; one belongs exclusively to the state while the other belongs exclusively to the church. Between the walls is an area in which church and state co-exist. Within this *no man's land* exist all matters of joint church-state concern. The state has exclusive control over this area and independently determines which matters are proper for joint concern. The state, under the first amendment, has

[28] School Dist. v. Schempp, 374 U.S. 203, 223-224 (1963).

[29] Everson v. Board of Educ., 330 U.S. 1 (1947).

[30] Hammett, *The Homogenized Wall*, 53 A.B.A.J. 929, 934 (1967).

a broad discretionary range within which it may bestow favors on the church — favors which may constitutionally be extended to the church in order to secure its cooperation on matters in which the state is interested for purely secular reasons. The granting of an ad valorem tax exemption for all property used exclusively for religious purposes well may be a permissible favor. The *Walz* decision failed clearly to resolve this issue.

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O'NEAL v. STATE

O'Neal was served with a subpoena duces tecum which required him to appear bfore a grand jury investigating certain practices in the bail bond business of Oklahoma County. Installed formally as a witness, O'Neal's testimony was given without any warning against self-incrimination or promises of immunity. His testimony resulted in a virtual confession when he revealed the making, under oath, of a false justification on a bail bond. At the conclusion of this testimony, the County Attorney filed an information charging O'Neal with the crime of perjury at the time of making the bond justification. At his trial, grand jurors were allowed to relate defendant's incriminating grand jury testimony. Subsequently, defendant was convicted in the District Court of Oklahoma County. In reviewing the record of his trial, the Oklahoma Court of Criminal Appeals concluded that the conviction was based solely on the introduction of the grand jurors' testimony and that perjury could not have been found in the absence of this evidence. The court further determined that defendant's constitutional right against self-incrimination had been violated at the grand jury proceeding. Thus, evidence based on his testimony at that proceeding was tainted, and the trial court committed reversible error by admitting this evidence. Therefore, the case was remanded with instructions to dismiss.[1]

[1] O'Neal v. State, 468 P.2d 59 (Okla. Crim. App. 1970).

An Oklahoma statute authorizes a trial court to require grand jurors to disclose testimony given before them where a charge of perjury is based on a witness's testimony before the grand jury.[2] However, as the court indicated, such authorization is not without limitations;[3] it being necessary to consider the constitutional safeguard afforded the individual against compelled self-incrimination.[4]

Generally a witness has been held not to be entitled to a warning of his constitutional rights.[5] Thus, a witness, in order to invoke the privilege against self-incrimination, must assert this right in the course of questioning or it is deemed waived.[6] The court in *O'Neal* acknowledges this general rule and agrees "that the fact a witness appears before the grand jury under subpoena does not show that the witness was 'compelled' and does not prevent the testimony from being 'voluntary.' "[7]

While the above rule has been held to apply to a witness merely summoned to testify much in the capacity of a trial witness, a distinction based on varying standards has just as often been made where it could be ascertained that the grand jury witness has been summoned as a prospective defendant.

[2] OKLA. STAT. tit. 22, § 342 (1961).

[3] 468 P.2d at 66.

[4] OKLA. CONST. art 2, § 21 provides: "No person shall be compelled to give evidence which will tend to incriminate him except as in this Constitution specifically provided...."

[5] United States v. DiMichele, 375 F.2d 959 (3rd Cir.), *cert. denied,* 389 U.S. 838 (1967); United States v. Orta, 253 F.2d 312 (5th Cir.), *cert. denied,* 357 U.S. 905 (1958); United States v. Parker, 244 F.2d 943 (7th Cir.), *cert. denied,* 355 U.S. 836 (1957); United States v. Scully, 225 F.2d 113 (2d Cir.), *cert. denied,* 350 U.S. 897 (1955).

[6] *See, e.g.,* Rogers v. United States, 340 U.S. 367, 370-71 (1951); United States v. Parker, 244 F.2d 943, 946 (7th Cir.), *cert. denied,* 355 U.S. 836 (1957); United States v. Lawn, 115 F. Supp. 674, 677 (S.D.N.Y.), *appeal dismissed sub nom.* United States v. Roth, 208 F.2d 467 (2d Cir. 1953).

[7] 468 P.2d at 67.

Consequently, courts have held that a witness must be warned of his privilege against self-incrimination where he has been charged with a criminal violation or, if it clearly appears at the time he gives testimony, he is the target of a prospective criminal action.[8] The usual dictate is that the witness be in fact a de jure defendant, already under some formal charge or complaint.[9] Even under the most liberal view, the courts have demanded at least some affirmative indication that the witness was a target for prosecution.[10]

United States v. Scully[11] has been widely cited for the holding that "the mere possibility that the witness may later be indicted furnishes no basis for requiring that he be advised of his rights under the Fifth Amendment, when summoned to give testimony before a Grand Jury." Concurring in *Scully,* Judge Frank found no facts which would establish a de facto defendant status. However, Judge Frank suggests that an inquiry into the intention of the prosecutor may be proper beyond the appraisal of the witness's de jure status. "Several state and federal courts have gone further in holding or indicating that warning is necessary if it unmistakably appears that, when a witness is under subpoena before a grand jury,

[8] United States v. Edgerton, 80 F. 374 (D. Mont. 1897); *see, e.g.,* United States v. Luxenberg, 374 F.2d 241, 246 (6th Cir. 1967); United States v. Scully, 225 F.2d 113, 116-19 (2d Cir.) (concurring opinion), *cert. denied,* 350 U.S. 897 (1955); United States v. Lawn, 115 F. Supp. 674, 677 (S.D.N.Y.), *appeal dismissed sub nom.* United States v. Roth, 208 F.2d 467 (2d Cir. 1953).

[9] United States v. Luxenberg, 374 F.2d 241 (6th Cir. 1967); Mulloney v. United States, 79 F.2d 566, 578-79 (1st Cir. 1935), *cert. denied,* 296 U.S. 658 (1936); United States v. Lawn, 115 F. Supp. 674 (S.D.N.Y.), *appeal dismissed sub nom.* United States v. Roth, 208 F.2d 467 (2d Cir. 1953); United States v. Miller, 80 F. Supp. 979 (E.D. Pa. 1948).

[10] *See, e.g.,* Robinson v. United States, 401 F.2d 248, 250 (9th Cir. 1968); United States v. Scully, 225 F.2d 113, 116-19 (2d Cir.) (concurring opinion), *cert. denied,* 350 U.S. 897 (1955).

[11] 225 F.2d 113, 116 (2d Cir.), *cert. denied,* 350 U.S. 897 (1955).

the prosecutor then intends to seek the witness' indictment."[12] But Judge Frank imposes the condition that "the [subsequently] indicted person state under oath, at least on information and belief, specific facts pointing very clearly to the existence of such an intention."[13]

Although, in *O'Neal*, there was no formal charge or complaint made against the defendant prior to his grand jury appearance, the court determined "that this defendant was called before the grand jury for the purpose of obtaining evidence on an anticipated charge, and that the defendant was the target of the investigation."[14] Dissenting, Judge Bussey declared that "the grand jury investigation was a general investigation of the bail bonding business and the defendant was not the 'target' of the investigation."[15] The majority conceded that the trial record failed to affirmatively reflect the prosecutor's intention when he subpoenaed the defendant.[16] However, acording to the majority, it was sufficient if the record revealed that the witness had developed into a potential defendant during the course of interrogation:

> Notwithstanding the fact that the grand jury might have been called for the purpose of inquiring into the bail bond business generally, when it became apparent to the grand jury that the witness was to become a defendant [assuming such fact was not known when the inquiry commenced], the witness should have been excused from further inquiry by the grand jury; or, at his trial before the testimony was admitted, the State should have made a positive showing that the

[12] *Id.* at 116.

[13] *Id.* at 117.

[14] 468 P.2d at 68.

[15] *Id.* at 72.

[16] *Id.* at 67. The court stated: "Whether or not the defendant was actually a target of the investigation, and a potential defendant to a perjury charge, could be answered by only one man, who did not provide the answer. Further, the answer is not contained in the record of trial." *Id.*

> defendant was fully advised of his constitutional rights against self-incrimination; and that he understandingly waived those rights.[17]

Thus, the court found a violation of defendant's constitutional privilege against self-incrimination although he was not a de jure defendant at the time of his grand jury testimony, and despite the fact that a determination could not be made in regard to the subjective intention of the prosecutor in issuing the subpoena duces tecum. Notwithstanding the court's conclusion that *O'Neal* was a target of the grand jury investigation, an analysis of the case indicates that the constitutional violation occurs at that point in the grand jury questioning when the witness is placed in the position that his testimony will necessarily be incriminating. Therefore, in the writer's opinion, *O'Neal* stands for the proposition that interrogation of a witness, where it can be foreseen that the witness would be expected to incriminate himself, is violative of his right not to be compelled to incriminate himself. Hence, the testimony elicited from the defendant, amounting to a confession, did not meet the voluntariness requirement set out in *Smith v. State*.[18]

> Confessions are either voluntary or involuntary. If voluntary, they may be admitted in evidence. If involuntary, they are inadmissible.[19]
> A 'voluntary confession' is one made by an accused freely and voluntarily, without duress, fear or compulsion in its inducement, and with full knowledge of the nature and consequences of the confession.[20]

The Supreme Court, in *Escobedo v. Illinois*[21] and *Miranda v. Arizona*,[22] might well have provided the underpinnings, sub silentio, of the present holding. The *O'Neal* court points out

[17] *Id.* at 68.
[18] 77 Okla. Crim. 142, 140 P.2d 237 (1943).
[19] *Id.* at 237 (Syllabus 1 by the court).
[20] *Id.* (Syllabus 2 by the court).
[21] 378 U.S. 478 (1964).
[22] 384 U.S. 436 (1966).

the necessarily custodial nature of the defendant's subpoenaed testimony. "Had this defendant left, or attempted to leave the grand jury room, the county attorney would have had him arrested and he would have been cited by the court for contempt."[23]

Whether the court of criminal appeals would wish consciously to hold *Escobedo* and *Miranda* applicable to grand jury proceedings, the court in effect applies their rationale to the right to be advised of the privilege against self-incrimnation. In *Miranda* it was said:

> Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling presures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.[24]

The O'Neal court's underlying determination that the distinction between the de jure and the de facto defendant should be removed, should meet with considerable favor. Rejected is the mere technical status of the individual as the dictating circumstance in deciding when the defendant must be advised of his constitutional privilege against self-incrimination. It has been suggested that where the distinction exists "[t]he prosecutor can take advantage of this anomalous treatment by deferring formal charge, summoning a *de facto* de-

[23] 468 P.2d at 67 (footnote omitted.).
[24] 384 U.S. at 467.

fendent before the grand jury and seeking disclosures which ensure indictment and may be used at trial [, and t]he anomaly is heighted by the *de facto* defendant's relative lack of protection, since formal charge makes the *de jure* accused aware of the danger of self incrimination and the need for counsel."[25]

The burden placed upon the prosecutor should be quite apparent. He has the duty of managing his questions and anticipating their ability to elicit incriminating testimony. The former duty may prove damaging, but most likely when the prosecutor fails through undersight, haste, or eagnerness to interrupt his questioning to warn the witness. But these circumstances are mistakes on his part and probably would not justify removing the duty. On the other hand, the duty of anticipating his questions' ability to elicit incriminating testimony may prove more onerous. Ths is a matter of determination on his part and might be expected to be a proper subject of dispute and differing interpretation in which the prosecutor could be given the benefit of doubt. But it seems to this writer that a confession or an admission by an unwarned witness will seldom be tendered in response to the prosecutor's inquiry without that answer, upon retrospective scrutiny, being seen as one of the expected results of the questioning. Therefore, it is conceivable that, in almost all instances where such an unwarned witness responds with an incriminating statement, the statement, under *O'Neal,* will prove inadmissible regardless of the intention of the prosecutor or his expectations regarding the answer. This, of course, excludes those few confessions or admissions which are the product of non sequitor responses. These responses cannot be reasonably expected and therefore would not fall within the rule of *O'Neal.*

Donald H. Darbee

[25] Note, *Self Incrimination by Federal Grand Jury Witnesses: Uniform Protection Advocated,* 67 YALE L.J. 1271, 1277 (1958) (footnotes omitted.) (emphasis in the original).