Journal of Criminal Law and Criminology

Volume 81
Issue 4 *Winter*

Article 8

Winter 1991

Fifth Amendment--Videotaping Drunk Drivers: Limitations on Miranda's Protections

Jacques LeBoeuf

0091-4169/91/8104-883
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 81, No. 4

Printed in U.S.A.

FIFTH AMENDMENT—VIDEOTAPING DRUNK DRIVERS: LIMITATIONS ON *MIRANDA'S* PROTECTIONS

Pennsylvania v. Muniz, 110 S. Ct. 2638 (1990)

I. INTRODUCTION

In *Pennsylvania v. Muniz*,[1] the United States Supreme Court held that the fifth amendment's prohibition against compelled self-incrimination, as interpreted in *Miranda*,[2] did not preclude the introduction at trial of a videotape of a person suspected of operating a motor vehicle under the influence of an intoxicant, despite the fact that, at the time of the recording, the suspect had not been informed of his *Miranda* rights.[3] The Court held that the slurred nature of a suspect's speech and related indicia of a lack of muscular coordination constituted physical, and not testimonial, evidence, and thus lay outside the scope of *Miranda*'s protections.[4] The Court ruled that a question requiring a suspect to perform arithmetic calculation constituted an attempt to elicit incriminating testimonial evidence, and that a response indicating the suspect's inability to calculate was inadmissible at trial.[5] The Court also held that incriminating testimonial evidence offered during the course of routine interrogation designed to obtain information necessary for processing lay outside the scope of *Miranda*'s protections.[6] Finally, the Court declined to extend the concept of implicit interrogation to the administration of sobriety and breathalyzer tests, and held that incriminating testimonial evidence offered during those procedures was admissible at trial.[7]

Chief Justice Rehnquist wrote a separate opinion dissenting from that portion of the ruling which held that a response to a question requiring calculation constituted inadmissible testimonial evi-

1 110 S. Ct. 2638 (1990).
2 Miranda v. Arizona, 384 U.S. 436 (1966).
3 *Muniz*, 110 S. Ct. at 2652.
4 *Id.* at 2645.
5 *Id.* at 2649.
6 *Id.* at 2650.
7 *Id.* at 2651-52.

dence.[8] Justice Rehnquist argued that the question did not force the suspect to face the trilemma of self-incrimination, perjury, or contempt.[9] Justice Rehnquist agreed with the Court that responses to questions designed to elicit information necessary for processing purposes were admissible, but believed it unnecessary to recognize a special exception for such questions. Rather, he reasoned that such questions did not place a suspect in the position of facing the trilemma of truth, falsity, or silence, and thus did not elicit testimonial evidence.[10]

Justice Marshall concurred in the opinion only insofar as it held that a response to a question requiring calculation was testimonial and therefore inadmissible.[11] Justice Marshall dissented from that portion of the opinion which recognized an exception for questions designed to obtain information necessary for processing, believing that such an exception would undermine one of *Miranda's* primary assets—its ease of application—and would lead, consequently, to time-consuming litigation.[12] Justice Marshall also questioned the applicability of such an exception, if recognized, to the facts of this case.[13] Finally, Justice Marshall disagreed with the majority's ruling that incriminating testimony volunteered during the administration of sobriety and breathalyzer tests was not offered in the course of custodial interrogation, believing that the administration of such tests constituted the functional equivalent of express questioning, defined as questions put to a suspect with the knowledge that they are likely to elicit incriminating testimony.[14]

This Note argues that Justice Marshall's position was substantially correct, and that the entire audio portion of the videotape should have been ruled inadmissible as testimonial evidence delivered during express or implicit custodial interrogation. First, Justice Marshall correctly contended that a response to a question requiring calculation constituted testimonial evidence. All three sides of the debate over the physical or testimonial nature of such a response were misguided, because the distinction between the two types of questions cannot be made to hinge on whether such a ques-

---

8 *Id.* at 2653-54 (Rehnquist, C.J., concurring in part, concurring in the result in part, and dissenting in part).

9 *Id.* (Rehnquist, C.J., concurring in part, concurring in the result in part, and dissenting in part).

10 *Id.* at 2654 (Rehnquist, C.J., concurring in part, concurring in the result in part, and dissenting in part).

11 *Id.* (Marshall, J., concurring in part and dissenting in part).

12 *Id.* at 2654-55 (Marshall, J., concurring in part and dissenting in part).

13 *Id.* at 2655-56 (Marshall, J., concurring in part and dissenting in part).

14 *Id.* at 2656-57 (Marshall, J., concurring in part and dissenting in part).

tion forces the suspect to face the trilemma of truth, falsity, or silence. This Note argues that, of the many possible policy foundations for the privilege against self-incrimination, the desire to avoid the cruel trilemma cannot aid the determination of whether a given piece of evidence is physical or testimonial. Rather, the determination can only be made with reference to a fundamental right to privacy.

This Note disagrees with Justice Marshall over the desirability of a routine booking question exception to the privilege against compelled self-incrimination. Such an exception is arguably necessary, and can be made to comport with *Miranda*'s bright line rule by means of an equally clear statement of the questions to which the exception applies. This Note agrees, however, with Justice Marshall's contention that such an exception, if recognized, could not be applied to the facts of this case. The necessity of the information sought would have to be an element of any definition of the exception, and the facts of this case indicate that the questions put to the defendant were unnecessary.

Finally, this Note agrees with Justice Marshall's contention that the Court was wrong in failing to apply the doctrine of implicit interrogation to the facts of this case. Because the police officers had reason to believe that the defendant would utter incriminating statements while being recorded, and because they quite possibly intended the procedures to elicit such responses, those statements should have been suppressed as the result of implicit custodial interrogation.

II. BACKGROUND

A. THE PROTECTIONS OF *MIRANDA*

The Self-Incrimination Clause of the fifth amendment provides that "no person . . . shall be compelled in any criminal case to be a witness against himself."[15] This provision grew out of the maxim *nemo tenetur seipsum accusare*,[16] which had long been a rule of evidence at English common law.[17] The maxim, and its subsequent incorporation into the Constitution, resulted from a universal abhorrence of the ancient inquisitorial methods of investigation. Under those methods, embodied in the proceedings of the ecclesiastical courts and the Star Chamber, a suspect would be put under oath and com-

15 U.S. CONST. amend. V.

16 No one is bound to accuse himself.

17 *See, e.g.*, Brown v. Walker, 161 U.S. 591, 596-97 (1896).

pelled to incriminate himself.[18] Eventually, such methods were denounced as cruel for a number of reasons. The primary motivation was the belief that such methods forced the suspect to choose between remaining silent, thereby being in contempt of the court; speaking falsely, thereby committing perjury; or speaking the truth, thereby incriminating himself.[19] This predicament came to be known as the cruel trilemma.[20]

In addition to an abhorrence of the cruel trilemma, the Supreme Court has recognized a number of other policy considerations which provide support for the privilege. In *Murphy v. Waterfront Commission of New York Harbor*,[21] the Court stated that the privilege was founded on:

> our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load;' our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life;' our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'[22]

Courts originally interpreted the self-incrimination clause of the fifth amendment as prohibiting only the extraction of confessions in the course of proceedings conducted under oath. In 1964, however, the Supreme Court extended protection to confessions elicited in the course of custodial interrogations conducted by police.[23] In *Escobedo v. Illinois*,[24] the Court ruled inadmissible statements made by a suspect who was ignorant of his rights, deprived of

---

18 Doe v. United States, 487 U.S. 201, 212 (1988). *See also* Andresen v. Maryland, 427 U.S. 463, 470-71 (1976).

19 Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 55 (1964). *See also* Ullman v. United States, 350 U.S. 422, 426 (1956).

20 *Murphy*, 378 U.S. at 55.

21 *Id.*

22 *Id.* (citations omitted); *see also Doe*, 487 U.S. at 213. The Third Circuit, in Rad Services, Inc. v. Aetna Casualty and Surety Co., compiled a similar list of policy considerations. It stated that "[f]our aims in particular support the Fifth Amendment privilege: (1) to discourage inhumane treatment and abuses by the government; (2) to maintain the appropriate state-individual balance of advantages; (3) to avoid subjecting persons to the cruel trilemma of self-accusations, perjury, or contempt; and (4) to protect the private enclave." 808 F.2d 271, 275 n.2 (3d Cir. 1986).

23 Escobedo v. Illinois, 378 U.S. 478 (1964).

24 *Id.*

counsel, and interrogated by police for hours while handcuffed and standing up.[25] The Court justified its extension of the privilege against compelled self-incrimination into the realm of police custodial interrogation by pointing out that such interrogations often create in the mind of the suspect the fear that silence will be construed as an admission of guilt, leaving the suspect to choose between lying and speaking the truth.[26] When it became clear in the years following *Escobedo* that law enforcement officers were finding it difficult to apply the principles of the case to concrete factual situations, the Court addressed the issue once again, in order "further to explore some facets of the problems . . . of applying the privilege against self-incrimination to in-custody interrogation, and to give concrete constitutional guidelines for law enforcement agencies and courts to follow."[27]

As a result, the Court handed down the landmark ruling in *Miranda v. Arizona*,[28] setting forth the now famous procedural safeguards which the Court believed would ensure that no suspect's fifth amendment rights were violated. The Court declared:

> [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean 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. As for procedural safeguards to

---

25 *Id.*

26 *Id.* at 485 (quoting Bram v. United States, 168 U.S. 532, 562 (1897)). The Court has on several occasions justified on similar grounds its extension of the fifth amendment privilege against compelled self-incrimination into the realm of custodial interrogation. In Miranda v. Arizona, the Court stated that "all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning." 384 U.S. 436, 461 (1966). The Court based this ruling, in part, on its finding that custodial interrogation "contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.* at 467.

In Pennsylvania v. Muniz, the Court explained the manner in which the concept of the cruel trilemma could be extended to describe custodial interrogations as well as proceedings conducted under oath. 110 S. Ct. 2638, 2648 n.10 (1990). The Court noted that suspects were compelled to speak, not by the threat of contempt sanctions, but by the 'inherently compelling pressures' recognized in *Escobedo*. *Id.* The Court also noted that the option of speaking falsely was made unavailable, not by the threat of indictment for perjury, but by the possibility that evidence indicating that a suspect lied to the police could be used at trial to support an inference of a guilty conscience. *Id.* The Court concluded that custodial interrogation functioned as the "modern-day analog of the historic trilemma," because it forced suspects to face three choices which were closely analogous to those which comprised the cruel trilemma. *Id.* at 2648-49.

27 *Miranda*, 384 U.S. at 441-42.

28 *Id.*

> be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning.[29]

B. THE DISTINCTION BETWEEN PHYSICAL AND TESTIMONIAL EVIDENCE

Although the obvious goal of the *Miranda* Court was a concrete rule of law accompanied by a precise statement of those circumstances in which the rule applied, it was immediately apparent that the Court's holding contained at least one major flaw. Specifically, the Court's ruling, if interpreted literally, would have prohibited law enforcement officials from obtaining physical evidence. Yet, the Supreme Court had consistently interpreted the fifth amendment as providing no bar against compulsion to produce evidence of a real or physical nature. In *Holt v. United States*,[30] for example, the Court held that a suspect could be made to don an item of apparel believed to have been worn by a murderer.[31] Writing for the Court, Justice Holmes stated that "the prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it [might] be material."[32]

Recognizing that *Miranda* could be construed as prohibiting the compelled production of physical evidence, the Court quickly moved to forestall any such interpretation. Just one week after the Court decided *Miranda*, it handed down its ruling in *Schmerber v. California*.[33] In *Schmerber*, the petitioner was convicted of driving under the influence of alcohol on the basis of an analysis of his blood, a sample of which had been taken over his strenuous objection while he was in the hospital. The petitioner claimed, *inter alia*, that the procedure violated his privilege against compelled self-incrimina-

---

29 *Id.* at 444-45 (footnote omitted).

30 218 U.S. 245 (1910).

31 *Id.* at 252-53. The case involved a murder committed on a military reservation. *Id.* at 246.

32 *Id.*

33 384 U.S. 757 (1966).

tion.[34] The Court ruled that *Miranda*'s protections did not extend to such situations, stating that "the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature . . . ."[35]

The Court extended this reasoning in *United States v. Dionisio*[36] and in *United States v. Wade*.[37] In both cases the Court ruled that suspects could be compelled to repeat aloud a prepared text in order to provide a voice exemplar.[38] Similarly, in *Gilbert v. California*,[39] the Court ruled that a suspect could be compelled to provide a handwriting exemplar.[40] Other cases have held that the privilege against self-incrimination provided no protection against compulsion to submit to fingerprinting,[41] photographing,[42] or the taking of measurements.[43]

Over the years, the Court has delivered several statements regarding the distinction between physical and testimonial evidence. In *Curcio v. United States*,[44] the Court ruled that fifth amendment concerns were implicated only where a suspect was compelled to "disclose the contents of his own mind."[45] Similarly, in *Wade*,[46] the Court held that the fifth amendment privilege extended only to those situations where the accused was compelled to "disclose any knowledge he might have"[47] or to "speak his guilt."[48] In *Couch v. United States*,[49] the Court stated that it is the "extortion of informa-

---

34 *Id.* at 759.

35 *Id.* at 761 (footnote omitted).

36 410 U.S. 1 (1973).

37 388 U.S. 218 (1967).

38 In *Dionisio*, persons suspected of involvement in a gambling racket were compelled to read prepared text for comparison with recordings obtained through the use of a wire tap. 410 U.S. at 2 & 2 n.1. In *Wade*, the defendant, who was suspected of bank robbery, was compelled in a police lineup before bank employees to repeat words to the effect of "put the money in the bag," the words allegedly uttered by the robber. 388 U.S. at 220.

39 388 U.S. 263 (1967).

40 The handwriting contained in the exemplar was compared with that contained in a note used by a bank robber. *Id.* at 266.

41 United States v. Kelly, 55 F.2d 67 (2d Cir. 1932) (defendant accused of selling liquor; fingerprints were compared with those found on the bottle).

42 Shaffer v. United States, 24 App. D.C. 417 (1904) (murder suspect identified on the basis of photograph taken after arrest).

43 United States v. Cross, 20 D.C. (9 Mackey) 365 (1892) (height of murder suspect measured to determine whether or not he could have fired the bullet that killed his wife).

44 354 U.S. 118 (1957).

45 *Id.* at 128.

46 388 U.S. 218 (1967).

47 *Id.* at 222.

48 *Id.* at 223.

49 409 U.S. 322 (1973).

tion from the accused himself that offends our sense of justice."[50] Finally, in *Doe v. United States*,[51] the Court stated that "in order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information."[52]

C. THE DOCTRINE OF IMPLICIT INTERROGATION

On two occasions, the Supreme Court has recognized that the privilege against compelled self-incrimination may be invoked not only when a suspect is subjected to *explicit* interrogation, but also when the suspect is subjected to *implicit* interrogation. The Court based this extension of *Miranda*'s protections on its belief that, because certain situations subject a suspect to the same inherently compelling pressures as do interrogations, those situations operate as the functional equivalents of express interrogation.

In *Rhode Island v. Innis*,[53] the leading case in this area, the Court first recognized, in dicta, this genre of compulsion. In *Innis*, a man suspected of armed robbery was arrested and informed of his *Miranda* rights. He then requested to speak with an attorney, and in accordance with the proscriptions of *Miranda*, all interrogation ceased. While he was being transported to the station, the three police officers accompanying him discussed the missing weapon. One of the officers, noting the proximity of the scene of the crime to a school for disabled children, observed that there were "a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves."[54] The suspect's more humane inclinations thus aroused, he instructed the police to turn the car around, and he led them to the spot where he had hidden the shotgun.[55] This evidence was used to convict him.[56]

While the Court held that the technique employed by the officers did not constitute interrogation for the purposes of *Miranda*,[57] the Court nonetheless significantly expanded its definition of interrogation for purposes of *Miranda*.[58] The Court explained,

---

50 *Id.* at 328.
51 487 U.S. 201 (1988).
52 *Id.* at 210.
53 446 U.S. 291 (1980).
54 *Id.* at 294-95.
55 *Id.* at 295.
56 *Id.* at 296.
57 *Id.* at 303.
58 *Innis* is widely recognized as greatly expanding the type of conduct considered to be interrogation. *See, e.g.*, Arizona v. Mauro, 481 U.S. 520, 526-27 (1987) (after *Innis*, interrogation for the purposes of *Miranda* was not limited to express questioning).

> [T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. . . . A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation.[59]

The Court stressed the fact that its expanded definition of interrogation "focuse[d] primarily on the perceptions of the suspect, rather than on the intent of the police."[60] The Court further indicated that "[a]ny knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining what the police should have known . . . ."[61] The Court concluded, however, that even this expanded definition was of no avail to Innis, since there was "nothing in the record to suggest that the officers were aware that the respondent was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children."[62]

While the Supreme Court has yet to apply the doctrine of implicit interrogation recognized in *Innis*, it recently reaffirmed its commitment to it. In *Arizona v. Mauro*,[63] the suspect confessed to having killed his son before invoking his right to counsel.[64] In accordance with the proscriptions of *Miranda*, all interrogation ceased. Later, when the suspect's wife requested to speak to him, the police consented only on the conditions that an officer be present and that the conversation be recorded.[65] At trial, the prosecution introduced into evidence the recording of the conversation to rebut Mauro's defense of temporary insanity.[66] In a narrowly divided opinion,[67] the Supreme Court ruled that the police officers' actions did not rise to the level of implicit interrogation.[68] The Court reasoned that even though the police knew that Mauro was likely to make incriminating statements while speaking to his wife,[69] there was no evidence showing that their intent in allowing the conversa-

---

59 *Innis*, 446 U.S. at 300-01 (footnotes omitted).
60 *Id.* at 301.
61 *Id.* at 302 n.8.
62 *Id.* at 302.
63 481 U.S. 520 (1987).
64 *Id.* at 521-22.
65 *Id.* at 522.
66 *Id.* at 523.
67 Justices Stevens, Brennan, Marshall, and Blackmun dissented.
68 *Mauro*, 481 U.S. at 527.
69 *Id.* at 528 n.6.

tion only in the presence of an officer was to elicit incriminating statements.[70]

D. THE EXCEPTION FOR ROUTINE BOOKING QUESTIONS

One final limitation on the privilege against compelled self-incrimination creates an exception for routine booking questions. The exception finds its genesis in the passage from *Innis*[71] excerpted above,[72] where the Court indicated that the protections of *Miranda* extended to police actions "other than those normally attendant to arrest and custody . . ."[73] Relying on this phrase, appellate courts have recognized another exception to the protections of *Miranda*. For example, in *United States v. Horton*,[74] the Eighth Circuit stated that "*Miranda* does not apply to biographical data necessary to complete booking or pretrial services."[75] Similarly, in *Gladden v. Roach*,[76] the Fifth Circuit held that "biographical questions, which are part of the booking routine and are not intended to elicit damaging statements, are not interrogation for fifth amendment purposes. Thus, it is permissible for officers to ask straightforward questions to secure the biographical data necessary to complete the booking process."[77] Finally, in *United States v. Gotchis*,[78] the Second Circuit ruled that "[r]outine questions about a suspect's identity and marital status, ordinarily innocent of any investigative purpose, do not pose the dangers *Miranda* was designed to check . . . ."[79] Similar sentiments have been expressed by a majority of the courts of appeals.[80]

---

70 *Id.* at 528. Note that the Court appears to have modified the test for implicit interrogation. Compare this reasoning with the Court's statement in Rhode Island v. Innis that the test "focused primarily on the perceptions of the suspect, rather than on the intent of the police." 446 U.S. 291, 301 (1980).

71 446 U.S. 291 (1980).

72 *See supra* note 59 and accompanying text.

73 446 U.S. at 300-01.

74 873 F.2d 180 (8th Cir. 1989).

75 *Id.* at 181 n.2.

76 864 F.2d 1196 (5th Cir.), *cert. denied*, 109 S. Ct. 3192 (1989).

77 *Id.* at 1198.

78 803 F.2d 74 (2d Cir. 1986).

79 *Id.* at 79.

80 *See, e.g.*, United States v. Taylor, 799 F.2d 126, 128 (4th Cir. 1986), *cert. denied*, 479 U.S. 1093 (1987) (stating that "[o]rdinarily, the request for identifying information, however phrased, is inherently ministerial and does not violate *Miranda*"); United States v. Avery, 717 F.2d 1020, 1025 (6th Cir. 1983), *cert. denied*, 466 U.S. 905 (1984) (stating that "[o]rdinarily, however, the routine gathering of biographical data for booking purposes should not constitute interrogation under *Miranda*"); Robinson v. Percy, 738 F.2d 214, 219 (7th Cir. 1984) (stating that "*Miranda* does not apply when officers ask a suspect routine processing questions"); United States v. Booth, 669 F.2d 1231, 1238 (9th

Although prior to this case the Supreme Court had not directly addressed the exception for routine booking questions, it nonetheless expressed its approval. In *South Dakota v. Neville*,[81] the Court ruled that evidence concerning a suspect's refusal to be subjected to a blood-alcohol test could be admitted at trial.[82] The Court concluded that such a refusal, being the product of a choice, was not coerced by the requesting officer, and thus could not be considered the result of interrogation for the purposes of *Miranda*.[83] In arriving at this conclusion, the Court raised and rejected the argument that a police officer's inquiry into whether a suspect wished to submit to the test constituted interrogation for the purposes of *Miranda*.[84] The Court based this decision on an exception, grounded in the language from *Innis*, for routine booking questions, and on its finding that the police inquiries in question were in fact quite routine and "highly regulated."[85]

E. STATE OF THE LAW

The carnage on our nation's highways caused by the operation of motor vehicles by inebriated drivers is an increasingly vexing problem. As a result, many states have recently enacted strict drunk driving laws, and many law enforcement agencies have begun utilizing a number of innovative methods of ensuring that violators are brought to justice. The use of videotapes has proved to be an effective means of accomplishing this result, and is becoming increasingly widespread.[86] Prior to this case, the Supreme Court had not addressed the question of the admissability at trial of the evidence thus obtained. A number of state courts, however, had done so, and most had agreed that the fifth amendment did not bar the introduction at trial of the video portions of the tapes at issue.[87] A similar consensus had not emerged, however, with regard to the audio portions of the tapes. Some state courts had allowed admission at trial

---

Cir. 1981) (stating that "[o]rdinarily, the routine gathering of background biographical data will not constitute interrogation").

81 459 U.S. 553 (1983).

82 *Id.* at 564.

83 *Id.*

84 *Id.* at 564 n.15.

85 *Id.*

86 The use of videotapes for this purpose is common in several states, including Alaska, Florida, Illinois, Louisiana, Massachusetts, New York, Oregon, and Texas. Note, *Self-Incrimination Issues in the Context of Videotaping Drunk Drivers: Focusing on the Fifth Amendment*, 10 HARV. J.L. & PUB. POL'Y 631, 631 n.2 (1987) [hereinafter Note].

87 *See, e.g.*, Palmer v. State, 604 P.2d 1106 (Alaska 1979); People v. Fenelon, 14 Ill. App. 3d 622, 303 N.E.2d 38 (1973).

of the entire audio portions of such tapes,[88] some admitted only those portions of the audiotapes which were free from incriminating testimonial statements,[89] and some regarded the entire audio portions as inadmissible testimonial evidence.[90]

III. FACTS

Early on the morning of November 30, 1986, Officer David Spotts of the Upper Allen, Pennsylvania, Police Department noticed the automobile of the defendant, Inocencio Muniz, stopped on the shoulder of Route 15 with the engine running and the hazard lights flashing.[91] Officer Spotts, believing that Muniz's vehicle was disabled, parked his patrol car a short distance away and approached it. When he arrived at the vehicle, he observed Muniz sitting in the driver's seat and a passenger sitting beside him.[92] Officer Spotts asked Muniz if he could be of any assistance, but Muniz informed him that he had just stopped to urinate.[93] Officer Spotts detected a strong odor of alcohol of Muniz's breath; he also noticed that Muniz's eyes were glazed and bloodshot, that his face was flushed, and that his coordination was poor.[94]

Believing that Muniz was intoxicated, Officer Spotts twice instructed him to remain parked on the shoulder until he was sober.[95] Muniz assured Spotts that he would.[96] Spotts began walking back to his patrol car, but before he reached it, he heard Muniz pull back onto the highway and drive away.[97] Officer Spotts pursued Muniz, and, after they had traveled approximately half of a mile, he acti-

88 *See, e.g.*, *Palmer*, 604 P.2d at 1110 (holding that "even if the statements made by the accused were testimonial in character, they were not the product of the sort of custodial 'interrogation' that requires a *Miranda* warning.")

89 *See, e.g.*, State v. Roadifer, 346 N.W.2d 438, 441 (S.D. 1984), where the court stated that:

> Were the audio tapes merely to show the manner of [the suspect's] attempt to count backwards or recite the alphabet as requested, we would see no real distinction from the rule on admission of photographic evidence. We hold, however, that in any instance where the contents are admissions regarding his condition, they would be testimonial in nature and clearly fall within the protection of the Fifth Amendment.

90 *See, e.g.*, Stewart v. State, 435 P.2d 191, 194 (Okla. Crim. 1965) (stating that "[i]f the films had been taken with the consent of defendant . . . they would have been admissible - without sound") (emphasis omitted).

91 Commonwealth v. Muniz, 377 Pa. Super. 382, 383-84, 547 A.2d 419, 420 (1988).

92 *Id.* at 384, 547 A.2d at 420.

93 *Id.*

94 *Id.*

95 Pennsylvania v. Muniz, 110 S. Ct. 2638, 2641 (1990); Joint Appendix at 14, Pennsylvania v. Muniz, 110 S. Ct. 2638 (1990) (No. 89-213) [hereinafter Joint Appendix].

96 *Muniz*, 377 Pa. Super. at 384, 547 A.2d at 420.

97 *Id.*

vated his warning lights and instructed Muniz to pull over.[98] Spotts requested Muniz's driver's license and automobile registration.[99] Muniz fumbled through his wallet, dropping several cards in the process, and produced his Social Security card and what appeared to be his United States Department of Agriculture farm labor card.[100] Eventually, Muniz managed to provide Spotts with the requested information.[101] Spotts then asked Muniz to step out of the car.[102]

Officer Spotts proceeded to administer three sobriety tests—the horizontal gaze nystagmus test, the "walk and turn" test, and the "one leg stand" test.[103] In Officer Spotts's opinion, Muniz failed each test.[104] During the administration of the tests, Muniz informed Spotts that he had been drinking and that he was drunk.[105] Muniz explained that his inability to perform the tests satisfactorily was due to his advanced state of inebriation.[106] Officer Spotts then placed Muniz under arrest and transported him to the West Shore facility of the Cumberland County Central Booking Center.[107] Officer Spotts did not advise Muniz of his *Miranda* rights.[108] En route to the booking center, Muniz again volunteered statements concerning his state of inebriation.[109]

Upon Muniz's arrival at the booking center, an employee recorded information such as his name, his date of birth, and the identity of the arresting officer.[110] The booking center routinely

98 *Id.*

99 *Id.*

100 *Id.*; Joint Appendix, *supra* note 95, at 18.

101 *Muniz*, 377 Pa. Super. at 384, 547 A.2d at 420.

102 *Id.*

103 Pennsylvania v. Muniz, 110 S. Ct. 2638, 2641 (1990). Administration of these three tests is recommended by The National Highway Traffic Safety Administration. The horizontal gaze nystagmus test measures the jerking of the eyes as they gaze to the side, a phenomenon which, while evident in the eyes of a sober person, is more pronounced in the eyes of an intoxicated suspect. The walk and turn test requires the subject to walk heel-to-toe along a straight line for nine paces, turn, and walk back the same way, counting aloud from one to nine in each direction. The one leg stand test requires the subject to stand on one leg for thirty seconds, counting aloud from one to thirty. Little effort is required to imagine the heightened difficulty which these tests pose to the intoxicated subject. *See* U.S. Dep't of Transp., *Improved Sobriety Testing*, USDOT-NHTSA HS-0806512 (Aug. 1989), *reprinted in* 1 R. ERWIN, M. MINZER, L. GREENBERG & H. GOLDSTEIN, DEFENSE OF DRUNK DRIVING CASES § 8A.99, at 8A-42 to 8A-51 (3d ed. 1989).

104 Joint Appendix, *supra* note 95, at 19.

105 *Muniz*, 377 Pa. Super. at 384, 547 A.2d at 420.

106 *Id.*

107 *Id.* at 384-85, 547 A.2d at 420.

108 Pennsylvania v. Muniz, 110 S. Ct. 2638, 2642 (1990).

109 Joint Appendix, *supra* note 95, at 20-21.

110 Respondent's Brief at 30, Pennsylvania v. Muniz, 110 S. Ct. 2638 (1990) (No. 89-213) [hereinafter Respondent's Brief].

videotapes persons suspected of driving under the influence of alcohol in order to preserve a record of their condition.[111] In accordance with this policy, Muniz, after providing the requested information, was informed by Jerry Hosterman, a processing officer at the booking center, that his actions and voice were to be recorded. Officer Hosterman did not advise Muniz of his *Miranda* rights.[112]

In the first segment of the videotaped procedures, Officer Hosterman asked Muniz his name and address.[113] In order to provide the second piece of information, Muniz found it necessary to look in his wallet for a card with the address on it.[114] The officer then asked Muniz his height, weight, eye color, date of birth, and current age.[115] Muniz informed the officer that his date of birth was April 19, 1947, but he gave his current age as 49. He then laughed, hit his head with his hand, and said, "I mean 39."[116] The officer then asked Muniz the date of his sixth birthday. Muniz first uttered an inaudible response and then informed his interviewer that he was unable to calculate that date.[117]

In the second segment of the videotaped procedures, Officer Hosterman administered the same three sobriety tests administered by Officer Spotts at roadside.[118] The videotape showed that Muniz's eyes jerked noticeably during the gaze test, that he could not walk a straight line, and that he could not balance himself on one leg for more than a few seconds.[119] Furthermore, during the one leg stand test, Muniz, who had been requested to count aloud from one to thirty, managed to count in Spanish only from one to six, skipping the number two. During the walk the line test, he did not count at all.[120] Finally, at several points Muniz requested clarification of the tasks he was expected to perform and attempted to explain his difficulties in performing those tasks by reference to his advanced state of inebriation.[121]

Procedure at the booking center required that suspects be allot-

111 Brief of Petitioner at 7, Pennsylvania v. Muniz, 110 S. Ct. 2638 (1990) (No. 89-213) [hereinafter Petitioner's Brief].

112 *Muniz*, 110 S. Ct. at 2642.

113 *Id.*

114 Respondent's Brief, *supra* note 110, at 3.

115 *Id.*

116 *Id.*

117 *Muniz*, 110 S. Ct. at 2642.

118 *Id.*

119 *Id.*

120 *Id.* at 2657 (Marshall, J., concurring in part and dissenting in part).

121 *Id.* at 2642 (Marshall, J., concurring in part and dissenting in part).

ted twenty minutes for the administration of the sobriety tests and for observation.[122] Since Muniz completed his tests in six minutes, he was required to sit for fourteen minutes. During that time he conversed with Officer Hosterman.[123] Finally, in the third segment of the videotaped procedures, an employee at the booking center, Lisa Deyo, explained Pennsylvania's Implied Consent Law[124] to Muniz and requested his permission to administer a breath test designed to measure his blood alcohol level.[125] Deyo informed Muniz that his refusal to take the test would result in the automatic suspension of his driver's license for a year.[126] Muniz asked a number of questions about the law, again commenting on his state of inebriation.[127] He offered to submit to the test only after waiting for a few hours or drinking some water.[128] When this request was denied, Muniz refused to be subjected to the test. At this juncture Muniz was finally advised of his *Miranda* rights.[129]

IV. PROCEDURAL POSTURE

Muniz was tried on May 27, 1987 at a bench trial before the Honorable George Hoffer in the Court of Common Pleas of Cumberland County.[130] At trial, the court admitted into evidence both the audio and video portions of the videotape, with the exception of the fourteen-minute portion recorded after the administration of the sobriety tests.[131] The court also admitted testimony relating to the roadside sobriety tests administered by Officer Spotts.[132] At the trial's conclusion, the court found Muniz guilty of driving under the influence of alcohol in violation of Pennsylvania's drunk driving statute.[133]

Muniz filed a motion for a new trial, alleging that the trial

122 *Id.* at 2657 n.2 (Marshall, J., concurring in part and dissenting in part).

123 *Id.* at 2642 n.2

124 The law, codified at 75 PA. CONS. STAT. ANN. sec. 1547 (Purdon 1977 & Supp. 1990), provides that individuals driving on Pennsylvania roads are presumed to have consented to have their blood alcohol level checked.

125 *Muniz*, 110 S. Ct. at 2642.

126 *Id.*

127 *Id.*

128 *Id.* at 2652.

129 *Id.* at 2642.

130 Commonwealth v. Muniz, 377 Pa. Super. 382, 385, 547 A.2d 419, 421 (1988).

131 *Muniz*, 110 S. Ct. at 2642.

132 *Id.*

133 75 PA. CONS. STAT. ANN. sec. 3731(a)(1) (Purdon 1977 & Supp. 1990). Since Muniz had been convicted of the same offense in 1985, the court ordered him to pay the costs of prosecution and a $310 fine, and sentenced him to imprisonment in the Cumberland County prison for a period of not less than forty-five days nor more than twenty-three months. *Muniz*, 377 Pa. Super. at 385, 547 A.2d at 421.

court's refusal to exclude the testimony relating to the roadside sobriety tests and the videotape recorded at the booking center violated his fifth amendment rights.[134] The trial court denied the motion on the grounds that the evidence extracted from Muniz prior to his being informed of his *Miranda* rights was physical and not testimonial; therefore, a *Miranda* warning was not required.[135] Muniz appealed this judgment to the Superior Court of Pennsylvania.

In an opinion filed on September 8, 1988, the superior court reversed the trial court's decision.[136] The court first noted that the protections afforded by *Miranda* applied only to testimonial or communicative evidence, and not to physical evidence.[137] The court then surveyed several Pennsylvania cases distinguishing physical and testimonial evidence, arriving at the conclusion that testimonial evidence was "essentially communicative in nature"[138] or revealed a suspect's thought processes.[139] The court pointed out that, while sobriety tests generally produced physical evidence, such tests sometimes yielded testimonial evidence.[140] When this occurred, *Miranda* protections applied.[141] The court held that Muniz had been subjected to questioning that elicited information revealing his thought processes, and that the admission of Muniz's videotaped responses therefore constituted reversible error.[142] The Pennsylvania Supreme Court denied the Commonwealth's application for review,[143] and the United States Supreme Court granted the Commonwealth's petition for certiorari.[144]

V. Supreme Court Opinions

To be protected by the privilege against compelled self-incrimination, evidence must satisfy three criteria: (1) the evidence must be of a testimonial nature; (2) it must be the product of custodial interrogation, either express or implicit; and (3) it must not be the

134 *Muniz*, 110 S. Ct. at 2642.
135 *Id.* at 2642-43.
136 Commonwealth v. Muniz, 377 Pa. Super. 382, 547 A.2d 419 (1988).
137 *Id.* at 386, 547 A.2d at 421 (citing Schmerber v. California, 384 U.S. 757, 761 (1966). *See supra* text accompanying notes 33-35 for a discussion of *Schmerber*.
138 Commonwealth v. Bruder, 365 Pa. Super. 106, 113-14, 528 A.2d 1385, 1388 (1987), cited in *Muniz*, 377 Pa. Super. at 388, 547 A.2d at 422.
139 Commonwealth v. Conway, 368 Pa. Super 488, 498-500, 534 A.2d 541, 546-47 (1987), cited in *Muniz*, 377 Pa. Super. at 389, 547 A.2d at 422-23.
140 *Muniz*, 377 Pa. Super. at 387, 547 A.2d at 422.
141 *Id.*
142 *Id.* at 390-91, 547 A.2d at 423.
143 522 Pa. 575, 559 A.2d 36 (1989).
144 110 S. Ct. 275 (1989).

result of routine booking questions. In this case, the Court was faced with the task of applying these three criteria to four aspects of the videotaped procedures: (1) the generally slurred nature of Muniz's speech; (2) Muniz's responses to the first seven questions; (3) his response to the question regarding the date of his sixth birthday; and (4) his statements volunteered during administration of the sobriety tests and explanation of the breathalyzer test.

A. MAJORITY OPINION

Justice Brennan, writing for the majority,[145] ruled that the police had not violated *Miranda* principles in acquiring the evidence in question, with the exception of Muniz's response to the question concerning the date of his sixth birthday.[146] The Court held that the generally slurred nature of Muniz's speech throughout the videotaped procedures constituted physical, not testimonial, evidence, and thus lay outside the protections of *Miranda*.[147] Muniz's responses to the first seven questions, while testimonial and the result of custodial interrogation, fell under the exception for routine book-

---

145 The composition of the panels of Justices joining in each of the several opinions is a marvel of complexity. As a result, the opinion of the Court sometimes reflects a majority and sometimes a plurality.

Specifically, the portion of the Court's opinion concluding that the generally slurred nature of Muniz's speech constituted admissible physical evidence (summarized *infra* in subsection (1)), and the portion of the Court's opinion concluding that Muniz's utterances during administration of the sobriety tests and during explanation of the breathalyzer test were not the results of interrogation (summarized *infra* in subsection (4)), both announced by Justice Brennan, were joined in by Chief Justice Rehnquist and Justices White, Blackmun, Stevens, O'Connor, Scalia, and Kennedy. Justice Marshall filed an opinion dissenting from both portions. The portion of the Court's opinion concluding that Muniz's response to the sixth birthday question constituted inadmissable testimonial evidence (summarized *infra* in subsection (2)), announced by Justice Brennan, was joined by Justices Marshall, O'Connor, Scalia and Kennedy. Chief Justice Rehnquist, joined by Justices White, Blackmun, and Stevens, filed an opinion dissenting from this portion of the Court's opinion.

Finally, the portion of the opinion recognizing an exception to Miranda's protections for routine booking questions (summarized *infra* in subsection (3)), announced by Justice Brennan, was a plurality opinion joined in by Justices O'Connor, Scalia and Kennedy. Chief Justice Rehnquist, joined by Justices White, Blackmun and Stevens, delivered a separate plurality opinion concurring in the result reached by the first plurality, but reasoning that Muniz's responses to the booking questions were admissible, not because they fell under an exception for routine booking questions, but because they were not testimonial. Justice Marshall dissented from the result reached by both plurality opinions.

For the sake of simplicity, Justice Brennan's opinion shall be referred to as the majority opinion, Chief Justice Rehnquist's as the concurrence, and Justice Marshall's as the dissent.

146 Pennsylvania v. Muniz, 110 S. Ct. 2638, 2652 (1990).

147 *Id.* at 2644.

ing questions, and thus lay outside the protections of *Miranda*.[148] Muniz's response to the question regarding the date of his sixth birthday, however, fell outside the routine booking question exception, and thus was improperly admitted at trial.[149] Finally, Muniz's volunteered statements during the administration of the sobriety tests and during the explanation of the blood-alcohol test, while testimonial, were not the products of custodial interrogation, and so lay outside the protections of *Miranda*.[150]

1. The Slurred Nature of Muniz's Speech

The Court[151] first addressed the question of whether the generally slurred nature of Muniz's speech constituted physical or testimonial evidence. The Court noted that its decision in *Schmerber v. California*[152] indicated that the privilege against compelled self-incrimination did not extend to compulsion to provide evidence of a physical nature.[153] The Court then noted that the distinction between physical and testimonial evidence drawn in *Schmerber* had been extended in *United States v. Wade*,[154] where the Court had ruled that a suspect could be compelled to repeat a phrase provided by police to enable witnesses to listen to his voice. In that case, the Court stated that such a procedure involved "compulsion of the accused to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have."[155]

The Court also noted that it had applied similar reasoning in *United States v. Dionisio*,[156] where it ruled that suspects could be compelled to read a prepared text in order to provide voice exemplars for comparison with recordings obtained through the use of wire taps. In *Dionisio*, the Court stated that the voice recordings "were to be used solely to measure the physical properties of the witnesses' voices, not for the testimonial or communicative content of what was to be said."[157] Finally, the Court noted its ruling in *Gilbert v.*

---

148 *Id.* at 2650.

149 *Id.* at 2649.

150 *Id.* at 2651-52.

151 Justices Marshall, O'Connor, Scalia and Kennedy joined in this portion of Justice Brennan's opinion.

152 384 U.S. 757 (1966). *See supra* text accompanying notes 33-35 for further discussion of this case.

153 *Muniz*, 110 S. Ct. at 2644.

154 388 U.S. 218 (1967). *See supra* notes 37-38 and accompanying text for further discussion of this case.

155 *Id.* at 222, quoted in *Muniz*, 110 S. Ct. at 2645.

156 410 U.S. 1 (1973). *See supra* notes 36-38 and accompanying text for further discussion of this case.

157 *Id.* at 7, quoted in *Muniz*, 110 S. Ct. at 2645.

California[158] that a suspect could be compelled to provide a handwriting exemplar for comparison with a robbery note. In *Gilbert*, the Court had stated that a handwriting exemplar, "in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside [the privilege's] protection."[159]

The Court concluded that, under *Schmerber* and its progeny, evidence of Muniz's slurring of speech and related indicia of a lack of muscular coordination constituted admissible physical evidence.[160] The Court drew an analogy between this case and the voice exemplar cases, concluding that "[r]equiring a suspect to reveal the physical manner in which he articulates words, like requiring him to reveal the physical properties of the sound produced by his voice, . . . does not, without more, compel him to provide a 'testimonial' response for the purposes of *Miranda*."[161]

2. *The Sixth Birthday Question*

The Court[162] then addressed the somewhat more difficult question of whether Muniz's response to the question regarding the date of his sixth birthday constituted physical or testimonial evidence. The difficulty stemmed, in part, from the assertion of the Commonwealth and of the United States as *amicus curiae* that, since Muniz's response allowed the trial court to make an inference concerning "the physiological functioning of [Muniz's] brain,"[163] the response therefore constituted physical evidence. The Court dismissed this assertion, pointing out that the question of whether evidence is physical or testimonial hinges not on the nature of the ultimate fact to be inferred from the evidence but rather on the method in which the evidence is obtained. In support of this contention, the Court observed that in *Schmerber*,[164] it ruled that a suspect could be compelled to provide a blood sample for measurement of its alcohol content, because the manner in which the evidence was obtained "did not entail any testimonial act on the part of the suspect."[165] The Court then noted that had the police simply asked Schmerber whether his blood-alcohol level was impermissibly high, the evi-

158 388 U.S. 263 (1967). *See supra* notes 39-40 and accompanying text for further discussion of this case.

159 *Id.* at 266-67, quoted in *Muniz*, 110 S. Ct. at 2645.

160 *Muniz*, 110 S. Ct. at 2645.

161 *Id.* (citation omitted).

162 Chief Justice Rehnquist and Justices White, Blackmun, Stevens, O'Connor, Scalia and Kennedy joined in this portion of Justice Brennan's opinion.

163 Petitioner's Brief, *supra* note 111, at 21, quoted in *Muniz*, 110 S. Ct. at 2646.

164 384 U.S. 757 (1966).

165 *Muniz*, 110 S. Ct. at 2646.

dence thus acquired would have been testimonial.[166] In both cases, the ultimate fact to be inferred would have been physiological in nature.[167]

Having rejected the Commonwealth's version of the test for determining whether evidence is physical or testimonial, the Court set about devising the proper test. The Court began by quoting at length a passage from *Doe v. United States*,[168] where the Court had reviewed several statements regarding the distinction between physical and testimonial evidence. In addition to the passages from *Wade*,[169] *Couch*,[170] and *Curcio*[171] excerpted above,[172] the *Doe* Court quoted Wigmore as writing that "[u]nless some attempt is made to secure a communication—written, oral, or otherwise—upon which reliance is to be placed as involving [the accused's] consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one."[173]

The Court then surveyed the policy considerations behind the privilege, as expressed in a passage from *Murphy v. Waterfront Commission of New York Harbor*[174] excerpted above.[175] In the Court's view, the most fundamental policy consideration was "our fierce unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt."[176] The Court then reasoned that, because the privilege against self-incrimination was based primarily on a desire to avoid the use of the cruel trilemma, evidence should be considered testimonial, and therefore protected by the privilege, whenever a suspect must face "the modern-day analog of the historic trilemma . . . ."[177]

The Court then demonstrated that the test thus stated comported with recent cases distinguishing between physical and testimonial evidence. The Court noted that neither compulsion to

166 *Id.*

167 *Id.*

168 487 U.S. 201 (1988).

169 388 U.S. 218 (1967).

170 409 U.S. 322 (1973).

171 354 U.S. 118 (1957).

172 *See supra* text accompanying notes 44-50.

173 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 386 (1961 & Supp. 1990), quoted in *Doe*, 487 U.S. at 211; *id.*, quoted in Pennsylvania v. Muniz, 110 S. Ct. 2638, 2646-47 (1990).

174 378 U.S. 52 (1964).

175 *See supra* text accompanying note 22.

176 *Muniz*, 110 S. Ct. at 2647 (citing *Doe*, 487 U.S. at 212).

177 *Id.* at 2647-48. Under the 'modern-day analog' of the traditional trilemma, the suspect is in police custody, and the option of remaining silent is rendered unavailable by the pressures to speak inherent in the custodial context. *See supra* note 26 and accompanying text.

provide a voice exemplar, upheld in *Wade*,[178] nor compulsion to produce a sample of handwriting, upheld in *Gilbert*,[179] required the suspect to reveal his thoughts or beliefs, and so neither situation forced a suspect to face the cruel trilemma. The Court also noted that, in *Doe*,[180] it ruled that a suspect could be compelled to sign a consent form, phrased in the hypothetical, waiving a privacy interest in bank records. Since execution of the waiver did not require the assertion of any of the suspect's beliefs, but rather amounted to only a "nonfactual statement,"[181] the suspect was not placed into the cruel trilemma, and so the evidence was physical and not testimonial.[182]

Having validated this test, the Court proceeded to apply it to the facts of this case. The Court concluded that the question regarding the date of Muniz's sixth birthday called for a testimonial response. The Court recalled its reasoning in *Miranda*,[183] where it had stated that, because informal custodial interrogations exerted extraordinary pressures on suspects, one horn of the trilemma—the option of remaining silent—is *ex hypothesi* unavailable in such situations.[184] When asked to calculate the date of his sixth birthday, Muniz was left with the choice of answering truthfully—*i.e.*, stating that he was incapable of performing the requested calculation—thereby incriminating himself, or delivering a response which he did not know to be truthful, thereby incriminating himself.[185] The Court concluded that Muniz's response was therefore testimonial and should have been suppressed.

3. The First Seven Questions

Justice Brennan[186] next addressed the question of whether the seven questions asked by Officer Hosterman just prior to the sixth birthday question—questions regarding Muniz's name, address, height, weight, eye color, date of birth, and current age—constituted interrogation. The Commonwealth argued that since the booking questions were innocent of any investigative purpose—*i.e.*, since the content of Muniz's responses was not to be used to prove

178 388 U.S. 218 (1967).
179 388 U.S. 263 (1967).
180 487 U.S. 201 (1988).
181 *Id.* at 213 n.11.
182 *Muniz*, 110 S. Ct. at 2648-49.
183 Miranda v. Arizona, 384 U.S. 436 (1966).
184 *Id.* at 467, cited in *Muniz*, 110 S. Ct. at 2648 n.10.
185 *Muniz*, 110 S. Ct. at 2649.
186 This portion of Justice Brennan's opinion represents a plurality of the Court. Justice Brennan was joined by Justices O'Connor, Scalia, and Kennedy.

his intoxication—the questions did not constitute interrogation.[187] In rejecting this argument, Justice Brennan stated that the test to determine whether questions asked by police officers constituted interrogation hinged not on the intent of the police, but rather on the perceptions of the suspect.[188]

To support this view, the plurality reviewed the history of the definition of the term 'interrogation.' The plurality first noted that *Miranda*[189] defined interrogation as "questioning initiated by law enforcement officers."[190] The plurality then noted that *Innis*[191] and *Mauro*[192] extended that definition to encompass the "functional equivalent" of direct questioning.[193] The plurality further noted that in *Innis* the term 'functional equivalent' was defined to include "any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."[194]

The plurality concluded that, under the definition of interrogation set forth in *Mauro* and *Innis*, the seven questions asked of Muniz by Officer Hosterman just prior to the sixth birthday question constituted custodial interrogation for the purposes of *Miranda*. However, the plurality held that Muniz's responses were admissible, because they fell within the exception for routine booking questions, which "exclud[ed] from *Miranda*'s coverage questions to secure the 'biographical data necessary to complete booking or pretrial services.' "[195] Since Muniz's responses were sought "for record-keeping purposes only,"[196] and since they appeared "rea-

187 Petitioner's Brief, *supra* note 111, at 15-16; *Muniz*, 110 S. Ct. at 2649-50. Although the plurality addressed the issue of whether Muniz's responses were the result of interrogation, it is not clear that the Commonwealth's contention was that Muniz was not being interrogated. The Commonwealth's petition can also be read as arguing that, while the questions posed by Officer Hosterman constituted interrogation, Muniz's responses did not qualify as testimonial.

188 *Muniz*, 110 S. Ct. at 2650.

189 Miranda v. Arizona, 384 U.S. 436 (1966).

190 *Id.* at 444, quoted in *Muniz*, 110 S. Ct. at 2650.

191 446 U.S. 291 (1980).

192 481 U.S. 520 (1987).

193 *Id.* at 526, quoted in *Muniz*, 110 S. Ct. at 2650.

194 *Innis*, 446 U.S. at 301 (footnotes omitted).

195 *Muniz*, 110 S. Ct at 2650 (quoting Brief for the United States as Amicus Curiae at 12, Pennsylvania v. Muniz, 110 S. Ct. 2638 (1990) (No. 89-213)). The government's brief, in turn, quoted United States v. Horton, 873 F.2d 180, 181 n.2 (8th Cir. 1989).

196 *Muniz*, 110 S. Ct. at 2650 (quoting Commonwealth v. Muniz, 377 Pa. Super 382, 390, 547 A.2d 419, 423 (1988)). Note that in the state court opinion, the excerpted words were immediately preceded by the word "ostensibly." The state court concluded that Muniz's responses to the booking questions were inadmissible. *Muniz*, 377 Pa. Super at 390, 547 A.2d at 423.

sonably related to the police's administrative concerns,"[197] those responses fell within the exception and therefore did not require suppression.[198]

4. *The Sobriety and Breathalyzer Tests*

Finally, the Court[199] addressed the question of whether the incriminating statements volunteered by Muniz during the administration of the sobriety tests and explanation of the breathalyzer test constituted testimonial responses elicited in the course of custodial interrogation. The Court once again sought to determine whether Muniz was being interrogated during the second and third segments of the videotaped procedures.[200] The Court concluded that he was not being interrogated, and that his incriminating utterances therefore constituted voluntary statements falling outside the protections of *Miranda*.[201]

In support of its conclusion, the Court noted that both Officer Hosterman's instructions during the administration of the sobriety tests and Officer Deyo's explanation of the legal implications of the result of the breathalyzer test were "carefully scripted."[202] The Court believed that, with two minor and unchallenged exceptions,[203] the instructions and questions posed by the police officers "were not likely to be perceived as calling for any verbal response"[204] and therefore did not constitute interrogation for the purposes of *Miranda*.

B. CONCURRING OPINION

Chief Justice Rehnquist[205] concurred with the plurality's conclusion that Muniz's responses to the seven booking questions were admissible, and dissented from the majority's conclusion that Muniz's response to the question regarding the date of his sixth

197 *Muniz*, 110 S. Ct. at 2650.

198 *Id.* *See infra* note 248 and accompanying text for a recitation of the Court's somewhat conclusory language.

199 Chief Justice Rehnquist and Justices White, Blackmun, Stevens, O'Connor, Scalia and Kennedy joined in this portion of Justice Brennan's opinion.

200 *Muniz*, 110 S. Ct. at 2651.

201 *Id.*

202 *Id.* at 2651-52.

203 The exceptions were Officer Hosterman's request that Muniz count aloud during administration of the walk-the-line test and the one-leg-stand test and Officer Deyo's inquiries into whether Muniz understood the legal consequences of the result of the breathalyzer tests.

204 *Muniz*, 110 S. Ct. at 2651.

205 Justices White, Blackmun and Stevens joined Chief Justice Rehnquist.

birthday constituted inadmissible testimonial evidence.[206] Chief Justice Rehnquist believed that none of Muniz's responses constituted testimonial evidence.[207] The Chief Justice arrived at both of these conclusions by refining and applying the 'cruel trilemma' test utilized by the plurality, concluding that none of the eight questions asked of Muniz by Officer Hosterman placed Muniz into the trilemma.

Chief Justice Rehnquist first addressed the majority's contention that, because the sixth birthday question required Muniz to choose between incriminating himself and answering untruthfully, the question was designed to elicit a testimonial response. Chief Justice Rehnquist applied the majority's 'cruel trilemma' test to Muniz's predicament and concluded that Muniz was not placed into the trilemma.[208] The Chief Justice first stated that an untruthful response would not have supported an inference of a guilty conscience.[209] Accordingly, he argued, Muniz was under no pressure to avoid giving a truthful answer. "Muniz would no more have felt compelled to fabricate a false date than one who cannot read the letters on an eye-chart feels compelled to fabricate false letters . . . ."[210]

Chief Justice Rehnquist also argued that there was no distinction between the sobriety tests, designed to measure Muniz's physical coordination, and the sixth birthday question, intended to gauge Muniz's "mental coordination."[211] Since the police were not interested in the content of Muniz's response, but rather were only attempting to determine the "functioning of Muniz's mental processes," Muniz's response constituted admissible physical evidence.[212]

Finally, Chief Justice Rehnquist applied the same test to the seven questions asked by Officer Hosterman just prior to the sixth birthday question, arriving at the conclusion that the responses to

---

206 *Id.* at 2653-54 (Rehnquist, C.J., concurring in part, concurring in the result in part, and dissenting in part).

207 *Id.* (Rehnquist, C.J., concurring in part, concurring in the result in part, and dissenting in part).

208 *Id.* (Rehnquist, C.J., concurring in part, concurring in the result in part, and dissenting in part).

209 *Id.* at 2653 (Rehnquist, C.J., concurring in part, concurring in the result in part, and dissenting in part).

210 *Id.* (Rehnquist, C.J., concurring in part, concurring in the result in part, and dissenting in part).

211 *Id.* (Rehnquist, C.J., concurring in part, concurring in the result in part, and dissenting in part).

212 *Id.* (Rehnquist, C.J., concurring in part, concurring in the result in part, and dissenting in part).

those questions were not testimonial in nature.[213]

C. DISSENTING OPINION

Justice Marshall dissented from the Court's opinion, except for its holding that Muniz's response to the sixth birthday question constituted inadmissible testimonial evidence.[214] He disagreed with the plurality's recognition of a routine booking question exception to *Miranda's* protections and expressed doubt that such an exception, if recognized, could properly be applied to the facts of this case.[215] Justice Marshall also found fault with the Court's failure to apply the doctrine of implicit interrogation to the second and third segments of the videotaped procedures, arguing that the proper test, if applied, would have resulted in a finding that the administration of the sobriety tests and explanation of the breathalyzer test constituted the functional equivalents of express interrogation.[216] Finally, Justice Marshall disagreed with the Court's ruling that Officer Hosterman's request that Muniz count aloud during two of the three sobriety tests did not constitute custodial interrogation.[217] He argued that, since the instructions were designed to reveal evidence which would have supported an inference concerning the functioning of Muniz's mind, they constituted impermissible custodial interrogation.[218]

Justice Marshall first addressed the plurality's recognition of an exception to the protection of *Miranda* for routine booking questions.[219] Such an exception, argued Justice Marshall, would contravene one of *Miranda*'s chief assets—its ease of application.[220] "Such exceptions undermine *Miranda*'s fundamental principle that the doctrine should be clear so that it can be easily applied by both police and courts."[221] Justice Marshall argued that recognition of the exception would lead to frustrating and time-consuming litigation over whether particular questions fell within the exception.[222]

Additionally, Justice Marshall argued that such an exception,

213 *Id.* at 2654 (Rehnquist, C.J., concurring in part, concurring in the result in part, and dissenting in part).
214 *Id.* (Marshall, J., concurring in part and dissenting in part).
215 *Id.* at 2655-56 (Marshall, J., concurring in part and dissenting in part).
216 *Id.* at 2656-57 (Marshall, J., concurring in part and dissenting in part).
217 *Id.* at 2657-58 (Marshall, J., concurring in part and dissenting in part).
218 *Id.* (Marshall, J., concurring in part and dissenting in part).
219 *Id.* at 2654-55 (Marshall, J., concurring in part and dissenting in part).
220 *Id.* (Marshall, J., concurring in part and dissenting in part).
221 *Id.* at 2654 (Marshall, J., concurring in part and dissenting in part) (citations omitted).
222 *Id.* at 2655 (Marshall, J., concurring in part and dissenting in part).

even if recognized, could not properly be applied to the facts of this case. He pointed out that even those jurisdictions which recognized the exception do not consider it applicable where ostensibly innocent booking questions are designed to produce incriminating testimonial evidence.[223] Since the facts of this case revealed that the police should have known that the booking questions were reasonably likely to elicit an incriminating response from an intoxicated suspect, Muniz's responses to those questions should have been suppressed.[224]

Justice Marshall next responded to Chief Justice Rehnquist's assertion that none of Muniz's responses to the eight booking ques-

---

[223] *Id.* at 2655-56 (Marshall, J., concurring in part and dissenting in part). Justice Marshall cited the following for support: United States v. Avery, 717 F.2d 1020, 1024-25 (6th Cir. 1983), *cert. denied*, 466 U.S. 905 (1984) (stating that "[e]ven a relatively innocuous series of questions may, in light of the factual circumstances and the susceptibility of a particular suspect, be reasonably likely to elicit an incriminating response"); United States v. Mata-Abundiz, 717 F.2d 1277, 1280 (9th Cir. 1983) (holding that exception does not apply if "the questions are reasonably likely to elicit an incriminating response in a particular situation"); United States v. Glen-Archila, 677 F.2d 809, 816 n.18 (11th Cir. 1982), *cert. denied*, 459 U.S. 874 (1982) (ruling that "[e]ven questions that are usually routine must be proceeded [sic] by *Miranda* warnings if they are intended to produce answers that are incriminating").

[224] *Id.* at 2655-56 (Marshall, J., concurring in part and dissenting in part). In discussing the exception for routine booking questions, Justice Marshall incorporated elements of his discussion of the doctrine of implicit interrogation. Justice Marshall argued, in effect, that because the police intended to elicit incriminating responses, the exception should not have been held to apply. This only clouds the issue. Knowledge on the part of police that a suspect will be lead to make incriminating statements is useful only in determining whether the suspect is being interrogated. Discussion of the exception for routine booking questions, however, *assumes* that the suspect *is* being interrogated.

An alarming number of the courts of appeals have misinterpreted the Court's alternative definition of interrogation contained in Rhode Island v. Innis, 446 U.S. 291 (1980), in a similar manner. In *Innis*, the Court stated that it did not approve of the narrow construction of *Miranda* wherein the definition of interrogation was limited to express questioning. *Id.* at 299. Rather, the *Innis* Court stated that "the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* (citations omitted). The test so stated is phrased in the alternative, and yet a surprising number of lower courts have phrased it in the additive. Under this interpretation, 'interrogation' for purposes of *Miranda* includes only those actual questions which the police should know are reasonably likely to elicit an incriminating response. Thus, in United States v. Morrow, 731 F.2d 233, 237 (4th Cir. 1984), *cert. denied*, 467 U.S. 1230 (1984), the Fourth Circuit ruled that booking questions did not constitute interrogation for *Miranda* purposes, because, although they were actual questions, they were not reasonably likely to elicit an incriminating response. Similarly, in United States v. Avery, 717 F.2d 1020, 1024 (6th Cir. 1983), *cert. denied*, 466 U.S. 905 (1984), the Sixth Circuit concluded that booking questions did not constitute interrogation for *Miranda* purposes, because they were not related to criminal activity. These opinions represent an increasing tide that the Supreme Court would do well to stem.

tions constituted testimonial responses.[225] Justice Marshall argued that all of the questions, not only the sixth birthday question, placed Muniz into the cruel trilemma, and that his responses were therefore testimonial.[226]

Justice Marshall then addressed the majority's ruling that the incriminating statements volunteered by Muniz during the second and third segments of the videotaped procedures were not delivered in response to custodial interrogation.[227] Justice Marshall argued that, had the Court properly applied the doctrine of implicit interrogation recognized in *Innis*,[228] it would have arrived at the conclusion that Officers Hosterman's and Deyo's words and actions amounted to the functional equivalents of express interrogation.[229] Justice Marshall reasoned that, while administration of sobriety tests and explanation of a breathalyzer test "would not prompt most sober persons to volunteer incriminating statements," such procedures should reasonably have been expected to have that result on a visibly intoxicated person.[230] Furthermore, because Muniz had explained his paltry performance on the roadside sobriety tests with reference to his advanced state of inebriation, the police had every reason to believe that the same tests performed in the station would have the same result.[231]

Justice Marshall chided the majority for ignoring Muniz's particular susceptibility to sobriety tests, already exposed to Officer Spotts, and for concentrating instead on the nature of Hosterman's and Deyo's words and actions.[232] Justice Marshall pointed out that in ignoring Muniz's condition, the Court contradicted its formulation in *Innis* of the doctrine of implicit interrogation.[233] He recalled that the *Innis* Court particularly emphasized that, in determining whether police conduct rises to the level of implicit interrogation, the focus is not on the words and actions of the police viewed in isolation, but rather on the effect which the police have reason to believe their actions will have.[234] Moreover, the *Innis* Court had indicated that any knowledge that the police had concerning the unusual susceptibility of a particular suspect to particular forms of

225 *Muniz*, 110 S. Ct. at 2656 (Marshall, J., concurring in part and dissenting in part).
226 *Id.* (Marshall, J., concurring in part and dissenting in part).
227 *Id.* at 2656-57 (Marshall, J., concurring in part and dissenting in part).
228 446 U.S. 291 (1980).
229 *Muniz*, 110 S. Ct. at 2656 (Marshall, J., concurring in part and dissenting in part).
230 *Id.* (Marshall, J., concurring in part and dissenting in part).
231 *Id.* (Marshall, J., concurring in part and dissenting in part).
232 *Id.* at 2657 (Marshall, J., concurring in part and dissenting in part).
233 *Id.* (Marshall, J., concurring in part and dissenting in part).
234 *Id.* (Marshall, J., concurring in part and dissenting in part).

implicit interrogation would be relevant in a determination of whether the police's expectations of the effects of their conduct were reasonable.[235] Given all of this, Justice Marshall argued, Officers Hosterman's and Deyo's conduct amounted to the functional equivalent of express interrogation, and Muniz's utterances in response to that conduct should have been suppressed.[236]

Finally, Justice Marshall took issue with the Court's ruling that Officer Hosterman's request that Muniz count aloud during the walk-the-line test and the one-leg-stand test did not amount to custodial interrogation designed to elicit incriminating testimonial evidence.[237] Justice Marshall first noted the majority's concession of the fact that Hosterman, in directing Muniz to count aloud, was engaged in custodial interrogation.[238] He then argued that, because the manner in which Muniz counted—or failed to count—supported an inference concerning his state of mind, Muniz's utterances were therefore testimonial.[239] Finally, Justice Marshall argued that the responses were incriminating, because the prosecution sought to introduce them at trial.[240]

Justice Marshall concluded that all of Muniz's utterances during all three segments of the videotaped procedures constituted testimonial responses to custodial interrogation, and that the entire audio portion of the videotape should have been suppressed.

VI. Analysis

The Court's ruling in this case presents several striking examples of result-oriented jurisprudence. First, at one point in the opinion, the Court severely abbreviated its discussion of a doctrine, allowing it to avoid the obvious conclusion that any formulation of the doctrine would have led to a result contrary to that reached by the Court. Specifically, the Court confined its discussion of the exception for routine booking questions to three sentences,[241] and cited in support of its recognition of the doctrine only the Brief of the United States as *amicus curiae* and, by reference, a footnote in one

235 *Id.* (Marshall, J., concurring in part and dissenting in part).

236 *Id.* (Marshall, J., concurring in part and dissenting in part).

237 *Id.* at 2657-58 (Marshall, J., concurring in part and dissenting in part).

238 *Id.* at 2657 (Marshall, J., concurring in part and dissenting in part).

239 *Id.* (Marshall, J., concurring in part and dissenting in part).

240 *Id.* (Marshall, J., concurring in part and dissenting in part) (citing Rhode Island v. Innis, 446 U.S. 291, 301 n.5 (1980)). The *Innis* Court had stated that "[b]y 'incriminating response' we refer to any response—whether inculpatory or exculpatory—that the *prosecution* may seek to introduce at trial." *Id.* (emphasis in original).

241 *Id.* at 2650.

court of appeals case cited therein.[242]

Second, at two points in the opinion, the Court achieved substantially the same result by placing its discussion of a doctrine in an improper and logically bizarre place, obviating the need to raise the doctrine where it would have detracted from the Court's conclusion. Specifically, the Court discussed the doctrine of implicit interrogation in its analysis of the first segment of the videotaped procedures,[243] where such a discussion was totally unnecessary. This allowed the Court to avoid discussion of the doctrine in its analysis of the second and third segments of the videotaped procedures,[244] where such discussion would have led to the conclusion that the elements of the doctrine had been satisfied. The second instance of this phenomenon was the Court's placement of its discussion of the sixth birthday question[245] prior to its discussion of the routine booking question exception,[246] which obviated an explanation of why the booking question exception did not apply to the sixth birthday question. Because such an explanation would necessarily have addressed the question of the necessity of the information sought, it would have led to the conclusion that few, if any, of the seven questions asked just prior to the sixth birthday question fell within the exception.

Finally, all three sides of the debate over whether or not certain questions placed Muniz into the cruel trilemma missed the point. Of the many policy foundations for the privilege against compelled self-incrimination, a desire to avoid the cruel trilemma cannot be used as a basis for distinguishing between physical and testimonial evidence. Rather, that distinction should be made to hinge on considerations of a fundamental right to privacy.

A. RECOGNITION AND APPLICABILITY OF AN EXCEPTION FOR ROUTINE BOOKING QUESTIONS

In recent years, numerous lower courts have recognized an exception from *Miranda*'s coverage for routine booking questions.[247] Notwithstanding Justice Marshall's contention that such an exception may not be desirable, it is difficult to imagine efficient administration of justice if police are precluded from obtaining information necessary to processing. For this reason, the plurality correctly rec-

242 *Id.* (citing United States v. Horton, 873 F.2d 180, 181 n.2 (8th Cir. 1989)).
243 *Id.* at 2649-50.
244 *Id.* at 2650-52.
245 *Id.* at 2645-49.
246 *Id.* at 2650.
247 *See supra* notes 74-80 and accompanying text.

ognized the exception. The plurality erred, however, in failing to devote more than three sentences[248] to recognition of the doctrine and to its application to the facts of this case.

Justice Marshall's fear—that the exception will contravene *Miranda*'s ease of application and will lead, subsequently, to time-consuming litigation—is well-founded. This apprehension could have been allayed, however, by a definition of the exception that is as well-reasoned and easily understood as the rule which it aims partially to supplant. The Court could have stated that responses to booking questions would be admitted at trial only if the questions were routine *and* if the information sought was both necessary to complete booking or pretrial processing and unavailable from any alternative source. Many of the courts of appeals which have recognized the exception for routine booking questions have defined the doctrine in this manner.[249]

Additionally, the Court could have provided a list of those questions the answers to which would be considered admissible at trial. Such a course of action would have comported with the bright-line quality of *Miranda* and would have substantially met Justice Marshall's objection. It is somewhat surprising that the Court, feeling itself obliged to announce a new doctrine of such far-reaching consequences, particularly one subject to such well-founded criticisms as those voiced by Justice Marshall, should fail to establish any of the contours of the doctrine.[250]

---

248 The plurality's discussion of the doctrine was as follows:

> [The plurality concluded that Muniz's responses to the booking questions were testimonial and elicited in the course of custodial interrogation.] We agree with amicus United States, however, that Muniz's answers to the first seven questions are nonetheless admissible because the questions fall within a 'routine booking question' exception which exempts from *Miranda*'s coverage questions to secure the 'biographical data necessary to complete booking or pretrial services.' The state court found that the first seven questions were 'requested for record-keeping purposes only,' and therefore the questions appear reasonably related to the police's administrative concerns. In this context, therefore, the first seven questions asked at the Booking Center fall outside the protections of *Miranda* and the answers thereto need not be suppressed.

Muniz, 110 S. Ct. at 2650 (citations omitted).

249 *See supra* notes 74-80 and accompanying text for further discussion of these cases.

250 Concededly, it is a well-known maxim that cases, particularly constitutional cases, should be decided as narrowly as possible. Courts therefore generally attempt to avoid announcing new doctrines or substantial refinements of existing doctrines. The situation changes, however, when a court feels that it has no choice but to announce new law. In such cases, while the court should not attempt to define the doctrine with such specificity as to ordain its applicability (or lack thereof) to unknown factual scenarios, the court is obliged to offer a cogent exposition of the doctrine sufficient to explain its applicability to the facts of the case at hand. Failure to do so subverts the rule of law.

Moreover, *Miranda* embodies an exception to the general rule. In response to the confusion that followed *Escobedo*, the *Miranda* Court decided the case very broadly, de-

This discussion has assumed that if police were required to issue *Miranda* warnings prior to booking, they would thereby be prevented from obtaining information which they require. This assumption is unwarranted. Suspects could be compelled to provide biographical information, but that information could not be introduced at trial unless it had been obtained through an independent source. The process of obtaining the information could be simplified if police informed suspects that responses to booking questions could not be used against them at trial.[251]

Any of these suggested modes of analysis would have been superior to that utilized by the plurality represented by Justice Brennan; yet, the plurality did not discuss any of them. Nor did the plurality provide any support for its own analysis. This uncharacteristic taciturnity might have been due to a desire to avoid an unwanted result. The plurality's refusal to discuss thoroughly the exception for routine booking questions might well have been due to a realization that such a discussion would have lead to the conclusion that the booking questions in this case could not be made to fall under the exception.

Any exception for routine booking questions could not be made to extend to the questions in this case for a number of reasons. First, the entire booking process was far from routine. The Commonwealth conceded that it did not videotape the booking of those charged with other crimes.[252] Rather, the videotaping process is reserved only for those suspected of driving under the influence of alcohol. As Justice Marshall pointed out, this fact alone is sufficient to raise doubts as to the purpose of the questions asked during the booking process.[253]

Moreover, it is apparent from the facts of the case that none of the questioning conducted while the camera was engaged was nec-

---

tailing with minute specificity not only the contours of the doctrine but also the law enforcement procedures which would suffice to forestall constitutional questions in subsequent adjudications. To recognize an exception to *Miranda* as vague and as poorly-reasoned as the one announced in this case is inconsistent with the spirit of *Miranda*, and would allow the Rehnquist Court to undo in three sentences what the Warren Court achieved in a hundred and ten pages.

251 Muniz appeared to put forth the slightly different proposition that police could simply disregard the requirement, fail to provide the *Miranda* warnings prior to booking, and then not attempt to introduce the evidence so acquired at trial: "Requiring *Miranda* warnings for all custodial questioning would not prevent police from obtaining biographical information .... Rather, it would simply prevent responses to those inquiries from being used in the prosecution's case in chief against the defendant." Respondent's Brief, *supra* note 110, at 27 n.6.

252 Petitioner's Brief, *supra* note 111, at 7.

253 *Muniz*, 110 S. Ct. at 2655 (Marshall, J., concurring in part and dissenting in part).

essary for processing. The police did not need to know the date of Muniz's sixth birthday in order to process him. Furthermore, Officer Hosterman did not need to ask Muniz's current age, since Muniz, in response to the previous question, had already provided Hosterman with his date of birth. Similarly, Muniz's eye color, height and weight could have been ascertained without Muniz's cooperation.

In fact, Muniz's driver's license, which Officer Spotts had already examined, contained all of the information requested by Officer Hosterman. That information probably appeared on several other pieces of identification which Muniz was carrying, all of which were placed into police custody upon his arrest. It is fair to conclude that the police possessed all of the information they needed to process Muniz.

The last, and most compelling, piece of evidence showing that the recorded questioning was unnecessary is Officer Hosterman's admission, made at a pretrial hearing, that Muniz had already provided the police with all of the information necessary to processing prior to his being brought before the camera. Hosterman explained his initial contact with Muniz as follows: "Well, we take the initial questions, name, date of birth, so forth, the arresting officer. And then he is brought into the room in front of the video camera and the processing is started."[254] It is difficult to conceive of how the plurality could possibly have ignored the fact that, in a very real sense, Muniz had already been booked before the videotaped procedures commenced.

Finally, Justice Brennan's transposition of his discussion of the sixth birthday question and his discussion of the routine booking question exception merits comment. The plurality discussed the sixth birthday question prior to discussing the booking exception, despite the fact that the opposite order would have been more logical. Had the plurality addressed the issues in the more logical manner, it would have reasoned that the booking questions fell under the exception, but that the sixth birthday question, being neither necessary nor routine, fell outside that exception. The plurality would have been compelled, however, to explain why the sixth birthday question fell prey to objections that were not equally applicable to the other questions. In other words, it would have been necessary for the plurality to state why the sixth birthday question was unnecessary in a way in which the other questions were not. Such an explanation would have been impossible. Justice Brennan

254 Respondent's Brief, *supra* note 110, at 30.

avoided this difficulty by transposing his discussion of the two issues.

B. THE DOCTRINE OF IMPLICIT INTERROGATION

The Court's treatment of the doctrine of implicit interrogation leaves much to be desired. The Court's failure to apply the doctrine to the facts of this case, especially in light of similar refusals to apply the doctrine to the facts of the two cases in which the Court previously discussed it,[255] indicates an intent to eviscerate the doctrine before ever utilizing it. Any sensible formulation of the doctrine consistent with the reasoning behind it would have led in each of the three cases to the conclusion that the police conduct in each case constituted the functional equivalent of express interrogation. Finally, the Court's placement of its discussion of the doctrine in the section of its opinion dealing with the express interrogation of Muniz by Officer Hosterman, where a discussion of implicit interrogation was totally unnecessary, can only be taken as a sign that the Court wished to avoid discussion of the doctrine in the section of its opinion dealing with the administration of the sobriety tests and explanation of the breathalyzer test, where a discussion of implicit interrogation would have led to the conclusion that the words and actions of the police constituted the functional equivalent of express interrogation.

In *Rhode Island v. Innis*,[256] the Court explained that the test for determining whether or not police conduct rose to the level of implicit interrogation hinged on the question of whether, given what the police knew about the suspect, they should have known that their conduct was likely to elicit an incriminating response.[257] While the Court stated that the test focused primarily on the perceptions of the suspect rather than on the intent of the police, the Court also added that:

> [t]his is not to say that the intent of the police is irrelevant, for it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response. In particular, where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect.[258]

---

255 Arizona v. Mauro, 481 U.S. 520 (1987); Rhode Island v. Innis, 446 U.S. 291 (1980).

256 446 U.S. 291.

257 *Id.* at 301.

258 *Id.* at 301 n.7.

In other words, while the Court believed that it would be unnecessary to examine the intent of the police, it based that belief on its reasoning that the knowledge of the likelihood of a given result would always be present where there was an intent to bring about that result. The Court reasoned that whenever a person intends to produce a given result, that person should know that the result is likely to obtain.

The Court's reasoning reflects a fundamental misunderstanding of human motivation. An individual will engage in a course of action, not only when the course of action is more likely than not to have the desired effect, but also when the benefit of the desired effect, discounted by the chance that it will not obtain, is greater than the effort required to engage in the attempt.

Everyone engages in this type of cost-benefit analysis every day, and police officers are no exception. Police officers, if they are rational, will attempt to trick a suspect into confessing, not only when they think that they will succeed, but any time they believe that the rewards—either to them personally or to the law enforcement process in general—are sufficiently high to make the attempt worth their while. Since the effort required is often minimal (recall that the officers in *Innis* needed only to engage in a conversation), and since the rewards to the law enforcement process might be perceived as being great, the implication is that such attempts will be commonplace.

Had the *Innis* Court given sufficient thought to the issue, it would have phrased the test for implicit interrogation in the alternative. In other words, implicit interrogation should be defined as either conduct which the police should know is reasonably likely to evoke an incriminating response, or conduct which the police intend will evoke such a response. Such an approach would be more consistent with the basic assumptions underlying the Court's reasoning than was the test on which the Court ultimately settled.

The Court's failure to formulate a sensible test for the doctrine of implicit interrogation, and its subsequent failure to apply the doctrine to the facts of *Innis*, comprised the first step in the evisceration of the doctrine. The second step was the Court's refusal to recognize that even its own formulation of the test was satisfied by the facts of *Mauro*.[259] The *Mauro* Court agreed with the state court's finding that the police officers were aware of the possibility that Mauro would incriminate himself if allowed to talk to his wife.[260] In

259 446 U.S. 520 (1987).
260 *Id.* at 528.

fact, the police officers believed that incrimination was not only possible, but likely. The Court specifically stated that it was not overturning the lower court's finding that the police "knew that . . . incriminating statements were likely to be made."[261] Yet, the Court ruled that their decision to allow the conversation did not amount to implicit interrogation.[262] The Court based this ruling on its belief that "[t]here [was] no evidence that the officers sent Mrs. Mauro in to see her husband for the purpose of eliciting incriminating statements . . ."[263] The *Mauro* Court's ruling was flatly inconsistent with its statement of the doctrine in *Innis*.

The final step in the evisceration of the doctrine of implicit interrogation was the Court's failure to apply the doctrine to the facts of this case. Justice Marshall's argument that the police had every reason to know that their conduct would evoke incriminating statements from Muniz is undoubtedly correct. First, as Justice Marshall pointed out, the police "had good reason to believe,"[264] based on their observations, that Muniz was intoxicated. It is also common knowledge that intoxicated persons, when thrust into strange circumstances and required to perform what to them are difficult tasks, often become confused. Officers Hosterman and Deyo, then, had every reason to know that Muniz would have difficulty understanding what was required of him during administration of the sobriety tests, and that he would voice his confusion. Since lack of ability to understand and follow the instructions given during these tests is considered evidence of intoxication,[265] Muniz's questions during explanation of the tests constituted incriminating testimonial evidence.

Second, the police also had good reason to believe that Muniz would volunteer incriminating statements during administration of the sobriety tests. Muniz explained his failure to perform the three roadside sobriety tests satisfactorily by reference to his advanced state of inebriation. The state court found that "[d]uring the field sobriety tests, Muniz readily admitted that he had been drinking, that he was drunk, and that he could not perform the various tasks required because he was too inebriated."[266] Moreover, Officer Spotts testified that Muniz made several more incriminating state-

261 *Id.* at 528, 529 n.6.

262 *Id.* at 530.

263 *Id.* at 528.

264 Pennsylvania v. Muniz, 110 S. Ct. 2638, 2656 (1990) (Marshall, J., concurring in part and dissenting in part).

265 *Muniz*, 377 Pa. Super. 382, 389, 547 A.2d 419, 423 (1988) (quoting Commonwealth v. Conway, 368 Pa. Super 488, 498-500, 534 A.2d 541, 546-47 (1987)).

266 *Muniz*, 377 Pa. Super. at 384, 547 A.2d at 420.

ments while en route to the booking center.[267] Given all of this, the police had every reason to know that Muniz would continue to make incriminating statements once at the station. Given Muniz's misguided attempt to excuse his poor performance during administration of the roadside sobriety tests, there was absolutely no reason to believe that he would not offer the same excuses while attempting to complete the same exercises before the camera.

Because the police officers had good reason to know that their words and actions would have the likely effect of eliciting incriminating testimony from Muniz, the Court should have regarded their conduct as falling precisely under its test for implicit interrogation. Had the Court applied the broader version of the test suggested here, under which intent forms an alternative basis for a finding of implicit interrogation, the result would have been even more inescapable. As Justice Marshall suggested, so many aspects of the police conduct at issue could have served no other purpose than to elicit incriminating testimony that such a result must have been intended.[268] As Justice Marshall noted, this conclusion is buttressed by the booking center's policy of allotting a mandatory period of twenty minutes for completion of the sobriety tests and for observation. As Justice Marshall observed, "[g]iven the absence of any apparent technical or administrative reason for the delay and the stated purpose of 'observing' Muniz, the delay appears to have been designed in part to give Muniz the opportunity to make incriminating statements."[269]

Finally, the Court's misplacement of its discussion of the doctrine of implicit interrogation also merits comment. The Court raised the issue of implicit interrogation in the course of its discussion of the first segment of the videotaped procedures, when Officer Hosterman asked Muniz the eight booking questions. As the Court pointed out, *Miranda* defined the term 'interrogation' as "questioning initiated by law enforcement officers."[270] It is difficult to conceive of a clearer case of custodial interrogation than that recorded in the first segment of the videotaped procedures. Yet, the Court chose this section of its opinion to raise the issue of implicit interrogation, only to reach the conclusion that, while the questioning did in fact constitute interrogation, Muniz's responses were admissible as the result of routine booking questions. The Court neglected to

267 Joint Appendix, *supra* note 95, at 21.

268 *Muniz*, 110 S. Ct. at 2657 & 2657 n.2 (Marshall, J., concurring in part and dissenting in part).

269 *Id.* (Marshall, J., concurring in part and dissenting in part).

270 Miranda v. Arizona, 384 U.S. 436, 444 (1966), quoted in *Muniz*, 110 S. Ct. at 2650.

raise the issue of implicit interrogation in its discussion of the second and third segments of the videotaped procedures, when Officers Hosterman and Deyo administered the sobriety tests and explained the legal ramifications of the breathalyzer test, respectively. At no point in this section of its opinion did the Court so much as mention the doctrine or cite to *Innis* or *Mauro*. Discussion of the doctrine, nonsensical where the Court placed it, would have made more sense in this section. More importantly, application of the doctrine to the circumstances surrounding the sobriety and breathalyzer tests would have led to the conclusion that the police conduct during those procedures constituted the functional equivalent of express questioning. Once again, the Court avoided an undesirable result by rearranging its opinion.[271]

C. SIMPLIFICATION OF THE DISTINCTION BETWEEN PHYSICAL AND TESTIMONIAL EVIDENCE

Another troubling aspect of the Court's opinion is its reliance on an abhorrence of the cruel trilemma to distinguish physical and testimonial evidence. Justice Brennan's plurality held that Muniz's responses both to the sixth birthday question and to the seven booking questions constituted testimonial evidence.[272] Chief Justice Rehnquist disagreed, believing that none of Muniz's responses to those questions constituted testimonial evidence.[273] Justice Marshall agreed with Justice Brennan,[274] but added that Muniz's counting aloud during the sobriety tests also constituted testimonial evidence.[275] All three positions, however, rely on an improper method for distinguishing between physical and testimonial evidence.

The question which all three sides viewed as dispositive was whether Muniz was placed into the cruel trilemma. In applying the concept of the cruel trilemma to informal proceedings conducted in police custody, it is important to bear in mind that one horn of the dilemma—the option of remaining silent—is *ex hypothesi* unavailable.[276] A guilty suspect is thus left with the choice of speaking truth-

271 An alternative explanation for the odd placement of the discussion of implicit interrogation is that the Court made the mistake discussed *supra* in note 224, whereby the definition of interrogation is restricted to include only actual questions intended to elicit incriminating responses.

272 *Muniz*, 110 S. Ct. at 2649-50.

273 *Id.* at 2653-54 (Rehnquist, C.J., concurring in part, concurring with the result in part, and dissenting in part).

274 *Id.* at 2654 (Marshall, J., concurring in part and dissenting in part).

275 *Id.* at 2657 (Marshall, J., concurring in part and dissenting in part).

276 *See supra* note 26 and accompanying text.

fully, thereby incriminating himself, or speaking untruthfully, thereby allowing an inference of a guilty conscience.

An application of the Court's test to situations where the desired outcome is intuitively obvious is useful in analyzing its efficacy. In other words, a determination of whether or not the Court's cruel trilemma test is sensible cannot be made without first considering what result the test would reach when applied to evidence of an obviously physical nature.

Consider first the case of an accountant who has embezzled corporate assets while maintaining two sets of books. One set cleverly conceals the thefts, so that close examination, while revealing that the ledger was a forgery, would not reveal the exact nature of the crime.[277] When presented with a subpoena and instructed to appear in formal proceedings, the accountant confronts the classic version of the trilemma: she may fail to produce either set of books and be jailed for contempt; produce the falsified set and risk indictment for committing a fraud upon the court; or produce the true set and incriminate herself. If the accountant is not subpoenaed, but is instead requested to produce the books during informal custodial interrogation, perhaps by a police officer lacking a warrant, she is placed in the 'modern-day analog' of the historic trilemma: the option of refusing is unavailable, due to the inherent pressures to comply with the request of the police officer. Only two options are available to the accountant: produce the falsified set and risk an inference of a guilty conscience;[278] or incriminate herself by producing the true set.

The analogy is consistent as well with situations where the falsification of physical evidence is impossible or easily detected. Consider an accountant who has been able to concoct only a poor forgery which does not effectively conceal his crimes. If police request the books during an informal investigation, the accountant is left with two choices: produce the real set, thereby incriminating himself, or produce the poorly falsified set, thereby incriminating himself *and* allowing the inference of a guilty conscience. The evidence in question is undoubtedly physical, and yet the accountant's position is indistinguishable from that of Muniz when confronted with the sixth birthday question.

This analysis leads to the conclusion that the cruel trilemma test is an inappropriate vehicle for determining whether evidence is

277 The paradigm presents an example of a situation where the production of falsified physical evidence is possible.

278 This option assumes that examination of the falsified set would reveal its falsified nature without providing any additional proof of wrongdoing.

physical or testimonial in nature. Since the distinction between physical and testimonial evidence cannot be made to rest on a desire to avoid the modern-day analog of the cruel trilemma, it must be made to rest on another of the policy considerations underlying the privilege against compelled self-incrimination. In particular, the distinction should be made with reference to the more analytically simple concept of a fundamental right to privacy.[279]

The Supreme Court and many lower courts have indicated that a respect for a right to privacy is one of the most important considerations behind the fifth amendment privilege against compulsory self-incrimination. In *Couch v. United States*,[280] for example, the Court stated that the privilege "respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation."[281] Similarly, in *United States v. Grunewald*,[282] Judge Frank stated that the privilege acts as a "safeguard of the individual's 'substantive' right of privacy, a right to a private enclave where he may lead a private life."[283] Later, in *Murphy v. Waterfront Commission of New York Harbor*,[284] the Supreme Court relied on Judge Frank's statement, writing that the privilege was founded on, inter alia, "our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life,' "[285] Two years later, the Court echoed this concern in *Miranda*,[286] where it stated that one of the principles behind the privilege was a respect for "the inviolability of the human personality."[287]

---

279 An alternative means of distinguishing between physical and testimonial evidence, and one which has been gaining support, focuses on the extent to which the evidence acquired is within the exclusive domain of, and its production therefore alterable by, the suspect. One writer has stated,

> [w]hen evidence is uniquely under the control of the defendant (as when it is in his mind), the potential for police misconduct is much greater than when the defendant is incapable of affecting the evidence sought. An interrogation of a kidnapping suspect to determine the location of the missing child, for instance, is likely to get much nastier much more quickly than a simple procedure for obtaining a suspect's blood type or fingerprints.

Note, *supra* note 86, at 634. Of course, were this mode of analysis chosen, the police practices at issue in this case could not be considered attempts to elicit testimonial evidence, both because inebriated suspects are almost by definition incapable of behaving in a sober fashion, and because any police misconduct would appear on the videotape.

280 409 U.S. 322 (1973).

281 *Id.* at 327.

282 233 F.2d 556 (2d Cir. 1956) (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957).

283 *Id.* at 581-82 (Frank, J., dissenting).

284 378 U.S. 52 (1964).

285 *Id.* at 55.

286 Miranda v. Arizona, 384 U.S. 436 (1966).

287 *Id.* at 460. *See also* Griswold v. Connecticut, 381 U.S. 479 (1965), where the Court

A distinction between physical and testimonial evidence based on this policy consideration is evident in numerous cases cited by the Court. In many of these cases, evidence that discloses the contents or functioning of a suspect's mind is considered testimonial. For example, in *Curcio*,[288] the Court stated that testimonial evidence was evidence the delivery of which compelled the suspect to "disclose the contents of his own mind."[289] Similarly, in *Wade*,[290] the Court held that evidence was testimonial only if the accused, in order to provide the evidence, was compelled to "disclose any knowledge he might have."[291] Finally, in *Doe*,[292] the Court stated that "in order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information."[293]

At several points in its opinion, the Court mentions a distinction between physical and testimonial evidence based upon considerations of privacy. The Court was not content, however, simply to leave the distinction there. Rather, the Court used the privacy distinction as a departure for the much more complex discussion of whether or not a given situation placed a suspect into the cruel trilemma. For instance, the Court stated that "the cases upholding compelled writing and voice exemplars did not involve situations in which suspects were asked to communicate any personal beliefs or knowledge of facts, and therefore the suspects were not forced to choose between truthfully and falsely revealing their thoughts."[294] This predilection appears to be due to the Court's belief that the two criteria will generally be satisfied simultaneously. Justice Brennan wrote that "[w]henever a suspect is asked for a response requiring him to communicate an express or implied assertion of fact or belief, the suspect confronts the 'trilemma' of truth, falsity, or silence and hence the response (whether based on truth or falsity) contains a testimonial component."[295] As the extended metaphor above indicates, however, such is not necessarily the case. The Court, it seems, made a mistake very similar in nature to the one it

---

stated that the privilege "enable[d] the citizen to create a zone of privacy which government may not force him to surrender to his detriment." *Id.* at 484.

288 354 U.S. 118 (1957).

289 *Id.* at 128.

290 388 U.S. 218 (1967).

291 *Id.* at 222.

292 487 U.S. 201 (1988).

293 *Id.* at 210.

294 Pennsylvania v. Muniz, 110 S. Ct 2638, 2648 (1990).

295 *Id.* (citation omitted).

made in *Innis*[296] described above.[297] Both mistakes involved the substitution of one test for another, based on the assumption that when the one test is satisfied, the other is satisfied as well.

The Court would do better to rely on a simpler test. Concededly, under a test focusing solely on a right to privacy, the contours of the distinction between physical and testimonial evidence would need to be defined without the benefit of the type of seemingly analytically rigorous tripartite test of which judges are so fond. Nonetheless, the end result would conform more closely to our notion of the purposes behind the privilege against compulsory self-incrimination.

D. SUGGESTED DOCTRINAL REFINEMENTS

This analysis of *Muniz* has shown that a number of doctrinal refinements would simplify future discussion of the issues raised in the case. First, while recognition of an exception to the protections of *Miranda* for routine booking questions is desirable, such an exception should be narrowly construed. Specifically, the Court should state that responses to such questions will be admitted only if the questions are routine and the information sought is both necessary for administration and unavailable from any alternate source. In addition to specifying those criteria, the Court could provide a list of permissible questions. Such a course of action would minimize the tension between *Miranda*'s bright-line qualities and the necessity for the exception.

Second, the Court should refine its definition of implicit interrogation to include both conduct which police should know is reasonably likely to elicit incriminating testimony and conduct which police intend to have that effect. Such a definition would comport with the reasoning used by the Court in the case where the doctrine was first announced. The Court should also make it clear that actual questioning will always constitute interrogation for the purposes of *Miranda*, regardless of whether or not the questions are designed to elicit incriminating testimony.

Third, the Court should abandon the cruel trilemma test as a basis for determining whether evidence is physical or testimonial, and it should adopt in its place a simple test focusing on a fundamental right to privacy. Numerous courts have applied such a test, and it is easier to apply and yields results which are more consistent with intuitive notions of the distinction.

---

296 Rhode Island v. Innis, 446 U.S. 291 (1980).

297 *See supra* text following note 258.

Finally, the practice addressed in this case—of introducing at trial the audio portions of videotapes of suspects recorded prior to reading of *Miranda* warnings—should be abandoned as hopelessly unworkable. In its place, the Court should state that law enforcement officers wishing to preserve a record of a suspect's slurring of speech should use the practice, commonly utilized in other contexts, of requiring the suspect to repeat aloud previously prepared or spoken text. This method would allow the state to record additional physical indicia of inebriation—the only aspect of the audio portion of the videotape which should be considered admissible—without running the risk that such evidence will be tainted with incriminating testimonial evidence.

VII. CONCLUSION

In *Muniz*, the United States Supreme Court held that the fifth amendment's prohibition against compelled self-incrimination, as interpreted in *Miranda*,[298] did not preclude the introduction at trial of a videotape of a person suspected of operating a motor vehicle under the influence of an intoxicant, despite the fact that, at the time of the recording, the suspect had not been informed of his *Miranda* rights. The Court held that the slurred nature of a suspect's speech and related indicia of a lack of muscular coordination constituted physical, and not testimonial, evidence, and thus lay outside the scope of *Miranda*'s protections.

The Court also announced an exception to *Miranda*'s protections for routine booking questions, ruling that incriminating testimony delivered in response to those questions was admissible at trial. Finally, the Court failed to apply the concept of implicit interrogation to the administration of sobriety and breathalyzer tests, holding that incriminating testimonial evidence obtained during those procedures was admissible.

To arrive at these results, the Court felt it necessary to cloud its argument by rearranging discussion of several issues. This rearrangement allowed it to avoid discussion of these issues where they would have done the most damage to the Court's conclusion.

Unfortunately, the decision in this case is representative of many recent cases, where a desire to eradicate what has been regarded as a pervasive evil has been responsible for the disregard by the Court of the most basic rights guaranteed by the first eight amendments to the Constitution.[299] The fact that the opinion of the

298 Miranda v. Arizona, 384 U.S. 436 (1966).

299 *See, e.g.*, Michigan Department of State Police v. Sitz, 110 S. Ct. 2481 (1990) (high-

Court in this case was authored by Justice Brennan, an erstwhile supporter of civil liberties, is indicative of the extent to which this alarming trend has garnered supporters.

With the decision in this case, the Court has made yet another inroad upon the protections of the fifth amendment as interpreted in *Miranda*. Those protections, paid for so dearly over two centuries ago, should not be disregarded so lightly.

JACQUES LEBOEUF

way sobriety checkpoint program did not violate the fourth amendment's prohibition of unlawful searches and seizures); United States v. Sokolow, 109 S. Ct. 1581 (1989) (use of 'probabilistic' facts describing personal characteristics of drug couriers as a basis for a finding of 'reasonable suspicion' necessary to justify a brief investigative detention of a suspected drug courier did not violate the fourth amendment's prohibition of unlawful searches and seizures); Skinner v. Railway Labor Exec. Ass'n, 109 S. Ct. 1402 (1989) (drug and alcohol testing of railroad employees without warrant, probable cause, or reasonable suspicion did not violate the fourth amendment); National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989) (requiring Customs Service employees seeking promotions or transfers to positions involving drug interdiction or the carrying of firearms to take urinalysis drug tests without any individualized suspicion of drug use did not violate the fourth amendment).