

1997

Constitutional Law - Article I, Section 9 - Privilege against Self-Incrimination - Right to Refuse a Field Sobriety Test

Sean M. Girdwood

Follow this and additional works at: <https://dsc.duq.edu/dlr>



Part of the [Law Commons](#)

Recommended Citation

Sean M. Girdwood, *Constitutional Law - Article I, Section 9 - Privilege against Self-Incrimination - Right to Refuse a Field Sobriety Test*, 35 Duq. L. Rev. 973 (1997).

Available at: <https://dsc.duq.edu/dlr/vol35/iss3/11>

This Recent Decision is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

CONSTITUTIONAL LAW—ARTICLE I, SECTION 9—PRIVILEGE AGAINST SELF-INCRIMINATION—RIGHT TO REFUSE A FIELD SOBRIETY TEST—The Pennsylvania Supreme Court held that the privilege against self-incrimination grounded in Article I, Section 9 of the Pennsylvania Constitution does not encompass a right to refuse a field sobriety test.

Commonwealth v. Hayes, 674 A.2d 677 (Pa. 1996)

In early 1993, a Narbeth town police officer observed Samuel G. Hayes (“Hayes”) driving erratically.¹ The officer pursued the vehicle until Hayes came to a stop in his driveway.² When Hayes exited his vehicle, the officer requested to see some form of identification.³ Upon observing Hayes’ demeanor, the officer believed him to be under the influence of alcohol and requested Hayes to perform several field sobriety tests.⁴ The officer subsequently determined Hayes to be incapable of successfully performing the various tests and placed him under arrest.⁵

At trial, a jury convicted Hayes of violating a state statute prohibiting individuals from driving under the influence of alcohol.⁶ Hayes was fined three hundred dollars and sentenced to a prison term of forty-eight hours to twelve months.⁷ The Pennsylvania Superior Court, which heard the case on appeal,

1. *Commonwealth v. Hayes*, 674 A.2d 677, 678 (Pa. 1996). The arresting officer observed Hayes driving in the wrong lane of traffic and proceeding toward the officer. *Id.*

2. *Hayes*, 674 A.2d at 678. After moving his vehicle into the correct lane, Hayes waved and smiled at the passing officer. *Id.*

3. *Id.*

4. *Id.* The officer observed Hayes as having red and glassy eyes, slurred speech, inadequate balance and an alcohol stench. *Id.*

5. *Id.* The officer administered the following tests: the horizontal gaze nystagmus test, the walk and turn test and the one leg stand test. *Id.* Nystagmus is defined as a persistent, rapid, involuntary and oscillatory movement of the eyeball. *THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE* 1333 (2d ed. 1987).

6. *Hayes*, 674 A.2d at 678. This statute provides: “(a) Offense defined - A person shall not drive, operate or be in actual physical control of the movement of any vehicle: (1) while under the influence of alcohol to a degree which renders the person incapable of safe driving.” 75 PA. CONS. STAT. § 3731 (a)(1) (Supp. 1996).

7. *Hayes*, 674 A.2d at 678. Hayes appealed his conviction. *Id.*

affirmed Hayes' conviction and sentence.⁸ The Pennsylvania Supreme Court then granted allocatur in the case.⁹

On appeal, the supreme court addressed the issue of whether the arresting officer violated Hayes' constitutional rights by failing to advise him of a right to refuse to perform the field sobriety tests.¹⁰ Hayes argued that the right to refuse a field sobriety test derives from the right against self-incrimination found in Article I, Section 9 of the Pennsylvania Constitution.¹¹ Hayes also argued that because the right to refuse a field sobriety test exists, an individual suspected of driving under the influence of alcohol must be informed of the right according to *Miranda v. Arizona*.¹²

In dealing with Hayes' contentions, the court looked to the Supreme Court of the United States for guidance.¹³ The court noted that in *Schmerber v. California*,¹⁴ the United States Supreme Court held that the self-incrimination protection found in the Fifth Amendment to the United States Constitution does not bar from admission at trial incriminating physical evidence unwillingly produced by the accused.¹⁵ The *Hayes* court then

8. *Id.* The superior court found the trial court to have committed no error of law. *Id.* at 677.

9. *Id.* Allocatur means the appeal is allowed, or that the court is taking the case on appeal. BLACK'S LAW DICTIONARY 75 (6th ed. 1990).

10. *Hayes*, 674 A.2d at 678.

11. *Id.* at 679. Article I, Section 9 of the Pennsylvania Constitution provides: "[The accused] cannot be compelled to give evidence against himself." PA. CONST. art. I, § 9.

12. *Hayes*, 674 A.2d at 679. See *Miranda v. Arizona*, 384 U.S. 436 (1966). In *Miranda*, the United States Supreme Court held that a person accused of a crime must be advised of his or her Fifth and Sixth Amendment rights when in police custody. *Miranda*, 384 U.S. at 471. Under the Fifth Amendment to the United States Constitution, individuals cannot be compelled to be witnesses against themselves in any criminal proceeding. U.S. CONST. amend. V. Under the Sixth Amendment, individuals have the right to a speedy trial, an impartial jury, to be informed of the nature of the accusation against them and to have assistance of counsel. U.S. CONST. amend. VI.

13. *Hayes*, 674 A.2d at 679. The court looked to the Supreme Court due to its understanding and interpretation of the privilege against self-incrimination. *Id.* The Pennsylvania Supreme Court gave deference to the Supreme Court of the United States with regard to the interpretation of the privilege against self-incrimination. *Id.* This deference was in part due to the textual similarity between the Fifth Amendment to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution. *Id.*

14. 384 U.S. 757 (1966) (holding that Fifth Amendment does not bar from admission at trial physical evidence produced by the accused even if incriminating).

15. *Hayes*, 674 A.2d at 679. The *Hayes* court also noted that the *Schmerber* court relied on *Holt v. United States*, 218 U.S. 245 (1910), in reaching its decision concerning physical evidence. *Id.* In *Holt*, Justice Holmes stated:

The prohibition of compelling a man in a criminal court to be 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 may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof.

Holt, 218 U.S. at 252-53.

noted that the Fifth Amendment is substantially similar to Article I, Section 9 of the Pennsylvania Constitution.¹⁶ As a result, the court permitted the use of incriminating field sobriety test evidence in the case against Hayes.¹⁷

Hayes also argued that the Pennsylvania Constitution provides a heightened form of protection against self-incrimination as compared to the self-incrimination protection afforded under the United States Constitution.¹⁸ In considering this claim, the court referred to *Commonwealth v. Edmunds*,¹⁹ a prior Pennsylvania case in which a four-pronged analysis was developed to deal with claims for such heightened protection.²⁰ The court noted that in determining whether a provision in the Pennsylvania Constitution affords greater protection than the protection offered under a similar provision in the United States Constitution, under *Edmunds* a court must perform the following: (1) a textual review of the provision; (2) a historical analysis of the provision; (3) a review of similar case law from other jurisdictions; and (4) a review of the provision from a public policy perspective.²¹

In applying the first prong of the *Edmunds* test, the court discussed the holding in *Commonwealth v. Swinehart*,²² where it also construed Article I, Section 9 of the Pennsylvania Constitution.²³ The *Hayes* court noted that the *Swinehart* court carefully examined the privilege against self-incrimination in Pennsylvania, and compared Article I, Section 9 of the Pennsylvania Constitution with the self-incrimination protection of the Fifth Amendment to the United States Constitution.²⁴ The *Hayes* court then noted that the *Swinehart* court wisely concluded that a claim for heightened state constitutional protection against

16. *Hayes*, 674 A.2d at 679.

17. *Id.* at 682. The court concluded that since the evidence obtained from the field sobriety tests was nontestimonial in nature, *Miranda* warnings were not required and there was no violation of Hayes' privilege against self-incrimination. *Id.* In *Miranda*, the Supreme Court of the United States held that the warnings developed in that case only apply to evidence in testimonial form. *Miranda*, 384 U.S. at 471.

18. *Hayes*, 674 A.2d at 679-80. Hayes based this contention on the fact that there are textual differences between Article I, Section 9 of the Pennsylvania Constitution and the Fifth Amendment to the United States Constitution. *Id.*

19. 586 A.2d 887 (Pa. 1991).

20. *Hayes*, 674 A.2d at 680. Concerning the four-pronged analysis in *Edmunds*, the *Hayes* court stated: "Although it is not mandatory, we find this four-pronged test to be quite useful in analyzing state constitutional claims and accordingly, will follow that framework herein." *Id.*

21. *Id.* See *Edmunds*, 586 A.2d at 895.

22. 664 A.2d 957 (Pa. 1995).

23. *Hayes*, 674 A.2d at 680. In *Swinehart*, the defendant was held in contempt of court for refusing to testify against a co-conspirator. *Swinehart*, 664 A.2d at 957.

24. *Hayes*, 674 A.2d at 680.

self-incrimination could not derive from a textual constitutional analysis of the privilege under Article I, Section 9 of the Pennsylvania Constitution.²⁵

The *Hayes* court moved on to the second prong of the *Edmunds* test and examined the history of the self-incrimination privilege in Pennsylvania.²⁶ Upon analysis, the court noticed that there is a tradition under Pennsylvania common law to protect the reputation of an individual accused of a crime.²⁷ The court went on to qualify this protection, however, noting that the protection has never been a concern when dealing with physical evidence offered against the accused such as that acquired from an individual's performance of a field sobriety test.²⁸ The *Hayes* court noted that the protection for the individual's reputation does not arise where evidence of a nontestimonial nature is concerned.²⁹ The court reasoned that while individuals compelled to perform field sobriety tests may be concerned about their reputation, the effect of the field sobriety test upon their reputation is no greater than the effect caused to the reputation of an individual asked to be fingerprinted or placed in a police lineup.³⁰ As a result, the court concluded *Hayes'* claim for heightened protection against self-incrimination could not be based on a historical examination of this privilege.³¹

25. *Id.* See *Swinehart*, 664 A.2d at 962. In *Swinehart*, the court stated that the *Edmunds* analysis was the most thorough way of examining a claim for heightened state constitutional protection. *Swinehart*, 664 A.2d at 961.

26. *Hayes*, 674 A.2d at 680. The *Hayes* court once again referenced the *Swinehart* decision and noted that there is a historical preference for interpreting Article I, Section 9 of the Pennsylvania Constitution consistently with the Fifth Amendment to the United States Constitution. *Id.*

27. *Id.* The court stated, "this concern for an individual's reputation is consistent with our long established sense of a heightened awareness of personal privacy in Pennsylvania." *Id.* See *Commonwealth v. DeJohn*, 403 A.2d 1283 (Pa. 1979); *Commonwealth v. Shaw*, 383 A.2d 496 (Pa. 1978).

28. *Hayes*, 674 A.2d at 680 (citing *Commonwealth v. Deren*, 337 A.2d 600 (Pa. Super. Ct. 1975)(holding that use of accused's hair sample does not violate privilege against self-incrimination); *Commonwealth v. Jefferson*, 281 A.2d 852 (Pa. 1971)(holding that fingerprints are not protected by privilege against self-incrimination because they are considered nontestimonial evidence); *Commonwealth v. Aljoe*, 216 A.2d 50 (Pa. 1966)(holding that there is no constitutional right to refuse to appear in lineup); *Commonwealth v. Musto*, 35 A.2d 307 (Pa. 1944)(holding that if defendant raises the issue of sanity, defendant must submit to a court-ordered exam)).

29. *Id.* at 680. Testimonial evidence is defined as communicative evidence, as distinguished from physical or demonstrative evidence. BLACK'S LAW DICTIONARY 556 (6th ed. 1990).

30. *Hayes*, 674 A.2d at 681. The court noted that there is no heightened concern for the reputation of an accused who is compelled to produce physical evidence such as fingerprints or hair samples. *Id.*

31. *Id.*

Moving on to the third prong of the *Edmunds* test, the court examined the decisions of other states that have dealt with this issue.³² The court found that the vast majority of states dealing with this issue have come to conclusions consistent with prior Pennsylvania case law.³³ Specifically, the court determined that all jurisdictions, with the exception of Oregon, have held that the privilege against self-incrimination cannot be invoked with regard to a field sobriety test because of the nontestimonial nature of the test.³⁴ Evidence derived from field sobriety tests is considered nontestimonial because the tests do not require the accused to communicate a statement, whether it be a statement of fact or belief.³⁵

The court then specifically examined *People v. Ramirez*,³⁶ a Colorado case that Hayes relied upon to argue that *Miranda* warnings should be given to an individual asked to perform a field sobriety test.³⁷ Noting that the Colorado Supreme Court

32. *Id.*

33. *Id.* The court looked at the following cases: *Stone v. City of Huntsville*, 656 So. 2d 404 (Ala. 1994); *State v. Corrigan*, 228 A.2d 568 (Conn. 1967); *Allred & DiAndrea v. State*, 622 So. 2d 984 (Fla. 1993); *Coates v. State*, 453 S.E.2d 35 (Ga. Ct. App. 1994); *People v. Krueger*, 241 N.E.2d 707 (Ill. App. Ct. 1968); *Heichelbech v. State*, 281 N.E.2d 102 (Ind. 1972); *State v. Faidley*, 450 P.2d 20 (Kan. 1969); *McAvoy v. State*, 551 A.2d 875 (Md. 1989); *Commonwealth v. Brennan*, 438 N.E.2d 60 (Mass. 1982); *Dixon v. State*, 737 P.2d 1162 (Nev. 1987); *State v. Arsenault*, 336 A.2d 244 (N.H. 1975); *People v. Boudreau*, 115 A.2d 652 (N.Y. 1985); *State v. Strickland*, 173 S.E.2d 129 (N.C. 1970); *State v. Zummach*, 467 N.W.2d 745 (N.D. 1991); *City of Piqua v. Hinger*, 238 N.E.2d 766 (Ohio 1968); *Flynt v. State*, 507 P.2d 586 (Okla. Crim. App. 1973); *Trail v. State*, 526 S.W.2d 127 (Tenn. Crim. App. 1975); *State v. Erickson*, 802 P.2d 111 (Utah 1990); *State v. Lombard*, 505 A.2d 1182 (Vt. 1985); *City of Mercer Island v. Walker*, 458 P.2d 274 (Wash. 1969). *Id.*

34. *Hayes*, 674 A.2d at 681. In *State v. Dill*, 870 P.2d 851 (Or. Ct. App. 1994), the Oregon Court of Appeals held that a police officer is required to give a verbal warning to a suspected drunk driver before administering a field sobriety test. *Dill*, 870 P.2d at 854. The applicable drunk-driving statute in *Dill* reads as follows:

Any person who operates a motor vehicle upon premises open to the public or the highways of the state shall be deemed to have given consent to submit to field sobriety tests upon the request of a police officer for the purpose of determining if the person is under the influence of intoxicants if the police officer reasonably suspects that the person has committed the offense of driving while under the influence of intoxicants in violation of ORS 813.010 or a municipal ordinance. Before the tests are administered, the person requested to take the tests shall be informed of the consequences of refusing to take or failing to submit to the tests under ORS 813.136.

OR. REV. STAT. § 813.135 (1995).

35. *Pennsylvania v. Muniz*, 496 U.S. 582 (1990). In *Muniz*, Justice Brennan acknowledged the difference between testimonial and nontestimonial evidence. *Id.* Justice Brennan specifically stated: "His response was testimonial because he was required to communicate an express or implied assertion of fact or belief and, thus, was confronted with the trilemma of truth, falsity, or silence, the historical abuse against which the privilege against self-incrimination was aimed." *Id.* at 583.

36. 609 P.2d 616 (Colo. 1980).

37. *Hayes*, 674 A.2d at 681. *Ramirez* was the only case the court could find that held *Miranda* warnings should be given when an accused is asked to perform a field

case *People v. Archuleta*³⁸ overruled *Ramirez* and held that *Miranda* warnings are not required when one is asked to perform a field sobriety test, the court found Hayes' reliance on *Ramirez* to be erroneous.³⁹ Therefore, the court's examination of cases arising out of all other jurisdictions proved that *Miranda* warnings are generally not required when one is asked to perform a field sobriety test.⁴⁰

As to the last prong of the *Edmunds* test, the court listened to Hayes' contention that as a matter of public policy, the protection against self-incrimination should apply to field sobriety tests.⁴¹ The court found, however, that if such protection was declared to be public policy, there would be a drastic change in the right against self-incrimination that was not intended by the Pennsylvania Constitution.⁴² Specifically, field sobriety test evidence would be useless due to the fact that it would be a violation of the privilege against self-incrimination to admit the evidence at trial.⁴³

In conclusion, the court noted that performing a field sobriety test is a minimal invasion when compared to the test's objective of making the highways safer by removing people under the influence of intoxicants from the road.⁴⁴ The court also noted that since there is no implied consent law punishing a driver for refusing to perform a field sobriety test in Pennsylvania, a driver requested to perform the test is not really compelled to produce self-damaging evidence.⁴⁵

The privilege against self-incrimination, as a legal concept, developed at a rather early time in the history of the United

sobriety test. *Id.* See *Ramirez*, 609 P.2d at 620 (holding that *Miranda* warnings are applicable to field sobriety tests).

38. 719 P.2d 1091 (Colo. 1986).

39. *Hayes*, 674 A.2d at 681. See *Archuleta*, 719 P.2d at 1093 (holding that *Miranda* warnings are not required when a suspect is asked to perform a field sobriety test).

40. *Hayes*, 674 A.2d at 682.

41. *Id.* Hayes argued that the court should reconsider the distinction between physical evidence and communicative evidence with respect to the privilege against self-incrimination, and thus overturn the precedent establishing the appropriateness of allowing self-incriminating physical evidence to be admitted at trial while not allowing the admission of self-incriminating communicative evidence. *Id.* Hayes claimed that the recent advance in scientific evidence and analysis has produced evidence that is irrefutable and overwhelmingly incriminating. *Id.*

42. *Id.*

43. *Id.* at 683.

44. *Id.*

45. *Hayes*, 674 A.2d at 683. The court failed to note that a suspected drunk driver who refuses a field sobriety test will probably be asked to submit to a blood alcohol test, and if he or she refuses this test, the individual's driver's license will be suspended for one year under Pennsylvania's Implied Consent Law. See 75 PA. CONS. STAT. § 1547 (1995).

States. As early as 1802, in the case of *Commonwealth v. Gibbs*,⁴⁶ the United States Supreme Court recognized that a privilege against self-incrimination is grounded in the Fifth Amendment to the United States Constitution and in Article I, Section 9 of the Pennsylvania Constitution.⁴⁷ The issue in *Gibbs* was whether Article I, Section 9 of the Pennsylvania Constitution prohibits a judicial officer from asking an individual certain questions that may lead to charging that person with a crime.⁴⁸ The Supreme Court concluded that both the United States Constitution and Pennsylvania Constitution do prohibit such questioning because the defendant's answers may lead to self-incrimination.⁴⁹

The Pennsylvania Supreme Court was first faced with the question of whether a defendant is required to produce documents at his or her own criminal trial that will aid in a conviction in *Boyle v. Smithman*.⁵⁰ In *Boyle*, Mr. Smithman refused to produce a written statement concerning his transportation and storage of oil, claiming that he did not fall under the provisions of the law requiring such a statement to be given.⁵¹ The prosecution argued that such a statement was needed in order to protect the public by compelling oil transporters to post a correct showing of their transactions along with the amount of oil they were holding.⁵²

Upon hearing the case, the Pennsylvania Supreme Court reasoned that the action against Smithman was effectively penal in nature.⁵³ As a result, Smithman could not be compelled to pro-

46. 4 U.S. 253 (1802).

47. *Gibbs*, 4 U.S. at 253. In *Gibbs*, the defendant was charged with violating an election law after an appointed judge questioned the defendant's father concerning the father's allegiance to the United States and the defendant made threatening remarks towards the election official. *Id.*

48. *Id.* at 255.

49. *Id.*

50. 23 A. 397 (Pa. 1892). In *Boyle*, P.C. Boyle brought suit against John Smithman, an oil transporter, for refusing to provide a written statement listing the amount of crude oil he transported. *Boyle*, 23 A. at 397. The Act of May 22, 1878 provided, in pertinent part, that every entity involved in the transportation or storage of petroleum must post, in its principal place of business, a statement showing the amount of oil stored as well as where the oil was stored. *Id.*

51. *Id.* Specifically, Mr. Smithman claimed that he was not engaged in transporting and storing oil for producers as a public carrier, but, alternatively, that he was a private purchaser and thus the law requiring a posting did not apply to him. *Id.* at 398.

52. *Id.*

53. *Id.* at 398. Justice Williams stated: "The act of 1878 is highly penal. This action is in form a penal action. Its object is to punish the defendant for disobeying the direction of the statute, by imposing penalties amounting to about \$80,000." *Id.*

duce any documents that may aid in his prosecution.⁵⁴ The court reasoned that the privilege against self-incrimination, located in Article I, Section 9 of the Pennsylvania Constitution, extended to any written documents that may incriminate the individual on trial.⁵⁵ The court then noted that any other holding would lead to a defendant aiding in his or her own conviction.⁵⁶

Thirty years later, in *Commonwealth v. Valeroso*,⁵⁷ the Pennsylvania Supreme Court considered the question of whether defendants in criminal proceedings may properly be compelled to testify against themselves either through oral testimony or the production of written material that may establish their guilt.⁵⁸ In *Valeroso*, a trial court convicted the defendant of murder in the first degree when a letter from the victim's attorney was admitted at trial to show that the defendant had the requisite motive to murder the victim.⁵⁹

The court found that the historical privilege against self-incrimination under the Fifth Amendment to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution was one of the fundamental rights afforded by all courts of English law.⁶⁰ The court then found that under the privilege, an individual accused of a crime can never be compelled to provide self-incriminating evidence in a criminal action brought against him or her.⁶¹ Additionally, the court found that ordering a defendant to provide such evidence is unjust because the jury may draw improper inferences at trial due to the defendant's lack of cooperation.⁶² As a result, the court concluded that the self-incriminating evidence barred from introduction at trial under Article I, Section 9 of the Pennsylvania Constitution includes both the oral testimony of the defendant and the defend-

54. *Id.* An individual involved in a penal action is afforded the privilege against self-incrimination because the action can result in the levying of fines and/or imprisonment. *Id.*

55. *Boyle*, 23 A. at 398. The court equated producing documents against oneself with being compelled to testify against oneself. *Id.*

56. *Id.*

57. 116 A. 828 (Pa. 1922).

58. *Valeroso*, 116 A. at 829. The defendant in *Valeroso* had appealed his criminal conviction, claiming that his forced production of a written document at trial, which incriminated him, was a violation of the privilege against self-incrimination. *Id.* at 829.

59. *Id.*

60. *Id.* The court noted that while it was not recognized in early common law, the privilege against self-incrimination developed throughout the years in England and was subsequently transferred to America. *Id.*

61. *Id.*

62. *Id.* at 830. The court noted that several state supreme courts have recognized that improper inferences may be drawn due to a defendant's lack of cooperation at trial. *Id.* These improper inferences include the jury's inference that since a defendant is silent or uncooperative, he or she must be hiding something or be guilty. *Id.*

ant's production of written material.⁶³ The court therefore defined the testimonial evidence so as to include the letter written by the accused in this case.⁶⁴

In *Commonwealth v. Musto*,⁶⁵ the Pennsylvania Supreme Court was confronted with the issue of whether the constitutional immunity from self-incrimination applies to a court-ordered physical exam performed on a defendant who raises the defense of insanity.⁶⁶ In *Musto*, the prosecutor anticipated that the defendant would plead insanity and attempted to have alienists⁶⁷ examine the defendant in prison.⁶⁸ The defendant's counsel objected to this examination, claiming that it violated the defendant's privilege against self-incrimination.⁶⁹

The court found that compelling a criminal defendant to submit to a physical exam does not violate his or her constitutional protection against self-incrimination as long as the exam does not require the defendant to answer oral questions.⁷⁰ The court reasoned that although a defendant's body may produce self-incriminating evidence, such evidence is not barred from production at trial under Article I, Section 9 of the Pennsylvania Constitution because the defendant is not required to make a statement during the exam.⁷¹

The Pennsylvania Supreme Court determined whether the Fifth Amendment privilege against self-incrimination encompasses fingerprint evidence in *Commonwealth v. Jefferson*.⁷² In *Jefferson*, the prosecution established that crime scene fingerprints belonged to the defendant by forcing the defendant to be fingerprinted in court and comparing these fingerprints to those

63. *Valeroso*, 116 A. at 831. Specifically, the court concluded that the demand upon the defendant in this case to produce an incriminating letter was unconstitutional and the trial court should not have been permitted this demand to be made. *Id.*

64. *Id.*

65. 35 A.2d 307 (Pa. 1944).

66. *Musto*, 35 A.2d at 309. The defendant in *Musto* shot and killed his wife and was charged with first-degree murder. *Id.*

67. An alienist is one who specializes in the study of mental diseases. BLACK'S LAW DICTIONARY 72 (6th ed. 1990).

68. *Musto*, 35 A.2d at 311. The prosecutor wanted a mental examination performed on the defendant by doctors of the prosecutor's own choosing in order to counter the defense physicians. *Id.*

69. *Id.* Specifically, defense counsel claimed that the use of the defendant's body as evidence against him violated the privilege against self-incrimination. *Id.*

70. *Id.*

71. *Id.* In holding this way, the court did not deviate from the ancient principle of delineating between testimonial evidence and nontestimonial evidence with respect to a purely physical exam of an accused and a physical exam that requires the answering of questions. *Id.*

72. 281 A.2d 852 (Pa. 1971). The defendant in *Jefferson* left his fingerprints in the car of his stabbing victim. *Id.* at 856.

removed from the crime scene.⁷³ The defendant's counsel claimed that such action violated the defendant's Fifth Amendment privilege against self-incrimination.⁷⁴

In addressing the defendant's claim, the court found fingerprints to constitute a form of nontestimonial evidence that is not afforded Fifth Amendment constitutional protection.⁷⁵ The court held that evidence, in order to be barred by the privilege against self-incrimination, must be of a communicative or testimonial nature.⁷⁶

Fifteen years later, in *Commonwealth v. Romesburg*,⁷⁷ the Pennsylvania Superior Court faced the question of whether results obtained from the administration of a field sobriety test are protected under Article I, Section 9 of the Pennsylvania Constitution.⁷⁸ Field sobriety testing on the defendant in *Romesburg* resulted in a finding that he was legally intoxicated.⁷⁹

At trial, the court held that the privilege against self-incrimination under the Pennsylvania Constitution affords the same protection to an individual as the privilege found under the Fifth Amendment to the United States Constitution.⁸⁰ The court then concluded that since evidence derived from a field sobriety test is not evidence of a communicative or testimonial nature, it is not protected under either the Pennsylvania or federal Constitution.⁸¹

In *Commonwealth v. Bruder*,⁸² the Pennsylvania Superior Court dealt with the issue of whether a defendant's answers to

73. *Jefferson*, 281 A.2d at 856. Jefferson was forced to be fingerprinted in court because the technician who recorded his fingerprints earlier was unavailable to testify at trial. *Id.*

74. *Id.* Specifically, defense counsel argued that the fingerprints elicited from the prosecution at trial constituted testimonial evidence barred by the privilege against self-incrimination. *Id.*

75. *Id.*

76. *Jefferson*, 281 A.2d at 856 (citing *Schmerber v. California*, 384 U.S. 757 (1966)).

77. 509 A.2d 413 (Pa. Super. Ct. 1986).

78. *Romesburg*, 509 A.2d at 414. In *Romesburg*, the defendant was pulled over by a police officer for driving erratically. *Id.* After noticing that the defendant reeked of alcohol, had bloodshot eyes and slurred speech, the officer performed a field sobriety test upon the defendant. *Id.*

79. *Id.* The defendant's blood alcohol concentration was determined to be .34%. *Id.* The applicable blood alcohol limit for adults in Pennsylvania is .10%. 75 PA. CONS. STAT. § 3731 (a)(4)(i) (Supp. 1996).

80. *Romesburg*, 509 A.2d at 414. Judge Wieand, writing for the majority, stated: "While it is true that the guarantees provided by our state constitution may provide greater protection than the guarantees of the federal constitution, the appellate courts of Pennsylvania have consistently held that the protections against self-incrimination afforded by the two constitutions are identical." *Id.* (citing *Commonwealth v. Sell*, 470 A.2d 457, 466-67 (Pa. 1983); *Commonwealth v. Tate*, 432 A.2d 1382, 1387-88 (Pa. 1981)).

81. *Id.* at 415.

82. 528 A.2d 1385 (Pa. Super. Ct. 1987).

questions posed for field sobriety test purposes are afforded the privilege against self-incrimination.⁸³ The defendant in *Bruder* was asked to recite the alphabet during a field sobriety test, at which he was unsuccessful.⁸⁴ At trial, the prosecution offered the field sobriety evidence against the defendant.⁸⁵

Applying previous case law, the court determined that the privilege against self-incrimination does not extend to physical aspects of the field sobriety test.⁸⁶ The court found the defendant's recitation of the alphabet during the test, however, to be protected under the privilege because of its testimonial nature.⁸⁷ Therefore, the court adhered to previous law delineating the difference between evidence of a testimonial and non-testimonial nature when protecting the evidence under the constitutional privilege against self-incrimination.⁸⁸

The Supreme Court of the United States determined whether a videotape of a defendant performing various field sobriety tests is afforded the privilege against self-incrimination in *Pennsylvania v. Muniz*.⁸⁹ The defendant in *Muniz*, who was transported to the police station for drunk driving, was asked several questions at the station and required to perform various field sobriety tests while being videotaped.⁹⁰ At trial, the defendant argued that the videotaped answers to the questions posed by the police were inadmissible because they violated the privilege against self-incrimination.⁹¹

The Pennsylvania Superior Court held that the defendant's answers to questions posed to him at the police station were

83. *Bruder*, 528 A.2d at 1388. In *Bruder*, a police officer stopped the defendant for proceeding through a red light and subsequently requested him to perform a field sobriety test due to his intoxicated appearance. *Id.* at 1386.

84. *Id.*

85. *Id.*

86. *Id.* at 1388. The physical aspect of this field sobriety test was the walking of a straight line. *Id.* The court found it well settled under Pennsylvania law that nontestimonial evidence obtained from a field sobriety test is not afforded the privilege against self-incrimination. *Id.* (citing *Commonwealth v. Benson*, 421 A.2d 383, 387 (Pa. Super. Ct. 1980)).

87. *Id.* The court specifically stated: "Although requiring *Bruder* to walk in a straight line was a physical test which need not have been preceded by *Miranda* warnings, we cannot readily reach the same conclusion regarding *Bruder's* recitation of the alphabet." *Id.* at 1388.

88. *Bruder*, 528 A.2d at 1388.

89. 496 U.S. 582 (1990). In *Muniz*, the defendant was arrested for driving under the influence of alcohol. *Id.* at 582.

90. *Muniz*, 496 U.S. at 582. While being videotaped, police officers asked the defendant his name, address, date of birth, eye color, height, weight, current age and the date of his sixth birthday. *Id.* During the videotaping, the defendant made several self-incriminating remarks. *Id.*

91. *Id.* The trial court admitted the whole tape at trial and the defendant was found guilty of driving under the influence of alcohol. *Id.*

inadmissible at trial.⁹² Specifically, the court found that testimonial evidence obtained in the performance of a field sobriety test was inadmissible, however any other evidence obtained from the field sobriety tests was admissible at trial because of its non-testimonial nature.⁹³

On appeal, the supreme court agreed with the superior court and determined that although a portion of the videotaped field sobriety tests was admissible at the defendant's trial, the portion of the videotape showing the defendant's responses to police questioning was not admissible.⁹⁴ Thus, the supreme court once again distinguished between evidence of a testimonial nature and evidence of a nontestimonial nature when analyzing the protections afforded under the constitutional privilege against self-incrimination.

The question of whether motor vehicle drivers are afforded a right to refuse a blood alcohol test in Pennsylvania was addressed in *Commonwealth v. Eisenhart*.⁹⁵ In *Eisenhart*, the defendant was transferred to the hospital where his blood was drawn and tested for alcohol content without his consent after his involvement in a car accident.⁹⁶ The results of the test later proved that the defendant was legally intoxicated while driving.⁹⁷ At the trial level, the results of the defendant's blood alcohol test were admitted.⁹⁸

92. *Id.*

93. *Commonwealth v. Muniz*, 547 A.2d 419 (Pa. Super. Ct. 1988), *alloc. denied*, 559 A.2d 36 (Pa. 1989). On appeal, the superior court concluded that the answers to the questions posed to the defendant were testimonial in nature. *Muniz*, 547 A.2d at 423. The superior court then concluded that the audio portion of the videotape should be suppressed. *Id.*

94. *Muniz*, 496 U.S. at 582. Justice Brennan tried to provide some guidance in making the determination whether evidence is testimonial or nontestimonial by stating: "To be testimonial, the communication must, explicitly or implicitly, relate a factual assertion or disclose information." *Id.* (citing *Doe v. United States*, 487 U.S. 201, 210 (1988)). The court in *Muniz* held that while the defendant's response to the question concerning his sixth birthday was testimonial and, thus, barred from admission in court, the responses to the other questions concerning his date of birth, age, height, weight, address and eye color were admissible, even though testimonial, because of the routine nature of these questions and their use for booking purposes. *Id.* at 584.

95. 611 A.2d 681 (Pa. 1992). In *Eisenhart*, the defendant crashed his vehicle into a cement wall. *Id.* at 681-82. Shortly thereafter, a police officer arrived on the scene and administered two field sobriety tests to the defendant, which the defendant failed. *Id.*

96. *Eisenhart*, 611 A.2d at 682. Hospital personnel extracted defendant's blood upon the advice of the District Attorney of York County. *Id.*

97. *Id.* The results of the blood test showed that defendant had a blood alcohol level of .293%. *Id.* The blood alcohol limit in Pennsylvania is .10%. 75 PA. CONS. STAT. § 3731 (a)(4)(i) (Supp. 1996).

98. *Eisenhart*, 611 A.2d at 682. A jury subsequently convicted the defendant for two counts of driving under the influence of alcohol. *Id.*

On appeal, the Pennsylvania Supreme Court utilized the Implied Consent Law, found in the Pennsylvania Motor Vehicle Code, to decide the case.⁹⁹ The court found that this law explicitly sanctions a defendant's refusal to submit to a blood test.¹⁰⁰ As a result, although evidence derived from a blood test is nontestimonial in nature, the defendant's refusal to submit to the blood test should be honored and the evidence derived from the test barred from admission at trial.¹⁰¹

The history of the privilege against self-incrimination in Pennsylvania clearly illustrates that the Pennsylvania Supreme Court made the right decision in *Commonwealth v. Hayes*. All of the cases that arose in the Commonwealth and in federal court prior to *Hayes* have been similarly resolved as to the issue of whether there is a right to refuse a nontestimonial field sobriety test. The courts have concluded that the evidence obtained from a field sobriety test is nontestimonial in nature and therefore not protected by the privilege against self-incrimination.¹⁰² This conclusion is reached either under Article I, Section 9 of the Pennsylvania Constitution or under the Fifth Amendment to the United States Constitution.

The question remains, however, whether the court should be applauded for this strict adherence to previous case law and tradition or be chastised for missing the point of this decision. The *Hayes* court decided that there is no right to refuse a field sobriety test by applying the four principles derived from *Edmunds*.¹⁰³ First, the *Hayes* court appropriately noted that the textual differences between Article I, Section 9 of the Pennsylvania Constitution and the Fifth Amendment to the United States Constitution are so minute as to make no difference in the application of either section to the privilege against self-incrimination.¹⁰⁴ This

99. *Id.* at 683 (citing 75 PA. CONS. STAT. § 1547 (1995)). The Implied Consent Law provides that a driver may refuse to submit to a chemical test. 75 PA. CONS. STAT. § 1547 (1995). This refusal, however, is punishable by a one year suspension of the driver's license to operate a motor vehicle. *Id.*

100. *Eisenhart*, 611 A.2d at 683.

101. *Id.* The court noted that since the defendant explicitly refused the blood test, the results of the test should have been barred from admission under the Implied Consent Law, regardless of whether the evidence was testimonial or nontestimonial in nature. *Id.*

102. See *Commonwealth v. Eisenhart*, 611 A.2d 681 (Pa. 1992); *Commonwealth v. Jefferson*, 281 A.2d 852 (Pa. 1971); *Commonwealth v. Musto*, 35 A.2d 307 (Pa. 1944); *Commonwealth v. Valeroso*, 116 A. 828 (Pa. 1922); *Commonwealth v. Romesburg*, 509 A.2d 413 (Pa. Super. Ct. 1992); *Commonwealth v. Bruder*, 528 A.2d 1385 (Pa. Super. Ct. 1987).

103. *Hayes*, 674 A.2d at 680. See *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991).

104. *Id.*

is a fact that cannot be disputed in an attempt to criticize the court's analysis.

Second, the court astutely analyzed the historical development of Article I, Section 9 of the Pennsylvania Constitution. A careful examination of the historical background of the privilege against self-incrimination in Pennsylvania reveals that while there is a tradition within the Commonwealth of protecting the reputation of an individual accused of a crime, the tradition only protects such an individual from self-incriminating testimonial evidence offered against him or her at trial and not self-incriminating evidence of a nontestimonial nature.¹⁰⁵ The *Hayes* court reasoned that evidence obtained from a field sobriety test that does not require testimonial responses is admissible evidence from which a defendant should not be afforded self-incrimination protection.¹⁰⁶

Third, the court's recognition that every state, with the exception of Oregon, has also found no right to refuse a field sobriety test and, thus, no constitutional bar to introducing evidence obtained from such a test at trial lends great support to the *Hayes* decision.¹⁰⁷ The persuasiveness of other jurisdictions throughout the country cannot be discounted, and the *Hayes* court's citation to at least twenty-one decisions from neighboring jurisdictions in agreement with its decision is notable.¹⁰⁸

The brilliance of the *Hayes* court's analysis, however, probably stops here. Upon applying the fourth prong of the *Edmunds* test, the court erred in holding that there are no public policy concerns that would require a departure from the historical analysis of the privilege against self-incrimination.¹⁰⁹

The *Hayes* court failed to recognize the reality involved in the case of a suspected drunk driver. While it is true that a person asked to perform a field sobriety test is not directly compelled to submit to such a test by the terms of Pennsylvania's implied consent law, suspected drunk drivers are indirectly compelled to submit to such a test for the following reasons.¹¹⁰ First, when a person is stopped for suspicion of driving under the influence of

105. *Id.* See *Commonwealth v. Eisenhart*, 611 A.2d 681 (Pa. 1992); *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991); *Commonwealth v. Jefferson*, 281 A.2d 852 (Pa. 1971); *Commonwealth v. Musto*, 35 A.2d 307 (Pa. 1944); *Commonwealth v. Valeroso*, 116 A. 828 (Pa. 1922); *Commonwealth v. Romesburg*, 509 A.2d 413 (Pa. Super. Ct. 1992); *Commonwealth v. Bruder*, 528 A.2d 1385 (Pa. Super. Ct. 1987).

106. *Hayes*, 674 A.2d at 681.

107. *Id.* at 681-82.

108. *Id.*

109. *Id.* at 682.

110. *Id.* There is no legislative requirement compelling a suspect to submit to a field sobriety test. *Id.*

alcohol, he or she is likely to do whatever the police officer asks, and thus submit to a field sobriety test out of fear or intimidation. Second, in the event that the accused refuses to perform the field sobriety test, though consent to testing does not lead to an automatic license suspension, upon withholding consent the accused will be asked to submit to a chemical test. Under Pennsylvania law, the consequences of withholding consent to a chemical test are a mandatory twelve month suspension of driving privileges and the admission of such refusal as evidence against oneself.¹¹¹ An accused drunk driver in the state of Pennsylvania is, therefore, compelled to incriminate himself or herself, and the Pennsylvania Supreme Court has condoned this indirect form of self-incrimination by affirming Hayes' conviction.

Sean M. Girdwood

111. 75 PA. CONS. STAT. § 1547(b), (e) (1995).

