

**NOTE**

**DECLINING TO STATE A NAME IN  
CONSIDERATION OF THE  
FIFTH AMENDMENT’S SELF-INCRIMINATION  
CLAUSE AND LAW ENFORCEMENT  
DATABASES AFTER *HIIBEL***

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The central storage and easy accessibility of computerized data vastly increase the potential for abuse of that information, and I am not prepared to say that future developments will not demonstrate the necessity of some curb on such technology.<sup>1</sup>

#### INTRODUCTION

In response to a report of an argument on a public sidewalk, a police officer approaches two people standing in the vicinity of the reported dispute. The officer requests that each person provide her name so the officer can run the names through databases to which the police department subscribes. After searching each name through various databases, the officer might discover that one of the individuals made several purchases of cold medicine containing pseudoephedrine and that the other just received a license from the State to procure certain hazardous chemicals. These two people might be in the early stages of setting up a methamphetamine ring, or they might respectively be a person getting over a cold and an entrepreneur. In either case, merely by giving her name, each person provided the police officer with information that she could have reasonably believed might lead the officer to incriminating evidence.

The potential for a name to be self-incriminating presents a question about the applicability of the Fifth Amendment's Self-Incrimination Clause. In *California v. Byers*, the Supreme Court held that a person cannot refuse to state her name in the course of a traffic stop based on the Self-Incrimination Clause.<sup>2</sup> The reason is because the statutes applicable to traffic stops are primarily regulatory—not criminal—and the Self-Incrimination Clause is inapplicable to noncriminal regulatory inquiries.<sup>3</sup> Outside of the context of a traffic stop, the Supreme Court has held that the Fourth Amendment prohibits a police officer from stopping an individual to ask for her name unless the police officer has “a reasonable suspicion, based on objective facts, that

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1. *Whalen v. Roe*, 429 U.S. 589, 607 (1977) (Brennan, J., concurring).

2. *California v. Byers*, 402 U.S. 424, 429–30 (1971) (plurality opinion); *id.* at 458 (Harlan, J., concurring in the judgment). While *Byers* involved a statute that required a driver to provide her name after an accident, successive lower courts have interpreted it as applying to traffic stops in general. *See, e.g.*, *Diamondstone v. Macaluso*, 148 F.3d 113, 121–23 (2d Cir. 1998) (explaining how the rationale espoused by the plurality in *Byers* enables a state to compel statements in the course of a traffic stop when the penalties for minor traffic violations are civil).

3. *Diamondstone*, 148 F.3d at 121–23.

the individual is involved in criminal activity.”<sup>4</sup> If a police officer approaches an individual without reasonable suspicion or probable cause, “the individual has a right to ignore the police [officer] and go about his business.”<sup>5</sup> The Supreme Court has stated that:

[w]hile “reasonable suspicion” is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop. The officer must be able to articulate more than an “inchoate and unparticularized suspicion or ‘hunch’” of criminal activity.<sup>6</sup>

The Supreme Court has also indicated that although the “probable-cause standard is incapable of precise definition,”<sup>7</sup> the “‘substance of all the definitions of probable cause is a reasonable ground for belief of guilt,’ and . . . the belief of guilt must be particularized with respect to the person to be searched or seized.”<sup>8</sup> In *Hiibel v. Sixth Judicial District Court*, the Supreme Court was presented with the question of whether in a non-traffic-stop situation an officer who has reasonable suspicion can compel a person to state her name.<sup>9</sup>

The Supreme Court in *Hiibel* held that the Search and Seizure Clause of the Fourth Amendment does not proscribe state or federal statutes from requiring an individual to provide her name to a police officer, so long as the police officer had reasonable suspicion to stop the individual.<sup>10</sup> The Supreme Court also held that based on the facts presented by the defendant, Larry Hiibel, the Fifth Amendment’s Self-Incrimination Clause did not protect the defendant’s decision to refuse to state his name.<sup>11</sup> The Court, however,

4. *Brown v. Texas*, 443 U.S. 47, 51 (1979). For a discussion of *Brown v. Texas* and related case law, see *Hiibel v. Sixth Judicial District Court*, 542 U.S. 177, 183–84 (2004).

5. *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) (citing *Florida v. Royer*, 460 U.S. 491, 498 (1983)).

6. *Id.* at 123–24 (citation omitted) (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)). For a different formulation of the definition of reasonable suspicion, see *Alabama v. White*:

Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.

*White*, 496 U.S. 325, 330 (1990).

7. *Maryland v. Pringle*, 540 U.S. 366, 371 (2003).

8. *Id.* (citation omitted) (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)).

9. *Hiibel*, 542 U.S. at 185–86, 188–89.

10. *Id.* at 187–89.

11. *Id.* at 189–91. The Court declined to consider Mr. Hiibel’s Fifth Amendment challenge for two reasons. First, Mr. Hiibel gave no indication at the time the officer requested his name that his refusal to answer was predicated on the Fifth Amendment. *Id.* at 191. Second, Mr. Hiibel’s “refusal to disclose his name was not based on any articulated real and appreciable fear that his name would be used to incriminate him, or that it ‘would furnish a link in the chain of evidence needed to prosecute’ him.” *Id.* at 190 (quoting *Hoffman v. United States*, 341 U.S. 479, 486 (1951)); see also Arnold H. Loewy, *The Cowboy and the Cop: The Saga of Dudley Hiibel, 9/11, and the Vanishing*

explicitly reserved the question of whether some similar set of circumstances may justify an individual's invocation of the Fifth Amendment's Self-Incrimination Clause to refuse to state a name.<sup>12</sup>

The Supreme Court's decision in *Hiibel* and the Court's Fourth and Fifth Amendment jurisprudence have left unresolved whether a person can invoke the Fifth Amendment's Self-Incrimination Clause to refuse to state a name in a non-traffic-stop, pre-arrest situation.<sup>13</sup> This Note uses the term non-traffic-stop, pre-arrest situation to reference a situation in which a police officer has reasonable suspicion, but does not have probable cause for either a search or an arrest. Post-arrest, a person cannot refuse to state her name based on the Self-Incrimination Clause because the information is being sought for record-keeping purposes and is reasonably related to the government's administrative concerns.<sup>14</sup> The Supreme Court's rationale in these cases does not extend to non-traffic-stop, pre-arrest situations because the purpose for seeking a name in a non-traffic-stop, pre-arrest situation is not regulatory or administrative, but to further a criminal investigation.<sup>15</sup>

The Fifth Amendment's Self-Incrimination Clause<sup>16</sup> only applies to communications that are testimonial, incriminating, and compelled.<sup>17</sup> A statement that fails to meet any one of the requirements is not protected under the Fifth Amendment's Self-Incrimination Clause.<sup>18</sup> The Court has defined the first requirement, that the statement be testimonial, as communications by the accused that "explicitly or implicitly, relate a factual assertion or disclose information."<sup>19</sup> This definition encompasses most verbal state-

*Fourth Amendment*, 109 PENN. ST. L. REV. 929, 930–36 (2005) (reprinting the transcript of the exchange between Mr. *Hiibel* and the sheriff's deputy).

12. *Hiibel*, 542 U.S. at 191.

13. See, e.g., *United States v. Doe*, 128 F. App'x 179, 180–81 (2d Cir. 2005) (unpublished) (noting that the "Fifth Amendment jurisprudence regarding the right to withhold one's name is far from clear when applied to Doe's" refusal to provide his name during sentencing); *State v. Brown*, 2004-Ohio-4058, ¶¶ 23–27 (Ct. App.) (analyzing whether the Self-Incrimination Clause justifies refusing to provide a name to a police officer if the name will reveal the existence of an arrest warrant); *Schreyer v. State*, No. 05-03-01127-CR, 2005 Tex. App. LEXIS 5921, at \*40–41, 2005 WL 1793193, at \*13 (Tex. App. July 29, 2005) (same).

14. *Pennsylvania v. Muniz*, 496 U.S. 582, 601–02 (1990).

15. *Balt. City Dep't of Soc. Servs. v. Bouknight*, 493 U.S. 549, 561 (1990) ("The State's regulatory requirement in the usual case may neither compel incriminating testimony nor aid a criminal prosecution . . ."); see also *infra* Sections I.B, II.A.

16. "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." U.S. CONST. amend. V.

17. *Hiibel*, 542 U.S. at 189; *United States v. Hubbell*, 530 U.S. 27, 34–38 (2000); *Doe v. United States (Doe II)*, 487 U.S. 201, 209 n.8 (1988); *United States v. Doe (Doe I)*, 465 U.S. 605, 610 n.8 (1984).

18. *Fisher v. United States*, 425 U.S. 391, 399 (1976) ("[T]he Court has never on any ground, personal privacy included, applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which, in the Court's view, did not involve compelled testimonial self-incrimination of some sort.").

19. *Doe II*, 487 U.S. at 210.

ments.<sup>20</sup> The second requirement, that the statement be incriminating, requires that the statement either support a conviction under a criminal statute or provide a link in the chain of evidence for prosecution under a criminal statute.<sup>21</sup> The definition of incriminating extends the privilege to statements that do not contain inculpatory information but that may lead to incriminating information.<sup>22</sup> The third requirement, that the statement be compelled, has been defined by the Supreme Court as circumstances that “deny the individual a ‘free choice to admit, to deny, or to refuse to answer.’”<sup>23</sup> A person’s refusal to answer a question where the answer would be testimonial, incriminating, and compelled, enjoys the protection of the privilege against self-incrimination.

In the past fifteen years, the implications of a person providing her name to a police officer<sup>24</sup> have been altered by the development of previously infeasible databases,<sup>25</sup> which have changed the information that a name provides.<sup>26</sup> New, complex databases, such as the Factual Analysis Criminal

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20. *Id.* at 213–14 (“There are very few instances in which a verbal statement, either oral or written, will not convey information or assert facts. The vast majority of verbal statements thus will be testimonial and, to that extent at least, will fall within the privilege.”). In the context of the Self-Incrimination Clause, a statement does not need to be made in a court proceeding, police station, or other similar forum in order to be considered testimonial. *See id.*; *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (“The [Fifth] Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.”); *Kastigar v. United States*, 406 U.S. 441, 444 (1972) (“[The privilege against self-incrimination] can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory . . .”).

21. *Hubbell*, 530 U.S. at 38; *Maness v. Meyers*, 419 U.S. 449, 461 (1975) (“The protection does not merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution.”); *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

22. *Hubbell*, 530 U.S. at 38 (“Compelled testimony that communicates information that may ‘lead to incriminating evidence’ is privileged even if the information itself is not inculpatory. It is the Fifth Amendment’s protection against the prosecutor’s use of incriminating information derived directly or indirectly from the compelled testimony of the respondent that is of primary relevance in this case.” (citing *Doe II*, 487 U.S. at 208 n.6)); *Hoffman*, 341 U.S. at 486.

23. *Minnesota v. Murphy*, 465 U.S. 420, 429 (1984) (quoting *Garner v. United States*, 424 U.S. 648, 657 (1976)). For the Supreme Court’s first articulation of this definition of compelled, see *Lisenba v. California*, 314 U.S. 219, 241 (1941).

24. This Note treats the terms “authorities,” “police officer,” and “government agent” as synonymous because the Fifth Amendment’s Self-Incrimination Clause applies against the states and against the federal government. *See Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

25. *See generally* Ming-Syan Chen et al., *Data Mining: An Overview from a Database Perspective*, 8 IEEE TRANSACTIONS ON KNOWLEDGE AND DATA ENGINEERING 866 (1996) (discussing the technical implications of increases in the capabilities of technologies that collect and store information); Willi Klösgen & Jan M. Żytkow, *Knowledge Discovery in Databases: The Purpose, Necessity, and Challenges*, in HANDBOOK OF DATA MINING AND KNOWLEDGE DISCOVERY 1 (Willi Klösgen & Jan M. Żytkow eds., 2002) (discussing the development of techniques for extracting information from large data sets).

26. Chris Jay Hoofnagle, *Big Brother’s Little Helpers: How ChoicePoint and Other Commercial Brokers Collect and Package Your Data for Law Enforcement*, 29 N.C. J. INT’L L. & COM. REG. 595, 596, 600 (2004) (discussing the ability of law enforcement to obtain a broad array of personal data from various databases).

Threat Solution (FACTS),<sup>27</sup> the National Crime Information Center (NCIC),<sup>28</sup> the United States Visitor and Immigrant Status Indicator Technology Program (US-VISIT),<sup>29</sup> and the Transportation Workers Identification Credential (TWIC)<sup>30</sup> have the capacity to organize information beyond that available through other resources.<sup>31</sup> They provide police with the ability to search information ranging from property ownership to federal government terrorist watch lists,<sup>32</sup> and from date of birth to the authority of an individual to access various transportation facilities.<sup>33</sup> As will be discussed in this Note, the development of detailed government and commercial databases means that a name now provides access to detailed information about a person's past criminal or alleged criminal activities.

This Note argues that the Self-Incrimination Clause of the Fifth Amendment applies to a person who has been requested to provide her

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27. The FACTS is the product of the now terminated Multi-State Anti-Terrorism Information (MATRIX) Pilot Project. See Press Release, Fla. Dep't of Law Enforcement, MATRIX Pilot Project Concludes (Apr. 15, 2005), [http://www.fdle.state.fl.us/press\\_releases/20050415\\_matrix\\_project.html](http://www.fdle.state.fl.us/press_releases/20050415_matrix_project.html).

28. 28 U.S.C. § 534 (2000) (authorizing the Attorney General to "acquire, collect, classify, and preserve identification, criminal identification, crime, and other records . . ."); 28 C.F.R. § 0.85(f) (2004) (authorizing the Director of the Federal Bureau of Investigations to create the National Criminal Information Center); Notice of Modified Systems of Records, 64 Fed. Reg. 52,343 (Sept. 28, 1999) (pursuant to Privacy Act of 1974) [hereinafter DOJ Notice].

29. Notice of Revised Privacy Impact Assessment and Privacy Policy (US-VISIT Program), 69 Fed. Reg. 57,036 (Sept. 23, 2004) [hereinafter Notice of Revised US-VISIT PIA]; Notice of Privacy Impact Assessment and Privacy Policy (US-VISIT Program), 69 Fed. Reg. 2,608 (Jan. 16, 2004) [hereinafter Notice of US-VISIT PIA].

30. Notice to establish new and altered systems of records; request for comments, 68 Fed. Reg. 49,496, at 49,507–08 (Aug. 18, 2003) (pursuant to Privacy Act of 1974) [hereinafter TSA Notice].

31. See generally Chen et al., *supra* note 25; Klösgen & Żytkow, *supra* note 25; MARK DOUGHERTY ET AL., DEVELOPING GIS-ENABLED CRIME ANALYSIS APPLICATIONS USING VALUE-ADDED WAREHOUSE DATA FOR LAW ENFORCEMENT (March 2004), <http://www.ojp.usdoj.gov/nij/maps/boston2004/papers/Dougherty.pdf> (discussing the role of databases in modern law enforcement and the potential gains from integrating various law enforcement information sources).

32. The ability to conduct a search with a person's name but without other information, such as date of birth, is unclear. In *Hiibel*, the State of Nevada and the amicus brief of the National Association of Police Organizations argued that a name was sufficient to permit a police officer to obtain information about a suspect. Brief for Respondent at 17–18, *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177 (2004) (No. 03-5554), 2004 WL 99348; Brief for the Nat'l Ass'n of Police Orgs. as Amici Curiae Supporting Respondents at 5–6, *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177 (2004) (No. 03-5554), 2004 WL 121586 [hereinafter *NAPO Amicus Brief*]. At least with regard to criminal history information, a name alone appears to be insufficient to obtain information about an individual. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, USE AND MANAGEMENT OF CRIMINAL HISTORY RECORD INFORMATION: A COMPREHENSIVE REPORT, 2001 UPDATE 37 (2001), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/umchri01.pdf> [hereinafter *Criminal History Record Information*]. But see *United States v. Ornelas-Ledesma*, 16 F.3d 714, 716 (7th Cir. 1994) (discussing a police officer obtaining information about two individuals' potential involvement in narcotics trafficking based on names obtained from a hotel registry), *vacated*, 517 U.S. 690 (1996); see also *infra* note 132 (providing the full appellate history of *Ornelas-Ledesma*). These limitations may not be applicable to some of the other databases, such as the FACTS and US-VISIT. Cf. WILLIAM J. KROUSE, THE MULTI-STATE ANTI-TERRORISM INFORMATION EXCHANGE (MATRIX) PILOT PROJECT 4 (2004), available at <http://www.fas.org/irp/crs/RL32536.pdf> (discussing the ability of law enforcement to use FACTS to complete searches based on incomplete information).

33. The Appendix, *infra*, outlines the details of the information provided in each database.

name in a non-traffic-stop, pre-arrest situation because of the potential for law enforcement databases to reveal incriminating information. Part I contends that a person's answer to a question requesting her name for a database search is a compelled, testimonial, self-incriminating statement that fulfills the three requirements for the invocation of the privilege against self-incrimination. Part II evaluates the practical application of people declining to state their names based on the privilege against self-incrimination.

#### I. APPLYING THE THREE REQUIREMENTS FOR THE INVOCATION OF THE SELF-INCRIMINATION CLAUSE TO THE DISCLOSURE OF A NAME USED FOR A DATABASE SEARCH

As aforementioned, a statement must be testimonial, incriminating, and compelled to trigger the Fifth Amendment's Self-Incrimination Clause. There are circumstances in which stating one's name to a government agent can meet all three of these requirements. Section I.A shows that stating one's name fulfills the testimonial requirement because a person stating her name is making a factual assertion about her identity. Section I.B establishes that the incriminating aspect of a person's name stems from the ability of a police officer to use a person's name to search various databases and then to combine the immediate circumstances and the database information in furtherance of a criminal investigation. Section I.C explains how imposing criminal or other sanctions for refusing to state one's name is sufficient to make stating one's name a compelled statement.

##### A. Stating One's Name Is Testimonial

The word "witness" in the Fifth Amendment's Self-Incrimination Clause limits the privilege against self-incrimination to testimonial statements.<sup>34</sup> The limitation to testimonial statements has not limited the privilege to statements made in court.<sup>35</sup> Determining whether a statement is testimonial for the purpose of the Self-Incrimination Clause depends on whether the content of the statement "communicates any factual assertions" or "conveys any information to the Government."<sup>36</sup> To classify stating one's name as

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34. "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." U.S. CONST. amend. V; *United States v. Patane*, 542 U.S. 630, 638–41, 643–44 (2004) (plurality opinion); *United States v. Hubbell*, 530 U.S. 27, 34 (2000); *Doe v. United States (Doe II)*, 487 U.S. 201, 212 (1988).

35. *United States v. Balsys*, 524 U.S. 666, 672 (1998) ("[The Self-Incrimination Clause] 'can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory,' in which the witness reasonably believes that the information sought, or discoverable as a result of his testimony, could be used in a subsequent state or federal criminal proceeding." (quoting *Kastigar v. United States*, 406 U.S. 441, 444–45 (1972))). The extension of the application of the Self-Incrimination Clause to proceedings other than criminal court proceedings has been limited through the incrimination requirement for invoking the Self-Incrimination Clause. See *infra* notes 103–113 and accompanying text.

36. *Doe II*, 487 U.S. at 214–15 ("The difficult question whether a compelled communication is testimonial for purposes of applying the Fifth Amendment often depends on the facts and

testimonial, it must, “explicitly or implicitly, relate a factual assertion or disclose information.”<sup>37</sup> Stating one’s name makes such a conveyance.<sup>38</sup> The majority in *Hiibel* declined to resolve Mr. Hiibel’s Fifth Amendment challenge on the grounds that a name is not testimonial and instead noted that stating a name may be testimonial because “[s]tating one’s name may qualify as an assertion of fact relating to identity.”<sup>39</sup> In *Crawford v. Washington*, the Supreme Court stated that “[w]hatever else the term [testimonial] covers, it applies at a minimum to . . . police interrogations.”<sup>40</sup> Questioning by a police officer in a non-traffic-stop, pre-arrest situation is a form of police interrogation, so responses to questions in such a context would be testimonial for Sixth Amendment purposes.<sup>41</sup> The Supreme Court’s analysis in *Crawford* supports classifying a name as testimonial and the classification is also supported by the Supreme Court’s prior Self-Incrimination Clause jurisprudence. Section I.A.1 explains why stating one’s name is not within the class of acts that the Supreme Court has classified as nontestimonial. Section I.A.2 explains that a name fulfills the testimonial requirement because the Self-Incrimination Clause protects any statements wherein the substance of the statement involves the disclosure of a person’s knowledge.

1. *Stating One’s Name Is Not within the Class of Compelled Acts  
the Court Has Classified as Nontestimonial*

Over the last century, the Supreme Court found the government’s compelling of certain acts to be consistent with the privilege against self-incrimination. By classifying these acts as nontestimonial, the Court created a group of government-compelled self-incriminating behaviors not prohibited by the Fifth Amendment’s Self-Incrimination Clause.<sup>42</sup> Although some

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circumstances of the particular case. This case is no exception. We turn, then, to consider whether Doe’s execution of the consent directive at issue here would have testimonial significance. We agree with the Court of Appeals that it would not, because neither the form, nor its execution, communicates any factual assertions, implicit or explicit, or conveys any information to the Government.” (citation omitted)).

37. *Id.* at 210.

38. *See id.* at 213–14.

39. *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 189 (2004). For an example of a court post-*Hiibel* finding an individual’s statement of his name in response to police questioning to be testimonial, see *State v. Brown*, 2004-Ohio-4058, ¶¶ 25–27 (Ct. App.).

40. *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

41. *Hiibel*, 542 U.S. at 195 (Stevens, J., dissenting); *Crawford*, 541 U.S. at 68.

42. Permitting the government to compel these acts has been separate from the rationale for not extending the privilege against self-incrimination to documents written by the individual. *See Fisher v. United States*, 425 U.S. 391, 410 n.11 (1976). The privilege against self-incrimination does not extend to the compelled production of documents because the government did not compel the individual to make the documents. *See Marchetti v. United States*, 390 U.S. 39, 53–54 (1968) (holding the Self-Incrimination Clause applicable to a document an individual is compelled to complete). *But see* Aaron M. Clemens, *The Pending Reinvigoration of Boyd: Personal Papers are Protected by the Privilege Against Self-Incrimination*, 25 N. ILL. U. L. REV. 75 (2004) (suggesting that *Hubbell* is the harbinger of a return to the Self-Incrimination Clause’s protection of individuals from the compelled production of personal papers).

might argue that one's name is like a physical identifier and therefore is nontestimonial, stating one's name to the police is outside of this classification because the evidentiary value of a person stating her name derives from the substance of her communication.

Determining whether an act is testimonial depends upon whether the evidentiary value of the statement derives from the substance of the communication or act. In *United States v. Holt*, the Supreme Court first distinguished statements from mere acts.<sup>43</sup> In *Holt*, the defendant was required to put on a shirt in order for the jury to assess the fit of the shirt to the defendant.<sup>44</sup> The Court classified the wearing of a shirt as an act that enabled the jury to compare the defendant's physical attributes to those of the perpetrator.<sup>45</sup> The evidentiary value derived not from the defendant but from the inferences and analyses of the jurors.<sup>46</sup> The Court applied the same principle when it held that the evidentiary value of a compelled blood sample derived from the chemical analysis of the blood.<sup>47</sup> The Court expanded the scope of the principle of the evidentiary value not deriving from the defendant by holding in *Gilbert v. California* that compelled handwriting exemplars represent real or physical evidence, not testimonial evidence.<sup>48</sup> The Court's analysis in *Gilbert* clarified the distinction between testimonial and nontestimonial by indicating that the protection of the Self-Incrimination Clause only applies when the evidentiary value derives from the substance of the person's statement.<sup>49</sup>

The Supreme Court has also stressed the relevance of the communicative aspect of a testimonial statement. In *United States v. Dionisio*, the government was permitted to compel a person to make a recording of his voice because the recording's evidentiary value arose from the physical attributes of the person's voice, not the content of his recorded statements.<sup>50</sup> Finally, in *United States v. Wade*, the Court held that the government's compelling a defendant to participate in a line-up did not violate the Self-Incrimination Clause.<sup>51</sup> The Court in *Wade* went on to reiterate the proposition from *Holt* that the privilege against self-incrimination permits the compelled introduction of a person's

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43. *United States v. Holt*, 218 U.S. 245, 252–53 (1910).

44. *Id.*

45. *Id.*

46. *Id.* at 253.

47. *Schmerber v. California*, 384 U.S. 757, 765 (1966).

48. *Gilbert v. California*, 388 U.S. 263, 266–67 (1967).

49. *Id.* at 266–67 (“One’s voice and handwriting are, of course, means of communication. It by no means follows, however, that every compulsion of an accused to use his voice or write compels a communication within the cover of the privilege. A mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside its protection.”).

50. *United States v. Dionisio*, 410 U.S. 1, 7 (1973). In *Dionisio*, the voice exemplars were part of a gambling investigation. The evidence in the case included recordings from wiretaps and about twenty people were subpoenaed to read transcripts of the wiretapped conversations. The voice exemplars recorded from the reading of the transcripts were then compared to the wiretaps. *Id.* at 3.

51. *United States v. Wade*, 388 U.S. 218, 221–22 (1967).

physical characteristics.<sup>52</sup> The Court found these acts to be nontestimonial because the evidentiary aspect of each of the acts in these cases stemmed from a noncommunicative element in the act.

Stating one's name is communicative and therefore cannot be compelled without being testimonial. The evidentiary value of a person stating her name is that the person making the statement is asserting that the name she speaks is her name. Unlike the information that a jury infers when a defendant is compelled to try on a glove,<sup>53</sup> the information gleaned when a person is compelled to state her name is based on the person's knowledge, and the value of her statement to the government derives from the substance of the statement. For example, a defendant could be compelled to try on a particular shirt in front of the jury but could not be compelled to testify as to his shirt size because the latter would permit the State to compel a statement for the purpose of using the substance of the statement. The Supreme Court's Self-Incrimination Clause jurisprudence supports classifying the statement of a name as testimonial because the statement is an assertion based on the speaker's knowledge and the government's interest in the statement derives from the substance of the statement.

## 2. *Stating One's Name Requires a Sufficient Disclosure from a Person's Mind to Be Testimonial*

The Supreme Court has excluded from the protection of the Self-Incrimination Clause acts that are "not sufficiently testimonial."<sup>54</sup> So, someone might argue that providing one's name to a police officer is nontestimonial because a name is "not sufficiently testimonial." A "not sufficiently testimonial" statement is testimonial because it requires the person to acknowledge a fact, but that acknowledgement is not sufficient for the Self-Incrimination Clause because it does not reveal the contents of the person's mind.<sup>55</sup> For instance, in *Doe II*, the Court classified a consent directive that allowed the government to access a bank account as nontestimonial.<sup>56</sup> The consent directive at issue in *Doe II* was a document to be signed by the defendant that would authorize foreign banks to produce records related to accounts the defendant allegedly had.<sup>57</sup> A consent directive arguably appears

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52. *Id.*

53. *E.g., Last Week in O.J. History; Week 68 (The Final Week): All O.J. All the Time*, BOSTON GLOBE, Oct. 8, 1995, at A34 (discussing comments by jurors about the failure of a glove that had the blood of the victim, Nicole Brown Simpson, to fit the defendant, O.J. Simpson); Bob Pool & Amy Pyle, *Case Was Weak, Race Not Factor; Two Jurors Say*, L.A. TIMES, Oct. 5, 1995, at A1 (same).

54. *Doe v. United States (Doe II)*, 487 U.S. 201, 216–17, 217 n.15 (1988) (discussing the inapplicability of the Self-Incrimination Clause to statements or acts that are "not sufficiently testimonial").

55. *Id.* at 216 & n.14 (discussing statements or acts that are "not sufficiently testimonial" as being those that do not reveal the contents of an individual's mind).

56. *Id.* at 214–19.

57. *Id.* at 202–03, 204 n.2. The text of the directive was:

to be more testimonial than stating one's name because a consent directive typically involves acknowledging more information—ownership or control of specific accounts at a particular bank. Reviewing the Court's analysis in *Doe II*, however, shows that stating one's name does not fall into the narrow “not sufficiently testimonial” exception for two reasons.

First, the consent directive was nontestimonial because it only required the person signing the directive to attest to hypothetical facts;<sup>58</sup> a person stating her name is not attesting to a hypothetical fact. More specifically, the consent directive only referenced hypothetical accounts without speaking as to the authenticity of any documents.<sup>59</sup> The Court also noted that the consent directive was not an admission of the “control or existence” of any bank accounts.<sup>60</sup> Furthermore, the phrasing of the consent directive in *Doe II* did not even acknowledge that the person had consented to the release of the bank records.<sup>61</sup> In order for a person responding to a request for her name to avoid conveying information from her mind in the same manner as the hypothetical phrasing of the consent directive in *Doe II*, the person would need to say something like: “There could hypothetically be a person known as Jane Doe. I neither confirm nor deny being Jane Doe. I am not admitting any knowledge as to the existence or nonexistence of Jane Doe. I am also not admitting knowledge of any information associated with such a person.” This statement starkly contrasts with what a police officer would likely consider an acceptable response to a request for a person's name. The extent of the contrast demonstrates that the ordinary statement of a name lacks the hypothetical nature of the *Doe II* consent directive that provided the basis for classifying the directive as nontestimonial.

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I, \_\_\_\_\_, of the State of Texas in the United States of America, do hereby direct any bank or trust company at which I may have a bank account of any kind or at which a corporation has a bank account of any kind upon which I am authorized to draw, and its officers, employees and agents, to disclose all information and deliver copies of all documents of every nature in your possession or control which relate to said bank account to Grand Jury 84-2 . . . or to any attorney of the District of Texas, or to any attorney of the United States Department of Justice assisting said Grand Jury, and to give evidence relevant thereto, in the investigation conducted by Grand Jury 84-2 . . . and this shall be irrevocable authority for so doing. This direction has been executed pursuant to that certain order of the United States District Court for the Southern District of Texas issued in connection with the aforesaid investigation, dated \_\_\_\_\_. This direction is intended to apply to the Confidential Relationships (Preservation) Law of the Cayman Islands, and to any implied contract of confidentiality between Bermuda banks and their customers which may be imposed by Bermuda common law, and shall be construed as consent with respect thereto as the same shall apply to any of the bank accounts for which I may be a relevant principal.

*Id.* at 204 n.2.

58. *Id.* at 215 (“The consent directive itself is not ‘testimonial.’ It is carefully drafted not to make reference to a specific account, but only to speak in the hypothetical. Thus, the form does not acknowledge that an account in a foreign financial institution is in existence or that it is controlled by petitioner. Nor does the form indicate whether documents or any other information relating to petitioner are present at the foreign bank, assuming that such an account does exist.”).

59. *Id.* at 215–17.

60. *Id.* at 218 (citing *In re Grand Jury Subpoena*, 826 F.2d 1166, 1171 (2d Cir. 1987); *United States v. Ghidoni*, 732 F.2d 814, 818 & n.9 (11th Cir. 1984)).

61. *Id.* at 215–16, 216 n.14.

Second, the Court in *Doe II* stated that the information given was non-testimonial because it merely pointed to a third party and that third party provided the incriminating factual assertion. The Court in *Doe II* rejected the argument that signing the consent directive was testimonial because the person was acknowledging that the signing had been performed by him.<sup>62</sup> The Court held that the implicit admission by the individual that he had performed the compelled act was not “sufficiently testimonial”<sup>63</sup> because the bank—not the defendant—would make the relevant factual assertion about the ownership of the accounts.<sup>64</sup> When a person states her name, she is the party making the relevant factual assertion—her identity. Therefore, the situation in which a person must state her name is unlike the situation in *Doe II* in which the relevant factual assertion would be made by a third party.<sup>65</sup>

The Supreme Court’s analysis in *United States v. Hubbell* of what is “sufficiently testimonial” elucidates why stating one’s name is “sufficiently testimonial.”<sup>66</sup> The purpose of the Fifth Amendment’s Self-Incrimination Clause is to prevent a person from being compelled to disclose incriminating information based on her knowledge<sup>67</sup> or the contents of her mind.<sup>68</sup> Courts have repeatedly explained the distinction between what is protected and what is not protected through an analogy to the difference between the key to a strongbox and the combination to a wall safe.<sup>69</sup> The privilege against self-incrimination does not bar discovery of incriminating information contained in a strongbox or wall safe, rather the privilege against self-incrimination limits the means that the police can use to obtain access to the incriminating information.<sup>70</sup> If the information that the police seek is con-

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62. *Id.* at 217 n.15.

63. *Id.* (“Petitioner apparently maintains that the performance of every compelled act carries with it an implied assertion that the act has been performed by the person who was compelled, and therefore the performance of the act is subject to the privilege. In *Wade*, *Gilbert*, and *Dionisio*, the Court implicitly rejected this argument. It could be said in those cases that the suspect, by providing his handwriting or voice exemplar, implicitly ‘acknowledged’ that the writing or voice sample was his. But as the holdings made clear, this kind of simple acknowledgment—that the suspect in fact performed the compelled act—is not ‘sufficiently testimonial for purposes of the privilege.’” (quoting *Fisher v. United States*, 425 U.S. 391, 411 (1976))).

64. *Id.* at 218.

65. *See id.*

66. *See United States v. Hubbell*, 530 U.S. 27, 43–44 (2000).

67. *Doe II*, 487 U.S. at 211; *United States v. Wade*, 388 U.S. 218, 222–23 (1967).

68. *Curcio v. United States*, 354 U.S. 118, 128 (1957).

69. *E.g.*, *Hubbell*, 530 U.S. at 43; *Doe II*, 487 U.S. at 210 n.9; *see also United States v. Green*, 272 F.3d 748, 753–54 (5th Cir. 2001) (holding evidence that had been obtained as a result of the defendant revealing to government agents the combinations to cases containing incriminating evidence inadmissible at trial based on the Fifth Amendment’s Self-Incrimination Clause).

70. *See Doe II*, 487 U.S. at 206–07; *Couch v. United States*, 409 U.S. 322, 328 (1973) (“[T]he Fifth Amendment privilege is a *personal* privilege: it adheres basically to the person, not to information that may incriminate him. As Mr. Justice Holmes put it: ‘A party is privileged from producing the evidence but not from its production.’” (quoting *Johnson v. United States*, 228 U.S. 457, 458 (1913))).

tained in a wall safe that requires a combination, the police cannot compel a person to reveal the combination to the wall safe.<sup>71</sup> The police cannot compel the disclosure of the wall safe's combination because this represents the contents of a person's mind, the area protected by the Self-Incrimination Clause.<sup>72</sup> In contrast, if the information is contained in a strongbox, the Self-Incrimination Clause would not bar the police from compelling the production of the key.<sup>73</sup> A person who is compelled to produce the key is not being required to speak of her own guilt; rather she is being compelled to produce a tangible object.<sup>74</sup>

The analogy shows that the privilege against self-incrimination does not prevent the police from obtaining incriminating information.<sup>75</sup> Rather, the privilege protects a person from being compelled to provide the government with the incriminating information or links to the incriminating information *from her own mind*.<sup>76</sup> For example, in *Hubbell* the Supreme Court applied the strongbox and wall safe analogies to the compelled production of documents.<sup>77</sup> In October of 1996, Webster Hubbell was served with a subpoena *duces tecum* from the Independent Counsel for the production of documents.<sup>78</sup> Mr. Hubbell initially invoked the Fifth Amendment and refused to state whether the documents sought by the subpoena were within his control or possession<sup>79</sup> but later produced 13,120 pages of documents after being granted immunity.<sup>80</sup> In April of 1998, the Independent Counsel charged Mr.

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71. *Hubbell*, 530 U.S. at 43; *Doe II*, 487 U.S. at 210 n.9; *Green*, 272 F.3d at 753–54.

72. *Doe II*, 487 U.S. at 210 n.9; *Green*, 272 F.3d at 753.

73. *Doe II*, 487 U.S. at 210 n.9.

74. *See id.* at 210–11 (reviewing prior cases involving compelled nontestimonial acts).

75. *Id.* at 206–07; *Couch*, 409 U.S. at 328; *see also* *Kastigar v. United States*, 406 U.S. 441, 459–62 (1972). In *Kastigar*, the Court discussed a requirement that arises when the government seeks to use evidence against the defendant that it obtained from the defendant under a grant of immunity. In such a circumstance, the government has the burden of showing that it had a “legitimate source wholly independent of the compelled testimony.” 406 U.S. at 460. The government is free to use other means of investigation, whether those means be other witnesses or forensic work, to discover the same information that the individual declined to state based on the privilege against self-incrimination. *Id.* at 461.

76. *Pennsylvania v. Muniz*, 496 U.S. 582, 595 (1990); *Doe II*, 487 U.S. at 213 (“[T]he privilege is asserted to spare the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the Government.”); *United States v. Wade*, 388 U.S. 218, 222–23 (1967).

77. *United States v. Hubbell*, 530 U.S. 27, 30, 43 (2000).

78. *Id.* at 31. Mr. Hubbell was being investigated by the Independent Counsel as part of the investigation of the Whitewater Development Corporation. *Id.* at 30. In December of 1994, Mr. Hubbell pled guilty to charges of mail fraud and tax evasion that had been brought by the Independent Counsel. *Id.*

79. *Id.* at 31. The Self-Incrimination Clause does not permit a person to refuse to produce documents; however, “the act of producing documents in response to a subpoena may have a compelled testimonial aspect.” *Id.* at 36. The act of producing documents is implicitly a compelled testimonial statement because by “producing documents in compliance with a subpoena, the witness would admit that the papers existed, were in his possession or control, and were authentic.” *Id.* (quoting *United States v. Doe (Doe I)*, 465 U.S. 605, 613 & n.11 (1984)).

80. *Id.* at 31. The immunity was granted pursuant to 18 U.S.C. § 6003(a), which provides:

Hubbell with tax-related crimes, and the documents obtained through the 1996 subpoena provided part of the evidence for the charges.<sup>81</sup> The government disclaimed the need to introduce any of the documents obtained under the subpoena to prove the charges against Mr. Hubbell.<sup>82</sup> The Supreme Court, however, found that the government had made “derivative use” of the documents in preparing its case and in obtaining the indictment against Mr. Hubbell.<sup>83</sup>

The Supreme Court found that producing documents in response to some of the broad questions in the subpoena was “the functional equivalent of the preparation of an answer to either a detailed written interrogatory or a series of oral questions at a discovery deposition.”<sup>84</sup> In consideration of these facts, the Supreme Court rejected the government’s contention that Mr. Hubbell’s production of the documents was “a simple physical act—the act of producing the documents.”<sup>85</sup> The Supreme Court held that in responding to the subpoena, Mr. Hubbell had made use of “‘the contents of his own mind’ in identifying the hundreds of documents responsive to the requests in the subpoena.”<sup>86</sup> The Supreme Court concluded by noting that “[t]he assembly of those documents was like telling an inquisitor the combination to a wall safe, not like being forced to surrender the key to a strongbox.”<sup>87</sup>

Like the defendant in *Hubbell* who had to use his memory to produce the subpoenaed documents, a person who provides her name to a police officer is revealing the contents of her mind—her knowledge of her identity—to permit the police officer to access potentially incriminating information. This is similar to a person providing the combination to a wall safe because the person is providing information from her own mind, not a tangible object, that enables the police to access information that may be incriminating.<sup>88</sup> Thus, the statement of a name is testimonial.

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In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this title.

18 U.S.C.S. § 6003(a) (LexisNexis 2005).

81. *Hubbell*, 530 U.S. at 31–32.

82. *Id.* at 41.

83. *Id.*

84. *Id.* at 41–42. The subpoena sought eleven categories of documents. *Id.* at 31.

85. *Id.* at 43.

86. *Id.*

87. *Id.* (citing *Doe v. United States (Doe II)*, 487 U.S. 201, 210 n.9 (1988)).

88. For clarification, a database might be considered distinct in that it is publicly accessible without a person’s name in a way that a wall safe is not accessible without the combination. However, the rhetorical purpose of the analogy is to emphasize the means used to access the information, not the ultimate location of the information sought. Also, the information in the database is accessi-

Likewise, the production of a driver's license<sup>89</sup> in non-traffic-stop, pre-arrest situations should be considered testimonial. The Supreme Court in *Hiibel* expressly did not reach the issue of compelling a person to produce *identification* because the Nevada Supreme Court had interpreted the statute Mr. Hiibel was convicted of violating to only require a person to state her *name*.<sup>90</sup> Although the majority in *Hiibel* declined to resolve whether producing a driver's license is testimonial, the majority did note that the "[p]roduction of identity documents might meet the definition as well."<sup>91</sup> The majority further noted that "acts of production may yield testimony establishing 'the existence, authenticity, and custody of items [the police seek].'"<sup>92</sup> A person who produces identification in response to a request from a police officer would be asserting that the identification document she provided represents her identity. In making this assertion by producing the document, the person has made a testimonial statement because she is making a "factual assertion."<sup>93</sup> Providing identification is not within the class of acts the Supreme Court has found to be nontestimonial because the facts of interest to a criminal investigation arise from the "factual assertion" the person made by providing the identification document. Further, the Fourth Amendment generally prohibits a police officer from conducting a warrantless search for identification during a non-traffic related investigatory stop.<sup>94</sup>

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ble without a name, but the name provides the means of connecting the information to the person whom the officer is questioning.

89. Driver's license is used here for simplicity, although the analysis would apply to any other form of government-issued identification, such as state identification cards and passports.

90. *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 185 (2004) ("[T]he Nevada Supreme Court has interpreted [the Nevada statute] to require only that a suspect disclose his name." (citing *Hiibel v. Sixth Judicial Dist. Court*, 59 P.3d 1201, 1206 (Nev. 2002))).

91. *Id.* at 189.

92. *Id.* (quoting *Hubbell*, 530 U.S. at 41) (modification in the original).

93. *Doe v. United States (Doe II)*, 487 U.S. 201, 210 (1988).

94. *See Schraff v. State*, 544 P.2d 834, 841 (Alaska 1975) (holding that a warrantless search for the defendant's wallet was not within any of the exceptions to the warrant requirement of the Fourth Amendment); *State v. Webber*, 694 A.2d 970, 971 (N.H. 1997) (holding that Part I, Article 19 of the New Hampshire Constitution, which provides that "[e]very subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions," bars a police officer from searching a person's wallet for identification during an investigatory stop); *State v. Newman*, 637 P.2d 143, 146 (Or. 1981) (holding that a police officer could not search for identification for the purpose of transporting a person to an alcohol treatment facility); E. Martin Estrada, *Criminalizing Silence: Hiibel and the Continuing Expansion of the Terry Doctrine*, 49 ST. LOUIS U. L.J. 279, 308 n.183 (2005) (discussing the case law and noting that most courts have held that an officer cannot search a suspect's wallet for identification); Daniel J. Steinbock, *National Identity Cards: Fourth and Fifth Amendment Issues*, 56 FLA. L. REV. 697, 716 n.99 (2004) (discussing the case law). *But see United States v. Garcia*, 942 F.2d 873, 876-77 (5th Cir. 1991) (holding that the Fourth Amendment did not prohibit border patrol agents from searching the defendant's wallet when the agents had a reasonable suspicion that the defendant was an illegal alien and had refused to state his name and citizenship).

### B. *Self-Incrimination by Stating One's Name*

Even if stating one's name is testimonial, the Self-Incrimination Clause also requires that such a statement be self-incriminating. This section argues that stating one's name to a police officer can be self-incriminating. Section I.B.1 reviews the requirements for a statement to be incriminating. Section I.B.2 explains how a name used to complete a database search meets the requirements for the statement to be considered incriminating.

#### 1. *What Circumstances Are Sufficient for a Name to Be Self-Incriminating*

The Self-Incrimination Clause may be invoked against disclosures that confront a person with "substantial hazards of self-incrimination."<sup>95</sup> The invocation of the Self-Incrimination Clause "does not require any special combination of words."<sup>96</sup> The privilege protects information that either directly or indirectly incriminates the individual.<sup>97</sup> A directly incriminating statement is one that supports a criminal conviction by itself.<sup>98</sup> This would be a statement such as "I killed John Doe." A name alone is unlikely to be direct evidence of a crime.<sup>99</sup> An indirectly incriminating statement need not itself be inculpatory<sup>100</sup>—a statement that only provides a link in the chain of evidence is sufficiently incriminating to permit the invocation of the privilege against self-incrimination.<sup>101</sup> For example, statements about others involved in a criminal enterprise that implicate the person making the statements as a participant in the criminal enterprise, but not in any criminal act, warrant the invocation of the privilege against self-incrimination.<sup>102</sup>

95. *California v. Byers*, 402 U.S. 424, 429 (1971) (plurality opinion).

96. *Quinn v. United States*, 349 U.S. 155, 162 (1955).

97. *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

98. *Id.* at 486.

99. The constitutional prohibition on bills of attainder would suggest that having a particular name could never be sufficient for a criminal conviction. *See* U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. art. I, § 10; *United States v. Brown*, 381 U.S. 437, 440–62 (1965).

100. *Doe v. United States (Doe II)*, 487 U.S. 201, 208 n.6 (1988).

101. *Hoffman*, 341 U.S. at 486.

102. *See Blau v. United States*, 340 U.S. 159 (1950). In *Blau*, the defendant had been subpoenaed before a grand jury and then a district court to answer questions about her affiliation with the Communist Party of Colorado. *Id.* at 159–60. In both proceedings the defendant invoked the Fifth Amendment, and in the district court she was held to be in contempt. *Id.* at 160. The questions that the defendant refused to answer were:

"Mrs. Blau, do you know the names of the State officers of the Communist Party of Colorado?" "Do you know what the organization of the Communist Party of Colorado is, the table of organization of the Communist Party of Colorado?" "Were you ever employed by the Communist Party of Colorado?" "Mrs. Blau, did you ever have in your possession or custody any of the books and records of the Communist Party of Colorado?" "Did you turn the books and records of the Communist Party of Colorado over to any particular person?" "Do you know the names of any persons who might now have the books and records of the Communist Party of Colorado?" "Could you describe to the grand jury any books and records of the Communist Party of Colorado?"

The standard that the Supreme Court has applied to determine if the threat of incrimination is sufficient to permit the invocation of the privilege is “whether the claimant is confronted by substantial and ‘real,’ and not merely trifling or imaginary, hazards of incrimination.”<sup>103</sup> In applying this standard, the Supreme Court held that the privilege against self-incrimination is justifiably invoked when the fact that a person would be acknowledging is the existence of, and her possession of, subpoenaed documents that the government would need to authenticate if the documents were obtained from an alternative source.<sup>104</sup> Determining whether the response to a particular question would be incriminating is an objective determination that is to be made by a court.<sup>105</sup> A person who is contemplating invoking the privilege against self-incrimination is not required to make a determination about whether the government is already in possession of the information she is considering invoking the privilege to withhold.<sup>106</sup> In the context of stating one’s name, this means that the right to invoke the Self-Incrimination Clause is not negated by the fact that the police may already be in possession of the person’s name or have a physical description that accompanies each name in the database. A person could therefore decline to state her name even if she believed that the police already knew her name.<sup>107</sup>

In *Albertson v. Subversive Activities Control Board*, the Supreme Court explained that a person may refuse to answer a question under the Self-Incrimination Clause if the question results in a response that provides “investigatory leads to a criminal prosecution,”<sup>108</sup> unless the question is “neutral

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*Id.* at 160 n.1. The Supreme Court held that the defendant could have reasonably feared that answering these questions would result in charges under the Smith Act. *Id.* at 160–61. The Smith Act made it a crime to, among other things, “advocate knowingly the desirability of overthrow of the Government by force or violence; to organize or help to organize any society or group which teaches, advocates or encourages such overthrow of the Government; to be or become a member of such a group with knowledge of its purposes.” *Id.* The Supreme Court held that the defendant had a right to remain silent under the Self-Incrimination Clause in response to the questions about her employment and affiliation with the Communist Party of Colorado. *Id.* at 161.

103. *Marchetti v. United States*, 390 U.S. 39, 53 (1968) (citing *Rogers v. United States*, 340 U.S. 367, 374 (1951); *Brown v. Walker*, 161 U.S. 591, 600 (1896)). The Supreme Court has indicated that the test applied in *Marchetti* is the basic test for determining whether the threat of incrimination fulfills the incrimination requirement of the Self-Incrimination Clause. *United States v. Apfelbaum*, 445 U.S. 115, 128 (1980).

104. *United States v. Doe (Doe I)*, 465 U.S. 605, 614 n.13 (1984).

105. *Rogers*, 340 U.S. at 374 (“As to each question to which a claim of privilege is directed, the court must determine whether the answer to that particular question would subject the witness to a ‘real danger’ of further crimination.”).

106. *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 81 (1965) (“The judgment as to whether a disclosure would be ‘incriminatory’ has never been made dependent on an assessment of the information possessed by the Government at the time of interrogation; the protection of the privilege would be seriously impaired if the right to invoke it was dependent on such an assessment, with all its uncertainties.”).

107. *Id.*

108. *Id.* at 78.

on [its] face and directed at the public at large.”<sup>109</sup> The types of questions that the Supreme Court has recognized as neutral and directed at the public at large have typically been in a “noncriminal and regulatory area of inquiry,”<sup>110</sup> such as income tax questions<sup>111</sup> and questions related to the operation of automobiles.<sup>112</sup> In *Albertson*, the Supreme Court explained that a question is not considered neutral and directed at the public at large when the question is directed at a “highly selective group inherently suspect of criminal activities” and in relation to an “area permeated with criminal statutes.”<sup>113</sup>

A police officer’s request for an individual’s name would meet both requirements that the Supreme Court employed in *Albertson* for classifying a question as nonneutral. First, an individual being questioned by a police officer represents a member of a “highly selective group inherently suspect of criminal activity”<sup>114</sup>—specifically the group of individuals that the police officer believes either were involved in the alleged criminal activity or have information about the alleged criminal activity. A dynamic definition of the group is consistent with the Court’s analysis in *Albertson* because that analysis was aimed at assessing the context of the questioning, which is by definition dynamic.<sup>115</sup> Second, a person whose name is requested is being questioned by a police officer who has already initiated an investigation into potentially criminal conduct.<sup>116</sup> The information the officer is seeking is almost by definition an investigatory lead for a criminal prosecution. This places the request for a person’s name in “an area permeated with criminal

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109. *Id.* at 79. The plurality in *Byers* stated that *Albertson* articulated the components of the “substantial hazards of self-incrimination” requirement. *California v. Byers*, 402 U.S. 424, 429 (1971) (plurality opinion).

110. *Albertson*, 382 U.S. at 79.

111. *United States v. Sullivan*, 274 U.S. 259, 262–64 (1927) (rejecting defendant’s assertion that compelling him to file a tax return would violate the Fifth Amendment because his income was derived from illicit traffic in liquor).

112. *Byers*, 402 U.S. at 432–34 (plurality opinion) (upholding a California statute that required the driver of an automobile involved in an accident to provide her name and address). The argument in this Note is not undermined by the *Byers* plurality’s statement that providing a name was “neutral.” *Id.* at 432. In *Byers*, the person’s name was being requested in furtherance of the state’s regulation of automobiles. The plurality opinion emphasized the extent to which requiring a driver to provide a name was neutral in a sense comparable to the requirement found to be consistent with the Self-Incrimination Clause in *Sullivan*, which involved the requirement that an individual file a tax return. *Id.* at 433–34.

113. *Albertson*, 382 U.S. at 79 (explaining that the exception created in *Sullivan* did not apply to “an inquiry in an area permeated with criminal statutes, where response to any of the form’s questions [which related to membership in the communist party] in context might involve the petitioners in the admission of a crucial element of a crime”).

114. *Id.*

115. *See Byers*, 402 U.S. at 429–31 (plurality opinion) (reviewing the Supreme Court’s application of the test from *Albertson*).

116. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 22–23 (1968) (discussing the interest of the State in permitting police officers to investigate a person by approaching and then attempting to elicit additional information).

statutes.”<sup>117</sup> A police officer asking for a person’s name in a non-traffic-stop, pre-arrest situation is not asking a neutral question, so the privilege against self-incrimination remains available to the person confronting the question.

Nevertheless, an individual cannot invoke the privilege against self-incrimination if the privileged communication is “insufficiently incriminating.”<sup>118</sup> A fact is “insufficiently incriminating” if the government could readily establish the information from other sources.<sup>119</sup> In *Baltimore City Department of Social Services v. Bouknight*, the Supreme Court discussed when the government can readily establish information from other sources.<sup>120</sup> In *Bouknight*, the respondent, Jacqueline Bouknight, claimed that compelling her to produce her child, Maurice, in juvenile court proceedings related to allegations of child abuse violated the Self-Incrimination Clause of the Fifth Amendment.<sup>121</sup> The Supreme Court stated that Ms. Bouknight could not assert the privilege against self-incrimination “upon the theory that compliance would assert that the child produced is in fact Maurice” because this was “a fact the State could readily establish.”<sup>122</sup> The Supreme Court in *Bouknight* did not elaborate as to how this fact could be “readily establish[ed]”; however, the D.C. Circuit has speculated that this section of the analysis in *Bouknight* was based on the fact that a social worker could have testified as to Maurice’s identity.<sup>123</sup> So, in *Bouknight*, the readily available source was a person employed by the state who was familiar with the relevant facts and whose primary purpose at the proceeding was to testify in furtherance of the state’s objectives.

In the context of a non-traffic-stop, pre-arrest situation, it is unclear that there is a readily available source from which a police officer could easily establish a person’s name.<sup>124</sup> A police officer questioning a person at best has another person at the scene who may or may not have the necessary knowledge and may or may not be willing to cooperate. The lack of a readily available source comparable to what was available in *Bouknight* is also evidenced by the decision of state legislatures to impose criminal sanctions for failing to state one’s name. The imposition of criminal sanctions demonstrates that there is a unique value to being able to compel the information

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117. *Albertson*, 382 U.S. at 79.

118. *Balt. City Dep’t of Soc. Servs. v. Bouknight*, 493 U.S. 549, 555 (1990).

119. *Id.*

120. *Id.*

121. *Id.* at 551–54.

122. *Id.* at 555.

123. *United States v. Hubbell*, 167 F.3d 552, 574 n.27 (D.C. Cir. 1999), *aff’d*, 530 U.S. 27 (2000).

124. The development of face-recognition technology and access to large-scale photographic databases could permit the police to use technology to identify an individual. The development of such technology would present its own set of constitutional and public policy questions. If such technology were otherwise permissible and were implemented on a wide scale, the analysis in this Section would need to be re-evaluated.

from the individual.<sup>125</sup> The analysis now turns to the implications of an officer's use of the name to search various databases.<sup>126</sup>

## 2. *How a Name Links a Person to Incriminating Information in Databases*

By stating her name, a person may enable a database search that provides the police with information that furthers a criminal investigation.<sup>127</sup> Databases, because of their tremendous scope, can provide law enforcement with wide-ranging information about a person.<sup>128</sup> The different reasons for law enforcement's interest in a name provide a framework for understanding a name's heightened significance in the context of modern law enforcement databases. The traditional use of a name is to provide a means of referencing a specific person and contacting that person later. Law enforcement also uses a person's name as a means of linking information to that person.<sup>129</sup> An important sub-category of this type of use of a name occurs when law enforcement believes a particular person has committed a specific crime and is endeavoring to apprehend that person.<sup>130</sup>

The characteristics of modern databases primarily implicate the scale of information that law enforcement may link to a person. Without the ability to search databases, an officer is limited to information available in the immediate surroundings with which to link a person to a crime. In such a situation, any information that the person declines to provide might be obtained from other sources at the scene. The other sources available to an officer at the scene include the officer's observations of the circumstances and information obtained from other people present at the scene. In contrast, when a person provides her name to a police officer, the officer is able to link her to information through database searches. Under these circumstances, the person is linked to information that is not available through

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125. *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 81 (1965) (noting that sanctions for failing to provide the information countered the suggestion that the information was of no utility).

126. The inquiry here does not involve the propriety of the government creating such databases or accessing such databases created by commercial providers. The independent constitutionality of such databases is not relevant for the analysis of this Note. Presumably, the Fifth Amendment's Self-Incrimination Clause does not bar the creation of such databases. *See Fisher v. United States*, 425 U.S. 391, 411 (1976) (finding the compelled production of a document to be consistent with the Self-Incrimination Clause); *United States v. Hubbell*, 530 U.S. 27, 35 (2000).

127. *See* sources cited *supra* note 32 (discussing what information a police officer needs in order to successfully execute a database search).

128. *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 196 (2004) (Stevens, J., dissenting) ("A name can provide the key to a broad array of information about the person, particularly in the hands of a police officer with access to a range of law enforcement databases."); Estrada, *supra* note 94, at 305 ("[T]he Government has the capacity to use your name or other nonpublic identifying information to access unparalleled amounts of personal information.").

129. Estrada, *supra* note 94, at 305–06 (discussing police use of identifying information, such as a name, as a means of linking a person to a particular event).

130. *Hiibel*, 542 U.S. at 185–86 (discussing the role of a name in pursuing a suspect).

other means. This type of connection represents the core of the Self-Incrimination Clause's protection against indirect self-incrimination.<sup>131</sup>

Information in a database has been held to provide a basis for reasonable suspicion.<sup>132</sup> The contents of various databases become important if the information in databases has the potential to provide a basis for criminal investigations and to link a person to otherwise unavailable information. The depth and detail of the information available through the different databases is expansive.<sup>133</sup> Briefly, these databases contain standard biographical information, biometric identifiers, licenses (State and Federal), filings with government agencies, property ownership, criminal records, government watch lists, and employment information.<sup>134</sup> The information contained in the various databases is such that it facilitates police investigations and can provide a basis for arrest.<sup>135</sup>

The results of a database search can provide incriminating information in a variety of ways. First, if the police officer is investigating a person for a particular type of criminal activity, then a database search may provide information that either supports or does not support the suspicions that the officer already has.<sup>136</sup> For example, if the police officer suspects that a person is engaging in drug-related activity, then database results, whether prior convictions or activity that the officer believes is consistent with drug-related activity, would guide the officer's further investigation.<sup>137</sup> Another example would be if the database search led to the discovery of an arrest

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131. *Maness v. Meyers*, 419 U.S. 449, 461 (1975) ("This Court has always broadly construed its protection to assure that an individual is not compelled to produce evidence which later may be used against him as an accused in a criminal action. The protection does not merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution." (citations omitted)); *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

132. In *United States v. Ornelas*, after initially being reversed by the Supreme Court for applying the wrong standard of review, the Seventh Circuit affirmed the district court's finding of reasonable suspicion based in part on information from a law enforcement database. *United States v. Ornelas-Ledesma*, 16 F.3d 714, 716-17 (7th Cir. 1994) (affirming, under clearly erroneous review, the district court's finding of reasonable suspicion based on information from the Narcotics and Dangerous Drugs Information System combined with the individuals fitting a "drug courier" profile), *vacated*, 517 U.S. 690 (1996) (vacating the court of appeals decision based on the court having applied the incorrect standard of review), *remanded to United States v. Ornelas*, Nos. 94-3349/94-3350, 1996 U.S. App. LEXIS 23388, at \*2-3, 1996 WL 508569, at \*1 (7th Cir. Sep. 4, 1996) (unpublished) (affirming, under *de novo* review, the district court's finding of probable cause based in part on information in the Narcotics and Dangerous Drugs Information System).

133. The review of databases presented here is not intended to be comprehensive. The databases presented are used only for illustrative purposes. The analysis of the permissibility of invoking the privilege against self-incrimination is not limited to the databases discussed.

134. The Appendix, *infra*, outlines the details of the information provided in each database.

135. Steinbock, *supra* note 94, at 717.

136. *Id.*

137. *Id.* at 717-18. This example of a drug-related investigation in which information from a database is used is derived from an example in Steinbock, *id.* For a case discussing the use of database information in furtherance of a drug-related investigation, see *Ornelas*, 1996 U.S. App. LEXIS 23388, at \*2-3, 1996 WL 508569, at \*1, and *supra* note 132 (providing the facts of the case and the full appellate history).

warrant for the same crime that the questioning officer thinks the person is committing. A specific example of this would be an officer who suspects a person is currently distributing narcotics and the results of a database search reveal an arrest warrant for narcotics distribution. The existence of an arrest warrant itself is not incriminating, however, because in stating her name the person would not provide any evidence that would be used in proving the crime for which the warrant was issued.<sup>138</sup> Second, the breadth of the database information combined with the officer's observations at the scene could be incriminating. This could take the form of the hypothetical discussed at the beginning of this Note. In that hypothetical, the officer obtains information about certain licenses obtained from the government and purchases of the precursors for the production of methamphetamine. These suggest, broadly, the means by which a database search based on a person's name could lead to incriminating information.

### C. Sanctions for Declining to State One's Name Constitute Compulsion

The Fifth Amendment's Self-Incrimination Clause was intended to prevent the use of legal compulsion to extract facts from the accused that would incriminate her.<sup>139</sup> Preventing compelled statements furthers the individual-State balance in relation to the competing interests of the government in prosecuting criminals and of the people in being left alone.<sup>140</sup> The accused is

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138. *State v. Brown*, 2004-Ohio-4058, ¶¶ 23–27 (Ct. App.) (holding that existence of an outstanding warrant does not meet the incrimination requirement for invoking the Self-Incrimination Clause because the identifying information only enabled the officer to take the defendant into custody but did not assist in proving the underlying charge); *Schreyer v. State*, No. 05-03-01127-CR, 2005 Tex. App. LEXIS 5921, at \*40–41, 2005 WL 1793193, at \*3 (Tex. App. July 29, 2005) (adopting the reasoning from *State v. Brown*). *But see* Michael S. Pardo, *Disentangling the Fourth Amendment and the Self-Incrimination Clause*, 90 IOWA L. REV. 1857, 1895–96 (2005) (“The most obvious way disclosure of identity can be incriminating is when suspects have a warrant out for their arrests. Indeed, [in *Hibel*] this was one of the important government interests the Court pointed to in its Fourth Amendment analysis discussing the reasonableness of requiring disclosure.”); Steinbock, *supra* note 94, at 718 (suggesting that warrants would always be incriminating).

139. *Doe v. United States (Doe II)*, 487 U.S. 201, 212 (1988) (“Historically, the privilege was intended to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him. Such was the process of the ecclesiastical courts and the Star Chamber—the inquisitorial method of putting the accused upon his oath and compelling him to answer questions designed to uncover uncharged offenses, without evidence from another source.”); *Andresen v. Maryland*, 427 U.S. 463, 470–71 (1976).

140. The Supreme Court has stated:

The privilege against self-incrimination “registers an important advance in the development of our liberty—one of the great landmarks in man’s struggle to make himself civilized.” It reflects many of our fundamental values and most noble aspirations: 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 realiza-

free to refuse to be a tool that assists the prosecution in convicting her.<sup>141</sup> There are two potential sources of pressure that make stating one's name compelled: local stop-and-identify statutes that require an individual to provide her name in response to a request from a police officer,<sup>142</sup> and local statutes that make disobeying a lawful order from a police officer a crime.<sup>143</sup> Both of these types of statutes would subject an individual who declines to state her name to criminal sanctions.

Stop-and-identify statutes, which require a person to provide her name in response to a request from a police officer, vary from state to state.<sup>144</sup> In some states, the statutes provide that a police officer conducting any investigation has the authority to request a person's name.<sup>145</sup> In these states, the criminal penalties would arise from the state's statute making it a criminal offense to disobey the lawful request of a police officer.<sup>146</sup> The statutes at

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tion that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."

Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (citations omitted) (footnote omitted).

141. See Ullman v. United States, 350 U.S. 422, 427 (1956).

142. See, e.g., NEV. REV. STAT. § 171.123 (2003). The statute states:

1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime.
2. Any peace officer may detain any person the officer encounters under circumstances which reasonably indicate that the person has violated or is violating the conditions of his parole or probation.
3. *The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer.*
4. A person must not be detained longer than is reasonably necessary to effect the purposes of this section, and in no event longer than 60 minutes. The detention must not extend beyond the place or the immediate vicinity of the place where the detention was first effected, unless the person is arrested.

*Id.* (emphasis added).

143. See, e.g., NEV. REV. STAT. § 199.280 (2003) ("A person who, in any case or under any circumstances not otherwise specially provided for, willfully resists, delays or obstructs a public officer in discharging or attempting to discharge any legal duty of his office shall be punished . . .").

144. *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 182–85 (2004) (discussing stop-and-identify statutes); *Kolender v. Lawson*, 461 U.S. 352 (1983) (invalidating a California stop-and-identify statute because the statute did not provide a standard for determining when a person had complied with the statute); *Brown v. Texas*, 443 U.S. 47 (1979) (invalidating a conviction under the Texas stop-and-identify statute because the initial stop violated the Fourth Amendment); *Papachristou v. Jacksonville*, 405 U.S. 156 (1972) (invalidating Florida's general vagrancy law for vagueness).

145. ALA. CODE § 15-5-30 (LexisNexis 1995); COLO. REV. STAT. § 16-3-103(1) (1997); 725 ILL. COMP. STAT. ANN. 5/107-14 (West 1992); KAN. STAT. ANN. § 22-2402(1) (1995); MO. REV. STAT. § 84.710(2) (2000); NEB. REV. STAT. § 29-829 (1995); NEV. REV. STAT. § 171.123(3) (2003); N.H. REV. STAT. ANN. § 594:2 (2001); N.Y. CRIM. PROC. LAW § 140.50(1) (McKinney 2004); N.D. CENT. CODE § 29-29-21 (1991); R.I. GEN. LAWS § 12-7-1 (2002); UTAH CODE ANN. § 77-7-15 (2003); WIS. STAT. § 968.24 (1998).

146. ALA. CODE § 13A-10-2 (LexisNexis 1994) (providing that a person commits the offense of obstructing governmental operations by intentionally interfering with a public servant performing a government function); COLO. REV. STAT. § 18-8-104(1)(a) (1997) (providing that a person obstructs a

issue in *Hiibel* were structured in this manner—a statute authorizing a police officer to request a person’s name and a statute criminalizing a refusal to obey an order of a police officer.<sup>147</sup> Some states have stop-and-identify statutes that are incorporated into another offense, typically loitering.<sup>148</sup> Under either of these statutory structures, a person who refuses to provide her name to a police officer would be guilty of a misdemeanor.<sup>149</sup>

The imposition of penalties for refusing to state one’s name makes the statement compelled. The stop-and-identify statutes discussed in this Note would impose criminal sanctions on people who refuse to state their names.<sup>150</sup> The Supreme Court has repeatedly held that a statement is considered compelled if the government would impose a penalty on the person for refusing to make the statement based on her right under the Fifth Amendment’s Self-Incrimination Clause.<sup>151</sup> Even if such statutes did not impose

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peace officer by hindering a peace officer’s enforcement of penal law); 720 ILL. COMP. STAT. ANN. 5/31-1 (West 2003) (providing that a person commits a class A misdemeanor by knowingly obstructing a peace officer’s performance of her official duty); KAN. STAT. ANN. § 21-3808(a) (1995) (providing that a person commits a felony or a misdemeanor, depending on the offense the officer is investigating, by intentionally interfering with an officer’s official duty); MO. REV. STAT. § 576.030 (2000) (providing that a person commits a misdemeanor by obstructing government operations); NEB. REV. STAT. § 28-906 (1995) (providing that a person commits a misdemeanor by obstructing a peace officer’s enforcement of penal law); NEV. REV. STAT. § 199.280 (2003) (providing that obstructing or willfully resisting a public officer is a misdemeanor, so long as a dangerous weapon is not used); N.H. REV. STAT. ANN. § 642:1 (1996) (providing that a person commits a misdemeanor by engaging in unlawful conduct that interferes with a public servant); N.Y. PENAL LAW § 195.05 (Gould 2005) (providing that a person commits a misdemeanor by preventing a public servant from performing an official duty); N.D. CENT. CODE § 12.1-08-01 (1997) (providing that a person commits a misdemeanor by intentionally hindering the administration of law); R.I. GEN. LAWS § 11-32-1 (2002) (providing that a person who obstructs an officer is subject to up to one year in jail or a five hundred dollar fine); UTAH CODE ANN. § 76-8-301 (2003) (providing that a person is guilty of a misdemeanor if she engages in unlawful conduct that interferes with a public servant’s performance of official duties); WIS. STAT. § 946.41 (1998) (providing that a person commits a misdemeanor by obstructing a police officer who is acting in her official capacity). *But see* *Hicks v. State*, 631 A.2d 6, 9 (Del. 1992) (holding that although title 11, section 1902(a) of the Delaware Code provides police officers with the authority to request an individual’s name, refusal to provide a name is not a basis for arrest).

147. *Hiibel*, 542 U.S. at 181–82.

148. ARK. CODE ANN. § 5-71-213(a)(1) (1997) (making a person who fails to identify herself guilty of loitering); DEL. CODE ANN. tit. 11, § 1321(6) (2001) (making a person who fails to identify herself guilty of loitering); FLA. STAT. ANN. § 856.021(2) (West 2000) (making a person who fails to identify herself guilty of loitering, a second degree misdemeanor); GA. CODE ANN. § 16-11-36(b) (2003) (making a person who fails to identify herself guilty of loitering, a misdemeanor); N.M. STAT. § 30-22-3 (2004) (classifying concealing one’s identity from a public officer as a petty misdemeanor); VT. STAT. ANN. tit. 24, § 1983 (2004) (providing that if a person fails to provide her name to a police officer, she is to be taken before a district court judge where she will be held in contempt if she again fails to provide her name); *see also* MODEL PENAL CODE § 250.6 (Proposed Official Draft 1962).

149. *See supra* notes 145, 146 & 148.

150. *See supra* notes 145, 146 & 148 and accompanying text.

151. *Mitchell v. United States*, 526 U.S. 314, 316–19, 327–30 (1999) (holding that the judge could not impose a greater sentence based on a negative inference from the defendant’s decision not to testify at sentencing after entering a guilty plea); *Lefkowitz v. Cunningham*, 431 U.S. 801, 803–05 (1977) (holding that a New York state statute that divested a political party official of all party offices and imposed a five-year ban on holding any party or public offices if he refused to testify before a grand jury violated the Self-Incrimination Clause); *Gardner v. Broderick*, 392 U.S. 273, 274–75, 279 (1968) (holding that firing a police officer because he refused to testify before a grand

criminal sanctions, other sanctions imposed by the State would be sufficient, because the statement would still be made under the threat of a penalty.<sup>152</sup> Therefore, a person who states her name when confronted with one of these statutes is making a compelled statement.<sup>153</sup>

Each of the three elements required for the application of the Self-Incrimination Clause can be present when a police officer requests a person to provide her name so that the officer can complete a database search. The presence of the three elements makes it permissible for an person to decline to answer the officer's question based on the privilege against self-incrimination.<sup>154</sup> Although a person might have such a right, questions remain as to the breadth of its application.

## II. CONTOURS OF THE APPLICATION OF THE FIFTH AMENDMENT'S SELF-INCRIMINATION CLAUSE

A police officer's request that a person state her name under the previously reviewed circumstances represents a basis for invoking the privilege against self-incrimination. Demonstrating the permissibility of invoking the privilege against self-incrimination, however, does not define the contours of the privilege's practical application. Section II.A discusses the specific circumstances under which a person could invoke the Fifth Amendment's Self-Incrimination Clause and refuse to state her name. Section II.B evaluates the available remedies when a person is arrested for refusing to state her name. Section II.C discusses whether law enforcement would be unduly impaired if a person is permitted to invoke the privilege against self-incrimination to justify refusing to state her name. Section II.D compares the protections outlined in Sections II.A and II.B to the historical scope of the Self-Incrimination Clause.

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jury violated the Self-Incrimination Clause); *Garrity v. New Jersey*, 385 U.S. 493, 494–95, 499–500 (1967) (invalidating, based on the Self-Incrimination Clause, a New Jersey statute that would have caused a group of police officers to lose their jobs if they did not testify in their prosecution for their involvement in a ticket-fixing scheme); *Griffin v. California*, 380 U.S. 609, 609–15 (1965) (holding that the prosecutor and judge commenting that the jury was free to draw a negative inference from the defendant's decision not to testify violated the Self-Incrimination Clause).

152. *Lefkowitz v. Turley*, 414 U.S. 70, 83 (1973) (invalidating a New York state statute that disqualified architects from future contracts with the state because they refused to sign a waiver of immunity and then testify before a grand jury).

153. *See Chavez v. Martinez*, 538 U.S. 760, 768–69 (2003) (plurality opinion) (citing *Griffin v. California*, 380 U.S. 609, 614 (1965)); *Cunningham*, 431 U.S. at 805 (“[W]hen a State compels testimony by threatening to inflict potent sanctions unless the constitutional privilege is surrendered, that testimony is obtained in violation of the Fifth Amendment and cannot be used against the declarant in a subsequent criminal prosecution.”).

154. *See infra* Section II.B.

### A. Who Can Decline to State Her Name?

The Self-Incrimination Clause only shields a person from making statements that could provide a basis for a criminal prosecution.<sup>155</sup> A statement that is protected confronts the person with “a real and probable danger” of incrimination that is not “of an imaginary and unsubstantial character.”<sup>156</sup> A court is the final adjudicator of whether a person is justified in invoking the privilege.<sup>157</sup> The court can require the person to answer “if ‘it clearly appears to the court that [the person invoking the privilege] is mistaken.’”<sup>158</sup> The standard that the Supreme Court has applied to determine if the threat of incrimination is sufficient to permit the invocation of the privilege is “whether the claimant is confronted by substantial and ‘real,’ and not merely trifling or imaginary, hazards of incrimination.”<sup>159</sup>

Assessing how broadly the Self-Incrimination Clause protects individuals who decline to state their names depends on whether *individuals* could generally find that the results of database searches present “a real and probable danger” of incrimination, that is not “of an imaginary and unsubstantial character.”<sup>160</sup> Individuals typically lack knowledge of what information specific to them is contained in various databases.<sup>161</sup> This shifts the analysis to what inferences a person could make based on general information about the databases.<sup>162</sup> This section reviews the implications of various levels of

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155. *Brown v. Walker*, 161 U.S. 591, 595–97, 605–06 (1896) (holding that the privilege against self-incrimination does not permit an individual to refuse to answer questions that could not provide incriminating evidence).

156. *Id.* at 608 (“[T]hat the witness was not protected by his pardon against an impeachment by the house of commons, is not a real and probable danger, with reference to the ordinary operations of the law in the ordinary courts, but ‘a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct.’ Such dangers it was never the object of the provision to obviate.” (quoting *Queen v. Boyes*, (1861) 1 Best & S. 311 (Q.B.))). For a more recent discussion of the requirements for incrimination, see 3 WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 8.10(a) (2d ed. 1999) (“While the concept of potential incrimination encompasses a great deal, it is not without limits. The threat of incrimination is limited only to criminal liability, and that liability must relate to the witness himself, not others. The threat must be ‘real and appreciable,’ not ‘imaginary and unsubstantial.’” (footnotes omitted)).

157. *Hoffman v. United States*, 341 U.S. 479, 486 (1951); *Rogers v. United States*, 340 U.S. 367, 374 (1951).

158. *Hoffman*, 341 U.S. at 486 (quoting *Temple v. Commonwealth*, 75 Va. 892, 899 (1881)).

159. *Marchetti v. United States*, 390 U.S. 39, 53 (1968) (citing *Rogers*, 340 U.S. at 374; *Brown*, 161 U.S. at 600). For examples of the Supreme Court’s later applications of this test, see *United States v. Doe (Doe I)*, 465 U.S. 605, 614 n.13 (1984) and *United States v. Apfelbaum*, 445 U.S. 115, 128–29 (1980).

160. *See Brown*, 161 U.S. at 608.

161. *See generally* Hoofnagle, *supra* note 26.

162. *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 189–90 (2004); *Kastigar v. United States*, 406 U.S. 441, 444–45 (1972) (“[The privilege against self incrimination] protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.”); *Brown*, 161 U.S. at 599 (“It was held, however, by Lord Chief Justice Cockburn that ‘to entitle a party called as a witness to the privilege of silence, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being

knowledge that a person might have about the contents of the databases, concluding that the results of a database search can represent a real and probable danger of incrimination for individuals with all levels of knowledge.

### 1. *A Person with Knowledge of the Contents of the Databases*

A person with knowledge or a reasonable belief that at least one database contains incriminating information about her has a basis for asserting the privilege.<sup>163</sup> This category would include a person who knows that linking her to her current geographic location would assist an ongoing investigation in which she is a suspect. In addition, a person who knows that the contents of the databases are otherwise incriminating would be justified in invoking the privilege. For example, a felon who is in possession of a firearm would know that a database search would reveal her prior conviction and indicate to a police officer that she is currently committing a crime.<sup>164</sup> Such a person would have a basis for asserting the privilege to refuse to state her name.

### 2. *A Person without Knowledge of the Contents of the Databases*

In some circumstances, a person without specific knowledge of the information in the databases could still infer a real and probable danger that she may incriminate herself by revealing her name to a police officer. The potential for any individual to make the inference that stating her name will be incriminating rests on the nature and scope of the databases. In order to ascertain what types of circumstances may justify the invocation of the Self-Incrimination Clause by individuals without specific knowledge of the databases, this Section reviews some of the situations in which a person could infer that the databases are incriminating without specific knowledge of the contents of the databases. Evaluating the circumstances where a person could infer the presence of incriminating information in the databases is

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compelled to answer,' although 'if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question.'" (quoting *Queen v. Boyes*, (1861) 1 Best & S. 311, 321 (Q.B.)).

163. This Note focuses on how the interrelationship between a person's name and various government databases provides a basis for a person to invoke the privilege against self-incrimination. The Note's analytic framework could be applied to a situation in which a person knows her name will incriminate her regardless of the existence of the databases reviewed in this Note.

164. See, e.g., MICH. COMP. LAWS § 750.224f (2005). The statute states:

(1) Except as provided in subsection (2), a person convicted of a felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state . . . .

. . .

(3) A person who possesses, uses, transports, sells, purchases, carries, ships, receives, or distributes a firearm in violation of this section is guilty of a felony, punishable by imprisonment for not more than 5 years, or a fine of not more than \$5,000.00, or both.

*Id.*

necessary because police-accessible databases do not generally permit people to regularly review the information that the databases contain about them.<sup>165</sup> The lack of access alone does not provide a basis for a person to infer that all the databases contain information that might incriminate her.<sup>166</sup>

First, a person may infer that the accumulation of time and place information from prior stops will be incriminating. Each database search conducted by an officer provides an opportunity to develop a more complete profile of the person by facilitating the addition of information about the person.<sup>167</sup> For instance, each encounter provides the police with the potential to enter information about a person's location at a specific time.<sup>168</sup> Time and place information could be analyzed for patterns of movement consistent with criminal activity and could place the individual in the vicinity of a crime or in a location where the police expected a particular criminal. The databases also add the potential to conduct searches for individuals who do not have a connection to a particular area. This suggests that the time and place information created by requiring a person to state her name without being arrested makes available information that could facilitate extensive criminal investigations, thus rendering one's name incriminating.

Second, stating one's name could provide a basis for a more immediate threat by providing the direct link to incriminating evidence—subjecting a person to criminal liability in two ways. The first example of this would be a person being charged with lying to a government official after a database search conducted using her name revealed that a statement she had made to the police officer prior to stating her name was false.<sup>169</sup> The second example

165. See Hoofnagle, *supra* note 26, at 622–28. Although some of the databases might permit a person to review partial or complete versions of her information, this does not allow that person to ascertain the contents of other databases.

166. *Brown*, 161 U.S. at 608 (noting the insufficiency of a “bare possibility” of incrimination as a basis for invoking the privilege against self-incrimination).

167. See 28 C.F.R. § 16.96(p)(1)–(2) (2005) (exempting the NCIC from the requirements of 5 U.S.C. § 552a(e)(1)). 5 U.S.C. § 552a(e)(1) provides that “[e]ach agency that maintains a system of records shall— (1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President . . . .” This permits the NCIC to contain information beyond arrest and disposition information. See 28 C.F.R. § 16.96(q)(4) (“Exemptions from the particular subsections are justified for the following reasons . . . (4) From subsection (e)(1) because it is impossible to state with any degree of certainty that all information in these records is relevant to accomplish a purpose of the FBI, even though acquisition of the records from state and local law enforcement agencies is based on a statutory requirement. In view of the number of records in the system, it is impossible to review them for relevancy.”).

168. *Criminal History Record Information*, *supra* note 32, at 49; BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, COMPENDIUM OF STATE PRIVACY AND SECURITY LEGISLATION: 2002 OVERVIEW 7, 46 (2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cspsl02.pdf> (listing the states that require transaction logs, which detail each time an individual accesses the databases).

169. *E.g.*, 18 U.S.C. § 1001 (2005). The statute states:

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

of this would be the combination of the information in the databases with the surrounding circumstances providing an officer with probable cause for arrest.<sup>170</sup> Determining if the circumstances support a belief in a real and probable danger of incrimination depends on the attendant circumstances and the individual's history. For instance, a person's current location could be relevant if the police classify the area as a "high-crime area,"<sup>171</sup> or if a person believes that databases contain information about her prior activities in the neighborhood.<sup>172</sup> Or, a person may be in a "high narcotics crime" area,<sup>173</sup> have recently traveled out of the country, and have also recently made a large cash transaction. The second two pieces of information could be available through various databases. A person in this type of situation could reasonably believe that there is a real and probable danger her name will provide a link to evidence in support of a narcotics conviction. These factual situations could apply to many individuals, thus providing those individuals with a basis to invoke the privilege against self-incrimination as a legal justification for refusing to state their names.

### *3. Implications of the Contents of the Databases Being Made Publicly Accessible*

The lack-of-knowledge basis for inferring the existence of potentially incriminating information would remain unchanged even if individuals were

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title or imprisoned not more than 5 years . . . or both.

*Id.* Likewise, TEX. PENAL CODE ANN. § 37.08 (Vernon 2005), provides:

(a) A person commits an offense if, with intent to deceive, he knowingly makes a false statement that is material to a criminal investigation and makes the statement to:

(1) a peace officer conducting the investigation; or

(2) any employee of a law enforcement agency that is authorized by the agency to conduct the investigation and that the actor knows is conducting the investigation.

. . .

(c) An offense under this section is a Class B misdemeanor.

*Id.*

170. See *United States v. Ornelas*, Nos. 94-3349/94-3350, 1996 U.S. App. LEXIS 23388, at \*2-3, 1996 WL 508569, at \*1 (7th Cir. Sep. 4, 1996) (unpublished) (affirming the district court's finding of probable cause based in part on information in the Narcotics and Dangerous Drugs Information System).

171. See *Adams v. Williams*, 407 U.S. 143, 147-48 (1972) (holding that the fact that a stop occurred in a "high-crime area" is a relevant factor in *Terry* analysis); see also *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (holding that presence in a "high-crime area" does not alone give rise to "a reasonable, particularized suspicion that the person is committing a crime").

172. Support for either of these beliefs would necessarily derive from the person's prior experiences, such as time in the neighborhood and prior encounters with the police.

173. See, e.g., *United States v. Sprinkle*, 106 F.3d 613, 617 (4th Cir. 1997) (discussing presence in a "high narcotics crime" area as one factor that supports reasonable suspicion).

granted the right to access all of the databases because individuals would not be obligated to review the databases. The Self-Incrimination Clause bars a person from being obligated to provide information that assists the State in finding incriminating information about her.<sup>174</sup> Requiring a person to actively review the information in various databases to confirm a lack of support for a criminal conviction imposes an obligation on that person to confirm her innocence and precludes individuals from maintaining a passive role in the efforts of the State to prosecute them.

Even if individuals could freely and regularly review the information contained in the various databases, it does not necessarily follow that individuals would ascertain the incriminating elements. The consequences of a person being unable to recognize the incriminating information in the databases depends on whether the person already has a basis to infer a real and probable danger of incrimination from stating her name. First, if the person already had a basis to infer a real and probable danger of incrimination from stating her name and her review of the database to which she was granted access *did not* indicate that her inference was incorrect, then she could still refuse to state her name. Second, if the person already had a basis to infer a real and probable danger of incrimination from stating her name and her review of the database to which she was granted access *refuted* that basis, she could no longer refuse to state her name. Third, if the person *did not* already have a basis to infer a real and probable danger of incrimination from stating her name and her review of the database to which she was granted access *did not* provide a basis to infer a real and probable danger of incrimination, then she could not refuse to state her name. These three possible scenarios mean that the contents of the databases being freely accessible would not necessarily negate the other bases discussed in this Note on which a person could conclude that stating her name would be incriminating. The inability of individuals to recognize the incriminating information in the databases represents a pragmatic concern independent of the aforementioned constitutional problem. The training and experience of police officers and other government agents enables them to more effectively discern evidence of criminal wrongdoing. Therefore, the databases being made publicly accessible would not affect the implications of computer databases for the Self-Incrimination Clause.

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174. See *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (“To maintain a ‘fair state-individual balance,’ to require the government ‘to shoulder the entire load,’ to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.” (citation omitted)); *Malloy v. Hogan*, 378 U.S. 1, 8 (1964) (“The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty, as held in [*Twining v. New Jersey*, 211 U.S. 78 (1908)], for such silence.”).

### B. *Process of Invocation and Remedies*

If a person being questioned by a police officer in a non-traffic-stop, pre-arrest situation believes that stating her name will be incriminating consistent with the analysis of the prior section, then she may decline to state her name and invoke the Fifth Amendment's Self-Incrimination Clause without explaining why her name might lead to incriminating information. Beyond one's name, this analysis would extend to other uniquely identifying information, such as a Social Security Number, that could provide a police officer with sufficient information to conduct searches of various databases.

An individual's right under the Self-Incrimination Clause bars the imposition of sanctions, criminal or otherwise, on her for the invocation of her constitutional privilege against self-incrimination.<sup>175</sup> This renders statutes<sup>176</sup> that require a person to state her name in a non-traffic-stop, pre-arrest situation unconstitutional. This also precludes a request for a person's name in a non-traffic-stop, pre-arrest situation from being considered a "lawful order" for the purposes of statutes<sup>177</sup> that criminalize disobeying the "lawful order" of a police officer. Section II.B.1 discusses the procedures that should occur when a person refuses to state her name. Section II.B.2 discusses what remedies are appropriate when a person is arrested for refusing to state her name.

#### 1. *Permissible Scope of Invocation*

The foregoing analysis of the Self-Incrimination Clause has only demonstrated that some subset of the population is justified in invoking the Self-Incrimination Clause to refuse to state a name. The rights of the individuals justified in invoking the Self-Incrimination Clause can only be protected, however, if everyone is permitted to refuse to state a name based on the Self-Incrimination Clause. A police officer who confronts a person who refuses to state a name may believe that the person lacks a sufficient basis for invoking the Self-Incrimination Clause. If the officer arrests the person, the officer will be able to obtain the person's name for booking purposes,<sup>178</sup> thereby negating the person's ability to avoid incriminating herself.

There are four reasons for barring an officer from arresting a person whom the officer believes has an insufficient basis for invoking the privilege.

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175. *Chavez v. Martinez*, 538 U.S. 760, 768–69 (2003) (plurality opinion) (citing *Griffin v. California*, 380 U.S. 609 (1965)); *Mitchell v. United States*, 526 U.S. 314, 316–19, 327–30 (1999); *Minnesota v. Murphy*, 465 U.S. 420, 439 (1984); *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977); *Gardner v. Broderick*, 392 U.S. 273, 274–75, 279 (1968); *Garrity v. New Jersey*, 385 U.S. 493, 499–500 (1967); *supra* notes 151 & 153 (explaining the particular penalties barred in the cited cases).

176. *See supra* note 148 and accompanying text (citing the applicable statutes).

177. *See supra* notes 145–146 and accompanying text (citing the applicable statutes).

178. *Pennsylvania v. Muniz*, 496 U.S. 582, 601–02 (1990) (holding that the response of a person under arrest to a request for her name is not protected by the Self-Incrimination Clause because the information is being sought for record-keeping purposes and is related to the administrative function of the police).

First, permitting an officer to make such an arrest provides a strong incentive for police officers to intentionally circumvent the Self-Incrimination Clause.<sup>179</sup> Enforcing the Self-Incrimination Clause in a manner that encourages officers to circumvent the privilege undermines the ability of the Self-Incrimination Clause to provide any substantive protection. Second, in most scenarios police officers will not have sufficient information about the basis for the person's invocation of the privilege against self-incrimination to determine if the invocation is legitimate.<sup>180</sup> This is so because without the person's name, the officer will not know what information the databases will reveal. Related to this consideration, it would be difficult for the person to explain to the police officer her basis for believing that her name will be incriminating without revealing incriminating information. Third, barring arrest in this context provides a rule that will be simple to administer. An alternative rule would require some ex post assessment of the officer's on-scene determination.<sup>181</sup> Fourth, barring arrest for invoking the privilege would avoid any of the problems created by only allowing a narrow class of individuals to refuse to state their names. In this context, police officers would have a strong incentive to continue to pursue the person because the person has already signaled her guilt.<sup>182</sup> This would create a de facto penalty of increased police scrutiny for invoking the privilege against self-incrimination. This de facto penalty would be contrary to the bar on imposing penalties on individuals who invoke the privilege against self-incrimination.<sup>183</sup> For these reasons, refusing to state a name based on the Self-Incrimination Clause is an insufficient basis for arrest.

## 2. Remedy If a Person Is Arrested

Even if the aforementioned rule were adopted and police officers could not arrest a person for refusing to state her name, the question of remedy remains for people who are arrested based on their refusal to state a name in a non-traffic-stop, pre-arrest situation. If the charges brought against the

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179. See *United States v. Patane*, 542 U.S. 630, 638 (2004) (plurality opinion) (“We have explained that “[t]he natural concern which underlies [these] decisions is that an inability to protect the right at one stage of a proceeding may make its invocation useless at a later stage.” (modifications in the original) (quoting *Michigan v. Tucker*, 417 U.S. 433, 440–41 (1974))).

180. Pardo, *supra* note 138, at 1896.

181. This alternative rule would require developing a test that officers could reasonably and fairly apply in the field. Further, the alternative rule would need a means of assessing whether the officer had applied the test reasonably and fairly in each case.

182. See M. Christine Klein, *A Bird Called Hiibel: The Criminalization of Silence*, 2004 CATO SUP. CT. REV. 357, 386 (discussing the oddity of permitting only those that definitively know of their guilt to invoke the privilege against self-incrimination).

183. See *Griffin v. California*, 380 U.S. 609, 614 (1965) (“It cuts down on the privilege by making its assertion costly. It is said, however, that the inference of guilt for failure to testify as to facts peculiarly within the accused’s knowledge is in any event natural and irresistible, and that comment on the failure does not magnify that inference into a penalty for asserting a constitutional privilege. What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.”) (citation omitted); *supra* notes 151, 153 and accompanying text.

individual all related to her refusal to state her name, then a remedy commensurate with the right violated would require that the illegally arrested person be released and the record of the incident expunged.<sup>184</sup>

A challenging situation arises when the individual is arrested and is then implicated in a separate crime as a result of the database search that was conducted based on the information she was required to provide after she was arrested. When a person who has previously refused to state her name provides her name to the police after being arrested, she is not making a voluntary statement.<sup>185</sup> The person providing her name has previously indicated her intent to withhold her name from the police based on the Self-Incrimination Clause. The appropriate remedy for the information obtained as a result of the illegal arrest turns on whether the charge can stand alone. If expunging the information gained as a result of compelling the person to state her name<sup>186</sup> removes a necessary element of the separate charge, then the separate charge should also be dropped.<sup>187</sup> A court would determine if the police could sustain the charge absent the combination of information that was made possible by the illegal arrest—if not, the charge should be dropped. For example, if the person had an outstanding arrest warrant, then the government could prove the commission of the criminal charge in the arrest warrant without any information obtained in the course of the illegal arrest.

If the other charge remains despite the expunging of the record, a different situation is presented. In this situation, the Self-Incrimination Clause would not bar the individual from being prosecuted for a criminal act that the State can prove without the information obtained as a result of the illegal arrest.<sup>188</sup> If nothing obtained as a result of the information the person

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184. See *United States v. Crowell*, 374 F.3d 790, 793 (9th Cir. 2004) (“Congress has not expressly granted to the federal courts a general power to expunge criminal records. Nevertheless, we have asserted that federal courts have inherent authority to expunge criminal records in appropriate and extraordinary cases. We have held that in criminal proceedings ‘district courts possess ancillary jurisdiction to expunge criminal records.’” (quoting *United States v. Sumner*, 226 F.3d 1005, 1014 (9th Cir. 2000))), *cert. denied*, 125 S. Ct. 911 (2005). Imposing the right to have the information expunged may not be sufficient without improvements in the recordkeeping policies applied to the various databases. Hoofnagle, *supra* note 26, at 622–23 (noting the problems of effectively removing inaccurate or inappropriately obtained information from all affected databases).

185. See *Dickerson v. United States*, 530 U.S. 428, 434 (2000) (describing the standard for determining whether a confession is voluntary as being the “totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation” (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973))). Although *Dickerson* concerned the standard for coercion in reference to *Miranda* warnings, the Court indicated that a voluntariness inquiry is aimed at determining whether a person’s “will was overborne.” *Dickerson*, 530 at 434 (quoting *Schneckloth*, 412 U.S. at 226). When person provides her name after being arrested for refusing to state her name, she is acquiescing the State’s demand because the State has demonstrated an intention to sanction her if she does not acquiesce.

186. This would include any information linked to the person’s database profile as a result of the police encounter, such as the time and place of the encounter.

187. See *Dickerson*, 530 U.S. at 434 (discussing the exclusion of involuntarily obtained confessions).

188. See *Segura v. United States*, 468 U.S. 796, 799 (1984) (holding that evidence derived from a “poisonous tree” may be admitted if there is also an independent source for the information);

provided after she was arrested is introduced into evidence at trial or used in the development of the independent case, then there is not a violation of the Self-Incrimination Clause.

Finally, recognition of the right to invoke the privilege against self-incrimination when an individual confronts an officer requesting her name does not imply the extension of *Miranda* rights<sup>189</sup> to this situation. The police are only required to give a *Miranda* warning prior to a custodial interrogation.<sup>190</sup> Typically the request for an individual's name is made prior to the initiation of a custodial interrogation. Recognizing the right not to state one's name does not suggest that a *Miranda* warning must be given prior to any police questioning.

*C. Permitting a Person to Refuse to State Her Name Would  
Not Unduly Interfere with Law Enforcement*

Some might suggest that either officer safety or public safety justifies requiring a person to provide her name to a police officer in a non-traffic-stop, pre-arrest situation because the name will enable the officer to ascertain if the person has any outstanding warrants or prior convictions.<sup>191</sup> A *Terry* pat-down, however, should provide an officer with sufficient ability to protect herself.<sup>192</sup> A public safety exception to the right of a person to refuse to state her name would undermine the functionality of the rule. First, a public safety exception would impair the ability of an individual to determine when the Self-Incrimination Clause justifies refusing to state her name. Second, a public safety exception would provide a means for the police to circumvent the protection that the Self-Incrimination Clause provides to a person with regard to stating her name.<sup>193</sup> A rule that allowed the public

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Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (“The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government’s own wrong cannot be used by it in the way proposed.”).

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

190. *Rhode Island v. Innis*, 446 U.S. 291, 300 (1980).

191. E.g., *NAPO Amicus Brief*, *supra* note 32, 2004 WL 121586, at \*4–6.

192. See *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 196 n.7 (2004) (Stevens, J., dissenting) (“The Court suggests that furnishing identification also allows the investigating officer to assess the threat to himself and others. But to the extent that officer or public safety is immediately at issue, that concern is sufficiently alleviated by the officer’s ability to perform a limited patdown search for weapons.”) (citation omitted); *Terry v. Ohio*, 392 U.S. 1, 28 (1968) (“We cannot say his decision at that point to seize Terry and pat his clothing for weapons was the product of a volatile or inventive imagination . . . the record evidences the tempered act of a policeman who in the course of an investigation had to make a quick decision as to how to protect himself and others from possible danger, and took limited steps to do so.”).

193. See *supra* Section II.B.1.

safety exception to be invoked only when genuinely justified by a safety interest would be difficult to administer.<sup>194</sup>

A broader argument might be made that the interest of public or officer safety demands that a person may never invoke the Self-Incrimination Clause to refuse to state her name in a non-traffic-stop, pre-arrest situation. The Supreme Court has held, however, that concerns about public safety, even immediate concerns, have only limited persuasive authority to justify disregarding a constitutionally protected right.<sup>195</sup> The seriousness of the safety concern presented by an individual being permitted to refuse to state her name is undermined by the large number of states that do not have statutes requiring an individual to state her name.<sup>196</sup> Additionally, the permissibility of a *Terry* pat-down provides police officers with a means to ensure that a person does not have any dangerous weapons.<sup>197</sup> As to the concerns about public safety, interpreting the Self-Incrimination Clause to justify refusing to state one's name has relatively minimal public safety implications as compared to prior Supreme Court decisions that exclude confessions.<sup>198</sup> Specifically, in excluding confessions because of the failure to give *Miranda* warnings, the Supreme Court interpreted the Fifth Amendment to protect a person for whom the probability of guilt is relatively high. In contrast, when a person refuses to state her name, there is no direct evidence, like a confession, to support the belief that she is a criminal. Moreover, for the individuals that pose the greatest threat to either officer safety or public safety, there is reason to believe that these individuals would not provide their actual names to the police.<sup>199</sup> A false name negates the value of a database search to the police officer.

The interests in favor of requiring a person to always state her name in a non-traffic-stop, pre-arrest situation do not warrant disregarding the importance of the individual right embodied in the Self-Incrimination Clause. In

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194. The problem arises because the police officer already has a reasonable suspicion that the person is involved in criminal activity in order to justify the *Terry* stop. *Terry*, 392 U.S. at 28. In this context, it is not clear what standard would enable courts to distinguish between legitimate and illegitimate exercises of a public safety exception.

195. See *Florida v. J.L.*, 529 U.S. 266, 272–74 (2000) (rejecting the contention that concerns about public safety should justify a stop-and-frisk on less than reasonable suspicion).

196. See *supra* notes 145, 146, & 148 (citing the stop-and-identify statutes of eighteen states that have such statutes).

197. *Hiibel*, 542 U.S. at 196 n.7 (Stevens, J., dissenting); *J.L.*, 529 U.S. at 272 (“Firearms are dangerous, and extraordinary dangers sometimes justify unusual precautions. Our decisions recognize the serious threat that armed criminals pose to public safety; *Terry*’s rule, which permits protective police searches on the basis of reasonable suspicion rather than demanding that officers meet the higher standard of probable cause, responds to this very concern.”).

198. *E.g.*, *Dickerson v. United States*, 530 U.S. 428, 432, 444 (2000) (holding inadmissible the confession of an individual charged with bank robbery, conspiracy to commit bank robbery, and using a firearm in the course of committing a crime of violence because the defendant had not received his *Miranda* warnings prior to confessing).

199. A person who is willing to attack a police officer during the course of an investigation or a person who previously committed a serious crime presumably has a relatively low level of respect for the law. The lack of respect for the law would suggest that such a person would be unconcerned about the illegality of providing a false name to a police officer.

interpreting the Self-Incrimination Clause, the Supreme Court has “created prophylactic rules designed to safeguard the core constitutional right protected by the Self-Incrimination Clause,”<sup>200</sup> and these protections “sweep[] more broadly than the Fifth Amendment itself.”<sup>201</sup> Moreover, permitting a person to refuse to state her name is deeply tied to society’s valuation of anonymity.<sup>202</sup> The social value of anonymity is closely tied to the social value of the right not to speak.<sup>203</sup> In analyzing anonymous pamphleteering, the Supreme Court has said:

Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society.<sup>204</sup>

This suggests that the values embodied in the decision to permit a person not to state her name are closely tied to the American conception of democracy.<sup>205</sup>

#### D. *Technological Change and the Application of Constitutional Rights*

Like other constitutional protections, the Fifth Amendment’s Self-Incrimination Clause should be adapted in consideration of technological change. The challenges of applying the Fifth Amendment’s Self-Incrimination Clause in consideration of advances in computer database technology are similar to the challenges the Supreme Court confronted in

200. *Chavez v. Martinez*, 538 U.S. 760, 770 (2003) (plurality opinion).

201. *Id.* (quoting *Oregon v. Elstad*, 470 U.S. 298, 306 (1985)). For other cases in which the Supreme Court explains the breadth of its construction of the Self-Incrimination Clause, see *Maness v. Meyers*, 419 U.S. 449, 461 (1975), *Arndstein v. McCarthy*, 254 U.S. 71, 72–73 (1920), and *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892).

202. *See generally* Loewy, *supra* note 11, at 929–30 (arguing that the Supreme Court in *Hübel* failed to appreciate the significance of the value of anonymity in American constitutional history and culture).

203. *See* *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (“[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’” (quoting *Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943))); Estrada, *supra* note 94, at 309.

204. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995) (citation omitted).

205. *See generally*, ERWIN N. GRISWOLD, *THE FIFTH AMENDMENT TODAY* (1955) (providing the transcripts of three speeches explaining the history and role of the Fifth Amendment’s Self-Incrimination Clause in American society). The Supreme Court has referenced *The Fifth Amendment Today* in several cases. *See, e.g.*, *Chavez v. Martinez*, 538 U.S. 760, 794 (2003) (Kennedy, J., concurring in part and dissenting in part); *United States v. Hubbell*, 530 U.S. 27, 34 n.8 (2000); *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 55 n.4 (1964); *Ullman v. United States*, 350 U.S. 422, 426 n.1 (1956).

applying the Fourth Amendment's Search and Seizure Clause to thermal imaging technology in *Kyllo v. United States*.<sup>206</sup> The Court in *Kyllo* sought to prevent technological advancement from eroding a constitutionally protected right.<sup>207</sup> The Court stated that using the thermal imaging technology to obtain "information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,' constitutes a search . . . . This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted."<sup>208</sup>

Applying the Self-Incrimination Clause to a person who refuse to state her name because of the information that is made easily accessible by computer databases serves to adapt existing protections in light of technological change. At the time of the Founding, the ability to use a person's name to link and track that person on the scale made possible by computer databases did not exist. In the absence of computer databases, a name primarily provides a means of referencing a person and later contacting that individual. Advances in database search technology have altered the implications of requiring a person to state her name to law enforcement officers. If the Self-Incrimination Clause is to retain its meaning in consideration of these implications, then individuals must be allowed to refuse to state their names.

#### CONCLUSION

Applying the Fifth Amendment's Self-Incrimination Clause to a person responding to a police officer's request to state her name represents a complex proposition. Delimiting the boundaries of the proper invocation of the privilege against self-incrimination necessitates an appreciation of the implications of stating one's name. This Note suggests that a requirement that a person state her name in a context where that name facilitates a search of various databases fulfills the three requirements for invoking the privilege against self-incrimination—that the statement be testimonial, incriminating, and compelled. Many individuals would be legally justified in invoking the privilege as a basis for refusing to state their names. Providing full meaning

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206. *Kyllo v. United States*, 533 U.S. 27 (2001). The distinction between detecting lawful versus unlawful activity recognized in *Illinois v. Caballes*, 125 S. Ct. 834, 838 (2005), did not abrogate this proposition.

207. *Kyllo*, 533 U.S. at 34 ("While it may be difficult to refine *Katz* when the search of areas such as telephone booths, automobiles, or even the curtilage and uncovered portions of residences is at issue, in the case of the search of the interior of homes—the prototypical and hence most commonly litigated area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that exists, and that is acknowledged to be *reasonable*. To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment. We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,' constitutes a search—at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." (quoting *Silverman v. United States*, 365 U.S. 505, 512 (1961))).

208. *Id.* (quoting *Silverman*, 365 U.S. at 512) (emphasis added).

to the rights of those who would be legally justified in refusing to state a name requires that anyone be permitted to refuse to state her name. Recognizing the permissibility of such an invocation creates difficulties for courts in handling situations where such an invocation was made. This Note demonstrates that the Fifth Amendment's Self-Incrimination Clause requires the elimination of criminal sanctions for those who decline to state their names based on the privilege against self-incrimination. Additional questions remain as to how courts can best protect an individual's right under the Fifth Amendment's Self-Incrimination Clause when she is compelled to state her name after first invoking the privilege against self-incrimination. Nevertheless, recognizing the right to invoke the privilege would represent a substantial step toward securing the principles embodied in the Fifth Amendment's Self-Incrimination Clause.

APPENDIX  
TABLE OF REFERENCED DATABASES

Name of the Database	Agency or Responsible Companies	Information Available through the Database
<p><b>FACTS/MATRIX</b><sup>209</sup></p> <p>Factual Analysis Criminal Threat Solution—<b>FACTS</b><sup>210</sup></p> <p>Multi-State Anti-Terrorism Information Exchange—<b>MATRIX</b><sup>211</sup></p> <p>FACTS is the database search technology that was developed by the <b>MATRIX</b> project.<sup>212</sup></p>	<p><b>MATRIX</b><sup>213</sup></p> <ul style="list-style-type: none"> <li>• U.S. Department of Homeland Security—Office for Domestic Preparedness</li> <li>• U.S. Department of Justice—Office of Justice Programs</li> <li>• Connecticut</li> <li>• Florida</li> <li>• Michigan<sup>214</sup></li> <li>• Ohio</li> <li>• Pennsylvania</li> </ul> <p><b>FACTS</b><sup>215</sup></p> <ul style="list-style-type: none"> <li>• LexisNexis</li> <li>• Florida</li> <li>• Ohio</li> </ul>	<p><b>MATRIX</b><sup>216</sup></p> <ul style="list-style-type: none"> <li>• Criminal history information</li> <li>• State sexual offender lists</li> <li>• Property ownership</li> <li>• Uniform Commercial Code filings</li> <li>• Bankruptcy filings</li> <li>• FAA pilot licenses and aircraft ownership records</li> <li>• Coast Guard registered vessels</li> <li>• State-issued professional licenses</li> <li>• Driver's license information and photo images</li> <li>• Motor vehicle registration information</li> </ul>

209. The MATRIX was a partnership between the Department of Homeland Security and several states. The MATRIX was a pilot program designed to develop means of coordinating information among various federal, state, and local law enforcement entities. The FACTS system was developed by the MATRIX Pilot Project and is a resource that remains available to law enforcement despite the termination of the MATRIX Pilot Project on April 15, 2005. *See generally* KROUSE, *supra* note 32; Press Release, Fla. Dep't of Law Enforcement, *supra* note 27.

210. Press Release, Fla. Dep't of Law Enforcement, *supra* note 27, at 1.

211. KROUSE, *supra* note 32, at 1.

212. KROUSE, *supra* note 32, at 4; Press Release, Fla. Dep't of Law Enforcement, *supra* note 27, at 1.

213. KROUSE, *supra* note 32, at 3–4 (listing participants).

214. Michigan withdrew from the MATRIX Pilot Project in March of 2005. *Michigan State Police Quit Anti-Terrorism Database*, SAN JOSE MERCURY NEWS, Mar. 7, 2005, available at 2005 WLNR 3504465. Additionally, Alabama, California, Georgia, Kentucky, Louisiana, New York, Oregon, South Carolina, Texas, Utah, and Wisconsin withdrew from the project after having initially decided to participate. KROUSE, *supra* note 32, at 4–5.

215. *See Police Data Sharing Is a Work in Progress*, TECHWEBNEWS, Apr. 25, 2005, available at 2005 WLNR 6459808 (explaining that only Ohio and Florida have entered into contracts with LexisNexis, which owns the FACTS technology).

216. KROUSE, *supra* note 32, at 6.

Name of the Database	Agency or Responsible Companies	Information Available through the Database
National Crime Information Center— <b>NCIC</b> <sup>217</sup>	<ul style="list-style-type: none"> <li>• U.S. Department of Justice</li> <li>• Federal Bureau of Investigation—Criminal Justice Information Services Division<sup>218</sup></li> </ul>	<p><i>Categories of Individuals Covered:</i><sup>219</sup></p> <ul style="list-style-type: none"> <li>• Wanted persons</li> <li>• Individuals who have been charged with a serious offense</li> <li>• Missing persons</li> <li>• Individuals designated by the Secret Service as posing a potential danger to the president</li> <li>• Members of violent criminal gangs</li> <li>• Members of terrorist organizations</li> <li>• Unidentified persons (e.g., unidentified deceased person)</li> </ul>
Transportation Workers Identification Credential— <b>TWIC</b> <sup>220</sup>	U.S. Department of Homeland Security—Transportation Security Administration <sup>221</sup>	<p>For individuals authorized for unescorted entry to secure transportation areas:<sup>222</sup></p> <ul style="list-style-type: none"> <li>• Individual's name</li> <li>• Address</li> <li>• Phone number</li> <li>• Social security number</li> <li>• Date of birth</li> <li>• Place of birth</li> <li>• Administrative identification codes/Unique card serial number</li> <li>• Systems identification codes</li> <li>• Company, organization, or affiliation</li> <li>• Issue date of authorization for access</li> <li>• Expiration date of authorization for access</li> <li>• Biometric data and digital photograph</li> <li>• Access level information</li> </ul>

217. DOJ Notice, *supra* note 28, at 52,343.

218. *Id.*

219. *Id.* at 52,343–44 (listing the categories in addition to providing definitions for the categories and listing subcategories).

220. TSA Notice, *supra* note 30, at 49,507–08.

221. *Id.* at 49,507.

222. *Id.* at 49,508.

Name of the Database	Agency or Responsible Companies	Information Available through the Database
United States—Visitor and Immigrant Status Indicator Technology— <b>US-VISIT</b> <sup>223</sup>	Department of Homeland Security <sup>224</sup>	Immigration information including: <sup>225</sup> <ul style="list-style-type: none"> <li>• Biometric identifiers (photograph, fingerprint)</li> <li>• Copies of travel documents</li> <li>• Name</li> <li>• Date of birth</li> <li>• Citizenship</li> <li>• Sex</li> <li>• Passport number</li> <li>• Country of issuance</li> <li>• Alien registration number</li> <li>• Address</li> </ul>

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223. Notice of Revised US-VISIT PIA, *supra* note 29; Notice of US-VISIT PIA, *supra* note 29.

224. Notice of Revised US-VISIT PIA, *supra* note 29, at 57,038.

225. *Id.* at 57,044.

