

NATIONAL IDENTIFICATION CARDS: POWERFUL TOOLS FOR
DEFINING AND IDENTIFYING WHO BELONGS IN THE
UNITED STATES

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In the wake of the terrorist attacks on September 11, 2001, there have been numerous calls for a federal national identification card system as a means to prevent future terrorist attacks in the United States. The proposals range from a comprehensive system involving chips and databases that could be used to track the movements of card holders to “trusted-traveler” cards that would facilitate faster boarding of planes for pre-screened individuals.¹ Another type of proposal is for a national identification card that simply identifies the holder as having the right to be in the United States. Such cards, it is proposed, would contain some or all of the following information: name, address, social security number, photo, and fingerprint of the holder. They would allow the holder to easily pass through security checks at airports, high rise buildings, and federal buildings. Some have suggested that such cards be voluntary, in which case those who choose to not show such a card would be choosing to undergo more scrutiny.

The current impetus for a national identification card system is at least in part due to the fact that some of the 9/11 hijackers obtained United States identification cards. The 9/11 Commission reported that “[a]ll but one of the 9/11 hijackers acquired some form of U.S. identification document, some by fraud.”² Others, in particular Representative Sensenbrenner, have alleged that the hijackers were able to carry out their terrorist acts because they possessed sixty-three drivers licenses.³ A fact sheet issued by the 9/11 Public

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¹ Barbara De Lollis, *‘Trusted-Traveler’ Card Could Speed Security Check*, USA TODAY, July 2, 2002, at 05B.

² NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 390 (2004).

³ Nat’l Immigration Law Ctr., *9/11 Commission Implementation Bill Passed Without Draconian DL*

Discourse Project, a campaign created by ten members of the 9/11 Commission, reports that the hijackers, in fact, had thirteen licenses, two of which were duplicates.⁴ While all were real licenses, not all were legally obtained.⁵ For example, some hijackers lied about being residents of a particular state.⁶ In any case, all the hijackers entered the United States on visas and all but one had legal immigration status when they applied for a license.⁷ The remaining hijacker used his passport to board the plane.⁸ It has also been reported that some of the U.S. identification cards mentioned by the 9/11 Commission were, in fact, very official-looking cards that were issued by private companies.⁹ The Public Disclosure Project Fact Sheet reports that while the Commission made recommendations to catch terrorists, it “did not make any recommendation[s] about licenses for undocumented aliens.”¹⁰

Despite these facts, many proponents of national identification card systems lump terrorists with immigrants whose only transgression is their presence in the country without legal permission. National identification cards, the argument goes, would help locate terrorists and “illegal aliens” because those without permission to be in the United States would not have a card. The cards would identify who has a right to be in the country.¹¹ Thus, the card would reduce the need for racial profiling by quickly identifying those who belong, and thwart terrorism by preventing terrorists from hiding in plain sight.

Among the people suggesting that a national identification card system be considered is Professor Alan Dershowitz.¹² A well-known civil-libertarian, Professor Dershowitz made waves when, in October 2001, he suggested that our recent experiences called for a

Provisions, IMMIGRANTS’ RTS. UPDATE, Dec. 22, 2004, available at <http://www.nilc.org/immlawpolicy/cdev/congrssdev018.htm>.

⁴ 9/11 PUB. DISCOURSE PROJECT, FACT SHEET: DRIVER’S LICENSES, 9-11, AND INTELLIGENCE REFORM 1 (2005), http://www.9-11pdp.org/press/2004-12-03_factsheet.pdf (last visited Sept. 1, 2008) [hereinafter PDP FACT SHEET]. “The 9/11 Public Discourse Project ceased operations on December 31, 2005.” 9/11 Public Discourse Project, <http://www.9-11pdp.org/> (last visited Sept. 1, 2008).

⁵ PDP FACT SHEET, *supra* note 4.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ See Nat’l Immigration Law Ctr., *supra* note 3.

¹⁰ PDP, FACT SHEET, *supra* note 4.

¹¹ Alan M. Dershowitz, *Why Fear National ID Cards?*, N.Y. TIMES, Oct. 13, 2001, at A23 [hereinafter Dershowitz, *National ID Cards*].

¹² See Alan M. Dershowitz, *Rethinking the Balance Between Liberty and Security*, 2001, <http://www.alandershowitz.com/publications/docs/libertysecurity.html> (last visited Sept. 1, 2008) [hereinafter Dershowitz, *Rethinking the Balance*]; Dershowitz, *National ID Cards*, *supra* note 11.

rebalancing of security and liberty.¹³ His card would be optional, but would permit the holder to easily pass through security checks at airports and buildings.¹⁴ It would contain only the holder's name, address, photo, and a chip containing a fingerprint or retina scan.¹⁵ Professor Dershowitz suggests that such a card would actually reduce racial and ethnic profiling.¹⁶ He acknowledges that Arab-Americans would likely be asked for their cards more often, but believes that production of their cards would avoid the harassment they currently suffer. He relies on an experience in his own life: when African-American students first began to attend Harvard in substantial numbers, many were harassed by the Harvard police when they entered campus. After Harvard identification cards were introduced, much of the harassment ended, although African-American students were asked for their cards more often than white students. The card signified to the police that those students belonged on Harvard's campus.¹⁷

Professor Dershowitz acknowledges that a national identification card would be a "compromise[] with liberty," but believes such a system would be justified because otherwise, "large compromises [would] be imposed only on outsiders ('theys')." ¹⁸ The "theys" are people in the country without permission, or "illegal aliens."¹⁹ One reason he supports such a system is based on his belief that it would move the country towards a "system under which 'illegal immigrant' status really means something. "We can no longer accept a situation in which millions of people are de facto accepted as residents while de jure being illegally here."²⁰ He urges that to protect the country from potential terrorists, the legal status of every person in the country must be "unambiguously clear" and that we should have a system whereby those who are here "illegally" are

¹³ See Dershowitz, *Rethinking the Balance*, *supra* note 12.

¹⁴ See Dershowitz, *National ID Cards*, *supra* note 11.

¹⁵ See Dershowitz, *Rethinking the Balance*, *supra* note 12. He has also suggested that the card contain the holder's social security number and that it be linked to a database. *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Alan M. Dershowitz, *Small Compromises*, BOSTON REV., Dec. 2002–Jan. 2003, at 15, available at <http://bostonreview.net/BR27.6/dershowitz.html>.

¹⁹ Although the term "alien" is a legal term used in the Immigration and Nationality Act to refer to all persons in the United States who are not United States citizens, the term "illegal alien" is generally considered pejorative outside of the legal world. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(3) (2000). Other terms for people in the United States in violation of the immigration laws include "undocumented immigrant" and "labor migrant."

²⁰ Alan M. Dershowitz, "Identification, Please" *In this Era of Terrorism, Foolproof ID Cards for Americans and Visitors Would Bolster Security. The Information They Would Contain Already Exists in Countless Databases*, BOSTON GLOBE, Aug. 11, 2002, at 14.

tracked down and deported.²¹ A national identification card would assist in that effort.

Others, including a broad array of civil liberties groups, have argued against the creation of a national identification card system—particularly if the card would be connected to a central databank—on the grounds that it would infringe upon privacy rights.²² Civil libertarians are concerned that such a system would lead to more discrimination and harassment of people who are perceived to look or sound foreign, or are of a particular religion.²³ Others note that a national identification system would condition the availability of many constitutional rights on credentials: “People [would] obtain ersatz-identities based on identification documents and numbers or places in databanks.”²⁴ They base their arguments on the theory that part of personhood is the right to be free from intrusion and that a national identification system would encourage such intrusion.²⁵

This Essay considers the concept of a national identification card system for the purpose of identifying who “belongs” in the United States—for defining and identifying “them.” It does not address the identification of potential terrorists, as foreigners in the United States without immigration papers are not necessarily terrorists, and as history has shown, terrorists are not necessarily in the United States without documents. Many are citizens.²⁶ Moreover, law enforcement’s need to identify potential terrorists is distinct from the issue of whether people who do not pose a terrorist threat “belong” in the United States even though they do not have “legal” immigration status.

²¹ *Id.*

²² See, e.g., Richard Sobel, *The Demeaning of Identity and Personhood in National Identification Systems*, 15 HARV. J.L. & TECH. 319, 320 (2002); see also Letter from Coalition to President George W. Bush, (Feb. 11, 2002), available at <http://www.aclu.org/privacy/spying/149221gl20020211.html> [hereinafter Letter] (opposing a national identification system on the following grounds: that it would not prevent terrorism; that it would rely on a database that is dependent upon accurate input; that it would be a waste of money; that it would contribute to identity fraud; and that it would compromise the liberty of all Americans).

²³ Letter, *supra* note 22.

²⁴ Sobel, *supra* note 22, at 321.

²⁵ *Id.*

²⁶ Timothy McVeigh and Terry Nichols, the Oklahoma City bombers, were both U.S. citizens as is Ted Kaczynski, the Unabomber. Profiles of the three Oklahoma City bombing conspirators: Timothy McVeigh, Terry Nichols, and Michael Fortier, <http://www.law.umkc.edu/faculty/projects/ftrials/mcveigh/conspirators.html> (last visited Sept. 1, 2008); see also Jeremiah Marquez, *Advocates Plan to Protect Immigrant Drivers License Law Politics: GOP’s Aim to Repeal Measure Prompts Opposition*, LONG BEACH PRESS-TELEGRAM, Oct. 19, 2003, at A7 (“[A]s [an] American citizen[] . . . Ted Kaczynski had no trouble acquiring [a] license[.]”).

The concept of a national identification card raises not only issues involving potential abuse of civil rights and intrusions into privacy, but also fundamental issues relating to the scope of who “belongs” in the United States. Who is the “they” who would be denied cards and thereby be excluded from life in the country? One division is between United States citizens who “belong” and everyone else. However, that would not take into account the millions of non-United States citizens who have rights under the immigration laws to be in the United States, including lawful permanent residents who often live here their entire lives without becoming citizens, immigrant workers, non-immigrant workers, refugees, students, and visitors. Thus, another division might be between all people who have rights under the immigration laws to be in the country, including foreigners who are “legal,” on one hand, and all foreigners who do not have such permission or are “illegal” on the other.

Yet, the “illegal” group is huge—the current population of undocumented people living and working in the United States is estimated to be anywhere between seven and twenty million. While these people may not have “legal” immigration status, they have been tacitly invited to contribute their labor and skills to the country’s economy and civic life. Over the last twenty years, the United States has encouraged and permitted millions of people to enter and remain in the country “illegally” while, at the same time, increasingly limiting the avenues for entering the country legally or acquiring legal immigration status while in the United States. Should those people be relegated to invisibility based solely on the fact that they do not possess a national identification card?

The first Section of this Essay is a brief history of the idea of national identification cards in the United States and the use of national identification cards in other countries, particularly when used to identify those who do not belong in a particular society. This Section is not comprehensive and is intended merely to provide background. The second Section provides a brief picture of the millions of non-U.S. citizens currently living in the United States. This Section examines the experiences of United States citizens as well as undocumented immigrants. The third Section considers the experience of New Haven, Connecticut with its Elm City Resident Card, an example of a card system whose purpose is to indicate that the holder is a resident of New Haven—that regardless of immigration status, the holder belongs. New Haven’s experience illustrates the power of identification cards to distinguish between

people who “belong” in a society and those who do not.

I conclude that a national identification card system should not be used to identify undocumented migrants. Such a system would be counter-productive as it would marginalize a vast number of people and would prevent them from participating in civic life. A national identification card system would also institutionalize the notion that a person does not “belong” in United States society unless he or she has a document—a concept that is antithetical to our form of government. The United States government is “by the people.” A system of national identification cards would reverse that power relationship into one where the government bestows identity on individuals through a national identification card.²⁷

IDENTIFICATION CARD SYSTEMS

Many countries have national identification cards. These include Germany, Portugal, Israel, France, Belgium, Greece, Luxemburg, and Spain.²⁸ However, the United States is not alone in resisting the idea. Countries without national identification cards include New Zealand, Australia, and Canada.²⁹

History is replete with examples of societies using national identification systems to identify people who did not “belong.” In the 1930s, Germany and the Soviet Union implemented identification card systems.³⁰ The Soviet government instituted a system of internal passports. Everyone over the age of sixteen had to have such a passport that included information such as nationality, employer’s name, employment beginning and ending dates, and criminal records.³¹

Germany used cards to identify and gather German Jews as well as Jews in occupied territories. German Jews had to apply for identification cards by December 31, 1938 and were required to carry them at all times. The German government also conducted two censuses to identify Jews. The first was in 1933 and identified all practicing Jews in Germany. The second, in 1939, identified all “racial Jews” in the Greater Reich.³² The identification system

²⁷ See, e.g., Sobel, *supra* note 22, at 320–21 (arguing against national identification systems).

²⁸ Simon Davies, Privacy Int’l, *Identity Cards: Frequently Asked Questions* (1996), [http://www.privacyinternational.org/article.shtml?cmd\[347\]=x-347-61881&als](http://www.privacyinternational.org/article.shtml?cmd[347]=x-347-61881&als).

²⁹ *Id.*

³⁰ Sobel, *supra* note 22, at 344–47.

³¹ *Id.* at 347.

³² *Id.* at 344–46.

enabled the police and other authorities to readily identify Jews for restriction of their participation in academic, professional, governmental, and commercial life, and eventual deportation to concentration camps.³³

Beginning in 1959 and until the fall of apartheid, South Africa required all blacks to carry passes which regulated where they could travel within the country. In 1985, all South Africans were required to carry identification cards. However, between 1985 and 1995, blacks were arrested 637,584 times and no whites were arrested under the law.³⁴

In Rwanda, the 1993 ethnic cleansing was facilitated by a national identification system that distinguished between Hutus and Tutsis. It had been created by the Belgians in the 1930s.³⁵

NATIONAL IDENTIFICATION CARDS IN THE UNITED STATES

The United States has not been immune to using documents and information to persecute “undesirable” people. During the United States Civil War, slaves were required to carry passes when traveling from plantations.³⁶ Immediately following the bombing of Pearl Harbor by Japan, President Roosevelt authorized the military to exclude people from parts of the United States in the name of security.³⁷ General Dewitt issued a series of orders including one mandating that all persons of Japanese ancestry—regardless of U.S. citizenship—be excluded from a large swath of the West Coast and that they be held in internment camps for the duration of the War.³⁸

People of Japanese ancestry were identified through census information. The United States government conducts a census every ten years that is to be used only for statistical purposes and may not be published in any manner in which individuals could be identified.³⁹ Yet, information from the 1930 and 1940 censuses were used to intern more than 100,000 Japanese-Americans.⁴⁰

Under the Passport Act of 1928, the Secretary of State was

³³ *Id.* at 345.

³⁴ *Id.* at 347.

³⁵ Jim Fussell, *Genocide and Group Classification on National ID Cards*, in NATIONAL IDENTIFICATION SYSTEMS: ESSAYS IN OPPOSITION 64–65 (Carl Watner & Wendy McElroy eds., 2004).

³⁶ Sobel, *supra* note 22, at 343.

³⁷ Exec. Order No. 9,066, 7 Fed. Reg. 1,407 (Feb. 19, 1942).

³⁸ *Korematsu v. United States*, 323 U.S. 214, 228–29 (1944).

³⁹ Sobel, *supra* note 22, at 348.

⁴⁰ *Id.* at 348–49. The United States Supreme Court found that the detentions did not violate the U.S. Constitution. See *Korematsu*, 323 U.S. at 218–19.

granted the discretion to grant and withhold passports. It provided that “[n]o passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States.”⁴¹ The Supreme Court eventually found that the Secretary’s practice of denying passports to Communists was unconstitutional.⁴²

However, the United States has traditionally resisted the idea of a national identity card. National identification systems have been introduced and rejected throughout our history. In the 1930s, there was initial resistance to issuance of social security numbers based on the fear that they would be used as national identity numbers. Social security numbers were originally assigned to workers in 1936 so that the Treasury Department could keep track of each worker’s contributions and eligibility for social security.⁴³ Congress and President Roosevelt had to assure the country that the social security card would be confidential and would not be used as an identification card.⁴⁴

However, since its implementation, Congress has mandated its use for other purposes more than forty times. For example, a social security number is required for tax payer identification, Medicare, public assistance, drivers licenses, Medicaid, food stamps, interest-bearing bank accounts, Housing and Community Development grants, and to identify federal employees.⁴⁵ In 1994, it became a requirement that children born in the United States be assigned tax payer identification numbers at birth.⁴⁶

Over the years, many proposals have been made, in essence, to make a social security card into a national identification card. For example, in 1997 Representative Bill McCollum (R-Fl) proposed that a photograph be placed on each social security card to make it counterfeit-resistant.⁴⁷ The purpose was to make it more difficult for “illegal” immigrants to use forged credentials in order to work.⁴⁸

⁴¹ See *Kent v. Dulles*, 357 U.S. 116, 127 (1958) (citing Passport Act of 1928, 32 Stat. 386 (1928) (codified as amended at 22 U.S.C. § 212)).

⁴² See *id.* at 130.

⁴³ NANCY J. ALTMAN, *THE BATTLE FOR SOCIAL SECURITY: FROM FDR’S VISION TO BUSH’S GAMBLE* 114–15 (2005).

⁴⁴ *Id.* at 114.

⁴⁵ Sobel, *supra* note 22, at 351.

⁴⁶ *Id.* at 352.

⁴⁷ Daniel W. Sutherland, *Big Brother Flunks a Test: Monitoring the National ID Program*, available at <http://www.ceousa.org/content/view/full/180/90/> (last visited Sept. 1, 2008) (citing Paul Gigot, *Uncle Sam Wants Your Papers Please*, WALL ST. J., Sept. 29, 1995; H.R. 231, 105th Cong. (1st Sess. 1997)).

⁴⁸ H.R. 231, 105th Cong. (1st Sess. 1997).

The bill was defeated.⁴⁹ Interestingly, in lobbying for the bill, supporters were adamant that the bill would not have created a national identification card.⁵⁰

There has also traditionally been some resistance to the assignments of numbers—as being too close to the “mark of the beast.”⁵¹ In 1981, the idea of an identification card system to combat “illegal” immigration was proposed at a cabinet meeting. A cabinet member exclaimed, why not tattoo a number on each American’s forearm?⁵² President Reagan purportedly exclaimed, “My God, that’s the mark of the beast,” and that was the end of that suggestion.⁵³

Yet, in August 2007, the Department of Homeland Security (“DHS”) promulgated regulations whereby social security numbers would be used to enforce immigration laws.⁵⁴ Since 1994, the Social Security Administration has been sending “no-match” letters to employers and employees notifying them that the employee’s social security number does not match the Administration’s records.⁵⁵ Of course, there are many reasons for no matches: transposed numbers or names, for example, or women who change their names after marriage.⁵⁶ The letters historically emphasized that receipt of a no-match letter does not imply that the employee is not authorized to work.⁵⁷

The new DHS regulations create a rule that receipt of a no-match letter “may lead to a finding that an employer had constructive knowledge” that the employee does not have permission to work in the United States.⁵⁸ There are safe harbor provisions for employers, but the point of the regulations is to hold employers liable for employing undocumented workers.⁵⁹

The regulations are currently subject to a preliminary injunction and therefore are not in effect.⁶⁰ However, in promulgating the

⁴⁹ See H.R. REP. NO. 105–845, at 216 (1999).

⁵⁰ Sutherland, *supra* note 47; H.R. 231, 105th Cong. § 1(c) (1st Sess. 1997).

⁵¹ See Barnaby J. Feder & Tom Zeller, Jr., *Identity Chip Planted Under Skin Approved for Use in Health Care*, N.Y. TIMES, Oct. 14, 2004, at A1.

⁵² Sobel, *supra* note 22, at 385.

⁵³ Dennis Behreandt, *Pushing National IDs*, NEW AM., JULY 9, 2007, at 12.

⁵⁴ *Am. Fed’n of Labor v. Chertoff*, 552 F.Supp.2d 999, 1001 (N.D. Cal. 2007) (citing 72 Fed. Reg. 45,611 (Aug. 15, 2007)).

⁵⁵ *Id.* at 1002 (citing 20 C.F.R. § 422.120(a) (2007)).

⁵⁶ *See id.* at 1010.

⁵⁷ *Id.* at 1002.

⁵⁸ *Chertoff*, 352 F.Supp.2d at 1003 (citation omitted).

⁵⁹ *See id.* at 1003, 1013.

⁶⁰ *See id.* at 1015.

regulations, the DHS—an Executive Branch agency—is seeking to make a social security number into a national identification number that would distinguish those who “belong” from everyone else. This is a use that President Roosevelt promised would never happen.⁶¹

The history of drivers licenses in the United States is similar. They are now used as a “photo ID” and in fact most states issue state identification cards to citizens who are not eligible for drivers licenses.⁶² However, drivers licenses were not created to be identification documents, and, in fact, initially had little to do with safety.⁶³ Driving was considered a privilege, not a right, and fees brought in money.⁶⁴ Examination requirements came later—in some states much later. South Dakota did not have an exam until 1959.⁶⁵

The most recent iteration of a national identification card was added to the REAL ID Act of 2005.⁶⁶ The bill was a must-pass military appropriations bill, but included provisions requiring standardization of state drivers’ licenses if they are to be used to fly, open bank accounts, or enter federal buildings.⁶⁷ The provision was not debated at the time.

The Act provides that only citizens and lawful permanent residents are to be issued first class licenses.⁶⁸ Other non-citizens who are legally entitled to be in the United States will receive a temporary or tier-two license.⁶⁹ Citizens will have to prove their citizenship to state Department of Motor Vehicle clerks.⁷⁰ Foreign documents, other than passports, will not be permitted.⁷¹ The documents used to verify identity would be scanned and put in a database.⁷² The Act requires that information in state databases be shared with those of other states and the federal government.⁷³

It has been pointed out that many citizens do not have the

⁶¹ Sobel, *supra* note 22, at 349–50.

⁶² *Id.* at 325–26.

⁶³ Maria Pabon Lopez, *More than a License to Drive: State Restrictions on the Use of Drivers Licenses by Noncitizens*, 29 S. ILL. U. L.J. 91, 108–09 (2004) (discussing the history and current use of drivers licenses and the automobile in the United States); JIM HARPER, *IDENTITY CRISIS: HOW IDENTIFICATION IS OVERUSED AND MISUNDERSTOOD* 114–15 (2006).

⁶⁴ HARPER, *supra* note 63, at 115.

⁶⁵ *Id.*

⁶⁶ REAL ID Act of 2005, Pub. L. No. 109–13, 119 Stat. 231, 302 (2005).

⁶⁷ *Id.* § 202.

⁶⁸ *Id.* § 202(c)(2)(B).

⁶⁹ *Id.* § 202(c)(2)(C)(i).

⁷⁰ *Id.* § 202(c)(3)(A).

⁷¹ *Id.* § 202(c)(3)(B).

⁷² *Id.* § 202(d)(1).

⁷³ *Id.* § 202(d)(11)–(12).

required papers. For example, a woman in Alaska tried to renew her drivers license and was informed that her married name—the name she had been using for twenty-five years—was not legal.⁷⁴ She had been using that name on her income tax forms.⁷⁵ Yet, the Social Security computer, which cross-checked her license renewal application, blocked it.⁷⁶ She was told that she needed to go to Juneau, ninety miles away, with her passport and marriage certificate to change it.⁷⁷ She did but was told that in order to change her name, she needed a passport or drivers license with her maiden name and a marriage certificate.⁷⁸ The problem was that her passport and drivers license already had her married name.⁷⁹ Her birth certificate was not acceptable but a certified medical record would do.⁸⁰ The forty-seven-year-old woman had to obtain a record from Vermont where she attended college.⁸¹

The final implementing regulations issued by the DHS in January 2008 support the Social Security Office's.⁸² The regulations provide standards for "[i]nformation and security features that must be incorporated into each card, application information to establish the identity and immigration status of an applicant before a card can be issued, and physical security standards for facilities where drivers licenses and applicable identification cards are produced."⁸³ They dictate the details of state department of motor vehicle operations from the color of the card background, to the fonts used on the card.⁸⁴ The proposed verification requirements are more onerous than the Act's.⁸⁵ Moreover, the estimated cost is \$23 billion.⁸⁶

⁷⁴ Heather Lande, *What's in a Name? Social Insecurity*, ANCHORAGE DAILY NEWS, Mar. 15, 2007, available at <http://dwb.adn.com/life/lende/story/8709601p-8611871c.html>.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Minimum Standards for Drivers Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 73 Fed. Reg. 5,272, 5,272 (Jan. 29, 2008) (to be codified at 6 C.F.R. pt. 37). "[The] final rule also provides a process for States to seek an additional extension of the compliance deadline to May 11, 2011, by demonstrating material compliance with the core requirements of the Act and [the] rule." *Id.*

⁸³ *Id.*

⁸⁴ *See id.* at 5,320.

⁸⁵ *Compare id.*, with REAL ID Act of 2005, Pub. L. No. 109-13, § 202, 119 Stat. 231, 312 (2005).

⁸⁶ The American Civil Liberties Union, *Funding for Invasive Real ID Cons States in Exchange for Their Privacy*, U.S. FED. NEWS, Feb. 6, 2008, available at 2008 WLNR 2475444.

UNDOCUMENTED MIGRANTS IN THE UNITED STATES

Estimates of the undocumented population in the United States range from seven to twenty million.⁸⁷ A respected study by the Pew Hispanic Center estimates that there were 11.1 million undocumented migrants in 2005 and reports that the population has grown rapidly since the end of the 1990s.⁸⁸ In 2005, 78 % of undocumented immigrants came from Mexico and Latin America, primarily Central America.⁸⁹ The Center estimates that there were 6.2 million undocumented Mexican migrants constituting 56 % of the undocumented population, and about 2.5 million undocumented migrants from Latin America, or 22 % of the undocumented population.⁹⁰

The number of Mexicans among the undocumented is not surprising given the one hundred year history of Mexican labor in the United States.⁹¹ Since at least the early part of the twentieth century, Mexican citizens have been viewed as a flexible source of labor and therefore have been invited to work, expressly and tacitly, by the United States government as well as private employers.⁹² In fact, it has been suggested that the more accurate term for Mexican migrants is “informal” labor.⁹³

In 1911, the Dillingham Commission, a Commission created by Congress to “make full inquiry, examination, and investigation . . . into the subject of immigration,”⁹⁴ reported that Mexican laborers were “providing a fairly adequate supply of labor.”⁹⁵ The Commission noted approvingly that they were not

⁸⁷ As undocumented migrants often live in the shadows and avoid being counted, it is impossible to arrive at a more exact figure. Brad Knickerbocker, *Illegal Immigrants in the US: How Many Are There?*, CHRISTIAN SCIENCE MONITOR, May 16, 2006, at 1, available at 2006 WLNR 8344160.

⁸⁸ JEFFREY S. PASSEL, PEW HISPANIC CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY 1-2 (2006), <http://pewhispanic.org/files/reports/61.pdf>.

⁸⁹ *Id.* at 4.

⁹⁰ *Id.* at 5.

⁹¹ See Jorge A. Vargas, *U.S. Border Patrol Abuses, Undocumented Mexican Workers, and International Human Rights*, 2 SAN DIEGO INT'L L.J. 1, 12 (2001).

⁹² See *id.*

⁹³ See Christian Zolniski, *The Informal Economy in an Advanced Industrialized Society: Mexican Immigrant Labor in Silicon Valley*, 103 YALE L.J. 2305, 2305 (1994).

⁹⁴ U.S. CONGRESS, REPORTS OF THE IMMIGRATION COMM'N, DICTIONARY OF RACES OR PEOPLE ii (1911) [hereinafter DICTIONARY OF RACES OR PEOPLE].

⁹⁵ Kitty Calavita, *The Immigration Policy Debate: Critical Analysis and Future Options*, in 3 DIMENSIONS OF UNITED STATES-MEXICAN RELATIONS, MEXICAN MIGRATIONS TO THE UNITED STATES: ORIGINS, CONSEQUENCES, AND POLICY OPTIONS 156 (Wayne A. Cornelius & Jorge A. Bustamante eds., 1989) [hereinafter Calavita, *Critical Analysis*] (quoting U.S. CONGRESS, SENATE IMMIGRATION COMM'N, IMMIGRATION COMMISSION REPORT 690-91 (1911)).

easily assimilated but that that was not important as long as most of them returned to Mexico.⁹⁶ Thus, Mexicans were exempt from many of the immigration restrictions that were imposed over the following years, including the literacy test. The Commission estimated that in 1910, 17,760 Mexicans were admitted legally into the United States and noted that that number did “not include so-called ‘nonimmigrant aliens.’”⁹⁷

When labor was not needed in the 1930s, many Mexican citizens were deported.⁹⁸ However, during World War II, nearly 500,000 Mexicans came to the United States under the “Bracero” program, which permitted and encouraged Mexican laborers to work temporarily in the United States.⁹⁹ These laborers were not permitted to remain in the United States, and most were young men from rural areas who traveled north to work and send money home to their families.¹⁰⁰ Between 1947 and 1949, more than 142,000 undocumented Mexican citizens were legalized under the “Bracero” program.¹⁰¹ Only 74,600 new laborers came from Mexico under the program.¹⁰²

During this period, Congress and the Immigration and Naturalization Service also tacitly encouraged undocumented Mexican labor by underfunding the border patrol and declining to deport Mexican citizens.¹⁰³ The Bracero program ended in 1964 but by that time, the symbiotic relationship between employers and Mexicans, “legal” or not, was institutionalized.¹⁰⁴ Over the years, the southern border of the United States became viewed as porous—laborers traveled back and forth.¹⁰⁵

In 1986, 2.7 million undocumented immigrants were able to legalize their immigration status in the United States.¹⁰⁶ However, since that time, the avenues for legalization have dwindled. Consequently, there are millions of families in this country headed by people who are undocumented—not by choice, but because the

⁹⁶ Calavita, *Critical Analysis*, *supra* note 95, at 156.

⁹⁷ DICTIONARY OF RACES OR PEOPLE, *supra* note 94, at 96.

⁹⁸ BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY* 125 (2004).

⁹⁹ *Id.* at 126; Vargas, *supra* note 91, at 14.

¹⁰⁰ *See* HING, *supra* note 98, at 126–27, 129.

¹⁰¹ Kitty Calavita, *U.S. Immigration and Policy Responses: The Limits of Legislation*, in *CONTROLLING IMMIGRATION: A GLOBAL PERSPECTIVE* 60 (Wayne A. Cornelius et al. eds., 1994).

¹⁰² *Id.*

¹⁰³ Calavita, *Critical Analysis*, *supra* note 95, at 158.

¹⁰⁴ *Id.*

¹⁰⁵ *See* HING, *supra* note 98, at 132–33.

¹⁰⁶ James R. Edwards, Jr., Letter to the Editor, *Fine Print of Alien Amnesty*, WASH. TIMES, Aug. 15, 2004, at B5.

laws prevent them from legalizing their status. In 2005, there were about 6.6 million families in which the head of the family or spouse was undocumented.¹⁰⁷ Families are often made up of United States citizens, “illegal aliens” and individuals with all kinds of other immigration statuses. The Pew Hispanic Center estimated that, in 2005, there were about 14.6 persons living in families where the head of the household or spouse was undocumented.¹⁰⁸

An estimated 3.1 million children who are United States citizens by birth live in such families.¹⁰⁹ As these children mature, their parents are increasingly involved in civic life in their communities. They are involved in their childrens’ schools and their churches. In many communities, they have revitalized economically depressed areas. The fact that they do not have documents stating that they have permission under immigration laws does not lessen the fact that they “belong” in the United States communities of which they are an integral part. Under a national identification system, these millions of people would become essentially non-persons.¹¹⁰ As a consequence, their families, including their U.S. citizen children, would be consigned to the same fate. Thus, a national identification system used to identify who “belongs” based on immigration status would marginalize millions of people.

ONE EXPERIENCE: THE ELM CITY RESIDENCE CARD

In July 2007, the City of New Haven, Connecticut was the first municipality in the country to institute a local resident identification card. New Haven, home of Yale University, is a liberal college town with a population of about 127,000, approximately seventeen percent of which are foreign born.¹¹¹ Many of its residents are from Mexico, Ecuador and other parts of Central and Latin America. New Haven officials estimate that 10,000 to 15,000 of the foreign born population are in the country in violation of the immigration laws.¹¹²

¹⁰⁷ PASSEL, *supra* note 88, at ii.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ For similar reasons, it has been argued that the drivers license provisions in the REAL ID Act of 2005 would legislate otherness within the United States. See Raquel Aldana & Sylvia R. Lezos Verges, Essay, “Aliens” In Our Midst Post 9/11: Legislating Outsiderness within the Borders, 38 U.C. DAVIS L. REV. 1683, 1720–23 (2005); see also discussion *supra* pp. 918–19.

¹¹¹ U.S. CENSUS BUREAU, AMERICAN FACT FINDER, NEW HAVEN CITY, CONNECTICUT (2006), <http://factfinder.census.gov> (search “New Haven City”) (last visited Sept. 1, 2008).

¹¹² Mark Spencer, *New Haven Begins ID Era: National Debate Plays out in City*, HARTFORD COURANT, July 25, 2007, at A1.

In July 2007, New Haven introduced the Elm City Residence Card, a multi-purpose card available to all New Haven residents, regardless of immigration status.¹¹³ It is intended to allow residents to “participat[e] in local commerce or other forms of civic engagement (e.g. obtaining a library card or opening a bank account).”¹¹⁴ The City expected that the card will benefit mostly “young children, elderly citizens, students and immigrants (both documented and undocumented).”¹¹⁵

The Elm City Residence card has a photo, name, address, and date of birth and assigns each resident a number. To obtain a card, residents must present identification and proof of New Haven residence.¹¹⁶ The cost is \$5.00 for children and \$10.00 for adults.¹¹⁷ To prove identity, an applicant must present one of the following: (1) a passport; (2) a U.S. drivers license; (3) a birth certificate; or (4) a consular ID card.¹¹⁸ Alternatively, an applicant may prove his or her identity by presenting any two of the following: (1) a national identification card with photo, name, address, date of birth, and expiration date; (2) a current—*not* expired—foreign drivers license; (3) a voter registration card; (4) a U.S. or foreign military identification card; (5) a current visa; or (6) an ITIN card accompanied by an ID with a photograph.¹¹⁹ At least one of the documents used to prove identity must include a photograph of the applicant.¹²⁰

To prove residence in New Haven, an applicant must present two of the following documents: (1) a rental or real estate purchase agreement; (2) a utility bill with name and address; (3) an insurance bill, bank statement, or check book; (4) an employment pay stub; (5) a local property tax statement; (6) proof of a minor enrolled in public or private school; (7) a voter registration card; (8) a library card; or (9) original documents from a health or social services organization

¹¹³ *Id.*

¹¹⁴ CITY OF NEW HAVEN, NEW HAVEN’S ELM CITY RESIDENT CARDS—FACT SHEET, http://www.cityofnewhaven.com/pdf_whatsnew/municipalidfactsheet.pdf [hereinafter FACT SHEET] (last visited Sept. 1, 2008).

¹¹⁵ *Id.*

¹¹⁶ CITY OF NEW HAVEN, CRITERIA FOR ACCEPTABLE DOCUMENTS FOR MUNICIPAL ID, <http://www.cityofnewhaven.com/Government/NewHavenResidents.asp> [hereinafter CRITERIA] (last visited Sept. 1, 2008).

¹¹⁷ Melissa Bailey, *City ID Plan Approved*, NEW HAVEN INDEP., June 5, 2007, available at http://newhavenindependent.org/archives/2007/06/City_id_plan_ap.php.

¹¹⁸ CRITERIA, *supra* note 116.

¹¹⁹ *Id.*

¹²⁰ *Id.*

attesting to the fact that the applicant is a New Haven resident.¹²¹ No documents are copied or kept on file and the card itself does not contain a chip with more information.¹²²

The idea of a municipal identification card was first raised in 2005 by members of the immigrant community in New Haven who felt that a card would signify that they—citizens, non-citizens, undocumented, and documented—are part of New Haven society.¹²³ Recognizing that a large part of its immigrant population was invisible, the city introduced the card so that people would no longer have to live nameless in New Haven. As the Mayor explained, “[t]he simple straightforward purpose here is to build a stronger community.”¹²⁴ You can’t police a community of people who won’t talk to our cops.”¹²⁵

The card is not intended to bestow any sort of legal immigration status.¹²⁶ It is, however, recognition that in the vacuum created by the federal government’s failure to address the dire state of the immigration system, the people already living in New Haven should be acknowledged regardless of their immigration status. They should not be invisible. The Mayor has been quoted as stating his belief that “New Haven is doing something that makes sense for New Haven.” Service to one another in community, more than waving an American flag, defines the spirit of our soul.”¹²⁷

The card is intended to simply indicate that the holder belongs in New Haven.¹²⁸ It provides residents with identification that helps overcome the reluctance of undocumented immigrants to report crimes, makes it easier for people to open bank accounts, helps in locating young children who are lost, and provides identification for elderly people who no longer have drivers licenses. The card also currently serves as a library card, provides access to the public

¹²¹ *Id.*

¹²² Interviews with Kica Matos, Community Service Administrator, City of New Haven (Feb. and Oct. 2008).

¹²³ *Id.*

¹²⁴ John Christoffersen, *New Haven Begins Offering ID Cards to Illegal Immigrants*, ASSOCIATED PRESS, July 24, 2007, available at http://www.boston.com/news/local/connecticut/articles/2007/07/24/new_haven_begin_offering_id_cards_to_illegal_immigrants/ [hereinafter Christoffersen, *Offering*].

¹²⁵ *Id.*

¹²⁶ John Christoffersen, *New Haven Proposes First ID Card for Undocumented Immigrants*, ASSOCIATED PRESS, May 18, 2007, available at http://www.boston.com/news/local/connecticut/article/2007/05/18/new_haven_proposes_first_id_card_for_undocumented_immigrants/ [hereinafter Christoffersen, *Proposes*].

¹²⁷ Christoffersen, *Offering*, *supra* note 124.

¹²⁸ FACT SHEET, *supra* note 114.

beach, the golf course, and the city dump. It can also be used to obtain discounted flu shots. It includes a debit card component which allows the user to put up to \$150 on the card for use at parking meters and to pay for goods and services at approximately fifty participating stores. A card for children replaces the debit feature with a feature that allows parents to list emergency contacts and allergy information. Thus far, over 5,000 cards have been issued.¹²⁹

New Haven police officers report that the Elm City Card has made many foreigners feel more comfortable coming to police stations. They note that many immigrants come from countries where the police cannot be trusted. The city police are prohibited from asking about immigration status. The Card makes it easier to identify an individual without asking about that person's country of origin.

Another effect noted by city officials is that since the Card became available, many more immigrants are coming to City Hall in downtown New Haven. Residents must come to City Hall in order to apply for the card. For many immigrants, the trip to apply for the card was their first trip to City Hall. Many have returned to avail themselves of additional services, information and orientation.

Tellingly, the inclusive effect of the Card is recognized by a vocal opposition coming from towns surrounding New Haven. Protesters have been quoted as stating that “[h]aving [the] ID says you’re welcome here.” We will give you all the protection you need, even though you are illegal.”¹³⁰ A group calling itself Southern Connecticut Immigration Reform, led by suburbanites, made a request under the state Freedom of Information Act to obtain the names of people who have Elm City Cards.¹³¹ The group made the request for the sole purpose of showing that it could obtain such data, thereby demonstrating to all Card holders that their data is not secure.¹³²

In July 2008, the state Freedom of Information Act Commission ruled against the suburbanites and found that the names and information of card holders fell under the “public safety” exemption

¹²⁹ Allan Appel, *IDs Top 5,000 Mark*, NEW HAVEN INDEP., Jan. 28, 2008, available at http://newhavenindependent.org/archives/2008/01/the_elm_city_re.php.

¹³⁰ Christoffersen, *Proposes*, *supra* note 126

¹³¹ Spencer, *supra* note 112, at A1.

¹³² *Id.*

from disclosure.¹³³ It found that the “ID Card program unleashed a level of vitriol and venom aimed at City officials and illegal immigrant that was far beyond mere political disagreement or healthy civic engagement.¹³⁴ The city had received threats that “clearly incited violence against holders of the ID card.” Examples included “[w]hen they show up for an ID card shoot them dead or at least deport them immediately,” and “[i]lllegals should and will be put to death.”¹³⁵

The Commissioner of the state Department of Emergency Management and Homeland Security (“DEMHS”) had concluded that there were “reasonable grounds to believe that disclosure may result in a safety risk.” The Commission ruled that, in making that determination, the DEMHS relied on “specific, credible, and imminent threats of violence.”¹³⁶

The power of the Elm City Card is also demonstrated by the concern felt by federal government officials. Recently released documents indicate that officials from the U.S. Attorney’s Office and the Department of Homeland Security were preoccupied with stopping the adoption of the Elm City Card program. More than three months before adoption of the program, federal officials developed a strategy to dissuade the city from adopting the program and thereby becoming a “sanctuary city.” They drafted a letter to the Mayor of New Haven intended to “discourage him from implementing this ID card program” but it was apparently never sent. On June 6, 2007, days after adoption of the program, immigration agents raided homes in New Haven, arresting more than 30 people. The city firmly believes the raids were in reaction to adoption of the program. The federal government continues to maintain they were not.¹³⁷

¹³³ *Chris Powell v. Mayor, City of New Haven*, No. 2007-498 (at www.state.ct.us/foi/2008FD/20080711/FIC2007-498.htm) ¶ 31. This matter was consolidated with another complaint brought by Dustin Gold and a group calling itself the Community Watchdog Project. *Id.*

¹³⁴ *Id.* at ¶ 15.

¹³⁵ *Id.* at ¶ 17.

¹³⁶ *Id.* at ¶¶ 27 and 31.

¹³⁷ Paul Bass, *Documents: Feds Tried To Stop ID*, New Haven Independent (Oct. 3, 2008) www.newhavenindependent.org/archives/2008/10/documents_feds.php.

CONCLUSION

New Haven's motivation for the Elm City Resident Card is the opposite of that of the proponents of a national identification system; New Haven instituted the card not so that immigrants could be singled out for deportation, but to enable them to participate in the larger society. New Haven seeks to embrace and protect its immigrant residents—documented and undocumented. It accomplishes this by permitting and encouraging every New Haven resident to obtain a card.

However, New Haven's experience illustrates the power of an identification card to signify who "belongs." Even though the Elm City Residence Card does not signify or bestow any immigration status on card holders, immigrants urged the city to issue such a card because they wanted a symbol that showed that they are residents of their community. It allows them to participate in civic life including using public institutions such as the library and beach. It bolsters their confidence to interact with the local police in reporting crime.

Opposition to the card program further demonstrates the power of an identification card to signify who "belongs." Threats have been made to immigrants and city officials, and lawsuits have been filed all in a concerted effort to shut down the program because it helps immigrants participate in civic life. Federal officials are preoccupied with its power to establish New Haven as a "sanctuary city" for immigrants.

There is no reason to believe that a national identification card system, even if voluntary, would not be just as powerful in signifying who "belongs" in the country. Those without a card would be subject to more scrutiny and those without legal immigration status would be subject to deportation. While proponents suggest that a national identification card would be used for benign purposes such as passing through security checks at airports and public buildings, such a card system would also be a perfect vehicle for distinguishing those who "belong" from "others." It would institutionalize the notion that a person does not "belong" in United States society unless he or she has a document.

Such a notion would be dishonest because millions of immigrants who would not be able to obtain the card do "belong" and have a stake in our society. Mexican citizens have been working in the United States for over one hundred years. Their presence is part of

their culture as well as the fabric of large parts of the United States. Families from many countries are made up of people with various immigration statuses. Families include United States citizens, immigrants, nonimmigrants, and undocumented people. Some members are merely waiting for their applications to be processed by the Department of Homeland Security. Surely, a woman married to a U.S. citizen with U.S. citizen children belongs in the United States even though the immigration laws do not permit her to acquire lawful permanent resident status because she crossed the border without permission. A man who has been in the United States for fifteen years, who owns a business and house, volunteers at his church, and is sending his daughter to college has a stake in United States society. While such people do not have legal immigration status, they have identities in United States society.¹³⁸ As New Haven's experience makes clear, regardless of immigration status, such people are part of society and their exclusion is detrimental to the entire community.

¹³⁸ In fact, in many cases, neighbors and acquaintances are unaware or do not care that a particular immigrant is in the United States without documentation.