
14. IDENTITY CARDS AND IDENTITY ROMANTICISM

A. MICHAEL FROMMKIN

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“National ID cards” are scare words in the United States, in England, and to a degree throughout the common-law world. If the instinctively negative reaction to ID cards were only an American phenomenon, one might dismiss it as yet another example of American exceptionalism—or, perhaps, another example of the U.S. failure to learn from foreign experience. But this powerful popular distaste for government-issued ID cards is not limited to the U.S. Similar and powerful reactions are found in England, Australia, and Canada. Indeed, in 2000, one could say that only four common-law countries had adopted ID cards in peacetime: Cyprus, Hong Kong, Malaysia, and Singapore. Meanwhile, however, ID cards are a routine and often uninteresting fact of life in the democracies of the civil-law world. That difference deserves exploration. (Some might argue that ID cards are inescapable, and that even the U.S. has them although it does not admit it,¹ but this makes the difference in popular attitudes even more difficult to understand.)

This chapter suggests that the U.S. hostility to ID cards is based on a romantic vision of free movement, and that the English view is tied to a related concept of “the rights of Englishmen.” I then suggest that these views distract from the real issues raised by contemporary national ID plans in the common and civil-law worlds. Today’s issues, I suggest, involve a complex set of data protection issues that have little to do with romantic stories of cowboys and motorists talking back to policemen, and a great deal to do with data storage and access.

A discussion of mental iconography should not blind us to critical issues such as the regulation of the databases to which ID cards are linked. Even so, it pays to tarry on the *image* of cards themselves because, until we shift to a purely biometric system of identification, ID cards are likely to remain the most tangible and visible symbols of national identification regimes. As both an emotive and

1. See Joseph W. Eaton, *Card-Carrying Americans* (Totowa, NJ: Rowman & Littlefield, 1986), 2 (“on a *de facto* basis, the United States already has a national ID system.”), 82–84.

political matter, how people feel about ID cards likely will play a large, perhaps even disproportionate, role in debates over fundamental national privacy policy.

I. WHY (SOME) PEOPLE CARE

Government-issued national ID cards evoke very different reactions around the world. The greatest cleavage is between common-law and civil-law countries. On the one hand, a very significant part of the population in the United States, England, and other common-law-based democracies seem instinctively frightened of ID cards. On the other hand, millions of people in democracies around the world carry ID cards every day and neither feel nor appear to be oppressed by them. To the extent that an organized opposition to ID cards coalesced in the civil-law world during the last few years, it seems based either on concerns about European federalism, or on new, reasonable concerns about possible misuse of modern databases linked to the cards. Some of the same arguments are found in the United States and especially England, but what is striking is how recent they are compared to the long-standing antipathy to ID cards.

A. In the United States

The United States has little tradition of identification documents before the twentieth century. With the important exception of racist legislation such as the Chinese Exclusion Acts, peacetime immigration to the United States did not require a passport for most of the period before World War I.² ID cards appear to be identified as tools of oppression in the U.S. popular imagination for three main reasons. First, the public strongly identifies ID cards with totalitarianism. Second, some religious groups, and at least one influential religious broadcaster, identify ID cards with the anti-Christ. Third, ID cards conflict in both principle and practice with the popular myth (but declining reality) of the right to move about freely. Notably absent from this list is any association with the manumission documents that might have been required of freed black slaves before the U.S. Civil War. This old precedent that affected only a small segment of a minority population seems to have no effect on current debates.

Citing Bentham's "Panopticon," Orwell's "Big Brother," and modern politics, opponents of ID cards routinely point to their association with totalitarianism. There are genuine grounds for this association, amplified by popular culture, for modern history is rich with examples of repressive regimes using ID cards as the cornerstone of programs designed to stifle dissent and oppress people. But the archetypal popular image—probably in black-and-white—is of a movie Nazi, perhaps with a big German Shepherd at his side, demanding "papers, please" in

2. See Martin Lloyd, *The Passport: The History Of Man's Most Traveled Document* (Thrupp, Stroud, Gloucestershire: Sutton Publishing, 2003), 115–116.

a movie-German accent. When I talk about ID cards with people, or read comments that people post online, this is surely the most often mentioned image even if no one can actually identify a movie in which it appears.³ Indeed, the image of ID cards, and enumeration in general, as a technology of control is endemic in film and literature, as is the revolt against identification as part of a revolt against authority. Recent films such as *Gattaca* and *Enemy of the State* project a dystopian future in which identity cards or biometric-based controls are used to track and control.

Although fears of ID cards and enumeration are linked to film, or to an idealized vision of liberty, the concerns do have roots in reality. The census as a form of social control is an idea as old as the Romans—indeed it is a critical part of the founding story of Christianity, appearing in Luke 2:1, 3–5. And the census remains a privacy issue today. Although U.S. law protects the confidentiality of individual responses to the census, there are documented incidents of census data being turned over to other government departments for national security purposes. Despite numerous government denials that personal information had been released, there is now strong evidence that the Census Bureau provided the U.S. Secret Service with names and addresses of Japanese-Americans during World War II.⁴ This extended beyond residence pattern and included “microdata”—individual names and addresses—at least in the Washington DC area. Similarly, the Census Bureau admits that it turned over data on residence patterns of Arab Americans to the Department of Homeland Security.⁵

Christianity, or at least some segments of the evangelical Protestant movement, is a further element that may fuel the modern U.S. antipathy to ID cards. Certain millennialist sects believe that mandatory IDs are a precursor to the second coming, or the end of times, foretold in Revelations 13:16–18. In this view, a national ID card is the next step toward the imposition of the biblical “mark of the beast” that they believe Christians will be forced to have to buy and sell during the “Last Days,” and that it is therefore a religious duty to oppose them.

This view that enumeration is ungodly is as old as the Republic, and as contemporary as the Internet. George Washington feared that the first U.S.

3. *Stalag 17* (1953) has moments that come close (“Anybody asks for your papers, you’re French laborers”). The film that probably launched the image is *The Great Escape* (1963), but neither film has the actual image that people seem to refer to. The real-life events on which *The Great Escape* was based certainly involved multiple encounters with German guards who demanded papers, although whether dogs were involved is less clear. See Alan Burgess, *The Three That Got Away*, <http://www.pbs.org/wgbh/nova/greatest-escape/three.html>.

4. J.R. Minkel, “Confirmed: The U.S. Census Bureau Gave Up Names of Japanese-Americans in WWII: Government documents show that the agency handed over names and addresses to the Secret Service,” *Scientific American*, (March 30, 2007), <http://www.sciam.com/article.cfm?chanID=sa003&articleID=A4F4DED6-E7F2-99DF-32E46B0AC1FDE0FE&pageNumber=1&catID=1>.

5. See EPIC, Department of Homeland Security Obtained Data on Arab Americans From Census Bureau, <http://www.epic.org/privacy/census/foia/default.html>.

census in 1790 would “greatly” undercount the population because so many would refuse to be counted due to “religious scruples”—although President Washington noted that others would evade the census for fear “it was intended as the foundation of a tax.”⁶ Today, doubts about ID cards, and especially cards with biometrics, are found both in the leadership of the Christian Coalition and all over the wilder parts of the Internet. Religious movements, and especially Protestants, are organized political forces in the United States, and the opinions of the leaders of advocacy groups such as the Christian Coalition carry weight, especially within the Republican Party.

The most widespread source of objection to ID cards is that Americans believe that they have a constitutional, or even natural, right to move freely around the nation. They do and they do not, but the ID card mythos seems tied to an enduring, romantic, if legally debatable, version of personal freedom.

The popular vision of untrammelled freedom to move about may reflect an earlier era in which the state lacked the ability to control a very mobile population. That romantic vision also reflects something real about the law: as a formal matter, the right to travel has strong roots in the modern decisions of the U.S. Supreme Court. The word “travel” is not found anywhere in the Constitution. Nevertheless, the modern Supreme Court has been clear that “the ‘constitutional right to travel from one State to another’ is firmly embedded in our jurisprudence.”⁷ This right of movement is said to be a fundamental component of nationhood: “the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.”⁸

Today, the Anglo-Saxon ideal that in a free country a person should be able to move freely without having to justify himself to authorities—that police have no right to stop you without probable cause and that even when they do one has no obligation to speak to them—is more deeply ingrained in the national psyche than reflected in the Constitution. Many states have stop-and-identify laws that require citizens to identify themselves to police officers.⁹ Often, however, these

6. George Washington to Gouverneur Morris (July 28, 1791), <http://teachingamericanhistory.org/library/index.asp?document=389> Cf. Margot Anderson & Stephen E. Feinberg, *The History of the First American Census and the Constitutional Language on Censustaking: Report of a Workshop* (Feb 23, 1999), lib.stat.cmu.edu/~fienberg/DonnerReportsFinal/FirstCensus.pdf (quoting George Washington to Gouverneur Morris (July 28, 1791)).

7. *Saenz v Roe*, 526 U.S. 489, 499 (1999) (quoting *United States v Guest*, 383 U.S. 745, 757, (1966)).

8. *Ibid.*, 499 (quoting *Shapiro v Thompson*, 394 U.S. 618, 629 (1969), with approval).

9. Note, *Stop and Identify Statutes: A New Form of an Inadequate Solution to an Old Problem*, 12 RUTGERS L.J. 585 (1981); Note, *Stop-and-Identify Statutes After Kolender v. Lawson: Exploring the Fourth and Fifth Amendment Issues*, 69 IOWA L.REV. 1057 (1984).

statutes require that an officer have a reasonable suspicion of criminality before making an identity demand.¹⁰

That is fine as far as it goes—and it goes about as far as your feet will take you. When it comes to augmenting one’s feet with mechanized transport the picture changes rather significantly and—the great American road movies notwithstanding—travel via mechanized transport is subject to ID-based controls that limit the right to travel.

The most prevalent and obvious control is the drivers’ licenses required by all fifty states in order to operate a motor vehicle on public roads. Cars are a practical necessity for most Americans who live outside the largest urban areas, making a driver’s license a practical necessity for most people. Today, the legal regulation of driving starts from the premise that driving is a “privilege” not a “right.”¹¹ It was not always thus: fifty to one hundred years ago, “Courts repeatedly wrote of an individual’s ‘right to travel’ by automobile and struck down regulations aimed at limiting the liberties of automobile drivers on constitutional grounds. In contrast, “Since 1950, no court has described driving an automobile as a ‘right.’”¹²

Classifying the right to drive as a mere privilege has significant legal consequences. Although the government does not have a right to suspend privileges in a wholly arbitrary manner—the Equal Protection clause of the Constitution prevents that—the procedural guarantees for “rights” are entirely absent for “privileges.” Similarly, the substantive requirements that attach to laws that may infringe on rights—means-ends rationality for example—are largely absent for the regulation of privileges.

A similar, but not identical, system of identification-based control applies to mechanized mass transit. In general, the official attitude remains somewhat ambiguous as regards domestic travel. The federal and state governments have tended to avoid taking the position that identification is an absolute requirement for access to planes and trains, while nonetheless promulgating rules that make it extremely difficult to travel without them. Similar ID requirements are being extended to intercity buses, and even local buses.¹³ Although demands for ID as

10. See *Hübel v Sixth Judicial Dist. Court of Nevada, Humboldt County*, 542 U.S. 177, 183 (2004).

11. Carl Watner, “Driver’s Licenses and Vehicle Registration in Historical Perspective,” in *National Identification Systems*, Carl Watner & Wendy McElroy eds., (Jefferson, NC: McFarland & Co., 2004), 109. This is true in both federal and state law: “Driving an automobile is a privilege, not a right, according to the prevailing laws of every jurisdiction of the United States.” Roger I. Roots, *The Orphaned Right: the Right to Travel by Automobile, 1890–1950*, 30 Okla. City U. L. REV. 245, 245 (2005).

12. Roger I. Roots, *The Orphaned Right: The Right to Travel by Automobile, 1890–1950*, 30 Okla. City U. L. REV. 245, 267 (2005).

13. See PapersPlease.org, *United States v Deborah Davis*, <http://www.papersplease.org/davis/facts.html> (recounting demands by Denver police for ID from passengers on a

a condition of boarding mass transit are increasingly common, and do not seem to be causing much in the way of resistance, their legal status remains debated.

The collision between the romantic vision of freedom of movement and the legal regulation of it took place in a recent Supreme Court case involving, of all things, a motionless cowboy. The cowboy, surely the embodiment of the romantic ideal of the wandering American, was Dudley Hiibel, and his case was *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County*.¹⁴ His legal team described him as “a 59-year-old cowboy who owns a small ranch outside of Winnemucca, Nevada. He lives a simple life, but he’s his own man.” In this account, Hiibel “was standing around minding his own business when all of a sudden, a policeman pulled up and demanded that Dudley produce his ID. Dudley, having done nothing wrong, declined.” This refusal led to his arrested on charges of “failure to cooperate” for refusing to show ID on demand.¹⁵

The Supreme Court, however, noted that the arresting officer was responding to a phone tip reporting an assault, and that while Hiibel was not in his truck, there was a young woman inside it; skid marks in the gravel caused the officer to believe it had come to a sudden stop. Hiibel appeared drunk. Asked repeatedly for ID, Hiibel repeatedly refused to provide it, then “began to taunt the officer by placing his hands behind his back and telling the officer to arrest him and take him to jail.” In the end he got his wish.¹⁶

From these facts, the Court concluded that “Here there is no question that the initial stop was based on reasonable suspicion”¹⁷—in other words, that its ruling would not address the more general case of suspicionless stops and requests for identification.¹⁸ Then, in language that is already being quoted in other decisions,¹⁹ the Supreme Court characterized the government’s interest in identifying Hiibel and others subjected to valid investigative stops as one of great importance.²⁰

Having defined the issue of identifying suspects in valid investigative situations as critical to police safety, it was short work to brush away contrary dicta and even to sweep aside Justice White’s concurring statement in the leading investigative stop decision. Justice White had suggested that a person detained

municipal bus route that crosses the Denver Federal Center). Charges in the case were later dropped. See Victory, <http://www.papersplease.org/davis/>.

14. 542 U.S. 177 (2004).

15. PapersPlease.org, Meet Dudley Hiibel, <http://www.papersplease.org/hiibel/>. For the record, I did some very minor legal kibitzing with various people involved in defending Mr. Hiibel.

16. *Hiibel*, 542 U.S. at 180-181.

17. *Ibid.*, 184.

18. The earlier case of *Brown v Texas*, 443 U.S. 47 (1979) suggested that such a rule would be unconstitutional.

19. E.g., *City of Topeka v Grabauskas*, 33 Kan.App.2d 210, 99 P.3d 1125 (Kan.App., 2004); *State v Aloi*, 280 Conn. 824, 838, 911 A.2d 1086, 1095 (Conn. 2007).

20. *Hiibel*, 542 U.S. at 186.

for an investigatory stop can be questioned but is “not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest.”²¹ In *Hiibel* the Supreme Court held that nothing in the Fourth or Fifth Amendments prevents a state from requiring “a suspect to disclose his name in the course of” a justified investigatory (“*Terry*”) stop.²²

This holding had three theoretically important limits, although their practical significance is more debatable. First, the Court expressly noted that it did not wish to open the door to bootstrapping arrests: “an officer may not arrest a suspect for failure to identify himself if the request for identification is not reasonably related to the circumstances justifying the stop.”²³

Second, in rejecting *Hiibel*’s claim that the sheriff’s demand for identification was an attempt to extract a form of coerced self-incrimination barred by the Fifth Amendment, the Court did not hold that such claims must always fail. They failed in *Hiibel*’s case because there was no way that the information could actually have incriminated him in the circumstances.²⁴ The Court thus left open the door to voiding application of an ID law if the suspect was, for example, fleeing from an arrest warrant.²⁵

Third, and perhaps most importantly for our purposes, the Court carefully sidestepped the ID card issue that gave the *Hiibel* case so much of its public resonance. It chose to read the Nevada statute as being satisfied with *oral* self-identification, and thus read the demand for an identification document right out of the statute:

[T]he Nevada Supreme Court has interpreted [the Nevada statute] to require only that a suspect disclose his name . . . As we understand it, the statute does not require a suspect to give the officer a driver’s license or any other document. Provided that the suspect either states his name or communicates it to the officer by other means—a choice, we assume, that the suspect may make—the statute is satisfied and no violation occurs.²⁶

This decision to avoid ruling on whether a demand for an identification document would be constitutional is a very significant limitation in the holding, although one that may be lost on some of the lower courts.²⁷

Whether the U.S. Constitution places limits on official demands for ID is especially salient in light of legislative initiatives that seek to standardize

21. *Terry v Ohio*, 392 U.S. 1, 34 (1968) (White, J. concurring).

22. See *Hiibel*, 542 U.S. at 187.

23. *Ibid.*, 188.

24. *Ibid.*, 190.

25. *Ibid.*, 191.

26. *Ibid.*, 186.

27. See *State v Mattson*, 2006 WL 2474237 * 6 (Minn.App., 2006) (summarizing *Hiibel* as “interpreting officer’s request for identification as a request to produce a driver’s license or some other form of written identification”).

government-issued ID cards and expand their use. Most notably, the REAL ID Act²⁸ of 2005 imposed a series of requirements on state issuance of driver's licenses, seeking to exploit the fault line between the easy-to-regulate privilege of holding a driver's license and the reality that this license has become a practical necessity for most people in the United States. If ever fully implemented (opposition is growing), all federal agencies will have to require state-issued credentials that comply with technical standards issued by the Department of Homeland Security. Although it will not be federally issued, the new federally defined ID card will become a practical necessity for anyone wishing to "travel on an airplane, open a bank account, collect Social Security payments, or take advantage of nearly any government service."²⁹

The REAL ID Act defines how states must issue drivers' licenses and what information licenses must contain. The card will have to include physical security features as to be defined by the Department of Homeland Security designed to prevent tampering, counterfeiting, or duplication. The act also requires that states verify the applicant's documentation and keep copies. States may not accept any foreign document other than an official passport. The state also must verify the applicant's name, primary address, date of birth, and Social Security number, plus check the number's correctness and uniqueness. The license must contain the holder's address, full legal name, date of birth, gender, signature, driver's license number, and a digital photo of the person's face.³⁰

Although promoted as a way to protect against terrorism, the act's most likely effect will be to make it more difficult for undocumented aliens to forge credentials for employment. The REAL ID Act specifies that states may only issue drivers' licenses to citizens, permanent residents and the holders of particular types of visas.³¹ Opposition to the REAL ID Act was slow to build, but has recently become something of a bandwagon,³² in part because states are discovering how expensive compliance may be. Several states have enacted legislation blocking REAL ID compliance and have called for the federal law to be amended. However, a number of states, including California, have already made plans to comply with REAL ID.

28. REAL ID Act of 2005, Pub. L. No. 109-113, div. B, 119 Stat. 231, 302. Title II of REAL ID, "Improved Security for Drivers' Licenses and Personal Identification Cards," codified in scattered sections of 8 and 49 U.S.C.A.

29. Declan McCullagh, *FAQ: How REAL ID will affect you*, C|Net News.com, http://news.com.com/FAQ+How+Real+ID+will+affect+you/2100-1028_3-5697111.html May 6, 2005.

30. REAL ID §§202(b), 202(c), 202(d).

31. REAL ID, §202(c)(2). The list of visa classes that qualify for a driver's license is noticeably shorter than the list of visa types that permit long-term residence and even employment in the United States. This is likely to cause serious problems.

32. See <http://www.privacycoalition.org/stoprealid/>; <http://www.realnightmare.org/news/105/>.

Whether or not REAL ID's opponents succeed in their attempt to change the statute, the underlying legal regime will remain one in which the constitutional protections relevant to ID cards are uncertain at best. The *Hiibel* case exemplifies the confused state of ID card law and practice in the United States: in theory, the United States runs a two-track system regulating the demand for identification, with car licensing as the exception to the background rule of romantic freedom of movement. But in practice the two tracks are merging into something unromantic. Although the legal system exhibits some queasiness at the margins, the de facto rules are that one must present ID to travel on most long-distance public transport, and that the issue is joined even for shorter-range common carriers. Automobile travel is heavily regulated and requires ID. Anyone stopped for the smallest offense—a broken taillight, a rolling stop—is immediately subject to a *Terry* stop, a valid investigation which routinely includes a demand for a driver's license.³³ After *Hiibel* a similar regime extends to pedestrians, and even those stationary in public: although it is unclear whether the police may demand physical ID, it is now clear that whenever the police can make out the elements of reasonable suspicion of even the most minor criminal activity, they may demand that a person identify themselves. In practice that is going to mean a driver's license far more often than anything else. Driving is only a privilege; walking is still a right, but one easily burdened in practice—dare to complain that police have no right to stop you, and a charge of resisting arrest is likely to figure in your future. Baseless charges can doubtless be beaten often, but it takes time, money, and effort—and leaves a data trail.

B. In Britain

Unsurprisingly, there are important similarities between U.S. and British attitudes to ID cards. But there are also differences. “The introduction of universal identity card systems has only been politically achievable in Britain in times of universal mobilization for war. In peacetime, partial systems gave the appearance of liberty—and therefore distance from continental models.”³⁴ Thus, the British accepted ID cards during WWI, but abandoned them shortly after it ended.³⁵ After WWII, the government initially sought to keep a national ID system in place, citing first the needs of the rationing system and its utility to the national health system. The legality of the holdover from WWII came to a head in 1951, in *Willcock v. Muckle*,³⁶ the *Hiibel* case of its time and place, although it involved

33. A small number of states allow the license to be presented at a police station after the fact; most require that the driver be carrying it.

34. Jon Agar, *Modern Horrors: British Identity and Identity Cards in Documenting Individual Identity* (Jane Caplan & John Torpey eds.) (Princeton, NJ: Princeton University Press, 2001), 101, 102.

35. *Ibid.*, 106.

36. [1951] 2 KB 844, [1951] 2 All ER 367, 49 LGR 584, 115 JP 431, [1951] WN 381.

no cowboy but instead one Clarence Henry Willcock playing the part of the quintessential British motorist.

Mr. Willcock refused to show his national registration identity card when demanded to do so by a constable. Offered instead a citation requiring him to produce his identity card at any police station, Mr. Willcock replied, "I will not produce it at any police station and I will not accept the form."³⁷ (Indeed, legend has it that Mr. Willcock told the constable that "I am a Liberal and I am against this sort of thing."³⁸) This stand on principle resulted in prosecution, conviction, a fine of ten shillings, and in due course an appeal to a specially constituted tribunal of seven judges of the King's Bench Division.

The court agreed with government on the primary issue, holding that emergency wartime legislation creating the ID system was still in force. But having announced that judgment, Lord Goddard went to say that courts nevertheless should not convict Britons for failing to produce their identity cards on demand: "To use Acts of Parliament, passed for particular purposes during war, in times when the war is past, except that technically a state of war exists, tends to turn law-abiding subjects into lawbreakers, which is a most undesirable state of affairs."³⁹ On this point, even Devlin, J, *dubitante* though he might have been on the continuance of the emergency powers acts, noted, "that I entirely agree . . . I think it would be very unfortunate if the public were to receive the impression that the continuance of the state of emergency had become a sort of statutory fiction which was used as a means of prolonging legislation initiated in different circumstances and for different purposes."⁴⁰

Faced with this judicial disapproval, the British government abandoned the national registration system shortly after the court's decision.⁴¹ Thanks to *Willcock v. Muckle*, the idea that the rights of Englishmen included the freedom to move about without having to carry identification, or to justify oneself to authority, was reaffirmed in England, and would survive for another half-century. (A popular version of it still survives in the idea of a right to ramble.)

The beginning of what now appears to be the end came in 2004, when the British government, citing the need to fight benefits fraud and combat terrorism, proposed legislation to bring in peacetime ID cards. At one point, British opinion seemed strongly in favor of the government's plan for a mandatory ID card, with one poll showing support as high as 80% in 2004,⁴² but public support has since fallen. The British government is not only pressing on with its

37. *Ibid.*

38. See <http://www.publications.parliament.uk/pa/cm200506/cmhansrd/v0051018/debtext/51018-21.htm> (18 Oct 2005: Column 759).

39. *Willcock v Muckle*, [1951] 2 KB 844.

40. *Ibid.*, (opinion of Devlin, J.).

41. Agar, *Modern Horrors*, 110 (n. 34).

42. <http://www.mori.com/polls/2004/detica-top.shtml>.

plans for a domestic ID card, but used its presidency of the EU to push for a European-wide biometric ID card with fingerprints as well as photographs,⁴³ although the current EU policy appears to be to standardize for interoperability rather than to issue a centralized card.⁴⁴

Under the new UK legislation, anyone applying for a British passport will need to have fingerprints and eye or facial scans added to a National Identity register. The first ID cards are scheduled to become available in 2009. The act remains controversial and has sparked an organized opposition movement. The creation of a massive new identity database sparked wide opposition, as did concerns over the weak legal and technical safeguards against misuse and unauthorized access. Opponents also warned of the unreliability of biometrics. Further, the shifting and vagueness of the government statements about the purpose(s) that the ID card scheme would serve led to justified fears of excessive data collection and function creep.

Academic commentary was and remains negative, notably in a series of reports from the LSE. Having seen its thoroughgoing 2005 critique⁴⁵ largely ignored, in 2007 the LSE described the government plan as “explicitly designed to maximize the surveillance capabilities of identity cards in ways that other countries find unacceptable.”⁴⁶ Nevertheless, the Labor party has pledged to make mandatory ID cards part of its platform in the next general election, meaning that if it achieves another majority it will introduce legislation to make biometric ID cards compulsory for all UK citizens over sixteen, but will not require that citizens carry the card at all times.⁴⁷

Similarly vociferous debates about mandatory ID cards are ongoing in other common-law based democracies, including Australia⁴⁸ and Canada.

43. John Lettice, “UK EU presidency aims for Europe-wide biometric ID card,” *The Register*, July 13, 2005, http://www.theregister.co.uk/2005/07/13/uk_eu_id_proposal/. See also <http://www.statewatch.org/news/2005/jul/11092-05.pdf> (text of UK proposal).

44. European Union, eGovernment in the European Union: Frequently Asked Questions, (Nov. 25, 2005), <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/05/446&format=HTML&aged=0&language=EN&guiLanguage=en>.

45. See THE IDENTITY PROJECT: AN ASSESSMENT OF THE UK IDENTITY CARDS BILL AND ITS IMPLICATIONS (June 27, 2005), <http://is2.lse.ac.uk/IDcard/identityreport.pdf>; The Identity Project: ID Cards - UK's high tech scheme is high risk (June 27, 2005), http://www.lse.ac.uk/collections/pressAndInformationOffice/newsAndEvents/archives/2005/IDCard_FinalReport.htm.

46. London School of Economics and Political Science Identity Project, Submission to the House of Commons Home Affairs Committee inquiry into “A surveillance society?” (24 April 2007), http://identityproject.lse.ac.uk/#Home_Affairs_Committee. [hereinafter LSE Testimony].

47. BBC, Q&A: Identity card plans (Dec. 19, 2006), http://news.bbc.co.uk/1/hi/uk_politics/3127696.stm.

48. [http://www.privacyinternational.org/article.shtml?cmd\[347\]=x-347-61882&als\[theme\]=National%20ID%20Cards&headline=On%20Campaigns%20of%20](http://www.privacyinternational.org/article.shtml?cmd[347]=x-347-61882&als[theme]=National%20ID%20Cards&headline=On%20Campaigns%20of%20)

C. Civil-Law Western European Democracies

Although the diversity of the European experience makes generalizations treacherous, there is no question that much of continental Europe has a long experience of ID cards and similar social registration and control documents or tokens. Perhaps because familiarity breeds content, ID cards have not widely been seen as a significant civil liberties issue, at least not until recently.

The history of identification documents in Europe would require a book.⁴⁹ Domestic identity cards as we now know them are a modern invention—nineteenth- and twentieth-century—if only because their use requires fairly general literacy not least among front-line officialdom. France required internal passports for travel from town to town from well before the French Revolution.⁵⁰ Before 1800, both France (*carte d'identité*) and Russia (internal passport) had the most elaborate internal document-based travel controls in Europe; but that statement, while true, is also slightly misleading. France and Russia were among the largest states in Europe; for smaller states a partly equivalent regulation of travel could be achieved by border control. For example, historically both Germany and Italy were divided into so many different states that the role of an internal document in France was to some extent played by *laissez-passer*, passports, and various documents or insignia of authorization. Other European countries evolved their own means of controlling movement; some also used identifying documents or badges to signal the rights and stations of members of the domestic population.⁵¹

Leaving aside their use as a means of controlling domestic travel in Russia and France, until World War I passports were primarily documents issued to nobles and other VIPs. Their most common use was to signal to local customs officials, and not least the local constabulary, that the holder was a person of importance, and that the sending government would appreciate the holder's being given kid-glove treatment by the receiving one. As travel became more common in the eighteenth and nineteenth centuries, ordinary people crossed many borders without showing identification documents for their persons—although the treatment of their goods was subject to customs duties and regulations.

Perhaps because of this long history, in contrast to the passions that ID card proposals generate in the common-law world, in a significant fraction of the civil-law western European democracies today ID cards are routine and boring.⁵²

Opposition%20to%20ID%20Card%20Schemes.

49. For a superb effort at telling many of the stories that would form the basis for any generalization, see Agar, *Documenting Individual Identity* (n. 34).

50. See Martin Lloyd, *The Passport: the History of Man's Most Traveled Document*, supra note 2; John Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (New York: Cambridge University Press, 2000), 21–56.

51. Agar, *Documenting Individual Identity* (n. 34).

52. In France, for example, about 90% of the population carries a government-issued ID card. http://news.bbc.co.uk/1/hi/uk_politics/3127696.stm. ID cards are also required

ID cards are compulsory in many European countries, although few require that they be carried at all times. ID cards are prevalent even when not legally required in most of the rest of the continental democracies. As a result, when I've discussed this issue with civil liberties-minded European colleagues, they almost inevitably struggle to understand why anyone would care about something they carry all the time and that in their view has never hurt anyone, and probably see it as yet another sign of American, or Anglo-Saxon, mania.

That ID cards were used in very harmful ways in Nazi Germany, in occupied areas, and in Vichy France, is not doubted. Nor is their use as control documents in Eastern European, notably East Germany and the Soviet Union. It may be that western Europeans, however, tend to see these pathological uses of identification systems as just one of many results of a deeper and broader political or social pathology. Where common-law critics of ID card regimes tend to see in the cards the creation of a regime that at the very least enables totalitarians if it does not actually tempt them into being, a generation that has carried IDs with no great discernable ill effects sees them as being little more threatening than other things that totalitarians, like others, might find useful—such as cars, currency, or telephones. Although I have not seen it stated in quite these terms, one gets the sense the western European answer to common-law paranoia about ID card systems would be that if a regime is using ID cards to oppress its people, the problems are much more fundamental than the existence of the cards—and their absence will not pose much of an obstacle to oppression anyway. Plus, they would note, even those civil-law countries that claim not to have ID cards do in fact have them in practice, whether they are called driver's licenses, cheque cards, social security numbers, or national health numbers. And the sky has not fallen.

If much of Europe has been sanguine about their domestic ID regimes, that calm has been perturbed by two recent developments: European cooperation and changes in computer technology.

In what may be reflexive nationalism or may be a reasonable concern about personal information leaking out to places where it is less subject to democratic control, a number of groups have begun to express concern about plans to harmonize European identity documents.⁵³ The EU has announced plans to standardize national identification regimes, leading many to speculate that the EU plans to have an ID card of its own, just as there is now a common European passport. In fact, as noted above, to date the European plan (not unlike the current European passport

or ubiquitous in Belgium, Germany, the Netherlands, and Portugal: http://news.bbc.co.uk/1/hi/uk_politics/2078604.stm#chart. For a survey of the latest round of electronic ID card deployments, involving millions of cards in ten European countries, see Smart Cards in Europe: eID Avalanche, <http://blog.negonation.com/en/smart-cards-in-europe-aid-avalanche/>.

53. See, e.g., French campaign against biometric ID card, <http://www.edri.org/edriagram/number3.11/biometrics>.

system) is to leave member states as the front line bodies and allow a degree of local variation, while harmonizing the collection and display of key information—which will include biometrics going beyond a photograph. In addition to standardizing their data collection and display, member states will be committed to a trans-European system of data sharing, at least at police request. There may not be a centralized European repository of information about Europeans, but there will, it seems, be a reasonably well-ordered distributed database organized to allow police and other officials to access data held beyond their borders.

This concern is far from universal. Belgium, Germany, and Austria are already deploying biometric smart cards.⁵⁴ But as the European project gathers steam it has spurred resistance, particularly in the countries that do not at present have mandatory cards. In France, for example, six large human rights organizations launched a campaign in 2005 against the proposed French mandatory biometric ID card, but the French government continued with its plans for a mandatory ID card with a contactless chip containing address and civil status, plus a photograph and fingerprints. Similar data would be held in nationally centralized databases.

II. NEW CHALLENGES

Whatever their merits in the past, there is good reason to believe that neither a focus on “the rights of Englishmen” nor on the “freedom to travel” will suffice to meet the challenges presented by twenty-first-century ID card regimes. Attention to a much broader set of issues is now required in order to preserve not just the freedom of movement, and privacy more generally, but perhaps also those civil liberties that could be threatened by pervasive surveillance and record-keeping, including freedom of association, transactional freedoms, and various forms of dissent and whistle-blowing. Among the issues which urgently need attention are: (1) the regulation—if any—of both public and private databases to which the card is linked or to which it serves as a gateway; (2) the terms on which ID cards will be available; and (3) the construction of the legal regime that will define the citizen’s rights and duties regarding the cards themselves once they are in circulation. The database has received the lion’s share of attention, but all three are worthy of attention.

A. ID Cards and Data Protection

ID cards stand poised to become the front end of a new regime of observation and perhaps control.⁵⁵ Even when they carry a chip, the cards currently on the

54. <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/05/446&format=HTML&aged=0&language=EN&guiLanguage=en>.

55. See A. Michael Fromkin, *The Death of Privacy?*, 52 STAN L. REV. 1461 (2000), available at www.law.miami.edu/~froomkin/articles/privacy-deathof.pdf.

drawing board only carry relatively small amount of data, but they serve as a connection to databases of unlimited size and detail. In both the United States and the United Kingdom, much remains unclear about how the governments will use the new cards, and especially the higher-quality databases that the card-creation exercise will produce. Ironically, the debate is more advanced in the United Kingdom, even though the need is even more acute in the United States because it has so little data protection legislation.

This is not the place to recapitulate the debate over the need for data protection legislation, nor of the merits and demerits of current implementations. But it is important to note that each ratchet up in an ID card regime—the introduction of a non-mandatory ID card scheme, improvements to authentication, the transition from an optional regime to a mandatory one, or the inclusion of multiple biometric identifiers—increases the need for attention to how the data collected at the time the card is created will be stored and accessed. Similarly, as ID cards become ubiquitous, a *de facto* necessity even when not required *de jure*, the card becomes the visible instantiation of a large, otherwise unseen, set of databases. If each use of the card also creates a data trail, the resulting profile becomes an ongoing temptation to both ordinary and predictive profiling.

In the United States we have already seen a disturbing tendency toward the use of “no-fly lists,” “terrorist watch lists,” and other secret government databases that restrict the freedom of persons who have not been charged with a crime. Some of the people caught in these lists are intended targets; others are accidental victims whose names resemble someone on the list. At present the legal system provides almost no redress for those who find their lives limited by being listed, however erroneously. And here we see the continuing attraction of the old-fashioned approach: at least until governments have a biometric database for the whole population and can do contactless identification, a centrally managed regime such as the no-fly list functions only when the rules require that IDs be tendered. The romantic version of free movement provided an acceptable formula for resistance to these almost standardless exercises of government power. As the romantic story becomes less relevant, some other autonomy-protecting principle must replace it to maintain a balance.

ID card proponents suggest that the balance is built into the system. They offer a counter-narrative: secure cards with good authentication will make accidental inclusion in watch lists less likely. With strong ID cards, the only people on these lists will be the ones that the government means to put there. Although not without its attractions, that account fails to give due consideration to the rights of the people whom the government means to target. If we are going to have ID cards, the whole relationship between a citizen and the government’s use of personal data needs, especially in countries without strong data protection rules, to be brought within the reach of judicial review and due process. To do that, however, requires that we define who holds what rights, and that in turn will require a very hard-nosed, quite unromantic, conversation.

B. Issuance and Nature of the Card

The terms on which ID cards will be issued remain controversial. Much turns on who will be entitled to have one, what it will cost, who will pay for it, how secure it will be, what information citizens will be required to produce before they will be issued one, how much of that information will be inscribed on the card (and whether it will include biometrics), what sort of security the card will have, and, finally, who will be able to read from or write to the card.

Who is entitled to an ID is far from obvious, and shapes the social contexts in which IDs can be required. Including every tourist is expensive and difficult, especially if they lack documentation comparable to that required of locals. Excluding anyone—children, tourists, residents without work permits, refugees—means that systems that ordinarily require an ID must have a built-in override. Routine overrides make systems less secure. For example, an ID system will be of even less value as a way of preventing suspected terrorists from boarding airplanes if it is routine to let foreign nationals board with passports instead. Yet attempting to include everyone becomes expensive and probably impractical.

Mandatory systems, whether required by law or practice, tend to be expensive. Many state Department of Motor Vehicles oppose the United States' REAL ID because they see the program as an unfunded federal mandate—the feds make the rules, the states pay the costs. Similarly, the UK debate has been marked by a series of increasingly large estimates as to what the new IDs would cost—a burden that will fall first on passport applicants and later on everyone wanting an ID. ID cards are touted, plausibly, as a way to reduce the Chicago species of vote fraud (“vote early, vote often”) although it is unclear how frequently double voting actually occurs. But if IDs are expensive and are required to exercise the franchise, they threaten to operate as a form of poll tax. Twenty-four U.S. states now require voters to show identification prior to voting. Seven of these states require a photo ID. Many of these statutes are being challenged in ongoing litigation.

More secure ID cards tend to be more expensive. Some security techniques also reduce transparency, although not all. The more secure the card, the more reasonable it will be for people to rely on it in a large variety of transactions, and the more damaging the results of identity theft if the card is counterfeited or cracked. Proper use of biometric data can enhance security by making identity theft more difficult, but it also raises more hackles and creates potential problems of its own. If the biometric data is stored centrally, that data becomes a target of its own. Using particular biometrics, especially DNA, may raise other sensitivities should it turn out that the DNA information has other uses as well.

C. Legal Regime Defining Citizens' Relationship to the Card

In the United States, almost no attention has yet been paid to the subtle but emotive issue of whether citizens will be required to carry the card, display it on demand, or even surrender it at times. Linking REAL ID to drivers licenses—a necessity for most of the adult population outside a few major cities—disguised

the importance of this question. Messrs. Wilcock and Hiibel both thought they were defending an important point of principle, the right to tell a police officer to stuff it. Both Wilcock and Hiibel found this point of principle important enough to go to court; Wilcock vindicated it in front of a special seven-judge division of the Kings Bench. Hiibel fought it to the Supreme Court—where he lost narrowly, but in terms that presage the end of the romantic ideal. Moving to a must-carry or must-identify regime surrenders this principle and works a psychological change in the nature of a citizen's interactions with law enforcement and perhaps other state functionaries. How great a change this works is very hard to measure.

On the one hand, a demand for “papers please” is allowed in many European democracies. The harm, if there is one, does not seem to have run deep into society—the arts flourish, elections are held regularly, and the trains are occasionally late. Although one could attempt to establish the extent to which a French citizen's rights as a criminal defendant or her remedies for police misconduct are of a piece with the authority relationship established by the police's ability to demand identification, this seems an ultimately unrewarding project. The real issues are likely to be elsewhere.

On the other hand, politics differ. A more productive line of investigation might seek to correlate attitudes to authority with ID card must-carry/must-display rules. It could be, for example, that ID cards present a greater problem in societies with a greater tendency towards compliance with state authority. In these more rule-following societies there may be a greater need to have a socially sanctioned method for refusing to comply with unreasonable police requests. Certainly the *Hiibel* rule—that police can only demand that a person identify him or herself when there is some reasonable suspicion warranting an investigation—will in practice prove to be a very weak limitation on law enforcement. There is certainly ample evidence from the way that United States law enforcement approaches traffic stops that police officers will do whatever they can to game any system of rules in order to maximize their discretion to stop and question people.⁵⁶

A related issue is the extent to which the government can condition the use of the card—who owns it, and what process is due before it is taken or its usage is burdened. This question implicates the entire data retention and access regime associated with the ID card, because the most likely “burden” will be to put some sort of annotation—setting the “no fly bit” for example—into some dossier associated with the card.

Even a less-than-ubiquitous card that strongly verifies identity will have great attraction for many private-sector applications, ranging from fraud protection to background checks to age and status verification. Whether private uses should

56. For a frank exposition of the police officer's view that almost anyone driving a car can be stopped, see Dale C. Carson & Wes Denham, *Arrest-Proof Yourself* (Chicago, IL: Chicago Review Press, 2007): “[T]here are thousands of mobile Easter eggs rolling down the roads.” *Id.* at 235.

be regulated, and if so how, falls under general data protection law in Europe. In the United States, however, the issue of private use, in databases and elsewhere, has been all but absent in debates over REAL ID and other proposals. As one great criticism of the United States' social security card is that it was sold as for public use only but gradually became a de facto national identification number, one might have expected more on this subject. I have argued that in the United States, private uses of a public card could be conditioned on adherence to fair information practices,⁵⁷ but this counter-intuitive idea that an ID card could in any way be privacy-enhancing has not met with many takers.

III. CONCLUSION

As of 2000, only four common-law countries had recognized, centralized peacetime national ID card regimes. The picture is certain to be quite different by 2010. Driven in part by fears of terrorism, government initiatives in the United Kingdom, United States (subject to possible repeal of REAL ID), Australia, and other countries are moving forward with plans to introduce various forms of mandatory or nearly mandatory domestic civilian national identity documents. The move from patchwork systems to standardized or even centralized ID card regimes has not been without controversy. That this debate has too often relied on old bogeymen is unsurprising because those images—Germans, guns, dogs, trains—resonate with the public. But maximizing the changes of a set of rules emerging that maximize the benefits and protect against some the real—and often new—dangers requires that we focus the debate on the issues that really matter: the legal rules that will define how the card is used, and the legal rules that will regulate the databases to which the card is linked. Where the old narrative was the plucky citizen-hero standing up for his rights, the new narrative may be the puzzled citizen trapped in the coils of bureaucracy. Great transparency and the careful definition and assignment of a sufficiently broad bundle of rights need to be designed into an ID card regime from the start. This may be especially important in countries such as the United States that do not have background data protection rules on which to fall back on, but if ID cards become the key—perhaps literally—to full participation in economic and political life, not to mention part of an internal travel control system that French Kings and Russian Tsars would have envied, a healthy dose of due process and judicial review will be called for as well. The U.S. experience with the “no fly list” does not bode well in this regard.

ID cards do in fact pose real threats to privacy and freedom, threats that need to be defused before it could be safe to deploy them, especially in countries without

57. A. Michael Fromkin, *Creating a Viral Federal Privacy Standard*, 48 B.C.L. Rev. 55 (2007), available at <http://law.tm/docs/virtial-privacy-standard.pdf>.

strong data protection rules, but these threats are both larger and more complex than those contemplated by the romantic visions. It is always suspect to suggest that the grass may be greener elsewhere, but one cannot help but wonder whether the European twentieth-century desensitization to ID cards—the absence of romanticism coupled with the recognition that data protection rules are necessary—might not put much of Europe in a better position to have a rational debate about the ID card issues that matter most.

The romantic accounts have value, but there is good reason to question whether they form an adequate lens through which to view the challenges posed by twenty-first-century ID card regimes. Without the shield provided by the romantic vision, those of us in the common-law world—and especially those of us outside the umbrella of European-style data protection regimes—urgently need to evolve and share not just new arguments, but new images to replace, or at least supplement, that black-and-white image of a guard with a German Shepherd on a train.

