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COMMENTS

CRIMINALIZING EMPLOYMENT OF ILLEGAL ALIENS: WORK AUTHORIZATION CARDS MAY INVADE PRIVACY

In response to an increasing concern for the impact of illegal aliens on the United States economy,¹ several congressmen have proposed legislation which would establish criminal penalties for any employer who knowingly hired illegal aliens.² The proposals to impose criminal liability on employers who knowingly employ illegal aliens are motivated by the belief that the primary incentive for illegal aliens to enter the United States is the availability of jobs which pay significantly higher wages

¹ [T]here are growing indications, in public opinion polls and in angry letters from constituents, that many Americans, convinced that immigrants are taking their jobs, draining the treasury and dividing cities into isolated and increasingly hostile ethnic communities, are demanding a solution. One recent poll by the Roper Organization showed that nine of ten of those surveyed supported an "all-out effort" to halt illegal immigration

N.Y. Times, Dec. 28, 1980, § 1, at 1, col. 1. See also *What Illegal Aliens Cost the Economy*, BUS. WEEK, June 13, 1977, at 87. The article suggested that:

Because of illegal workers, the unemployment figures are significantly higher than they would otherwise be. It is impossible for the U.S. to provide jobs for the whole world's unemployed, but because it is the richest and freest of the large economies, the country is drawing them in increasing numbers.

Id.

² The first proposals to establish criminal penalties for the knowing employment of illegal aliens were made by Congressman Rodino in 1972 and 1975. Neither bill was passed. In 1975 Senator Kennedy proposed a bill which limited sanctions for hiring to civil penalties. Senator Eastland backed a similar bill in 1976, and in 1977 the Carter Administration advocated legislation which would create an initial civil penalty followed by an injunctive remedy for "pattern or practice" of employing illegal aliens. The Kennedy, Eastland, and Carter proposals all failed. Select Commission on Immigration and Refugee Policy, Enforcement Decision Memo No. 1, app. C (Dec. 1980) [hereinafter cited as Enforcement Decision Memo No. 1]. In 1979 the following bill was proposed:

Any person who employs an alien and who knows that the alien is not permitted to be employed in the United States shall be fined not less than \$1,000 and not more than \$25,000, or imprisoned for not more than five years, or both, for each alien so employed. H.R. 2213, § 5, 96th Cong., 1st Sess. (1979). A similar proposal was made in the Senate in 1980. Huddleston Amendment to S. 1763, 96th Cong., 2d Sess. (1980), reported in S. REP. NO. 96-859, 96th Cong., 2d Sess. (1980).

than the jobs available in their home countries.³ The proposed legislation attempts to eliminate this incentive by making these jobs unavailable. Currently, an employer faces no civil or criminal penalty for hiring illegal aliens.⁴

In order to enforce the proposed legislation fairly,⁵ and to give effect to the knowledge requirement which would be included in the law,⁶ commentators have suggested that the government should require all legally employable persons (citizens and legally resident aliens) to carry work authorization cards.⁷ The Select Commission on Immigration and Refugee Policy endorsed the establishment of a more secure method of identification for citizens and legal aliens on February 26, 1981.⁸ Work

³ The arguments for the adoption of an employee eligibility/employer responsibility law, including a secure means of identifying eligible employees, are based on the conclusion that as long as no credible deterrent exists, ambitious men and women will spend a lifetime of savings and take great personal risks to find work in the United States. Without the deterrent of an employee eligibility/employer responsibility system, enforcement will rest on ineffective border vigilance and difficult interior apprehensions, that are cost-inefficient, sometimes inhumane and do not discourage illegal entry.

Enforcement Decision Memo No. 1, *supra* note 2, at 2.

In 1978, the Select Commission on Immigration and Refugee Policy was created by Pub. L. 95-412, § 4, 92 Stat. 907 (1978). Its purpose is "to study and evaluate, . . . existing laws, policies, and procedures governing the admission of immigrants and refugees to the United States and to make such administrative and legislative recommendations to the President and to the Congress as are appropriate." *Id.* § 4(c). The Enforcement Decision Memo is a staff recommendation.

⁴ 8 U.S.C. § 1324 (Supp. II 1978). This provision of the Immigration and Nationality Act of 1952 exempts employers from prosecution under the section of the act which makes harboring illegal aliens a crime. There is one law which prohibits employers from hiring undocumented aliens, the Farm Labor Contractor Registration Act of 1963, 7 U.S.C. §§ 2041-53 (1976):

This law makes it illegal for contractors or farmers knowingly to employ undocumented aliens on their work crews, and requires those who do hire migrant workers to be certified by the federal government. Sanctions against employers who violate the Act include suspension of, and refusal to renew certification; the assessment of civil penalties of up to \$1,000 for each violation; and referral for criminal action.

Enforcement Decision memo No. 1, *supra* note 2, at 1. This Act has not been an effective deterrent to illegal immigration.

⁵ See text accompanying notes 42-48 *infra*. The proposed legislation would simply impose criminal sanctions on employers who knowingly hired illegal aliens. The current bills give an employer no way to check the immigration status of job applicants. Such a law, without more, would encourage discrimination by employers. An employer could justify his refusal to hire any Hispanic or Oriental person with the argument that he believed the job applicant to be an illegal immigrant.

⁶ See note 2 *supra*. If the proposed legislation was enacted as it stands now, and employers were prohibited from making the defense that they had refused to hire certain job applicants because they thought the applicants might be illegal immigrants, then employers would be compelled to hire all job applicants regardless of whether they looked or talked as though they might be illegal aliens. This would render the provision of the proposed legislation creating criminal liability for the knowing employment of illegal aliens meaningless.

⁷ See text accompanying notes 49-50 *infra*.

⁸ The staff of the Select Commission on Immigration and Refugee Policy made a recommendation in early December 1980 for

implementation of an employee eligibility/employer responsibility system based on a counterfeit-resistant card . . . , to be implemented in three stages: . . .

authorization cards would probably bear a numerical identifier or the holder's social security number, in addition to name, date of birth, sex, and photograph.⁹

Congress has never before proposed that American citizens be forced to carry identification cards in order to exercise a fundamental right such as work. The concept of a work authorization card is diametrically opposed to the concepts of informational privacy and freedom from searches and seizures. Proponents of the work authorization card argue that the need to stem the flood of illegal aliens into this country is sufficiently important that a work authorization card used in a way similar to a social security number or a driver's license should not be found unconstitutional. Examination of the issues, however, shows that a work authorization card could impose burdens on citizens' rights to privacy significantly greater than those now imposed by the social security number and driver's license. Given this possibility, the need to discourage illegal aliens from entering the United States is perhaps not sufficiently important to warrant the establishment of a work authorization card.

Section I of this comment evaluates the impact of illegal aliens on the United States economy and assesses the need to reduce the flow of immigrants into the United States. Subsequent sections of the comment weigh this need against the detrimental effects a work authorization card can be expected to have on fundamental rights. An outline of the current proposals for the work authorization card is presented in Section II. Section III analyzes the effect of the proposed work authorization card on the permissible scope of searches and seizures in the workplace, and Section IV examines the potential effects of the work authorization card on informational rights of privacy and the government's ability to

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- B. A second-phase based on a counterfeit-resistant work authorization card for certain age groups; and
 - C. Eventual implementation of the work authorization card system for the entire labor force.

Enforcement Decision Memo No. 1, *supra* note 2, at ii. The final report of the Commission was issued February 26, 1981. The final report of the Commission made several key recommendations including imposition of penalties on employers who make a practice of hiring illegal aliens and the establishment of a more secure method of identification for citizens and legal aliens. Select Commission on Immigration and Refugee Policy, U.S. Immigration Policy and National Interest, (Final Report, February 26, 1981), discussed in *Now Up for Debate, a Chain of Proposals on Illegal Aliens*, N.Y. Times, March 1, 1981, § 4, at E3, col. 1. Although the Commission did not endorse a national identification card system, nearly the entire Commission agreed on the need for some secure identification system. See Editorial, *Immigration and the Missing Nail*, N.Y. Times, March 1, 1981, § 4, at E18, col. 1. Congress will act on these proposals in the future.

⁹ Enforcement Decision Memo No. 1, p. 8.

collect and assemble information in data banks. Section V concludes the comment.

I. IMPACT OF ILLEGAL ALIENS ON THE UNITED STATES ECONOMY

Although the proposals to establish criminal penalties for the knowing employment of illegal aliens are based on the belief that the presence of illegal aliens in this country creates a burden on the nation's economy,¹⁰ that conclusion is not clearly borne out by the statistics developed by researchers in the area.¹¹ In order to gauge the need for the proposed legislation, the impact of illegal aliens on the U.S. economy must be realistically assessed.

According to classical economics, immigration is generally beneficial to an economy in that "it increases the supply of the available labor and therefore makes labor cheaper, product prices lower, and employment greater. In this simple view, immigration promotes profits, economic growth, and general prosperity, with possible excessive demands for social capital formation (schools, hospitals, housing)"¹² This benign view of immigration is inapplicable to an economy with a high unemployment rate. Some theorists believe that in an economy with significant unemployment, immigrants only substitute for native workers in jobs which the native workers could perform with equal efficiency.¹³ Thus, in an economy with high unemployment,

wages and prices are not lowered by immigration. In this situation, immigrants impose only costs on the economy. This economic burden is borne by the displaced native workers and by society generally to the extent that displaced native workers and their families are supported by the public social welfare programs. Moreover, immigrants themselves use social services, but that is also true under full employment.¹⁴

The displacement view of immigration may not be accurate.

¹⁰ See notes 1 & 3 *supra*.

¹¹ Generally speaking, the statement is correct that severe economic competition or severe and widespread displacement has not been proven. But neither has the opposite been proven. . . . The staff of the [Select Commission on Immigration and Refugee Policy] has almost concluded that the economics debate is fruitless because the evidence on both sides of that debate is incomplete, and none of it is terribly persuasive in the aggregate.

AMERICAN ENTERPRISE INSTITUTE, SHOULD U.S. IMMIGRATION POLICY BE CHANGED? 6 (June 2, 1980) (statement of Exec. Dir. Lawrence H. Fuchs, Select Comm'n on Immigration & Refugee Pol'y).

¹² Fogel, *Illegal Aliens: Economic Aspects and Public Policy Alternatives*, 15 SAN DIEGO L. REV. 63, 67 (1977). Fogel's analysis is correct in the short run. Over the long run, however, extended periods of immigration could create high rates of growth in the population and GNP and put excessive strain on the nation's resources and environment. See also R. LECOMBER, *ECONOMIC GROWTH VERSUS THE ENVIRONMENT* (1975).

¹³ Fogel, *supra* note 12, at 67.

¹⁴ *Id.* at 68.

M.I.T. economist Michael J. Piore has advanced the thesis that illegal aliens may be taking jobs which are unwanted by American workers.¹⁵ These jobs have been described as secondary because of low-skill requirements, low wages, and resulting low status.¹⁶

Piore contends that adult native workers consistently reject these secondary jobs because of their low status and the lack of career advancement opportunity accompanying them. He posits that these same jobs are sought by migrant workers from poor rural communities.¹⁷ To the extent that these secondary jobs are essential to the growth of an industrial economy, a large flow of immigrants into the United States may be necessary to support continued economic development. Thus, legislation which proposes to criminalize the employment of illegal aliens is not only unnecessary, but to the extent that it causes vital secondary jobs to go unfilled, detrimental to the economy. Underlying Piore's theory is the premise that even in times of high unemployment, illegal immigrants do not displace American workers, but instead take jobs that those legally entitled to work would not want anyway.

This analysis, however, fails to consider the indirect, detrimental effect of an illegal alien work force on the bargaining strength of unions and on the minimum wage and hour provisions enacted by Congress. The continual supply of illegal aliens, ready to work at any job which pays better than a job in their home countries, enables many employers to ignore labor statutes.¹⁸ Any illegal immigrant unwilling to accept the wages and working conditions offered by his employer will quit rather than report a wage law violation to authorities. Since he can always be replaced by another, an illegal alien has no bargaining power to negotiate better terms of employment. Furthermore, their illegal status renders illegal aliens powerless to seek enforcement of standards established by national and state legislation for worker representation, minimum wages, hours of work, social security, and safety.¹⁹ "They fear that any contract with an enforcement agency is likely to result in deportation; either the agency or their employer is likely to report them to the Immi-

¹⁵ Piore, *Impact of Immigration on the Labor Force*, MONTHLY LAB. REV. May 1975, at 41-43, reprinted in AMERICAN ENTERPRISE INSTITUTE, *ILLEGAL ALIENS: PROBLEMS AND POLICIES* 13 (1978). [hereinafter cited as AEI REPORT].

¹⁶ AEI REPORT, *supra* note 15, at 7.

¹⁷ Adult native workers in any industrialized society tend regularly to reject secondary jobs because of low social status and the instability and lack of career opportunity which they carry. These jobs, however, tend to carry much higher relative status in the social structures of rural agricultural communities. That and the fact that rural workers who migrate to urban areas generally expect to stay only temporarily and are therefore less interested in career opportunity and work stability make migrants an attractive source of labor for the secondary sector and they are recruited for that purpose.

Piore, *supra* note 15, at 41-43, reprinted in AEI REPORT, *supra* note 15, at 13.

¹⁸ Fogel, *supra* note 12, at 66.

¹⁹ *Id.*

gration and Naturalization Service."²⁰

Lack of compliance with labor laws is rarely limited to one employer in any given industry. Although "[o]ther firms in secondary markets may attempt to comply with labor laws, . . . competition from firms which willingly violate the law makes compliance difficult."²¹ Once one employer is able to cut costs significantly by violating the labor laws, other employers in the same industry may be forced to violate the labor laws in order to compete. If any of the employers in the affected industry hire native Americans, those workers will also suffer a decline in the quality of their working conditions.²²

Another argument is that "illegal aliens burden social programs such as those offering welfare, food stamps, and medical assistance and that taxpayers bear the expense."²³ Some studies, however, have found that illegal aliens contribute to the welfare system through certain taxes.

Insofar as illegals are bona fide employees of bona fide employers, as a substantial percentage of the respondents were, they are making substantial tax contributions in the form of withholding taxes, in addition to whatever other tax contributions are automatic (e.g., sales taxes) which illegals pay in their role as consumer.²⁴

Illegal aliens may not participate directly in public assistance programs, because they tend to be economically motivated and because participation would increase the risk of detection by the authorities who would

²⁰ *Id.* Similarly, "[f]ear of retaliation by their employer culminating in a rather short-lived job also causes aliens to avoid unionization." *Id.*

²¹ *Id.*

²² Employees in those industries which produce substitutes for the goods produced by noncomplying employers will also be adversely affected by an employer who cuts costs by failing to comply with labor laws because a decrease in the price of the illegally produced commodity will decrease the quantity demanded of a good for which it is a substitute. Although the employees in substitute industries may not be forced to work under conditions which violate the labor laws, they may instead be forced out of work because of competition from lower priced goods made by cheaper, illegal alien labor.

²³ AEI REPORT, *supra* note 15, at 14.

²⁴ D. NORTH & M. HOUSTON, THE CHARACTERISTICS AND ROLE OF ILLEGAL ALIENS IN THE U.S. LABOR MARKET 142 (1976), *reprinted in* AEI REPORT, *supra* note 15, at 16. The North and Houston study also points out that the percent of illegals who contribute to social services is much higher than is the percent of aliens who withdraw funds from the programs.

deport them.²⁵ Nonetheless, to the extent that illegal aliens displace natives from their jobs and cause displaced citizens to seek public assistance, they burden social programs indirectly.²⁶ Opinions vary as to the net impact of illegal aliens on social assistance programs in the United States. The information currently available is insufficient to determine whether they are a net cost or a net benefit to the system.²⁷

The money which illegal aliens send to their dependents in home countries is also a concern of economists.²⁸ Although the number of dollars sent out of the United States is indeterminate, the annual figure seems to be in the billions.²⁹ This flow of funds has repercussions on American international economic policy because it aggravates the al-

TAX PAYMENTS AND USE OF PUBLIC PROGRAMS BY ILLEGAL ALIENS

Program Activity	Percentage of Respondent Participation
Input	
Social security taxes withheld	77.3
Federal income taxes withheld	73.2
Hospitalization payments withheld	44.0
Filed U.S. income tax returns	31.5
Output	
Used hospitals or clinics	27.4
Collected one or more weeks of unemployment insurance	3.9
Have children in U.S. schools	3.7
Participated in U.S.-funded job-training programs	1.4
Secured food stamps	1.3
Secured welfare payments	0.5

Id. at 142, reprinted in AEI REPORT, *supra* note 15, at 16 (Table 6).

²⁵ AEI REPORT, *supra* note 15, at 17. See also D. NORTH & M. HOUSTON, *supra* note 24, at S-1 ff., reprinted in AEI REPORT, *supra* note 15, at 7. On the basis of a sample of 793 apprehended illegal aliens who were at least sixteen years old and who had worked for wages in the United States for two weeks or more, North and Houston characterized the typical illegal alien as (1) a young adult (78.1% were thirty-four years old or less); (2) male (90.8% of the sample); (3) economically motivated (74.2% had come to the United States to get a job); (4) supporting at least one relative or dependent in the country of origin (79.7%); (5) relatively unskilled and uneducated with approximately half as much education as his counterpart in the United States labor force (6.7 years as against 12.4 years of schooling); (6) less likely to be married than his United States counterpart. AEI REPORT, *supra* note 15, at 7. To the extent that these characteristics are typical of the illegal alien population in the United States, that population is probably unlikely to require public aid.

²⁶ COMPTROLLER GENERAL OF THE UNITED STATES, IMPACT OF ILLEGAL ALIENS ON PUBLIC ASSISTANCE PROGRAMS: TOO LITTLE IS KNOWN 3 (Report to the Senate Comm. on the Budget, Dec. 1, 1977), reprinted in AEI REPORT, *supra* note 15, at 15.

²⁷ *Id.* at 14, reprinted in AEI REPORT, *supra* note 15, at 16.

²⁸ Salinas & Torres, *The Undocumented Mexican Alien: A Legal, Social and Economic Analysis*, 13 HOUS. L. REV. 863, 876 (1976).

²⁹ AEI REPORT, *supra* note 15, at 18.

ready unfavorable balance of payments of the United States.³⁰ On the other hand, funds sent abroad this way are a form of disguised foreign aid, a sudden halt to which could have undesirable repercussions, particularly for our diplomatic relationship with Mexico.³¹

The impact of illegal aliens on the American economy is ambiguous. Clearly, they work for wages and under conditions inferior to those demanded by native workers. Yet studies have failed to demonstrate whether illegal aliens are displacing legitimate American workers from jobs, or are working in jobs which few Americans would want to take anyway. Similarly, the experts have failed to agree on the extent to which illegal aliens burden the public assistance programs of the United States. Moreover, the money sent home by illegal aliens, although damaging to our balance of payments, may be beneficial to diplomatic relations as a form of foreign aid.

II. CURRENT LEGISLATIVE PROPOSALS

Despite this uncertainty, members of Congress have proposed legislation such as H.R. 2213 and the Huddleston Amendment to S. 1763.³² The purpose of the proposals is to eliminate the employment incentive which draws aliens to this country.³³ Currently, an employer has no risk of liability for hiring illegal aliens.³⁴ The proposed legislation would establish criminal sanctions for an employer who knowingly hires illegal aliens. In theory, these sanctions will discourage an employer from hiring any illegal alien. Although such legislation has never been enacted on a federal level, California and Kansas have statutes which establish

³⁰ *Id.*

³¹ *Id.*

State [Department] officials warn that for some of the most important countries of origin, such as Mexico, the shock of simultaneously losing the money that most aliens send home and of also having to re-integrate them into their slow-growing economies would be sure to worsen diplomatic relations with the U.S. and might heighten their social and political instability. Furthermore, many private organizations, most notably the Catholic Church and interested ethnic groups such as the Chicano "La Raza" argue vigorously that such a massive upheaval would be repugnant on humanitarian grounds.

What Illegal Aliens Cost the Economy, *supra* note 1, at 87.

³² H.R. 2213, 96th Cong., 1st Sess. (1979); Huddleston Amendment to S. 1763, 96th Cong., 2d Sess. (1980). *See* note 2 *supra*.

³³ *See* note 3 *supra*. *See also* Comment, *Illegal Aliens and Enforcement*, 8 U.C. DAVIS L. REV. 127 (1975).

INS and local police enforcement of immigration laws with its emphasis upon detecting and apprehending individual illegal aliens, has not and will not have more than minimal effect on reducing the volume of illegal entrants. The most effective method of solving the problem is to take profit out of illegal immigration by minimizing the employment opportunities available to illegal aliens in the United States.

Id. at 152.

³⁴ 8 U.S.C. § 1324 (Supp. II 1978). *See* note 4 *supra*.

criminal penalties for the knowing employment of illegal aliens.³⁵

In 1976, a case challenging the California statute was considered by the Supreme Court.³⁶ The Court's treatment of that case indicates a predisposition toward statutes which attempt to discourage the influx of illegal aliens by imposing criminal penalties on their employers. In *De-Canas v. Bica*, migrant farm workers who were legal residents of the United States brought an action against farm labor contractors pursuant to the provision of the California code which criminalizes the knowing employment of aliens not lawfully admitted to residence in the United States.³⁷ The defendants argued that the statute was unconstitutional. The Supreme Court of the United States upheld the statute. After making a determination that the statute was not pre-empted,³⁸ the Court approved the statute as an exercise of the state's police power. The Court referred to the broad authority possessed by the state to "regulate the employment relationship to protect workers within the State," and cited child labor laws, minimum wage laws, occupational health and safety laws, and workmen's compensation laws as examples of that police power.³⁹ Because the employment of illegal aliens might deprive citizens and lawfully admitted aliens of jobs, and acceptance by illegal aliens of jobs with substandard wages and working conditions can depress wages and working conditions for the whole work force, the Court held that the California law prohibiting the knowing employment of illegal aliens was well within the state's police power to regulate the employment relationship.⁴⁰ Thus, the Supreme Court gave explicit approval to a statute which criminalized the knowing employment of illegal aliens. The Court perceived the statute as a legitimate exercise of the state's police power,⁴¹ and would probably be inclined to uphold a

³⁵ CAL. LAB. CODE § 2805 (West Supp. 1978), states:

(a) No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.

(b) A person found guilty of a violation of subdivision (a) is punishable by a fine of not less than two hundred dollars (\$200) nor more than five hundred dollars (\$500) for each offense.

KAN. STAT. ANN. § 21-4409(b) (1978), states that: "Knowingly employing an alien illegally within the territory of the United States shall be a Class C misdemeanor."

³⁶ *DeCanas v. Bica*, 424 U.S. 351 (1976).

³⁷ *Id.* at 353.

³⁸ [T]he Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus pre-empted by this constitutional power, whether latent or exercised. . . . [E]ven if such local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration

Id. at 355-56.

³⁹ *Id.* at 356.

⁴⁰ *Id.* at 357.

⁴¹ The Court neglected, however, to consider the impact of the California law on other

federal statute on the same grounds.

Yet *DeCanas v. Bica* fails to consider the potential for discrimination which might arise under the proposed legislation if it is enacted in its present form.⁴² The current proposals would impose liability on the employer who *knowingly* hires illegal immigrants, but would give employers no standards by which to distinguish those job applicants who are illegal immigrants from those legally entitled to work. A cautious employer will refuse to hire any job applicant who might be an illegal alien. An applicant with a Latino or Oriental appearance, or who is unable to speak English well, will be vulnerable to rejection by an employer who suspects that the applicant might be an illegal immigrant even though the applicant might be legally entitled to work.⁴³ Thus, the law could become a tool for employers to legitimize discrimination against Chicanos, other Latinos, and Asian-Americans who are United States citizens or legal immigrants. In this way, the effect of the proposals in their current form would be to aggravate the unemployment problems of groups already suffering severe unemployment.⁴⁴

Furthermore, an employer presumably would not be liable for failure to inquire into the legal status of someone who did not appear to be Hispanic or Oriental, or who had learned to speak English well. In those cases, the employer could argue that he did not knowingly hire an undocumented alien because he could not reasonably have determined from appearances that the person was an illegal immigrant.⁴⁵ Thus the application of the legislation in its present form would be flexible. An employer would have reason to inquire into the status of some applicants and not others.⁴⁶ Flexibility is another aspect of the proposed legislation which is susceptible to discriminatory abuses. To the extent that the knowledge requirement could be met by proof that an employer made a bona fide inquiry into the legal status of an employee, one commentator has suggested that an employer could probably "make a prima facie case of a bona fide inquiry by obtaining a signed writing from the employee attesting to the employee's legal right to seek em-

states. Regulation of the employment of undocumented aliens requires a national, uniform approach. "If California effectively enforces its law, how is Texas going to handle the influx of undocumented workers? If Texas also enacts a law as a result of the unique effect of undocumented workers on its economy, what state will be the next to suffer economically?" Salinas & Torres, *supra* note 28, at 900. See also *Edwards v. California*, 314 U.S. 160 (1941).

⁴² See note 2 *supra*.

⁴³ Salinas & Torres, *supra* note 28, at 910. Currently, the only deterrent to this kind of employer discrimination against Americans of Hispanic descent would be Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1976), which forbids discrimination on the basis of race, religion, sex, or national origin. See Comment, *supra* note 33, at 158.

⁴⁴ Salinas & Torres, *supra* note 28, at 910.

⁴⁵ *Id.* at 912.

⁴⁶ *Id.*

ployment."⁴⁷ Under these circumstances, the employer could continue hiring illegal aliens simply by collecting signed attestations from all his employees.⁴⁸

The logical solution to the problem of discrimination and the incentive for unscrupulous employers to collect meaningless forms signed by illegal aliens attesting to their right to work is to require employers to check identification papers of applicants before hiring them to work. Yet critics argue that

An employer should not be held responsible for demanding the presentation of birth certificate, passport, alien registration receipt card, or other documentation, and then attempt to determine from these documents if the applicant for employment is legitimately in the United States. This task should be reserved for the agencies responsible for regulating immigration and the work force.⁴⁹

Not only is expecting an employer to understand the various papers which might establish a person's right to work in the United States unreasonable, but the ease with which illegal aliens can obtain forged documents would seriously undermine an enforcement program which required an employer to check an applicant's papers. For these reasons, commentators have proposed that legal aliens and U.S. citizens carry a standard, non-duplicatable work authorization card.

A work authorization card has been justified as "[a]n effective identification system . . . [which] should make it substantially easier to locate illegal aliens without fear of harassing citizens or lawfully admitted aliens. Presentation of the card would attest to employment status for purposes of the mandatory employment application procedure."⁵⁰ In order to minimize the possibility of counterfeit, the work authorization card would be made of a plastic or other synthetic such as that used in most state driver's licenses, and would bear a photograph of the holder. The card would also display vital information about the holder⁵¹ and a numerical identifier unique to the individual holder.⁵²

⁴⁷ Comment, *supra* note 33, at 156.

⁴⁸ *Id.*

⁴⁹ Salinas & Torres, *supra* note 28, at 913.

⁵⁰ Comment, *supra* note 33.

⁵¹ The counterfeit resistant card would carry the minimum information necessary to identify the person: name, date of birth, sex, a photograph, and an identifying number unique to the individual. Additional information (place of birth, mother's first name) would also be maintained in a computer data base to help screen out imposters or persons using a loaned card to establish eligibility.

Enforcement Decision Memo No. 1, *supra* note 2, at 8.

⁵² The Social Security Administration (SSA) has resisted conversion of the social security number into a "standard universal identifier," with a more general purpose. The SSA officials point out that the social security number is currently not a very good identifier since the SSA has been relatively lax in requiring identification prior to issuance of a number and because of the SSA's willingness to change an individual's file name or number. A. WESTIN &

Several commentators have made proposals for work authorization card systems. The most specific has been formulated by the staff of the Commission on Immigration and Refugee Policy. The staff has recommended that "[t]he initial employment eligibility system should be based on a statement of eligibility filled out by all newly hired employees and filed by employers for screening with the [employee eligibility/employer responsibility] federal entity."⁵³ In the second phase of the program, the staff recommends that the work authorization card system should be established and applied in the first year to all job changers

M. BAKER, *DATA BANKS IN A FREE SOCIETY: COMPUTERS, RECORD-KEEPING AND PRIVACY*, 43 (1972). As a result, there are many individuals with two numbers, and possibly, some numbers belonging to two individuals. SECRETARY'S ADVISORY COMMITTEE ON AUTOMATED PERSONAL DATA SYSTEMS, U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, RECORDS, COMPUTERS AND THE RIGHTS OF CITIZENS 112 (1973) [hereinafter cited as HEW REPORT]. Furthermore,

[t]he Administration also raises the issue of damage to its public image. The feeling of many is that whether or not it actually administers a national identification program, the concept of a universal identifier is so distasteful to many segments of the population that public confidence in Social Security programs would be undermined.

A. WESTIN & M. BAKER, *supra*, at 44. The staff for the Commission on Immigration and Refugee Policy has summarized the reasons for and against using the social security number as the numerical identifier for work authorization cards.

Reasons for:

- The public has considerable experience with the social security card and/or number and is more likely to be receptive to the extension of its use than to a completely new employment eligibility card and system;
- A social security-type card is less likely to become an internal identifier than cards with more information; . . .
- This system can be uniformly applied to all persons seeking employment and to all employers;
- Using the social security number will provide, as a by-product, the basis for correcting inaccurate Social Security Administration records; and
- These cards, without photographs, would not have to be reissued over time and need only be replaced after lengthy use, loss or name change.

Reasons against: . . .

- Even if the data base existed apart from the Social Security Administration (SSA), use of the social security number would allow immediate tracing of personal information between the two data bases; . . .
- Indirect costs to the SSA could be considerable if it had to merge its other processing and its data base with this new responsibility; some new expense would be involved in simply verifying social security numbers;
- A once-in-a-lifetime enrollment process produces a less satisfactory means of identifying the bearer of the card. This could make an employer less confident of an applicant's eligibility and result in some intentional and unintentional discrimination. It could make identification more time-consuming for field investigators; and . . .
- The social security card is not as fraud resistant as [an eligibility card with the holder's name, date of birth, sex, photograph and a different, unique numerical identifier].

Enforcement Decision Memo No. 1, *supra* note 2, at 11-12. The staff of the Commission on Immigration and Refugee Policy recommended that the work authorization card system be established apart from the Social Security System. Yet, whether the social security number or some other numerical standard universal identifier is displayed on the work authorization card, the implication for the informational rights of privacy for Americans will be the same. *See* Section IV *infra*.

⁵³ Enforcement Decision Memo No. 1, *supra* note 2, at 13.

between the ages of eighteen to twenty and to all new entrants to the job market; in the second year to all job changers between twenty and twenty-two years of age and to all new entrants; until job changers of all ages and all new entrants are covered by the system.⁵⁴ The staff also recommends that the work authorization card be used in conjunction with a call-in or real-time access data bank system.⁵⁵ The staff expects that the implementation of these proposals would reduce the flow of illegal immigration by as much as thirty percent in the first year. Once the card-based system is applied to the labor force, "effectiveness could increase to about ninety-five percent by the tenth or eleventh year of the program."⁵⁶

The work authorization card, however, may not actually benefit the American citizens and legal aliens who will be forced to carry it in order to work. An application of the Supreme Court's treatment of the driver's license⁵⁷ and right to privacy⁵⁸ to the work authorization card indicates that the card could impose significant new burdens on the freedom of American people and on their right to privacy.

III. DRIVER'S LICENSE CASES

Over the past decade, the Supreme Court has issued several opinions on the authority of police to stop automobiles in order to check the license of the driver and the validity of searches and seizures performed pursuant to those stops. To the extent that the work authorization card is analogous to the driver's license, the principles established in the driver's license cases will be applicable to the work authorization card. As a result, the establishment of a work authorization card could mean that enforceable identification checks and valid searches and seizures in the workplace will be possible when they never were before.

In 1973, the Supreme Court decided *United States v. Robinson*.⁵⁹ In that case, a police officer had lawfully arrested the respondent for operating a motor vehicle after revocation of his permit.⁶⁰ The police officer had observed the respondent driving, and as a result of a previous investigation following a check of respondent's operator's permit, had reason to believe that the respondent was driving with a revoked permit. The police officer then searched the respondent's person pursuant to police

⁵⁴ *Id.*

⁵⁵ *Id.* at 8. See text accompanying notes 91 & 92 *infra*.

⁵⁶ Enforcement Decision Memo No. 1, *supra* note 2, at 15.

⁵⁷ See text accompanying notes 59-90 *infra*.

⁵⁸ See text accompanying notes 91-136 *infra*.

⁵⁹ 414 U.S. 218 (1973).

⁶⁰ It is an offense defined by statute in Washington, D.C. for a driver to operate a motor vehicle after his permit has been revoked. *Id.* at 220 (citing D.C. CODE ANN. § 40-302(d) (1967)).

regulations. Although he was not motivated by a feeling of danger or specifically looking for weapons, the police officer conducted a full body search of the respondent. Inside a crumpled cigarette package found in the breast pocket of the respondent's heavy coat, the police officer found fourteen capsules containing heroin. The heroin was admitted into evidence in the district court, resulting in respondent's conviction. The Supreme Court upheld the validity of the search.

The Court's decision rested on the fact that a "lawful custodial arrest" had been effected.⁶¹ Both parties conceded that the arrest was lawful. Due to the police officer's previous investigation of the respondent's permit several days earlier, he had probable cause to arrest the respondent for driving after the revocation of his permit.⁶² The Court characterized the custodial arrest based on probable cause as a "reasonable intrusion under the Fourth Amendment," and asserted that a full body search conducted pursuant to a legitimate arrest was not so much more intrusive under the fourth amendment that it needed additional justification.⁶³ In other words, the Court held that the authority to make the arrest included the authority to undertake the less intrusive activity, the full body search. The Court's opinion indicates that as long as the arrest was lawful, a search conducted pursuant to that arrest would be upheld.

Moreover, the scope of the search need not be limited to a defensive frisk by the arresting officer. The concept of a defensive frisk was established in *Terry v. Ohio*.⁶⁴ In *Terry*, the Court held that a police officer had authority to conduct a reasonable search for weapons when "he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime."⁶⁵ A protective search is defined as "a carefully limited

⁶¹ *Id.* at 235.

⁶² *Id.* at 220.

⁶³ A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful, custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.

Id. at 235.

⁶⁴ *Terry v. Ohio*, 392 U.S. 1 (1968).

⁶⁵ *Id.* at 27. The *Terry* court weighed the intrusion of the individual against "the governmental interest in investigating the crime" and the "more immediate interest" of the policeman's safety and concluded that:

Where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous; where in the course of investigating this behavior he identifies himself as a police officer and makes reasonable inquiries; and where nothing in the initial stages of the encounter serves to dispel this reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search. . . . [A]ny weapons seized

search of the outer clothing . . . in an attempt to discover weapons which might be used to assault him.”⁶⁶ In *Terry*, the Court permitted a police officer only to *frisk* a detained suspect on the basis of the police officer’s apprehension that the suspect might be armed and dangerous.

Yet in *Robinson*, despite the fact that the arrest was not based on any suspicion that Robinson had been involved in a violent crime and that the arresting officer conceded that he had no feeling of danger and was not looking for weapons, the Court upheld the full body search. The author of the majority opinion, Justice Rehnquist, distinguished *Terry* on the grounds that in *Robinson* the search was conducted pursuant to a lawful arrest, whereas in *Terry* there had been no arrest.⁶⁷ This distinction is not persuasive. The search was limited in *Terry* because there had been no probable cause for arrest. Similarly, in *Robinson* where the respondent was arrested merely for driving with an invalid license, the police officer had no cause to suspect that the respondent carried a gun or was involved in any other crime. Yet the Court stated that “the standards traditionally governing a search incident to lawful arrest are not . . . commuted to the stricter *Terry* standards by the absence of probable fruits or further evidence of the particular crime for which the arrest is made.”⁶⁸

Regardless of the basis for the arrest, or the harmlessness of the suspect, the fact that the arrest is lawful gives police the authority to conduct a full body search. Under this analysis, a more intrusive search could be made of an individual arrested for simply driving with an improper license than could be made of an individual suspected of being armed and dangerous whom police lacked probable cause to arrest. *Robinson* may dictate a similar lack of constraints for searches of a person arrested for working with an invalid work authorization card. Applied to the work authorization card, the *Robinson* analysis may give police the impetus to extend their search of temporarily detained persons beyond the limits set by *Terry*. Under *Robinson* police could, by arresting sus-

may properly be introduced into evidence against the person from whom they were taken.

Id. at 30.

⁶⁶ *Id.*

⁶⁷ 414 U.S. at 227. “*Terry* . . . affords no basis to carry over to a probable-cause arrest the limitations this court placed on a stop-and-frisk search permissible without probable cause.”

Id.

⁶⁸ *Id.* at 234. The Court noted that “30% of the shootings of police officers occur when an officer stops an automobile.” *Id.* at 234 n.5. Thus it rejected the argument that the search of a person arrested for driving with a revoked license should be limited in scope because such persons are less likely to possess weapons than those arrested for other crimes. *Id.* at 234. But in a dissenting opinion Justice Marshall argued that “virtually all of the killings are caused by guns and knives, the very type of weapon which will not go undetected in a properly conducted weapons frisk.” *Id.* at 255 (Marshall, J., dissenting).

pects working with invalid cards, make full body searches of those suspected of committing other crimes despite the lack of probable cause to arrest. Today, police can conduct full body searches only if they have probable cause to arrest, and can only frisk a suspect if he is believed to be armed and dangerous.

A second issue arises with respect to the scope of the search. In *Robinson*, the Court invoked the well settled rule that:

A search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment. This general exception has historically been formulated into two distinct propositions. The first is that a search may be made of the *person* of the arrestee by virtue of the lawful arrest. The second is that a search may be made of the area within the control of the arrestee.⁶⁹

In *Robinson*, the Court's decision did not touch the issue of the "area within the control of the arrestee."⁷⁰ The Court's reference to this well settled rule leaves little doubt that if an employee were arrested at work for failure to have a proper work authorization card on his person, the work area could also be searched to some extent. No search of the work area could occur today without a valid search warrant.⁷¹ The work authorization card could thus alter workers' expectations of privacy dramatically.

In a companion case to *Robinson*, *Gustafson v. Florida*,⁷² the Court held that a full body search, conducted pursuant to an arrest made because the petitioner did not have his driver's license with him when he was driving, was reasonable under the fourth amendment⁷³ despite the fact that Gustafson later produced a valid driver's license. In the driver's license cases, the state's power to arrest is based on the important interest of highway safety.⁷⁴ Those who have not complied with

⁶⁹ 414 U.S. at 218 (emphasis in original).

⁷⁰ See, e.g., *Dell v. State*, 468 F.2d 324 (5th Cir. 1972), cert. denied, 411 U.S. 938 (1973). In *Dell*, the Court upheld the seizure of evidence found, pursuant to lawful arrest, on the floorboard and rear floorboard of the defendant's car. Immigration and Naturalization Service officials may not search a work place without a search warrant. 8 U.S.C. § 1357 (1976). See also *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).

⁷¹ In 1978, the Court held that warrantless searches to enforce the Occupational Safety and Health Act (OSHA) were not permissible under the fourth amendment with the general statement that "[w]arrantless searches are generally unreasonable . . . this rule applies to commercial premises as well as homes." *Marshall v. Barlow's, Inc.*, 436 U.S. at 311.

A future Supreme Court might not find *Marshall v. Barlow's* persuasive in the work authorization card context. The Court limited its holding to "the facts and law concerned with OSHA." *Id.* at 322. In the enforcement of other regulatory schemes, "[t]he reasonableness of a warrantless search . . . will depend upon the specific enforcement needs and privacy guarantees of each statute." *Id.* at 321.

⁷² 414 U.S. 260 (1973).

⁷³ *Id.* at 265.

⁷⁴ "[T]he states have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation and hence

the licensing procedures are subject to arrest by the state, including those caught driving without a proper license on their person. In *DeCanas v. Bica*,⁷⁵ the Court recognized the importance of protecting the economy and reserving jobs for Americans legally entitled to them.⁷⁶ Surely the Court would find this economic interest as important as highway safety. Following *Gustafson*, the state is presumably entitled to arrest those caught working without a work authorization card on their person. Under *Robinson*, if the arrest is lawful, a valid search could be made pursuant to it.⁷⁷ Not only would those carrying invalid cards be vulnerable to full body searches, but under *Gustafson*, those who misplaced or forgot to carry their cards would also be vulnerable.

In *Delaware v. Prouse*,⁷⁸ the Court seemed to limit *United States v. Robinson* and *Gustafson v. Florida*. The *Prouse* decision focused on the issue of when a police officer could make a valid request to check a driver's operator's license. In both *Robinson* and *Gustafson*, the police officer had probable cause to make the arrest.⁷⁹ Yet, often a police officer stops a car to check the driver's license with no probable cause.⁸⁰ In *Prouse*, a patrolman, not acting pursuant to any standards promulgated by either his department or the state, made a random stop of the respondent's vehicle for the purpose of checking the driver's license and the car's registration, without having observed any traffic or equipment violations, or suspicious activity. The patrolman seized marijuana in plain view on the floor and the respondent was subsequently indicted for illegal possession.

The Supreme Court held that the search was unreasonable under the fourth amendment. It reached this result by balancing the individual's right to privacy against the state interest of highway safety.⁸¹ The Court recognized the importance of the state interest in highway

that licensing, registration and vehicle inspection requirements are being observed." *Delaware v. Prouse*, 440 U.S. 648, 650 (1978).

⁷⁵ 424 U.S. 351.

⁷⁶ *Id.* at 356-57. See text accompanying note 40 *supra*.

⁷⁷ 414 U.S. at 265.

⁷⁸ 440 U.S. 648 (1979). See Note, *Fourth Amendment Reasonable Expectations of Privacy in Automobile Searches*, 70 J. CRIM. L. & C. 498 (1979).

⁷⁹ In *Robinson*, the officer had checked Robinson's license four days previously and had determined that Robinson's operator's permit had been revoked. When the police officer saw Robinson driving again, he arrested him. 414 U.S. at 220. In *Gustafson*, the petitioner had been driving recklessly. Thus, the officer had cause to stop him and request identification. 414 U.S. at 262.

⁸⁰ *Delaware v. Prouse*, 440 U.S. 648 (police made random stop of vehicle in order to check driver's license and car's registration); *U.S. v. Millar*, 543 F.2d 1280 (10th Cir. 1976) (police had set up road block for the purpose of checking driver's license and vehicle registrations); *Keziah v. Bostic*, 452 F. Supp. 912 (W.D.N.C. 1978) (patrolman, on a hunch, followed petitioner's car into private driveway and requested to see driver's license).

⁸¹ 440 U.S. at 548.

safety,⁸² yet it stated that "an individual operating or travelling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. Automobile travel is a basic, pervasive and often necessary mode of transportation"⁸³ The Court concluded that this privacy interest outweighs the benefit which might accrue to the state in the form of improved highway safety from a random check, and held that the incremental contribution to highway safety made by the random check was not sufficient to justify the practice under the fourth amendment.⁸⁴ The Court's decision was based to a large extent on the state's use of other mechanisms to ensure highway safety. These included: (1) periodic issuance of operator's licenses, with renewal requiring familiarity with the rules of the road; (2) vehicle registration requirements; (3) annual vehicle inspection; (4) minimum insurance requirements.⁸⁵

Yet *Prouse* would provide, at best, a weak defense for an employee trying to resist a random check of his work authorization card by the authorities. In *Prouse*, the Court applied a balancing test and concluded that with respect to random checks, the individual's privacy interest outweighed the state interest in highway safety. A distinction should be made between an invalid driver's license and an improper work authorization card. Usually, a driver operating a motor vehicle without a valid driver's license has not actually violated any part of the state interest of highway safety; but a worker with an improper work authorization card would probably be a person not legally entitled to work in the United States and thus would be directly violating the state interest of reserving American jobs for citizens and legal aliens. Hence, the state interest in random checks of work authorization cards might have sufficient magnitude to outweigh the individual's privacy interest.

Furthermore, because alternative mechanisms for promoting highway safety were available to the state, the *Prouse* Court gave less weight to the state's interest in using random vehicle checks. If, however, the work authorization card is adopted, the government may not have a viable alternative to the random check for policing employers prohibited from hiring illegal aliens. The only way to enforce such a law might be to check each employee's work authorization card. An element of surprise might be integral to this type of check.⁸⁶ The language of *Prouse*

⁸² *Id.*, See note 74 *supra*.

⁸³ *Id.* at 662.

⁸⁴ *Id.* at 658.

⁸⁵ *Id.*

⁸⁶ In *Marshall v. Barlow's, Inc.*, 436 U.S. at 321-22, the Court indicated that its holding requiring a search warrant for OSHA inspection did not mean that warrantless search provisions in other regulatory schemes would be found unconstitutional. Rather, the Court suggested that for each statute it would weigh enforcement needs against privacy guarantees.

does not rule out that kind of procedure where there are no alternative means of enforcement.

The Court also indicated that its holding in *Prouse* "does not preclude . . . states from developing methods for spot checking that involve less intrusion or that do not involve the unconstrained exercise of discretion."⁸⁷ This qualification implies that nondiscretionary mechanisms for spot checking driver's licenses, such as a roadblock or stopping every sixth car, would be acceptable to the Supreme Court.⁸⁸ The *Prouse* Court would not require a state to have probable cause in order to stop the driver of a motor vehicle to check his license. Similarly, *Prouse* would permit spot checks of work authorization cards without probable cause as long as these checks were not discretionary on the part of the police officer.⁸⁹ Thus, the full body search of *Robinson* could be conducted even when a nondiscretionary spot check had been used to determine that a worker was not carrying his card. Under *Prouse*, this highly intrusive search can be made of a worker who was never suspected of any violation. Thus, the work authorization card could become an extraordinary tool for harassment.

The application of *Robinson*, *Gustafson*, and *Prouse* to the work authorization card proposals is intimidating. These cases define the law on

⁸⁷ 440 U.S. at 663. The Court's criticism of the "unconstrained exercise of discretion" in *Prouse* should be contrasted with the Court's statement in *Robinson* that:

A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick ad hoc judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step of the search.

414 U.S. at 235. The conflict between these two statements creates some uncertainty as to the Court's attitude toward a police officer's use of discretion in searches and seizures.

⁸⁸ *Prouse* did not define any standards for a legitimate nondiscretionary check, but the Court considered similar issues in *Brown v. Texas*, 443 U.S. 47 (1979). In *Brown*, two police officers stopped the appellant because he looked suspicious and they had never seen him before in the area. They did not, however, suspect appellant of any specific misconduct or of being armed. When the appellant refused to identify himself, the officers arrested him for violation of a Texas statute which makes it a criminal act for a person to refuse to give his name and address to an officer who had lawfully stopped him and requested the information. *Id.* at 49.

The Court found the seizure of the appellant to be unlawful under the fourth amendment: "[T]he Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Id.* at 51. Thus roadblocks or checking the driver of every seventh car would probably be acceptable to the Court as "plans embodying neutral limitations on the conduct of officers." See Note, *supra* note 78, at 509, for a series of suggestions of what might constitute nondiscretionary stops.

⁸⁹ Examples of nondiscretionary spot checks of work authorization cards might include (a) checking the card of every worker in the factory, or (b) checking the card of every seventh worker coming into the factory. Although such mechanisms would eliminate discretion with respect to employees; such mechanisms would not limit the discretion used to determine which workplaces to check.

the only kind of identity card required of large numbers of people for participation in a given activity. The gap between the driver's license and the work authorization card is small. Although an argument can be made that there is a fundamental right to work but not to drive and that the two activities should therefore be distinguished, both activities are subject to significant government regulation. As *Prouse* makes clear, the power of the state to regulate driving is usually grounded on the state interest in highway safety, for the protection of the travelling public. Similarly, Congress promulgated the Fair Labor Standards Act of 1938, regulating wages and hours and prohibiting oppressive child labor, in order to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."⁹⁰ The work authorization card would be justified as another means of maintaining this minimum standard of living.

Furthermore, the cards would be facially similar to driver's licenses. Both a driver's license and the proposed work authorization card would bear similar information, including a photograph of the holder, his name, sex, date of birth, and an identifying number. Both would be issued to attest to the holder's right to participate in an activity which the government has chosen to regulate. Thus, the Court could easily analogize the established driver's license caselaw to work authorization cards. Under that caselaw, establishment of the work authorization card could make American workers vulnerable to searches and seizures more intrusive than ever before. Given the uncertainty of the actual impact of illegal aliens on the United States economy and the potential for broader searches and seizures with the work authorization card, the establishment of the card is difficult to justify.

⁹⁰ 29 U.S.C. § 202(a) (1938). The Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19, regulates wages and hours of employees engaged in commerce or in the production of goods and services for commerce and also prohibits oppressive child labor in activities related to such commerce. The Act was upheld in *United States v. Darby*, 312 U.S. 100 (1941):

The motive and the purpose of the present regulation are plainly to make effective the congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions. . . . [T]he motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control.

Id. at 115. Furthermore, sections 211(a) and 212(b) of the Fair Labor Standards Act give the administrator of the Act or his delegates the power to investigate an employer and his records. As with driving regulations, compliance with the Fair Labor Standards Act is primarily ensured by inspection.

IV. RELATIONSHIP BETWEEN AN INFORMATION RIGHT OF PRIVACY AND THE WORK AUTHORIZATION CARD

The ramifications of a work authorization card extend beyond issues of search and seizure, and raise questions of data storage and the right to privacy. Under any work authorization card scheme, some data storage system would be essential for organization and enforcement. The staff of the Commission on Immigration and Refugee Policy, for example, has developed a plan under which all persons seeking employment would go to a designated federal office and present documentary proof of their citizenship, permanent resident status, or other authorization to work. Once an applicant's right to work was ascertained, he would be issued a work authorization card bearing his eligibility identification number. Prospective employers could telephone the federal office with the identification number and receive immediate verification of the job applicant's employment eligibility.⁹¹ Although the card would carry only necessary identification data such as the holder's name, date of birth, sex, photograph and identifying number, additional information would be maintained in the data base "to help field personnel screen out imposters or persons using a loaned card to establish eligibility."⁹²

Privacy issues arise to the extent that individuals are unable to control the accumulation and use of personal information gathered by the government. Former Secretary of Health, Education, and Welfare Caspar Weinberger described this type of centralized data storage as a "double-edged sword":

On the one hand, it can help to assure that decisions about individuals are made on the basis of accurate, up-to-date information. On the other, it demands a hard look at the adequacy of our mechanisms for guaranteeing citizens all the protections of due process in relation to the records we maintain about them.⁹³

An examination of the current caselaw shows that an informational right of privacy⁹⁴ is not broadly recognized by the courts.⁹⁵ Although

⁹¹ Enforcement Decision Memo No. 1, *supra* note 2, at 5-6.

⁹² *Id.* at 8.

⁹³ Weinberger, *Foreward* to HEW REPORT, *supra* note 52, at vi.

⁹⁴ Some authors distinguish between due process privacy and first amendment guarantees:

The relationship between due process privacy and the First Amendment is subtle and complex. To cite only one example of a case in which the two virtually merge, *see Stanley v. Georgia*, 394 U.S. 557 (1969). They can also come to sword's points. *E.g.*, *Rowan v. Post Office Department*, 397 U.S. 728 (1970). In essence they are alike, however, in that they affirmatively guarantee individual freedoms. The emphasis of each differs. Under the first amendment the emphasis is on the mind, the spirit and the communication between persons by means of symbols. Due process privacy emphasizes the body and the personality as well as the ability to control them and to control information

Congress passed a Privacy Act in 1974,⁹⁶ it has not always been interpreted to allow citizens to control the application and dissemination of information about them.⁹⁷ The proposed work authorization card would further diminish the ability of individuals to control the use of information about them.⁹⁸ Until the courts recognize and enforce an informational right of privacy, congressional enactment of the work authorization card proposal would be unwise.

Some lower federal courts have, on nonconstitutional grounds, enforced an individual's right to have potentially derogatory, inaccurate records removed from government files and to prevent needless dissemination of records, however accurate, obtained for one purpose but employed for another. For example, in *Menard v. Saxbe*,⁹⁹ the District of Columbia Circuit Court interpreted the relevant statute as the basis for an order that FBI arrest records in cases where probable cause had been absent should be expunged. *Menard* relies, however, on a specific statutory provision and hence contributes little to the development of general principles of informational privacy.¹⁰⁰ Constitutional principles are nec-

about them. Both, in their respective spheres, reserve to the individual certain fundamental personal liberties.

Note, *Due Process Privacy and the Path of Progress*, 1979 U. ILL. L.F. 469, 471 n.12.

⁹⁵ See text accompanying notes 99-136 *infra*.

⁹⁶ Federal Privacy Act of 1974, 8 U.S.C. § 552a (1976).

⁹⁷ See text accompanying notes 123-27 *infra*.

⁹⁸ As one commentator has observed:

[R]ecords are mechanical memories not subject to the erosions of forgetfulness and the promise of eventual obliteration. The threat of misuse becomes as permanent as the records themselves. The risks of autonomy multiply not simply because of the heightened possibilities of unconsented reproduction and distribution at any given time, but also because those possibilities, however reduced by regulation, now extend indefinitely through time. Such a chronic and enduring risk must count as itself an injury.

Gerefy, *Redefining Privacy*, 12 HARV. C.R.—C.L. L. REV. 233, 288 (1977). Another commentator observed:

True freedom of action exists only when informational privacy rights are respected. Since acts deny their meaning from their social context, the ability of an actor to exert some control over who knows what about his behavior is essential for unrestrained action. Informational privacy is a necessary context for mental health, individuality and ethical self-development. The social relations that exist in our society are based on a respect for informational privacy. Additionally, informational privacy is the policy underlying the specific guarantee of the Fourth and Fifth Amendments to the United States Constitution.

Note, *Information Privacy: The Concept, Its Acceptance and Affect on State Information Practices*, 15 WASHBURN L.J. 273, 280 (1976).

⁹⁹ 498 F.2d 1017 (D.C. Cir. 1974).

¹⁰⁰ Other cases which enforce some kind of right to informational privacy on nonconstitutional grounds include *Tarlton v. Saxbe*, 507 F.2d 1116 (D.C. Cir. 1974) (recognized informational right of privacy as an administrative matter); *Roe v. Ingraham*, 403 F. Supp. 931 (S.D.N.Y. 1975), *rev'd on other grounds sub nom.* *Whalen v. Roe*, 429 U.S. 589 (1977) (as incidental to other privacy rights). Some tort actions also recognize the right of individuals to exert some control over personal information. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1975); *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973).

essary to constrain abuses of information gathered pursuant to the proposed work authorization card system.

The Supreme Court has not recognized the existence of a constitutional right to privacy. No right of privacy is mentioned in the Constitution.¹⁰¹ The Supreme Court has, however, protected various aspects of personal privacy by judicial interpretation of the Bill of Rights.¹⁰² The Court has recognized a right of privacy as the basis for protecting the freedom of the individual to practice contraception,¹⁰³ to read or look at pornography in the home,¹⁰⁴ and to have an unwanted pregnancy terminated.¹⁰⁵ The decisions in these cases are clearly rooted in concerns for personal privacy, but the Supreme Court has articulated its decisions in terms of previously recognized Bill of Rights guarantees.¹⁰⁶ The Supreme Court has never acknowledged a constitutional basis for an informational right of privacy.¹⁰⁷

Three decisions emphasize the Court's unwillingness to recognize any constitutional protection for an informational right of privacy.¹⁰⁸ The first of these cases, *Laird v. Tatum*, was decided by the Court in 1972. In *Laird*, the respondents challenged the constitutionality of a data-gathering system established by Army Intelligence in response to the Army's experience in the various civil disorders it was called upon to control in 1967 and 1968 in Detroit. Respondents argued that the existence of this data-gathering system created a chilling effect on their first amendment rights. The Court held in a five-to-four decision that the jurisdiction of a federal court could not be

invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the *mere existence, without more*, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a

¹⁰¹ Only ten states explicitly mention a right to privacy in their constitutions. See ALASKA CONST. art. I, § 22; ARIZ. CONST. art. 2, § 8; CAL. CONST. art. 1, § 1; FLA. CONST. art. 1, § 12; HAWAII CONST. art. 1, § 6; ILL. CONST. art. 1, § 12; LA. CONST. art. 1, § 5; MONT. CONST. art. 2, § 10; S.C. CONST. art. 1, § 10; WASH. CONST. art. 1, § 7.

¹⁰² *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹⁰³ *Griswold v. Connecticut*, 381 U.S. 479 (the Court found a right of marital privacy within the specific guarantees of the first, third, fourth, and fifth amendments).

¹⁰⁴ *Stanley v. Georgia*, 394 U.S. 557 (the Court held that the first amendment forbade making the mere possession of obscene materials a crime).

¹⁰⁵ *Roe v. Wade*, 410 U.S. 113 (the Court held that state criminal abortion laws violate the due process clause of the fourteenth amendment which protects the right of privacy against state action).

¹⁰⁶ HEW REPORT, *supra* note 52, at 34.

¹⁰⁷ In *Roe v. Wade*, the Court announced that only those privacy rights which were "fundamental," or "implicit in the concept of ordered liberty," should be afforded constitutional protection.

¹⁰⁸ *Whalen v. Roe*, 429 U.S. 589; *U.S. v. Miller*, 425 U.S. 435 (1976); *Laird v. Tatum*, 408 U.S. 1 (1972).

valid governmental purpose.¹⁰⁹

The crux of the Court's holding was that the allegation of a chilling effect produced by the mere existence of the Army surveillance system did not state a claim of injury in fact. The federal courts therefore lacked jurisdiction to consider the question of whether the surveillance system was constitutionally overbroad.¹¹⁰

The Court distinguished *Laird* from other cases which have held that constitutional violations could arise where a governmental regulation fell short of a direct prohibition against the exercise of first amendment rights, but chilled the exercise of those rights.¹¹¹ The Court pointed out that in each of the cases where the chilling effect of a government regulation had constituted a violation of the first amendment, "the challenged exercise of governmental power was regulatory, proscriptive or compulsory in nature and the complainant was either presently or prospectively subject to the regulations, proscriptions or compulsions he was challenging."¹¹² In contrast, the Court concluded that the chilling effect alleged by the complainant in *Laird* derived from mere knowledge that the government was engaged in a particular activity. The Court reasoned that the chilling effect did not arise from the challenged activity itself, but from the fear that the information gathered could, in the future, be the basis for some "other and additional action" which could injure the individual. Since the challenged activity of information-gathering by the Army was not the direct source of the chilling effect alleged by the complainant, the Court refused to hold this type of information-gathering unconstitutional.¹¹³ Thus, absent some use of the information by the Army, the individual knowing such information was being accumulated suffered no injury and could make no constitutional challenge.

The Court emphasized that the primary sources of the information gathered by the Army were news media and publications of general circulation, field reports from Army Intelligence agents who attended

¹⁰⁹ 408 U.S. at 10 (emphasis added).

¹¹⁰ *Id.* at 13-16.

¹¹¹ *See, e.g.*, *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Baggett v. Bullitt*, 377 U.S. 360 (1964).

¹¹² 408 U.S. at 11.

¹¹³ In none of [those] cases . . . did the chilling effect arise merely from the individual's knowledge that a governmental agency was engaged in certain activities or from the individual's concomitant fear that, armed with the fruits of those activities, the agency might in the future take some other and additional action detrimental to the individual. Rather, in each of [the cases where the chilling effect constituted a violation of the Constitution], the challenged exercise of governmental power was regulatory, proscriptive or compulsory in nature and the complainant was either presently or prospectively subject to the regulations, proscriptions or compulsions he was challenging.

Id. at 11.

meetings open to the public, and information provided to the Army by civilian law enforcement agencies.¹¹⁴ The Court refused to recognize that accumulation of public information could be injurious to an individual's freedom to exercise first amendment rights.¹¹⁵ *Laird* continues to stand¹¹⁶ "as a barrier to plaintiffs who wish to challenge the simple accumulation of information, where no unreasonable search has taken place,"¹¹⁷ or no injurious use has been made of the information.¹¹⁸

Under *Laird*, the holder of a work authorization card would be without standing to challenge the accumulation of personal information collected for work authorization card files unless some injurious use was made of that accumulated information. The work authorization data bank proposal presents an even more disturbing prospect than that presented by *Laird*. In *Laird*, information was being collected on a particular set of individuals in Detroit. In contrast, the work authorization card proposal would cover all lawful workers in America. Furthermore, the information collected in *Laird* was not organized in any particular way, yet in the context of the work authorization data bank, the use of a numerical identifier would facilitate comparisons between files and possibly between government agencies. The application of the holding in *Laird* to the work authorization data bank is far from satisfactory. Yet *Laird*, one of the few cases confronting this issue, still stands as good law.

In 1976, the Supreme Court decided *United States v. Miller*.¹¹⁹ In *Miller*, the respondent, who had been charged with a variety of federal offenses, made a pretrial motion to suppress microfilms of checks, deposit slips and other records of his accounts at two banks which main-

¹¹⁴ *Id.* at 6. The Court suggests that since these were public sources of the Army's information, no unconstitutional search had taken place, presumably because no legitimate expectation of privacy attaches to these sources of information.

¹¹⁵ The Court's opinion ignored the alleged chilling effect arising from the accumulation of information about the individual and the individual's awareness that this information is being accumulated. Instead, the Court seemed to understand the chill as arising from the respondents' views of the proper role of the military in America:

[T]he alleged "chilling" effect may perhaps be seen as arising from respondents' very perception of the system as inappropriate to the Army's role under our form of government, or as arising from respondents' beliefs that it is inherently dangerous for the military to be concerned with activities in the civilian sector, or as arising from respondents' less generalized yet speculative apprehensiveness that the Army may at some future date misuse the information.

Id. at 12-14.

¹¹⁶ Although the Federal Privacy Act of 1974, 8 U.S.C. § 552(a), limits the ability of entities like the Army to conduct surveillance and data-gathering programs such as those at issue in *Laird*, the holding in *Laird* with respect to an individual's lack of standing to challenge the accumulation of information about him is still good law.

¹¹⁷ Note, *supra* note 94, at 256.

¹¹⁸ 408 U.S. at 13-15.

¹¹⁹ 425 U.S. 435. See Comment, *Reasonable Expectations of Privacy in Bank Records: A Reappraisal of United States v. Miller and Bank Depositor Privacy Rights*, 72 J. CRIM. L. & C. 243 (1981).

tained the records pursuant to the Bank Secrecy Act of 1970. He contended that the subpoenas duces tecum pursuant to which the banks had produced the material were defective, and that the records had thus been illegally seized in violation of the fourth amendment.¹²⁰ The Court held that the respondent lacked the fourth amendment interest in the bank records necessary to challenge the validity of the subpoenas duces tecum.¹²¹

The basis of the Court's holding was that there was no reasonable expectation of privacy in a person's bank records. A person's bank records consist only of documents conveyed voluntarily by the individual to the bank and regularly used by the bank's employees in the ordinary course of business. The Court held that no legitimate expectation of privacy attaches to such documents.¹²² The implication of the Court's holding is that there are two types of information: information which is sufficiently confidential to warrant fourth amendment protection, and information which is not personal enough to merit such protection. Since the individual "lack[s] any legitimate expectation of privacy" in his bank records, these receive no fourth amendment protection.

In both *Miller* and *Laird*, the Court upheld the acquisition of information sought by the government in part because of its public nature. In *Miller*, the information at issue consisted of bank records. In *Laird*, it was news media and publications of general circulation, reports on public meetings, and information supplied to the Army by local police. In neither case did the Court restrict the acquisition of information because of its private character. Although *Miller* implies that some information is protected from government acquisition because of its private nature, the Court's opinion does not specify the criteria used to differentiate that information which is confidential and thus protected, from that which is not. Because *Miller* failed to draw a bright line between personal information and unprotected information, there is currently no limit on the type of information the government can collect.

In both *Miller* and *Laird*, the Court emphasized the public nature of the information sought by the government. In both cases, however, the Court failed to consider the effect of the *accumulation* of information

¹²⁰ 425 U.S. 435 at 438-39.

¹²¹ *Id.* at 439.

¹²² The checks are not confidential communications, but negotiable instruments to be used in commercial transactions. All of the documents obtained, including financial statements and deposit slips, contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business. The lack of any legitimate expectation of privacy concerning the information kept in bank records was assumed by Congress in enacting the Bank Secrecy Act

Id. at 442.

on the individual's liberty. As information is accumulated, various facts can be linked and characteristics of the individual isolated. Accumulation of information is a threat to informational privacy. If the worker identification number is used by other government agencies, the problem of accumulation is aggravated by the potential pooling of government files with common numbers.

In 1974, Congress adopted the Federal Privacy Act.¹²³ The Act safeguards the individual's right to privacy in the records maintained about him by the federal government. For example, the Act permits an individual to find out what records are collected and used by an agency, and to gain access to information pertaining to him in federal agency records.¹²⁴ Congress intended the act to "permit an individual to prevent records pertaining to him obtained by [federal] agencies for a particular purpose from being used or made available for another purpose without his consent."¹²⁵ Yet, the Act provides that any agency may disclose information to another person or agency for a "routine use."¹²⁶ This routine use provision undermines the protections created by the Privacy Act. To the extent that the work authorization card proposal establishes a numerical standard universal identifier for the entire working population, it will "create an incentive for institutions to pool or link their records thereby making it possible to bring a lifetime of information to bear on any decision about a given individual."¹²⁷ As long as the disclosure of information can be characterized as routine, the Privacy Act will not bar the pooling and linking of data files. Nor has the Supreme Court held that the accumulation of information about an individual can be a violation of privacy rights. Unless Congress or the Supreme Court takes a position which limits the ability of agencies to accumulate and exchange information, the work authorization card

¹²³ 5 U.S.C. § 552a (1976).

¹²⁴ *Id.* § 552a(b)(1), (3).

¹²⁵ *Id.* Pub. L. 93-579 § 2(b)(2), 88 Stat. 1896 (codified at 5 U.S.C. § 552a (1976)). *See also* 5 U.S.C. § 552a(e) (1976).

¹²⁶ *Conditions of Disclosure*—No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be . . .

(3) For a routine use as defined in subsection (a)(7) of this section and described under (e)(4)(D) of this section. . . .

(a)(7) the term 'routine use' means, with respect to disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected. . . .

(e) *Agency Requirements.* Each Agency that maintains a system of records shall . . .

(4) . . . publish in the Federal Register at least annually a notice of the existence and character of the system of records, which notice shall include . . .

(D) each routine use of the records maintained in the system.

¹²⁷ HEW REPORT, *supra* note 52, at 111.

through a numerical identifier could invade the rights of informational privacy of lawful American workers.

Furthermore, information held in a computer data bank can be stored permanently. Consequently, the chance for misuse of the information gathered under the work authorization plan could become a permanent risk for the individual.¹²⁸ No Supreme Court case has yet protected the individual's privacy interest against the risks of accumulated information.

In *Whalen v. Roe*,¹²⁹ the Court did, however, recognize an informational right of privacy. In an unanimous decision, the Court upheld the state program at issue against the acknowledged privacy claim. The New York legislature established the program in 1972 in response to a concern that prescription drugs were being diverted to unlawful uses. The statute required prescriptions for the most dangerous legitimate drugs to be prepared on an official form identifying the drug, the dosage, and the patient. A copy of the form was to be retained by the state for five years under a security system designed to prevent public disclosure.¹³⁰

The Court recognized that "[t]he mere existence in readily available form of the information about patients' use of [the most dangerous legitimate] drugs creates a genuine concern that the information will become publicly known and that it will adversely affect their reputations."¹³¹ Concern for this possible stigma led the Court to conclude that the statute threatened to impair the individual's interest in the non-disclosure of private information.¹³² For the first time, the Court recognized that a right to informational privacy could be violated by the simple existence of accessible information. The Court based its finding

¹²⁸ See note 98 *supra*.

¹²⁹ 429 U.S. 589 (1977).

¹³⁰ The statute classified potentially harmful drugs, and provided that prescriptions for the category embracing the most dangerous legitimate drugs (Schedule II) be prepared on an official form. One copy of the form, which required identification of the prescribing physician, dispensing pharmacy, drug, and dosage, and the patient's name, address, and age, was to be filed with the State Health Department, where pertinent data are recorded on tapes for computer processing. All forms are retained for a five-year period under a system to safeguard their security, and are thereafter destroyed. Public disclosure of the patient's identity is prohibited and access to the files is confined to a limited number of health department and investigatory personnel. *Id.* at 593-95.

¹³¹ *Id.* at 600. The Court's recognition of the need for informational privacy is based on testimony by two parents that their children would be stigmatized by the state's central filing system (one child had been taken off his medication as a result); by three adults who feared that disclosure of their names would result from the central filing of patient identification; and four physicians who testified that the filing requirement imposes on patients' privacy and that they had observed a reaction of shock, fear, and concern on the part of their patients whom they had informed of the plan. *Id.* at 595-96 n.16.

¹³² *Id.* at 600.

of the need for informational privacy on the potential for stigma to the individual that could result if there was disclosure. Consequently, the Court might not find any need to enforce an informational right to privacy in situations where there was no risk of stigma to the individual, and thus the informational right of privacy acknowledged in *Whalen v. Roe* might not be applicable to the work authorization card.

Recognizing the possibility of an informational right of privacy, the *Whalen* Court nonetheless upheld the state program. In essence, the Court found that the state statute provided adequate procedural safeguards,¹³³ and that the state's interest in having the program outweighed the individual's fear of disclosure. "The state's vital interest in controlling the distribution of dangerous drugs would support a decision to experiment with new techniques of control."¹³⁴ Although the Court, in reaching its holding, gave considerable weight to the procedural safeguards put in place by the statute and the importance of the state interest in controlling the distribution of drugs, it also referred to the statute as an experiment. The use of the word "experiment" calls into question the weight of the state interest necessary to override the individual's right to informational privacy. The Court's opinion does not clarify this issue.

The Court concluded its opinion with the statement that it was "not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files."¹³⁵ Although the Court stressed the dependence of many essential government functions on the government's right to collect and apply personal information, it also emphasized that typically the right to collect personal information is regulated by statu-

¹³³ The Court noted the following procedural protections:

The receiving room is surrounded by a lock wire fence and protected by an alarm system. The computer tapes containing the prescription data are kept in a locked cabinet. When the tapes are used, the computer is run "off-line" which means that no terminal outside of the computer room can read or record any information. Public disclosure of the identity of patients is expressly prohibited by the statute and by a Department of Health regulation. Willful violation of these prohibitions is a crime punishable by up to one year in prison and a \$2,000 fine. At the time of trial, there were 17 Department of Health employees with access to the files; in addition, there were 24 investigators with authority to investigate cases of overdispensing which might be identified by the computer. Twenty months after the effective date of the Act, the computerized data had only been used in two investigations involving alleged overuse by specific patients.

Id. at 594-95.

¹³⁴ *Id.* at 598.

¹³⁵ *Id.* at 605. In the same vein, Justice Brennan, in a concurring opinion, said that:

[A]s the example of the Fourth Amendment shows, the Constitution puts limits not only on the type of information the state may gather, but also on the means used to gather it. The central storage and easy accessibility of computerized data vastly increase the potential for abuse of that information, and I am not prepared to say that future developments will not demonstrate the necessity for some curb on technology.

Id. at 607 (Brennan, J., concurring).

tory duties to avoid unwarranted disclosure.¹³⁶ Yet, the meaning of this statement, which seems to indicate a willingness on the part of the Court to enforce a right of informational privacy, must be taken in the context of the entire opinion in which the Court only recognized a right of informational privacy to the extent that disclosure of the information might bring stigma to individuals on whom records were kept, and in which the Court held that the state's interest in an experimental program outweighed the right of informational privacy. Although the *Whalen* Court acknowledged the need for some informational right of privacy, the effect of the Court's opinion is to minimize the urgency of this privacy need in order to promote the exercise of the state's police power to collect data on citizens for purposes of its programs.

Thus *Whalen v. Roe*, which is the strongest statement by the Court on the existence of a constitutionally protected right of informational privacy, provides little basis for controlling any intrusions into an individual's informational privacy rights caused by the establishment of the work authorization data system. Until the Supreme Court recognizes an informational right of privacy, the work authorization data system should not be established because of the heavy burden it would impose on an already fragile right.

V. CONCLUSION

For the past decade there has been an extraordinary influx of illegal immigration into the United States, which shows no signs of abating. A recent article stated:

In the past ten years, the United States has absorbed more than four million immigrants and refugees and perhaps twice that number of illegal aliens, more new residents than in any decade in its history. If current immigration and fertility rates remain the same, the nation's population will double in 100 years.¹³⁷

American workers fear that illegal aliens are taking jobs, depriving legally entitled citizens of the opportunity to work, and that illegal aliens are burdening welfare and other government support programs. The data, however, is ambiguous, and some economists argue forcefully that illegal aliens do not displace American workers, but take secondary employment that American workers typically reject. The same economists also posit that illegal aliens contribute more to the government revenue

¹³⁶ The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, . . . all require the orderly preservation of information, much of which is personal in character and potentially harmful or embarrassing if disclosed. The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures.

Id. at 605.

¹³⁷ N.Y. Times, *supra* note 1.

through withholding and sales taxes than they take out in other forms of social relief. Those economists point out that most illegal aliens are afraid to take any direct form of government relief for fear of being deported.

The impact of illegal aliens in the United States is not limited to the economy. The heavy flood of illegal immigration tends to bring social problems. Most illegal immigrants do not speak English. They are usually poor and not well educated. A large and growing population with these characteristics will probably cause severe social strains in American cities. Although the actual impact of illegal immigrants on the United States economy is not known, some commentators argue that the potential social conflicts alone are serious enough to justify consideration of the work authorization card proposals. These commentators have ignored hard-working habits¹³⁸ and low crime rates¹³⁹ usually attributed to the illegal immigrant population.

Although the rate of illegal immigration is higher than it has ever been in American history, the social and economic effects of this immigration are not well known because illegal immigrants tend to avoid contact with the authorities or anyone who might report them. Hence, their numbers and the effect of their presence are not susceptible of easy measurement. Yet unless the impact of the illegal aliens is ascertained with empirical evidence, the establishment of a work authorization card plan, with its concomitant social costs, would be difficult to justify.

The staff of the Select Commission on Immigration and Refugee Policy projects that their proposed plan will cost millions of dollars. For the call-in or real-time access data bank system, "[t]he non-recurring design and implementation costs of [the] system are estimated to be \$90 million over six years. Annual operations costs total \$250 to \$310 million for the enrollment, verification and data base maintenance functions" for the first seven years.¹⁴⁰ For the work authorization card itself, "Start-up costs would total \$50 million to be spent over a six- to seven-year period on system design and development. This expenditure would be followed by \$40 million spent on hardware [F]rom the beginning annual operating costs [would be between] \$180 and \$230 million" ¹⁴¹ All costs are based on 1981 estimates. Given the magnitude of these projected expenses, the immigration of illegal aliens must be shown empirically to cost the country more under current law than will the projected cost of the work authorization card, before the proposal can be justified.

¹³⁸ See note 25 *supra*.

¹³⁹ AEI REPORT, *supra* note 15, at 18.

¹⁴⁰ Enforcement Decision Memo No. 1, *supra* note 2, at 6.

¹⁴¹ *Id.* at 9.

Another cost which must be considered is the impact the proposal will have on our diplomatic relations with other countries, particularly Mexico. Currently, the United States is trying to cultivate an amicable relationship with Mexico, because of the large oil reserves there. The work authorization card proposal would, in theory, discourage poor Mexicans from coming to the United States. Those individuals would probably remain in Mexico as unemployed workers, contributing to the already high unemployment rate. Furthermore, if illegal Mexican aliens no longer worked in the United States, the indirect foreign aid sent to Mexico in the form of illegal workers' paychecks would also cease. Although the actual amount of money sent to Mexico this way each year is not known, it is substantial and might prove essential to the continuation of a friendly relationship with Mexico.

The most serious ramification of the work authorization card proposal is its threatened effect on American's rights. Recent caselaw suggests that the work authorization card would seriously undermine the freedom from searches and seizures and rights to informational privacy. The current law would give these rights little protection against the work authorization card.

Under the logic of the driver's license cases, employees would be vulnerable to searches and seizures in the workplace if they failed to have an up-to-date work authorization card with them when enforcement authorities checked. This conclusion is dictated by the analysis of *Robinson*, *Gustafson*, and *Prouse*. In *Robinson* and *Gustafson*, the Supreme Court affirmed the authority of police officers to make full body searches of legitimately arrested persons, even when the arrest was for driving with an invalid license, or for failure to carry a driver's license. If enforcement officers have the power to arrest employees for working without a valid work authorization card, then by analogy *Robinson* and *Gustafson* would give officers the authority to conduct full body searches pursuant to those arrests, regardless of whether the arrest was related to the commission of some other crime, or the arresting officer felt threatened by the possibility that the worker might be carrying a weapon.

The third case, *Prouse*, stated that a police officer need not have probable cause to stop a motorist to check the validity of his license. Although a random check is impermissible because it relies on the discretion of the police officer, the Court did indicate that spot checks based on neutral, nondiscretionary criteria would be upheld. Applied to the work authorization card, *Prouse* would allow a worker to be arrested for failure to have a valid work authorization card and be subjected to a full body search. A person never suspected of any criminal behavior would be vulnerable to an intrusive search if he happened not to have

his card with him when authorities were checking. In contrast, a worker currently could not be searched unless he was first arrested on a charge based on probable cause. Yet, because of the strong analogy between the driver's license and the proposed work authorization card, if the latter is established, courts will tend to treat the driver's license cases as persuasive. Thus, the work authorization card might unjustifiably extend the permissible scope of searches and seizures.

The proposed card also threatens privacy on a second level. The use of the work authorization card would necessitate the assignment of an identification number to each worker and the creation of a data bank to store relevant information. To the extent that the identification number and the data bank facilitate the accumulation and comparison of information about the individual, privacy rights are threatened.

Miller, Laird, and Whalen emphasize the Supreme Court's reluctance to enforce an acknowledged right to informational privacy. In *Miller*, although the Court implied that some information is sufficiently confidential to merit fourth amendment protection while other information is not, the Court failed to define the difference between these two types of information. As a result, there is no limit on the type of information the government can collect. *Laird* held that the accumulation of information by government agencies was not unconstitutional. In reaching its decision, the Court failed to consider that the accumulation of information facilitates detection of an individual's characteristics. Instead, *Laird* ruled that an individual is not injured by the accumulation of information, and therefore has no standing to challenge the collection of information by a government agency until the information is used in a way injurious to the individual. The *Whalen* Court recognized a right to informational privacy, but only to the extent that the accumulation of information could result in some stigma to the individual if disclosed. Furthermore, the *Whalen* Court indicated that the individual interest in informational privacy could easily be outweighed by the state's need to collect information, even for an experimental program.

Miller, Laird, and Whalen indicate that there would be practically no limitation on the ability of the government, through the work authorization card, to collect information about everyone employed in the United States. Although several government agencies such as the Internal Revenue Service and the Social Security Administration already accumulate personal information, the proposed work authorization card system poses a greater threat to informational privacy. Under the work authorization card plan, a numerical standard universal identifier would be established for the entire population. Not even the social security number has this broad scope. To the extent that other agencies adopt the same identification system, there will be an incentive for agen-

cies to pool their data. Furthermore, the work authorization card plan contemplates the accumulation of information in order to facilitate the identification of users of counterfeit and borrowed cards. Thus, enforcement agents and employers who suspect an employee of being an illegal immigrant will be able to call the data bank for verification of the holder's identity.¹⁴² If information stored in the data bank is made available to employers and enforcement officials, there will always be the potential for misuse of that information. The United States does not yet have laws adequate to control the use of accumulated information necessary for a massive identification system. Without these laws, the work authorization card system threatens rights to informational privacy.

The burdens the card would impose should only be justified by the weightiest of governmental interests. The work authorization card would be required to insure the fair administration of legislation that would make it criminal for employers to hire illegal aliens. The available empirical evidence, however, fails to establish the seriousness of the impact of illegal aliens and the resulting need for such legislation. American workers are unemployed and the United States economy is unstable, but "this temporary recurring social condition" should not become the basis for a remedy which may permanently jeopardize individual liberties.¹⁴³

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¹⁴² *Id.* at 6.

¹⁴³ Comment, *Regulation of Illegal Aliens: Sanctions Against Employers Who Knowingly Hire Undocumented Workers*, 4 WAYNE ST. U.L. REV. 41, 62 (1976).