

## Is Everyone Else Doing It? Indiana's Voter Identification Law in International Perspective

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Since the passage of the Help America Vote Act (HAVA) in 2002, requiring people to present identification to vote has become one of the most controversial and divisive issues in election reform. HAVA necessitates, among other things, that members of a small group of people—new voters registering by mail—establish their identity in one of many ways.<sup>1</sup> While about half of the states in the country today apply just that requirement, many states have used the HAVA identification provision to justify additional, more stringent measures. At present, twenty-four states require *all* voters to present identification when casting a ballot in person.

Most of these states accept a wide range of both photo and non-photo forms of identification. A handful of states allow only photo identification. Four of them—Louisiana, Hawaii, Michigan, and South Dakota—allow eligible voters to cast regular ballots on Election Day even if they fail to bring or do not have the photo identification required. Such voters simply sign affidavits and cast their votes. Only three states absolutely require photo identification: Florida, Georgia, and Indiana. Indiana's law, passed in 2005, is the most restrictive. Unlike the Florida law, which allows voters to present several different types of photo identification, the Indiana and Georgia laws require that the photo identification be government-issued. But unlike Georgia, Indiana makes it difficult for voters to obtain that identification.<sup>2</sup> For these reasons, opponents believe that the Indiana law will inflict the most widespread disenfranchisement.

In April 2008, the U.S. Supreme Court upheld the constitutionality of the Indiana law.<sup>3</sup> Even though the state failed to present evidence that this

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<sup>1</sup> New mail registrants can either enclose with their application or bring to the polls one of several forms of identification or their driver's license number or the last four digits of their social security number. See Help America Vote Act, Pub. L. No. 107-252, § 303, 116 Stat. 1666, 1713 (2002).

<sup>2</sup> Georgia requires only a voter registration certificate or any one of a number of other documents. See GA. COMP. R. & REGS. 183-1-20.01 (2009). In Indiana, the requirements are far more onerous, as we discuss below.

<sup>3</sup> *Crawford v. Marion County Election Bd.*, 128 S.Ct. 1610 (2008).

law would prevent fraud, the Court reasoned that those challenging the law did not demonstrate sufficient evidence of voter disenfranchisement to require the law's invalidation. In the wake of the Court's ruling, several states—including Texas, Oklahoma, Kansas, and Mississippi—have attempted to pass similar laws. The Indiana law, many believe, is a bellwether of things to come. For this reason, its provisions deserve close scrutiny.

One of the claims made by advocates of Indiana-like voter identification laws is that other countries require identification to vote, so therefore the United States should too. "If ID cards threaten democracy, why does almost every democracy except us require them, and why are their elections conducted better than ours?" one prominent supporter has asked rhetorically.<sup>4</sup> Senator Mitch McConnell, one of the major champions in Congress of strict voter identification laws, has used the same argument in pushing for such legislation.<sup>5</sup> In the Supreme Court oral argument regarding Indiana's law, Justice Alito queried, "If [impersonation fraud] is not a problem at all, how do you account for the fact that . . . many other countries around the world have voter ID requirements?"<sup>6</sup>

The "everyone else is doing it" claim is exaggerated. While many countries require identification for voting, some do not. Countries that do not require identification include Denmark, Australia, New Zealand, and the United Kingdom (with the exception of Northern Ireland). In Norway,<sup>7</sup> Ireland,<sup>8</sup> and the Netherlands,<sup>9</sup> voters are required to present identification only if it is requested by a poll worker. In Switzerland, every registered voter is sent a registration card prior to an election, and if the voter brings her registration card to the polling place, no additional identification is needed.<sup>10</sup>

Just as importantly, those who make the "everyone else is doing it" claim fail to consider—for those countries that do have identification requirements—each country's law individually to ascertain whether it bears any resemblance to the measures enacted in Indiana. Such a comparison requires asking the following questions:

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<sup>4</sup> Robert Pastor, *America Observed: Why Foreign Election Observers Would Rate the United States Near the Bottom*, AM. PROSPECT, Jan. 1, 2005, at A2.

<sup>5</sup> John Fund, Op-Ed., *Jimmy Carter is Right*, WALL ST. J., May 22, 2006, available at <http://www.opinionjournal.com/diary/?id=110008411>.

<sup>6</sup> Transcript of Oral Argument at 24, *Crawford v. Marion County Election Bd.*, 128 S.Ct. 1610 (2008) (No. 07-21), 2008 WL 83835 [hereinafter *Transcript*].

<sup>7</sup> See Norway, The Main Features of the Norwegian Electoral System, <http://www.valg.no> (select "English", then follow "The Norwegian Electoral System" hyperlink, then select "The Main Features of the Norwegian Electoral System" hyperlink) (last visited Apr. 19, 2009) ("The elector shall produce proof of identity if he or she is not known to the election official.").

<sup>8</sup> See OSCE OFFICE FOR DEMOCRATIC INSTS. AND HUMAN RIGHTS, IRELAND PARLIAMENTARY ELECTIONS 24 MAY 2007, at 17 (2007) (poll workers instructed to ask for identification from every fourth voter).

<sup>9</sup> See Netherlands, Act of 28 September 1989 Containing New Provisions Governing the Franchise and Elections (Elections Act), Last Amended by Act of 28 April 2005, Bulletin of Acts and Decrees 2005, No. 229, Section J24.

<sup>10</sup> OSCE OFFICE FOR DEMOCRATIC INSTS. AND HUMAN RIGHTS, SWISS CONFEDERATION FEDERAL ELECTIONS 21 OCTOBER 2007, at 18 (2008).

- What type(s) of identification meet the relevant requirement?
- How easy is it for people to obtain the required form(s) of identification?
- Are there any provisions for voters who do not possess the required form(s) of identification?
- Is anyone exempt from the relevant identification requirement?
- Has the relevant identification requirement disenfranchised eligible voters?

While we cannot yet offer comprehensive answers to these questions, we can make a few salient observations that all point in the same direction. The Indiana voter identification law, with the exception of its provisions for absentee voters, is far more restrictive than many of the identification laws enacted elsewhere around the world; and even some of these less restrictive identification laws carry significant dangers of disenfranchisement.

## I. COMPARATIVE IDENTIFICATION REQUIREMENTS

### *A. Types of Identification Allowed*

Identification laws vary greatly in the types of identification they allow voters to present at the polling place. The Indiana law requires every voter to present photo identification issued by the state of Indiana or by the federal government. There are only a few types of identification that qualify: an Indiana driver's license, an Indiana photo ID card, a military ID, a U.S. passport, or a photo student ID from an Indiana state school. Many countries that require identification at the polls provide much greater flexibility. In Ireland, if a poll worker requests proof of identity, the voter may present, in addition to five different forms of photo identification, bank books and even credit cards, checkbooks, and marriage certificates, as long as the voter can also furnish a document which establishes her address.<sup>11</sup> Canada permits any voter who lacks one of the allowed forms of photo identification to present two of forty-five other forms of identification or documentation that have the voter's name and address on at least one. Acceptable documents include leases, student transcripts, and utility bills.<sup>12</sup> Sweden does not require photo identification, and mandates only that "[a] voter who is not known to the voting clerks [produce] an identity document or in another way verify her or his identity."<sup>13</sup> India allows the use of fifteen different types of identification ranging from property documents to arms licenses to income tax identity

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<sup>11</sup> GOV'T OF IRELAND, DEP'T OF THE ENV'T, HERITAGE, AND LOCAL GOV'T, GENERAL ELECTION THURSDAY 24 MAY 2007: IDENTIFICATION DOCUMENTS (2007), available at <http://www.environ.ie/en/Publications/LocalGovernment/Voting/FileDownload,5350,en.pdf>.

<sup>12</sup> Elections Canada On-Line, Voter Identification at the Polls, <http://www.elections.ca/content.asp?section=ele&dir=ids&document=index&lang=e&textonly=false> (last visited Aug. 24, 2009); Canada Elections Act, 2000 S.C., ch. 9.

<sup>13</sup> Proposition 2005/05:837 The Elections Act [government bill] (Swed.).

cards.<sup>14</sup> Included, too, are forms of identification most likely to be possessed by the poor, who might otherwise find themselves disenfranchised. For instance, voters can present ration cards issued to the poor to allow them to buy food staples and kerosene oil at subsidized prices. Roughly eighty percent of rural households and seventy percent of urban households hold such cards.<sup>15</sup> Also accepted are job cards issued to the rural poor as part of the National Rural Employment Guarantee Scheme, which was set up to provide employment to rural dwellers willing to do public works unskilled labor. In the 2008–09 fiscal year, more than forty million households participated in the program.<sup>16</sup>

Relative to many countries around the world, Indiana's identification requirements are restrictive. Unlike Ireland, Canada, and Sweden, Indiana does not allow non-photo forms of identification. Unlike India, Indiana does not include forms of identification most likely to be possessed by the poor, such as leases, Medicaid cards, military discharge certificates, or public housing identification cards. Not all countries, to be sure, offer the flexibility that Ireland, Canada, Sweden, and India do. Belgium, for instance, allows only a single form of identification. But as we shall see below, Belgium, unlike Indiana, makes getting identification easy and has liberal policies in place for voters who fail to bring identification to the polls.

### *B. Ease of Obtaining Identification*

Many democracies make it far easier to obtain identification than does Indiana. Countries such as Spain, Greece, France, Malta, Belgium, and Italy provide national identity documents to their citizens to use for many purposes, including travel, banking, and healthcare access as well as voting. In Spain, Greece, Malta, Belgium, and Italy, possession of such documents is compulsory. By contrast, the United States has never required or provided a national identity document. Indeed, the very idea of such a document has been considered anathema in a country founded on the principle of individual rights protection.<sup>17</sup> Consequently, the infrastructure that exists in many

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<sup>14</sup> Letter from S. K. Kar, Under Secretary, Election Comm'n of India, to Ghandi Nagar, Chief Electoral Officer, Gujarat (Dec. 7, 2007), available at [http://eci.nic.in/CurrentElections/guj\\_ins/ins\\_07122007.pdf](http://eci.nic.in/CurrentElections/guj_ins/ins_07122007.pdf).

<sup>15</sup> Press Note, Ministry of Statistics and Programme Implementation of India, Public Distribution System and Other Sources of Household Consumption, 2004-05 (July 11, 2007), available at [http://mospi.gov.in/press\\_note\\_510-Final.htm](http://mospi.gov.in/press_note_510-Final.htm).

<sup>16</sup> DEPT. OF RURAL DEVEL., NREGA IMPLEMENTATION STATUS REPORT FOR THE FISCAL YEAR 2008–2009, available at <http://nrega.nic.in/states/nregampr.asp>.

<sup>17</sup> IDs—NOT THAT EASY, QUESTIONS ABOUT NATIONWIDE IDENTITY SYSTEMS 7 (Stephen T. Kent & Lynette I. Millett eds., National Academy Press 2002), available at [http://www.nap.edu/html/id\\_questions](http://www.nap.edu/html/id_questions) (“In the United States, citizens’ concern for civil liberties, their historic association of ID cards with repressive regimes, and states’ rights concerns have discouraged movement toward a governmentally sanctioned nationwide identity system. Additionally, because the country was settled by immigrants, a significant fraction of whom wanted to escape just such practices, many U.S. record systems were intentionally designed not to gather linking data.”).

European democracies for getting identification documents into the hands of voters is absent in Indiana, as it is in other parts of the United States.

Many European countries, furthermore, make special efforts to ensure that everyone is able to obtain identification. In Belgium, every citizen is automatically sent an identity card upon reaching the age of twelve, and every adult is given notice when it is time for renewal.<sup>18</sup> In Spain, citizens can obtain a national identity card at their local police stations or from mobile teams dispatched to municipalities without police stations.<sup>19</sup> In Malta, housebound citizens can request that government agents come to their residences to complete the paperwork necessary for obtaining identification.<sup>20</sup>

Consider, too, Mexico, a country that the United States is sometimes urged to emulate when it comes to electoral administration.<sup>21</sup> Mexican electoral authorities issue each person a voter identification card (*credencial para votar*) when she registers to vote, and as of 2006, over ninety-five percent of Mexicans were on the registration rolls.<sup>22</sup> According to the immediate past president of the Federal Electoral Institute (IFE), the agency that oversees Mexican elections, this high rate of registration is a result of an aggressive campaign that IFE undertakes 365 days of the year, not just around election time. While it is true that a citizen must get the card from an IFE office, there are more than one thousand such offices in the country, and when elections approach, even more are opened. In addition, IFE sends mobile units to more remote parts of the country as elections approach to make it easier for people living in those areas to register.<sup>23</sup> While an applicant generally needs some form of documentation to obtain a card, a card will be issued to an applicant without access to such documentation if two individuals with identification vouch for that person's identity.<sup>24</sup>

Contrast Indiana, where the documentation requirements are dizzying.<sup>25</sup> In essence, if a citizen does not already have a current driver's license or

<sup>18</sup> Belgium, La carte d'identité électronique ou eID, [www.belgium.be/fr/famille/identite/carte\\_d\\_identite/](http://www.belgium.be/fr/famille/identite/carte_d_identite/) (last visited Apr. 19, 2009); Belgium, Documents d'identité FAQ, [http://www.ibz.rn.fgov.be/index.php?id=598&no\\_cache=1&L=0](http://www.ibz.rn.fgov.be/index.php?id=598&no_cache=1&L=0) (last visited Apr. 14, 2009).

<sup>19</sup> Gobierno de España, Ministerio de Interio, Como Obtener su DNI, [http://www.mir.es/SGCAVT/dni/obtencion\\_dni.html](http://www.mir.es/SGCAVT/dni/obtencion_dni.html) (last visited Apr. 14, 2009).

<sup>20</sup> See Electoral Comm'n of Malta, Application for Identity Card, <http://www.electoral.gov.mt/> (select "Downloads") (last visited Apr. 14, 2009).

<sup>21</sup> See, e.g., George W. Grayson, *Registering and Identifying Voters: What the United States Can Learn from Mexico*, 3 ELECTION L.J. 513 (2004); Robert A. Pastor, *Improving the U.S. Electoral System: Lessons from Canada and Mexico*, 3 ELECTION L.J. 584 (2004).

<sup>22</sup> INSTITUTO FEDERAL ELECTORAL, VERIFICACIÓN NACIONAL MUESTRAL: INFORME FINAL DE RESULTADOS (2006).

<sup>23</sup> Phone interview by Tova Andrea Wang with Luis Carlos Ugalde, former President, Instituto Federal Electoral de México (June 13, 2008).

<sup>24</sup> Instituto Federal Electoral, Documentos con los que Debes Acudir a tu Módulo, Para Realizar Cualquier Trámite, <http://www.ife.org.mx/portal/site/ifev2> (select "Credencial para votar," then follow the hyperlink "Identifica el trámite que necesitas realizar") (last visited Apr. 14, 2009).

<sup>25</sup> To get a driver's license or non-driver's ID, an Indiana resident must present a primary document, a secondary document, and a proof of residency; or two primary documents and one proof of residency document. The only items that count as primary documents for individuals under the age of sixty-five are a passport or an original stamped birth certificate. See Office of

passport with a name that matches the name filled out on the voter registration form, that person will have difficulty voting. Even with the proper documents in hand, there are time and transportation problems to overcome. To obtain Indiana photo identification, for example, Indianans must go to the Bureau of Motor Vehicles (BMV). But as Justice Souter observed in his Indiana dissent, requiring travel to a BMV may be tough for some people:

The burden of traveling to a [BMV office] is probably serious for many of the individuals who lack photo identification. They almost certainly will not own cars . . . and public transportation in Indiana is fairly limited. According to a report published by Indiana's Department of Transportation in August 2007, 21 of Indiana's 92 counties have no public transportation system at all, and as of 2000, nearly 1 in every 10 voters lived within 1 of these 21 counties.<sup>26</sup>

There are people in rural Indiana counties without any public transportation who live up to forty-five minutes from the closest BMV.<sup>27</sup> Unlike Spain, Malta, and Mexico, Indiana does not utilize mobile units to service individuals who might have trouble getting to the appropriate office. Indiana, in other words, has failed to put in place any of the measures variously adopted in other parts of the world to make photo identification widely accessible.

### C. Provisions for Voters Who Do Not Possess Identification

Sometimes voters show up at the polls without identification in hand. Many countries have special provisions to handle such voters. In Canada, another voter can vouch for the voter's identity.<sup>28</sup> In Portugal, two voter witnesses can vouch for the identity of a voter, or a voter without identification can vote if she is known to all the presiding election officials.<sup>29</sup> In Italy, a

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the Sec'y of State (Indiana), Obtaining a Photo ID, <http://www.in.gov/sos/photoid/howdoi.html> (last visited Apr. 14, 2009). Only about a quarter of Americans have passports, and many people do not have an original birth certificate at home. Getting a birth certificate, not incidentally, may require the voter to present additional forms of identification. In Indiana, to get a birth certificate, a resident must show a passport, a driver's license, a state ID card, a work ID card with a signature, a military ID with a signature, a school ID with a signature, a veteran's identification, or two of the following documents: bank card, housing lease, social security card, motor vehicle registration, military DD-214, professional license, original employment application that is more than six months old or, ironically, a current voter registration card. Ind. State Dep't of Health, Vital Records—FAQ's, <http://www.in.gov/isdh/20243.htm#VitalFAQ6> (last visited Apr. 14, 2009). The applicant must also know the name of the hospital she was born in and have a mailing address. If a person was born outside of Indiana, she would have to find out and follow the procedures for that state.

<sup>26</sup> *Crawford v. Marion County Election Bd.*, 128 S.Ct. 1610, 1644 (2008) (Souter, J., dissenting).

<sup>27</sup> *Now* (PBS television broadcast Feb. 8, 2008), available at <http://www.pbs.org/now/shows/406/voterid.html>.

<sup>28</sup> See Brief for Dr. Frederic C. Schaffer et al. as Amici Curiae Supporting Petitioners at 9, *Crawford*, 128 S.Ct. 1610 (Nos. 07-21, 07-25).

<sup>29</sup> PRESIDENTE DA REPÚBLICA: LEGISLAÇÃO ELEITORAL art. 82 § 1-2 (Maria de Fátima Abrantes Mendes & Jorge Miguéis eds., 1990).

person without identification is allowed to vote if she is known personally by any one of the presiding election officials, or if another known voter can verify her identity.<sup>30</sup> In Belgium, every voter must have a national identity card to vote, but if the voter loses the card or has it stolen, she may obtain from the police a temporary certificate that can be used for voting.<sup>31</sup>

Various U.S. states that require identification also have special provisions. In Michigan, to give just one example, voters without identification can cast regular ballots if they fill out affidavits stating that they do not have, or failed to bring, acceptable identification.<sup>32</sup>

Contrast Indiana, where voters who show up without identification may have no recourse. Unlike in Portugal, Italy, Canada, Belgium, and states like Michigan, there is no easy alternative route available in Indiana. If voters come to the polls without the right kind of identification, they cannot vote by regular ballot and are instead offered provisional ballots. For the provisional ballots to count, voters must travel to their county boards of elections with the necessary identification within ten days. If they cannot produce proper identification, their votes will not be counted.<sup>33</sup> Even if they do possess identification, individuals without cars may be presented with potentially enormous hardships because their county boards may be some distance away. A person living in Gary, for instance, might have to take a bus all the way to Crown Point, some seventeen miles away.<sup>34</sup>

#### D. Exemptions

Some countries exempt certain groups of in-person voters from showing identification. In France, people living in communities of five thousand or less are exempt.<sup>35</sup> In Germany, only voters who do not have polling notices or who attempt to cast ballots outside of their registered precincts are required to show identification.<sup>36</sup> In Indiana there are also exemptions. Voters in state-licensed facilities, such as nursing homes, are exempt. So too are indigent voters and voters with religious objections to being photographed. However, to have their votes counted, such voters must go to their county boards of elections within ten days following an election to fill out affidavits

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<sup>30</sup> DIREZIONE CENTRALE DEI SERVIZI ELETTORALI, DIPARTIMENTO PER GLI AFFARI INTERNI E TERRITORIALI, MINISTERO DELL'INTERNO, ISTRUZIONI PER LE OPERAZIONI DEGLI UF CI ELETTORALI DI SEZIONE 49-50 (2008).

<sup>31</sup> Belgium, Direction des Elections, Pour l'électeur, <http://www.ibz.rtn.fgov.be/> (select "Elections," then "Législatives 2007," then "FAQ," then "Pour l'électeur") (last visited Apr. 14, 2009).

<sup>32</sup> Mich. Elec. Code §168.523 (LexisNexis 2009); see Nat'l Conference of State Legislatures, Requirements for Voter Identification, <http://www.ncsl.org/programs/legismgt/elect/taskfc/voteridreq.htm> (last visited Apr. 14, 2009).

<sup>33</sup> This is the case unless they are indigent or have religious objections.

<sup>34</sup> *Transcript*, *supra* note 6, at 16.

<sup>35</sup> C. ELEC. ART. R 60 (Fr.), available at <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070239&dateTexte=20090420>.

<sup>36</sup> LOUIS MASSICOTTE, ANDRÉ BLAIS, & ANTOINE YOSHINAKA, ESTABLISHING THE RULES OF THE GAME: ELECTION LAWS IN DEMOCRACIES 121-22 (2003).

swearing under law as to their indigence or religious objections—an onerous process that is likely to deter many from availing themselves of that option. Indiana law, furthermore, leaves indigence undefined, so many who qualify for these exemptions may not even know it.

Yet ironically, when it comes to identification requirements for mail-in absentee voters, Indiana law is relatively lax. Unlike countries such as Spain and Canada—which require absentee voters to provide proof of identification when submitting their absentee ballot applications<sup>37</sup>—Indiana has no identification requirement in place. Indiana’s leniency on this count is all the more ironic insofar as absentee balloting in Indiana, and in the United States more generally, has in fact been prone to fraud. In 2003, absentee fraud in the East Chicago mayoral race resulted in charges against fifty-three individuals and in forty-five convictions. The city had no choice but to hold a new election. Similarly, the results of the 1997 mayoral election in Miami, Florida, were overturned after at least 225 illegal absentee ballots were cast. From 2000 to 2004, prosecutors brought criminal charges for absentee ballot fraud in fifteen states.<sup>38</sup>

In sum, some in-person voters in Indiana are exempt from showing identification, but they must follow burdensome procedures to take advantage of the exemptions. Ironically, only the identification rules for absentee balloting, a form of voting that is prone to fraud, are relaxed.

## II. DISENFRANCHISEMENT OF ELIGIBLE VOTERS

Another detail that voter identification advocates omit in their arguments is that we know little about the extent to which identification requirements abroad may be disenfranchising voters, since few studies on this issue have been conducted around the world.

In 2003, electoral authorities in Northern Ireland undertook one such study shortly after new voter identification requirements went into effect, and their findings are sobering.<sup>39</sup> In Northern Ireland, it is far easier and less costly for a voter to obtain identification than it is in Indiana: a free electoral identity card is made available to anyone in Northern Ireland who does not possess any of the other prescribed forms of identification.<sup>40</sup> To receive the

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<sup>37</sup> See B.O.E. 1985, 19111 (Spain), available at [http://noticias.juridicas.com/base\\_datos/Admin/lo6-1985.html](http://noticias.juridicas.com/base_datos/Admin/lo6-1985.html); Voting by Special Ballot, <http://www.elections.ca/content.asp?section=gen&document=ec90540&dir=bkg&lang=e&textonly=false> (last visited Aug. 24, 2009) (Canada).

<sup>38</sup> Michael Moss, *Absentee Votes Worry Officials as November 2 Nears*, N.Y. TIMES, Sept. 13, 2004, at A1.

<sup>39</sup> See ELECTORAL COMM’N OF THE UNITED KINGDOM, ELECTORAL FRAUD (NORTHERN IRELAND) ACT 2002: AN ASSESSMENT OF ITS FIRST YEAR IN OPERATION (2003) [hereinafter *Electoral Fraud*].

<sup>40</sup> *Id.* at 61. By contrast, in Indiana, to obtain a driver’s license or non-driver’s ID, which state officials claim are “free,” residents must present either an original stamped birth certificate or a passport (which American-born citizens can obtain only by presenting an original stamped birth certificate). See (Indiana) Bureau of Motor Vehicles: Identification Require-

free card, the applicant need only fill out a form, attach a photo, and mail it in a pre-paid envelope.<sup>41</sup> Yet even this free and relatively simple process has not put identification into the hands of all eligible voters. In a survey of voting-age adults commissioned by electoral authorities, seven percent of the respondents reported that they did not possess an allowable form of identification, with levels of non-possession highest among young adults, the poor, the disabled, and renters. Among registered voters, the rate of non-possession was three percent. Thus, taking into account the survey's margin of error, between 4400 and 70,300 registered voters did not possess an eligible form of identification.<sup>42</sup>

Many voters, furthermore, remained unaware of the new identification requirements despite a massive information campaign that included the distribution of leaflets to individual households as well as advertising on radio and television, in local and regional newspapers, on outdoor billboards, and in schools, colleges, and universities. One in five voting-age adults did not know about the requirement, while six of every ten respondents under the age of twenty-five were unaware.<sup>43</sup> Electoral authorities also conducted an in-depth study of one 2003 by-election. They found that one of every one-hundred voters was turned away from the polls for not possessing proper identification.<sup>44</sup>

In Indiana, the number of citizens without the requisite identification is potentially higher. A 2007 study found that more than seventeen percent of registered Indianans did not have the necessary identification to cast in-person ballots under the new law.<sup>45</sup> In 2006, many of those without proper identification cast mail-in absentee ballots, which do not require most voters to

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ments, <http://www.in.gov/bmv/3573.htm> (last visited Apr. 14, 2009). Hence, a voter without a birth certificate handy would have to buy one. That costs ten dollars in Indiana and possibly more if it is from out of state. For example, getting a birth certificate costs twenty dollars in Wisconsin, twenty-five dollars in New Jersey, and thirty dollars in New York State, excepting New York City. See Request for a Birth Certificate, <http://dhs.wisconsin.gov/VitalRecords/birth.htm> (last visited Aug. 24, 2009) (Wisconsin); Getting Copies of Non-Generational Records, <http://www.state.nj.us/health/vital/nongen.shtml> (last visited Aug. 24, 2009) (New Jersey); Birth Certificates, [http://www.health.state.ny.us/vital\\_records/birth.htm](http://www.health.state.ny.us/vital_records/birth.htm) (last visited Aug. 24, 2009) (New York).

<sup>41</sup> *Electoral Fraud*, *supra* note 39, at 61.

<sup>42</sup> *Id.* at 65.

<sup>43</sup> *Id.* at 27, 63.

<sup>44</sup> *Id.* at 64–66.

<sup>45</sup> MATT A. BARETTO ET AL., WASH. INST. FOR THE STUDY OF RACE, THE DISPROPORTIONATE IMPACT OF INDIANA VOTER ID REQUIREMENTS ON THE ELECTORATE 10 (2007). *But see* ROBERT PASTOR ET AL., CTR. FOR DEMOCRACY AND ELECTION MGMT., VOTER IDs ARE NOT THE PROBLEM: A SURVEY OF THREE STATES 17 (2008) (finding that only 0.3 percent of registered Indianans do not have photo identification). What accounts for the large discrepancy between these two studies? Part of it may have to do with margins of error: 6.7 percent for the CDEM study and 3.1 percent for the WISR study. Part of it may also have to do with differences in the questions asked. The CDEM study asked only about the type of identification possessed, whereas the WISR study asked in addition whether the identification was current and contained the person's full name as it appeared on the voter registry—both of which are required to vote. Given the lower margin of error and more relevant questions asked in the WISR study, its findings are probably more accurate and certainly more germane.

show identification, but many others could not and did not.<sup>46</sup> Using the most conservative approach possible, the state of Indiana is ready to concede that at least 43,000 Indiana citizens lack the forms of photo identification required to vote. Opponents argue the number is ten times that.<sup>47</sup>

In short, we know little about the impact of voter identification rules on disenfranchisement around the world. However, what we do know is not encouraging. Even the relatively flexible identification requirements and robust education campaign of Northern Ireland were not enough to put identification into the hands of three percent of registered voters. Estimates from Indiana are rough at best, but they nevertheless indicate that the potential for disenfranchisement in that state may well be higher.

### III. INDIANA'S UNJUSTIFIABLE DIFFERENCES

Although this survey of identification laws is not comprehensive, it does suggest that Indiana is different. Not all democracies require their citizens to show identification when voting. When we compare Indiana to several countries that do have such a requirement, we see that Indiana is in many ways an outlier: its new law is relatively restrictive in the kinds of identification allowed, makes it harder for voters to obtain the necessary identification, places more burdens on voters who do not possess identification on Election Day, and attaches onerous restrictions to identification exemptions—with the ironic exception of fraud-prone absentee balloting.

There is another way to situate Indiana relative to America's peer democracies abroad. As far as we can tell, these countries fall into four broad categories when it comes to identification laws for in-person voters. Countries either: (1) require no identification; (2) require identification only when the identity of a voter is in doubt; (3) allow multiple forms of non-photo identification; or (4) require a single or few types of photo identification but make it easy for voters to obtain that identification. "No identification" countries include Denmark, Australia, New Zealand, and the United Kingdom (with the exception of Northern Ireland). "Only when identity is in doubt" countries include Ireland, Netherlands, Norway, Switzerland, and Sweden. "Multiple non-photo identification" countries include India and

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<sup>46</sup> BARETTO ET AL., *supra* note 45, at 10. Note that not everyone is allowed to cast a mail-in absentee ballot in Indiana. To be eligible, a voter must either: (a) have a specific, reasonable expectation of being absent from the county during the entire period the polls are open; (b) have a disability; (c) be at least 65 years of age; (d) have official election duties outside of her voting precinct; (e) be scheduled to work during the entire period that the polls are open; (f) be confined due to illness or injury, or be caring for someone confined due to illness or injury during the entire period that the polls are open; (g) be prevented from voting because of a religious discipline or religious holiday during the entire period that the polls are open; or (h) be a participant in the state's address confidentiality program. See Absentee Voting, <http://www.in.gov/sos/elections/2402.htm> (last visited Aug. 24, 2009).

<sup>47</sup> *Older Voters: Opportunities and Challenges in the 2008 Election: Hearing Before the S. Special Comm. On Aging*, 110th Cong. 3 (2008) (statement of Wendy R. Weiser, Deputy Director, Democracy Program, Brennan Center for Justice, NYU School of Law).

Canada (indeed Canada allows some forty-five different types). “Photo but easy” countries include Spain, France, Malta, Belgium, and Mexico. Countries in the second, third, and fourth categories—Ireland, Canada, and Belgium for instance—also often have flexible provisions in place for voters who show up at the polls without identification.

Where do we situate Indiana? The Hoosier state does not fit into any of these categories. Limiting our comparison to countries in which identification is always required, we see that unlike “photo but easy” countries, Indiana puts up many administrative hurdles to obtaining identification; and unlike “multiple non-photo identification” countries, Indiana does not permit much flexibility in the types of identification a voter can present. Unlike “photo but easy” and “multiple non-photo identification” countries such as Canada and Belgium, Indiana does not have friendly provisions in place for voters who show up at the polls without identification.

The relative harshness of Indiana’s voter law might be justified on the grounds that high levels of voter fraud require it. But this is not the case. Instances of the kind of fraud this law prevents are nonexistent in Indiana (and exceedingly rare in the United States as a whole). Indiana state leaders conceded that there has never been a case of in-person polling place impersonation in the entire history of the state.<sup>48</sup> During hearings on the voter identification bill, in fact, all the Secretary of State could point to were instances of mail-in absentee ballot fraud<sup>49</sup>—yet the bill specifically exempted mail-in absentee ballot voters from the identification requirement.

Why is absentee ballot fraud so much more common than in-person vote fraud in Indiana? One possibility is that in-person vote fraud exposes the impersonator to far more risk than absentee ballot fraud. Someone engaging in absentee ballot fraud is shielded from public view because ballots are typically submitted by mail. To cast a fraudulent in-person vote, in contrast, requires presenting oneself at a polling station. To pass undetected, the impersonator would have to be sure that the voter to be impersonated had not yet shown up on Election Day. Even armed with this knowledge, an impersonator faces a real danger of being caught. A poll worker or another voter, after all, might know the person being impersonated. People who want

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<sup>48</sup> Brief for Petitioners at 7, *Indiana Democratic Party v. Rokita*, 128 S. Ct. 830 (2007) (No. 07-25) [hereinafter Brief for Petitioners] (“It is undisputed that prior to enactment of the photo identification law, Indiana had never prosecuted a case of in-person voter fraud. Indeed, the State of Indiana conceded that it was not even aware of any actual incidents of in-person fraud. ([T]he State of Indiana is not aware of any incidents or person attempting [to] vote, or voting, at a voting place with fraudulent or otherwise false identification.”) A member of the Indiana House Elections Committee testified that since his election in 1996, not a single legislator or interest group had ever come before the committee indicating, by anecdote or data, that Indiana had a problem with in-person voting fraud. The same member recalls that Indiana Secretary of State Todd Rokita, the State’s chief election official and a prime supporter of the photo identification law, offered no evidence in testimony before that committee of in-person voting fraud in Indiana.” (internal citations omitted)).

<sup>49</sup> Brief for Petitioners, *supra* note 48, at 7. *Indiana Democratic Party v. Rokita*, 128 S. Ct. 830 (2007) (No. 07-25) [hereinafter Brief for Petitioners].

to “steal” elections in Indiana simply stand a higher chance of success and lower chance of prosecution by engaging in absentee ballot fraud.<sup>50</sup>

Paradoxically, the new Indiana law actually *increases* opportunities for election cheating—in the form of abstention buying, which, like absentee ballot fraud, is relatively low risk for the perpetrator, since nothing detectably illegal need go on at the polling place. We know that political operatives around the world have used voter identification requirements to suppress the vote of opposition supporters by “renting” from individuals their identification documents, making these individuals unable to vote. This has taken place in Guyana, Mexico, Venezuela, Kenya, Zambia, and Malawi, among other places.<sup>51</sup> Sometimes the scope of ID-renting has been large. In Mexico, roughly 94,000 people had their abstentions bought in this way during the 2000 elections.<sup>52</sup> ID-renting works best where only one form of identification is allowed, or where voters are likely to possess only one of the allowable forms of identification.<sup>53</sup> That roughly half of Indiana registered voters possess only one form of allowable identification (a driver’s license) certainly makes ID-renting a feasible strategy in that state.<sup>54</sup> A skeptic might counter that Indiana is not in Africa or Latin America, and that ID-renting could not become a serious problem in the Hoosier state. In this context, it is troubling to note that Indiana politicians in places as diverse as the city of East Chicago and rural Crawford County have already demonstrated a willingness to buy votes under the guise of tree-trimming and sidewalk improvement schemes as well as with cash and, as one legend has it, whiskey.<sup>55</sup> Indiana thus may be more vulnerable to identification renting than most are aware.

Whatever the future of abstention buying in Indiana, the threat of in-person voter impersonation has been low. It has been far more real in at least two places abroad that have recently adopted voter identification requirements. In Northern Ireland, this type of fraud has a long history and is

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<sup>50</sup> Of course, engaging in absentee ballot fraud is hardly risk-free, as scattered prosecutions demonstrate. See Moss, *supra* note 38.

<sup>51</sup> FREDERIC CHARLES SCHAFFER, *THE HIDDEN COSTS OF CLEAN ELECTION REFORM* 117–19 (2008).

<sup>52</sup> *Id.* at 117.

<sup>53</sup> For other conditions that facilitate ID-renting, see *id.* at 119–22.

<sup>54</sup> Half is a crude estimate, based on a representative survey finding that fifty-three percent of Indiana registered voters possessed a driver’s license but not a passport or military ID. PASTOR ET AL., *supra* note 45, at 17. To arrive at a more precise figure, it would be necessary to determine how many registered voters who have a driver’s license (but not a military ID or passport) also possess either an Indiana photo ID card or an eligible student ID from an Indiana state school. Unfortunately, this information is unavailable. Note too that a crafty voter might try to outwit an abstention buyer by “renting out” her driver’s license and then voting absentee, which does not require identification. But as long as the buyer defers payment, he can determine, from lists prepared by election officials, which individuals requested and used absentee ballots, and thus which individuals upheld their end of the deal and deserve payment.

<sup>55</sup> See, e.g., Sharon Cohen, *Voter Shenanigans a Political Tradition in Crawford County*, ASSOCIATED PRESS, NOV. 17, 1986; *Two More East Chicago Officials Plead Guilty in Sidewalk Scheme*, ASSOCIATED PRESS, OCT. 6, 2004.

known as “personation.” It had been widespread enough prior to the 2002 voter identification law to spur political parties to assign “personation agents” to polling places to prevent the impersonation of their voters, an especially important safeguard, as impersonators were rarely, if ever, prosecuted.<sup>56</sup> By the time the new requirements were put in place, as an Electoral Commission report put it, “the existence of electoral fraud [was] acknowledged on all sides of the political divide.”<sup>57</sup>

In Mexico, lawmakers overhauled the administration of elections in the early 1990s—including the mechanisms for registering and identifying voters—because the credibility of the entire system had become severely tarnished. During the 1980s, as a former Mexican election official explained, “popular demonstrations against electoral fraud became commonplace”:

The 1988 controversial presidential election demonstrated the illegitimacy of the traditional pattern of electoral administration. Although the PRI [Institutional Revolutionary Party] presidential candidate “legally” won the election, the two most important opposition parties did not accept the outcome, and massive popular protests were organized to try to annul the results.

. . . Consequently, in 1990 with the support of the PRI and a sector of the PAN [National Action Party], Congress passed an electoral reform law.<sup>58</sup>

Thus, in both Northern Ireland and Mexico, the dangers of in-person vote fraud were substantial, widely acknowledged, and part of broader syndromes of electoral malfeasance and prosecutorial impotence.

In this regard, Canada, more than Mexico or Northern Ireland, resembles Indiana. Our northern neighbor adopted new identification requirements in 2007 even though in-person vote fraud did not appear to have been a widespread problem. Indeed the outgoing Chief Electoral Officer testified before a parliamentary committee, “I have no evidence that would lead me to believe there has been any fraud in this country, based on the testimony heard. I have no evidence.”<sup>59</sup> According to the British Columbia Public Interest Advocacy Center, “in the last two decades there have been two prosecutions for fraudulent voting in federal elections.”<sup>60</sup> Consequently, the identification law in Canada was controversial. The minority New Demo-

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<sup>56</sup> PAUL MITCHELL & GORDON GILLESPIE, *The Electoral Systems, in* POLITICS IN NORTHERN IRELAND 66, 72 (Paul Mitchell and Rick Wilford eds., 1999).

<sup>57</sup> *Electoral Fraud*, *supra* note 39, at 15.

<sup>58</sup> Jacqueline Peschard, *Mexico's Search for Credibility*, 3 ELECTION L.J. 412, 413 (2004).

<sup>59</sup> Murray Mollard, Op-Ed., *Voter-ID Law Would Go Too Far*, GLOBE AND MAIL, Dec. 13, 2006, at A27; accord Press Release, British Columbia Civil Liberties Ass'n, Civil Rights Group Criticizes New Voter ID Requirements as Disenfranchising Vulnerable People (Nov. 28, 2006) (on file with author).

<sup>60</sup> Press Release, British Columbia Pub. Interest Advocacy Ctr., Charter Challenge to New Federal Voter ID Rules (Nov. 4, 2007) (on file with authors).

cratic Party (NDP) tried to filibuster the bill in parliament,<sup>61</sup> with NDP Members of Parliament and civil rights advocates alleging that the new law would disenfranchise thousands of poor people.<sup>62</sup> As in Indiana, a coalition of organizations has launched a court challenge to the law.<sup>63</sup>

Canada and Indiana are not, however, similar in all ways. In Canada, the bill was backed by most major parties, and passed into law with their support. In Indiana it was only after Republicans took unified control of the state government in 2004 that voter identification became a legislative priority. The bill was strongly opposed by the Indiana Democratic Party and groups representing elderly, disabled, poor, and minority voters. Nonetheless, it passed on a strict party-line vote in both chambers of the state legislature, with all Democrats voting against and all Republicans voting in favor. It was signed into law by the Republican governor.<sup>64</sup>

Perhaps more significantly, Canada election officials have demonstrated far greater concern than have their counterparts in Indiana about the potential for disenfranchisement. In Indiana, Republican Secretary of State Todd Rokita has been one of the main proponents of the voter identification requirement and has treated concerns about disenfranchisement dismissively. "It's terribly insensitive," he has remarked, "to claim people are too stupid, too dumb or too removed from society that they cannot comply with a simple attempt to protect the polls."<sup>65</sup> In the face of reports that voters have been prevented from voting because of the identification law, he simply denied that such was the case.<sup>66</sup> Given this stance, it is unsurprising that the Secretary of State's office has undertaken no analysis, either before or after enactment of the identification requirements, to determine how many eligible citizens are without requisite identification or would be significantly burdened by the need to obtain it.

Contrast Canada, where concerns about disenfranchisement led election officials to investigate the actual impact of the 2007 requirement. During the September 2007 by-election in Quebec, the first election after the identification requirement went into effect, Elections Canada commissioned surveys and asked poll workers in three electoral districts to keep tallies of people who were turned away from the polls. Among the main findings: 159 of about 73,000 voters (0.2%) did not vote because they could not meet any of the identification requirements (photo identification, two forms of non-photo

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<sup>61</sup> Tim Naumetz, *NDP to Block Progress of Voter ID Bill*, OTTAWA CITIZEN, Feb. 14, 2007, at A6.

<sup>62</sup> Press Release, New Democratic Party, *New Election Law Bad for Voters: NDP* (Feb. 13, 2007) (on file with authors).

<sup>63</sup> *Rose Henry v. Canada*, No. S080662 Vancouver Registry (British Columbia).

<sup>64</sup> Brief for Petitioners, *supra* note 48, at 39.

<sup>65</sup> Steve Walsh, *Voter ID Ruling Left to Judges*, POST-TRIBUNE (Merrillville, IN), Oct. 19, 2006, at A1.

<sup>66</sup> See Editorial, *A Principled Stand; League of Women Voters' Lawsuit on State Voter ID Law to Be Commended*, TRIBUNE-STAR, Jul. 2, 2008; see also Cynthia Tucker, Op-Ed., *Voter ID Law Religious in Its Absurdity*, ATLANTA J.-CONST., May 11, 2008; Greg Gordon, *With No Photo IDs, Nuns Denied Ballots in Indiana*, McCLATCHY, May 6, 2008.

identification, or fellow-voter vouching).<sup>67</sup> Despite the relatively low number of people who left without voting, electoral authorities still worried about a provision of the new law that required identity documents to include a residential address with street name and number. Since more than a million people, mostly rural and aboriginal, do not possess documents showing such a residential address,<sup>68</sup> election officials feared that many voters would be unable to meet the new requirement.<sup>69</sup> After Canada's election chief briefed lawmakers about this concern, Parliament quickly amended the law to allow non-residential addresses, as long as they match the information contained on the list of electors.<sup>70</sup> When voters in a Saskatchewan electoral district complained that they were turned away from the polls during a March 2008 by-election because of identification problems, electoral authorities promptly launched an investigation.<sup>71</sup>

What explains the difference in responsiveness of election officials in Indiana and Canada? In Indiana, the Secretary of State is an elected, partisan official. In Canada, the Chief Electoral Officer is a nonpartisan official appointed by the House of Commons; and although a simple majority in the House would suffice for appointment, all appointments have instead been made by unanimous consent.<sup>72</sup> Far less partisan than his counterpart in Indiana, the Chief Electoral Officer in Canada has a freer hand and clearer mandate to protect the voting rights of *all* citizens, regardless of how they are likely to vote.

#### IV. CONCLUSION

Indiana's new law requires government-issued photo identification in order to vote, something that many citizens simply do not possess and would have trouble obtaining. It is the most stringent identification law in the country, but many state legislators across the United States are trying to pass laws that imitate it. Advocates often justify these stringent measures by claiming that "everyone is doing it"—that most other democracies place these kinds of restrictions on voting. But the "everyone is doing it" argument is wrong. Not all democracies require voter identification, and among those countries that do, there is a great variation in approach. These differences may seem

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<sup>67</sup> ENVIRONICS RESEARCH GROUP, APPLICATION OF THE NEW VOTER IDENTIFICATION PROCEDURES UNDER BILL C-31 FOR THE SEPTEMBER 17 FEDERAL BY-ELECTIONS IN QUEBEC 7 (2008).

<sup>68</sup> Post office boxes and rural route numbers are more common among these individuals.

<sup>69</sup> *A Million Voters Could Be Disenfranchised*, TORONTO STAR, Oct. 23, 2007.

<sup>70</sup> See An Act to Amend the Canada Elections Act, C. GAZ. vol. 30 No. 3, chap. 37 (23 Jun. through 14 Dec. 2007) (amending the Canada Elections Act regarding verification of residence).

<sup>71</sup> See *Elections Canada Checking Byelection Turnout*, CANADIAN PRESS, Mar. 19, 2008; see also ENVIRONICS RESEARCH GROUP, EVALUATION OF NEW VOTER IDENTIFICATION REQUIREMENTS: BY-ELECTIONS—MARCH 17, 2008 (2008).

<sup>72</sup> See Jean-Pierre Kingsley, *The Administration of Canada's Independent, Non-Partisan Approach*, 3 ELECT. L.J. 406, 406 (2004).

nanced to some, but the devil is often in the details. And in this instance, the details may mean the difference between the right to vote and disenfranchisement.

Concerns about poll integrity are, to be sure, legitimate. Yet integrity is not enhanced by measures that address a non-existent problem. In Indiana, the threat of in-person vote fraud is negligible at best. The state's new law thus goes too far, and it unnecessarily threatens to keep eligible voters from casting their ballots. While not enough research exists to permit us to say with any confidence which measures—if any—might minimize or eliminate the danger of identification-induced disenfranchisement in Indiana or elsewhere, this article does suggest a number of practices worthy of further study, including: commissioning mobile units, allowing forms of identification most likely to be possessed by the poor, and requiring non-partisan electoral administration. We should recall, too, that a number of well-functioning democracies and half of all U.S. states seem to be getting by fine without any identification document requirements at all.