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Cover Page Footnote

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FINGER IMAGING: A 21ST CENTURY SOLUTION TO WELFARE FRAUD AT OUR FINGERTIPS

I. Introduction

In May 1994, the State of New York arrested Shirley Simmons for defrauding the welfare system of over \$450,000 by collecting Aid to Families with Dependent Children ("AFDC"), food stamps and Medicaid benefits under at least fifteen aliases and for seventy-three children including eleven sets of twins.¹ Applying and reapplying under several names, Ms. Simmons illegally collected benefits at different locations throughout New York City using original and photocopied birth and baptismal certificates, landlords' letters and utility bills that were stolen or forged.² Investigators admit that Ms. Simmons' fraud might have gone undetected had the State Department not discovered last year that she had applied for multiple passports.³

The potential for fraud in the welfare system is vast.⁴ For example, 10% of the \$22 billion spent annually on food stamps nationwide is lost to fraud.⁵ In 1993, New York State spent \$2.7 billion on AFDC, \$1.1 billion for Home Relief recipients, \$2.2 billion for supplemental security income recipients and \$1.8 billion for food stamp recipients.⁶ In New York City alone, over 17% of the population receives some form of public assistance.⁷

Federal and state governments distribute many different kinds of public assistance. The federal programs include Old Age Survivors

1. Seth Faison, *Officials Say Woman on Welfare Stole Thousands With Fake ID's*, N.Y. TIMES, May 20, 1994, at B1.

2. *Id.*

3. *Id.*

4. In one set of cases in New York City alone, 114 people were caught in 1992 having defrauded New York City's welfare agencies of nearly \$45 million by using phony Social Security numbers and identification cards. Christopher Ruddy, *Fingerprinting Can Catch New York's Welfare Cheats*, NEWSDAY, Feb. 17, 1993, at 80.

5. Interview with Sarah Moody-Mariani, Bureau Chief of the Welfare Fraud Unit, New York County District Attorney's Office (Jan. 4, 1995).

6. New York State Department of Social Services Office of Quality Assurance and Audit in Conjunction with Rockland and Onondaga County DSS Assessment Report of the Automated Finger Imaging Matching System Demonstration Project, at 4 (Jan. 1994); Kyle Hughes, *Welfare Fingerprinting Law May Change*, GANNETT NEWS SERVICE, Nov. 22, 1994, at 1.

7. Interview with Sarah Moody-Mariani, Bureau Chief of the Welfare Fraud Unit, New York County District Attorney's Office (Jan. 4, 1995).

and Disability Insurance ("OASDI"),⁸ Supplemental Security Income ("SSI")⁹ and Medicare.¹⁰ Together with state and local governments, the federal government oversees AFDC,¹¹ Aid to Families With Dependent Children where a parent is unemployed ("AFDC-U"),¹² Medicaid,¹³ Food Stamps,¹⁴ Emergency Assistance to Families¹⁵ and Unemployment Insurance.¹⁶ Citizens of New York who do not qualify for any of the federally funded programs

8. Social Security Act, subchapter II, 42 U.S.C. § 401 (1994).

9. Social Security Act, subchapter XVI, 42 U.S.C. § 1381 (1994). Through this program, Congress provided for support for the aged, blind and disabled in every state.

10. Social Security Act, subchapter XVIII, 42 U.S.C. § 1395 (1994).

11. Social Security Act, subchapter IV, 42 U.S.C. § 601 (1994). AFDC is created by Title IV of the Social Security Act "for the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives . . . to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence." *Id.* It includes aid to the child, a caretaker relative and any other essential member of the household. Social Security Act, subchapter IV, 42 U.S.C. § 606 (1994). The Social Security Act defines the term "dependent child" as a "needy child" who is either a student or under age 18 and "has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent." Social Security Act, subchapter IV, 42 U.S.C. § 606(a) (1994).

12. Social Security Act, subchapter IV, 42 U.S.C. § 607 (1994) (mandatory for all states participating in the AFDC program as of October 1, 1992). These benefits are given to unemployed, but employable, adults. They are available only if the child's father has been unemployed for at least thirty days, had not "without good cause" declined employment and had six or more quarters of work in any thirteen calendar quarters or was qualified to receive unemployment compensation within one year prior to application for aid. Social Security Act, subchapter IV, 42 U.S.C. § 607(b)(1)(C) (1994).

13. Social Security Act, subchapter XIX, 42 U.S.C. § 1396 (1994) (different rules apply to 100% state-funded Medicaid). Medicaid is designed to provide medical assistance to those people who are eligible under one of the existing welfare programs established under the Social Security Act, AFDC or the Supplemental Security Income program for the aged, blind and disabled.

14. Food Stamp Act, 7 U.S.C. § 2011 (1995) (arguably a cash program). This program figures significantly in the national welfare scheme and currently mandates "an opportunity to obtain a more nutritious diet . . ." Food Stamp Act, 7 U.S.C. § 2013(a) (1995). Recipients benefit by paying less for the stamps than they are worth in purchasing power.

15. Social Security Act, subchapter IV, 42 U.S.C. § 603(a)(5) (1994); Social Security Act, subchapter IV, 42 U.S.C. § 606(e)(1) (1994). Similar to AFDC-U, this program dispenses aid, for a period not exceeding thirty days in any twelve-month period, to a child who qualifies for AFDC. A child qualifies who "is without available resources [and] the payments, care, or services involved are necessary to avoid destruction of such child or to provide living arrangements . . ." *Id.*

16. Social Security Act, subchapter III, 42 U.S.C. § 501 (1994); New York program: N.Y. LAB. LAW § 500 (McKinney 1995). Unemployment programs provide benefits for those not currently working and require substantial past employment and involuntary unemployment for eligibility.

may be eligible for Home Relief—New York State's public assistance program. Asset and income tests primarily determine eligibility for Home Relief.¹⁷ The asset test considers both countable and non-countable assets;¹⁸ to be eligible for Home Relief, an individual's or family's countable assets may not exceed \$1,000.¹⁹ The income test consists of a two-step evaluation of the applicant's gross income compared to the state's standard of need.²⁰ To be eligible, a person's gross monthly income must not exceed 185% of the standard of need.²¹

Criminals commonly defraud the welfare system by forging, stealing or fraudulently obtaining multiple New York State welfare cards and using them to collect additional benefits. Recipients of public assistance in New York, however, may only collect their benefits in one county in the state.²² New York State implemented this requirement to control and keep track of those receiving public assistance throughout the state. By requiring recipients to collect all of their benefits in one county, the potential for fraud is lessened because officials become acquainted with individual recipients. This requirement, however, is not enough to curtail fraud as the case of Shirley Simmons exemplifies. A simple and inexpensive solution exists to ensure that welfare recipients do not receive

17. SENATOR JOSEPH R. HOLLAND, HOME RELIEF: A NEW PERSPECTIVE 5 (Dec. 1994).

18. *Id.*

19. *Id.* Common assets which are not countable include the value of a home, the first \$1,500 of equity in a car, household and personal belongings, most educational grants and work study monies, and the face value of life and burial insurance (the cash surrender value is considered countable).

20. HOLLAND, *supra* note 17, at 5.

21. *Id.* "Sources of income used in determining eligibility include, but are not limited to, wages, unemployment compensation, disability and social security payments, child support, and pensions. Food stamps, educational loans and grants, and housing subsidies are not considered income. A net income test is also employed in order to consider the contrast between an individual's expenses and actual income."

22. N.Y. SOC. SERV. LAW § 62 (McKinney 1994). This law states that each public welfare district shall be responsible for the assistance and care of any person who resides or is found in its territory and who is in need of public assistance and care which he is unable to provide for himself. Since public assistance recipients cannot possibly be residents of more than one district at once, it is impossible for more than one district to have the responsibility of dispensing aid to them. If those in need intentionally apply for aid to a district in which they do not reside, they attempt to receive aid that they do not deserve. Consequently, these intentional actions are illegal. *See, e.g., Lee v. Smith*, 387 N.Y.S.2d 952 (N.Y. Sup. Ct. 1976), *aff'd*, 58 A.D.2d 528, 394 N.Y.S.2d 1021 (1st Dept.), *aff'd*, 373 N.E.2d 247, 402 N.Y.S.2d 351 (N.Y. 1977) (local social services district has responsibility to assist any person who resides or is found in territory of the district, and who is in need of public assistance and care that he is unable to provide for himself).

multiple benefits. Finger imaging, an updated version of fingerprinting,²³ is now technologically available, and would virtually eliminate the simultaneous collection of benefits from different counties.

Although cities like New York understand the systemic problems underlying welfare fraud, there is little indication that application of the most common remedial measure, case-by-case criminal prosecution, has ended the threat of fraud.²⁴ First, the threat of prosecution does not deter potential wrongdoers. In *United States v. Concepción*,²⁵ the federal district court acknowledged that defendants seemed amazed at the ease with which they defrauded the government by obtaining and using false identification to obtain illegal public assistance.²⁶ As the *Concepción* court asserted, "it can be stated with nearly the certainty of a scientific hypothesis tested over the years in our criminal courts that government benefit programs will be abused if an easy opportunity is provided."²⁷ Second, law enforcement officials should not have to direct resources toward uncovering and prosecuting those who are fraudulently collecting public assistance. At the root of this fraud is the ease with which criminals can obtain false identification documents, such as birth certificates and social security numbers. Instead of combatting the result of the problem, officials should eliminate the potential for this type of fraud by preventing the

23. Since it was implemented in the 1890s, fingerprinting has proved an infallible means of personal identification. Arthur Conan Doyle referred to fingerprinting in his story *A Case of Identity* in 1891, and Mark Twain used the technique to differentiate between twins in his novel *THE TRAGEDY OF PUDD'NHEAD WILSON* (1894). COMPTON'S ENCYCLOPEDIA, ONLINE EDITION, Downloaded from America Online, Feb. 7, 1995. The uniqueness of fingerprint patterns has been recognized since the 19th century when in England thumb prints were used by merchants on cash receipts and in India hand prints once took the place of signatures on contracts. PRINTRAK INTERNATIONAL, INC., *UNIQUE IDENTIFICATION: A NEW GENERATION OF EXPECTATIONS* (1994).

24. See *United States v. Concepción*, 825 F. Supp. 19, 24 (E.D.N.Y. 1993) ("None-theless, there is little indication that this effort has ended the threat of welfare fraud in this city. The selection of roughly one hundred individual wrongdoers for federal prosecution in a city, where, according to the 1990 census, over thirteen percent of households receive public assistance from funds administered by the city, state and federal governments is a poor substitute for meaningful reform of the public institutions that permitted this theft.").

25. *Id.* (A group of approximately 1,000 women from the Dominican Republic defrauded the federal government by using false names to open fraudulent welfare cases).

26. *Id.* ("The clear sense of impunity with which they acted suggest that the prospect of penal sanction is remote or nonexistent in the minds of such low-level offenders.").

27. *Id.* at 25.

fraud before individuals commit it. Although the *Concepción* court did not explicitly advocate the implementation of a finger imaging system, it mentioned the success of the finger imaging program in California and implied that a finger imaging program in New York State might be an excellent solution.²⁸

Finger imaging is a much discussed topic in New York State. On July 9, 1994, then-Governor Mario Cuomo decreed that all state counties could fingerprint welfare recipients as a way of deterring fraud.²⁹ More recently, aides and advisers to Governor George Pataki have indicated a desire to promote the finger imaging program.³⁰ In January 1994, the New York State Department of Social Services organized a demonstration project in Rockland and Onondaga Counties to evaluate the cost effectiveness of an automated two-digit finger imaging matching identification system.³¹ This demonstration project was extremely successful; for every \$1.00 spent on the program, the counties saved \$4.50.³²

As a result of this program, New York State Senator Joseph Holland has supported a measure³³ that would expand the finger imaging program from the two test counties to the entire state.³⁴ New York City Mayor Rudolph Giuliani and county executives from

28. "It is not for judges to decide whether our nation's commitment to helping those in need is placed at risk by allowing the fraud and abuse encouraged by negligent supervision to sap public support for government welfare programs. It is appropriate to note that this court's scarce criminal judicial resources can be used more effectively in other cases—particularly if the responsible governmental agencies take effective legislative and executive action to eliminate the kinds of endemic welfare abuses revealed in this case." *Id.*

29. Nicholas Goldberg, *Cuomo Oks Welfare Fingerprinting for NY*, NEWSDAY, July 9, 1994, at A13.

30. Kyle Hughes, *Welfare Fingerprinting Law May Change*, GANNETT NEWS SERVICE, Nov. 22, 1994, at 1.

31. Chapter 41 of the Laws of 1992 amended section 139-a of the Social Services Law and required the Rockland and Onondaga County Departments of Social Services to authorize finger imaging demonstration projects. The initial legislation authorized the project for the period from October 1, 1992 to October 1, 1993 and a legislative change extended the project until March 31, 1994. The project was authorized for Home Relief applicants and recipients only. *See supra* note 34 for further discussion.

32. New York State Department of Social Services Office of Quality Assurance and Audit in conjunction with Rockland and Onondaga County Department of Social Services Assessment Report of the Automated Finger Imaging Matching Identification System Demonstration Project 1 (Jan. 1994).

33. N.Y. SOC. SERV. LAW § 139-a (McKinney 1994).

34. *Id.* This law would further expand the current New York State law which authorizes finger imaging demonstration projects, identical to the one in Rockland and Onondaga, in Allegany, Broome, Dutchess, Niagara, Oneida, Orange, Oswego, Rensselaer, Steuben and Suffolk Counties. This law only includes recipients and applicants for Home Relief in New York and does not encompass AFDC.

across the state support the bill.³⁵ Remarking on the legislation, Senate Majority Leader Ralph J. Marino stated, “[R]ampant fraud and abuse in the welfare system is [sic] currently costing taxpayers millions of dollars. Finger imaging will make the welfare program more accountable and public assistance a more dignified aid program for both needy recipients and taxpayers who deserve to know that their money is being spent wisely.”³⁶

Fingerprinting, however, is not a panacea for all forms of welfare fraud. The New York County District Attorney’s Office Welfare Fraud Prosecution Unit has identified many different kinds of welfare fraud.³⁷ In addition to the use of multiple aliases to obtain additional benefits, criminals may also underreport income on public assistance applications or fail to report new income once receiving assistance.³⁸ They also may trade their benefits, such as food stamps, on the street, in stores or through fencing operations in order to receive cash or other goods.³⁹ Moreover, New York’s proximity to New Jersey and Connecticut enables “double dip-pers”⁴⁰ to register in multiple jurisdictions and collect public assistance in excess of their entitled amount.⁴¹ While fingerprinting on a countywide or a statewide scale will prevent the use of multiple aliases within the state, it is unlikely that it will prevent any of these other types of fraud.⁴² Only when the finger imaging system is implemented nationwide will the system begin to combat some of the different types of fraud that are common within the welfare system.

Fingerprinting is not a new procedure; officials have long used the procedure for identification and organizational purposes.

35. Press Release from State Senator Ralph J. Marino (April 5, 1994) (on file with author).

36. *Id.*

37. Interview with Sarah Moody-Mariani, Bureau Chief of the Welfare Fraud Unit, New York County District Attorney’s Office (Jan. 4, 1995).

38. *Id.*

39. *Id.* Food stamps are often sold for cash at approximately 70% of face value or traded for drugs, guns, and other non-food items. Two party rent checks are cashed illegally by check fencing stores. Loan sharks provide up-front money in return for the future welfare benefits anticipated by a recipient.

40. A colloquial term used to describe a particular type of fraud within the welfare system. Specifically, the criminal uses multiple identities to fraudulently obtain more public assistance than he really deserves.

41. Interview with Sarah Moody-Mariani, Bureau Chief of the Welfare Fraud Unit, New York County District Attorney’s Office (Jan. 4, 1995).

42. Although the finger imaging program will not directly prevent these other types of fraud, fingerprinting in general will make applicants and recipients more accountable and therefore less likely to be willing to lie or misrepresent themselves.

Although critics of finger imaging programs contend that this procedure would place an unnecessary criminal stigma upon individuals receiving public assistance,⁴³ New York State already requires state residents to submit their fingerprints for a variety of different, non-criminal purposes without any resulting stigma.⁴⁴

Part II of this Note describes the finger imaging process and summarizes the current New York Social Services law regarding public assistance. It also outlines the current finger imaging bill before the New York State Legislature. Part III examines and considers the two major policy arguments against the implementation of the program. Part IV outlines the legal controversy regarding finger imaging and addresses each express concern as well as constitutional issues. Part V compares New York's finger imaging legislation with similar legislation already in place in California and argues that the New York program will be as effective as California's. In conclusion, this Note urges the New York State Legislature to enact a statewide finger imaging requirement for public assistance and embrace the finger imaging system as an effective and proper method of combatting welfare fraud in the state.

II. The Science of Finger Imaging and Relevant Caselaw

Before studying the legal issues involved in the finger imaging program, one must understand the finger imaging process itself and the area of science from which it derives. This Part explains the mechanics of the finger imaging process and the overall utility of the system. Specifically, it outlines finger imaging technology and its various applications. Next, this Part discusses the specifics of the New York finger imaging program and the test program implemented in Rockland and Onondaga counties. Finally, this Part discusses various federal and state welfare cases that have had a direct effect on the New York finger imaging program.

A. The Technology of Finger Imaging and the Specifics of the New York Program

Finger imaging is part of a field of science called biometrics. Biometrics involves the scanning or recording of some unique personal characteristic, such as a fingerprint, a retinal print or voice pattern and the comparison of the digitized image or recording

43. See *infra* Part III for an analysis of opponent's concerns.

44. See *infra* notes 102-09 and accompanying text.

against a verified database for positive identification.⁴⁵ Digital imaging, the technology involved in finger imaging, is already a basic component of a myriad of applications ranging from document management to medical radiology to videoconferencing, and its contribution to the field of biometrics makes the current technology of finger imaging possible.⁴⁶ In finger imaging, the technology converts a fingerprint into a highly detailed and exact electronic image that a computer can interpret and compare to other images. Of the many biometric recognition technologies present today, fingerprint identification systems are one of the most accurate.⁴⁷ More than half the states and several major cities have established fingerprint identification databases for a variety of purposes.⁴⁸ For example, motor vehicle drivers in California, Texas and Colorado must give their fingerprints to obtain their driver's licenses.⁴⁹ The fingerprinting requirement enables Department of Motor Vehicle

45. Dan Driscoll, *Fingerprint ID Systems: To Multimedia Imaging for Law Enforcement & Security*, ADVANCED IMAGING, May 1994, at 20. Generally, biometric technology is applied for two purposes: identification and security. Security applications are used primarily for access control - where the subjects are cooperative and want to be identified for access into a building or computer system. Identification usually involves "cold searches," comparing an unknown subject with a large database of known quantities for a match. Essentially, security is a one-to-one comparison to see if a sample matches the image on file, while identification involves a one-to-many search. Identification systems, however, are much more demanding. For example, securing a building for a company that has 1,000 authorized employees requires 1,000 distinct images in a database. To gain entry, the employee's biometric input needs to be compared to the 1,000 samples for a match. For widespread applications like welfare benefits processing, however, it is not unusual to have tens or hundreds of thousands of database entries. In this situation, the uniqueness of the biometric entry is crucial. *Id.*

46. *Id.* Digital imaging allows people to examine data and pictures on a level never before achieved. Operators may organize data pixel by pixel to achieve a substantially clearer picture or to perform a detailed examination of an image.

47. *Id.* Other biometric technologies include voice print identification in which a computer records a sample of an individual's voice, retinal coding in which a computer records the unique pattern of the blood vessels on a human retina and DNA coding where a computer records the unique genetic structure of an individual's genetic makeup. *Id.* Finger imaging technology is approximately 99.99% accurate. Telephone Interview with Robert McGrath, *Printrak International, Inc.* (April 5, 1995).

48. Jacques Steinberg, *Coming Soon: Fingerprints at Many Fingertips*, N.Y. TIMES, Jan. 10, 1993, at 6. These purposes include identification systems for driver's licences and applications requirements for many different professions.

49. Licensed California Drivers (Thumbprint) CAL. VEHICLE CODE § 12800 (West 1995); Licensed Texas Drivers (Thumbprint) TEX. REV. CIV. STAT. ANN. art. 6687b-5b (West 1994); Licensed Colorado Drivers (Index Finger) COLO. REV. STAT. ANN. § 42-2-106 (West 1995).

workers to determine quickly whether an applicant should receive a license.⁵⁰

Under the current bill, New York State would implement this type of technology in a program entitled the Automated Finger Imaging System ("AFIS"). Although this technology has a wide range of potential applications, the AFIS program focuses only on welfare fraud. The proposed AFIS program is a simple non-intrusive system that operates like a scanner at a grocery checkout counter.⁵¹ To begin the finger imaging process, each individual places his/her right and left index fingers on the scanning device so that the software may convert the minutiae of the finger into a numeric algorithm for storage and matching purposes.⁵² The scanner generates a digitized print and triggers a computerized photograph of the client that is easily and instantly available for reference⁵³ and indicates whether the client is currently receiving public assistance within the scope of the database or has applied anywhere else within the scope of the database.⁵⁴ A positive match indicates to the investigator that the client is already in the system and insures that the applicant is denied a duplicate check.

In Rockland and Onondaga counties, the two test areas for the finger imaging system in New York State, the social services districts have established finger imaging workstations at the Home

50. Drivers who have had their license taken away will often apply for a license using a different identity. The finger imaging program will immediately detect this type of fraud.

51. Officials have selected North American MORPHO Systems, Inc., of Tacoma ("MORPHO"), to oversee an estimated \$6 million expansion of the New York welfare fingerprinting system. MORPHO beat out five other bidders to develop, install and maintain the system. In addition, MORPHO will operate the automated system in some counties. *Fingerprinting Firm Wins NY Job*, THE NEWS TRIBUNE, Nov. 30, 1994, at C1.

52. New York State Department of Social Services Office of Quality Assurance and Audit in Conjunction with Rockland and Onondaga County DSS Assessment Report of the Automated Finger Imaging Matching Identification System Demonstration Project. Minutiae are the points where ridges on a fingerprint split or end; the vector direction of the converging lines also characterize these points. *Id.* These points define the fingerprint; the more identifiable intersections, the more accurate the fingerprint match. *Id.*

53. In New York, officials also use a digital photograph of the recipient taken during the application process to prevent fraud. If a match is detected, officials will compare the photograph with the individual with whom the match was made. Similarities or differences will be noted and used in the final determination of fraud.

54. Under the current bill, the scope of the database would be each welfare district. N.Y. SOC. SERV. LAW § 139-a (McKinney 1994). The database, however, could expand to all of New York State and eventually the entire country and form a nationwide database established solely for the purpose of combatting welfare fraud.

Relief enrollment locations.⁵⁵ Home Relief applicants must provide their names, social security numbers and dates of birth to the system operator for data entry. As no hard copy of the digitized finger image is available, the police, or any other agency, cannot share this information.⁵⁶ In addition, because this information serves only an administrative purpose, it is not in any way a disqualification tool.⁵⁷

B. The Proposed AFIS Plan for New York State

Chapter 41 of the Laws of 1992 amended section 139-a of the New York State Social Services Law and initiated a finger imaging requirement into the qualifications for obtaining welfare in Rockland and Onondaga counties.⁵⁸ This was a test project designed to determine the cost effectiveness of an automated two-digit finger imaging matching identification system. Although proponents originally aimed this legislation solely at Home Relief recipients, legislators planned to expand the program so that it would encompass more categories of welfare recipients. The Legislature eventually did expand section 139-a to include the social services districts of Allegany, Broome, Dutchess, Niagara, Oneida, Orange, Os-

55. New York State Department of Social Services Office of Quality Assurance and Audit in Conjunction with Rockland and Onondaga County DSS Assessment Report of the Automated Finger Imaging Matching Identification System Demonstration Project. These workstations consisted of a micro-computer, two finger imaging scanning devices (tissue box size), a monitor (CRT) and keyboard, as well as a video camera.

56. Section 139-a forbids the use of finger imaging data to anyone other than officials detecting and prosecuting welfare fraud. N.Y. SOC. SERV. LAW § 139-a(3) (McKinney 1994).

57. *See id.* Section 139-a(3)(f) states that: "Notwithstanding any other provision of law, nothing contained herein shall be deemed to authorize or permit the termination, suspension, or diminution of Home Relief benefits except as elsewhere specifically authorized in this chapter, provided, however, that where the basis of a proposed sanction is a determination of a fraudulent multiple enrollment based on the use of an automated finger imaging matching identification system authorized pursuant to this section, no such sanction shall be imposed pending a hearing conducted pursuant to section twenty-two of this chapter within forty-five days of the notification of the applicant or recipient of the alleged fraudulent multiple enrollment, or pending a final determination of a request by an applicant or a recipient for correction or amendment of a record pursuant to section ninety-five of the public officers law, and no such sanction shall be imposed unless the local social services district has verified the results of the automated finger imaging matching identification system by means of a manual match conducted by a person who is qualified to perform such identifications. N.Y. SOC. SERV. LAW § 139-a(3)(f) (McKinney 1994).

58. N.Y. SOC. SERV. LAW § 139-a (McKinney 1994).

wego, Rensselaer, Steuben and Suffolk counties.⁵⁹ In addition, State Senator Kruger sponsored an amendment to the state social services law that would create another test project in the City of New York.⁶⁰

Section 139-a stipulates, in part, that any data collected and maintained through the use of this finger imaging system "may not be used, disclosed or redisclosed for any purpose other than the prevention of multiple enrollments in Home Relief, may not be used or admitted in any criminal or civil investigation, prosecution, or proceeding, other than a civil proceeding pursuant to section 145-c of this article."⁶¹ This section 145-c civil proceeding is directed toward those who intentionally defraud or attempt to defraud the welfare system.⁶² The provision further states that the

59. N.Y. SOC. SERV. LAW § 139-a (3)(a) (McKinney 1994). "The social services districts of Allegany, Broome, Dutchess, Niagara, Onondaga, Oneida, Orange, Oswego, Rensselaer, Rockland, Steuben, and Suffolk shall authorize and implement demonstration projects for the purposes of determining the cost-effectiveness of preventing multiple enrollment of Home Relief benefit recipients through the use of an automated two-digit finger imaging matching identification system. The system shall only include Home Relief benefit recipient finger imaging upon application for eligibility for such benefits and finger imaging of Home Relief recipients currently receiving Home Relief benefits."

60. N.Y.S.B. 1153, 218th General Ass., 1st Sess. § 4(a) (Jan. 24, 1995). "The social services district of the City of New York shall authorize and implement demonstration projects for the purposes of determining the cost-effectiveness of preventing multiple enrollment of Home Relief benefit recipients through the use of an automated two-digit finger imaging matching identification system. The system shall only include Home Relief benefit recipient finger imaging upon application for eligibility for such benefits and finger imaging of Home Relief recipients currently receiving Home Relief benefits."

61. N.Y. SOC. SERV. LAW § 139-a (3)(b) (McKinney 1994):

Notwithstanding the provisions of section one hundred thirty-six of this article or any other provision of law, data collected and maintained through the use of an automated finger imaging matching identification system as authorized by this subdivision may not be used, disclosed or redisclosed for any purpose other than the prevention of multiple enrollments in Home Relief, may not be used or admitted in any criminal or civil investigation, prosecution, or proceeding, other than a civil proceeding pursuant to section one hundred forty-five-c of this article, and may not be disclosed in response to a subpoena or other compulsory legal process or warrant, or upon request or order of any agency, authority, division, office or other private or public entity or person, except that nothing contained herein shall prohibit disclosure in response to a subpoena issued by or on behalf of the applicant or recipient who is the subject of the record maintained as a part of such system. Any person who knowingly makes or obtains any unauthorized disclosure of data collected and maintained through the use of an automated two-digit finger imaging matching identification system shall be guilty of a class A misdemeanor, and shall be punished in accordance with the provisions of the penal law.

62. See *infra* notes 70-71 and accompanying text.

court, in accordance with the penal law, will punish any person who illegally uses this information or discloses it without authorization.⁶³ Under this statute, an individual's fingerprint, taken for purposes of obtaining welfare, may not be used to identify that person for any other purpose.⁶⁴ The police may not access this database when investigating a crime or examining an individual's background. Even an individual with an outstanding warrant for his or her arrest may not be identified using the welfare finger imaging database. This finger imaging information may only prevent an individual from collecting excess welfare benefits.⁶⁵ This provision in the statute assuages the common fear among finger imaging opponents that the finger imaging system will result in a large all-encompassing database reminiscent of "Big Brother" in George Orwell's *1984*.⁶⁶

On account of fear that the finger imaging program would be used for other purposes, the New York Legislature included specific language that precludes the disclosure of data obtained from the program.⁶⁷ Thus, originally, section 139-a made no mention of the use of finger imaging information to investigate or prosecute individuals who had used multiple identities to obtain illegal benefits. A recent amendment⁶⁸ to the law, however, addresses this specific issue.⁶⁹ The law now limits the use of finger imaging information solely to detect multiple enrollments, or to further a criminal investigation or prosecution of crimes arising from multiple enrollment for Home Relief.⁷⁰

Once welfare fraud has been detected, section 139-a provides a safeguard. If the state accuses an individual of welfare fraud because of the results of a finger image match, it will not automatically terminate his or her benefits. Instead, the individual may request a hearing, pursuant to Chapter 22 of the Consolidated Laws; that the state must conduct within forty-five days of the notification of the applicant or recipient of the alleged fraudulent mul-

63. N.Y. SOC. SERV. LAW § 139-a (3)(b) (McKinney 1994) (this person shall be guilty of a class A misdemeanor).

64. *Id.*

65. N.Y. SOC. SERV. LAW § 145-c (McKinney 1994).

66. GEORGE ORWELL, *1984* (1961). *See supra* note 61 and accompanying text.

67. N.Y. SOC. SERV. LAW § 139-a (3)(b) (McKinney 1994); *see supra* note 61 for text.

68. New York enacted this amendment on January 10, 1995.

69. An act to amend social services law 139-a, 1995-96 regular sessions, In senate, January 10, 1995.

70. An act to amend social services law 139-a, 1995-96 regular sessions, In senate, January 10, 1995.

tiple enrollment.⁷¹ At this hearing, the applicant or recipient may present evidence demonstrating that the state's information is incorrect or inaccurate. The individual will also have the opportunity to examine the state's evidence. The state may present additional evidence, obtained through its investigation, that proves that the individual is fraudulently applying for or receiving public assistance.⁷² This hearing preserves due process and minimizes the chance that a computer mistake will interrupt the deserved benefits of a recipient or applicant.

This experiment has thus far proven to be successful, revealing that, of the 3,344 individuals receiving Home Relief in the two counties in which the experiment is taking place, 145 or 4.3% proved unwilling to go through the finger imaging process when it came time to reapply.⁷³ When interviewed by state officials, the 145 individuals offered no justifiable reason as to why they did not reapply. The report concluded that it seemed reasonable to infer that the requirement to enroll in the new system led to the closing of the 145 cases.⁷⁴ If implemented statewide, the assessment determined that the state and social services districts would save approximately \$46.2 million (out of an estimated \$1.1 billion in annual Home Relief expenditures).⁷⁵

C. Welfare Caselaw Applied to the New York AFIS System

Several U.S. Supreme Court decisions deal directly with welfare and outline an individual's right to receive public assistance. In applying finger imaging legislation, New York State must observe and conform to the Court's holdings. Although once considered a privilege, courts currently consider welfare an "entitlement."⁷⁶ De-

71. N.Y. SOC. SERV. LAW 139-a (3)(f) (McKinney 1994).

72. The State also may verify the computer results by manually matching the fingerprints of the people in question. N.Y. SOC. SERV. LAW § 139-a (3)(f) (McKinney 1994).

73. *Id.* (After receiving a notice informing them about the new requirement, these 145 individuals failed to show up to reapply or claim their benefits.).

74. *Id.*

75. *Id.*

76. *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970); *Shapiro v. Thompson*, 394 U.S. 618, 627 n.6 (1969). In *Goldberg v. Kelly*, the Court held that welfare was not a mere privilege; although not a "right" or an accrued property interest, it was nevertheless constitutionally protected. *Goldberg*, 397 U.S. at 262. The Court held that the interest of the eligible recipient in the uninterrupted receipt of public assistance, which provides him with essential food, clothing, housing, and medical care, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens. *Id.* at 264-66. Specifically, this ruling regards public assistance as

cisions such as *Goldberg v. Kelly*⁷⁷ and *Shapiro v. Thompson*⁷⁸ summarize the way both the United States and New York State must construe welfare. As a result of *Goldberg* and *Shapiro*, states, which maintain their own welfare systems separate from the federal system, may not terminate welfare benefits or discriminate against groups of welfare recipients without first demonstrating a compelling interest that justifies breaching the recipients' rights to public assistance.⁷⁹ Although states may not impose restrictions more onerous than those already established by the federal government, individual states may be more generous than the federal government.⁸⁰ The federal standards define a group of intended recipients to which a state must not deny benefits, but a state may always adopt additional standards that enlarge that group of eligible recipients. New York State's AFIS program does nothing to deprive needy individuals of public assistance. It merely prevents individuals from receiving more than their legal share of welfare benefits. New York State's AFIS program is non-discriminatory and continues to treat welfare as an entitlement, thereby satisfying the standards set by the Supreme Court. Other than those intending to defraud the welfare system, no group can claim discrimination as a result of this program.

New York State's general assistance program, Home Relief, provides benefits to low-income, disabled and able-bodied individuals,

important enough so as to ensure that individuals cannot be deprived of this entitlement without the due process of the law. In terms of finger imaging legislation, the government may not immediately and automatically deny aid to a public assistance applicant or current recipient solely because of a fingerprint match. Applicants and recipients must be given the opportunity for a hearing in the matter.

77. *Goldberg*, 397 U.S. 254.

78. *Shapiro*, 394 U.S. 618.

79. *Goldberg*, 397 U.S. at 262; *Shapiro*, 394 U.S. at 627.

80. In *Minino v. Perales*, the court defined this constitutional mandate in New York and, by extension, the boundaries of the AFIS plan. *Minino v. Perales*, 581 N.Y.S.2d 162 (N.Y. 1992). New York State may enact additional legislation with regard to finger imaging that goes further than current federal legislation, if the federal government chooses to implement finger imaging legislation. As long as New York State does not legislate a benefits program that provides less than the federal government, it is free to provide more. The Court of Appeals rejected New York State's contention that compliance with federal law required adoption of a preemptive income "deeming" provision. Moreover, it refused to agree with the claim that the doctrine of federal supremacy prohibited the state courts from holding a state statute, as applied to a state funded program, unconstitutional under the State Constitution because such a ruling would impliedly conflict with federal legislation. *Id.* at 164 (quoting HOLLAND, *supra* note 17, at 30). Instead, the court ruled that no federal preemption existed and placed the burden of funding public assistance for newly arrived, needy, legal aliens entirely upon the state and its local governments. *Id.*

as well as couples and families with children, who do not meet eligibility requirements for federally funded cash-assistance programs, or who are awaiting an eligibility determination for federal Supplemental Security Income (SSI).⁸¹ In New York, unlike other states, state and local social services districts equally share the costs of the Home Relief program, and the local social services districts administer the program at the county level.⁸² New York State has the highest monthly caseload in the country with 319,893 welfare recipients in July 1994.⁸³ California, the state with the next highest monthly caseload, served only 170,511 people in May 1994.⁸⁴

The New York Legislature is subject to a constitutional mandate that requires the state and its localities to provide support for the needy. Article XVII, Section 1 of the New York State Constitution states that "the aid, care, and support of the needy are public concerns and shall be provided by the state and such of its subdivisions, and in such manner and by such means, as the Legislature

81. HOLLAND, *supra* note 17, at 2. In New York, Home Relief recipients receive a basic living allowance which includes a Basic Needs Grant (\$112), a Home Energy Allowance (\$14.10), and a Supplemental Home Energy Allowance (\$11.00), totalling \$137.10 per month for all Home Relief recipients. In addition, the shelter allowance varies according to shelter costs within the county. For example, the shelter allowance with heat in New York City is \$215 a month for an individual (the allowance increases according to household size). Overall, a single Home Relief recipient in New York City is eligible for \$352 per month cash assistance, \$107 per month food stamps, and Medicaid benefits (see 18 N.Y. COMP. CODES R. & REGS. TIT. 18, § 352.3 (1995) for a list of benefit levels by county). *Id.* at 5.

82. *Id.* Alabama, Arkansas, Louisiana, Mississippi, Oklahoma, Tennessee, West Virginia and Wyoming do not offer any form of general assistance programs. Colorado, Florida, Georgia, Kentucky, Nevada, Montana, North Carolina, North Dakota, South Dakota, Texas and Virginia do not offer general assistance programs statewide, but some counties within the state choose to administer and fund general assistance programs. California, Idaho, Indiana, Iowa, Maine, New Hampshire, and Wisconsin require counties or localities to fund and administer general assistance programs without uniform statewide guidelines. Connecticut administers general assistance through each of the state's municipalities in accordance with regulations published by its Department of Social Services. In Illinois and Nebraska, the state runs the general assistance program in some counties, but in other counties the county funds and administers the program on its own. Finally, Alaska, Arizona, Delaware, Hawaii, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, and Washington have statewide general assistance programs with eligibility and monthly benefit formulas that are set by the respective state. *Id.*

83. HOLLAND, *supra* note 17, at 24.

84. *Id.* Pennsylvania has the third highest caseload with 170,511 people; Ohio is fourth with 69,234 people; Illinois is fifth with 40,023 people; New Jersey finishes sixth with 37,000 people. *Id.*

may from time to time determine.”⁸⁵ The New York Court of Appeals, in *Tucker v. Toia*, clarified this constitutional provision, which defines the boundaries of the AFIS system in New York. In *Tucker v. Toia*, the Court of Appeals held that Article XVII “establishes a right fundamental to the relationship between the State of New York and its needy citizens.”⁸⁶ In ruling that a restriction on the age of a welfare recipient violated the state constitution, the court held that the New York State Constitution specifically decreed Article XVII as an assistance provision and that the Legislature may not deny all aid to certain individuals who are admittedly needy solely on the basis of criteria unrelated to need.⁸⁷ The court, however, did not hold that the Legislature could not set limits on the amount of aid given or impose restrictions on those who receive aid. It specifically stated that “our Constitution provides the Legislature with discretion in determining the means by which [public assistance] is to be effectuated, in determining the amount of aid, and in classifying recipients and defining the term ‘needy.’”⁸⁸ Consequently, the Legislature has the ability to determine which individuals qualify to receive public assistance. It follows that this opinion establishes that the Legislature has authority to use methods such as finger imaging in order to classify recipients.

Because New York precedent requires the state to give aid to those who qualify as needy, the AFIS program cannot interfere with the right of legitimately needy individuals to obtain public assistance. The New York Legislature and courts, however, have never prescribed how and in what manner the state must give that aid.⁸⁹ Put simply, as long as the state satisfies the need, the method of satisfying that need does not matter. On account of this, New York State may use finger imaging to determine whether or not an

85. N.Y. CONST. art. 17, § 1. The Constitution was adopted on November 8, 1938 and effective January 1, 1939.

86. *Tucker v. Toia*, 89 Misc. 2d 116, 390 N.Y.S.2d 794, 800 (Sup. Ct.), *aff'd*, 371 N.E.2d 449, 400 N.Y.S.2d 728 (N.Y. 1977).

87. *Tucker v. Toia*, 371 N.E.2d 449, 452-53 (N.Y. 1977).

88. *Id.* at 731.

89. In *Tucker v. Toia*, for instance, the court did not base its ruling on whether the state could limit benefits in a certain way, but rather that the denial of benefits in that particular case stemmed from a measure not directly related to the neediness of the individual. In other words, the state may not deny benefits to an individual for the sole reason that support from another source is not forthcoming. *Tucker v. Toia*, 400 N.Y.S.2d at 732 (1977). The state, however, may seek support from legally responsible sources and is ultimately responsible for ensuring that needy individuals receive their state entitled support.

individual is truly "needy." A positive match using the finger imaging system is a strong indication that an individual is collecting benefits elsewhere and thus is not needy because the state is already addressing their needs.⁹⁰ Opponents of finger imaging, however, do not believe that AFIS will be effective in determining the needy within the state.

III. Addressing Opponents' Concerns

Despite the court-asserted right of officials to impose reasonable requirements to determine the eligibility of welfare applicants and recipients,⁹¹ many individuals and groups oppose fingerprinting welfare recipients as a prerequisite to obtaining benefits and contend that the program will do more harm than good. This Part outlines the major arguments against finger imaging and addresses each in turn. In addition, this Part compares the perception of finger imaging with that of social security numbers when the federal government first introduced them in 1935.

Much of what opponents of finger imaging are concerned with stems from a long history of onerous welfare application requirements designed to prevent fraud⁹² and instill prejudice against individuals receiving public assistance.⁹³ People have perceived many

90. Although a positive match is a strong indication that an applicant or recipient is collecting benefits elsewhere, the individual still has the opportunity to request a hearing with regard to the matter. During this time, officials will conduct an investigation to verify or refute the results of the initial match and while this investigation is being conducted, the individual will not be denied any benefits she is currently receiving. NEW YORK SOC. SERV. LAW § 139-a (3)(f) (McKinney 1994).

91. See *infra* Part IV for legal analysis.

92. See MIMI ABRAMOVITZ, REGULATING THE LIVES OF WOMEN 322-23 (1988) (In 1951, Congress passed the Jenner Amendment as a rider to the 1951 Revenue Act. In response to charges of welfare fraud, the Jenner Amendment allowed states to publicize names on the ADC rolls provided that the information was not used for political or commercial purposes. Although numerous efforts to find evidence of fraud routinely produced negligible numbers, about half the states adopted the Jenner Amendment, "adding to the stigma and harassment of welfare mothers and to the idea that most did not need (read: deserve) economic aid."); *Id.* at 323 (Many states used a variety of administrative rules to discredit and shrink ADC. For example, in 1961 in Newburgh, New York, the town announced a thirteen-point code of welfare regulations that tightened eligibility rules, enforced residency requirements and "harassed clients in a variety of ways . . . Although twice as many people collected Unemployment Insurance than welfare at the time, ADC became the focus of the attack that limited the time families could receive ADC grants, required all able-bodied men to work off their relief checks, threatened to remove children from "unsuitable" homes, and forced welfare families to pick up their checks at the police station.").

93. MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA xi-xii (1986) ("Other themes run through the history

of these requirements as intentionally making the collection of public assistance harder or as resulting in a criminal stigma for those receiving benefits. Thus, one of the major arguments against finger imaging is that it "criminalizes" welfare recipients.⁹⁴ A president of a local NAACP chapter stated that "the fact that people have to rely on welfare is already dehumanizing enough and for them to have to now be fingerprinted makes it even more dehumanizing and demoralizing."⁹⁵ President Clinton alluded to the social stigma of receiving welfare benefits in his first State of the Union Address:

[The welfare system] doesn't work; it defies our values as a nation. If we value work, we can't justify a system that makes welfare more attractive than work The people who most want to change the system are the people who are dependent on it. They want to get off welfare; they want to go back to work But to all those who depend on welfare, we should offer ultimately a simple compact. We will provide the support, the job training, the child care you need for up to two years, but after that anyone who can work, must⁹⁶

Although legislators have, at times, erred with respect to welfare legislation, finger imaging is not one of those mistakes and does not criminalize welfare recipients. Since the very beginning of public assistance, recipients have had to identify themselves in order to

of welfare. One is the stigma attached to extreme poverty in America. In the land of opportunity, poverty has seemed not only a misfortune but a moral failure."); H. RODGERS, JR., *POVERTY AMID PLENTY: A POLITICAL AND ECONOMIC ANALYSIS* 3 (1979) ("Americans have long been taught that the poor are simply the lazy, those whose flaws of character fail to have the requisite initiative and self-discipline to improve their lot."); MICHAEL B. KATZ, *THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE* 15 (1989) ("The foundation of the social welfare edifice erected by [Franklin Roosevelt's] administration became a distinction between public assistance and social insurance (relief based solely on need versus universal programs such as Social Security) that assured that public policy would continue to discriminate invidiously among categories of dependent people."); C. HENDERSON, *INTRODUCTION TO THE STUDY OF DEPENDENT, DEFECTIVE, AND DELINQUENT CLASSES* 10 (1901) ("The typical 'pauper' [an able-bodied person who is receiving public assistance] is a social parasite, who attaches himself to others, and, by living at their expense, suffers loss of energy and ability by disease and atrophy. Pauperism at this stage is a loathsome social disease, more difficult to cure than crime.").

94. Thomas W. Faist, *Fingerprints Not Racist*, *THE TIMES UNION*, Mar. 30, 1994, at A10; *Welfare Recipients to be Fingerprinted, N.Y. Faces Likely Court Challenge*, *THE RECORD*, July 10, 1994, at A4; Mike McKeon, *Welfare Fingerprinting Plan Draws Fire*, *THE TIMES UNION*, Jan. 13, 1994, at B1.

95. Mike McKeon, *Welfare Fingerprinting Plan Draws Fire*, *THE TIMES UNION*, Jan. 13, 1994, at B1.

96. William J. Clinton, *The State of the Union Address* (Jan. 25, 1994), in *WASH. POST*, Jan. 26, 1994, at A12.

establish eligibility.⁹⁷ Similar to taking a color photograph of an applicant's face or demanding a social security number, finger imaging is simply a positive identification system. In fact, a color photograph of a person's face is more invasive and provides more information than finger imaging, which does not reveal sex, age, race, national origin or any other such trait.⁹⁸ When applying for public assistance, an applicant must provide routine personal information; finger imaging is no more stigmatizing or invasive than providing any of this other information.

In addition, it is difficult to understand why individuals consider finger imaging stigmatizing when a Cuomo administration study found that 93% of current welfare recipients surveyed did not think that the finger imaging process was an inconvenience.⁹⁹ Ninety-four percent of the same group also opined that a finger imaging system would prevent multiple enrollments.¹⁰⁰ With such an overwhelming number of recipients finding no inconvenience associated with finger imaging and agreeing with its effectiveness, it is reasonable to conclude that these recipients do not believe finger imaging to be stigmatizing and generally approve of the procedure.

Close to one million people in New York State alone have submitted fingerprints for non-criminal reasons.¹⁰¹ Among the groups nationwide who must be fingerprinted include: New York State lawyers; New York City School District employees;¹⁰² licensed Cal-

97. Thomas W. Faist, *Fingerprints Not Racist*, TIMES UNION, Mar. 30, 1994, at A10.

98. *Id.*

99. New York State Department of Social Services Office of Quality Assurance and Audit in Conjunction with Rockland and Onondaga County DSS Assessment Report of the Automated Finger Imaging Matching System Demonstration Project 3 (Jan. 1994) (This study surveyed the opinions of 265 individuals who had completed enrollment.); See Katti Gray, *Many Take Process in Stride*, NEWSDAY, Feb. 6, 1994, at 40.

100. *Id.* Written notices informed applicants and undercare clients that the finger images were for social services use only. Of those surveyed, 95 percent believed that their finger images were for social services use only and would not be compared to the records of any other agency. *Id.* at 4.

101. Alex Storozynski, *Fingerprinting is Not an Infringement of Rights*, EMPIRE STATE REP., Apr. 1993, at 46 ("If these people are willing to have their fingerprints on file as condition of employment, then surely the less fortunate that have to ask for government assistance should understand that the state is trying to cut down on abuse to better serve them."). Finger imaging has a variety of uses and, with the advent of new technology, its utility will only increase. Some people have begun fingerprinting their children as a way to help find them if they are lost or kidnapped. Dental work is one way of identifying the dead in disasters, but fingerprints work as well. Soon, fingerprints will be on bank cards and credit cards. Fingerprints registered at a hotel's front desk will replace room keys, and a touch of a scanner will open your room. *Id.*

102. N.Y. EDUC. LAW, § 2590-b(20) (McKinney 1994).

ifornia, Texas and Colorado drivers;¹⁰³ New York school bus drivers,¹⁰⁴ New York public art gallery employees,¹⁰⁵ all military personnel; newborn infants and their mothers;¹⁰⁶ New York accountants;¹⁰⁷ police officers;¹⁰⁸ and most doctors as a part of their license application.¹⁰⁹ If fingerprinting public assistance applicants and recipients is as stigmatizing as opponents suggest, then, logically, every accountant, police officer and teacher (to name only a few groups) in New York State must also share in this criminalizing stigma.

Opponents of finger imaging also claim that the savings attributed to the program are not nearly what its proponents claim they are.¹¹⁰ Opponents assert that the savings reported take into account not only those trying to defraud the system, but also those who, despite being legitimately eligible for aid, have a fear of being fingerprinted. As a result, these opponents profess that the savings

103. Licensed California Drivers (Thumbprint) CAL. VEHICLE CODE § 12800 (West 1995); Licensed Texas Drivers (Thumbprint) TEX. REV. CIV. STAT. ANN. art. 6687b-5b (West 1994); Licensed Colorado Drivers (Index Finger) COLO. REV. STAT. ANN. § 42-2-106 (West 1995).

104. N.Y. VEH. & TRAF. LAW, § 498(2)(d) (McKinney 1994).

105. N.Y. ARTS & CULT. AFF. LAW, § 61.11 (McKinney 1994).

106. N.Y. COMP. CODES R. & REGS. tit. 10(c), § 405.21 (1994).

107. N.Y. COMP. CODES R. & REGS. tit. 8, § 59.5 (1994) (Professional Public Accountancy and Certified Public Accountancy license applicants upon taking the examination).

108. N.Y. COMP. CODES R. & REGS. tit. 9(f), § 6056.6 (1994) (Peace Officers licensed to carry or use firearms).

109. N.Y. COMP. CODES R. & REGS. tit. 8, § 59.5 (1994) (Professional Psychology license applicants upon taking the examination, Professional Dentistry license applicants upon taking the examination; Professional Medicine license applicants upon taking the examination; and Professional Veterinary Medicine license applicants upon taking the examination to name a few).

110. Virginia Ellis, *Officials Can't Lift a Finger to Curb Fraud*, LOS ANGELES TIMES, Aug. 3, 1993, at B1; Carla Rivera, *Fingerprint Program to Target Aid Fraud: Critics Say There Are Already Elaborate Security Measures and the Three-Year Experiment Will Cost More Than It Saves*, LOS ANGELES TIMES, April 7, 1994, at B1 ("Critics counter that the county has presented no proof that those who were unwilling to be fingerprinted represented actual instances of fraud. They say that many of the General Relief recipients may simply have been intimidated by the fingerprinting plan."); *Drive to Fingerprint Welfare Recipients Saves \$4.5 Million*, DAILY NEWS OF LOS ANGELES, Oct. 16, 1994, at N15 ("Advocates of the poor, however, questioned whether legitimate recipients were being denied aid because they had failed to receive notice of the new fingerprinting requirement or were too frightened to comply."); Rick Brand, *Pressing Ahead on Welfare Prints Suffolk Picks Firm to Halt Fraud*, NEWSDAY, May 18, 1994, at A25 ("Critics of such programs have complained that savings do not come so much from deterring fraud as from scaring away people who are entitled to benefits."); Sheryl McCarthy, *Wrong Cure for Welfare*, NEWSDAY, Mar. 16, 1994, at 30.

from catching those defrauding the system actually is much less than the reported figures.

The Cuomo administration study found that there was no explainable reason why 4.3% of the 3,314 people in the program failed to reapply.¹¹¹ In its analysis, it stated that, "while not an absolute certainty, it appears reasonable to conclude that the requirement to enroll in the new system was the explanation for the closing of the 145 cases."¹¹² Although the study did not conclusively prove that the people who failed to reapply did so because they were consciously defrauding the government, it also did not prove that these people were legitimately deserving of aid and did not apply solely out of a fear of fingerprinting. To address this fear of fingerprinting, officials in California, for example, have taken the extra precaution of including permanent and temporary exemptions from the finger imaging requirement if applicants or recipients meet certain conditions.¹¹³ Permanent exemptions are granted to clients who lack the capacity to cooperate, have permanent medical or psychological conditions that would prevent them from being fingerprinted, are missing both index fingers, provide medical verification which states that they cannot be fingerprinted (a licensed medical provider or social worker must aid in this process) or are permanently unable to come into the office on account of illness or injury (verification from a licensed medical provider or licensed social worker must be on file).¹¹⁴ Temporary exemptions are granted to clients who are temporarily unable to come into the office on account of verified illness or injury, have their index fin-

111. New York State Department of Social Services Office of Quality Assurance and Audit in Conjunction with Rockland and Onondaga County DSS Assessment Report of the Automated Finger Imaging Matching System Demonstration Project 3 (Jan. 1994):

Of the 3,344 undercare clients called in by both districts, 495 clients had their cases closed. We reviewed the 495 cases and identified the reasons for the closings. We found that 330 cases were closed for what appeared to be routine causes such as whereabouts unknown, moved out of district, incarcerated, excess resources, and client request-no reason given. During the eight months that we tracked these cases, another 20 cases [were] submitted to the finger imaging process and were re-enrolled. For the 145 remaining cases (4.3 percent of the 3,344 universe) there was no explainable reason other than an unwillingness to submit to finger imaging.

112. New York State Department of Social Services Office of Quality Assurance and Audit in Conjunction with Rockland and Onondaga County DSS Assessment Report of the Automated Finger Imaging Matching System Demonstration Project 3 (Jan. 1994).

113. Dorothy Enisman et al, General Assistance Program Information, San Francisco Department of Social Services, March 1, 1994, Memorandum 94-06, at 3.

114. *Id.*

gers/hands temporarily in a cast or bandage (if one index finger is in a cast or is bandaged, however, the client's other index finger must be fingerprinted), reside in a locked halfway house, present verification from licensed medical providers or licensed social workers, or are given temporary exemptions by an Americans with Disabilities Act worker.¹¹⁵ When New York State implements its own finger imaging requirement, it undoubtedly must have similar exemptions.

If someone does not qualify for one of the above exemptions, he or she must be fingerprinted before receiving public assistance. It is unfortunate if law-abiding people, who legitimately deserve public assistance, do not apply for the benefits simply because of an irrational fear of fingerprinting. This fear can be minimized by promoting an educational program designed to educate and inform a public-assistance applicant about what finger imaging actually does and how the state uses, and does not use, the technology. For example, providing finger imaging brochures at every public-assistance site throughout the state will help anxious individuals realize that this program will not interfere with their rights to receive public assistance. Because officials will only be able to use these fingerprints in the context of preventing welfare fraud,¹¹⁶ individuals need not worry that they will use them in any other context.

Finger imaging is not intended to scare away potential recipients of public assistance; it merely is another identification tool that officials will use to deliver the correct amount of aid as fairly and quickly as possible. New York State's legal responsibility to these citizens ends with treating public assistance as both an entitlement and a fundamental right and encouraging needy people to apply for aid.¹¹⁷ Because there has not been an effective system of welfare fraud detection in New York,¹¹⁸ it has gone undetected and is, for the most part, unmeasurable. If New York's AFIS program has a 2% success rate in stemming fraud, the state, depending on the targeted population, will save over \$200 million in the first year alone.¹¹⁹

Opponents of a finger imaging system have voiced many of the same objections that individuals expressed when the United States

115. *Id.*

116. See *supra* note 61 and accompanying text.

117. See *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Tucker v. Toia*, 390 N.Y.S.2d 794 (Sup. Ct.), *aff'd*, 371 N.E.2d 449 (N.Y. 1977); N.Y. SOC. SERV. LAW § 139-a.

118. See *supra* note 5.

119. Letter from Elmer Toro, Inspector General of the State of New York, to Bill Damerest, Writer, ROCKLAND JOURNAL NEWS (June 2, 1993).

introduced social security numbers. Like fingerprints, social security numbers are unique to the individual and are used for identification purposes. Criminals have increasingly obtained fraudulent social security numbers, however, thus subverting the identification purpose of social security numbers. Fingerprinting, and now finger imaging, prevent such subversion. Because social security numbers have been in place for a much longer period of time and are similar in purpose to finger imaging, it is useful to examine the public's attitude toward social security numbers and their role in society. Through this analysis, one can gain valuable insight into the finger imaging program and better understand its societal value.

When President Franklin D. Roosevelt signed the Social Security bill into law on August 14, 1935,¹²⁰ many Americans feared that the registration form was an invasion of privacy and that the collection of and access to such a vast amount of data would lead to the regimentation of American society.¹²¹ Today, however, social security numbers have become an integral part of all levels of government and private business. The possession of a social security number is necessary for a variety of purposes, including: applying for a job, opening a bank account, filing income-tax returns, owning Federal Government securities, and receiving dividends, unemployment compensation, old-age assistance, Medicare, or other types of Federal Assistance.¹²²

Over time, Americans have come to accept the use of social security numbers as part of their daily routine. In addition, courts have ruled that requiring divulgence of social security numbers is not a violation of a citizen's right to privacy.¹²³ In particular, the courts have upheld the use of social security numbers as a valid method of preventing fraud in administering government "entitle-

120. Social Security Act, 42 U.S.C. §§ 301-1011 (1995).

121. Wilbur J. Cohen, *The Early Days of Social Security; Social Security's 50th Anniversary*, SOCIAL SECURITY BULLETIN, Aug. 1985, at 1. People feared that the government would gain access and control over parts of people's lives that they wanted to keep separate from the government.

122. *Social Security; Rising Concern Over Misuse of Your Number*, U.S. NEWS & WORLD REP., Nov. 17, 1975, at 50.

123. *Cantor v. Supreme Court of Pennsylvania*, 353 F. Supp. 1307, 1321-22 (E.D. Pa. 1973) (social security number required for license to practice law); *Conant v. Hill*, 326 F. Supp. 25, 26 (E.D. Va. 1971) (social security number required for driver's license); *Ostric v. Board of Appeal on Motor Vehicle Liability Policies and Bonds*, 280 N.E.2d 692, 695 (Mass. 1972) (social security number required for renewal of driver's license); *Arthur v. Department of Soc. & Health Servs.*, 576 P.2d 921, 925 (Wash. Ct. App. 1978).

ments." For example, in *Chambers v. Klein*,¹²⁴ the District Court of New Jersey held that a regulation requiring parents to obtain and furnish social security numbers for children receiving AFDC payments was consistent with the Privacy Act of 1974 and did not violate the constitutional right of privacy enjoyed by the children and their parents. The court held that a parent's right to decline to obtain social security numbers for their children is neither a fundamental right nor "implicit in the concept of ordered liberty."¹²⁵ Thus, there was no need to determine whether the regulations at issue served any compelling governmental interest.¹²⁶

In addition, Congress has determined that social security account numbers are "useful to the efficient and effective administration of federal programs."¹²⁷ It has noted that the use of these identification numbers serves numerous functions including the avoidance of administrative errors on account of recipients having identical names, the determination of eligibility, the verification of a dependent child's resources and entitlement to certain benefits, and the detection and prevention of fraud.¹²⁸ This determination of Congress can be applied to welfare benefits without violating any constitutional right to privacy or equal protection of the law.¹²⁹

In 1986, the U.S. Supreme Court addressed the question of the legality of the use of social security numbers in administering welfare.¹³⁰ In *Bowen v. Roy*, the Court held that the statutory requirement that welfare applicants provide a social security number as a condition of eligibility for public assistance did not violate the Free Exercise Clause.¹³¹ The Court declared that the social security number requirement "clearly promotes a legitimate and important public interest," namely, preventing fraud.¹³² Politicians also recognize the benefit of social security numbers. In a speech supporting the bill that made the social security number requirement

124. *Chambers v. Klein*, 419 F. Supp. 569 (D. N.J. 1976), *aff'd*, 564 F.2d 89 (3d Cir. 1977); *Doe v. Sharp*, 491 F. Supp. 346 (D. Mass. 1980).

125. *Chambers*, 419 F. Supp. 569 (D. N.J. 1976), *aff'd*, 564 F.2d 89 (3d Cir. 1977).

126. *Id.* at 583.

127. *See, e.g.*, S. Rep. No. 93-1356, 93d Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 8133, 8152.

128. *See, e.g.*, S. Rep. No. 93-1356, 93d Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 8133, 8152 (quoting *McElrath v. Califano*, 615 F.2d 434 (7th Cir. 1980)).

129. *McElrath v. Califano*, 615 F.2d 434, 441 (7th Cir. 1980); *Lavine v. Milne*, 424 U.S. 577, 584 n.9 (1976); *Chambers v. Klein*, 419 F. Supp. 569, 583 (D. N.J. 1976), *aff'd*, 564 F.2d 89 (3d Cir. 1977).

130. *Bowen v. Roy*, 476 U.S. 693 (1986).

131. *Id.* at 706. The appellees contended that obtaining a social security number for their 2-year-old daughter would violate their Native American religious beliefs.

132. *Id.* at 709.

mandatory for the Food Stamp program, Representative Richmond explained, "we want applicants and recipients alike constantly to be aware that the Congress does not and will not tolerate any refusal to disclose earnings accurately" ¹³³

Not only has the use of the social security number been considered legal and proper, but it has also been considered an effective method for preventing fraud. Under the Reagan administration, the President's Private Sector Survey on Cost Control, known more popularly as the "Grace Commission," reported that computer matching techniques using social security numbers were "the Federal Government's most cost-effective tool for verification or investigation in the prevention and detection of fraud, waste and abuse" in the welfare system. ¹³⁴

A requirement of finger imaging for potential and current welfare recipients accomplishes a purpose comparable to that of social security numbers. Just as social security numbers are "unique numerical identifiers," ¹³⁵ fingerprints are "unique physiological identifiers." ¹³⁶ Using fingerprints, officials can identify individuals in a manner very similar to identification of individuals via social security numbers. Instead of entering one's particular social security number, however, a computer scans an individual's finger and electronically photographs the fingerprint. With both social security numbers and finger imaging, the identity of the individual is easily determined. A fingerprint is even more effective, however, as it is something that people cannot forge and that people always carry around with them.

IV. Legal Issues

Despite AFIS's utility, many people have expressed legal concerns about the program. ¹³⁷ They fear that this system would be an invasion of an individual's right to privacy guaranteed under the Fourteenth and Fourth Amendments. ¹³⁸ The current AFIS bill

133. 127 CONG. REC. 24783 (1981) statement of Rep. Richmond (R-NY) (quoting *Bowen v. Roy*, 476 U.S. 693, 709-10 (1986)).

134. 7 The President's Private Sector Survey on Cost Control, Management Office Selected Issues — Information Gap in the Federal Government 90 (1984) (quoted in *Bowen v. Roy*, 476 U.S. 693 (1986)).

135. *Bowen v. Roy*, 476 U.S. at 710.

136. *See supra* note 23.

137. Opponents to finger imaging state that it is a violation of an individual's right to privacy and should not be implemented statewide.

138. Despite these public policy arguments, opponents of finger imaging do not make any legal arguments in support of their assertion. Adolph Reed, Jr., *Pimping Poverty, Then and Now; The Academic Poverty Research Industry*, Progressive, Aug.

before the New York State Legislature addresses these concerns and in no way violates these rights. To the contrary, the procedures and methods followed under the program fully ensure the protection of an individual's constitutional rights.

There is a two-part inquiry when examining whether legislation has violated privacy rights. In *Terry v. Ohio*, the U.S. Supreme Court explained that "the Fourth Amendment protects people, not places," and concluded that "wherever an individual may harbor a reasonable 'expectation of privacy,' . . . he is entitled to be free from unreasonable governmental intrusion."¹³⁹ As the Court clarified in *Schmerber v. California*, the obtaining of physical evidence from a person involves a potential privacy violation at two different levels — (1) the "seizure" of the person necessary to bring him into contact with government agents and (2) the subsequent search for,

1994, at 24; Joe Wilson, *Welfare "Reform"? It's a Criminal Proposition*, SAN FRANCISCO EXAMINER, Sept. 20, 1993, at A19; *Clerics Slam Fingerprint Welfare Test*, NEWS-DAY, Feb. 16, 1994, at 13; Sheryl McCarthy, *Wrong Cure for Welfare*, NEWS-DAY, Mar. 16, 1994, at 30; *Welfare Fraud Weapon: Fingerprints Opponents Blast Practice as an Unproven Method that Invades Privacy*, CHI. TRIB., Jan. 23, 1994, at 8; Rachel Gordon, *Fingerprint Plan for S.F. Welfare Clients Proposal Aimed at Curbing Fraud Raises Questions of Privacy*, SAN FRANCISCO EXAMINER, Apr. 15, 1993, at A1; Paul Vitello, *Pay Dirt in the Politics of Poor-Bashing*, NEWS-DAY, Sept. 19, 1993, at 6; Wanda Motley, *Legislator Pushes for Fingerprinting of Welfare Recipients the Measure is Meant to Curb Welfare Fraud. Critics Say It Would "Criminalize a Human Services Program,"* PHILA. INQUIRER, Oct. 14, 1993, at B3; See, e.g., Roger A. Clarke, *Information Technology and Dataveillance*, COMMUNICATIONS OF THE ACM, May 1988, at 498; *Welfare Fraud Weapon: Fingerprints; Opponents Blast Practice as an Unproven Method that Invades Privacy*, CHI. TRIB., Jan. 23, 1994, at 8; Norm Parish, *Debating Welfare-Fraud Curbs; Legislature Weighs Implementing Fingerprints, 'Smart Cards,'* ARIZONA REPUBLIC, Sept. 21, 1993, at B1. Individuals derive this privacy right from *Griswold v. Connecticut*. *Griswold v. Connecticut*, 381 U.S. 479 (1965). Some have even asserted an Equal Protection violation, but the courts have unanimously rejected such claims. *Miller v. Murphy*, 143 Cal. App. 3d 337, 349 (Cal. Ct. App. 1983); *People v. Robertson*, 412 N.Y.S.2d 982, 983 (N.Y. Crim. Ct. 1979); *Thom v. New York Stock Exchange*, 306 F. Supp. 1002, 1011, 1012 (S.D.N.Y. 1969), *aff'd sub nom.*, *Miller v. New York Stock Exchange*, 425 F.2d 1074 (2d Cir.), *cert. denied*, 398 U.S. 905 (1970); *Walton v. City of Atlanta*, 181 F.2d 693, 694 (5th Cir.), *cert. denied*, 340 U.S. 823 (1950). Finger imaging in the welfare context does not produce an equal protection violation. There is never a group that is discriminated against as a result of the use of the finger imaging system. In fact, the automated finger imaging matching identification system is incapable of any kind of discrimination. Race, gender, socio-economic status or any other distinction make no difference to the finger imaging computer. Its only purpose is to detect a fingerprint match within the parameters and area of the search database. The only group that could possibly claim discrimination in this situation are those who are attempting to defraud the welfare system. Clearly, they do not have an equal protection claim.

139. *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)).

and seizure of, the evidence.¹⁴⁰ In *Schmerber*, the Court found the initial seizure of the accused justified as a lawful arrest, and the subsequent seizure of the blood sample from his body reasonable in light of the exigent circumstances.¹⁴¹ The Court examined whether the search that precipitated the blood test was reasonable as well as whether the blood test itself was improper. Applying the same two-part test, the Court in *Terry v. Ohio* concluded that neither the initial seizure of the person, an investigatory “stop” by a policeman, nor the subsequent search, a “patdown” of his outer clothing for weapons, constituted a violation of the Fourth or Fourteenth amendments.¹⁴² The constitutionality of the New York AFIS program necessarily turns on the same dual inquiry — whether either the initial requirement that an individual submit their fingerprints to obtain public assistance or the subsequent finger imaging procedure is an unreasonable search and seizure within the meaning of the Fourteenth and Fourth Amendments.

A. AFIS Does Not Violate an Individual’s Fourteenth Amendment Right to Privacy

To satisfy the Fourteenth Amendment due process right to privacy, a finger imaging requirement for obtaining public assistance must not deprive an individual of “life, liberty, or property, without due process of law” or abridge his privileges or immunities as a United States citizen.¹⁴³ Only those rights that are “fundamental” or “implicit in the concept of ordered liberty” are included under the constitutional guarantee of individual privacy.¹⁴⁴ Fundamental rights are parsed into several discrete “zones of privacy.”¹⁴⁵ These zones include marriage,¹⁴⁶ procreation,¹⁴⁷ contraception,¹⁴⁸ family

140. See *infra* note 153.

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

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

143. U.S. CONST. amend. XIV, § 1.

144. *Griswold v. Connecticut*, 381 U.S. 479, 499-502 (1965) (Harlan, J., concurring). Justice Harlan argues that the justification for extending the fundamental protection of the Due Process Clause of the Fourteenth Amendment beyond those rights explicitly assured by the letter or penumbra of the Bill of Rights is found in our tradition of adherence to those basic values “implicit in the concept of ordered liberty,” a concept originally enunciated by Justice Cardozo in *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

145. *Roe v. Wade*, 410 U.S. 113, 152 (1973).

146. *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Zablocki v. Redhail*, 434 U.S. 374 (1978).

147. *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942).

148. *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1971) (White, J., concurring in result).

life,¹⁴⁹ and child rearing and education.¹⁵⁰ State action that infringes on self-determination within these zones traditionally triggers the highest level of constitutional review: strict scrutiny. Under strict scrutiny, the legislation in question must use narrowly tailored means to achieve a compelling state interest.¹⁵¹ Even when a law classifies persons in a manner that does not involve the exercise of fundamental rights, the Court will use an intermediate standard of review if the classification is based upon traits such as gender or illegitimacy. Under this test, the government must show that the law is substantially related to an important government interest.

When the legislation does not involve a "fundamental" right, encroach upon a "zone of privacy," or involve a suspect classification or the characteristics of citizenship, gender or illegitimacy, courts employ the rational basis test in reviewing the substance of those laws. Today, courts use the rational basis test to approve laws allocating welfare benefits.¹⁵² Consequently, courts will uphold welfare legislation as long as there is any conceivable basis for finding a rational relationship between such legislation and the state objective.

Courts, however, will still invalidate a law or procedure if the methods involved are improper and do not contain even a rational relationship to a legitimate state objective. For example, the court in *Davis v. Mississippi* invalidated the taking of a suspect's fingerprints ruling that the initial seizure of the defendant was an improper detention and the fingerprinting was a direct result of that

149. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

150. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 532 (1925). For a reiteration of these protected zones, see, e.g., *Paul v. Davis*, 424 U.S. 693, 713 (1976).

151. See, e.g., *Roe v. Wade*, 410 U.S. 113, 155 (1973).

152. See, e.g., *Cleland v. National College of Business*, 435 U.S. 213 (1978) (upholding restrictions on educational payments under "GI Bill" which denied benefits for educational courses taken at certain types of proprietary educational institutions); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980), *reh'g denied*, 450 U.S. 960 (1981) (upholding congressional elimination of payment of dual retirement benefits to some employees who had engaged in both railroad and non-railroad employment on any basis that is not "patently arbitrary or irrational"); *Schweiker v. Wilson*, 450 U.S. 221 (1981) (upholding Social Security Act classification giving reduced Medicaid benefits to persons institutionalized in certain public mental care institutions); *Schweiker v. Hogan*, 457 U.S. 569 (1982), *on remand*, 597 F. Supp. 1106 (D. Mass. 1984), *rev'd*, 769 F.2d 886 (1st Cir. 1985) (upholding Social Security Act classifications that provide for reimbursement of state providing Medicaid benefits to "medically needy" but exempting from program repayment for benefits to "categorically needy.").

detention.¹⁵³ Because the police took the defendant to police headquarters twice without first obtaining a search warrant and fingerprinted him, the Court held that such fingerprints were inadmissible in determining guilt.¹⁵⁴ Similarly, in *Hayes v. Florida*, the Court held that defendant's fingerprints were an inadmissible fruit of an illegal detention.¹⁵⁵ In that case, the police held the defendant in custody for fingerprinting without probable cause to arrest or prior judicial authorization for detaining him.¹⁵⁶ Again, as a result of improper procedures, the otherwise admissible fingerprint evidence was inadmissible.¹⁵⁷

Both of these cases involve actions that were clearly improper and can be distinguished from the New York AFIS legislation and fingerprinting rules in general. *Davis* and *Hayes* involved improper police procedures in detaining an individual against his will rather than the individual's privacy interest in his fingerprints. Thus, these cases have no effect on the finger imaging system.

There are many situations in which courts have regularly upheld fingerprinting against charges that it violates the right to privacy.¹⁵⁸ The U.S. district court in *Thom v. New York Stock Exchange*, for example, upheld a New York State statute requiring that member firms of national security exchanges and affiliated clearing corporations fingerprint all employees as a condition of employment.¹⁵⁹ The court held that the statute addressed and controlled the escalating theft problem in the securities industry and was a valid exercise of the state's police power.¹⁶⁰ The court emphasized that the employees were not disputing the exchanges' or clearing houses' right of inquiry into their private lives; they were only disputing the

153. *Davis v. Mississippi*, 394 U.S. 721, 726 (1969) ("Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention").

154. *Id.* at 722.

155. See *Hayes v. Florida*, 470 U.S. 811 (1985).

156. See *id.*

157. Both *Davis* and *Hayes* imply that if police officers had followed proper procedures, the fingerprint evidence would have been admissible. *Davis*, 394 U.S. at 727-28; *Hayes*, 470 U.S. at 815-16.

158. See, e.g., *Thom v. New York Stock Exchange*, 306 F. Supp. 1002 (S.D.N.Y. 1969), *aff'd sub nom.*, *Miller v. New York Stock Exchange*, 425 F.2d 1074 (2d Cir.), *cert. denied*, 398 U.S. 905 (1970); *Walton v. City of Atlanta*, 181 F.2d 693 (5th Cir.), *cert. denied*, 340 U.S. 823 (1950) (fingerprinting of taxi drivers); *Friedman v. Valentine*, 30 N.Y.S.2d 891 (N.Y. Sup. Ct. 1941), *aff'd*, 42 N.Y.S.2d 593 (N.Y. App. Div. 1943) (fingerprinting of cabaret employees).

159. *Thom*, 306 F. Supp. at 1009.

160. *Id.* at 1006-07.

fingerprint requirement.¹⁶¹ The court responded to this objection by stating that fingerprints were only being used to verify all of the other non-disputed information obtained,¹⁶² and therefore the fingerprint requirement was a proper means to a legitimate end. The plaintiffs also argued that the statute should have mandated an alternate method, other than fingerprinting, that would have been less restrictive of individual rights.¹⁶³ In addressing this contention, the court restated that because there was no significant invasion of privacy, there was no need to apply a less restrictive method of regulation.¹⁶⁴

In *Iacobucci v. City of Newport*, the U.S. Court of Appeals for the Sixth Circuit addressed the same question and similarly held that a city fingerprinting ordinance for employees of bars did not violate the constitutional right of privacy.¹⁶⁵ The court stated that:

[W]hatever the outer limits of the right to privacy, clearly it cannot be extended to apply to a procedure the Supreme Court regards as only minimally intrusive. Enhanced protection has been held to apply only to such fundamental decisions as contraception . . . and family living arrangements. Fingerprints . . . have not been held to merit the same level of constitutional concern.¹⁶⁶

The court was distinguishing and categorizing certain kinds of rights. Although the constitution protects individuals against unreasonable and irrational legislation, fingerprinting does not automatically raise any warning flags in the context of these Fourteenth Amendment policies.

More recently, a plaintiff brought suit seeking to compel the California Department of Motor Vehicles to renew her driver's license without complying with the statutory requirement of obtaining fingerprints.¹⁶⁷ In this case, Christopher Ann Perkey, the plaintiff, had satisfied all of the other requirements necessary to obtain a

161. *Id.* at 1009.

162. *Id.*

163. *Id.* at 1010.

164. *Thom v. New York Stock Exchange*, 306 F. Supp. 1002, 1010 (S.D.N.Y. 1969), *aff'd sub nom.*, *Miller v. New York Stock Exchange*, 425 F.2d 1074 (2d Cir.), *cert. denied*, 398 U.S. 905 (1970)

165. *Iacobucci v. City of Newport, Kentucky*, 785 F.2d 1354, 1357-58 (6th Cir.), *rev'd on other grounds*, 479 U.S. 92 (1986).

166. *Id.*

167. *Perkey v. Department of Motor Vehicles*, 721 P.2d 50 (Cal. App. Dep't Super. Ct. 1986).

driver's license in California other than giving her fingerprints.¹⁶⁸ The California Supreme Court held that the fingerprinting requirement was rationally related to highway safety and, moreover, fingerprinting *per se* did not infringe upon an individual's right to privacy.¹⁶⁹

Fingerprinting is proper in the context of preventing welfare fraud as it is in promoting highway safety. The court held that the section of the California Vehicle Code¹⁷⁰ requiring every applicant for a driver's license to submit a fingerprint is rationally related to highway safety in that it aids in the interception of applications from those posing a serious danger to public safety because a fingerprint constitutes the "only assuredly accurate source of identification which remains immutable throughout an individual's lifetime"¹⁷¹ One could make the same argument for the use of fingerprints in preventing welfare fraud. Finger imaging protects the public from a substantial harm in that it prevents "double dip-pers" from obtaining benefits that they do not deserve. As a result, the system saves and reallocates money towards individuals and public programs that really merit assistance, thereby benefitting society overall. As the *Perkey* court observed, a person can easily alter his or her appearance with wigs, makeup or a change in facial hair, making it much harder for a busy worker to detect any similarity in appearance.¹⁷² With finger imaging technology, the computer will detect any matches almost immediately, with minimum inconvenience.

The *Perkey* court continued by restating the vast amount of pertinent decisional authority holding that the act of fingerprinting *per se* does not infringe an individual's right to privacy.¹⁷³ It noted that because the physical process of fingerprinting does not require penetration beyond the body's surface, the procedure "does not readily offend those principles of dignity and privacy which are fundamental to our notion of due process."¹⁷⁴ Despite the use of electronic equipment, the finger imaging process is as non-intrusive as fingerprinting in the context of *Perkey* because penetration beyond the body's surface is unnecessary, leaving an individual's right

168. VEHICLE CODE section 12800, subdivision (c) requires each applicant for a driver's license to submit a fingerprint to the Department of Motor Vehicles.

169. *Perkey*, 721 P.2d at 53.

170. CAL. VEHICLE CODE § 12800(c) (West 1995).

171. *Perkey*, 721 P.2d at 53.

172. *Id.*

173. *Id.*

174. *Id.*

to privacy intact without violating the Fourth Amendment search and seizure requirement.¹⁷⁵

B. Fingerprinting Is Not an Improper Search and Seizure

The second part of the test applies the Fourth Amendment to the finger imaging process itself. The Fourth Amendment guarantees that all people shall be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ."¹⁷⁶ Any Fourth Amendment violation in the present setting must rest on a lawless governmental intrusion upon the privacy of "persons" rather than on interference with "property relationships or private papers."¹⁷⁷ In order to pass this part of the test, courts must determine that the finger imaging process itself is not a search and seizure violation.

Although opponents of the finger imaging system assert that finger imaging violates an applicants' Fourth Amendment right to privacy, it is well-established that the taking of fingerprints is not *per se* violative of any constitutional prohibition against unreasonable searches and seizures.¹⁷⁸ For example, in 1973, the U.S. Supreme Court noted that the taking of finger and palm prints, if obtained under proper circumstances, does not involve a search or seizure within the contemplation of the Fourth Amendment to the U.S. Constitution.¹⁷⁹ Because fingerprinting does not involve the puncturing of the skin or the interference with any internal bodily function, only under grievously improper circumstances would it be considered a violation of privacy.¹⁸⁰ The standard turns on

175. The *Perkey* court did, however, require that fingerprint information, which is personal information relating to the physical condition of the applicant, be shielded from public disclosure. *Perkey v. Department of Motor Vehicles*, 721 P.2d 50, 55-56 (Cal. App. Dep't Super. Ct. 1986). The Department of Motor Vehicles may use this information for anything pertaining to the right to drive in the state of California, but it may not freely disseminate its fingerprint files to all interested parties because doing so would raise serious privacy concerns. *Id.* at 55. Similarly, the New York Legislature addresses these concerns by making the use of finger imaging data unavailable to anyone else but those concerned with welfare fraud. N.Y. SOC. SERV. LAW § 139-a (3)(b) (McKinney 1994) (*see supra* note 61 for the text of the law). In this way, the state maintains the right to the privacy of those finger imaging records and still has a valuable resource that it can use to fight welfare fraud.

176. U.S. CONST. amend. IV.

177. *Schmerber v. California*, 384 U.S. 757, 767 (1966).

178. *See Utility Workers Union of America v. Nuclear Regulatory Comm'n.*, 664 F. Supp 136 (S.D.N.Y. 1987); *Nuriel v. Young Women's Christian Ass'n of Metropolitan Detroit*, 463 N.W.2d 206 (Mich. Ct. App. 1990); *State v. Duncan*, 872 P.2d 380, (N.M. Ct. App.), *cert. denied*, 873 P.2d 270 (N.M. 1994).

179. *U.S. v. Dionisio*, 410 U.S. 1, 15 (1973).

180. *See Schmerber v. California*, 384 U.S. 757 (1966).

whether there is an unwarranted intrusion into an individual's private life or body.¹⁸¹ If a search does not pass that threshold level of intrusion then it is extremely unlikely that the court will deem the search unconstitutional.¹⁸² For example, the U.S. Court of Appeals for the Fourth Circuit determined that a forced blood test in order to create a DNA database was an invasion of privacy because it was intrusive and offensive.¹⁸³ Conversely, the U.S. Supreme Court has held that the production of voice exemplars and handwriting samples is not sufficiently intrusive to constitute an invasion of privacy.¹⁸⁴

In *Davis*, the Court observed that "fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search."¹⁸⁵ In that case, as a result of a fingerprint match, the state charged and convicted the defendant of rape and sentenced him to life imprisonment. Although the Court did not comment on whether the fingerprinting would have been intrusive if the police had followed proper procedures, it did note that the process itself did not seem to be intrusive enough so as to constitute an invasion of privacy.¹⁸⁶

181. *Id.*

182. The reasonableness of intrusions beneath the skin depends on a case-by-case approach in which an individual's interest in privacy and security are weighed against society's interests in conducting the procedure. See *Winston v. Lee*, 470 U.S. 753 (1985).

183. See *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992).

184. See *United States v. Dionisio*, 410 U.S. 1 (1973); *Gilbert v. California*, 388 U.S. 263 (1967).

185. *Davis v. Mississippi*, 394 U.S. 721, 727 (1969). In the case, police officers, without warrants, brought approximately 24 African-American youths to police headquarters, questioned them briefly, fingerprinted them, and then released them without charge in response to fingerprints found at the site of a rape in the vicinity. The police also interrogated 40 or 50 other African-American youths either at police headquarters, at school, or on the street. *Id.* at 722.

186. *Id.* at 727-28 ("Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search. Nor can fingerprint detention be employed repeatedly to harass any individual since the police need only one set of each person's prints. Furthermore, fingerprinting is an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions and is not subject to such abuses as the improper line-up and the 'third degree.' Finally, because there is no danger of destruction of fingerprints, the limited detention need not come unexpectedly or an [sic] an inconvenient time. For this same reason, the general requirement that the authorization of a judicial officer be obtained in advance of detention would seem not to admit of any exception in the fingerprinting context. We have no occasion in this case, however, to determine whether the requirements of the Fourth Amendment could be met by narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest. For it is clear that no

C. AFIS Also Satisfies the Procedural Due Process Requirement

In addition to the right to privacy, the AFIS program also satisfies the procedural due process requirement that the U.S. Supreme Court, in *Goldberg v. Kelly*, imposed on welfare programs. In *Goldberg*, the Court held that a pre-termination evidentiary hearing satisfied the recipient's due process requirement of "timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally."¹⁸⁷ Both the current AFIS or New York law and the most recent bill to amend that law include a notice requirement that provides the recipient or applicant with the right to an evidentiary hearing within forty-five days of the notification of the alleged fraudulent multiple enrollment.¹⁸⁸ Thus, the law protects recipients and applicants from any unjust deprivation of public assistance. After a proper hearing, however, New York State is able to terminate public assistance provided there has been an impartial determination showing fraud.¹⁸⁹ The finger imaging system would not infringe on the welfare recipient's right to due process because New York State may not spontaneously terminate public assistance benefits or deny public assistance based on data retrieved by the automated finger imaging system. As the law already requires an evidentiary hearing, the AFIS program virtually eliminates the danger of a deprivation of procedural due process resulting from the automated finger imaging system.¹⁹⁰

attempt was made here to employ procedures which might comply with the requirements of the Fourth Amendment. . .").

187. *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970).

188. N.Y. SOC. SERV. LAW § 139-a (3)(e), (f) (McKinney 1994) (*see supra* note 57 for the text of 139-a (3)(f)); N.Y. Assembly Bill No. 4808, 218th Gen. Ass., 1st Sess. (1995).

189. N.Y. SOC. SERV. LAW § 139-a (3)(f) (McKinney 1994). Even under Senator Holland's newest amendment, there must be an impartial determination that the individual was collecting benefits from another source.

190. The option for an evidentiary hearing is consistent with cases such as *Martin v. Berger* in which the court held that the petitioner was properly afforded his procedural due process rights with respect to his application for public assistance, where in the notice of his denial of benefits, he was not only informed of the reason and basis for the agency's decision to deny his application, but was also informed of his right to a fair hearing to review that decision. *Martin v. Berger*, 391 N.Y.S.2d 499, 501 (N.Y. App. Div. 1977). *See supra* note 57 and the accompanying text for further discussion on this subject. There is also an amendment on the floor of the legislature recommending that the hearing requirement no longer be mandatory, but available at the

V. The California System

To better understand the likely effects and success of the proposed AFIS system in New York State, it is helpful to examine a state that has already implemented a similar program. This Part outlines California's program, focusing on the Los Angeles county system, the oldest program in the state. The California Legislature has dictated the implementation of finger imaging in various California counties and the program has proven quite successful.¹⁹¹ The law currently in place in Los Angeles and Orange counties requires that the county photograph and fingerprint all applicants and recipients of general relief and Aid to Families with Dependent Children.¹⁹² Los Angeles County's General Relief Program is the largest of its kind in the country; its caseload totalled more than 100,000 people as of December 1993.¹⁹³ In the early stages of the fingerprinting program, computers were less prevalent and, as a result, the county amassed 60,000 paper files that made matching applicants nearly impossible.¹⁹⁴ In 1991, however, California updated the system and created a fingerprint data base.¹⁹⁵ As a result of the new fingerprinting process, the state immediately identified 559 people who tried to receive general relief twice, and approximately 8,000 other applicants who apparently tried illegally to obtain additional benefits did not report for scheduled second interviews.¹⁹⁶ In fact, after six months of countywide operation, the county credited the Automated Fingerprint Image Reporting and Match ("AFIRM") system with savings of \$5.4 million, or 56% of the total cost of the system itself.¹⁹⁷

After implementing AFIRM in three of Los Angeles county's fourteen General Relief district offices, the county reported a drop

option of the applicant or recipient. N.Y. Senate Bill No. 2469, 218th Gen. Ass., 1st Sess. (Feb. 21, 1995).

191. See Ted Vollmer, *Fingerprinting Voted to Cut Welfare Fraud*, L. A. TIMES, Mar. 5, 1986, at 1 (Los Angeles, Orange, Alameda, Contra Costa, San Diego and San Francisco counties).

192. *Id.*

193. INNOVATIVE FINGERPRINT TECHNOLOGY MAKES LOS ANGELES COUNTY WELFARE PROGRAM A HANDS-DOWN WINNER, ELECTRONIC DATA SYSTEMS CORPORATION (1994).

194. *Id.*

195. *Id.*

196. Norm Parish, *Debating Welfare-Fraud Curbs; Legislature Weighs Implementing Fingerprints, 'Smart Cards,'* THE ARIZONA REPUBLIC, Sept. 21, 1993, at B1.

197. INNOVATIVE FINGERPRINT TECHNOLOGY MAKES LOS ANGELES COUNTY WELFARE PROGRAM A HANDS-DOWN WINNER, ELECTRONIC DATA SYSTEMS CORPORATION (1994).

in the number of people coming into those three offices.¹⁹⁸ Instead, applicants were going to surrounding offices where the county had not yet implemented AFIRM.¹⁹⁹ In the first two and a half years of countywide operation, the Los Angeles AFIRM system has reduced operating expenses by \$11.3 million, and the county expects to save \$20.1 million over the life of the contract.²⁰⁰ The county has recouped the \$9.6 million cost of the system and expects to realize additional cost savings because of the deterrent effect of AFIRM.²⁰¹ Of the 19,000 applications submitted each month, AFIRM now turns down only thirty to fifty people as a result of matched prints.²⁰²

In addition to the savings recouped on account of the detection of double dippers, Los Angeles county also has realized a labor benefit as a result of AFIRM. Previously, when the state manually fingerprinted applicants, it also required ten welfare fraud investigators to take the prints and photographs.²⁰³ Since implementing the AFIRM system, however, the county has been able to reassign the investigators and replace them with clerks, trimming \$600,000 in labor costs.²⁰⁴

Because Los Angeles's fingerprint system was so efficient at processing General Relief applicants, officials expanded the system in April 1994 to include applicants for AFDC.²⁰⁵ As part of the application procedure, the state will now fingerprint new applicants for welfare at San Fernando, Pasadena and thirteen other Los An-

198. *Id.*

199. *Id.*

200. *Id.*

201. INNOVATIVE FINGERPRINT TECHNOLOGY MAKES LOS ANGELES COUNTY WELFARE PROGRAM A HANDS-DOWN WINNER, ELECTRONIC DATA SYSTEMS CORPORATION (1994).

202. *Id.* Orange County has an almost identical system aimed at tracking welfare recipients and cracking down on individuals who attempt to defraud the system. Matt Lait, *Welfare Cheats Targeted: Fingerprint System Can Reveal 'Double Dippers,'* LOS ANGELES TIMES, Sept. 22, 1994, at B1. As part of the procedure, all general relief applicants and recipients will place their right and left index fingers on a computer scanner that compares the prints to tens of thousands of other recipients. As in Los Angeles, if the prints match, benefits may be denied or terminated after an additional investigation. *Id.* Initially, the AFIRM system, which cost \$1.3 million, is expected to screen about 3,400 people from the general relief program and is expected to pay for itself in five years. *Id.*

203. INNOVATIVE FINGERPRINT TECHNOLOGY MAKES LOS ANGELES COUNTY WELFARE PROGRAM A HANDS-DOWN WINNER, ELECTRONIC DATA SYSTEMS CORPORATION (1994).

204. *Id.*

205. Terrey H. Quindlen, *Fingerprint ID Prevents Fraud in L.A.*, GOVERNMENT COMPUTER NEWS, Oct. 3, 1994, at 1.

geles county locations.²⁰⁶ In 1994, Los Angeles county spent \$160 million each month in AFDC benefits to 900,000 poor people, including children.²⁰⁷ According to Lisa Nunez, the Chief of the Computer Services Division for the Department of Public Social Services for Los Angeles county, "of the almost \$2 billion a year the county spends on AFDC benefits, an estimated 1.5% stems from multiple-aid fraud, or double- and triple-dipping by people using false identification."²⁰⁸ As a result of fingerprinting, Los Angeles county has saved \$4.5 million in a single month and has the potential to yield \$116 million in total savings over the next two and one half years.²⁰⁹

VI. Conclusion

In remarking on public assistance, Justice Cardozo stated:

Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation. What is critical or urgent changes with the times The hope behind this [welfare] statute is to save men and women from the rigors of the poor house as well as the haunting fear that such a lot awaits them when journey's end is near.²¹⁰

206. David Bloom, *Pilot Project to Cut Welfare Fraud Begins*, DAILY NEWS OF LOS ANGELES, Apr. 12, 1994, at N4.

207. Leslie Berger, *Savings Seen in Welfare Fingerprint Program*, L. A. TIMES, Oct. 15, 1994, at B1.

208. *Id.* at B2.

209. *Id.* at B1. As of the date of publication, there has been no litigation challenging the AFIRM system.

210. *Helvering v. Davis*, 301 U.S. 619, 641 (1937). The federal government originally developed the system of public assistance in the United States. The Social Security Act of 1935 represented the federal government's first major investment in public assistance and served as the government's response to the widespread poverty resulting from the Great Depression. Social Security Act, 42 U.S.C. § 301 (Aug. 14, 1935). The act funded four categories of welfare assistance which served the aged, the blind, the disabled, and dependent children. See generally Social Security Act, subchapters IV & VI (McKinney 1994). Assistance was to be in the form of cash grants, a fundamental policy choice which left considerable freedom of choice in the control of the recipient. Although this legislation constituted a new federal commitment of funds toward relieving poverty, it chose to channel welfare funds through local units of government, specifically the states. Aside from the four original categories, all other needy individuals were left to state or local welfare programs of general assistance. States which chose to cooperate in the program received federal funding, which the states matched out of their own budgets. From 1935 to the present, the states were not free to determine who would be eligible for the programs of assistance, only how much assistance would be provided to eligible recipients. See generally 42 U.S.C. chapter 7 (1994). The Supremacy Clause of the Constitution mandates this relationship. U.S. CONST. art. VI, cl. 2. In other words, where Congress has acted within its

Justice Cardozo emphasized that societal needs change with the times and that public assistance legislation must be adaptable as well. By utilizing finger imaging, legislation can adapt to confront effectively certain types of fraud that now exist in the welfare system.

Although Americans commonly perceive fingerprinting as a stigmatizing procedure usually portrayed in B-grade films with gruff-looking police attendants at gloomy station houses rubbing the accused's thumb and forefinger in ink before creating an impression on paper, technology has progressed. With the advent of finger imaging, the process is much smoother and more effective. Instead of a procedure that could potentially last for many minutes or even an hour,²¹¹ the same result occurs in a matter of seconds. Digital imaging, which would replace smudgeable ink, is a process that is infinitely more accurate.

Although agreeing that there is nothing legally wrong with finger imaging, many critics claim that programs such as New York's AFIS are only temporary solutions to our nation's welfare crisis. In order to address the problem fully, critics claim that the state should give the disadvantaged more opportunities for jobs and education because only through these actions will the state and the nation solve the welfare problem. The proponents do not claim that finger imaging will solve these problems; this technology merely addresses and successfully prevents a specific kind of fraud. It does not discriminate in any way, violate the Fourth Amendment search and seizure rule, threaten the individual's due process rights or infringe one's right to privacy.

The technology for finger imaging is currently available and ready for use. Despite the initial monetary outlay, counties and states that implement a finger imaging system, such as AFIS, can save more than the price of it in the first year alone. Many claim that this savings is insignificant in the grand scheme of welfare. The millions of dollars saved because of finger imaging become available to assist the disadvantaged, however, helping them to get jobs or furthering their education. Critics also claim that fraud constitutes such a small percentage of overall welfare payments that it is not worth the trouble to fight, and further, that to fingerprint welfare recipients stigmatizes them. There are, however,

authority, states may not deny benefits that Congress has conferred, because federal law is supreme. *See, e.g., King v. Smith*, 392 U.S. 309 (1968); *Townsend v. Swank*, 404 U.S. 282 (1971).

211. Assuming someone fights or resists.

many groups in New York that submit their fingerprints before obtaining a benefit or employment opportunity. If New York State implemented AFIS, it is doubtful that public assistance applicants and recipients would feel a criminal stigma any more than these other groups do. As with everyone else, public assistance applicants and recipients must accept this procedure as a necessary part of the effective organization of the entire system.

In addition, finger imaging programs, such as AFIS, would not lead to any unnecessary litigation because the computer at the local welfare office will detect any match during the application procedure, before any fraud has been committed. Hence, the proactive nature of AFIS and similar programs prevents an unnecessary burden on the legal system because such systems would detect problems before the crime was even committed.

Finger imaging is an easy, effective way to combat welfare fraud and one of the best methods of personal identification currently available. In the near future, many of its applications are certain to become prevalent in our society. The success of California's finger imaging program proves its effectiveness in combatting welfare fraud and supports its future success in New York. With such a simple, non-violative, cost-effective anti-fraud measure within reach, there is no legitimate reason for New York not to embrace it.

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