Mandatory Fingerprinting of Public School Teachers: Facilitating Background Checks or Infringing on Individuals' Constitutional Rights?

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MANDATORY FINGERPRINTING OF PUBLIC SCHOOL TEACHERS: FACILITATING BACKGROUND CHECKS OR INFRINGING ON INDIVIDUALS' CONSTITUTIONAL RIGHTS?

With the continuing growth of governmental intrusions into the private lives of its citizens, critics increasingly have taken aim at state actions which unnecessarily burden an individual's right to be let alone. One group in particular — public school teachers — often endure tedious examinations of their private affairs as a condition of employment. This Note examines the current state of privacy concerns, specifically in the realm of public school teachers, and argues that a compromise must be struck that better balances the public's need to protect children from dangerous teachers with the individual teacher's right to privacy. The Note further argues that techniques other than fingerprint analysis may be employed that would provide a better suited mechanism for promoting the public good while imposing minimal encroachments on the privacy rights of the teachers.

* * *

The slippery slope is that danger zone where the slide toward the complete erosion of personal liberties accelerates, carried forward by the accumulated weight of established official invasions and intrusions. The point soon comes where even protesting against Big Brother is forbidden. How far are we from that point now?¹

Background checks for employment are a routine procedure for millions of Americans. However, many public school teachers across the United States are being required to submit more than just their name and address to school officials in order to obtain or maintain employment. Numerous states have enacted laws requiring all applicants for public teaching positions to submit fingerprint cards for identification purposes when conducting criminal background checks. These fingerprint cards are part of an effort to prevent convicted felons from falsifying their identity so as to avoid detection of their past criminal record. Of greatest concern are past child abusers or violent criminal offenders who may pose a threat to the children whom they would be entrusted to supervise if they were employed at a school. Parental fears are fueled by stories about children being abused in classrooms by teachers or other school employees who have prior criminal records that went undiscovered by the school district until an incident of abuse occurred. This scenario occurred in a New York school, where previous allegations of sexual

¹ Maine Educators Against Fingerprinting, The Election is Over — Write or Call Legislators and the Governor Elect, at http://www.slipperyslope.org (last updated Oct. 6, 2002).
misconduct by a music teacher at his previous school were never uncovered, despite the fact that they were public record. These fears drive society’s desire to protect innocent children from sexual predators and translate into pressure on legislatures to enact laws to improve the screening procedures and supervision of all persons who work with children. State legislatures have responded to these pressures by enacting mandatory fingerprinting laws. The implementation of these statutes, however, created a new controversy and a different set of pressures for legislatures from the potential teachers and employees forced to comply with the laws.

The opening quote of this Note reflects the concerns of many educators and community members that the implementation of mandatory fingerprinting requirements is the beginning of a slippery slope. The fear is that American citizens will exchange their rights of liberty and freedom for real, or imagined, assurances of protection and security. In the wake of the terrorist attacks of September 11, 2001, and the continuing “War on Terrorism,” the issue of waiving rights in exchange for personal and national security is extremely pertinent. State legislatures enacted mandatory fingerprinting laws of teachers with the stated purpose of protecting our children—some of our most vulnerable citizens—from abuse. The motive behind the mandatory fingerprinting laws is commendable, but the construction and application of the laws must be examined to determine if they are achieving their stated goal or if they instead are creating too many harms and placing too many hindrances on an already overwhelmed educational system.

Cases of child abuse by caregivers are often headline news, and the problem of abuse in schools is sensationalized by the media. But a review of state and national statistics reveals that child abuse in schools may be relatively isolated and may not be cured by fingerprinting teachers. The costs of implementing fingerprinting requirements often are prohibitive for underfunded school districts and are passed along to the individual teachers and applicants, creating additional discontent and hiring problems. Many teachers feel they are being treated unjustly under these laws, often feeling as though they are criminals. The mandatory fingerprinting laws also have many teachers upset that their constitutional rights are being violated. These concerns stem from the claims that mandatory fingerprinting violates an individual’s right to privacy, protection from illegal search and seizure, and due process. This Note will examine the advantages and disadvantages of mandatory

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3 See supra text accompanying note 1.
4 See Maine Educators Against Fingerprinting, supra note 1.
5 See infra note 53.
6 See Pine v. Okzewski, 170 A. 825, 830 (N.J. 1934):

Changing conditions necessarily impose a greater demand upon that reserve element of sovereignty called the police power, for such reasonable supervision and regulation as may be essential for the common welfare. Acceptance of restrictions upon the so-called natural rights of every individual, necessary to
fingerprinting laws through a brief review of the history of fingerprinting in the United States. A detailed review of state and individual responses to the laws, along with case law concerning mandatory fingerprinting in relation to individuals' constitutional rights, will be presented. Finally, alternatives to mandatory fingerprinting that would protect the rights of both children and teachers, as well as proposals to change existing laws, will be discussed and analyzed.

FINGERPRINTING REQUIREMENTS FOR TEACHERS THROUGHOUT THE UNITED STATES

In 1993, President Clinton signed the National Child Protection Act into law, authorizing states to enact statutes concerning the facilitation of criminal background checks of persons who work with children. Specifically, it authorized
states to institute either mandatory or voluntary fingerprinting of prospective employees in childcare fields in order to facilitate criminal background checks. The Act does not hold states or entities liable for failing to conduct such background checks, but it strongly encourages implementation of procedures in all areas where persons are given the responsibility of supervising children. A majority of states responded to the growing concerns over child abuse and the enactment of the National Child Protection Act of 1993 by establishing laws requiring public school teachers to undergo mandatory fingerprinting and to obtain background checks for employment and certification. Some states only require fingerprinting for first-time applicants to obtain certification and/or employment within the state. At the to a child to whom the qualified entity provides child care.

(c) REGULATIONS. — (1) The Attorney General may by regulation prescribe such other measures as may be required to carry out the purposes of this Act, including measures relating to the security, confidentiality, accuracy, use, misuse, and dissemination of information, and audits and recordkeeping.

(2) The Attorney General shall, to the maximum extent possible, encourage the use of the best technology available in conducting background checks.

Id. § 3(a)-(c).

(d) LIABILITY. — A qualified entity shall not be liable in an action for damages solely for failure to conduct a criminal background check on a provider, nor shall a State or political subdivision thereof nor any agency, officer or employee thereof, be liable in an action for damages for the failure of a qualified entity (other than itself) to take action adverse to a provider who was the subject of a background check.

Id. § 3(d).


For an example of the wording of this type of legislation, see VA. CODE ANN. § 22.1-296.2 (Michie 2003):

A. As a condition of employment, the school boards of the Commonwealth shall require any applicant who is offered or accepts employment after July 1, 1989, whether full-time or part-time, permanent, or temporary, to submit to fingerprinting and to provide personal descriptive information to be forwarded along with the applicant’s fingerprints through the Central Criminal Records Exchange to the Federal Bureau of Investigation for the purpose of obtaining
time the statute was enacted, a few states required fingerprinting of all employees,\footnote{12} with some states requiring repeat fingerprinting and background checks for re-certification.\footnote{13} As written, these statutes conceivably require teachers who have been teaching in the same school system for twenty or thirty years, without incident, to subject themselves to fingerprinting in order to obtain re-certification or continued employment. For example, in April of 2000, the governor of Arizona signed a bill requiring all teachers and administrators to submit to fingerprinting and national criminal background checks every six years before they may renew their teacher certification.\footnote{14} In Alabama, the recently implemented fingerprinting statute requires all current teachers employed before July 1, 1999, as well as all incoming teachers, to be fingerprinted.\footnote{15} Any currently employed teachers who refuse to comply will be fired.\footnote{16}

Some of these states also require fingerprinting of all school employees in addition to teachers. For example, in Maine, all "new and veteran teacher[s], along with school employees from superintendents to custodians and bus drivers," must be fingerprinted "and submit to [a] criminal background check."\footnote{17} In addition to

\begin{footnotes}
\item[16] Kleffman, supra note 12.
\item[17] Associated Press, \textit{Efforts to Overturn Fingerprinting Law Gaining Momentum},
requiring teachers to submit to fingerprinting, which is most commonly done at local police stations, many states require the teacher to pay for the fingerprinting procedure.\textsuperscript{18} The Alaska Administrative Code provides that "applicants for whom a background check is required by statute, [shall submit] two completed fingerprint cards, with fingerprinting performed by a law enforcement agency or a person who has been trained in recording fingerprints, for separate submittal to the Department of Public Safety and the Federal Bureau of Investigation."\textsuperscript{19} The Code further states that "[u]nless otherwise provided in this section, fees must be paid at the time of application and are nonrefundable . . . [which include] the cost of a criminal history background check required under (b)(4) of this section."\textsuperscript{20} For a profession frequently at the bottom of the pay scale in employment surveys, requiring a teacher to pay out-of-pocket for a mandatory procedure seems to add insult to injury.

The backlash in the states where these mandatory fingerprinting laws have been enacted has varied, but is greatest in states with the most extensive and intrusive policies. In Maine, tremendous criticism has emerged over the law requiring all school employees to be fingerprinted upon initial employment and certification, and then for re-certification.\textsuperscript{21} "In the two years that the law has been in effect, 65

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\item \textsuperscript{18} For example, the Code of Virginia allows the displacement of the cost onto the applicants and not the school board/district. VA. CODE ANN. § 22.1-296.2(A) (Michie 2003); cf. id. § 22.1-301 ("It shall be unlawful for any school board to require any instructional employee to pay the costs of a medical examination or the cost of furnishing medical records required as a condition to continued employment."). How can Virginia allow the applicants to pay for the fingerprinting requirement, but not the medical exam requirement? How can states require applicants to pay the fees charged for the mandatory fingerprinting? Who should ultimately pay these expenses?
\item \textsuperscript{19} ALASKA ADMIN. CODE tit. 4, § 12.010(b)(4) (1999).
\item \textsuperscript{20} Id. § 12.010(g).
\item \textsuperscript{21} Among academic personnel: 76.7% are not comfortable with the fingerprinting/police check law; 19.7% are comfortable with it; 3.6% are unsure. Of those uncomfortable with the law: 24.9% still support it as necessary; 66.5% do not support it but feel they have to comply (most say they can’t afford to lose their jobs, some fear being left standing alone if they refuse to comply, and some give both reasons); 8.5% (or 6.5% of all respondents) find the law unacceptable and will refuse to comply. Among non-academic support staff: 56.4% are not comfortable with the fingerprinting/police check law; 42.5% are comfortable with it; 1.1% are unsure. Of those uncomfortable with the law: 37.6% still support it as necessary; 59.4% do not support it but feel they have to comply (as on the academic side most say they can’t afford to lose their jobs, some fear being left standing alone if they refuse to comply, and some give both reasons); 3.0% (or 1.6% of all respondents) find the law unacceptable and will refuse to comply.
\end{itemize}
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teachers have pledged to refuse the test and at least 20 have lost their jobs over it.\textsuperscript{22} These facts provoke the inquiry into why teachers are so opposed to mandatory fingerprinting policies. Are these laws important enough to risk losing valued teachers with years of experience because they feel that they are being treated like criminals and being denied their rights? A review of various fingerprinting policies throughout United States history may shed light on the perceptions surrounding fingerprinting in this country and why such a heated debate over these laws has arisen.

**HISTORY OF FINGERPRINTING IN THE UNITED STATES**

The history of fingerprinting in the United States involves a complex look at the interplay of public perception and technological innovation. Throughout history, fingerprinting has maintained an attached stigma of suspicion of criminal activity. Courts have stated that "[f]inger printing seems to be no more than an extension of methods of identification long used in dealing with persons under arrest for real or supposed violations of the criminal laws."\textsuperscript{23} Mandatory fingerprinting has long been viewed as something to which people who were suspected of a crime were subjected.\textsuperscript{24} With technological advances, however, the criminal stigma has

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  \item academic personnel, and 179 support staff); see also The Ad, Feb. 27, 2000, available at http://www.slipperslope.org/theadd.html (reprinting an advertisement originally placed in the ME. SUNDAY TELEGRAM, which set forth the group’s objections):
  We are supportive of reasonable and prudent background checks for individuals being considered for employment, and for improving them in a variety of ways, but mass fingerprinting, with all of its negative fallout, is not one of them. As a result of our refusal to comply, we regrettably will no longer be employable in the schools of Maine. ... We believe this law was passed quietly and with virtually no debate by a well-intended Legislature led to believe in a quick fix for a serious, complex problem. We have not seen any sound statistical argument for its implementation. We believe it will do almost nothing to stop the infinitesimally rare abuse of children in schools, but will falsely lead people to believe otherwise. ... At an even deeper level, we view the law as an insidious violation of the Fourth Amendment of the U.S. Constitution, which guarantees freedom from unreasonable search and seizure.
  \textit{Id.} At the time The Ad was published, sixty-three teachers had signed the petition with a combined 1,352 years of teaching experience. See \textit{id.}
  \textsuperscript{22} Associated Press, \textit{supra} note 17; see The Ad, \textit{supra} note 21.
  \textsuperscript{23} United States v. Kelly, 55 F.2d 67, 69 (2d Cir. 1932) (holding that fingerprinting a suspect at the time of arrest is an appropriate means for identification).
  \textsuperscript{24} M.C. Dransfeld, Annotation, \textit{Fingerprints, Palm Prints, or Bare Footprints as Evidence}, 28 A.L.R.2d 1136, 1137 (1953) ("It is ordinarily held that the constitutional provision under consideration is not violated by the compulsory taking of the finger, palm, or footprints of one accused of crime but not yet convicted or sentenced, as a means of identification."); e.g., Kelly, 55 F2d at 67; People v. Jones, 296 P. 317 (Cal. Ct. App. 1931);
somewhat lessened as fingerprinting has become a more common form of identification utilized outside of the criminal justice system. Some commentators have stated that this view has changed as the fingerprinting of children for purposes of maintaining police records in the event of kidnaping and for identification has become more prevalent. Historically, whereas some argued that “finger-printing [was] losing in the public mind its association with criminal guilt,” others argued, as one judge in 1926 stated, that:

Time may be when this system of identification becomes so universal that it is no longer connected in thought with crime. The mores of people constantly change. But the innocuity of a practice must be tested in the light of its prevailing, and not possible future, significance. ... In my judgment, compulsory finger-printing before conviction is an unlawful encroachment upon person, in violation of the state and federal Constitutions.

This quote supports the position that the relevance of the criminal stigma of fingerprinting should be a question determined by society today, and assumptions should not be made as to what people believe.

As fingerprinting has become increasingly more common and utilized in a wide array of non-criminal settings, arguments are made that “fingerprinting today does not hold the stigma that it may have carried in the past because society no longer associates fingerprinting ‘exclusively ... with criminal bookings.’” Although this may have merit, the fact remains that many of the innocuous fingerprinting examples involve voluntary fingerprinting. And although certain other professions require fingerprints for entry into employment, very few, if any, require repeated

While we have no statute authorizing or directing sheriffs and other peace officers to fingerprint persons in their custody suspected or accused of crimes, we think they have the power to do so, under the general police power, to establish identification of such persons, and that to do so is not an invasion of any constitutional or natural right of such persons.

27 Id.
29 Technology Examples: Fingerprint Databases, MILWAUKEE J. SENTINEL, Aug. 9, 2001, at J1 (“Six states require fingerprinting to get a driver’s license.”).
30 A few examples are: lawyers being admitted into state bars, federal employees who work in high security jobs, and employees at prisons.
fingerprinting. Cases arising from legislation regarding the fingerprinting of potential employees in other fields have almost unanimously upheld such legislation. For example, a Florida statute requiring all resort personnel to be fingerprinted for background checks was upheld as constitutionally valid. Another statute concerning employees of securities firms in New York was similarly upheld as constitutional. Other examples of similar holdings concerning fingerprinting requirements of employees are found in the businesses of casinos, liquor stores, and public housing. Defenders of these fingerprinting policies tend to rally around the

31 See supra notes 23–26.
   The Palm Springs ordinance requiring the registration of certain classifications
   of employees reads as follows: “Intent and Purpose. The provisions of this
   Article intend to cover temporary and itinerant classes of employees and the
   purpose for the regulations hereunder is to protect the visitors and residents of
   this resort community from crime and loss both against the person and against
   property.”
33 Id. at 166 (citation omitted):
   In Thom v. New York Stock Exchange, substantially the same arguments being
   adduced herein were considered and rejected by the reviewing court; in Thom,
   the state of New York, in response to rising thefts in the securities industry,
   enacted a statute which required all employees of member firms of national
   security exchanges registered with the Securities and Exchange Commission to
   be fingerprinted as a condition of employment; the employees affected by the
   statute attempted to enjoin enforcement of the act, claiming, among other things,
   that the fingerprinting requirement constituted an illegal search and seizure and
   was violative of their right of privacy; the court disagreed, stating that
   fingerprinting in a non-criminal context was widespread, that there was no
   significant intrusion on the privacy of the registrants, and that the registration act
   represented a valid exercise of the state’s police power.
34 The Las Vegas Ordinance provided:
   It is hereby declared to be the policy of the City of Las Vegas, as herein
   expressed by the Board of Commissioners of the City of Las Vegas, that the
   safety, morals, good order and general welfare of the inhabitants of the City of
   Las Vegas will be better protected and served, by requiring the registration with
   the Police Department of said City, and the thumb, finger-printing, and
   photographing of all employees of gambling houses, taxi drivers, and employees
   of establishments where alcoholic beverages are sold at retail and served on the
   premises, as such employees and establishments are defined in Section 1 of this
   Ordinance.
   Norman v. City of Las Vegas, 177 P.2d 442, 443 (Nev. 1947) (quoting Ordinance No. 305
   of the City of Las Vegas); see also Young v. Chi. Housing Auth., 112 N.E.2d 719, 722 (Ill.
   App. Ct. 1953) (“The requirement of fingerprinting as a condition of employment does not
   violate the rights of any employee.”); Friedman v. Valentine, 30 N.Y.S.2d 891, 894, 896
   (N.Y. Gen. Term 1941) (“Applicants for cabaret licenses have been fingerprinted since 1931.
   ... [T]he regulations extending the requirements of fingerprinting to employees of licensees
   of cabarets is a lawful and proper exercise of power. It is certainly as justifiable as the
common theme that fingerprinting is innocuous and much more beneficial than harmful.\textsuperscript{35} The court in \textit{Young v. Chicago Housing Authority} summarized this argument when it stated that:

\begin{quote}
The obvious advantages and widespread acceptance of fingerprinting are apparent from the fact that the Armed Forces and other federal, state and local agencies, including Civil Service, have for many years required the personnel to be fingerprinted as an aid to investigation of their qualifications, as a deterrent to furnishing false information and to enable quick and certain identification in the event of death.\textsuperscript{36}
\end{quote}

Many of these employment situations, however, dealt with highly sensitive government jobs, and fingerprinting was required only for the initial hiring.\textsuperscript{37}

In contrast, public school teachers are not high security risks, yet they often are subjected to repeated fingerprinting even after their initial hiring. Opponents of mandatory fingerprinting laws do not oppose background checks for teachers; rather, they oppose the fingerprinting process in which they feel the individual is treated as if she is guilty before being proven innocent. The argument under this view is that the process of fingerprinting is not required for an accurate background check unless the applicant is lying about his or her name or other identifying information.\textsuperscript{38} Opponents do not view fingerprinting as an innocuous requirement, but rather as an invasion of teachers' rights and an insult to their character.\textsuperscript{39} The fact that some other professions require fingerprinting for new employees does not mean that it should also be required for teachers. As a representative in the Maine Legislature stated:

\begin{quote}
Recently, I read a letter to the editor whose author asked why it was any different for members of other professions like banking who are required to be fingerprinted and have a background check. To that, I must answer it is not, other than they were willing to accept their shackles.\textsuperscript{40}
\end{quote}

\textbf{RESPONSES TO CURRENT FINGERPRINTING LAWS}

One day last year, instructor Carl Chase reached into his mailbox at fingerprinting of the applicants for licenses, which has been sustained many times.”).
the George Stevens Academy in Blue Hill, Maine, and found a letter from his principal. That’s when he first learned the news: Thanks to a new law, employees at Maine public and private schools were to be fingerprinted by state police for a criminal records check. Teachers who did not get printed would not be recertified.

Chase, a 30-year veteran teacher, was immediately offended: “I get paid very little, and my initial reaction was that if this is all they care about, then I am out of here.” Despite seven years at Stevens, an independent school where he had created an innovative steel-drum curriculum, he decided not to return to the classroom when schools opened this fall.

As state legislatures across the country continue to debate and vote to enact mandatory fingerprinting laws, teachers, parents, and community members are joining the argument. Teachers all over the country are expressing a sense of outrage that they are being subjected to mandatory fingerprinting. In the words of a recent article, “[i]t’s not only embarrassing. It puts a cloud of suspicion around teachers, that they can’t be trusted around children.” One teacher in Oregon stated that the new mandatory fingerprinting made him feel as though he was “for all practical purposes, classified with the likes of Charles Manson, Al Capone and John Wilkes Booth, getting [his] fingerprints taken.” This sense of criminalization of teachers surely could not have been the intent of the legislatures, so what is happening here?

Maine is a hotbed of political debate over the issue of mandatory fingerprinting. In Maine, teachers, parents, and students are appealing to “everyone from superintendents to 2002 gubernatorial candidates to reverse the law they say violates their civil liberties.” Eight Maine school boards have openly

42 Id.
43 There is an overall suspicion and mistrust of teachers, and I’m insulted and demeaned by this selective McCarthyism. One of the cornerstones of democracy is that, in law, you are innocent until proven guilty. But it seems that before we even step into a classroom, teachers are considered likely to be guilty of something.
45 Lambeck, supra note 13.
46 Chaney, supra note 43.
47 ME. REV. STAT. ANN. tit. 20-A, § 6103 (West 2003).
48 Beth Daley, Fingerprinting Foes Step up Battle in Maine, BOS. GLOBE, Sept. 9, 2001, at C1.
opposed the fingerprinting requirement. In a recent resignation letter, a nineteen-year veteran teacher, Bernie Huebner, stated that he was resigning because he was about to have to obtain re-certification and in the process be required to submit to mandatory fingerprinting for a background check. In his letter, Mr. Huebner also stated that "the law is doing virtually nothing to prevent child abuse, while simultaneously making a mockery of some of the same constitutional values we are expected to teach: the Fourth Amendment prohibition against unreasonable search and seizure; due process; and 'innocent until proven guilty.'" There must be some validity to Mr. Huebner's concerns as, in the interest of finding other ways to protect school children beyond fingerprinting, the Maine Legislature voted in 2000 to exempt current school employees from fingerprinting, though Governor King vetoed this change. In 2001, the Legislature voted to repeal the law entirely, but was again vetoed by Governor King. This record of attempted change and repeal demonstrates that legislators still have reservations about the existing mandatory fingerprinting law.

In Maine's recent gubernatorial race, mandatory fingerprinting was an emotionally charged issue, with all four candidates proposing changes to the existing fingerprinting law ranging from complete repeal to limiting the scope of its application. During his campaign, the new governor, John Baldacci, supported a rewriting of the bill to apply only to new state employees. Maine teachers must wait to see if Governor Baldacci will reverse his predecessor's legacy and endorse change to the existing law. In another governmental response to the expressed outrage over the fingerprinting bill, Maine decided to pay for the fingerprinting checks, a shift from the original policy that placed the forty-nine dollar cost on the employees. This may be a step in the right direction toward finding ways to make the fingerprinting law less offensive and burdensome on educators, but it still fails to alleviate the remaining underlying concerns regarding mandatory fingerprinting laws.

Commonly cited criticisms of mandatory fingerprinting laws throughout the United States include issues of financing the fingerprinting, arguments of the laws'
over- and under-inclusiveness, concerns that individuals' rights are being violated, and concerns that people will be discouraged from applying to positions if they are required to obtain fingerprints, which may cause staffing problems at schools. In New York, a new law (enacted on July 1, 2001) requiring the fingerprinting of new teachers was expected to:

result in teaching positions going temporarily unfilled when the new school year starts in the fall. Since the fingerprinting and background check could take the FBI and the state a month or more to complete, school districts may be unable to quickly hire teachers to replace those who leave suddenly before the start of the school year.56

This concern elucidates another of the financing problems of fingerprinting laws: What is the true expense of conducting mandatory fingerprints of school district applicants, and who will bear the cost? If mandatory fingerprinting laws will delay the hiring of new teachers, who will teach the children if the new teacher is not allowed to work until the F.B.I. gives an “all clear”? This may result in a substitute teacher filling this position, who unless the law specifically covers substitute teachers as well as full-time teachers, may not be required to submit to fingerprinting for background checks, thus defeating the purpose of the statute. To answer these questions, it is important to focus on the impact of the current laws and the purpose behind their creation.

LEGISLATIVE INTENT BEHIND THE STATUTES: DOES THE LAW ACCOMPLISH THE GOAL?

The stated goal of mandatory fingerprinting laws, as well as of the National Child Protection Act of 1993, is to prevent child abuse.57 The mandatory fingerprinting laws focus on increasing the ability of school officials to obtain accurate criminal history background checks on all teachers, and in some states on all personnel, who have contact with children in public schools.58 The legislative intent of the fingerprinting laws is to protect students from individuals who have criminal backgrounds and who may pose a threat to the welfare of the children.59

57 See supra note 7.
59 See, e.g., Henry v. Earhart, 553 A.2d 124, 128 (R.I. 1989) (“[The regulations] merely require, as part of the licensing or employment process, certain background information to ensure the safety of the children to be cared for.”). The governor of Maine responded to criticisms of the state’s fingerprinting statute, which became law in 2001, in the following manner:

Governor Angus King, while acknowledging that teachers may feel
Mandatory fingerprinting of teaching applicants accomplishes the goal of "weed[ing] out the very few" teachers who may pose a threat by ensuring that an accurate background check on each applicant will be obtained, despite the attempts by any applicant to change their name or identifying information on his or her application. The fingerprinting of applicants is a protection against fraud by applicants who may lie to prevent a background check revealing past crimes which would disqualify them from working with children.

Is the fingerprinting of all teachers for the purpose of "weed[ing] out the very few" who may pose a threat to the children in their care result-oriented and effective enough to justify the possible intrusion into individuals' privacy and rights? If the mandatory fingerprinting of all teachers would effectively prevent child abuse, the answer would be yes — any minor invasion of rights would appear to be justified. "It is a well-settled principle of constitutional analysis that legislative enactments are presumed to be constitutional. . . ." A party challenging the constitutional validity of an act carries the burden of persuading the court that the act violates an identifiable aspect of the State or Federal Constitution. It is often a difficult task to show that a legislature's enactment is unconstitutional because courts are deferential to its legislative intent. This presumption in favor of the legislatures as was stated by the court in State v. Tyndall:

The legislative power to protect the citizens in their health and safety is a very high power, but one justly exercisable and one which the legislature cannot alienate. . . . The legislature has the right to learn for itself the reasons which impel it to act. A very large measure of authority is vested in the legislature upon that subject, and unless we can say that the act is unreasonable, we are not authorized to overthrow it.

However, mandatory fingerprinting does not actually accomplish the goal of preventing child abuse; it is perhaps more of a drastic measure that leaves gaping holes in the protection of children from child abuse. Upon reviewing statistics of child abuse throughout the country, the theory behind the mandatory fingerprinting laws, while well-intentioned, proves to be somewhat flawed. In his testimony

uncomfortable with pressing their fingers into inkpads, has said in other press accounts that the law "is a device for prevention, not accusation." While he said the overwhelming majority of teachers pose no threat to children, the fingerprinting is necessary to weed out the very few who may harm youngsters. Daley, supra note 47.

60 Daley, supra note 47.
61 Id.
63 Id. (citing Boucher v. Sayeed, 495 A.2d 87, 92 (R.I. 1983)).
64 State v. Tyndall, 74 N.E.2d 914, 916-17 (Ind. 1947) (citations omitted).
When we look at who the perpetrators of child abuse are, teachers are not on the top of the list — they’re not even on the list. In a 1999 U.S. Department of Health and Human Services survey, perpetrators of child maltreatment, including sexual abuse, in Montana are broken down as follows: 75% parents, 8% other relatives, 12.5% unknown, 0.5% foster parents and residential facility staff, 0.4% child care providers, 3% non-caretakers such as neighbors or friends. Maltreatment by educators is so rare, the U.S. Department of Health and Human Services doesn’t even track it. If there were any incidents of it at all, I suppose it would be included in the 3% category with neighbors and friends.\(^6\)

If the primary goal of the law is to prevent child abuse, these statistics demonstrate that mandatory fingerprinting of all public school teachers may not be the best vehicle to accomplish this goal, as it suffers from problems of both underand over-inclusivity. Mandatory fingerprinting of all teachers is under-inclusive in that it does not address the people who are actually responsible for the vast majority of child abuse in this country.\(^6\) The process of fingerprinting, only “catches” those persons who are actively trying to hide their past criminal convictions through the use of false names or information.\(^6\) “In fact, since [all] volunteers are not required to be checked, there are gaping holes in the supposed security net officials tried to create.”\(^6\) Some states leave such background checks on non-teachers up to the discretion of the school district. In New Hampshire, the school administrative unit, school district, or charter school shall not be required to complete a background investigation or a criminal history records check on volunteers, provided, however, that the governing body of a school administrative unit, school district, or charter school may adopt a policy designating certain categories of volunteers.

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\(^6\) See id.

\(^6\) The only times fingerprints obtain more accurate records of people than using just an individual’s name are when the individual provides a false name. “A source at the FBI office for background fingerprints states that individual states will discover that they cannot get information using prints that they couldn’t have discovered without them.” Why Should I Oppose Fingerprinting?, at http://www.sites.netscape.net/onevoice10/why.

as "designated volunteers" who may be required to undergo a background investigation and a criminal records check.

Thus, the law is under-inclusive when applied only to prospective and current teachers, as it does not require fingerprinting of everyone who has contact with children in schools. There must be a line established as to who is included under such policies and perhaps the risk posed by varying groups of school employees other than teachers.

If the law does not cover all persons who come in contact with children and who may be potential child abusers, can it be upheld despite its under-inclusivity? Courts will allow legislatures to legislate one-step-at-a-time, as long as the legislature states a reasonable connection and purpose. "[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." However, courts do not always give under-inclusivity allowances as demonstrated in City of Cleburne v. Cleburne Living Center. As background checks can only identify those persons who have already been convicted of child abuse or related crimes, potential child abusers will not be identified through this process if they were never convicted or do not have a record. This reliance on fingerprint background checks may cause a false sense of security and a lessening of other safeguard measures that may actually be more efficient and effective at preventing child abuse in schools.

An


70 See Williamson v. Lee Optical, 348 U.S. 483 (1955). "The reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." Id. at 489 (emphasis added).

71 Id. at 487–88.

72 473 U.S. 432 (1985). In this case, the Supreme Court did not find a logical means-end fit for a restriction on certain housing in a neighborhood. Despite its usual inclination to accept the stated purpose of the legislature and use a rational basis review of such laws, in this case it used a heightened rational basis review and found the law to be unconstitutional.

73 One statistic from Maine relates that "the annual in-school abuse constitutes about 2/10ths of 1% of the total abuse occurring in Maine... [and] only a small portion might be prevented by fingerprinting, as 3/4 of the Department of Education's cases occurred after initial licensing in Maine." Facts Relating to the Current Fingerprinting Law, at http://www.mainemarketplace.com/fprint/facsheet.html.

74 One website solicits ideas for other ways to prevent child abuse in schools and has come up with the following alternatives:

Alternatives — Within Schools: 1) Improve and bring consistency to existing background check and hiring procedures by: A) requiring training in effective checks/hiring procedures of all candidates for administrators’ certificates (to be offered by State and/or universities), or upon renewal of same; B) studying and implementing ways to overcome the “pass the trash” problem of references failing to give candid appraisals of job applicants. 2) Offer training to all school
example of this false sense of security is that defense of fingerprinting and possible privacy invasions, """"[s]ome parents . . . have argued that freedom comes from knowing that their children are not being taught by convicted child molesters who lied during their background checks.""""

This, however, gives a poor result because while parents can be assured that their children's teachers did not lie about their backgrounds, they have no assurance through this system that their children's teachers are not potential child abusers. Reports on child abuse confirm the problem of false security of the small number of teachers or school employees found guilty of abusing children, many of them are first time offenders with no prior record — who thus would not have been screened out despite the presence of fingerprinting checks.75

Mandatory fingerprinting may also be argued to be overinclusive in that it subjects all teachers to the process even though only an infinitesimally small number, if any, will have tried to lie about their backgrounds or even have objectionable backgrounds that could not have been discovered through other, less intrusive, means. Should all teachers be subjected to mandatory fingerprinting, when it is known that statistically very few, if any, child abusers will be identified through this procedure, justified? In Railway Express Agency v. New York, the Supreme Court stated that """"[i]t is no requirement of equal protection that all evils of the same genus be eradicated or none at all."""

Over-inclusivity of a law is

personnel in how to recognize signs of abuse. Since school personnel are statistically the ones most likely to report abuse, give them professional training in reading the signs. 3) Teach students how better to protect themselves from potential abusive situations. We can never watch all members of the community; there will always be undetected and first-time pedophiles out there. 4) Provide better support for networking of existing agencies and school personnel, each of which may have a piece of the bigger solution but lacks the resources to coordinate efforts. Alternatives — Outside Schools: 1) Re-allocate the fingerprinting/FBI check money to DHS to be used to investigate and fully pursue ALL cases of suspected abuse. 1999 figures show 1,264 cases referred to DHS and deemed appropriate for investigation but not followed up on due to lack of resources. 2) Examine the judicial response to child abuse where it effectively returns pedophiles to the community without rehabilitation within a matter of months, so perpetuating the problem. 3) Offer training in recognizing the signs of abuse to police, clergy and other members of the community. 4) Consider crisis intervention/hotline centers where citizens can speak to trained personnel about suspected or known child abuse.

Maine Educators Against Fingerprinting, Positive Alternatives to Deal with the Problem of Child Abuse in Maine, Mar. 2000, at http://www.slipperyslope.org/choices.html.

75 Technology Examples: Fingerprint Databases, MILWAUKEE J. SENTINEL, Aug. 19, 2001, at 01J.


allowed as long as there is a sufficient fit between the means used and the ends sought by the legislature. Thus, the justification for including all teachers in the mandatory fingerprinting laws would be the legislature’s goals of catching applicants who lied on their employment applications or identifying those who have relevant criminal background. This goal is accomplished or is reasonably thought to be furthered by mandatory fingerprinting of everyone.

However, there may be other reasons, possibly not stated by the legislatures, for instituting mandatory fingerprint background checks for all teachers. One possibility is a liability issue for school districts. Although the National Child Protection Act of 1993 does not hold states or schools liable for not conducting thorough background checks, schools may be liable for the actions of their employees if a child is abused and the school board had means to know or discover that the employee was a child abuser. Courts have “recognized that ‘a special relationship is formed between a school district and its students so as to impose an affirmative duty on the district to take all reasonable steps to protect its students.’ Thus, the District had a duty to protect [the student] from assaults by her teacher.”

School districts may be shielding themselves from liability in “duty to protect” cases by requiring fingerprinting. Hiring or supervising personnel and school districts may be deemed to owe a duty to protect students from harm if they knew or should have known that an individual had a prior record of abuse towards children and thus posed a foreseeable risk of harm to the children under his or her supervision. If school districts are liable for harm caused by their employees, one way they can protect themselves from potential threats is through the mandatory fingerprinting of all employees. But, if this is the goal, then all school employees, not just teachers, should be fingerprinted. Perhaps fingerprinting requirements should extend even further to everyone who comes into contact with children in the school, although this would create a problem of identifying groups who need to be fingerprinted. Legislatures are less able to require the fingerprinting of everyone who enters a school than they have when it comes to issuing teaching certificates. It may be viewed that legislatures are targeting teachers with these laws because of the availability and ease in identifying and controlling teachers. The liability of the school districts may be an alternative factor in the reasoning of state legislatures when implementing mandatory fingerprinting laws. However, this would appear that legislatures are protecting the school districts from liability as a primary concern.

78 See supra note 7.
80 Virginia G., 19 Cal. Rptr. 2d at 1855.
MANDATORY FINGERPRINTING OF PUBLIC SCHOOL TEACHERS

and protecting children from abuse as a related concern. Thus, the stated legislative intent may not be the actual intent behind the law. If this were the case, then the assumption that the stated purpose of the law is the real purpose could be challenged by opponents. "But States are not required to convince the courts of the correctness of their legislative judgments. Rather, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." Despite the apparent flaws in fingerprinting laws, challengers of these laws face a high burden of proof and significant difficulty when attempting to demonstrate that there is inappropriate legislative intent behind the creation of these laws.

INFRINGEMENT UPON CONSTITUTIONAL RIGHTS

Opponents of mandatory fingerprinting laws argue that these laws violate teachers' constitutional rights. Three such rights that teachers allege are violated by these laws are the right to privacy, protection from illegal search and seizure, and due process. Similar to the legislative intent arguments, opponents of these laws must overcome a high burden of proof and negative case law to have success with any constitutional challenge.

There is only one case directly on point regarding the mandatory fingerprinting of teachers and it supports overwhelmingly the existence of these laws. The court held in Henry v. Earhart that mandatory fingerprinting is acceptable. Early education employees filed regarding a law implementing mandatory fingerprinting and background checks for employees of nursery schools and preschools. The plaintiffs alleged that the law, which required them to "undergo an employment background check and criminal records check including fingerprinting" was unconstitutional. The law provided for the fingerprinting of all employees of these schools, "however, student teachers, parents, or others who are not present for child task-oriented purposes are excluded from this requirement." The plaintiffs further alleged that the regulations:

82 See Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981). "In equal protection analysis, this Court will assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they 'could not have been a goal of the legislation.'" Id. at 463, n. 7 (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n. 16 (1975)).
83 Id. at 464 (quoting Vance v. Bradley, 440 U.S. 93, 111 (1979)).
85 Id. at 126.
86 Id. (internal quotation omitted).
87 Id.
[v]iolate[d] the due-process clause because it impose[d] a presumption of guilt; and . . . violate[d] the constitutional right to privacy and the search and seizure provision of the Fourth Amendment by requiring plaintiffs to undergo employment-history and criminal-record checks and fingerprinting by the Rhode Island State Police without requiring the Department of Education to show probable cause or to obtain a warrant. 88

The court rejected the plaintiff's claims and supported the regulation, stating that "[s]everal courts have held that fingerprinting employees does not invade privacy rights but is rather a minimal and reasonable intrusion. We agree." 89 The court also stated:

The plaintiffs' final constitutional argument is that the regulations violate the search and seizure provisions of the Fourth Amendment. Again we disagree. The employment history, criminal-record check, and fingerprinting are not part of a criminal investigation. The regulations do not invade individual privacy rights. They merely require, as part of the licensing or employment process, certain background information to ensure the safety of the children to be cared for. 90

The court held the regulations were constitutional and that "[t]hey] do not create a presumption of guilt. They merely create a presumption that a person with a criminal record may not be fit to care for children." 91

Even though the court in Henry v. Earhart found the fingerprinting regulations in Rhode Island to be constitutional, it raised important points of discussion regarding fingerprinting statutes in other states and possible constitutional objections. Although there are no other cases dealing specifically with mandatory fingerprinting of teachers, there are several cases that address fingerprinting of

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88 Id.
89 Id. at 128; see also Iacobucci v. City of Newport, Ky., 785 F.2d 1354, 1357 (6th Cir. 1986), rev'd on other grounds, 479 U.S. 92 (1986) ("[W]hatsoever 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."); Thom v. N.Y. Stock Exch., 306 F. Supp. 1002, 1007 (S.D.N.Y. 1969) ("The day is long past when fingerprinting carried with it a stigma or any implication of criminality."); id. at 1009 ("The submission of one's fingerprints is no more an invasion of privacy than the submission of one's photograph or signature to a prospective employer."); Henry, 553 A.2d at 128 (noting that, "in non-criminal contexts, courts have regularly upheld fingerprinting of employees" where fingerprints are used only to identify and certify a prior criminal record . . . .") (quoting UWUA v. Nuclear Regulatory Comm'n, 664 F. Supp. 136, 138–39 (S.D.N.Y. 1987)).
90 Henry, 553 A.2d at 128.
91 Id.
employees in other fields. Other courts have held similarly to the Rhode Island case by upholding fingerprinting requirements and rejecting employees’ constitutional. Cases involving fingerprinting have been upheld in various employment situations involving nuclear facility employees, bar employees, non-employment situations involving welfare recipients, housing applicants, and banking customers. All of these upheld fingerprint requirements finding no violations of an individual’s constitutional rights.

It is useful to review the reasoning behind these decisions and how it may be different or similar to the current debate involving teachers and their claims that fingerprinting violates their rights of privacy, protection from illegal search and seizure, and due process. Despite the fact that a review of case law concerning fingerprinting policies throughout the United States in both employment and non-employment settings reveals that there is very little support for challenges to such laws based solely on constitutional grounds, such arguments are not moot. In reviewing these cases and holdings it must be considered whether fingerprinting is merely a minimally intrusive procedure that does not violate an individual’s constitutional rights, or if there are circumstances unique to the mandatory fingerprinting of teachers that merit another review of these laws by courts and legislatures.

RIGHT TO PRIVACY

“Salus populi est suprema lex’ is an ancient legal maxim.” With full recognition of the rights of the citizen we must nevertheless hold that the safety of the people is the first law and this law must prevail even as against some of the apparent rights of privacy.” Is fingerprinting a necessary infringement on teachers’ rights to privacy or does it violate what our courts and society deem to be acceptable and allowable actions by our government? Some of the strongest constitutional arguments against fingerprinting arise when courts consider the impact of

92 See supra notes 82–83.
94 See Iacobucci v. City of Newport, Ky., 785 F.2d 1354 (6th Cir. 1986).
98 “Salus populi est suprema lex” means that the safety of the people is the first (supreme) law.
99 Id.
fingerprinting on an individual's right to privacy. The right of privacy is a fundamental right held by all Americans\textsuperscript{100} and courts evaluate carefully cases alleging privacy violations.\textsuperscript{101} Majority opinions in cases involving the issue of fingerprinting, are overwhelmingly in favor of such policies. However, dicta in many of these cases leaves open the possibility for persuasive arguments on behalf of teachers' privacy rights in relation to fingerprinting laws.

Courts have routinely upheld the fingerprinting of employees in cases where a legitimate need for such fingerprinting is established. \textit{Iacobucci v. City of Newport}, held that a statute requiring bar employees to be fingerprinted did not violate the right of privacy.\textsuperscript{102} 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 . . . . Fingerprinting . . . have not been held to merit the same level of constitutional concern."\textsuperscript{103} The court in \textit{Utility Workers Union of America, AFL-CIO v. Nuclear Regulatory Commission}, supported this ruling and further stated that "[s]ince fingerprints do not merit enhanced protection, Congress may require certain individuals to be fingerprinted if it can show that fingerprinting bears a rational relationship to a legitimate government objective."\textsuperscript{104} The court in \textit{Young v. Chicago Housing Authority}, supported the holding and stated that "[t]he requirement of fingerprinting as a condition of employment does not violate the rights of any employee."\textsuperscript{105} However, these cases dealt with small, specific groups of employees and the court in each case found that the fingerprinting policy was rationally related to a legitimate government objective.

Given these decisions in employment settings, it is likely that courts, if faced with the issue of mandatory fingerprinting of prospective teachers, will find that the fingerprinting is not a violation of their privacy rights. Nonetheless, an argument may be made that the mandatory fingerprinting of veteran teachers is not supported by these rulings. The case of veteran teachers is different from that of prospective teachers in that the fingerprinting of such individuals is even less likely to further the objective of protecting children from child abuse. This is because veteran

\textsuperscript{100} See Roe v. Wade, 410 U.S. 113, 152 (1973) ("These decisions make it clear that only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty,’ are included in this guarantee of personal privacy.") (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

\textsuperscript{101} See Roe, 410 U.S. at 152 ("The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as . . . 1891, the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."); see also City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

\textsuperscript{102} \textit{Iacobucci v. City of Newport, Ky.}, 785 F.2d 1354, 1357 (6th Cir. 1986).

\textsuperscript{103} \textit{Id.} at 1357–58.


teachers have already been entrusted with children and the fingerprinting of these individuals seems even more invasive than that of mere applicants who have not proven themselves worthy of trust in the schools. Further, the dissemination of fingerprints and information that is obtained through background checks to outside agencies, individuals, or school districts, to which teaching applicants have not applied, may cause concern for violation of privacy rights.

Courts have also addressed the issue of fingerprinting and rights of privacy in cases concerning the fingerprinting of accused, yet unconvicted, individuals in criminal contexts. The court in McGovern v. Van Riper, upheld the validity of a statute that allowed fingerprinting and photographing of accused persons along with dissemination of this information to outside law enforcement agencies. The court stated that the right to privacy protects a person's private life, but "when the life seemed to be a matter of public interest, proper steps by public officials for the purpose of the due administration of criminal laws could not be said to be an unwarranted infringement of the right." Should teachers be viewed in the context of criminals because their personal information is a matter of public interest? Does this public interest therefore warrant the dissemination of this material? This seems highly improbable. Perhaps this is where the line can be drawn regarding the level of infringement of such rights.

Violations of rights of privacy by fingerprinting are often a common claim in other settings as the frequency of the use of fingerprints has expanded outside of the criminal and the employment arenas. Mandatory fingerprinting has been instituted in non-employment areas to confirm identity of participants in programs and prevent fraud. For example, some banking procedures require fingerprinting of bank customers - raising concern among the customers that their personal privacy is being invaded. Arguments against fingerprinting in this context are based on the facts that

[f]ingerprinting is often associated with our criminal justice system. Obviously, people do not want to be treated like criminals, especially when making simple transactions. It is argued that subjecting people to fingerprinting creates a presumption of guilt, thus affecting one's dignity. Furthermore, fingerprinting is a way of disclosing one's identity. Requiring citizens to disclose their identity is very personal, and may invade privacy rights protected by the United States Constitution. . . . The right to privacy goes beyond physical intrusions into property; this premise also encompasses mental intrusions, including personal

106 W.E. Shipley, Right of Privacy, 14 A.L.R.2d 750, 760 (quoting McGovern v. Van Riper, 54 A.2d 469 (N.J. 1947)).
107 Id.
108 Waltz, supra note 97, at 598.
The concerns raised regarding a violation of privacy in such banking practices may not be as persuasive an argument in the teacher debate because the banks require this of private citizens who are not applying for a job with the state and are merely attempting to conduct their daily business. However, it may not be as different as it first appears. Teachers are willing to provide their names, addresses and identifying information for employment purposes. The legislatures, however, show a distrust of the applicants and insult the "personal dignity" of the individual teachers by requiring fingerprints in addition to the application. The only way a fingerprint background check would differ from a name background check would be if the individual providing the name was lying or the person entering the name into the database mistyped it. Thus, legislators appear to be saying that they are unwilling to trust name background checks because of the possibility of individuals who lie and human error. If this reasoning was followed in all areas of life, our society would be utterly changed and personal privacy and integrity would never be respected. Does society want to start down that road?

Another area in which the fingerprinting and privacy issues are being debated is in the welfare system. Welfare recipients in New York are required to submit to fingerprinting to obtain aid. The argument supporting this action is the need to prevent fraud is a much greater concern than the need to protect individuals' rights.

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109 Cf. id. at 598-99. "You don't have to be a criminal to be fingerprinted anymore. Driven by technology and fear in a changing society, fingerprinting is finding increasing favor as a means of identification, standing the principle of innocent until proven guilty on its head." Aimee L. Curl, Civil Rights Vs. Public Safety: An Age-old Debate Extends Beyond the Classroom, ME. TIMES, Mar. 1, 2001.

110 See Curl, supra note 109.

111 This computerized fingerprinting — known as finger imaging — is a powerful weapon against recipient fraud, but it has prompted vociferous criticism. Opponents challenge both the intrusiveness of the measure and its empirical justification, branding it a draconian response to a relatively insignificant problem. As a preliminary matter, finger imaging does not violate recipients' constitutional right of privacy. To survive constitutional analysis, the procedure need bear only a rational relationship to a legitimate state objective unless it impairs a "fundamental right," in which case courts apply strict scrutiny. This "[e]nhanced protection has been held to apply only to such fundamental decisions as contraception and family living arrangements"; fingerprinting does not implicate the same intensely personal considerations, and thus "ha[s] not been held to merit the same level of constitutional concern." Therefore, New York’s finger imaging program is subject only to rational basis review, which it easily satisfies — preventing welfare fraud is a legitimate goal, and finger imaging is a rational means for achieving it. Recent Legislation, supra note 95, at 1169 (citing Bowen v. Roy, 476 U.S. 693, 710-11 (1986)).
to privacy and due process.

Every man, when he enters into society, gives up a part of his natural liberty as the price of so valuable a boon, and obliges himself to conform to those laws, which the community has thought proper to establish. Otherwise, there would be no security to individuals in any of the enjoyments of life.\textsuperscript{112}

Is the right to privacy a "natural liberty" retained by individuals, or is this right given up in exchange for an individual's role in society? The argument arises that upon entering society, a person "has given up that part of his 'natural liberty' which these duties restrict," and in exchange for entrance into society, one must comply with the laws which are designed for the whole and not necessarily the individual as "where there is no law, there is no freedom . . . . So the immutability and absoluteness of the right of privacy, the right to be let alone, finds little support in the mere fact that it had its origin in natural law."\textsuperscript{113}

The court, in \textit{Eddy v. Moore}, stated that "after Griswold, there can be little doubt that 'the right of privacy is enshrined as a constitutional doctrine. . . . The challenge is to determine the dimensions of that right. Few things have been as basic to our legal system as the presumption of innocence.'"\textsuperscript{114}

The cases dealing with the equitable right of privacy and the comments of Prosser and other commentators take us to the threshold of a recognition of a right of an individual to be free of improper use of his fingerprints and photographs by the state, but these cases stop short of establishing a constitutional right of privacy and granting too much discretion to the state without the need for justification to determine what records are needed to effectuate the law enforcement function.\textsuperscript{115}

\textsuperscript{112} Norman v. City of Las Vegas, 177 P.2d 442, 447 (Nev. 1947) (quoting 1 \textsc{Blackstone's Commentaries} 125–26).

\textsuperscript{113} \textit{Norman}, 177 P.2d at 448.

\textsuperscript{114} \textit{Eddy v. Moore}, 487 P.2d 211, 217 (Wash. Ct. App. 1971) ("After her arrest, [Appellant] was fingerprinted and photographed, and the fingerprints and photographs were placed in the files of the police department. At trial, the charges against her were dismissed. She then demanded from the Chief of Police, one W.F. Moore, the return of her fingerprints and photographs.") (quoting State v. Rabe, 484 P.2d 917, 924 (Wash. 1971)). She asserted "her right of privacy in her fingerprints and photographs." \textit{Eddy}, 487 P.2d at 212.

\textsuperscript{115} \textit{Eddy}, 487 P.2d at 214; see \textsc{W. Prosser, Privacy}, 48 \textsc{Cal. L. Rev.} 383 (1960); see also State \textit{ex rel. Mavity v. Tyndall} 74 N.E.2d 914 (Ind. 1947).

[Where it was argued that a citizen had a property right in his fingerprints and photograph taken when he was arrested on a charge of which he was later acquitted, the court, however, holding that even if the contention were granted, the right must be made to harmonize with the rights of society to its proper protection. An appeal to the United States Supreme Court was dismissed for lack of a substantial Federal question.]
Are there ways to decrease the violations of privacy interests that occur because of mandatory fingerprinting laws? "In Davis [v. Mississippi], . . . the court conceded that in non-criminal situations a statute could require fingerprinting of certain persons, if narrowly circumscribed by appropriate standards to protect privacy."116 In Norman v. City of Las Vegas, "[i]t [was] the 'dissemination' of the prints and the 'dissemination' of the facts of the employee's previous criminal record, if such be the case, that is claimed to violate their right of privacy which is asserted to be guaranteed by both the Federal and State Constitutions."117 This is also a concern regarding the maintenance of the teachers' fingerprint records because there is not a uniform procedure for maintaining such records throughout the states.

There are ways to better maintain and insure the confidentiality and accuracy of the information obtained from fingerprint background checks. In Utility, "[t]he plaintiff also complain[ed] that when licensees obtain criminal history records, they may find old or incomplete information which would unfairly stigmatize certain employees and adversely affect their careers."118 Some states have made specific provisions on how to handle and dispose of fingerprint cards and background information. For example, the Idaho Code provides that:

[a] record of all background checks shall be maintained at the state department of education in a data bank for all employees of a school district with a copy going to the applicant. The department of education shall forward to all applicants for a criminal history check, notification that the fingerprint card has been destroyed after the background check has been completed. The department of education and the Idaho state police shall ensure that fingerprint cards have been destroyed after a criminal history check has been completed.119

Returning the fingerprint cards to the applicants may also be a viable solution as it would perhaps better assuage fears of applicants that their cards were not being disseminated to persons who should not receive them. The return of identification records obtained by police has been debated regarding accused felons who were acquitted of all crimes.120 The court in Eddy v. Moore stated that it believed that the return of fingerprints and photographs, upon acquittal, "is a fundamental right

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Annotation, Protection of Privacy Under Other Forms of Rights, 14 A.L.R.2d 750, 756 (1950).
implicit in the concept of ordered liberty." And in a concurring opinion in *Griswold v. Connecticut*, Justice Goldberg stated that "[i]n a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose." The Supreme Court further stated in *Bates v. Little Rock* that "[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." Therefore, "[t]he law must be shown "necessary, and not merely rationally related, to the accomplishment of a permissible state policy." Perhaps the implementation of better confidentiality policies with the improved accuracy and use of records would help to reduce the objections to mandatory fingerprinting.

There are already safeguards in place for the maintenance of confidentiality and return of records of alleged criminals, which adds to the argument that there should be safeguards just as strict, if not more so, on the dissemination and maintenance of fingerprint records obtained from job applicants. The development of uniform fingerprint maintenance and distribution procedures would be one viable

121 *Id.* at 217.
125 For an example of such statutes, see Code of Virginia Annotated § 19.2-392.2: *Expungement of police and court records.*

A. If a person is charged with the commission of a crime and
   1. Is acquitted, or
   2. A nolle prosequi is taken or the charge is otherwise dismissed, including dismissal by accord and satisfaction pursuant to § 19.2-151, or
   3. Is granted an absolute pardon for the commission of a crime for which he has been unjustly convicted, he may file a petition setting forth the relevant facts and requesting expungement of the police records and the court records relating to the charge.

F. After receiving the criminal history record information from the CCRE, the court shall conduct a hearing on the petition. If the court finds that the continued existence and possible dissemination of information relating to the arrest of the petitioner causes or may cause circumstances which constitute a manifest injustice to the petitioner, it shall enter an order requiring the expungement of the police and court records relating to the charge. Otherwise, it shall deny the petition. However, if the petitioner has no prior criminal record and the arrest was for a misdemeanor violation, the petitioner shall be entitled, in the absence of good cause shown to the contrary by the Commonwealth, to expungement of the police and court records relating to the charge, and the court shall enter an order of expungement.
safeguard against some of the privacy issues discussed and may ameliorate the perceived infringement on an individual’s privacy created by the use of mandatory fingerprinting.

**PROTECTION FROM ILLEGAL SEARCH AND SEIZURE**

Another, although weaker, constitutional challenge to mandatory fingerprinting concerns protection of teachers from illegal search and seizure. Does the requirement that applicants present themselves at the police station to have their mandatory fingerprints taken violate any constitutional protection from illegal search and seizure? Important considerations in the application of such arguments on behalf of teachers are whether the mandatory fingerprinting of teachers, when conducted at police stations, constitute unlawful detention of these individuals and whether the taking of such fingerprints reasonably achieves the stated goal of protecting children or is merely an attempt to catch criminals.

A review of cases that address the issue of fingerprinting and illegal search and seizure reveals that although courts hold that detention and seizure is subject to Fourth Amendment restraints, fingerprinting in general does not violate these constraints. In *Davis v. Mississippi*, the court stated that “[d]etentions for the sole purpose of obtaining fingerprints are no less subject to the constraints of the Fourth Amendment.”[^1^] The court went on to add that “[i]t is arguable, however, that, because of the unique nature of the fingerprinting process, such detentions might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense.”[^2^]

While detentions for extensive searches must comply with the Fourth Amendment, the *Davis* court rationalized that

[d]etention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions. 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.[^3^]

The inconvenience and destructive nature of abrupt police searches is also perhaps not as applicable to fingerprinting as “there is no danger of destruction of fingerprints, [so] the limited detention, need not come unexpectedly or at an

[^2^]: *Id.* (citing *Camara v. Municipal Ct.*, 387 U.S. 523 (1967)).
[^3^]: *Davis*, 394 U.S. at 727.
inconvenient time."

These are all very plausible arguments against the suggestion that requiring prospective teachers to present themselves at the police station to have their prints taken violates search and seizure laws.

However, the Davis court did not decide this issue as it "[had] no occasion in this case . . . 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." A distinction may be made between involuntary detention of accused criminals for fingerprinting and the voluntary appearance at police stations by teachers for fingerprinting. In the case of People v. Stuller, the court stated:

[...]

In Hayes v. Florida, however, the Court, while considering precedential through criminal cases concerning illegal detention and search and seizure, stated that although

none of these cases have sustained against Fourth Amendment challenge the involuntary removal of a suspect from his home to a police station and his detention there for investigative purposes, whether for interrogation or fingerprinting, absent probable cause or judicial authorization. . . . None of the foregoing implies that a brief detention in the field for the purpose of fingerprinting, where there is only reasonable suspicion not amounting to probable cause, is necessarily impermissible under the Fourth Amendment.

Other courts have held that fingerprinting does not require probable cause or create a serious intrusion on an individual's rights. The court in Early v. People stated that "[d]etention for fingerprints may constitute a much less serious intrusion
upon personal security than other types of police searches and detentions." The reasoning behind the court's decision was that fingerprinting is a much less intrusive procedure than typical police interrogations or searches and has many more positive than negative attributes.

In cases specifically addressing the issue of fingerprinting of employees, courts have held that mandatory fingerprinting does not constitute an illegal search and seizure. In Utility Workers Union of America, a statute "oblige[d] workers . . . to comply with the fingerprinting and checking process in order to retain, or obtain, unescorted access privileges to a nuclear facility. Failure to comply . . . result[ed] in the denial of access privileges. In most cases, the loss of access privileges [means] loss of employment." This is very similar to the teachers' situation because if they refuse to submit to the fingerprinting, they will not be employed. It was argued by the plaintiff in this case "that the fingerprinting requirement of the statute constitutes an unreasonable search and seizure of its members." The court, however, found that “[t]here is no merit to this argument because the intrusion is both minimal and reasonable.” Furthermore, the court stated that “the procedure will be done on all employees who apply for access privileges. No stigma is attached to the process. Moreover, in non-criminal contexts, courts have regularly upheld fingerprinting of employees.”

Thus the argument that the taking of fingerprints is unconstitutional appears unsupported by case law. However, another argument looks at the intent behind the taking of fingerprints. The court in Edmond v. Goldsmith, stated that

[w]hen urgent considerations of the public safety require compromise with the normal principles constraining law enforcement, the normal principles may have to bend. . . . But the purpose behind the program is

134 Id.
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 at an inconvenient time.

Id. (quoting Davis, 394 U.S. at 1398).
136 Id. at 138.
137 Id. at 138; see also Murray Miller v. Cornelius Murphy, 143 Cal. App. 3d 337 (1983).
critical to its legality. The program must be a bona fide effort to implement an authorized regulatory policy rather than a pretext for a dragnet search for criminals.\textsuperscript{139}

Mandatory fingerprinting laws, while possibly violating privacy and due process rights, may also be characterized as a "dragnet search for criminals."\textsuperscript{140} It must be determined if state legislatures are using mandatory fingerprint background checks in a legitimate effort to protect children from abusers, or if they are using illegal searches and seizures in the hopes of catching individuals who they believe are attempting to evade them when there are other more effective ways to identify such violators and protect children. If this were true, then the basis of the law would appear to be solely to catch criminals and not necessarily to prevent abuse of children. The only people who will be caught through fingerprinting will be applicants who lied about their background information or who have already been convicted of child abuse or another crime. This does not eliminate the threat of child abuse by persons who have no prior criminal record. A further examination of the issues and possible violations of rights caused by mandatory fingerprinting is merited to determine if these laws comply with constitutional principles and if the goal of protecting children would be better served if these laws were revised.

**DUE PROCESS INFRINGEMENTS**

Fingerprinting is an encroachment on liberty of person. It is justifiable, as is imprisonment, upon conviction for crime, in the exercise of the police powers of the State for the purpose of facilitating future crime detection and punishment. What can be its justification when imposed before conviction? What constitutes 'due process of law') is ordinarily for the determination of the Legislature, but it may not act without limit.\textsuperscript{141}

This view, expressed in 1926, is certainly outdated today in a modern society in which daily infringements upon individuals’ rights are allowed for the benefit of

\textsuperscript{139} Edmond v. Goldsmith, 183 F.3d 659, 663–65 (Ind. 1999).
\textsuperscript{140} Id.
\textsuperscript{141} People v. Heverm, 215 N.Y.S. 412, 417 (City Magis. Ct. 1926): Mere arrest upon a charge of crime presupposes no guilt. It is one of society’s risks. To escape it, one must find the wilderness. A charge of crime needs only a complaint from anybody. A defendant is arraigned, in fact innocent, and refuses to submit to finger-printing. A recoilment from it is not unnatural. It cannot be said that the refusal is unreasonable or unjustified. Yet he is denied bail. The requirement for finger-printing is oppressive and unreasonable. It contravenes article 1, section 5, of the Constitution of the State of New York, and in my judgment is unconstitutional.
the society as a whole. The court in *Matter of Friedman v. Valentine*, stated that "[t]he right to pursue any calling may be conditioned. Any occupation may be reasonably regulated if others may be exposed to danger or misfortune by such calling."\(^{142}\) But does this view from the early part of the twentieth century hold any weight today? It still holds true today, as it did at the time of this court’s decision in 1926, that “however laudable the purpose of the Legislature may be, they cannot be a just excuse for annulling and destroying constitutional safeguards and guaranties.”\(^{143}\) If it is true, then perhaps society has accepted as constitutional that which was once considered unconstitutional.

The Supreme Court stated in *Board of Regents v. Roth* that

[the requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment’s protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite.\(^{144}\)]

The Court held “rights” and “privileges” are not easily defined, but, that the right to employment is not one of those protected rights under the Fourteenth Amendment.\(^{145}\) Justice Marshall in his dissenting opinion, disagreed with the majority and stated that there is a “liberty to work which is the ‘very essence of the personal freedom and opportunity.” securred by the Fourth Amendment.\(^{146}\) He went on to state that “[e]mployment is one of the greatest, if not the greatest, benefits that governments offer in modern-day life.”\(^{147}\) Regarding the issue of personal rights, the court in *United States v. Kelly* stated that “[a]ny restraint of the person may be burdensome. But some burdens must be borne for the good of the community... The slight[est] interference with the person involved in finger printing seems to us one which must be borne in the common interest.”\(^{148}\) This statement seems to sum up many of the constitutional arguments against fingerprinting in that people feel that mandatory fingerprinting is not just and infringes on some rights, but that it is a burden that “must be borne in the common interest.”\(^{149}\) Based on the existing precedent, it seems unlikely that a court will strike down mandatory fingerprinting in the near future. Perhaps a better way to challenge and ameliorate the laws is through an examination of what can be changed to make the laws more effective in

\(^{142}\) *In re* Application of Samuel Friedman v. Valentine, 30 N.Y.S.2d 891, 895 (1941).

\(^{143}\) *Id.* at 419.

\(^{144}\) *Bd. of Regents v. Roth*, 408 U.S. 564, 569–70 (1972).

\(^{145}\) *Id.* at 571.

\(^{146}\) *Id.* at 589 (Marshall, J., dissenting).

\(^{147}\) *Id.*

\(^{148}\) *United States v. Kelly*, 55 F.2d 67, 68 (2d Cir. 1932).

\(^{149}\) *Id.*
accomplishing their laudable stated purpose of protecting children while at the same
time minimizing the intrusion on the rights of teachers.

COMPROMISE: PROTECTING THE STUDENTS AND THE TEACHERS

With the advances in technology over the past few decades, the likelihood that
mandatory fingerprinting laws will be overturned in the near future is extremely
low. The current sense of protectiveness and suspicion of people in the United
States has caused some of the arguments against fingerprinting to diminish.\textsuperscript{150} In the
wake of the terrorist attacks of September 11, 2001, and the “War on Terrorism”,
the enactment of mandatory fingerprinting laws became part of a larger movement
in which United States citizens are willing to give up increasing control over their
privacy and their personal information in exchange for promises of security and
protection from harmful throughout the world. The implementation of national
databases, face recognition technology, and DNA identification systems all point to
the assumption that Americans are willing to sacrifice their rights in order to enjoy
the freedom that comes with living in the United States. But, is the establishment
of mandatory fingerprinting laws a realistic answer to society’s search for security?

There is no case law supporting contentions that mandatory fingerprinting of job
applicants violates any constitutional rights of individuals. This, does not mean that
mandatory fingerprinting should be accepted. The Constitution and society’s laws
are designed to be flexible and to respond to the needs and concerns of society. As
demonstrated in court decisions, fingerprinting of innocent citizens used to be much
more regulated and restricted. Society need not sit back and accept the current state
of the laws if it thinks they are wrong or not in the best interest of those they impact.
Society may critically examine the situation at hand and determine if this is the
direction it wants to pursue.

The anonymity of individuals in society is only increasing and with it, society’s
fear of losing track of undesirable persons who may pose a threat to other members
of society. Perhaps, there are other ways to give a sense of security to children’s
parents without causing teachers to feel as though they are being treated like
criminals.\textsuperscript{151} At the start of 2000, “Sixteen states [did] not require criminal
background checks for first-time applicants for professional certificates . . . .
Twenty-one states [did] not require employees to be fingerprinted, either for
certification or employment, and [had] no immediate plans to require it.”\textsuperscript{152} This

\textsuperscript{150} In Charleston, West Virginia, “[w]hatever issues teachers unions had with performing
criminal background checks for prospective teachers has faded with time.” Editorial, \textit{supra}
note 12.

\textsuperscript{151} In West Virginia, “[b]oth teacher union opposed the original bill because it called for
the background checks to be done every few years. That did not make sense, and so a one-
time background check will be conducted. Now both unions support this.” \textit{Id.}

\textsuperscript{152} Gloria Chaika, \textit{Is the Teacher in the Classroom Next Door a Convicted Felon?}, \textit{EDUC.}
indicates that not all states believe mandatory fingerprinting is a necessity despite some arguments that fingerprints are the only way to get complete and accurate background checks.¹³³ The recent debates in the Maine legislature and among the gubernatorial candidates at the end of 2002 is further evidence that this issue is far from being settled. However, with the increasing sense of insecurity in the United States, it appears likely that the remaining states will buckle under the pressure to implement some version of mandatory fingerprinting laws to satisfy their citizens that they are doing everything possible to insure their safety and the safety of their children.

Some proposed changes to the laws would potentially decrease the negative impact on teachers while still protecting children.¹⁵⁴ One such change may be to require the states to pay for the fingerprinting instead of the teachers or the school districts who cannot afford the expense. Another change may be to have the fingerprinting take place at the schools, instead of the police station, to lessen the feeling of criminalization surrounding the process and claims of Fourth Amendment violations. Requiring the fingerprinting of only new hires and not requiring veteran teachers, for whom there is no reason of suspicion, to be fingerprinted would also further the goal of protecting children from anyone trying to enter the teaching profession who has a criminal background, but would not challenge the trust and integrity of established teachers who do not pose a threat. Also, requiring fingerprints of all new hires, including any personnel who will be working directly with children, and of any volunteers or other persons who will work unsupervised with children should be considered if fingerprinting is to be implemented in all states to avoid a loophole in the law. A final modification to such laws may be to implement standards and guidelines or the maintenance, disclosure, and destruction of fingerprint information. All of these proposals would lessen the impact on teachers being required to give fingerprints while still protecting the children.

There are also changes that can be made outside of the fingerprinting debate to further protect children from abuse.¹⁵⁵ There needs to be better overall education among people who work with children regarding child abuse. Teachers, school personnel, and students need to be taught how to properly detect, report, and prevent child abuse. As there is not even a reporting statistic for child abuse perpetrated in the schools, instead of being criminalized and distrusted, teachers should be considered soldiers at the front of the battle lines in the fight against child abuse as they are among the few persons who have the opportunity on a daily basis to

¹³³ A police captain in Connecticut stated "'If you really want to know if an individual has a criminal record . . . you have to have fingerprints.' . . . For national checks, the FBI will not do a check without an up-to-date fingerprint card. They can't be kept and used again." Lambeck, supra note 13.

¹⁵⁴ See supra note 51.

¹⁵⁵ See supra note 66.
observe the signs of child abuse and are able to report children they suspect are being abused.\textsuperscript{156}

Teachers are caught in the middle of this debate. They are among our most trusted and respected professionals and yet they are treated on a whole as little more than dishonest criminals.\textsuperscript{157} The issue presents a sensitive balancing of society's interests. Society cannot afford to lose qualified teachers, but at the same time it cannot permit child sex offenders in schools. The reality of the situation is that there must be compromises made on both sides of the issue so that fears can be assuaged the students and the teachers are protected.

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\textsuperscript{156} See \textit{supra} note 66.
\textsuperscript{157} See \textit{supra} note 43.