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## ADMISSIBILITY OF FINGERPRINT EVIDENCE AND CONSTITUTIONAL OBJECTIONS TO FINGER- PRINTING RAISED IN CRIMINAL AND CIVIL CASES

ANDRE A. MOENSSENS\*

**T**HE ADMISSIBILITY OF FINGERPRINTS as evidence of identity was established many years ago. Yet many, and often complex, problems still arise from time to time with regard to this kind of evidence. Expert's qualifications are doubted; the applicability of established rules of evidence to a particular situation is put in issue; the right of the police to record an arrestee's fingerprints before conviction is challenged on constitutional grounds. With the United States Supreme Court showing an increased propensity for extending the protection of human liberties, areas that have heretofore been considered untouchable may have to be re-examined.

### INTRODUCTION

The epidermal skin of the palmar surfaces of the hands and the plantar surfaces of the feet bear intricate patterns, formed by fine friction ridges. Each ridge bears a row of sweat pores. When perspiration flows out of the pores, it courses over the ridges. As a result of this, when a digit touches a smooth surface, a perspiration impression of the ridges is left on that surface. This is called a latent impression. Although frequently invisible, the design can be made to appear quite distinct through the proper use of fingerprint powders, chemical solutions, and vapors.

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The identification of individuals by means of fingerprints is based upon three premises:

1. The ridge patterns on the digits never change during the life of an individual.
2. The ridge patterns differ from individual to individual, and even from digit to digit in every individual.
3. Although all patterns are individual and distinct in their ridge characteristics, they vary within limits which allow for systematic classification.

### HISTORICAL BACKGROUND

Fingerprints have been used for several millenaries. In ancient Babylon, during Hammurabi's reign (1955-1913 B.C.), finger seals were used on contracts. In China, finger impressions were used as seals on letters, documents, and contracts as early as the third century B.C.

The patterns on the palmar surfaces of the hand were first brought to the attention of Western civilization in the 17th century by Dr. Nehemiah Grew.<sup>1</sup> Anatomical in nature, his study was followed by similar observations by G. Bidloo, and Prof. Marcello Malpighi of the University of Bologna;<sup>2</sup> by Christian J. Hintze,<sup>3</sup> and Bernard S. Albinus.<sup>4</sup>

In 1788, J. C. A. Mayer first expounded the theory that the arrangement of skin ridges is never duplicated in two individuals.<sup>5</sup> Prof. Johannes E. Purkinje, in 1823, published a thesis in which he classified fingerprints into nine different patterns. He did not, however, mention that they might be used to identify individuals.<sup>6</sup>

It was not until 1858 that modern fingerprinting came to life,

<sup>1</sup> Grew, *The Description and Use of the Pores in the Skin of the Hands and Feet*, 14 Phil. Trans., Roy. Soc. 566 (London 1684).

<sup>2</sup> Bidloo, *Anatomia Humani Corporis* (Amsterdam 1685); Malpighi, *De Externo Tactus Organo* (London 1686).

<sup>3</sup> Hintze, *Examen Anatomicarum Papillarum Cutis Tactui Inservientium* (Göttingen 1751).

<sup>4</sup> Albinus, *Academicæ Annotationes* (Leiden 1764).

<sup>5</sup> Mayer, *Anatomische Kupfertafeln Nebst Dazu Gehorigen Enklarungen 1783-88* (The section dealing with fingerprints appears in the last section—1788).

<sup>6</sup> Purkinje, *Commentatio De Examine Physiologico Organi Visus Et Systematis Cutanei* (Thesis, Breslau 1823).

when William Herschel, administrator in the Hooghly District of Bengal, India, started to record handprints of natives on contracts. Herschel did not publish anything on his work until 1880 when Dr. Henry Faulds, a Scottish medical missionary in Tokyo, Japan, described fingerprints as a means for identifying criminals.<sup>7</sup>

The eminent English biologist Sir Francis Galton took up Herschel's study and eventually wrote the first textbook on fingerprints in 1892.<sup>8</sup> Alphonse Bertillon of Paris had simultaneously developed his anthropometric system, consisting of a series of measurements of bony parts of the human body that, according to Bertillon, never change during the life of an adult person. His system gained widespread use all over the world. Police identification men became known as "Bertillon officers" and this name lingered on for years, even after the Bertillon system was discarded in favor of the more accurate fingerprint system. To this day, many lawyers erroneously refer to fingerprinting as the Bertillon system, although Bertillon's anthropometry had nothing to do with digital impressions.

Edward R. Henry, Herschel's successor in India, developed a workable fingerprint classification system of his own, which was adopted by New Scotland Yard in London in 1901. This system with local modifications is used in most English speaking countries, including the United States.

Officially, fingerprint science was adopted in the United States in 1902 when Dr. Henry P. DeForest, Chief Medical Examiner of the New York Civil Service Commission, started fingerprinting all civil service applicants. From that date on, fingerprinting spread rapidly throughout this country. In short order, police identification bureaus adopted fingerprinting in St. Louis, New York, Chicago, San Francisco, and other major cities.<sup>9</sup>

<sup>7</sup> Faulds, *On the Skin-Furrows of the Hand*, 22 *Nature* 605 (1880). This letter to the editor said in part:

If bloody finger prints or impressions on clay, glass, etc., are present, the scientific conviction of the perpetrator may be effected. I have already met with two practical cases in my experience, and was able to use such finger prints as necessary evidence. In one case, someone had left greasy finger prints on a drinking glass. . . . In the other case, the sooty finger prints left by a person climbing over a white wall were of great value as exonerating evidence. . . .

<sup>8</sup> Galton, *Finger Prints* (Macmillan, London 1892).

<sup>9</sup> For a more comprehensive study of the science of fingerprint identification, its

## ADMISSIBILITY OF FINGERPRINT EVIDENCE

The earliest reference to fingerprints in any legal report or legislative enactment appears to be that contained in the Act of 1899, amending the Indian Evidence Act, 1872, passed by the Government of India. Section 45 read:

When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to the identity of hand writing or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, hand writing or finger impressions are relevant facts.

Such persons are called experts.

It is mentioned in fingerprint textbooks that earlier, in 1892, fingerprints had been used for the conviction of criminals by Argentine pioneer Dr. Juan Vucetich, but no reports are found concerning the details.

In 1897, an Indian was indicted for murder and theft at Jalpaiguri. Two brown smudges of fingerprints found at the crime scene were introduced in evidence against him. Confronted with the novel type of evidence consisting of fingerprints only, and in the face of defendant's not guilty plea, the court seemed sufficiently convinced of the worth of fingerprints to find the defendant guilty on the theft charge, yet not quite willing to accept the evidence to substantiate a capital charge, and acquitted the accused on the murder charge.<sup>10</sup>

One of the earliest cases where the validity of fingerprint testimony was upheld was *Emperor v. Sahdeo*,<sup>11</sup> where the reviewing tribunal in India held that if it was proven by competent expert testimony that two finger impressions made at different times, however far apart, contain several points of agreement and no points of disagreement in their ridge characteristics, no further evidence was necessary to prove that they were made by the same finger.

history, claims and techniques, see: Wentworth & Wilder, *Personal Identification* (2d ed. 1932); Cummins & Midlo, *Finger Prints, Palms And Soles* (1934); Wilton, *Fingerprints: History, Law and Romance* (1938); Myers, *History of Identification in the United States*, 4 *Finger Print and Identification Magazine* 3-32 (1938) and 6 *Finger Print and Identification Magazine* 3-28 (1942); Bridges, *Practical Fingerprinting* (1942); F.B.I., *The Science of Fingerprints* (U.S.G.P.O. 1957).

<sup>10</sup> Wilton, *op. cit. supra* note 9, 88-96.

<sup>11</sup> 3 Nagpur, L. Rep. 1 (India 1904).

The following year, in another Indian case, a jury refused to place reliance upon an expert's testimony as to the identity of a badly blurred print, compared to one taken from the defendant. Upon appeal, the Justice writing the opinion refused to disturb the jury verdict on the ground that the print was too indistinct to be subject to identification, but upheld the principle of fingerprint identification.<sup>12</sup>

In England also, fingerprint evidence was received and upheld in early cases. In 1907, testimony to the effect that a defendant's fingerprints were found on a window at the burglarized premises was ruled admissible,<sup>13</sup> and this holding was followed in 1909 in *In Re Castleton*.<sup>14</sup>

In 1912, the Supreme Court of Victoria gave an affirmative answer to a question of the sessions court as to whether evidence of identity depending on a comparison of fingerprints only was sufficient to support a conviction.<sup>15</sup>

In the United States, the first conviction on fingerprint evidence was obtained in 1906, in New York, but the decision was not passed upon by an appellate court. The incident is mentioned by Berthold Laufer in *History of the Finger-Print System*.<sup>16</sup>

In what we may call pre-fingerprint era decisions, some attention to impressions of the hand was shown in *State v. Miller*,<sup>17</sup> where a bloody handprint, found at the scene of a crime, was compared with an impression made by a suspected individual. Evidence involving the similarity of such impressions was held admissible. In the same vein, a Texas court held in 1907 that an

<sup>12</sup> *Emperor v. Abdul Hamid*, 32 Indian L.R. Calcutta Ser. 759 (1905).

<sup>13</sup> *Coleman v. Rex*, Trans. L.R. (Sup. Ct. 1907).

<sup>14</sup> 3 Crim. App. R. 74 (Cohen 1909).

<sup>15</sup> *Parker v. Rex*, 14 Commw. L.R. 681 (Austl. 1912).

<sup>16</sup> Laufer, *History of the Finger-Print System* 631-652, Ann. Rep. Smithson. Inst. (1962). The author states:

On May 2, 1906, the *Evening Post* of New York announced in an article headed "Police Lesson from India" the first successful application in this country of the thumb-print test. A notorious criminal had robbed the wife of a prominent novelist in London of £800, had made his escape to New York, and was captured after committing a robbery in one of the large hotels in that city. The Bertillon Bureau of the Police Department took a print of one of his thumbs, which was mailed without any particulars to the Convict Supervision Office, New Scotland Yard, London, where he was promptly identified. He was convicted and sentenced to seven years in prison. . . .

<sup>17</sup> N.J.L. 528, 60 Atl. 202 (1905).

impression of defendant's hand was admissible to show that its distinctive features—a peculiar imprint made by an abnormal little finger—were found in an impression at the scene of the crime.<sup>18</sup>

The leading American case involving fingerprint evidence was decided in 1911 by the Illinois Supreme Court.<sup>19</sup> The defendant argued on appeal that fingerprint evidence is of a class of testimony not admissible under the common law rules of evidence, and since there was no Illinois statute authorizing it, the court should have refused to permit its introduction. Called upon to decide this point for the first time in the United States, Justice Carter, in an exhaustive opinion, held that fingerprint evidence, even though it may not be of independent strength, is admissible with other evidence, as a means of identification and as tending to make out a case. It was also held that expert testimony is not limited to classed and specified professions, but it is admissible where the witnesses offered have peculiar knowledge or experience not common to the world, which renders their opinions, founded on such knowledge and experience, an aid to the court or jury in determining the issues. The court indicated that persons experienced in the matter of fingerprint identification may give their opinions as to whether the fingerprints found at the scene of a crime correspond with those of an accused, basing their conclusions upon a comparison of the photographs of such prints with impressions made by the accused, there being no question as to the accuracy or authenticity of the photographs. It was further held in this case that the weight to be given to the testimony of experts in the fingerprint identification is a question for the jury.

A few years later the New Jersey court dealt with a similar

<sup>18</sup> *Powell v. State*, 50 Tex. Crim. 592, 99 S.W. 1005 (1907).

<sup>19</sup> *People v. Jennings*, 252 Ill. 534, 96 N.E. 1077 (1911). Justice Carter stated:

We are disposed to hold from the evidence . . . and from the writings we have referred to on this subject, that there is a scientific basis for the system of fingerprint identification, and that the courts are justified in admitting this class of evidence; that this method of identification is in such general and common use that the courts can not refuse to take judicial cognizance of it. 252 Ill. at 549, 96 N.E. at 1082.

The court also disposed of defendant's contention that expert testimony on the subject of fingerprints was not permissible:

From the evidence in this record we are disposed to hold that the classification of finger-print impressions and their method of identification is a science requiring study. . . . [T]he evidence in question does not come within the common experience of all men of common education in the ordinary walks of life, and therefore the court and jury were properly aided by witnesses of peculiar and special experience on this subject. 252 Ill. at 550, 96 N.E. at 1083.

matter in *State v. Cerciello*.<sup>20</sup> It held that fingerprint testimony presented by a qualified expert was admissible. The same court later held that it was competent to admit a facsimile impression of fingerprints found upon a balcony post of a burglarized home for the purpose of comparison with an actual impression of the defendant's fingerprints. The court specified that whether or not the prints were the same presented a question of fact for the jury to decide in view of all the circumstances and the light thrown upon them by the expert witnesses.<sup>21</sup>

In 1915, the matter of fingerprint evidence came before the New York Court of Appeals. It was insisted that the admission in evidence of the testimony of an alleged expert as to fingerprint impressions was prejudicial error necessitating a reversal of the conviction. The court ruled that the defense had had ample occasion to cross-examine the expert at length as to every detail of his testimony, and that an ample basis was thus afforded for the jury to come to an intelligent conclusion as to the correctness of the opinion he expressed. The court pointed out that it could not rule, as a matter of law, that fingerprint evidence was incompetent in view of the fact that those charged with the detection of crime in the police departments of the larger cities of the world use it as a means of identification.<sup>22</sup>

It has since been generally held that fingerprint evidence, when competent, relevant, and material, is admissible to prove the identity of the accused.<sup>23</sup> The reliability of fingerprint evidence as

<sup>20</sup> 86 N.J.L. 309, 90 Atl. 1112 (1914).

<sup>21</sup> *State v. Connors*, 87 N.J.L. 419, 94 Atl. 812 (1915).

<sup>22</sup> *People v. Roach*, 215 N.Y. 592, 109 N.E. 618 (1915).

<sup>23</sup> UNITED STATES: *Duree v. United States*, 297 Fed. 70 (8th Cir. 1924).

ALA: *Sims v. State*, 253 Ala. 666, 46 So. 2d 564 (1950).

ARIZ: *Moon v. State*, 22 Ariz. 418, 198 Pac. 288 (1921).

ARK: *Hopkins v. State*, 174 Ark. 391, 295 S.W. 361 (1927).

CALIF: *People v. Van Cleave*, 208 Cal. 295, 280 Pac. 983 (1929).

CONN: *State v. Chin Lung*, 106 Conn. 701, 139 Atl. 91 (1927).

FLA: *Martin v. State*, 100 Fla. 16, 129 So. 112 (1930) (admissible if it does not result in a miscarriage of justice or violate fundamental rules of evidence); *Coco v. State*, 80 So. 2d 346 (Fla. 1955), *cert. denied*, 349 U.S. 931, 75 Sup. Ct. 774, 99 L. Ed. 1261.

GA.: *Lewis v. State*, 196 Ga. 755, 27 S.E.2d 659 (1943).

IDAHO: *State v. Martinez*, 43 Idaho 180, 250 Pac. 239 (1926).

ILL.: *People v. Jennings*, 252 Ill. 534, 96 N.E. 1077 (1911).

IOWA: *State v. Williams*, 197 Iowa 813, 197 N.W. 991 (1924).

KANSAS: *State v. Martin*, 175 Kan. 373, 265 P.2d 297 (1953).

KY.: *Hornsby v. Commonwealth*, 263 Ky. 613, 92 S.W.2d 773 (1936).



a system of identification, and the fact that the practice of taking and comparing fingerprints rests on a substantial scientific basis, have been so universally admitted in this country and abroad, that many courts have taken judicial notice of the fact that there are no two sets of fingerprints alike, and that fingerprints are a means of identifying individuals.<sup>24</sup> It has been held that finger-

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- LA.: *State v. Edwards*, 232 La. 577, 94 So. 2d 674 (1957).  
 MD.: *Debinski v. State*, 194 Md. 355, 71 A.2d 460 (1950).  
 MASS.: *Commonwealth v. Bartolini*, 299 Mass. 503, 13 N.E.2d 382; *cert. denied*, 304 U.S. 562, 58 Sup. Ct. 950, 82 L. Ed. 1531 (1939).  
 MICH.: *People v. Chimovitz*, 237 Mich. 247, 211 N.W. 650 (1927); *People v. Les*, 267 Mich. 648, 255 N.W. 407 (1934).  
 MISS.: *Willoughby v. State*, 154 Miss. 653, 122 So. 757, (1929); *McLain v. State*, 198 Miss. 831, 24 So. 2d 15 (1945).  
 MO.: *State v. Richetti*, 343 Mo. 1015, 119 S.W.2d 330 (1938) (admissible where expert testifies prints are legible and are identical with those of accused).  
 NEV.: *State v. Kuhl*, 42 Nev. 185, 175 Pac. 190 (1918).  
 N.J.: *State v. Cerciello*, 86 N.J.L. 309, 90 Atl. 1112 (1914); *State v. Connors*, 87 N.J.L. 419, 94 Atl. 812 (1915); *Lamble v. State*, 96 N.J.L. 231, 114 Atl. 346 (1921).  
 N. MEX.: *State v. Johnson*, 37 N.M. 280, 21 P.2d 813 (1933).  
 N.Y.: *People v. Roach*, 215 N.Y. 592, 109 N.E. 618 (1915).  
 NO. CAR.: *State v. Combs*, 200 N.C. 671, 158 S.E. 252 (1931); *State v. Helms*, 218 N.C. 592, 12 S.E.2d 243 (1940).  
 OHIO: *State v. Viola*, 148 Ohio 712, 82 N.E.2d 306 (1947).  
 OKLA.: *Stacy v. State*, 49 Okla. Crim. 154, 292 Pac. 885 (1930).  
 PA.: *Commonwealth v. Loomis*, 270 Pa. 254, 113 Atl. 428 (1921); *Commonwealth v. Albright*, 101 Pa. Super. 317, 321 (1931) ("Its [fingerprint evidence's] accuracy and reliability are too well established to require elaborate confirmation. . .").  
 TEXAS: *McGarry v. State*, 82 Tex. Crim. 597, 200 S.W. 527 (1918). *Grice v. State*, 142 Tex. Crim. 4, 151 S.W.2d 211 (1941).  
 VT.: *State v. Lapan*, 101 Vt. 124, 141 Atl. 686 (1928); *State v. Watson*, 114 Vt. 543, 49 A.2d 174 (1946).  
 WASH.: *State v. Witzell*, 175 Wash. 146, 26 P.2d 1049 (1933); *State v. Johnson*, 194 Wash. 438, 78 P.2d 561 (1938).  
 W. VA.: *State v. Johnson*, 111 W. Va. 653, 164 S.E. 31 (1932); *State v. Lawson*, 125 W. Va. 1, 22 S.E.2d 642 (1942).  
 WYOM.: *Waxler v. State*, 67 Wyo. 396, 224 P.2d 514 (1950).
- <sup>24</sup> UNITED STATES: *Piquet v. United States*, 81 F.2d 75, 81 (7th Cir. 1936) ("This court will take judicial knowledge of the well recognized fact that fingerprint identification is one of the surest methods of identification known, and that it is universally used in the detection of criminals.").
- CALIF.: *People v. Adamson*, 27 Cal. 2d 478, 495, 165 P.2d 3 (1946) ("Fingerprints are the strongest evidence of identity of a person. . .").
- ILL.: *People v. Jennings*, 252 Ill. 534, 96 N.E. 1077 (1911).  
 MD.: *Murphy v. State*, 184 Md. 70, 40 A.2d 239 (1944).  
 N.J.: *Lamble v. State*, 96 N.J.L. 231, 114 Atl. 346 (1921).  
 N.M.: *State v. Johnson*, 37 N.M. 280, 21 P.2d 813 (1933).  
 NO. CAR.: *State v. Rogers*, 233 N.C. 390, 64 S.E.2d 572 (1951).  
 OKLA.: *Stacy v. State*, 49 Okla. Crim. 154, 292 Pac. 885 (1930).  
 TEXAS: *Bingle v. State*, 144 Tex. Crim. 180, 161 S.W.2d 76 (1942).  
 VT.: *State v. Lapan*, 101 Vt. 124, 141 Atl. 686 (1928) ("The subject is one of the things that does not have to be proved.").  
 WASH.: *State v. Bolen*, 142 Wash. 653, 254 Pac. 445 (1927) (Records of War Department bearing fingerprints).  
 WISC.: *Bridges v. State*, 247 Wisc. 350, 19 N.W.2d 529 (1945).

print evidence, unsupported by other evidence, is sufficient *alone* to identify a defendant.<sup>25</sup>

Thus, a Pennsylvania court, in 1931, upheld a conviction which was based solely on fingerprint evidence. The court indicated that the question was one for the jury and that there was sufficient evidence to sustain a guilty verdict.<sup>26</sup> In 1941, the Texas Court of Criminal Appeals held that from "now on" it may be considered so well established that no two fingerprints can be alike, that the prosecution may be relieved of the burden of proving this contention, and that the burden of proof of the contrary rests on the accused.<sup>27</sup> Likewise, in an Oklahoma case a statute required that testimony of an accomplice had to be corroborated by outside evidence. The court held that an accomplice's testimony was sufficiently corroborated by fingerprints found at the scene of the crime which, according to records of the police department and an expert witness, contained fifteen points of similarity to the defendant's.<sup>28</sup>

Thus far, this discussion has emphasized the comparison of the defendant's prints with those found at the scene of a crime, or on stolen objects, for the purpose of connecting him to the crime. However, fingerprint evidence may also prove valuable to the defendant. Thus, an accused may introduce evidence tending to show that none of the fingerprints found at the scene of the crime were his,<sup>29</sup> or that there was an absence of any fingerprints.<sup>30</sup> Of course, in such cases the prosecution may counter by showing that gloves were found in the automobile used in the crime,<sup>31</sup> or

<sup>25</sup> *People v. Daly*, 168 Cal. App. 2d 164, 335 P.2d 503 (1959).

<sup>26</sup> *Commonwealth v. Albright*, 101 Pa. Super. 317 (1931). This case was criticized in 70 U. Pa. L. Rev. 642 (1931). See also *Grice v. State*, 142 Tex. Crim. 4, 151 S.W.2d 211 (1941); and *Jamison v. State*, 209 Tenn. 426, 354 S.W.2d 252 (1962).

<sup>27</sup> *Grice v. State*, *supra* note 26.

<sup>28</sup> *Rushing v. State*, 199 P.2d 614 (Okla. Cr. App., 1948). In *People v. Ray*, 26 Cal. Rptr. 825 (Cal. App. 1962), evidence of fingerprints of one of the defendants, found on the front door glass of the residence of a robbery victim, was sufficient corroboration of an accomplice's testimony as to defendant's participation in the robbery.

<sup>29</sup> *Commonwealth v. Loomis*, 270 Pa. 254, 113 Atl. 428 (1921); *Willoughby v. State*, 154 Miss. 653, 122 So. 757 (1929).

<sup>30</sup> *State v. Cooper*, 2 N.J. 540, 67 A.2d 298 (1949). In *State v. Olson*, 135 Wash. 240, 273 Pac. 502 (1925), the defendant was permitted, apparently without objection, to show the absence of any fingerprints on the weapon of the crime.

<sup>31</sup> *State v. Kleier*, 69 Idaho 278, 206 P.2d 513 (1949). See also *Commonwealth v. Wallace*, 326 Mass. 393, 94 N.E.2d 767 (1950); and *State v. Varga*, 205 P.2d 803 (Nev. 1949).

by bringing in direct testimony that the offender wore gloves during the commission of the act.<sup>32</sup>

The importance of fingerprint evidence to the defendant has been recognized by such decisions as *Parsons v. State*,<sup>33</sup> in which it was held that the accused was entitled to subpoena every written report and statement of the prosecution's fingerprint experts.

### QUALIFICATIONS OF EXPERT WITNESSES

As indicated in the previous section, fingerprints may be accepted in evidence upon the testimony of a competent witness whose qualifications as an expert are not questioned.<sup>34</sup> But the qualifications of an expert must be proven. It is not sufficient to show that a witness belongs to a group of people to which the subject matter of the inquiry relates. It must be shown that the expert possesses special knowledge on the very subject on which he proposes to express an opinion.<sup>35</sup>

No hard and fast rule can be laid down as to when a person familiar with fingerprints becomes an expert. The courts have had ample occasion to rule on the matter of an expert's qualifications and their decisions should serve as a guide. Five years' actual experience in fingerprint identification work has been held sufficient to qualify a person as an expert.<sup>36</sup> As a general rule, it is up to the sound discretion of the trial court to determine whether the qualifications of a witness are such as to bring him within the class of fingerprint experts, and its ruling will not be disturbed unless

<sup>32</sup> *Draper v. State*, 192 Ark. 675, 94 S.W.2d 119 (1936).

<sup>33</sup> 251 Ala. 467, 38 So. 2d 209 (1948). See also *United States v. Rich*, 6 Alaska 670 (1922), where it was held that the defense should have been permitted to have a photograph of fingerprints allegedly made by defendant on a piece of glass, in possession of the prosecution, which intended to use it against defendant at trial, for the purpose of allowing defense experts to examine the prints.

<sup>34</sup> *People v. Jennings*, 252 Ill. 534, 96 N.E. 1077 (1911); *State v. Cerciello*, 86 N.J.L. 309, 90 Atl. 1112 (1914); *People v. Roach*, 215 N.Y. 592, 109 N.E. 618 (1915). Also in *Moon v. State*, 22 Ariz. 418, 198 Pac. 288 (1921); *Robertson v. State*, 168 Tex. Crim. 35, 322 S.W.2d 620 (1959).

An expert witness is one possessed of scientific knowledge acquired by study or practice, or both, and is ordinarily a person who has experience and knowledge in relation to matters not generally known: *Pierce v. State*, 371 P.2d 924 (Okla. Crim. App., 1961).

<sup>35</sup> *State v. Robinson*, 223 La. 595, 66 So. 2d 515 (1953).

<sup>36</sup> *Leonard v. State*, 18 Ala. App. 427, 93 So. 56 (1922). In Texas, an officer who had been in the identification section of the county sheriff's office for two years and had received training and instruction in fingerprinting under an expert in the department was qualified as a fingerprint expert: *Todd v. State*, 342 S.W.2d 575 (Tex. Crim. App. 1961).

a flagrant abuse of that discretion is shown.<sup>37</sup> The trial court has been held not to have abused that discretion in qualifying a witness as an expert in fingerprint comparison where he had a bachelor's degree in science, with a major in criminology, had taken several courses in fingerprinting, was employed in a law enforcement agency as a laboratory technician, and had worked in the office of a county district attorney.<sup>38</sup>

Evidently, to qualify as an expert on fingerprint comparisons, the witness must show that he has practical experience as well as formal training in the subject of taking, reading and comparing fingerprints, as well as photography. Such training may be acquired at law enforcement agency training schools,<sup>39</sup> by study at recognized fingerprint schools,<sup>40</sup> in the armed forces,<sup>41</sup> or in the Federal Bureau of Investigation.<sup>42</sup>

Thus, it has been held that where a defendant offered a witness as a fingerprint expert who had completed three semester hours in criminology in college, had discussed the subject of fingerprint identification with people in the field and had read books on the subject, but had never worked in criminology, had no practical experience with fingerprints in law enforcement work, and whose experience was only in comparing unknown prints to known prints, the trial court did not abuse its discretion in ruling that the defendant's witness was not qualified to testify as an expert.<sup>43</sup>

A distinction must also be made between those persons experienced in the practice of recording fingerprints, and those experienced in interpreting and comparing them. An expert finger-

<sup>37</sup> *Davis v. State*, 33 Ala. App. 68, 29 So. 2d 877 (1947); *People v. Flynn*, 333 P.2d 37 (Cal. App. 1959); *Green v. Commonwealth*, 268 Ky. 475, 105 S.W. 2d 585 (1937).

<sup>38</sup> *People v. Eaton*, 171 Cal. App. 2d 120, 339 P.2d 951 (1959).

<sup>39</sup> *People v. Jennings*, *supra* note 34.

<sup>40</sup> *McLain v. State*, 198 Miss. 831, 24 So. 2d 15 (1945). This case involved a superintendent of police who was a graduate of a recognized fingerprint school, had twelve years of practical experience, and was an officer of the International Association for Identification.

<sup>41</sup> *State v. Combs*, 200 N.C. 671, 158 S.E. 252 (1931). The witness had completed a course of instruction approved by the superintendent of the fingerprint department of the United States Army and Navy requiring two years of study.

<sup>42</sup> *State v. Viola*, 148 Ohio 712, 82 N.E.2d 306 (1947). The witness was an agent of the bureau, and declared the Federal Bureau of Investigation to be the recognized world authority on fingerprints.

<sup>43</sup> *People v. Chambers*, 162 Cal. App. 2d 215, 328 P.2d 236 (1959).

print recorder may not be allowed to testify as to whether a fingerprint found at the scene of a crime was a good or bad one, if he has not qualified as a fingerprint reader.<sup>44</sup>

The defense will be given adequate opportunities to inquire into the background of a witness, so as to examine whether or not he can qualify as an expert. The defendant apparently has a right to a continuance so that the qualifications of a proposed expert, whose testimony will be highly damaging to his case, can be examined.<sup>45</sup> But when a fingerprint expert has been subjected to a lengthy and penetrating cross-examination, he may on re-direct relate his fingerprint experience in other cases for the purpose of rehabilitating and defending the science of fingerprinting, which the defendant stoutly had insisted was unreliable to the point of non-existence.<sup>46</sup> And when defendant's counsel, on cross-examination, accepts a prosecution witness as qualified to testify as an expert, he will later be precluded from objecting to the witness' qualifications, especially when the state has brought out the extent of the witness' training and experience on direct examination.<sup>47</sup>

#### PROOF OF FINGERPRINT ACCURACY

It has been held that an expert may demonstrate that every fingertip bears distinctive marks, that no two fingerprints are exactly alike, and that unmistakable identification can be made in this manner. In *Moon v. State*,<sup>48</sup> each juror was permitted to place his fingers upon separate sheets of paper while the fingerprint expert was absent from the courtroom. Upon his return, he developed the latent prints on the sheets with black powder and then secured inked impressions of the fingers of the jurors and correctly paired off the prints to illustrate to the jury that latents can be identified when made on an apparently clean sheet of paper. Similar demonstrations were allowed in *People v. Chimovitz*,<sup>49</sup> and *State v. Dunn*.<sup>50</sup>

<sup>44</sup> *State v. Lapan*, 101 Vt. 124, 141 Atl. 686 (1928).

<sup>45</sup> *Sheldon v. Commonwealth*, 280 Ky. 733, 134 S.W.2d 653 (1939).

<sup>46</sup> *Moon v. State*, 22 Ariz. 418, 198 Pac. 288 (1921).

<sup>47</sup> *State v. Tyler*, 349 Mo. 167, 159 S.W.2d 777 (1942).

<sup>48</sup> 22 Ariz. 418, 198 Pac. 288 (1921).

<sup>49</sup> 237 Mich. 246, 211 N.W. 650 (1927).

<sup>50</sup> 161 La. 532, 109 So. 56 (1956). See also *Smith v. State*, 54 Okla. Crim. 236, 18 P.2d 282 (1933).

Since the identification of individuals by means of fingerprints is now judicially recognized in most jurisdictions, there is little or no reason for such experiments today, except where the qualifications of the expert are disputed, or perhaps in a case where it is doubted that a latent print could successfully be obtained from a particular surface or object.

#### FINGERPRINTS CONSISTENT WITH INNOCENCE

While fingerprints found at the scene of a crime may be properly admitted in evidence to prove the identity of the accused, the testimony should be excluded if it appears from the facts that the prints might have been deposited there innocently or when the person was lawfully on the premises. In such case, the prints would be consistent with innocence.<sup>51</sup> Failure to exclude the evidence would then be reversible error.

Thus, in a prosecution for larceny of an automobile, proof that the defendant's thumb print was found on the rear view mirror of the recovered car, although it established the fact that defendant had been in the auto, was held not sufficient, in the absence of other proof, to establish defendant's guilt of the offense charged, since the thumbprint could also have been deposited in the commission of a trespass.<sup>52</sup> Similarly, fingerprints of an accused found around burglarized premises easily accessible to the public are generally without probative value.<sup>53</sup>

It appears, therefore, that testimony must clearly establish that fingerprints found at the scene of a crime could only have been deposited there at the time when the crime was committed. Since the time element is of the essence, defendant may properly contend that the evidence of his fingerprints found at the scene of a crime some time after its commission is inadmissible if the prosecution fails to establish the time at which the fingerprints were made.<sup>54</sup>

<sup>51</sup> *Graves v. State*, 119 Tex. Crim. 68, 45 S.W.2d 953 (1931).

<sup>52</sup> *McLain v. State*, 198 Miss. 831, 24 So. 2d 15 (1945).

<sup>53</sup> *Anthony v. State*, 85 Ga. App. 119, 68 S.E.2d 150 (1951).

<sup>54</sup> *State v. Richetti*, 342 Mo. 1015, 119 S.W.2d 330 (1938). See also *State v. Minton*, 228 N.C. 518, 46 S.E.2d 296 (1948).

## EXPERT TESTIMONY: CONCLUSIONS AS OPINION OR FACT

Since it has been established that fingerprints provide a means of *positive* identification, the defense may contend that the expert witness is testifying to an ultimate fact, rather than profering an opinion as to the identity of certain fingerprints. Thus, in *State v. Steffen*,<sup>55</sup> it was held that the expert may testify only as to his opinion or belief, but he cannot testify to the ultimate facts that must be determined by the jury. In that case, testimony that the fingerprints were made by the defendant was held to be reversible error. The holding, however, was later overruled.<sup>56</sup>

The rule of the *Steffen* case was not generally followed and other courts have repeatedly held that while it is recognized that fingerprint evidence is circumstantial or opinionated in nature, the main reason for the general recognition of its admissibility in proving identity is its infallibility or conclusiveness. Therefore, it has been held that fingerprint evidence is admissible, not as a circumstance, but as a fact,<sup>57</sup> and that an expert may say that in his opinion the print could not have been made by any other person.<sup>58</sup> Of course, the actual probative value of the evidence remains for the jury to decide.<sup>59</sup>

## PHOTOGRAPHS AND DEMONSTRATIVE EVIDENCE

At the trial, it is customary for a fingerprint expert to produce photographic enlargements of the developed latent fingerprints and photographic enlargements of the comparison inked prints of the defendant. On these enlargements, lines of comparison are drawn to point out the identical characteristics. The number of identical characteristics required for an absolute identification

<sup>55</sup> 210 Iowa 196, 230 N.W. 536 (1930). Professor Wigmore, in a note on this case in 2 Am. J. Pol. Sci. 273 (1931), criticizes the attitude of the court and declares: "This general rule is an absurd and impractical one, and the present application of it goes to an extreme never before reached in any other court."

<sup>56</sup> *Grismore v. Consolidated Products*, 232 Iowa 328, 5 N.W.2d 646 (1942). But see also *State v. Powell*, 238 N.C. 527, 78 S.E.2d 248 (1953).

<sup>57</sup> *People v. Chimovitz*, 237 Mich. 246, 211 N.W. 650 (1927). Also *Grismore v. Consolidated Products*, *supra* note 56.

<sup>58</sup> *Grice v. State*, 142 Tex. Crim. 4, 151 S.W.2d 211 (1941). Also in *State v. Viola*, 148 Ohio 712, 82 N.E.2d 306 (1947) (positive identification of fingerprints by expert not improper testimony of an ultimate fact).

<sup>59</sup> *State v. Combs*, 200 N.C. 671, 158 S.E. 252 (1931); *Mason v. Commonwealth*, 357 S.W.2d 667 (Ky. 1962); *Jamison v. State*, 209 Tenn. 426, 354 S.W.2d 252 (1962).

cannot be precisely defined, because it depends greatly on the rarity of the type, or the presence of certain highly characteristic signs. It is usually conceded that when there are more than twelve evidence points and the impression is clear, identification is absolute. However, evidence of partial fingerprints showing less than twelve characteristics may be admissible, although in the majority of cases as many as 15 to 20 points of identity are shown.

There has been a recent trend in fingerprint circles to do away with exhibits if possible and to rely only upon opinion testimony. This has caused great dissention in the ranks of fingerprint experts as to which practice is preferable. The importance of fingerprint exhibits was recently analyzed by this author in a discussion of a California case where the expert did not use exhibits.<sup>60</sup>

It has been generally held that it is competent to show fingerprints found at the scene of a crime by means of photographs so long as the photographs are properly authenticated.<sup>61</sup> In *Lamble v. State*,<sup>62</sup> photographic enlargements of fingerprints found upon

<sup>60</sup> *People v. Abner*, 25 Cal. Rptr. 882 (1962); 44 *Finger Print and Identification Magazine* 11-13 (June 1963).

<sup>61</sup> UNITED STATES: *Duree v. United States*, 297 Fed. 70 (8th Cir. 1924).

ALA.: *Davis v. State*, 33 Ala. App. 68, 29 So. 2d 877 (1947).

ARIZ.: *Moon v. State*, 22 Ariz. 418, 198 Pac. 288 (1921).

ARK.: *Hopkins v. State*, 174 Ark. 391, 295 S.W. 361 (1927).

CALIF.: *People v. Jones*, 112 Cal. App. 68, 296 Pac. 317 (1931).

CONN.: *State v. Chin Lung*, 106 Conn. 701, 139 Atl. 91 (1927).

GA.: *Lewis v. State*, 196 Ga. 755, 27 S.E.2d 659 (1943).

IDAHO: *State v. Reding*, 52 Idaho 260, 13 P.2d 253 (1932).

ILL.: *People v. Jennings*, 252 Ill. 534, 96 N.E. 1077 (1911).

IOWA: *State v. Williams*, 197 Iowa 813, 197 N.W. 991 (1924).

KY.: *Hornsby v. Commonwealth*, 263 Ky. 613, 92 S.W.2d 773 (1936).

LA.: *State v. Dunn*, 161 La. 532, 109 So. 56 (1926).

MICH.: *People v. Les*, 267 Mich. 648, 255 N.W. 407 (1934).

MISS.: *McLain v. State*, 198 Miss. 831, 24 So. 2d 15 (1945).

MO.: *State v. Richetti*, 343 Mo. 1015, 119 S.W.2d 330 (1938).

NEB.: *Sharp v. State*, 115 Neb. 737, 214 N.W. 643 (1927).

NEV.: *State v. Kuhl*, 42 Nev. 185, 175 Pac. 190 (1918).

N.J.: *State v. Connors*, 87 N.J.L. 419, 94 Atl. 812 (1915).

N.M.: *State v. Johnson*, 37 N.M. 280, 21 P.2d 813 (1933).

N.Y.: *People v. Reese*, 258 N.Y. 89, 179 N.E. 305 (1932).

NO. CAR.: *State v. Huffman*, 209 N.C. 10, 182 S.E. 705 (1935).

OHIO: *State v. Viola*, 148 Ohio 712, 82 N.E.2d 306 (1947).

OKLA.: *Smith v. State*, 54 Okla. Crim. 236, 18 P.2d 282 (1933).

PENNA.: *Commonwealth v. Albright*, 101 Pa. Super. 317 (1931).

TEXAS: *McGarry v. State*, 82 Tex. Crim. 597, 200 S.W. 527 (1918).

VT.: *State v. Lapan*, 101 Vt. 124, 141 Atl. 686 (1928).

WASH.: *State v. Witzell*, 175 Wash. 146, 26 P.2d 1049 (1933).

W. VA.: *State v. Johnson*, 111 W. Va. 653, 164 S.E. 31 (1932).

<sup>62</sup> 96 N.J.L. 231, 114 Atl. 346 (1921). But photographs are admissible only for the pur-



the door of a stolen automobile were held admissible without the production of the door of the automobile. Similarly, it was held competent to show photographs of fingerprints found upon a balcony post of a house without the post being produced in court.<sup>63</sup>

#### ADMISSION OF FINGERPRINT RECORD CARDS

Fingerprint records as proof of identity may be introduced in evidence if they are properly authenticated. If these fingerprint record cards, taken from the identification bureau files, also make mention of the criminal record of the accused it is not error to produce the card when the criminal record has been covered up so it cannot be seen by the jury.<sup>64</sup>

Some decisions, however, have allowed duly authenticated fingerprint records to show prior convictions for the purpose of providing enhanced punishment,<sup>65</sup> or to impeach a defendant testifying as a witness in his own behalf.<sup>66</sup>

pose of clarifying or substantiating witness' testimony, not as substantive evidence. *State v. Tew*, 234 N.C. 612, 68 S.E.2d 291 (1951).

<sup>63</sup> *State v. Connors*, 87 N.J.L. 419, 94 Atl. 812 (1915). In *State v. Witzell*, 175 Wash. 146, 26 P.2d 1049 (1933), it was held that defendant's contention that the fingerprint evidence should be excluded because the piece of the safe upon which they were found was not produced was without merit since failure to produce the safe, if objectionable at all, goes only to the weight and not to the competency of the exhibits or photographs of the original.

An unusual situation happened in *Duree v. United States*, 297 Fed. 70 (8th Cir., 1924), where finger prints on a bottle containing nitroglycerin, used in opening the mail-car in a train robbery, were developed and enlarged. Before the trial, the bottle disappeared mysteriously and evidence was produced showing that the photographs of the bottle were correct and accurate representations. The evidence was admitted without showing the bottle.

<sup>64</sup> *Moon v. State*, *supra* note 61. In *United States v. Dressler*, 112 F.2d 972 (7th Cir. 1940), a conviction was reversed because the jury had been permitted to examine, compare, and take with them to the jury room the questioned prints and standard specimens of defendant's prints as they appeared on police fingerprint cards, the backs of which contained notations as to defendant's prior record. The court held that the information as to defendant's prior record on the back of the fingerprint card may have had a prejudicial effect and should not have been permitted to reach the jury. In its opinion, the court mentioned that one way to avoid this problem is by covering up the back so that the notations will not be seen by the jury. But in *Rocchia v. United States*, 78 F.2d 966 (9th Cir. 1935), it was held that defendant had waived any objections on constitutional rights to the fact that the card made mention of defendant's prior criminal record, where it was shown that the card was introduced in evidence only as an exemplar to prove the similarity between the signature on the card and that on a lease.

<sup>65</sup> CALIF.: *People v. McKinley*, 2 Cal. 2d 133, 39 P.2d 411 (1934).

N.Y.: *People v. Reese*, 258 N.Y. 89, 179 N.E. 305 (1932).

MO.: *State v. Clark*, 360 S.W.2d 666 (Mo. 1962).

ORE.: *State v. Smith*, 128 Ore. 515, 273 Pac. 323 (1929).

WASH.: *State v. Johnson*, 194 Wash. 438, 78 P.2d 561 (1938).

W. VA.: *State v. Lawson*, 125 W. Va. 1, 22 S.E.2d 643 (1942).

<sup>66</sup> *People v. D'A Philippo*, 220 Cal. 620, 32 P.2d 962 (1934). But it was held error to

It is important that the witness presenting the evidence has personal knowledge of the taking of the fingerprints. Thus, in *People v. Zirbes*,<sup>67</sup> the defendant attempted to impeach the deceased's dying declaration that defendant shot him, by calling as a witness an identification expert of the California State Bureau of Criminal Investigation who showed by a fingerprint card that the deceased was a convict. Since the witness had not known the deceased personally, and had not recorded the prints on the card, his testimony was excluded as hearsay. In a bigamy case, the fingerprints of the first wife were admitted into evidence upon the testimony of the police officer who had recorded them after the defendant had married his second wife.<sup>68</sup>

The mere fact that one has an established fingerprint record is not necessarily proof that one is a criminal, or has been previously convicted.<sup>69</sup> Any authentication must extend, therefore, not only to the fingerprints, but also to the criminal record contained on the card.<sup>70</sup>

#### EVIDENCE OF PALM IMPRESSIONS

The papillary ridges which are the instruments of fingerprint impressions extend over the whole palm of the hand, and indeed over the soles of the feet. Original research into the individuality of papillary ridge characteristics was not confined to an examination of the finger skin, but included also the skin on the palmar surface of the hands and the plantar surface of the feet.<sup>71</sup>

At the beginning of this century, when friction skin identification gained widespread use, finger impressions were extensively relied upon because of their convenience and frequency of occurrence at crime scenes. There is, however, no biological, physiological or physical difference between palmprints and fingerprints

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allow the prosecution to show defendant's prior penal record and fingerprints on cross-examination in *People v. Darcy*, 101 Cal. App. 2d 665, 226 P.2d 53 (1951).

<sup>67</sup> 6 Cal. 2d 425, 57 P.2d 1319 (1936). But in *State v. Shank*, 185 N.E.2d 63 (Ohio App. 1962), the card was held admissible where the chief of a police identification bureau had qualified himself as lawful custodian of the records, although he had not himself recorded the fingerprints on the card.

<sup>68</sup> *State v. Martinez*, 43 Idaho 180, 250 Pac. 239 (1926).

<sup>69</sup> *Bundren v. State*, 152 Tex. Crim. 45, 211 S.W.2d 197 (1948).

<sup>70</sup> *People v. Darling*, 120 Cal. App. 453, 7 P.2d 1094 (1932).

<sup>71</sup> For references, consult the works listed in footnotes 1, 2, 3, 8 and 9.

so far as identification is concerned. The courts have repeatedly upheld this kind of evidence<sup>72</sup> and recognized that the imprint of the palmside of the human hand, when properly recorded, presents reliable, individual and unchanging characteristics. This may be shown by qualified fingerprint technicians.

#### FOOTPRINTS AND TOE IMPRESSIONS

In our country, barefoot traces are of very rare occurrence. But if and when they are found, they may be identified in the same manner as fingerprints and palm impressions.<sup>73</sup>

In *Commonwealth v. Bartolini*,<sup>74</sup> the prosecution introduced evidence tending to show that a naked footprint, found on a linoleum floor of the bathroom where a murder was committed, was identical with the evidence footprint of the suspect recorded at the police station. In rendering its decision, the court stated that there was ample evidence that footprints, like fingerprints, remain constant throughout life and furnish an adequate and reliable means of identification.

As yet, there have been no reported cases in the United States involving only toeprints. If such a case should arise, such evidence will in all likelihood be ruled admissible, if offered by a competent expert, since the basic principles involving friction skin identification of toeprints are exactly the same as those underlying fingerprint, palmprint and footprint identification.

In 1952, a case involving a partial impression of a big toe was tried before the High Court of Justiciary in Glasgow, Scotland. Fingerprint expert Det. Supt. George Maclean of the Glasgow

72 CALIF.: *People v. Buckowski*, 37 Cal. 2d 629, 233 P.2d 912 (1951).

COLO.: *Brooke v. People*, 139 Colo. 388, 339 P.2d 993 (1959).

IDAHO: *State v. Reding*, 52 Idaho 260, 13 P.2d 253 (1932).

LA.: *State v. Dunn*, 161 La. 532, 109 So. 56 (1926).

MICH.: *People v. Les*, 267 Mich. 648, 255 N.W. 407 (1934).

NEB.: *Sharp v. State*, 115 Neb. 737, 214 N.W. 643 (1927).

NEV.: *State v. Kuhl*, 42 Nev. 185, 175 Pac. 190 (1918).

TEXAS: *Powell v. State*, 50 Tex. Crim. 592, 99 S.W. 1005 (1907).

VT.: *State v. Lapan*, 101 Vt. 124, 141 Atl. 686 (1928).

73 ALA.: *Evans v. State*, 39 Ala. App. 404, 103 So. 2d 40 (1958).

304 MASS.: *Commonwealth v. Bartolini*, 299 Mass. 503, 13 N.E.2d 382 (1939), *cert. denied*, 304 U.S. 562, 58 Sup. Ct. 950, 82 L.Ed. 1531.

NO. CAR.: *State v. Rogers*, 233 N.C. 390, 64 S.E.2d 572 (1951).

VT.: *State v. Lapan*, *supra* note 72.

74 *Supra* note 73.

police identification bureau was extensively cross-examined. Lord Birnam, presiding, admitted the evidence of the toeprint over defendant's objection that there was not sufficient practical experience to be obtained in Great Britain in this aspect of friction ridge identification to justify a conclusion that an identification from a toeprint is as conclusive as that from a finger or palm. The jury, instructed that this was a case of first impression in the world and that it might believe or disbelieve the proof offered, returned a guilty verdict. The case was not reviewed on appeal.<sup>75</sup>

#### RIGHT TO FINGERPRINT—GENERAL CONSIDERATIONS

The constitutionality of obtaining fingerprints upon the arrest of an individual has been challenged repeatedly in recent years. If the police are to be prevented, on constitutional grounds, from verifying an arrestee's identity by comparing his fingerprints against those on file, they would at once become practically powerless to enforce the law, since not only would a criminal's assumption of a false identity in an effort to avoid punishment become highly difficult to detect and prove, but also law enforcement would of necessity break down in the investigation of crimes that are committed daily. Most criminals are repeaters. Thus, the necessity for the police to build up a file of fingerprints against which latent prints found at crime scenes may be compared. If the police cannot fingerprint arrestees before conviction, they will fail to build up such a file. It would simply mean that law enforcement would make a step backwards in time of about sixty years to a time when there was no fingerprinting at all.

It is not unlikely that in the future the authority to fingerprint and to retain fingerprint records will be more and more challenged as violative of the constitutional guarantees of individual human liberties. It therefore becomes important to know by what authority such prints may be recorded, before or after conviction. We must also examine whether a case can be made in favor of the proposition which seeks to prevent the taking of fingerprints of arrestees before conviction. After conviction, the fingerprints are of little investigative use.

<sup>75</sup> *The Case of the Great Toe Print*, 34 *Finger Print and Identification Magazine* 3 (March 1953).

Usually, constitutional objections are based upon two separate amendments to the United States Constitution, the fifth and fourteenth, dealing with the guarantees against self-incrimination, and against violation of due process of law. Occasionally, objections based upon a common law right against an invasion of privacy are raised in those states which recognize such a right. Another frequent issue is the right to a return or destruction of fingerprints taken from a suspect who is subsequently cleared, either during the police investigation, or by acquittal at trial.

The right of the police to fingerprint and photograph persons upon their lawful arrest is powerfully supported by an argument based on convenience and public interest in permitting the courts to learn the truth about questions at issue. The criminal law exists for the protection of society. While its provisions are also calculated to exculpate the innocent, they should not, through pure sentimentalism, be extended so as to make the apprehension and conviction of the guilty more difficult.

As early as 1900, before the adoption of fingerprinting in the United States, it was held that a sheriff was entitled, at his discretion, to take photographs and Bertillon measurements (a procedure much more tedious, lengthy and taxing on the subject than fingerprinting) since such acts were without personal violence to the prisoner, and he would not incur liability on his official bond for doing so.<sup>76</sup>

As a general rule, it developed that, in the absence of a restrictive statute, fingerprinting and photographing of individuals lawfully arrested on a criminal charge is valid, even if done before conviction, on the grounds that it offers a means of identifying the accused and aids in recapture in the event of his escape before trial.<sup>77</sup> In a California case, the accused was charged with a prison break. At the trial his fingerprints were admitted for the purpose of identifying the accused. Upon review, it was held that the admission of the fingerprints did not violate the accused's rights

<sup>76</sup> *State ex rel. Bruns v. Clausmier*, 154 Ind. 599, 57 N.E. 541 (1900). Also it was held that there was no infringement of constitutional or common law rights in *Shaffer v. United States*, 24 App. D.C. 417 (1904), *cert. denied*, 196 U.S. 639, 25 Sup. Ct. 795 (1905).

<sup>77</sup> *Sterling v. City of Oakland*, 24 Cal. Rptr. 696 (Cal. App. 1962).

against self-incrimination, and that no statutory authority for taking such prints was required.<sup>78</sup>

Historically, the right of the police to fingerprint arrestees has been upheld almost without exception. In 1909, it was decided in Maryland that where law enforcement officers arrested a suspect, charged him with embezzlement, photographed and fingerprinted him, they were within their rights to do so, even though Maryland had no statute authorizing fingerprinting while in custody and before trial.<sup>79</sup>

A dissenting note came in 1912 when a New York court held that photographing and measuring a prisoner (no mention being made of fingerprints) before conviction was unlawful in the absence of a statute authorizing it.<sup>80</sup> However, this decision was later repudiated.<sup>81</sup>

New Jersey enacted a statute in 1930 requiring law enforcement officers, immediately upon the arrest of any person for an indictable offense, to take his fingerprints and forward them to the State Bureau of Identification.<sup>82</sup> But even before this statute the New Jersey courts had held that fingerprinting was lawful upon arrest. In *Bartletta v. McFeely*,<sup>83</sup> the court ruled that whether any specific person may be fingerprinted and photographed is an administrative question to be determined by the police department. The opinion also noted that fanciful rights of accused persons cannot be allowed to prevent the functioning of the police and so jeopardize the safety of the public. It was held that no rule could be laid down to guide the police so that they may know whether or not the prisoner in their hands is one whom they had best watch carefully in the future, or one who is liable to escape before trial. However, neither the New Jersey statute nor the decision dealt with retention of fingerprints after acquittal.

The leading case dealing with the right to fingerprint is

<sup>78</sup> *People v. Sowers*, 22 Cal. Rptr. 401 (Cal. App. 1962).

<sup>79</sup> *Downs v. Swann*, 111 Md. 53, 73 Atl. 653 (1909).

<sup>80</sup> *Hawkins v. Kuhne*, 153 App. Div. 216, 137 N.Y. Supp. 1090, *aff'd*, 208 N.Y. 555, 101 N.E. 1104 (1912).

<sup>81</sup> *People v. Sallow*, 100 Misc. 447, 165 N.Y. Supp. 915 (Gen. Sess. 1917).

<sup>82</sup> N.J. Stat. Ann. 53:1-12 *et seq.* (1930).

<sup>83</sup> 107 N.J. Eq. 141, 152 Atl. 17 (1930), *aff'd*, 109 N.J. Eq. 241, 156 Atl. 658 (1931).

*United States v. Kelly*, decided in 1932.<sup>84</sup> In it, the Government appealed from an order directing the United States Attorney to return the defendant's fingerprint records. Kelly had been arrested by prohibition agents for having sold a quart of gin. Upon his arrest he was fingerprinted but later released. In reversing the lower court's order and upholding the right of law enforcement agencies to fingerprint upon a lawful arrest, irrespective of statute, the court stated:

We find no ground in reason or authority for interfering with a method of identifying persons charged with crime which has now become widely known and frequently practiced both in jurisdictions where there are statutory provisions regulating it and where it has no sanction other than the common law.

The appellee argues that many of the statutes and the decisions in common law states have allowed finger printing only in cases of felonies. But, as a means of identification it is just as useful and important where the offense is a misdemeanor, and we can see no valid basis for a differentiation. In neither case does the interference with the person seem sufficient to warrant a court in holding finger printing unjustifiable. It can really be objected to only because it may furnish strong evidence of a man's guilt. It is no more humiliating than other means of identification that have been universally held to infringe neither constitutional nor common law rights. Finger printing is used in numerous branches of business and of civil service, and is not in itself a badge of crime. As a physical invasion it amounts to almost nothing, and as a humiliation it can never amount to as much as that caused by publicly attending a sensational indictment to which innocent men may have to submit.<sup>85</sup>

Although pointing out that the United States attorneys and marshals are instructed by the Attorney General not to make public such photographs or fingerprints prior to trial, and are required to destroy them after acquittal, the court added:

We prefer, however, to rest our decision upon the general right of the authorities charged with the enforcement of the criminal law to employ finger printing as an appropriate means to identify criminals and detect crime.<sup>86</sup>

This case has been widely quoted and was followed in subsequent decisions. One of them, *Shannon v. State*,<sup>87</sup> held that the sheriff had the right to fingerprint appellant who was charged with homicide and admitted to bail, for the purpose of establish-

<sup>84</sup> 55 F.2d 67 (2d Cir. 1832).

<sup>85</sup> *Id.* at 70.

<sup>86</sup> *Ibid.*

<sup>87</sup> 207 Ark. 658, 660, 182 S.W.2d 384, 385 (1944).

ing his identity, the court adding, “. . . and this is not an invasion of any constitutional or natural right of such persons.” The court pointed out that while Arkansas does not have a statute authorizing or directing sheriffs and other peace officers to fingerprint persons in their custody suspected or accused of crime, the officers have the power to do so under the general police power.

There is authority for the proposition that a peace officer does not have the right to fingerprint a person when he makes an illegal arrest.<sup>88</sup> But when a law enforcement officer does make a lawful arrest, as a general rule, he has the right to fingerprint under the general police power. In fact, failure by a sheriff or other police official of his statutory duty to take fingerprints is an indictable offense.<sup>89</sup>

#### FINGERPRINTING—NO INDIGNITY, NO PUNISHMENT

The actual recording of fingerprints is not an indignity in itself.<sup>90</sup> No stigma of guilt is attached to it. In modern maternity hospitals, babies are footprinted, and their mother's thumbprint or fingerprint is put on the same sheet to insure that the right baby goes home with the mother; the armed forces fingerprint all their civilian as well as military personnel; employees of large corporations are fingerprinted as an incident to their signing of an employment contract. Law enforcement agencies identify hundreds of drowning victims, as well as victims of air or rail catastrophies who are mutilated beyond recognition, through a comparison of their fingerprints with the civilian files maintained at the Federal Bureau of Investigation.

Thus, the courts have held that a requirement of fingerprinting as a condition of employment at the Chicago Housing Authority was not violative of the rights of any employee, and a complaint to enjoin such printing was held properly dismissed for want of equity.<sup>91</sup> An ordinance of the city of Wichita requiring secondhand dealers to take, and furnish to the police department,

<sup>88</sup> *Bynum v. United States*, 262 F.2d 465 (D.C. Cir., 1959).

<sup>89</sup> *State v. McGovern*, 136 N.J.L. 115, 54 A.2d 812 (1947).

<sup>90</sup> *State ex rel. Mavity v. Tyndall*, 224 Ind. 364, 66 N.E.2d 755 (1946).

<sup>91</sup> *Young v. Chicago Housing Authority*, 350 Ill. App. 287, 112 N.E.2d 719 (1st Dist. 1953). The court said: “No stigma is attached to fingerprinting. It is widely accepted and used as a method of determining employee fitness.” 350 Ill. App. at 291, 112 N.E.2d at 721.



the thumb prints of persons from whom property was received and purchased was held reasonable and valid.<sup>92</sup> The rule of a commissioner of licenses requiring submission of fingerprints as a condition precedent to granting original and renewal licenses to deal in secondhand articles was also held reasonable and valid.<sup>93</sup>

Similarly, a city ordinance in Las Vegas requiring fingerprinting and photographing of persons seeking employment in establishments selling alcoholic beverages at retail for consumption on the premises, and requiring the fingerprints to be sent to the California State Bureau of Criminal Investigation and to the Federal Bureau of Investigation, providing the information received should be treated as confidential, was held not to violate the Nevada constitutional guarantees of life, liberty, and the pursuit of happiness.<sup>94</sup>

In 1945, the New York legislature passed a law ordering fingerprinting of the patients of state mental institutions.<sup>95</sup> In Maine, a law was passed ordering fingerprinting of all the pupils in the public schools.<sup>96</sup> Finally, no visa can be issued to any alien seeking to enter the United States until such person has been registered and fingerprinted.<sup>97</sup> The wilfull failure and refusal to apply for registration and fingerprinting is a misdemeanor.<sup>98</sup>

Since fingerprinting carries no stigma with it, it cannot be regarded as a penalty. If it were, such records could never be made.

An accused cannot be punished before trial, nor, in the absence of special statutes, could such a "penalty" be included in the sentence after conviction. In this regard, taking photographs and fingerprints must be considered the same as any other administrative procedure of the police to which an individual must, at times, be subjected for the common good.<sup>99</sup>

This proposition was also embodied in a recent decision from the 3d Federal Circuit.<sup>100</sup> The defendant, Krapf, pleaded guilty to

<sup>92</sup> *Wichita v. Wolkow*, 110 Kan. 127, 202 Pac. 632 (1921). A similar ordinance was upheld in *Medias v. Indianapolis*, 216 Ind. 155, 23 N.E.2d 590 (1939).

<sup>93</sup> *Itzkowitz v. Geraghty*, 139 Misc. 163, 247 N.Y. Supp. 703 (Sup. Ct. 1931).

<sup>94</sup> *Norman v. City of Las Vegas*, 64 Nev. 38, 177 P.2d 442 (1947).

<sup>95</sup> Chapter 729 of the Laws of 1945.

<sup>96</sup> *Maine Rev. Stat.*, Ch. 336.

<sup>97</sup> 8 U.S.C. § 1301 (1952).

<sup>98</sup> 8 U.S.C. § 1306(a) (1952).

<sup>99</sup> 14 Am. Jur., *Crim. Law* § 133 (1962).

<sup>100</sup> *United States v. Krapf*, 285 F.2d 647 (3d Cir. 1961).

seven violations of the Interstate Commerce Act and was subsequently sentenced to pay fines. After the court's verdict, the United States Marshal approached Krapf and requested him to submit to the usual procedure of fingerprinting, which the defendant refused. The matter was brought before the sentencing judge who ordered that Krapf submit to fingerprinting. The latter appealed this ruling and contended that the violations of which he was guilty were not of such a nature as to warrant his inclusion in the class of offenders which the United States Marshal had the right to fingerprint.

Krapf based his challenge to the authority and power of the marshal on Sec. 549 of Title 28 of the United States Code, entitled "Power as Sheriff," which specifies that a United States Marshal and his deputies, while executing the laws of the United States within a state, may exercise the same powers which a sheriff in such a state may exercise in executing the laws thereof. According to Krapf, these provisions gave the United States Marshal only the same power as is exercised by sheriffs in New Jersey. In this particular state, the defendant contended, the sheriff is only empowered to take fingerprints of the following classes of persons: those convicted of an indictable offense; well known criminals; those arrested for an indictable offense; those believed to be habitual criminals; and those confined to jails or other penal institutions. Krapf argued that a distinction should be made between *mala in se* and *mala prohibita* acts, and that his offense did not fall into any of the categories outlined in the powers of a sheriff.

The District Court refused to concede that Sec. 549 is the only source determining the authority to compel persons to submit to a United States marshal for fingerprinting. In its opinion it quoted several other important decisions, *e.g.* *United States v. Kelly*,<sup>101</sup> and emphasized:

. . . It must be remembered that fingerprinting is not a punishment but a procedure, the purpose of which is to facilitate law enforcement. With that purpose in mind, there is no persuasive reason to draw a distinction between crimes solely on the bases of their being *mala in se* or *mala prohibita* . . . .<sup>102</sup>

<sup>101</sup> 55 F.2d 67 (2d Cir. 1932).

<sup>102</sup> 285 F.2d at 651.

## FINGERPRINTING AND SELF-INCRIMINATION

Much controversy has been generated about the privilege of immunity from compulsory self-incrimination which is extended to witnesses and defendants alike. More or less dormant for a long time, problems have cropped up with increasing frequency in the twentieth century as a result of the development of scientific methods of crime detection and identification.

The doctrine developed in the English law through judicial decision as a rule of evidence. No reference to it appears in Magna Charta (1215), in the Petition of Rights (1629), or in the Bill of Rights (1689).<sup>103</sup> Dean Wigmore believes that in the development of the doctrine the privilege was directly aimed at the inquisitorial system whereby involuntary statements, extorted from the defendants by a variety of means, were used to convict them.<sup>104</sup>

Provisions against self-incrimination were embodied in the constitutions or bills of rights of all the states except Iowa and New Jersey.<sup>105</sup> When the fifth amendment to the United States Constitution was adopted, the provision read "No person . . . shall be compelled to be a witness against himself *in any criminal case.*" But the courts have liberally construed the constitutional provisions against self-incrimination as to extend to all judicial or official hearings, investigations, or inquiries where persons are called upon to formally give testimony, whether civil or criminal.<sup>106</sup>

The privilege was always aimed at statements, whether oral or written. The prohibition of compelling a man in a criminal case to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communication from him, not an exclusion of his body as evidence when it may be material.<sup>107</sup> It was held that the primary purpose of the provision is to prohibit

<sup>103</sup> For a discussion on the development of the privilege doctrine, see: 8 Wigmore, Evidence, § 2259 (3d Ed. 1940); Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination*, 21 Va. L. Rev. 763 (1935); and Inbau, *Self-Incrimination* (1950).

<sup>104</sup> 8 Wigmore, Evidence, § 2263 (3d Ed. 1940).

<sup>105</sup> Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1, 23 (1950).

<sup>106</sup> *United States v. Di Carlo*, 102 F. Supp. 597 (N.D. Ohio 1952); *Phelps v. Phelps*, 133 N.J. Eq. 392, 32 A.2d 81 (1943).

<sup>107</sup> *Holt v. United States*, 218 U.S. 245, 252, 31 Sup. Ct. 2, 6, 54 L. Ed. 1021, 1030 (1910).

the compulsory oral examination of the arrestee, either before or at trial, "to prevent his being required to incriminate himself by speech or the equivalent of speech."<sup>108</sup> According to our courts "speech or the equivalent of speech" refers to a communication, whether oral or written. Thus, it was held that an arrestee may be photographed,<sup>109</sup> or be required to assume positions taken by the perpetrator of a crime,<sup>110</sup> or to participate in a police line-up,<sup>111</sup> without violation of his constitutional rights. It was also held that the privilege covers oral testimony only, and does not preclude the use of the suspect's body or secretions thereof and their chemical analysis as evidence.<sup>112</sup>

It is therefore not surprising that the courts early adopted the view that fingerprinting cannot be classified as a communication or as a confession, and will therefore not violate the privilege against self-incrimination. In the leading case of *People v. Sallow*,<sup>113</sup> a woman defendant was arrested for disorderly conduct and fingerprinted. A New York statute provided that no person convicted should be sentenced until the city's fingerprint records were searched with reference to the particular defendant to ascertain whether or not he had a previous conviction. Upon searching the files, she was found to be a fourth offender, which subjected her to an additional penalty. She objected that fingerprinting was unconstitutional since she could not be forced to give evidence against herself. The court held that defendant's contention that her privileges were violated was without merit, and stated:

Fingerprints are but the tracings of physical characteristics of the line upon the fingers. Nothing further is required in fingerprinting than has been sustained heretofore by the courts in making proof of identification. The steps are to exhibit the fingers of the hands and to permit a record of their impressions to be taken. The requirement that the defendant's fingerprints be taken for the purpose of establishing identity is not objectionable in principle. There is neither torture nor volition nor chance of error . . . .

<sup>108</sup> Commonwealth v. Statti, 166 Pa. Super. 577, 73 A.2d 688 (1950).

<sup>109</sup> Shaffer v. United States, 24 App. D.C. 417 (1904), cert. denied, 196 U.S. 639, 25 Sup. Ct. 795 (1905).

<sup>110</sup> State v. Neville, 175 N.C. 731, 95 S.E. 55 (1918).

<sup>111</sup> Merivether v. State, 63 Ga. App. 667, 11 S.E.2d 816 (1940).

<sup>112</sup> United States v. Nesmith, 121 F. Supp. 758 (D.D.C. 1954).

<sup>113</sup> 100 Misc. 447, 165 N.Y. Supp. 915 (Gen. Sess. 1917). See notes in 17 Colum. L. Rev. 633 (1917), and 27 Yale L.J. 412 (1918).

No volition, that is, no act of willing, on the part of the mind of the defendant is required. Fingerprints of an unconscious person or even a dead person are as accurate as are those of the living. . . .

By the requirement that the defendant's fingerprints be taken, there is no danger that the defendant will be required to give false testimony. The witness does not testify—the physical facts speak for themselves; no fears, no hopes, no will of the prisoner to falsify or to exaggerate could produce or create a resemblance of her fingerprints or change them in one line, and, therefore, there is no danger of error being committed or untruth told. . . .

Both upon sound reason and upon the authority of analogous cases, I am of the opinion that the taking of the defendant's fingerprints and their introduction in evidence was not a violation of the Constitution of this state. The proof was not the defendant's proof. She was not called as a witness. It was the proof of a competent witness based upon the record of his examination of the defendant. The constitutional inhibition, in my opinion, has reference to testimonial utterances by the defendant and may not be used to prevent the establishment of the truth as to the existence or non-existence of certain marks of identity upon the defendant's fingers from which the record of her former convictions may be ascertained.<sup>114</sup>

Since this decision, it has been generally held that the constitutional guarantees against self-incrimination are not violated when the prints are given voluntarily,<sup>115</sup> and in many jurisdictions this has been extended so as to include compulsory fingerprinting or situations where the defendant is coerced into submitting to fingerprinting.<sup>116</sup> There is, however, some authority to the con-

<sup>114</sup> 100 Misc. at 462-464, 165 N.Y. Supp. at 924.

<sup>115</sup> UNITED STATES: *United States v. Iacullo*, 226 F.2d 788 (7th Cir. 1955).

ARIZ.: *Moon v. State*, 22 Ariz. 418, 198 Pac. 288 (1921).

CALIF.: *People v. Jones*, 112 Cal. App. 68, 296 Pac. 317 (1931).

MICH.: *People v. Les*, 267 Mich. 648, 255 N.W. 407 (1930).

MO.: *State v. Carrenza*, 357 Mo. 1172, 212 S.W.2d 743 (1948).

N.J.: *State v. Cerciello*, 86 N.J.L. 309, 90 Atl. 1112 (1914).

N.Y.: *People v. Sallow*, *supra* note 113.

NO. CAR.: *State v. Rogers*, 233 N.C. 390, 64 S.E.2d 572 (1951).

TEXAS: *McGarry v. State*, 82 Tex. Crim. 597, 200 S.W. 527 (1918).

VT.: *State v. Watson*, 114 Vt. 543, 49 A.2d 174 (1946).

WASH.: *State v. Lei*, 365 P.2d 609 (1961).

W. VA.: *State v. Johnson*, 111 W. Va. 653, 164 S.E. 31 (1932).

<sup>116</sup> UNITED STATES: *United States v. Kelly*, 55 F.2d 67 (2d Cir. 1932).

ARK.: *Shannon v. State*, 207 Ark. 658, 182 S.W.2d 384 (1944).

CALIF.: *People v. Jones*, *supra* note 115.

MICH.: *People v. Les*, *supra* note 115.

N.J.: *Bartletta v. McFeely*, 107 N.J. Eq. 141, 152 Atl. 17 (1930), *aff'd*, 109 N.J. Eq. 241, 156 Atl. 658 (1931).

N.Y.: *People v. Sallow*, *supra* note 113.

NO. CAR.: *State v. Rogers*, *supra* note 115.

TEXAS: *McGarry v. State*, *supra* note 115 ; *Mendez v. State*, 362 S.W.2d 841 (Tex. Crim. App. 1962).

TENN.: *East v. State*, 197 Tenn. 644, 277 S.W.2d 361 (1962).

VA.: *Owens v. Commonwealth*, 186 Va. 589, 43 S.E.2d 895 (1947).

trary. In *People v. Hevern*,<sup>117</sup> an opinion of the Magistrate's Court of the City of New York, not passed upon on review, it was held that a New York law, providing that no person charged with a felony or other specified offenses should be admitted to bail until such persons were fingerprinted, was unconstitutional, as requiring self-incrimination. In so deciding, the magistrate apparently ignored the previous decision in *People v. Sallow*, cited above, and stated:

Lastly, fingerprinting before conviction involves prohibited compulsory self-incrimination. . . . Concededly, there cannot be a compulsory written examination of a defendant as to his past career. . . . He may not be compelled to make a disclosure of his past life by the nod or nay of the head or the lines of his hand.<sup>118</sup>

The great weight of authority is against this case, and not much notice has been given to this decision including in New York. The decision was strongly refuted and criticized in the often quoted case of *United States v. Kelly*.<sup>119</sup>

Even if fingerprints have been obtained through a subterfuge on the part of the police, the privilege against self-incrimination is not violated. Thus, when a defendant in custody was asked by officers to sign a sheet of paper, and at the same time impressed latent fingerprints on the sheet, the court held that the prints were voluntarily given, although unknowingly, and would be admissible.<sup>120</sup>

#### FINGERPRINTING AND THE DUE PROCESS CLAUSE

It is fairly easy to dispose of the argument that fingerprinting violates the rights of a defendant to due process of law. Fingerprinting is not painful or harmful. It cannot be compared to such tests as the taking of blood. A close analogy exists between the searching of a prisoner—which does not deprive him of due process of law—and fingerprinting him. In both instances authorities want to obtain evidence against him, and in both cases his person is subjected to no more handling than what is required in preventing his escape. For example, the refusal to surrender or destroy fingerprints made by city police after acquittal was

<sup>117</sup> 127 Misc. 141, 215 N.Y. Supp. 412 (Magis. Ct. 1926).

<sup>118</sup> *Id.* at 147, 215 N.Y. Supp. at 418.

<sup>119</sup> *Supra* note 116.

<sup>120</sup> *State v. Cerciello*, *supra* note 115.

held to be no violation of the constitutional provision relating to cruel and unusual punishment.<sup>121</sup> No cases have been found where it was held that fingerprinting incident to a lawful arrest was a violation of the right to due process of law. But it has been held that the due process clause of the United States Constitution was violated when a police officer compelled a person who was *not* under arrest on a criminal charge to submit to the taking of fingerprints and photographs.<sup>122</sup>

#### FINGERPRINTING—INVASION OF PRIVACY

Occasionally, a defendant raises an objection to either fingerprinting itself, or the retention of fingerprint records by the police after he has been acquitted on the ground that his privacy has been invaded. The authorities are almost unanimous in holding that the mere making of a record of fingerprints by police officers of persons in custody on a criminal charge does not constitute an unwarranted invasion of the right of privacy.<sup>123</sup> The right of privacy is not an absolute right, at least in the sense that it will always be superior to the rights of the public.

It is customary to take photographs and fingerprints for many reasons. It appears that it is a daily practice indulged in for the common good, that it is used for many non-criminal purposes, and that the right of the police to fingerprint incident to a lawful arrest has been upheld by most courts. Fingerprints in themselves are not a badge of crime. No conclusion of guilt of a crime may be said to have resulted from the mere fact that a defendant has been previously fingerprinted.<sup>124</sup>

In *McGovern v. Van Riper*,<sup>125</sup> the court held that the right of privacy of the individual has certain limitations when considered with the rights of the public. The practice of dissemination of fingerprint records to other law enforcement agencies before conviction was held to be proper exercise of the police power for the purpose of facilitating crime detection, and that "one who has been

<sup>121</sup> *State ex rel. Mavity v. Tyndall*, 224 Ind. 364, 66 N.E.2d 755 (1946).

<sup>122</sup> *De Mello v. Gabrielsen*, 34 Hawaii 459 (1938).

<sup>123</sup> *Hodgeman v. Olsen*, 86 Wash. 615, 150 Pac. 1122 (1915); *Miller v. Gillespie*, 196 Mich. 423, 163 N.W. 22 (1917); *State ex rel. Mavity v. Tyndall*, *supra* note 121.

<sup>124</sup> *Bridges v. State*, 247 Wisc. 350, 19 N.W.2d 529 (1945).

<sup>125</sup> 140 N.J. Eq. 341, 54 A.2d 469 (1947).

indicted must submit to such slight invasion." The court also pointed out that when a person is indicted, his life ceases to be private and becomes a "matter of public interest." Another ground for upholding the right to disseminate the records is that it is necessary for the purpose of determining whether the person under indictment is a repeater or a habitual criminal. "Such dissemination is not an unwarranted invasion of the right of privacy claimed by the indicted persons to be protected by Art. 1, par. 1 and 6 of our State Constitution."<sup>126</sup>

The lone dissenting opinion is that of *People v. Hevern*, discussed previously,<sup>127</sup> where a magistrate of the City of New York held that compulsory fingerprinting was an invasion of a person's right to privacy.

#### RETURN OR DESTRUCTION OF FINGERPRINT RECORDS

Either based upon the common law right against an invasion of privacy, now recognized as a cause of action in most states, or upon the due process clauses in federal and state constitutions, many defendants have sought the return of fingerprint records, taken at the time of their arrest, after they had been acquitted at trial.

As early as 1905, several defendants acquitted at trial brought an action in equity for the purpose of enjoining the police from exhibiting their photographs in the "rogues' gallery." These rogues' galleries existed in many cities and consisted of large boards exposed in places accessible to the public, upon which were affixed the photographs of criminals and fugitives from justice. The court granted injunctive relief, reasoning that no public good could be served by exhibiting a picture of an honest man.<sup>128</sup> The same decision was arrived at by the same court in another case the same year.<sup>129</sup>

But these two Louisiana decisions can be safely classified as

<sup>126</sup> *Id.* at 342, 54 A.2d at 469.

<sup>127</sup> *Supra* at note 117.

<sup>128</sup> *Schulman v. Whitaker*, 115 La. 628, 39 So. 737 (1905); 117 La. 707, 42 So. 227 (1905) (decided without aid of statute).

<sup>129</sup> *Itzkovich v. Whitaker*, 115 La. 479, 39 So. 499 (1905), where the court held that the police cannot circulate photographs of innocent people, and said that everyone who does not violate the law can insist upon being left alone.



history. The rogues' galleries are a thing of the past. Fingerprint records on file at a law enforcement agency cannot be compared to photographs exhibited in a public place. The fingerprint records are filed away in closed metal cabinet drawers, according to a classification formula derived from the fingerprint patterns by a qualified fingerprint classifier. They cannot be found unless the classification formula is known, and the records are not accessible to the public.

In 1907, it was held that an accused found not guilty was not entitled to a return of his fingerprint records and photographs, even though the taking of the accused's fingerprints was unlawful.<sup>130</sup> In this case the defendant had brought a mandamus action to compel the return of the fingerprints, but the court held that mandamus would not lie because the action is one to compel an official to do what he ought to do, and not to undo what is improperly done, even though under color of performance of a public duty. Other courts may not agree with the scope of mandamus as defined by this court, but the fact remains that the return of the finger prints was denied.

In *Molineux v. Collins*,<sup>131</sup> the defendant had been convicted for murder and was awaiting execution when his photographs and Bertillon measurements were taken. Before execution, an appeal resulted in a new trial and a subsequent acquittal. The defendant then sought the surrender of the photographs and measurements held in the prison records. A statute directed that the records be taken, but did not authorize the destruction or return of such records.<sup>132</sup> The court held that where records are legally obtained by the police under a statute it would be up to the legislature to also provide for their return. The court refused to grant defendant's request, "not even to relieve a citizen from an unjust reflection on his character," and added: "If the position of the defendant is sound, where is the destruction of public records to end? What may become of the indictment, the minutes of the clerk recording the verdict of guilty, and the judgment of conviction?"<sup>133</sup>

<sup>130</sup> *Gow v. Bingham*, 66 Misc. 57, 107 N.Y. Supp. 1011 (Sup. Ct. 1907).

<sup>131</sup> 177 N.Y. 395, 69 N.E. 727 (1904).

<sup>132</sup> Laws of 1896, c. 440, par. 1.

<sup>133</sup> 177 N.Y. at 398-99, 69 N.E. at 728.

Subsequently, the New York legislature passed a law requiring that all data be returned by all police departments upon acquittal of a defendant.<sup>134</sup> As a result of this law, fingerprint records were ordered returned to the petitioners in two New York cases.<sup>135</sup>

With the exception of New York, no other courts have forced the police to return identification data of persons acquitted at trial. Very few states provide by statute for the return of records after acquittal. About one-third of the states have no mention of criminal identification records in their laws at all.<sup>136</sup>

In Illinois, a statute provides for the return of records in certain instances. It reads:

It is hereby made the duty of all sheriffs of the several counties of this state and of the chief police officers of all cities, villages and incorporated towns in this State to furnish to the Department [of Public Safety], daily, copies of finger prints on standardized eight by eight inch cards, and descriptions, of all persons who are convicted of felonies. . . . All photographs, finger prints or other records of identification so taken shall, upon the acquittal of the person charged with the crime, or upon his being released, without being convicted, be returned to him.<sup>137</sup>

In 1953, a plaintiff filed a petition based on this statute before the Criminal Court of Cook County requesting that the police commissioner return records, fingerprints, and other data relating to two cases dismissed in the Municipal Court for want of prosecution. The court sustained the petition, but the police commissioner appealed to the Illinois Supreme Court, attacking the constitutionality of the statute and the jurisdiction of the criminal court. The Supreme Court upheld the statute<sup>138</sup> and referred the issue of jurisdiction to the Appellate Court. That court held that since the

<sup>134</sup> New York Penal Law § 516.

<sup>135</sup> *Troilo v. Valentine*, 179 Misc. 954, 40 N.Y.S.2d 442 (Sup. Ct. 1943); *Campbell v. Adams*, 206 Misc. 673, 133 N.Y.S.2d 876 (Sup. Ct. 1954).

<sup>136</sup> An excellent case note on the matter appeared in 7 De Paul L. Rev. 120 (1957). It lists the states having statutes providing for the establishment of a bureau of criminal identification, and mentions further that only eight states require the bureau to return records after acquittal: Conn. Gen. Stat. § 3657 (1949); Ill. Rev. Stat. Ch. 39 § 780(e) (1955); Mich. Stat. Ann. § 4463 (1952); Mont. Rev. Code Ch. 80-601 (1947); N.Y. Consol. Laws Ann., Penal Law § 516 (1944); Ohio Rev. Code § 5149.06 (1953); R.I. Gen. Laws Ch. 620, § 7 (1938); W. Va. Code Ann. § 1264(1) (1955). Of these, only two states, New York and Rhode Island, specifically require the police to return data.

<sup>137</sup> Ill. Rev. Stat. Ch. 38, § 780(e) (1963).

<sup>138</sup> *Maxwell v. O'Connor*, 415 Ill. 147, 112 N.E.2d 469 (1953).

right involved was one of invasion of privacy, a civil right, the criminal court did not have jurisdiction.<sup>139</sup>

In another Illinois case, the plaintiff sought the return of his fingerprints and arrest records and to enjoin the chief of police from forwarding these records to the Department of Justice after his arrest for a violation of a city ordinance. The Circuit Court dismissed his suit and on appeal relief was again denied under the statute because the petitioner did not show that he had been found not guilty on the charge.<sup>140</sup>

In still another Illinois case, six men arrested on various charges by the Chicago Police Department were subsequently tried and acquitted. After their release, they sought the return of all fingerprint cards, photographs and other identification data taken by the police at the time of their arrest. The Circuit Court of Cook County did order the return of the records, but the Appellate Court, in reversing this decision, held that the statute relied upon by the plaintiffs compelled only the Department of Public Safety of the State of Illinois to return such records, and was of no effect on a city police department. The court also pointed out that the retention of the records, which were at the Chicago Police Department, and not open to public scrutiny, did not constitute such an invasion of privacy as to enable the plaintiffs to obtain relief in the absence of a statute.<sup>141</sup>

The Michigan Supreme Court, faced with a request for the return of police records—no photographs were involved—of an innocent person arrested by mistake through malice on the part of the prosecuting witness, and acquitted of the crime at the subsequent trial, refused to issue such an order and held that the petitioner, even though falsely arrested and subsequently acquitted, was not entitled to a mandatory injunction to compel the destruction of the records. The court held that such records were true and did not expose the plaintiff to ridicule, nor was it an invasion of his right of privacy.<sup>142</sup>

139 *Maxwell v. O'Connor*, 1 Ill. App. 2d 124, 117 N.E.2d 325 (1st Dist. 1953).

140 *Poyer v. Boustead*, 3 Ill. App. 2d 562, 122 N.E.2d 838 (2d Dist. 1954).

141 *Kolb v. O'Connor*, 14 Ill. App. 2d 81, 142 N.E.2d 818 (1st Dist. 1957).

142 *Miller v. Gillespie*, 196 Mich. 423, 163 N.W. 22 (1917).

In *Owensby v. Morris*,<sup>143</sup> an injunction restraining the police from using or circulating the fingerprints and other records made upon defendant's arrest without a warrant was denied. The court said:

. . . [C]rime is so well organized in our land, and the prompt arrest and conviction of criminals is rendered so difficult, by reason of the present conditions with which law-abiding citizens are forced to cope, we do hold that a peace officer who has good cause to believe, and does believe, that a person is compounding a crime, for which the officer will be under a duty to procure his arrest, may detain him, take his fingerprints, have him photographed, and otherwise identify him, for the protection of society, without being liable for damages by reason of such official acts.<sup>144</sup>

In another case, decided in New Jersey, the defendant was not indicted after arrest and subsequently sued to have his fingerprints and records returned. His request was refused by the court.<sup>145</sup> However, it pointed out that if a man of good repute had been falsely accused and cleared, the police should destroy the records; but the court, in the absence of a statute, was unable to compel them to do so. The court said:

. . . Sometimes a grand jury dismisses a charge because it seems trivial; sometimes the trial jury must acquit a guilty person because the evidence does not establish guilt beyond a reasonable doubt. In every large community are men who have never been convicted of an indictable offense but whose association and manner of life are such that the police feel reasonably assured that such a one, unless he turn over a new leaf, will eventually be guilty of a serious crime. . . .<sup>146</sup>

In *Voelker v. Tyndall*,<sup>147</sup> the Indiana court held that statutes establishing state and police identification services and permitting the fingerprinting and photographing of persons arrested on a criminal charge are a proper exercise of the police power and do not abridge the privileges or immunities of citizens or deprive them of due process of law.

In another Indiana case involving a request for the return or destruction of fingerprint records made by a city police officer, the court held that the refusal to grant such a request was not a

<sup>143</sup> 79 S.W.2d 934 (Tex. Civ. App. 1935).

<sup>144</sup> *Id.* at 935.

<sup>145</sup> *Fernicola v. Keenan*, 136 N.J. Eq. 9, 39 A.2d 851 (1944).

<sup>146</sup> *Id.* at 10, 39 A.2d at 851.

<sup>147</sup> 226 Ind. 43, 75 N.E.2d 548 (1947).

violation of the constitutional provision relating to cruel and unusual punishment.<sup>148</sup> The Indiana Supreme Court, in this case, agreed with the decision in the *Molineux* case,<sup>149</sup> and declared that if the legislature authorizes the taking of identification data without making provisions for the return of such data upon acquittal of a defendant relief must be sought from the legislature.<sup>150</sup>

### FINGERPRINTS IN CIVIL CASES

Very few decisions have been found where the admissibility of fingerprint evidence in civil cases has been at issue. This is probably due to a general lack of knowledge and acquaintance with such possible uses. Banks could profitably make use of fingerprinting to identify illiterate depositors who cannot sign their name. Insurance companies might avoid fraudulent life insurance claims by fingerprinting the policy holders at the time the policy is taken out. In the educational field there are a great many opportunities for the application of fingerprinting. Taking the fingerprints of candidates for examinations, degrees, and certificates would prevent with absolute certainty the fraudulent transfer of diplomas. Impersonation at the time of examinations would be rendered impossible. Better known is the use of fingerprinting of applicants for employment, and compelling an applicant to submit to fingerprinting for such purposes has been held not to be an unwarranted invasion of his privacy.<sup>151</sup>

If and when the issue arises, the admissibility of fingerprint evidence in non-criminal cases should be unquestioned, provided it is relevant to the issues. It is the best evidence of identity available. "The fingerprints of an individual are personal to him, without duplication in the prints of any other person."<sup>152</sup>

<sup>148</sup> *State ex rel. Mavity v. Tyndall*, 224 Ind. 364, 66 N.E.2d 755 (1946).

<sup>149</sup> *Molineux v. Collins*, 177 N.Y. 395, 69 N.E. 727 (1904).

<sup>150</sup> The court in a second appeal held that individual liberties are always subject to the power of the state to act in order to protect the health and welfare of its citizens, and the limits of what may be done by the state in this direction are constantly expanding "as our society grows and becomes more complex." It found that the keeping of the records is a proper public function and denied the appeal. *State ex rel. Mavity v. Tyndall*, 225 Ind. 360, 74 N.E.2d 914 (1947) *cert. denied*, 333 U.S. 834, 68 Sup. Ct. 609, 92 L. Ed. 1118 (1948). A similar issue was decided in *Sterling v. City of Oakland*, 24 Cal. Rptr. 696 (Cal. App. 1962).

<sup>151</sup> See *supra* notes 91 through 98 for cases where the non-criminal use of fingerprinting was an issue.

<sup>152</sup> *Cowdrick v. Pennsylvania Ry.*, 132 N.J.L. 131, 39 A.2d 98 (1944), *cert. denied*,

There have been some civil cases in which fingerprint evidence has been utilized. For example, in an action on a burglary insurance policy, it was held that the trial court did not err in admitting into evidence photographs of fingerprints of unknown origin, found on the burglarized premises and shown not to be of members of the family who had access to the building.<sup>153</sup>

More frequent have been cases in the probate area where fingerprints were used as a substitute for, or in conjunction with signatures of testators. An early case in the Philippines held that a law requiring that a will be signed by the testator may be complied with not only by the customary written signature, but also by the testator's thumbprint, when applied in the presence of three attesting witnesses.<sup>154</sup> In a later case, so convinced was the Philippine court of the value of fingerprints as a substitute for a signature that it allowed itself to be carried too far. A will was signed by the testator, who had allegedly also placed his thumbprint on it. The print was made with ordinary ink and quite blurred. It was compared with a thumbprint conceded to be genuine on a bill of sale and the court concluded that the prints were identical, even though a qualified expert testified that the prints were not identical or too blurred to be properly identified.<sup>155</sup> Finally, in England, evidence that a testator who was unable to write had put his thumbprint on a will in the presence of an attesting witness was admitted.<sup>156</sup>

However, in a New York case, a will that had a fingerprint as a signature was denied probate, and this ruling was affirmed on appeal. The fingerprint itself was not an issue in this denial. Later a new trial was sought. The parties proved by a comparison with police records that the fingerprint was that of the testator. The court held this fact, in view of other evidence, insufficient to grant a new trial since the fact that testator fingerprinted the will was not contradicted at the trial.<sup>157</sup> Shortly thereafter, another case

<sup>153</sup> 323 U.S. 799, 65 Sup. Ct. 555, 89 L. Ed. 637 (a suit to recover under the Federal Employer's Liability Act, 45 U.S.C. §§ 51 *et seq.* (1908)).

<sup>154</sup> *New Amsterdam Casualty Co. v. James*, 122 Fla. 710, 166 So. 813 (1935).

<sup>155</sup> *De Gala v. Gonzales*, 53 P.I. 104 (1929). See Annotation 72 A.L.R.2d 1267, 1269 (1960).

<sup>156</sup> *Dolar v. Diancin*, 55 P.I. 479 (1930).

<sup>157</sup> *Finn's Estate*, 52 T.L.R. 153 (1935).

<sup>158</sup> *Re Meltzer's Will*, 248 App. Div. 645, 287 N.Y. Supp. 931 (1936).

came up in New York where an illiterate alien had placed his fingerprints upon a will in lieu of a signature. The placing was attested to by two subscribing witnesses. The witnessing was held sufficient proof that the fingerprints were those of the testator, without an expert comparison. A fingerprint expert did testify that he had compared, and found identical, the post mortem prints of the testator with the prints on the will. While his testimony was held commendable by the court, it was deemed unnecessary. The court commented on the fact that the execution of the will by placing fingerprints in lieu of a signature showed more than ordinary intelligence on the part of the testator, since fingerprints are much better than an ordinary cross mark.<sup>158</sup>

A few years later, a typewritten will was admitted to probate, bearing two red finger impressions on the line reserved for the signature of the testatrix, beneath which was written, "Anna Arcowsky, her name and her mark by two impressions of her right thumb." The court commented:

. . . As a strict matter of fact, it is obvious that a subscription by fingerprints is much more individual and reliable than one by a mere cross mark which has uniformly been sustained.<sup>159</sup>

If and when other cases arise where fingerprints are used in lieu of a signature, there should be no problem about their admission into evidence, when proven to be identical by competent testimony of a qualified expert witness.

#### CONCLUSION

Fingerprints are unique, and can be used to identify an individual without fear of erroneous identification. This point is uncontradicted. Such identification by fingerprints may be explained by duly qualified fingerprint experts at the trial. In the majority of jurisdictions, an expert witness will be allowed to testify as to the ultimate fact that two fingerprints are identical, rather than proffer an opinion as to their identity or non-identity.

Fingerprints found on a crime scene, developed, and compared with those of a defendant, are not admissible in evidence

<sup>158</sup> *Re Romaniw's Will*, 163 Misc. 481, 296 N.Y. Supp. 925 (Surr. Ct. 1937).

<sup>159</sup> *Re Arcowsky's Will*, 171 Misc. 41, 11 N.Y.S.2d 853 (Surr. Ct. 1939).

if the crime scene prints could have been deposited there when the accused was lawfully at that place. The prosecution, therefore, must prove that the crime scene prints he offers in evidence are inconsistent with the defendant's alleged absence from the scene at the time the crime was committed.

Under the proper circumstances, some jurisdictions allow the introduction of fingerprint record cards from foreign jurisdictions, provided such cards are duly authenticated, for the purpose of providing enhanced punishment.

Palmprints, footprints, and toeprints are made up from the same minute friction skin details as are the fingerprints. There is absolutely no biological, physiological or physical difference between the friction skin found on any of these surfaces. Friction skin patterns from the palms of the hand and the soles of the feet may be identified the same as fingerprints. As a general rule, such evidence is admissible when offered by a competent and qualified expert witness. As yet, there have been no reported cases in the United States involving only toeprints. If the time comes when the admission of toeprint evidence is at issue, the evidence will in all likelihood be ruled admissible. There is no sound reason for its refusal. Actually, the only significant difference between palmprints and footprints on one side, and fingerprints on the other, is that the latter are recorded as a matter of police routine, then classified, and filed. Palmprints and footprints are not recorded generally, although some police departments do maintain palmprint files of known burglars and car thieves.

Law enforcement officers can fingerprint persons incident to a lawful arrest. In so doing, they do not violate the constitutional privileges and immunities of the subject being fingerprinted. Fingerprinting has become commonplace in our modern world, and is no longer associated solely with crime. Many employers fingerprint their personnel; the armed forces keep fingerprint records of all enlisted and civilian personnel; the FBI maintains its separate civilian fingerprint file which has often been of great value in the identification of disaster and amnesia victims. Fingerprinting is therefore not a "badge of crime," and does not subject a person to mortification and humiliation *per se*. It is merely a



procedure designed to establish identity, and its application has been regulated by statute in many states.

A few states have statutes providing for the return or destruction of fingerprint records after acquittal at trial, or upon release. The wording of the statute controls, but the statutes have been construed strictly in favor of law enforcement.