California Law Review

Volume 8 | Issue 1 Article 2

November 1919

Right to Take Fingerprints Measurements and Photographs

A. M. Kidd

The Right to Take Fingerprints, Measurements and Photographs

BEFORE considering the right to take fingerprints, measurements and photographs there is a question sometimes discussed which really should have no legal importance—that is, the relevancy of fingerprints as evidence in court. For centuries it has been the practice to take the shoes of the accused and fit them in the footprints around the scene of the crime. The footprints being admissible, no question should arise as to fingerprints, as fingerprints are far superior in probative value. The pattern of the fingerprint is unique. This can seldom be shown of a shoeprint. Although fingerprints were known to the Assyrians and to the Chinese in ancient times, their use in modern police work in the United States is a matter of the last twenty years. Accordingly, the subject has a certain air about it of mystery akin to magic and the Black Art, illusions which will not be dispelled until there is a more general knowledge of the subject.

If the San Francisco police had been acquainted with the science of fingerprints in 1895 the guilt or innocence of Theodore Durrant could have been readily and conclusively established by the use of fingerprints, for it is highly improbable that the "crime of the century," a murder in the dusty belfry of a church, could have been committed without leaving telltale fingerprint traces in superabundance. In Europe the use of fingerprints had begun at that time. This shows the importance of police departments keeping in touch with the latest methods employed all over the world, for modern scientific discoveries are being successfully applied to the detection of crime every day, and it is only through some sort of clearing house that the methods discovered in one portion of the world can be utilized in other places.

Convincing as fingerprint evidence is, lawyers are cautious and conservative; they are afraid to trust to the common sense and logic of the judges before whom they appear, and require a precedent on the exact facts before presenting to the court the most obvious evidence. Fortunately, these matters have been passed on by the courts, so that it is now held:

1. The courts will take judicial notice of fingerprinting as a method of identification.

"We are disposed to hold from the evidence of the four witnesses who testified, 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 cannot refuse to take judicial cognizance of it."[1]

2. The subject is one requiring expert testimony. "From the evidence in this record we are disposed to hold that the classification of fingerprint impressions and their method of identification is a science requiring study. While some of the reasons which guide an expert to his conclusions are such as may be weighed by any intelligent person with good eyesight from such exhibits as we have here in the record, after being pointed out to him by one versed in the study of fingerprints, the 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."[2]

3. Witnesses of practical experience in fingerprint work are competent to testify. The only case in which the expert was not believed by the jury was in India, and the upper court held that the jury may have been justified in disagreeing with the expert, as the expert's qualifications were doubtful.[3] The practical suggestion is that the expert who is called must be properly qualified, know his subject thoroughly, and be able to explain and illustrate it on the stand. There is some controversy as to whether the expert should testify positively as to the identity or merely state his opinion. It would seem that, if the expert is properly prepared, and is able to tell that the chance of error in a particular case is one in several billion, the jury might safely draw a conclusion of identity.

[1] People v. Jennings (1911) 252 Ill. 534, 96 N. E. 1077, 43 L. R. A. (N. S.) 1206.

[2] People v. Jennings, supra, n. 1.

[3] Finger Print Evidence, Press of United States Navy Recruiting Bureau, New York, compiled by J. H. Taylor; a number of authorities are here collected.

4. The expert may utilize a camera and processes of enlarging for assistance in presenting evidence to the jury.

"It is contended by appellant here that the court erred in admitting certain photographic enlargements and in permitting the witnesses Stone and Botorff to illustrate their testimony by the use of a projectoscope by means of which an enlarged photograph of the impressions was displayed to the jury. It might suffice to say that no question is raised as to the accuracy of the photographic exhibits, nor is any question raised as to the method of identifying the photographs or as to the manner in which the palmprint impression of the defendant was taken or as to the correctness of the enlargements. The appliances used and the methods resorted to, so far as we are able to determine, were those appliances and methods recognized by science. By these appliances, the jury was afforded an opportunity to follow the testimony of the experts in their direct and cross examination. By this means they were better able to judge of the correctness of the testimony as it was being given and to estimate its weight and significance. This method of presenting proof has received the sanction of the highest authority. Wharton on Criminal Evidence (8th Ed.) § 544; Wigmore on Evidence, vol. 1, § 795; Rogers on Expert Testimony (2d Ed.) § 140; Dederichs v. Salt Lake C. R. Co., 14 Utah, 137, 46 Pac. 656, 35 L. R. A. 802, and note; State v. Connors, 87 N. J. Law, 419, 94 Atl. 812. That instruments may be photographed for the purpose of so enlarging as to make the proportions plainer, and such photographs, when already in evidence, may be projected to illustrate the testimony of witnesses, is a rule that has found general sanction. First National Bank v. Wisdom, 111 Ky. 135, 63 S. W. 461; United States v. Ortiz, 176 U. S. 422, 20 Sup. Ct. 466, 44 L. Ed. 529; Howard v. Illinois Trust Co., 189 Ill. 568, 59 N. E. 1106; Marcy v. Barnes, 16 Gray (Mass.) 161, 77 Am. Dec. 405.

"Appellant complains of the act of the trial court in admitting photographs of the palm impressions, when upon such photographs there were certain lines and markings, placed there by the witnesses Stone and Botorff before their testimony was given. These lines, as appears from what record there is before us, were placed on the photographs by the experts for the purpose of more clearly illustrating their testimony. They indi-

cated the points of similarity and identity to which the experts testified. Their existence and significance were fully explained by the witnesses. These markings in no wise affected the photographs, and we are at a loss to discern any prejudice or injury that could have thus accrued to the appellant."[4]

The case from which the above quotation is taken reviews the authorities in a very interesting way; quoting from Pudd'nhead Wilson:

"Every human being carries with him from his cradle to his grave certain physical marks which do not change their character and by which he can always be identified—and that without shadow of doubt or question. These marks are his signature, his physiological autograph, so to speak; and this autograph cannot be counterfeited, nor can he disguise it or hide it away, nor can it become illegible by the wear of the mutations of time. This signature is each man's own—there is no duplicate of it among the swarming millions of the globe. Upon the haft of this dagger stands the assassin's natal autograph, written in the blood of that helpless and unoffending old man who loved you and whom you all loved. There is but one man in the whole earth whose hand can duplicate that crimson sign."

There is also a quotation from Mr. Brayley's book: "'God's finger print language,' the voiceless speech, and the indelible writing imprinted on the fingers, hand palms, and foot soles of humanity by the All-Wise Creator for some good and useful purpose in the structure, regulation, and well-being of the human body, has been utilized for ages before the civilization of Europe as a means of identification by the Chinese, and who shall say is not a part of the plan of the Creator for the ultimate elimination of crime by means of surrounding the evilly disposed by safeguards of prevention, and for the unquestionable evidence of identity in all cases where such is necessary, whether it be in wills, deeds, insurance, or commercial mediums of finance, as well as in the discovering and identification of lawbreakers."

The Kuhl case involved the question of palm prints, but precisely the same principles are applicable, except that palm prints have not been classified and standardized as have finger

[4] State v. Kuhl (1918) 175 Pac. 190 (Nevada).

prints so that they are not available for filing and general identification. Another leading case in the United States on finger prints is People v. Sallow,[5] where the court said:

"Before examining the authorities which by analogy are pertinent, the origin and nature of finger prints will be considered. Scientific authority declares that finger prints are reliable as a means of identification. 10 Ency. Brit. (11th Ed.) 376. The first recorded finger prints were used as a manual seal, to give a personal mark of authenticity to documents. Such prints are found in the Assyrian clay tablets in the British Museum. Finger prints were first used to record the identity of individuals officially by Sir William Herschel, in Bengal, to check forgeries by natives in India in 1858. C. Ainsworth Mitchell, in "Science and the Criminal," 1911, p. 51. Finger print records have been constantly used as a basis of information for the courts since Sir Francis Galton proved that the papillary ridges which cover the inner surface of the hands and the soles of the feet form patterns, the main details of which remain the same from the sixth month of the embryonic period until decomposition sets in after death, and Sir Edward Henry, the head of the Metropolitan Police Force of London, formulated a practical system of classification, subsequently simplified by an Argentine named Vucetich. The system has been in general use in the criminal courts in England since 1891. It is claimed that by means of finger prints the metropolitan police force of London during the 13 years from 1901 to 1914 have made over 103,000 identifications, and the Magistrates' Court of New York City during the 4 years from 1911 to 1915 have made 31,000 identifications, without error. Report of Alfred H. Hart, Supervisor, Fingerprint Bureau, Ann. Rep. N. Y. City Magistrates' Courts, 1915. Their value has been recognized by banks and other corporations, passport bureaus of foreign governments, and civil service commissions as a certain protection against impersonation.

"It was held in 1909 by the Lord Chief Justice of England that the court may accept the evidence of finger prints, though it be the sole ground of identification. Castleton's Case, 3 Crim. App. C. 74. In People v. Jennings, 252 Ill. 534, 549, 96 N. E. 1077,

[5] (1917) 100 Misc. 447, 165 N. Y. Supp. 915.

1082 (43 L. R. A. (N. S.) 1206), Mr. Chief Justice Carter, in holding such evidence admissible, states:

> "That 'there is a scientific basis for the system of finger print 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 cannot refuse to take judicial cognizance of it.'

"And in People v. Roach, 215 N. Y. 592, at page 604, 109 N. E. 618, at page 623 (Ann. Cas. 1917A, 410), Mr. Justice Seabury said:

> 'In view of the progress that has been made by scientific students and those charged with the detection of crime in the police departments of the larger cities of the world, in effecting identification by means of finger print impressions, we cannot rule as a matter of law that such evidence is incompetent. Nor does the fact that it presents to the court novel questions preclude its admission upon common-law principles. The same thing was true of typewriting, photography, and X-ray photographs, and yet the reception of such evidence is a common occurrence in our courts.'

"See, also, State v. Cerciello, 86 N. J. Law, 309, 90 Atl. 1112, 52 L. R. A. (N. S.) 1010; State v. Connors, 87 N. J. Law, 419, 94 Atl. 812."

Coming to the question of the right to take photographs, measurements and finger prints:

In prisons and reformatories the matter is often covered by statute, but even without statute it has been held that in the interests of prison discipline there is that power. The case in which this has been held, Hodgeman v. Olsen,[6] a case from Washington, would probably be accepted as authority in every jurisdiction. When, however, we take the case of defendants who are not in a reformatory or prison, it is impossible to state what the law is. There are over fifty independent jurisdictions in this country; in only a few of them are there statutes having any bearing whatever on the matter; in only a few have there been any decisions at all on the question, and those decisions have necessarily involved one particular angle of the entire subject. This will perhaps be made clear by a few typical cases. In Shaffer v. United States,[7] the defendant was photographed

[6] (1915) 86 Wash. 615, 150 Pac. 1122.

[7] (1904) 24 Appeals, District of Columbia, 417. Certiorai denied (1905) 196 U. S. 639, 25 Sup. Ct. Rep. 795, 49 L. Ed. 631.

after his arrest. This photograph was used on the trial for purposes of identification, the defendant having in the meantime grown a full beard. Objection was made to the use of the photograph. The court said: "This objection is founded upon the theory that the use of the photograph so obtained is in violation of the principle that a party cannot be required to testify against himself, or to furnish evidence to be so used. But we think there is no foundation for this objection. In taking and using the photographic picture there was no violation of any constitutional right. There is no pretense that there was any excessive force or illegal duress employed by the officer in taking the picture. We know that it is the daily practice of the police officers and detectives of crime to use photographic pictures for the discovery and identification of criminals, and that, without such means, many criminals would escape detection or identification. It could as well be contended that a prisoner could lawfully refuse to allow himself to be seen, while in prison, by a witness brought to identify him, or that he could rightfully refuse to uncover himself, or to remove a mark, in court, to enable witnesses to identify him as the party accused, as that he could rightfully refuse to allow an officer, in whose custody he remained, to set an instrument and take his likeness for purposes of proof and identification. It is one of the usual means employed in the police service of the country, and it would be matter of regret to have its use unduly restricted upon any fanciful theory of constitutional privilege."

But suppose the defendant refused to be measured. In Mabry v. Kettering[8] it was held that federal officers had a right to photograph the defendant in order to take the photographs to witnesses in various parts of the country for identification in a land fraud case.

In Downs v. Swann,[9] the defendant, a clerk in the office of

[8] (1909) 92 Ark. 81, 122 S. W. 115; (1909) 89 Ark. 551, 117 S. W. 746.

[9] (1909) 111 Md. 53, 73 Atl. 653, 23 L. R. A. (N. S.) 739. See also State v. Clausmeier (1900) 154 Ind. 599, 57 N. E. 541, 77 Am. St. Rep. 511, in which an action was brought against the sheriff and the sureties on a bond because the sheriff had photographed and measured the defendant and had sent these particulars to other departments. The defendant had been arrested, but was later acquitted. The court seemed to think that in sending the photographs the sheriff was not acting under color of his office and therefore there would be no liability on the bond. This seems questionable, but the court further held: "It would seem, therefore, if, in the discretion of the sheriff, he should deem it necessary to the safe keeping of a prisoner, and to prevent his escape, or to enable him the

the city register, was arrested for embezzlement. The authorities were about to take his photograph and measurements. The defendant asked for an injunction. This was denied by the court. The court does say that they were not to be understood as countenancing the placing in the rogues gallery the photograph of any person, not habitually criminal, who has been arrested but not convicted on a criminal charge, or the publication under those circumstances of his Bertillon record. The court says further: "In our opinion, the photographing and measuring of the appellant in the manner and for the purposes mentioned and the use of his photograph and the record of his measurement to the extent set forth in the answer by the police authorities of Baltimore City would not constitute a violation of the personal liberty secured to him by the constitution of the United States or of this state."

It will be observed that these cases go no further than to permit the taking of photographs and measurements of persons suspected of serious offenses, for the purpose of identification. They do not sanction the common practice of "mugging" every suspect whose picture and measurements the police would like to have. Nor do these cases sustain the right to retain the prints and measurements after acquittal. In other words, that army of vagrants, hop-heads and degenerates in whose ranks are often to be found the most dangerous criminals, cannot under the above decisions be fingerprinted in order to fasten on them crimes of which they may have been guilty in other places, nor can their records be retained to aid in future apprehension. There are several decisions which do not even allow the power given to police officials in the foregoing cases.

In Schulman v. Whitaker,[10] a pawn-broker was arrested for receiving stolen property. He had been arrested many times before, but apparently never convicted. His picture was taken;

more readily to retake the prisoner if he should escape, to take his photograph, and a measurement of his height, and ascertain his weight, name, residence, place of birth, occupation, color of his eyes, hair, and beard, as was done in this case, he could lawfully do so. The complaint does not charge that any physical force was used to induce the relator to have his negative taken, or to furnish the sheriff the information above mentioned not obtainable by observation." See also McGarry v. State (1918) 200 S. W. 527 (Tex. Cr. App.)

[10] (1906) 117 La. 704, 42 So. 227, 7 L. R. A. (N. S.) 274. See also Itzkovitch v. Whitaker (1905) 115 La. 479, 39 So. 499, 1 L. R. A. (N. S.) 1147, where an injunction was granted and the negative of the photographs ordered returned, it being held that no pictures should be taken before conviction except for identification or detection.

he was afterwards tried and discharged. The court held that the picture should be destroyed, the ground being that there was no necessity of taking it as the defendant was well-known and it was not needed for purposes of identification or to prevent escape. The court, however, is careful to say: "Whilst expressing the foregoing views, we desire to have it well understood that we are decidedly of opinion that cases may arise justifying the officer in charge of the police department in ordering a picture to be taken; but the necessity must be evident. Convicts and hardened criminals may forfeit all rights to consideration; to such an extent, at any rate, that their pictures may be taken if necessary to their identification, and that without much delay."

In Gow v. Bingham,[11] the defendant was arrested, charged with grand larceny and forgery. Never before apparently had he been accused or suspected of crime. While awaiting bail his photograph, measurements and imprints were taken. The prisoner was afterwards discharged and he brought a writ of mandate to compel the destruction of the photographs, records and impressions. The court held that he had mistaken his remedy, but declared: "It is perfectly clear, therefore, that there is no statutory authority justifying the acts of the police department which are here attacked. The real ground for their action, as it appears from the moving papers herein, is a custom of the police department which has existed for a considerable period of time of adding to the photographs and measurements of convicted criminals taken under the statutes above referred to the photographs and measurements, not of every person arrested, but only of those particular persons that in the wisdom of the police officials they deemed desirable to have in their collection, and this custom is indirectly countenanced by a rule of the department to the effect that 'likenesses of persons collected for the use of the detective bureau shall be privately kept in a gallery for the official use of the police force as an aid to the prevention and detection of crime, and shall not be exhibited to any person unless such person is accompanied by an officer of the department,' and that 'the Bertillon system in use by the department shall be in charge of the detective bureau.' Such a custom and such a rule would not of itself be

[11] (1907) 57 Misc. 66, 107 N. Y. Supp. 1011.

sufficient to justify the conduct of the respondents here. The officers of the police department are purely executive and administrative officers. The act of determining whether the liberty of a citizen shall be infringed in the manner above referred to belongs solely to the Legislature. Inasmuch as even under the rule of the department only such suspected persons are photographed and measured as the officials of the department determine shall be so treated the act of determining what conduct on the part of a citizen justifies such infringement upon his natural rights is an act judicial in character. To sustain a mere rule of the police department under such circumstances would be to confer upon the officials of that department not only executive, but legislative and judicial powers. The founders of our government were exceedingly careful to distribute the sovereign power of the state between the executive, legislative and judicial branches thereof, and to provide that neither should trespass upon the domain of the other. The time has not yet come when the entire sovereign power of the people of the state, executive, legislative, and judicial, is united in a member of the police force. The acts of the police department here criticised were not only a gross outrage, not only perfectly lawless, but they were criminal in character. Every person concerned therein is not only liable to a civil action for damages, but to criminal prosecution for assault, and also for criminal libel. . . ." The defendants rested in part on a peculiar statute passed as a result of the Molineux case,[12] in which it was held that Molineux, who had been properly photographed after his conviction, could not obtain the destruction of the photographs when the judgment was reversed on appeal. The legislature then passed a statute providing that on acquittal finger prints and photographs should be destroyed. The court in the Bingham case held that this statute was intended to cover only the case of conviction and subsequent reversal on appeal, and that it was not intended expressly or impliedly to sanction the taking of photographs and measurements before conviction.

The advice of the court in the Bingham case to bring an action for damages was taken in the case of Hawkins v. Kuhne.[13] The defendant was arrested on cable from Porto Rico for em-

[12] Molineux v. Collins (1904) 177 N. Y. 395, 69 N. E. 727, 65 L. R. A. 104.

[13] (1912) 153 App. Div. 216, 137 N. Y. Supp. 1090.

bezzlement. On the following morning he was taken to police headquarters, where the usual procedure was followed. The defendant was later acquitted of the charge and brought an action to recover damages. The jury returned a verdict for the plaintiff in the sum of $1788.09, which judgment was later affirmed on appeal. The defendant conceded that the taking of the prints and picture before conviction was an illegal act.

In a Scottish case, Adamson v. Martin,[14] a boy was arrested for the theft of a bicycle. He had committed some very trifling offense when twelve years old. After his arrest his measurements and photograph were taken. He was later acquitted of the charge and brought this action for damages. The plaintiff prevailed.

It is apparent from the above cases that police officials take a risk in the photographing, measuring and finger-printing regularly done in most departments. Some courts have held that a prisoner may be made to wear a garment in order to see whether it fits him and to show marks on his body and to make footprints where required. Some courts will not allow even this.[15] Any court that objects to compelling the defendant to exhibit a scar or make an imprint with his shoe would certainly not allow fingerprints to be taken before conviction. On the other hand, courts which allow the examination of defendant's person for marks and scars may not allow finger-printing, as the New York cases show. On the whole, it is probable that

[14] (1916) 1 Scots Law Times 53.

[15] The authorities on this question are collected in People v. Sallow, supra, n. 5, and in Wigmore on Evidence, § 2265. Later cases may also be found. They have, however, only an indirect bearing on the right to take fingerprints. New York, for example, in the case of People v. Gardner (1894) 144 N. Y. 119, 127, 38 N. E. 1003, 1004, 28 L. R. A. 699, 43 Am. St. Rep. 741, has a clear statement that a prisoner's person may be examined for marks and bruises and then they may be proved upon his trial to establish his guilt. People v. Van Wormer (1903) 175 N. Y. 188, 67 N. E. 299 holds that shoes may be taken from the defendant and placed in foot-marks; yet as has been seen, New York does not sanction the taking of fingerprints before conviction. Hawkins v. Kuhne (1912) 153 App. Div. 216, 137 N. Y. Supp. 1090. The New York cases of People v. Joyce (1899) 27 Misc. 658, 59 N. Y. Supp. 418, and Owen v. Partridge (1903) 40 Misc. 415, 82 N. Y. Supp. 248, have been considered to turn simply on the question of remedy, not of right. The minority states which do not permit compulsory comparison for shoe prints or compulsory physical examination would certainly not allow compulsory fingerprints.

Alabama: Cooper v. State (1889) 86 Ala. 610, 6 So. 110.
Georgia: Elder v. State (1915) 143 Ga. 363, 85 S. E. 97.
Iowa: State v. Height (1902) 117 Ia. 650, 91 N. W. 935.
Missouri: State v. Matsinger (1915) 180 S. W. 856.
Tennessee: Stokes v. State (1875) 5 Baxter 619.

a learned author states the law accurately: "It is certainly better to deny the power of finger-printing in such cases, except under authority of a statute restricting it to its proper purpose, and providing safeguards against its abuse. Where a suspected criminal is arrested but must be discharged for lack of evidence, there seems to be no constitutional warrant for compulsory photographing or measurement, desirable as some such measure of identification may be for practical purposes."[16]

What are the principles involved? It is often claimed that the taking of finger prints is a violation of the constitutional right of the defendant not to incriminate himself. There is some loose opinion that way, but the weight of authority and the reason and history of the thing, as shown conclusively by Professor Wigmore, are that this constitutional provision has nothing to do with anything except testimony in open court.[17] Even in open court, as has been seen, simple identification is allowed, although it might be objectionable to compel in open court any unusual act by the defendant. The constitutional phase of the matter is dealt with in People v. Sallow:[18]

"The taking of finger prints is not a violation of the spirit or purpose of the constitutional inhibition. 'The scope of the privilege, in history and in principle,' says Greenleaf, 'includes only the process of testifying, by word of mouth or in writing; i. e., the process of disclosure by utterance. It has no application to such physical, evidential circumstances as may exist on the witness' body or about his person.' Section 469e, vol. 1, 16th Ed. It would be a forced construction to hold that by finger printing the defendant was required to furnish evidence against herself. Such is not the case. The defendant was already in the case. The court merely makes inquiry by physical examination and records the same as to her identity while it detains her. It might as well be urged that by her arrest the defendant was deprived of her constitutional rights, because her body is produced before the court.

"Both upon sound reason and upon the authority of analogous cases I am of opinion that the taking of the defendant's finger prints and their introduction in evidence was not a vio-

[16] Freund on Police Power, § 103. Fosdick, European Police Systems, pp. 327, 329, gives the practice in the countries of Europe.
[17] Wigmore on Evidence, § 2265.
[18] Supra, n. 5.

lation of the Constitution of this state. The proof was not the defendant's proof. She was not called as a witness. It was proof by a competent witness, based upon the record of this 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."

If the privilege against crimination does not apply, there is nothing else applicable except due process of law. It is settled that a person arrested may be detained and confined pending his production before the magistrate. He may be searched; he may be taken before persons to be identified. Is it extending these necessary powers in the light of modern conditions to add that of taking prints, measurements and photographs, at least for identification and apprehension in case of escape? On principle this should be allowed without statute, but as we have seen, few if any courts have gone the full length.[19] It should, however, be perfectly competent for the legislature to grant such power. Not many statutes have been passed covering the subject. In People v. Sallow,[20] it seems a statute was passed in New York providing that in certain cases of vagrancy there should be no sentence on conviction until the fingerprint records had been searched with reference to the particular defendant. It was this act which was sustained in People v. Sallow, but it will be observed it applies only to persons who have been duly convicted. In California the matter is fairly well covered by statute:[21]

"§ 8. DAILY COPIES OF FINGER PRINTS FURNISHED. DAILY REPORTS OF PROPERTY STOLEN. It is hereby made the duty of the sheriffs of the several counties of the State of California, the chiefs of police of incorporated cities therein and marshals of incorporated cities and towns

[19] The right of privacy sometimes invoked in this connection really has no pertinence. There is not merely a violation of the right of privacy, but an assault and in some cases a libel, unless the police power is a justification. The notion that the incidents of the power for arrest do not include the right to take finger prints or photographs rests on a quotation from Tiedemann, State and Federal Control of Persons and Property, § 51, which had no foundation in judicial authority.

[20] Supra, n. 5.

[21] Cal. Stats. 1917, ch. 723, p. 1391.

therein to furnish to the said bureau daily copies of finger-prints on standardized eight by eight inch cards, and descriptions of all such persons arrested who in the best judgment of such sheriffs, chiefs of police, or city marshals, are persons wanted for serious crimes, or are fugitives from justice, or of all such persons in whose possession at the time of arrest are found goods or property reasonably believed by such sheriffs, chiefs of police or city marshals to have been stolen by them; or of all such persons in whose possession are found burglar outfits or burglar tools or burglar keys or who have in their possession high-power explosives reasonably believed to be used for unlawful purposes or who are in possession of infernal machines, bombs or other contrivances in whole or in part and reasonably believed by said sheriffs, chiefs of police and city marshals to be used for unlawful purposes, or of all persons who carry concealed firearms or other deadly weapons and reasonably believed to be carried for unlawful purposes, or who have in their possession inks, dye, paper or other articles necessary in the making of counterfeit bank notes, or in the alteration of bank notes; or dies, molds or other articles necessary in the making of counterfeit money, and reasonably believed to be used by them for such unlawful purposes. This section is by no means intended to include violators of city or county ordinances or of persons arrested for other trifling offenses. It is further made the duty of the aforesaid sheriffs, chiefs of police or city marshals to furnish said bureau daily reports of lost, stolen, found, pledged or pawned property received into their respective offices."

If there were an habitual offender's act to cover the vagrants and other hopeless recidivists, making the repetition of certain offenses a serious crime, the act would seem to cover most of the cases where there is any real reason to take prints, measurements and photographs.[22]

Foreigners comment very severely upon the gross infringement of personal liberty involved in arresting men and taking them to jail for trifling offenses. In most countries in Europe such a thing would not be permitted. It is sufficient to summon a defendant to appear, not drag him to jail. In a country so jealous of personal liberty as ours is supposed to be, this viola-

[22] As in England, Stats. of Edward VII, ch. 59, part 2.

tion is surprising.[23] Can it perhaps be accounted for in part by the fact that the citizen of the United States is migratory—that he lacks a local habitation? Only in case of speed offenses has the principle of summons being generally adopted, the ownership of the automobile insuring attendance. This leads to the suggestion that it would be of great advantage to the people as a whole if every person in the country over a certain age were finger-printed, not for the sake of the criminal law alone, but for the benefit of each individual. Seven hundred years ago in almost every part of England every man was in a tithing, that is, he formed one of a group of ten or twelve. This tithing was responsible for the performance of his public duties and for his production when needed. A man who was not in frank pledge, as it was called, was a lawless man and likely to be taken up and hanged on short notice. For his own protection it behooved him to be in frank pledge.[24] Similarly, there was a publicity to all transactions, including the sale of land and sale of chattels. With the break-up of the medieval world and with better methods of communication the old restrictions and limitations were thrown aside. No impediments were placed on freedom of action. We have suffered from this insecurity. Sir Henry Maine pronounced his celebrated generalization that the progress of society was from status to contract. Later scholars, however, have pointed out that we are rapidly abandoning freedom of contract for fixed relations, duties and liabilities imposed by law, e. g., Workmen's Compensation Laws.[25] The looseness and insecurity of transactions in which there are no formalities are being succeeded by a system of publicity.[26] Deeds and mortgages must be recorded or titles registered under

[23] Perhaps it is as a result of the separation of the executive, legislative and judicial branches, without the presence of any supervising or co-ordinating administrator that the courts have been so astute in finding technical violations of personal rights in the taking of fingerprints, although as a matter of fact not only are fingerprints taken, but third-degree methods are daily resorted to by the police, and rarely does any government officer attempt to right the wrong. See Bingham v. Gaynor (1910) 141 App. Div. 301, 126 N. Y. Supp. 353. It is only in the exceptional case, not once in a hundred thousand times, that the injured party asks for redress. It is a striking example of what Dean Pound has called "the difference between law in books and law in action."

[24] Pollock & Maitland, History of English Law (2nd ed.), Vol. 1, p. 568.

[25] Pound, The Limits of Effective Legal Action, 3 American Bar Association Journal, 55; Isaacs, the Law and the Law of Change, 65 University of Pennsylvania Law Review, 665.

[26] Huebner, History of Germanic Private Law, Continental Legal History Series, pp. 28, 46, 221.

the Torrens system. Business men must make returns to the government and must submit their books to inspection. Will there not be another phase of this same movement by the federal government requiring every person above a certain age to be registered with his fingerprints and other identification marks? Had this been done how much the operation of the recent selective service draft law would have been simplified. But it is not only for crime and war that finger print registration is desirable. Kuhne[27] enumerates in addition to the army use for apprehension of deserters and identification of the dead on the battlefield, the use by banks to protect depositors, corporations to prevent re-employment of undesirables, examiners to prevent impersonation at examinations, life insurance companies for identification purposes, lying-in hospitals to prevent mixing of children, under election laws for identification, immigration laws; in short every situation where it is desirable to be able to prove identity. It would be such an advantage for every good citizen to be registered that he would no more be unregistered than a man seven hundred years ago would have been out of frank pledge. If the aliens smuggled into the country, the anarchists bent upon its destruction, the army of vagrants, hoboes and unemployables from whom the criminals are recruited are to be rounded up, if the expense of police, courts, prisons, reformatories and the yearly toll of crime is to be materially reduced, if the government is to perform its fundamental duty of security, universal registration by means of fingerprints is indispensable.

A. M. Kidd.

Berkeley, California.

[27] The Finger Print Instructor, p. 12. Cahalane, Police Practice and Procedure, p. 79.