

DIGITAL IMAGING LEGAL PRECEDENTS

The following are a list of past touchstone cases that are the basis for current legal decisions involving fingerprinting or fingerprinting in the United States.

John DAVIS, Petitioner,

v.

State of MISSISSIPPI.

(Cite as: 394 U.S. 721, 89 S.Ct 1394)

Argued Feb. 26 and 27, 1969. Decided April 22, 1969

Defendant was convicted of rape and sentenced to life imprisonment by jury in the Circuit Court of Lauderdale County, Mississippi. The Supreme Court of Mississippi affirmed the conviction, 204 So.2d 270. On writ of certiorari, the United States Supreme Court, Mr. Justice Brennan, held that where city police made no attempt to employ procedures which might comply with requirements of Fourth Amendment, detention at police headquarters of defendant and others was not authorized by judicial officer, defendant was unnecessarily required to undergo two fingerprinting sessions and defendant was not merely fingerprinted during first detention but was also subjected to interrogation, fingerprints obtained from defendant during first detention were product of the illegal detention and were improperly admitted into evidence.

Reversed.

Mr. Justice Stewart and Mr. Justice Black dissented.

[1] CONSTITUTIONAL LAW k266(2)

Trustworthiness of fingerprint evidence does not except it from the proscriptions of the Fourth and Fourteenth Amendments. U.S.C.A.Const. Amends. 4,14.

[2] CRIMINAL LAW k394.4(1)

There is no exception from the rule that illegally seized evidence is inadmissible at trial, however relevant and trustworthy the seized evidence may be as an item of proof. U.S.C.A.Const. Amends. 4,14.

[3] CRIMINAL LAW k394.4(1)

Rule excluding illegally seized evidence was fashioned as sanction to redress and deter overreaching government conduct prohibited by the Fourth Amendment. U.S.C.A.Const. Amends. 4,14.

[4] SEARCHES AND SEIZURES k52

The Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed "arrests" or "investigatory detentions". U.S.C.A.Const. Amend. 4.

[5] CRIMINAL LAW k393(1)

While police have right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer. U.S.C.A.Const. Amends. 4,14.

*726 The State makes no claim that petitioner voluntarily accompanied the police officers to headquarters on December 3 and willingly submitted to fingerprinting. The State's brief also candidly admits that '(a)ll that the Meriden Police could possibly have known about petitioner at the time ***would not amount to probable cause for his arrest***.' [FN5] The State argues, however, that the December 3 detention was a type which does not require probable cause. Two rationales for this position are suggested. First, it is argued that the detention occurred during the investigatory rather than accusatory stage and thus was not a seizure requiring probable cause. The second and related argument is that, at the least, detention for the sole purpose of obtaining fingerprints does not require probable

cause.

FN5. Brief for Respondent 3.

[4][5][6] It is true that at the time of the December 3 detention the police had no intention of charging petitioner with the crime and were far from making him the primary focus of their investigation. But to argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions *727 to be termed ‘arrests’ or ‘investigatory detentions.’[FN6] We made this explicit only last Term in *Terry v. Ohio*, 392 U.S. 1,19,88 S.Ct. 1868, 1878, 1879, 20 L.Ed.2d 889 (1968), when we rejected ‘the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a ‘technical arrest or a ‘full-blown search.’”

FN6. The State relies on various statements in our cases which approve general questioning of citizens in the course of investigating a crime. See *Miranda v. Arizona*, 384 U.S. 436, 477-478, 86 S.Ct. 1602, 1629-1630, 16L.Ed.2d 694 (1966); *Columbe v. Connecticut* 367 U.S. 568,635,81 S.Ct. 1860,1896,6 L.Ed.2d 1037 (concurring opinion) (1961). But these statements merely reiterated the settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer.

[7][8][9][10] Detentions for the sole purpose of obtaining fingerprints are no less subject to the constraints of the Fourth Amendment. It is arguable, however, that, because of the unique nature **1398 of the fingerprinting process, such detentions might, under narrowly defining circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense. See *Camara v. Municipal Court*, 387 U.S. 523,87 S.Ct. 1727,18 L.Ed.2d 930 (1967). Detention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions. Fingerprinting involves none of the probing into an individual’s private life and thoughts that marks an interrogation or search. Nor can fingerprint detention be employed repeatedly to harass any individual, since the police need only one set of each person’s prints. Furthermore, fingerprinting is an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions and is not subject to such abuses as the improper line-up or the ‘third degree.’ Finally, because there is no danger of destruction of fingerprints, the limited detention need not come unexpectedly or at an inconvenient time. *728 For this same reason, the general requirement that the authorization of a judicial officer be obtained in advance of detention would seem not to admit of any exception in the fingerprinting context.

[11] We have no occasion in this case, however, to determine whether the requirements of the Fourth Amendment could be met by narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest. For it is clear that no attempt was made here to employ procedures which might comply with the requirements of the Fourth Amendment: the detention at police headquarters of petitioner and the other young Negroes was not authorized by a judicial officer; petitioner was unnecessarily required to undergo two fingerprinting sessions; and petitioner was not merely fingerprinted during the December 3 detention but also subjected to interrogation. The judgment of the Mississippi Supreme Court is therefore reversed.

Reversed.

Mr. Justice FORTAS took no part in the consideration or decision of this case.

Mr. Justice HARLAN, concurring.

I join the opinion of the Court, with one reservation. The Court states in dictum that, because fingerprinting may be scheduled for a time convenient to the citizen, ‘the general requirement that the authorization of a judicial officer be obtained in advance of detention would seem not to admit of any exception in the fingerprinting context.’ Ante, this page. I cannot concur in so sweeping a proposition. There may be circumstances, falling short of the ‘dragnet’ procedures employed in this case, where compelled submission to fingerprinting would not amount to a violation of the Fourth Amendment even in the *729 absence of a warrant, and I would leave that question open.

John THOM and R.J. Flynn, Plaintiffs,

v.

NEW YORK STOCK EXCHANGE, American Stock Exchange, Goldman, Sachs and Company, Shields and Company, and Louis Lefkowitz, individually and as Attorney General of the State of New York, Defendants.

Donald J. MILLER, Plaintiff,

v.

NEW YORK STOCK EXCHANGE, American Stock Exchange, Paine, Webber, Jackson and Curtis, and Louis Lefkowitz, individually and as Attorney General of the State of New York, Defendants.

Nos. 69 Civ. 4092, 4205.

United States District Court S.D. New York.

Nov. 18, 1969

Plaintiff employees of stock exchange firms brought action against their employers, Attorney General of New York and national stock exchanges challenging constitutionality of New York statute requiring all employees of member firms of national security exchanges registered with Securities and Exchange Commission and employees of affiliated clearing corporations to be fingerprinted as condition of employment. The District Court, Edward Weinfeld, J., held that statute was reasonably calculated to meet evils of increasing thefts in securities industry and was valid exercise of state's police power. Motion for convening of statutory three-judge court denied; temporary restraining order vacated and defendant's motion to dismiss complaint granted.

Judgment affirmed.

[1] FEDERAL COURTS k1011

170Bk1011

Single issue on motion for three-judge court is whether one or more constitutional claims are of substance and present a basis for equitable relief. 28 U.S.C.A. ss 2281, 2284.

[2] CONSTITUTIONAL LAW k81

92k81

Securities industry is a business affected with public interest and state has legitimate concern with problem of ever-mounting thefts in the securities industry.

[2] EXCHANGES k2

160k2

This claim of privacy rests principally upon *Davis v. Mississippi*. [FN13] In *Davis* the Supreme Court barred a 'dragnet' fingerprinting of youths in an attempt to identify a rapist. Plaintiffs assert that *Davis* clearly establishes the right of privacy and that the right is not confined to criminal cases. Their assault upon the Act based upon *Davis* runs in many directions: that fingerprinting is an indignity to their person and privacy; that it constitutes 'dragnet' fingerprinting, since without adequate standards it indiscriminately applies to all persons in the securities industry; that other and more effective means involving less intrusion upon individual privacy could have been devised by the state; that no provision is made for the return of fingerprints after they have served their purpose.

FN13. 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d. 676 (1969); see *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

Plaintiff's essential reliance upon *Davis v. Mississippi* is misplaced. *Davis* was concerned with methods used in obtaining fingerprint evidence during the course of a criminal investigation. [FN14] It is but another application of the principle that the Fourth Amendment applies to all searches and seizures of the person no matter what the scope or duration. [FN15] It held that in the circumstances there presented the detention for the sole purpose of fingerprinting was in violation of the Fourth Amendment ban against unreasonable search and seizure. It is inapposite to the situation here presented. Similarly inapposite is *Griswold v. Connecticut*, [FN16] upon which plaintiffs also rely. The right of marital privacy at the core of the Court's ruling in *Griswold* is in no sense analogous to the instant claim of privacy.

FN14. See *Bynum v. United States*, 104 U.S.App.D.C. 368, 262 F.2d 465 (1958).

FN15. See *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

FN16. 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

Plaintiffs' contention that fingerprinting is an affront to their dignity and an invasion of their privacy is without substance. The day is long past when fingerprinting carried with it a stigma or any implication of criminality. Federal and state courts alike, in upholding fingerprinting requirements, have rejected any such view. [FN17] Our Court of Appeals, *1008 almost forty years ago, in upholding the right of federal agents to take fingerprints after an arrest upon probable cause, even in the absence of statutory authority, observed, 'Finger printing is used in numerous branches of business and of civil service, and is not in itself a badge of crime.' [FN18] To the same effect is a state court's contemporaneous opinion upholding a regulation requiring fingerprinting for the issuance of a license to deal in secondhand articles. [FN19]

FN17. See *Stevenson v. United States*, 127 U.S.App.D.C. 43, 380 F.2d 590, 594 n. 12, cert. denied, 389 U.S. 962, 88 S.Ct. 347, 19 L.Ed.2d 375 (1967); *United States v. Krapf*, 285 F.2d 647 (3d Cir. 1961); *Walton v. City of Atlanta*, 181 F.2d 693 (5th Cir.), cert. denied, 340 U.S. 823, 71 S.Ct. 56, 95 L.ed. 604 (1950) (fingerprinting of taxi drivers); *United States v. Laub Baking Co.*, 283 F.Supp. 217 (N.D. Ohio 1968); *United States v. New Orleans Chap., Assoc. Gen. Contractors*, 238 F.Supp. 273, 278-279 (E.D. La. 1964), rev'd on other grounds, 382 U.S. 17, 86 S.Ct. 33, 15 L.Ed.2d 2 (1965); *Sterling v. City of Oakland*, 208 Cal.App.2d 1, 24 Cal. Rptr. 696 (1962); *State ex rel. Mavity v. Tyndall*, 224 Ind. 364, 66 N.E. 2d 755 (1946); *id.* 225 Ind. 360, 74 N.E.2d 914 (1947), appeal dismissed, 333 U.S. 834, 68 S.Ct. 609, 92 L.Ed. 1118, rehearing denied, 333 U.S. 858, 68 S.Ct. 732, 92 L.Ed. 1138 (1948); *Medias v. City of Indianapolis*, 216 Ind. 155, 23 N.E.2d 590, 125 A.L.R. 590 (1939) (pawnbrokers and second-hand dealers required to keep and submit to police department cards with fingerprints of everyone from whom they receive or buy property); *City of Wichita v. Wolkow*, 110 Kan. 127, 202 P.632 (1921) (pawnbrokers and second-hand dealers required to keep and submit to police department register with fingerprints of everyone from whom they receive or buy property); *Norman v. City of Las Vegas*, 64 Nev. 38, 177 P.2d 442 (1947) (fingerprinting of employees in establishments selling alcoholic beverages for on-premises consumption); *Roesch v. Ferber*, 48 N.J. Super. 231, 137 A.2d 61 (1957); *Simone v. Kennedy*, 26 Misc.2d 748, 212 N.Y.S.2d 838 (Spec.T.1961) (fingerprinting of employees in cabarets); *Friedman v. Valentine*, 177 Misc. 437, 30 N.Y.S.2d 891 (Sup.Ct.1941), aff'd, 266, App.Div. 561, 42 N.Y.S.2d 593 (1943) (fingerprinting of employees in cabarets); *Bridges v. State*, 247 Wis. 350, 19, N.W.2d 529, 539, rehearing denied, 347 Wis. 350, 19 N.W.2d 862 (1945); cf. *United States v. Kalish*, 271 F.Supp. 968 (D.P.R.1967) (objection based solely upon inclusion in criminal file).

FN18. *United States v. Kelly*, 55 F.2d 67, 70, 83 A.L.R. 122 (2d Cir. 1932).

FN19. *M. Itzkowitz & Sons v. Geraghty*, 139 Misc. 163, 247 N.Y.S. 703 (Spec.T.1931). A contrary conclusion was reached in two even earlier lower court cases in New York, *Gow v. Bingham*, 57 Misc. 66, 107 N.Y.S. 1011 (Spec.T.1907) (dictum); *People v. Hevern*, 127 Misc. 141, 215 N.Y.S. 412 (Mag.Ct. 1926). See also *Hawkins v. Kuhne*, 153 App.Div. 216, 137 N.Y.S. 1090 (1912), aff'd 208 N.Y. 555, 101 N.E. 1104 (1913); *Fidler v. Murphy*, 203 Misc. 51, 113 N.Y.S.25 388 (Sup.Ct.1952) (fingerprinting in case not provided for by law constitutes cause of action for assault). But the dictum in the *Gow* case, which ultimately held only that petitioner had mistaken his remedy, may be read as indicating only that fingerprinting was a sufficient intrusion into personal liberty to require legislative authorization. Such authorization was subsequently provided in criminal cases, see N.Y.Code Crim.Proc. 940 (McKinney Supp.1969), and is clearly granted by ch.1971. *Hevern* declared unconstitutional a state statute requiring fingerprinting upon arrest, as a condition of bail, N.Y.Code Crim.Proc. 552-a (McKinney Supp.1969), ruling that the fingerprinting involved (1) compulsory self-incrimination, and (2) an unlawful encroachment upon the person. The first ground is clearly wrong, see note 25 *infra*; as to the second, the court noted that although it felt fingerprinting at the time conveyed 'an imputation of crime,' at some future time it might lose such association. That development has clearly taken place. In any event, the passage of time and the intervening developments in statutory and case law within and without New York, see note 17 *supra*; appendix, considerably weaken the impact of these early lower court decisions.

Fingerprinting in noncriminal contexts today is even more widespread. It is required of all employees of United States government agencies and departments. [FN20] As far back as 1910, the New York City Municipal Service Commission adopted fingerprinting as a means of identification, so that today there are thousands upon thousands of fingerprints of city employees on file with the Commission. [FN21] In Maine all school children must be fingerprinted. [FN22] In Pennsylvania all babies must be footprinted and mothers fingerprinted. [FN23] The extensive acceptance of fingerprinting throughout

the country is illustrated by a random selection of federal and state statutes set *1009 out in the appendix to this opinion which authorize or require fingerprinting. In sum, the public has long recognized it as a valuable and reliable means of identification, and to suggest that a stigma attaches when it is so used is to fly in the face of reality.

FN20. Executive Order No. 10450, 3 C.F.R. 936 (1949-53 Comp.).

FN21. New York City Civil Service Commission requires fingerprinting both prior to examinations and again upon appointment or promotion. N.Y. City Civ. Serv. Comm'n, Rules 4.4.3, 5.1.2. See *M. Itzkowitz & Sons v. Geraghty*, 139 Misc. 163, 247 N.Y.S. 703, 705 (Spec.T.1931).

FN22. Maine Rev. Stat. Ann., tit. 25, s 1548 (1965).

FN23. Pa. Stat. Ann., tit. 35, s 352 (1964).

Plaintiffs' further contention that fingerprinting is an unwarranted invasion of their personal liberty or privacy is equally unjustified. Plaintiffs do not challenge the right of inquiry into their private lives when employed or seeking employment by the stock exchanges and affiliated clearing houses under existing SEC and Exchange regulations. [FN24] They attack only the fingerprint requirement. But fingerprinting under the statute is only a means of verifying the required information as to the existence or nonexistence of a prior criminal record. It involves no additional intrusion into the personal lives of employees and applicants. The submission of one's fingerprints is no more an invasion of privacy than the submission of one's photograph or signature to a prospective employer, [FN25] which the Stock Exchange rules still require. As the Supreme Court in *Davis* observed, 'Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search.' [FN26] The actual inconvenience is minor; the claimed indignity, nonexistent; detention, there is none; nor unlawful search; nor unlawful seizure.

FN24. See SEC Rule 17a-3(a)(12), 17 C.F.R. s 240.17a-3(a)(12)(1969); NYSE Rule 345.19, discussed at p. 1005.

FN25. See *Schmerber v. California*, 384 U.S. 757, 764, 86 S.Ct. 1826, 1832, 16 L.Ed.2d 908 (1966), where, even with respect to the privilege against self-incrimination, the Supreme Court observed: '***both federal and state courts have usually held that it (the privilege) offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture.' See also *Gilbert v. California*, 388 U.S. 263, 266-267, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967); *Lewis v. United States*, 127 U.S. App.D.C. 269, 382 F.2d 817, cert. denied, 389 U.S. 962, 88 S.Ct. 350, 19 L.Ed.2d 377 (1967) (handwriting exemplar).

FN26. *Davis v. Mississippi*, 394 U.S. 721, 727, 89 S.Ct. 1394, 1398, 22 L.Ed.2d 676 (1969).

Taking a somewhat different tack, plaintiffs acknowledge that even under *Davis*, in noncriminal situations, a statute could require fingerprinting of certain persons, if narrowly circumscribed by appropriate standards to protect privacy. [FN27] But they claim that the statute here is overbroad and as applied fails to meet required constitutional standards, for it indiscriminately requires all persons in the securities business, regardless of circumstances, to submit his fingerprints.

FN27. Cf. *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967); See *v. City of Seattle*, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967).

[6] These three plaintiffs, a lawyer, a computer programmer and an executive kitchen employee, urge there is no rational basis for their inclusion in the fingerprint requirement. But even employees in the securities business who have no direct access to securities may be in contact with fellow employees having direct or immediate access to or knowledge of the location of negotiable securities running into astronomical figures. Theft of securities may be accomplished not only by those who handle certificates in the 'back room,' but by other employees who are in a position to conceive, aid and abet the crime, or to 'finger' the securities or to arrange for outsiders to receive and sell the stolen certificates. As to the lawyer's further contention that his good character was attested to when he was certified for admission to the bar, [FN28] the short answer is that it may be he 'is well known to be of good character ***but it is not *1010 practical *** to make one rule for one applicant and another for the balance***.' [FN29] And even if some individuals with little or no access to the securities must still be fingerprinted, this does not invalidate legislation if otherwise there is justification for the course adopted by the state. [FN30] 'The slight interference with the person involved in finger printing seems to us one which must be borne in the common interest.' [FN31]

FN28. It should be noted that admission to the bar involves many of the same procedures plaintiff here finds objectionable. The New York State Board of Law Examiners requires a handwriting exemplar in the application for the bar examination. Rules of N.Y. State Bd. Law Examiners, Rule 1(c), N.Y. Codes, Rules & Regs., tit. 22, s 6000.1(c) (1969). The Committees on Character and Fitness of the Second Judicial Department in New York have a similar requirement for admission to the bar. See Application and Sworn Statement for Admission to the Bar, App.Div., 2d Dep't., Comms. On Character

and Fitness, Quest. 13, N.Y. Codes, Rules & Regs., tit. 22, app. C-1 (1969). In the Second Department, applicants are also required to submit photographs and to be fingerprinted.

FN34. Cf. *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80, 84-85, 66 S.Ct. 850 (1946).

[9] The second claim is equally conjectural and untenable. In any case, the most plaintiffs can posit here is that the potential use of the prints for future criminal investigations is an additional unstated purpose of the law; that they will in fact be used for the stated purpose of initial investigation cannot seriously be questioned. Given such an admittedly valid purpose so clearly within the legislative competence, the circumstance of an incidental future by-product of fingerprinting does not invalidate the legislative act. Nor does that circumstance warrant a court ascribing to the Legislature a purpose different from the one that led to its enactment. As has been so aptly put: 'Judicial inquiries into (legislative) motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed.' [FN35]

FN35. *Flemming v. Nestor*, 363 U.S. 603, 617, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960). See also *Arizona v. California*, 283 U.S. 423, 454-457, 51 S.Ct. 522, 75 L.Ed. 1154 (1931); *Nigro v. United States*, 276 U.S. 332, 48 S.Ct. 388, 72 L.Ed. 600 (1928); *United States v. Doremus*, 249 U.S. 86, 39 S.Ct. 214, 63 L.Ed. 493 (1919).

And even if plaintiffs were to succeed in establishing that the state intended to incorporate these fingerprints into its central criminal identification files [FN36] to be used as a means of future crime detection, such a procedure does not run afoul of any constitutional prohibitions. As indicated above, the *Davis* case, so heavily relied upon, does not place any limitations upon the use of fingerprints properly obtained; it bars only unreasonable detentions for the purpose of obtaining such prints. Prints obtained in the course of criminal proceedings are routinely retained and used for future investigative purposes. Absent some statutory requirement of return or destruction upon acquittal, [FN37] or some prejudicial classification attached thereto, [FN38] there is no constitutional requirement that prints properly obtained be returned. [FN39] The state having presented a valid justification under its police power for the original taking of the prints under reasonable circumstances, their use for future identification purposes, even in criminal investigations, is not impermissible. [FN40] The decision as to whether prints lawfully obtained under the Act should be returned once they have served their purpose is a matter of legislative policy.

FN36. See N.Y. Exec. Law ss 600-608 (McKinney Supp. 1969); Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society*, 67 Mich.L.Rev. 1091, 1191 (1969).

FN37. See, e.g., N.Y. Code Crim. Proc. ss 552-a, 944 (McKinney Supp. 1969).

FN38. See *United States v. Kalish*, 271 F.Supp. 968 (D.P.R. 1967).

FN39. *Sterling v. City of Oakland*, 208 Cal.App.2d 1, 24 Cal. Rptr. 696 (1962); *Kolb v. O'Connor*, 14 Ill.App.2d 81, 142 N.E.2d 818 (1957); *State ex rel. Mavity v. Tyndall*, 225 Ind. 360, 74 N.E.2d 914 (1947), appeal dismissed, 333 U.S. 858, 68 S.Ct. 732, 92 L.Ed. 1138 (1948); cf. *Herschel v. Dyra*, 365 F.2d 17 (7th Cir.), cert. denied sub nom. *Herschel v. Wilson*, 385 U.S. 973, 87 S.Ct. 513, 17 L.Ed.2d 436 (1966). *Campbell v. Adams*, 206 Misc. 673, 133 N.Y.S.2d 876 (Spec.T. 1954), cited by plaintiffs, is not to the contrary. That case involved only interpretation of relevant New York statutes governing the taking and return of fingerprints.

FN40. See *Stevenson v. United States*, 127 U.S.App.D.C. 43, 380 F.2d 590, 593-594, cert. denied, 389 U.S. 962, 88 S.Ct. 347, 19 L.Ed.2d 375 (1967).

[10] The plaintiffs' further claim that they are denied equal protection of the laws is patently frivolous. The contention *1012 is that employees in the securities business have been singled out for fingerprinting, whereas employees in other industries, such as banking, where embezzlement and theft are also rampant, are not required to be fingerprinted, and thus there is an invidious and irrational discrimination against security industry employees. The mere statement of the contention requires its rejection. That other industries to which the Legislature has not applied the Act may present similar problems, if such be the fact, does not render it unconstitutional. The extension of the Act, if evils also

exist in related industries, is a matter of legislative judgment and discretion. 'If 'the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied.' [FN41]

FN41. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400, 57 S.Ct. 578, 585, 81 L.Ed. 703 (1937); see *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 533 (1949); *Gundling v. Chicago*, 177 U.S. 183, 188, 20 S.Ct. 633, 44 L.Ed. 725 (1900).

[11] In sum, the Act neither invades the right of privacy of plaintiffs, nor does it in any respect deprive them of their constitutional right of due process or of the equal protection of the laws.

The motion for the convening of a statutory three-judge court is denied; the temporary restraining order is vacated; the defendants' motion to dismiss the complaint is granted.

The Right to Privacy

[9] The right to privacy protects a person's interest in being free from governmental invasions "of the sanctity of a man's home and the privacies of life." (*Boyd v. United States* (1886) 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746.) Even more simply, it may be referred to as the "right to be let alone." (*Warren & Brandeis: The Right to Privacy* (1890) 4 Harv.L.Rev. 193.) The California Constitution specifically secures the right of privacy. (Cal. Const., art. I, s 1.) Meanwhile, the United States Supreme Court has held that the right to privacy is one of those rights which necessarily emanates from other specifically guaranteed rights of the United States Constitution. (*Griswold v. Connecticut*, supra, 381 U.S. 479, 484-485, 85 S.Ct. 1681-1682, 14 L.Ed.2d 510.) Appellants have separated their claim concerning privacy into two parts. The first is that the ordinance constitutes unauthorized "government snooping," and that the second is that the ordinance constitutes an "overbroad collection and retention of unnecessary personal information." (*White v. Davis* (1975) 13 Cal.3d 757, 775, 120 Cal.Rptr. 94, 533 P.2d 222.) However, it is not necessary to discuss appellants' privacy rights with those distinctions in mind. They both concern the general right to privacy, and appellants' rights may be discussed in a general fashion as well. As will be made more clear in the following, what is important are the various rights and interests involved, not the specific ways in which appellants' privacy have been implicated.

[10] In limited instances, the right to privacy has been declared to be a fundamental right and therefore worthy of strict scrutiny. (*Roe v. Wade*, supra, 410 U.S. 113, at pp. 154-156, 93 S.Ct. 705, at pp. 727-728, 35 L.Ed.2d 147 [right to decide whether to abort pregnancy]; *Griswold*, supra, 381 U.S. 479, 486-487, 85 S.Ct. 1688, 1682-1683, 14 L.Ed.2d 510 [right to privacy in the marriage relation].) However, *Roe v. Wade* and *Griswold* do not stand for the proposition that all regulations in some way connect with privacy necessarily implicate a fundamental right. Some constitutional restrictions, even though identified with the right to privacy, are *344 deservant of less than strict scrutiny because of their minimal intrusion into a person's privacy. Restrictions of privacy caused by fingerprinting are one of those areas in which **745 courts have not extended the protection of strict scrutiny.

The starting point in discussing the constitutionality of fingerprinting requirements is *Davis v. Mississippi* (1969) 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676. At issue in that case was the constitutionality of the actions of police officers who indiscriminately detained, without probable cause, 24 youths for questioning and fingerprinting in connection with a rape investigation. Basing its analysis upon the Fourth Amendment the court held the detentions to be unconstitutional, as there was no probable cause and the suspect was "not merely fingerprinted...but also subjected to interrogation." (*Id.*, at p. 728, 89 S.Ct., at p. 1398.) However, the court also directly discussed the constitutionality of compelled fingerprinting itself: "Detention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions. Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search. Nor can fingerprint detention be employed repeatedly to harass any individual, since the police only need one set of each person's prints. Furthermore, fingerprinting is an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions and is not subject to such abuses as the improper line-up and the 'third degree.' Finally, because there is no danger of destruction of fingerprints, the limited detention need not come unexpectedly or at an inconvenient time." (*Id.*, at p. 727, 89 S.Ct., at p. 1398.) Thus, the United States Supreme Court recognized that restrictions on privacy caused by fingerprinting requirements may not be worthy of a preferred position among the fundamental constitutional protections.

That fingerprinting requirements may not be subjected to strict review has been consistently adhered to by the United States Supreme Court. The usual justification has been that the print of a person's finger is a personal characteristic which is continually and knowingly offered to public inspection.

Seizures of reflections of other personal characteristics, such as the nature of one's handwriting or voice, have been upheld on similar grounds. (United States v. Dionisio (1973) 410 U.S. 1, 14, 93 S.Ct. 764, 771-772, 35 L.Ed.2d 67; United States v. Mara, supra, 410 U.S. 19, 21-22, 93 S.Ct. 774, 775-776, 35 L.Ed.2d 99; see also: Cupp v. Murphy (1973) 412 U.S. 291, 93 S.Ct. 2000, 36 L.Ed.2d 900.)

State and federal courts throughout the nation have taken up the rationale of the United States Supreme Court's holding concerned with fingerprinting, and accordingly have consistently held that full scrutiny is not required. A review of those cases follows. *345 In Thom v. New York Stock Exchange (S.D.N.Y.1969) 306 F.Supp.1002, cert. den. 398 U.S. 905, 90 S.Ct. 1696, 26 L.Ed.2d 64, the court dismissed a New York statute requiring all employees of security firms to submit to fingerprinting. The court held that the public's interest in preventing forced fingerprinting did not rise to a fundamental level: "Plaintiffs' contention that fingerprinting is an affront to their dignity and an invasion of their privacy is still without substance. The day is long past when fingerprinting carried with it a stigma or any implication of criminality." (Id., 306 F.Supp. 1002, 1007.) In Goodman v. Liebovitz (N.Y.1978) 96 Misc.2d 1059, 410 N.Y.S.2d 502, the court addressed the constitutionality of a statute which required all potential grand jurors to submit to fingerprinting. The court cited Thom, supra, with approval, and mentioned that "the realities of a modern urban society of mobile citizens have made certain governmental procedures both justifiable and acceptable to the general population." (Goodman, supra, 410 N.Y.S.2d at p. 506.)

It is unnecessary to detail the facts of numerous other cases holding that the invasion of privacy caused by fingerprinting does not necessitate strict scrutiny. Cases which reach the same conclusion have concerned compulsory fingerprinting and photography of state mental patients (Winters v. Miller (2d Cir.1971) 446 F.2d 65, 71-72), retention of a suspect's fingerprints after **746 charges have been dropped (State v. Adler (Wash.1976) 16 Wash.App 459, 558 P.2d 817, 819-820; Purdy v. Mulkey (Fla.App.1969) 228 So.2d 132, 137; Walker v. Lamb (Del.1969) 254 A.2d 265, 267), compelled fingerprinting, or furnishment of voice or handwriting exemplars ordered by a grand jury (United States v. Doe (2d Cir. 1972) 457 F.2d 895, 898; In re Riccardi (D.N.J.1972) 337 F.Supp. 253; United States v. Dionisio, supra, 410 U.S. 1, 14, 93 S.Ct. 764, 771-772, 35, L.Ed.2d 67; United States v. Mara, supra, 410 U.S. 19, 21-22, 93 S.Ct. 774, 775-776, 35 L.Ed.2d 99), a police officer's taking of fingerprints in connection with an application for a business license (Brown v. Brannon (M.D.N.C.1975) 399 F.Supp. 133, 138; People v. Stuller (1970) 10 Cal.App.3 582, 595-596, 89 Cal.Rptr. 158). Furthermore, at least in California: "[T]here are so many non-criminal situations in which fingerprints are required of a registrant or applicant for a license. (See Bus. & Prof.Code, ss 6876 [6894.3],...6894.13 (collection agencies and their employees); and s 7525 (private detectives); Civ.Code, s 607f (humane officers); Gov.Code, s 1030 (peace officers); Ins.Code, s 1652 (insurance agents, brokers, and solicitors); Pen.Code, s 12052 (applicants for a license to carry a concealed weapon).)" (People v. Stuller, supra, 10 Cal.App.3d 582, 595, 89 Cal.Rptr. 158.) Even when one is required to submit hair samples and facial skin scrapings, strict scrutiny is not required. (In re Grand Jury Proceedings (3d Cir.1982) 686 F.2d 135, 139.)

[11] *346 The abundance of authority related above can only lead to the conclusion that courts are unwilling to extend strict scrutiny to a regulation requiring fingerprinting. Such a slight intrusion is not seen by courts to infringe on interests which must be deemed fundamental.

Nicholas A. IACOBUCCI, d/b/a Talk of the Town, et al., Plaintiffs-Appellants

v

CITY OF NEWPORT, KENTUCKY, et al., Defendants-Appellees.

No. 83-5471

United States Court of Appeals

Sixth Circuit.

Argued Sept. 24, 1984.

Decided March 20, 1986

Rehearing and Rehearing En Banc Denied May 9, 1986.

Action was brought challenging city ordinances requiring employees of establishments serving liquor by the drink to register with police department, be fingerprinted and photographed and procure identification card. The United States District Court for the Eastern District of Kentucky, William O.

Bertelsman, J., entered judgment in favor of both ordinances, and challengers appealed. The Court of Appeals, Boyce F. Martin, Jr., Circuit Judge, held that: fingerprinting ordinance was not unconstitutional.

John W. Potter, District Judge, sitting by designation, concurred in part and dissented in part and filed opinion and would grant rehearing for the reasons stated in his dissent.

[1] CONSTITUTIONAL LAW k82(7)

92k82(7)

Municipal ordinance requiring certain employees of establishments serving liquor by the drink to register with police department, be fingerprinted, photographed and procure identification card bore rational relationship to legitimate government interests in facilitating enforcement of state laws regulating retail liquor establishments and advanced city's goal of eliminating crime, and thus did not deprive workers of rights to privacy or freedom to pursue occupation of their choice in light of its minimally intrusive nature and lack of categorical restrictions on those who may be employed in retail liquor establishments. U.S.C.A. Const.Amends. 9,14; KRS 244.090.

[1] CONSTITUTIONAL LAW k88

92k88

Municipal ordinance requiring certain employees of establishments serving liquor by the drink to register with police department, be fingerprinted, photographed and procure identification card bore rational relationship to legitimate government interests in facilitating enforcement of state laws regulating retail liquor establishments and advanced city's goal of eliminating crime, and thus did not deprive workers of rights to privacy or from serving alcohol in any retail establishment, K.R.S. s 244.090. Newport's notorious crime problems intensify the necessity of such compliance; a remand for a statement to this effect is therefore not required. See, e.g., *Friedman v. Valentine*, 30 N.Y.S.2d at 894 ("That an unsupervised cabaret offers a tempting field and crimes is almost axiomatic.")

FN2. As a result of a 1978 amendment, section 244.090(1)(a) prohibits a liquor licensee from employing any person who "has been convicted of any felony, misdemeanor or offense directly or indirectly attributable to the use of intoxicating liquors, within the last two (2) years." Additionally, minors, aliens, and those who have violated liquor laws are not eligible for employment. K.R.S. s 244.090(1)(b)-(d).

Courts have consistently upheld the constitutionality of similar ordinances as valid implementations of the police power. In *People v. Stuller*, 10 Cal.App.3d 582, 89 Cal.Rptr. 158 (1970), cert. denied, 401 U.S. 977, 91 S.Ct. 1205, 28 L.Ed.2d 327 (1971), a bartender's fingerprints taken pursuant to a virtually identical ordinance were admitted as evidence in his trial for rape. In rejecting the defendant's claim that the ordinance authorized an unconstitutional invasion of his privacy, the *Stuller* court noted the minimal nature of the intrusion involved in registration and fingerprinting, and listed the numerous non-criminal situations in which fingerprints are required. 89 Cal.Rptr. at 166-67. A New York Police Commission regulation requiring the registration and fingerprinting of all cabaret employees was upheld in *Friedman v. Valentine*, 177 Misc. 437, 30 N.Y.S.2s 891 (Sup.Ct.1941), aff'd, 266 A.D. 5612, 42 N.Y.S.2d 593 (1943). The court held that the regulation was justified by conditions in the cabaret industry, stating "[n]o one can seriously argue against the conclusion that persons employed in cabarets and by their concessionaires have especially favorable opportunities to victimize patrons of such establishments." 30 N.Y.S.2d at 895. *Friedman* was reaffirmed in *Simone v. Kennedy*, 26 Misc.2d 748, 212 N.Y.S.2d 838, 840 (N.Y.Sup.Ct.1961), in which the court approved the police department's practice of charging fees for the identification cards required by the ordinance.

The *Friedman* reasoning helped pave the way for a federal case on fingerprinting requirements, *Thom v. N.Y. Stock Exchange*, 306 F.Supp. 1002 (S.D.N.Y.1969), aff'd sub nom. *Miller v. N.Y. Stock Exchange*, 425 F.2d 1074 (2d Cir.), cert. denied, 398 U.S. 905, 90 S.Ct. 1696, 26 L.Ed.2d 64 (1970). *Thom* upheld the constitutionality of a New York state statute requiring fingerprinting of all employees of member firms of national security exchanges registered with the Securities and Exchange Commission and all employees of affiliated cleaning corporations. The court rejected the plaintiff's privacy argument, observing that fingerprinting "is only a means of verifying the required information as to the existence or nonexistence of a prior criminal record...[t]he actual inconvenience is minor; the claimed indignity, nonexistent; detention, there is none; nor unlawful search; nor unlawful seizure." *1357 Id. At 1009. See also *id.* at 1007 n. 17 (citing federal and state cases upholding fingerprinting requirements); *Davis v. Mississippi*, 394 U.S. 721, 727-28, 89 S.Ct. 1394, 1397-98, 22 L.Ed.2d 676 (1969) (recognizing the minimal intrusiveness of the fingerprinting process).

The Durham, North Carolina City Council adopted a similar, but more extensive, ordinance regulating massage parlors. The ordinance requires all applicants for licenses for massage businesses to be fingerprinted and photographed, and to submit to medical examinations. The constitutionality of this ordinance was upheld in *Brown v. Brannon*, 399 F.Supp. 133, 1238-39 (M.D.N.C.1975), aff'd, 535 F.2d 1249 (4th Cir.1976). The *Brown* court concluded that the ordinance was rationally related to a valid state interest: "[T]he photographing and fingerprinting obviously serve to aid police and adminis-

trative personnel in identifying and investigating potential applicants for a license...The records also would aid in the efforts of North Carolina relating to offenses against public morality and indecency.” Id. at 139.

Fingerprints are required by states and cities in many noncriminal situations, most often in connection with applications for licenses or permits. See, e.g., Ky., Sup.Ct.R. 2.020(2) (requiring fingerprints of applicants for the bar); Louisville, Ky., Code ss 73.22, 112.15(2) (requiring photographs and fingerprints of applicants for licenses for numerous occupations, including auctioneers, fortune tellers, and collecting agencies); Louisville, Ky., Code s 114.049(A)-(D) (requiring fingerprints of applicants for retail liquor licenses and authorizing the Director of Safety to require fingerprinting of all “stockholders, agents, or employees of a licensed corporation” if he has reasonable grounds to believe the person has a prior criminal record.)

Newport’s fingerprinting ordinance serves corresponding goals. Because no fundamental right is threatened by the ordinance, it will be upheld if it is reasonable, not arbitrary, and bears a rational relationship to a permissible state objective. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974). We believe that the ordinance legitimately furthers Kentucky’s objective of screening employees of retail liquor establishments, and advances the city’s goal of eliminating crime. Cf. *International Soc. For Krishna Consciousness v. City of Houston*, 689 F.2d 541, 556-57 (5th Cir.1982) (upholding city ordinance requiring religious solicitors to comply with registration and financial disclosure requirements, and to carry identification cards); *Hamilton v. New Jersey Real Estate Comm’n.*, 117 N.J.Super. 345, 284 A.2d 564 (1971) (upholding Real Estate Commission regulation requiring all applicants for salesman, broker-salesman, or broker’s licenses to be fingerprinted); *Playboy Club of New York, Inc. v. O’Connell*, 18 A.D.2d339, 239 N.Y.S.2d 262 (1963), *aff’d*, 14 N.Y.2d 503, 248 N.Y.S.2d 226, 197 N.E.2d 662 (1964) (upholding regulation of department of licenses that female cabaret employees are prohibited from mingling with patrons). Compare *Wulp v. Corcoran*, 454 F.2d 826, 834 (1st Cir.1972) (ordinance requiring newspaper vendors to obtain a license and to wear a badge held unconstitutional because printed materials distributed anonymously “have played an important role in the progress of mankind”.); *Strasser v. Doorley*, 432 F.2d 567 (1st Cir.1970) (same). *Wulp* and *Strasser* involved undisputed first amendment concerns; no comparable governmental interest is threatened by this ordinance.

Judicial authority is therefore in agreement that requiring fingerprints of employees in retail liquor establishments bears a rational relationship to the legitimate goal of crime prevention. The operators of the Newport establishments present essentially the same arguments rejected in these earlier cases. Whatever the outer limits of the right to privacy, clearly it cannot be extended to apply to a procedure the Supreme Court regards as only minimally intrusive. Enhanced protection has been held to apply only to such fundamental decisions as contraception, *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and family living arrangements, *1358 *Moore v. City of East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977). Fingerprints and photographs have not been held to merit the same level of constitutional concern. We also reject the proprietor’s argument that the fingerprinting ordinance interferes with their freedom to pursue the occupation of their choice. Although government may not unreasonably interfere with a citizen’s pursuit of his occupation, *Wilkerson v. Johnson* 699 F.2d 325, 327-28 (6th Cir.1983), this fingerprinting ordinance places no categorical restrictions on those who may be employed in retail liquor establishments. Compliance with the ordinance is not a sufficiently serious impediment to the pursuit of employment in a retail liquor establishment to merit constitutional protection. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976) (invalidating a civil service rule barring all non-citizens from employment in the federal civil service system). We therefore reject the proprietors’ claim, and affirm the lower court’s ruling as to ordinance 0-82-56. [FN3]

FN3. Newport’s fingerprinting ordinance is supplementary to the State’s regulatory scheme, and thus is within the City’s regulatory power. *City of Bowling Green v. Gasoline Marketers, Inc.*, 539 S.W.2d 281, 284 (Ky.1976).

