

# Privacy And National Politics: Fingerprint and DNA Litigation in Japan And the United States Compared

Dongsheng Zang

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# PRIVACY AND NATIONAL POLITICS: FINGERPRINT AND DNA LITIGATION IN JAPAN AND THE UNITED STATES COMPARED

Dongsheng Zang\*

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## I. INTRODUCTION

Privacy is again under attack in the United States. Recently, in its decision in *Dobbs v. Jackson Women’s Health Organization*,<sup>1</sup> the United States Supreme Court overruled *Roe v. Wade*,<sup>2</sup> rolling back a constitutional right that Americans had enjoyed for half a century. Not only does the decision create immediate concerns of data privacy related to abortion,<sup>3</sup> but also, the ruling may have the potential to undermine the foundation of privacy as a constitutional right. Justice Thomas, who concurred with the majority, would go even further by urging reconsideration of other major substantive due process cases.<sup>4</sup> *Dobbs* is only the most recent example on the substantive aspect of privacy. Before *Dobbs*, one major legal barrier in privacy litigation was procedural: the Article III standing requirement based on injury-in-fact.<sup>5</sup> In *Clapper v. Amnesty International USA*,<sup>6</sup> lawyers and journalists in conjunction with human rights, labor, legal, and media organizations, filed a lawsuit against James Clapper, the then Director of the National Security Agency (NSA).<sup>7</sup> The Supreme Court ruled that mere exposure

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1. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

2. See *Roe v. Wade*, 410 U.S. 113 (1973).

3. See Natasha Singer & Brian X. Chen, *Digital Privacy Looks Worse Than Ever*, N.Y. TIMES, Jul. 15, 2022, at B1; Patience Haggin, *Abortion Ruling Sparks Phone-Data Debate*, WALL ST. J., Aug. 8, 2022, at A7 (regarding mobile-device location data that may reveal users who had visited abortion clinics).

4. See *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring) (“[I]n future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is ‘demonstrably erroneous,’ we have a duty to ‘correct the error’ established in those precedents . . . .”) (citations omitted); see also *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (declaring the right to contraceptives to married couples); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (declaring the right to engage in private, consensual sexual acts); *Obergefell v. Hodges*, 576 U.S. 644, 676–77 (2015) (declaring the right to same-sex marriage).

5. See U.S. CONST. art. III, § 2; James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers’ Plan for Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1, 2 (2001); Cass R. Sunstein, *Injury in Fact, Transformed*, 2021 SUP. CT. REV. 349–74 (2021); Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 632–33 (1999).

6. See *Clapper v. Amnesty Int’l USA*, 568 U.S. 398 (2013).

7. See *id.* at 407–08.

to NSA surveillance—without allegation of further harm or financial loss—could not be recognized as “injury in fact” because the claim was “speculative.”<sup>8</sup> Thus, the plaintiffs had no standing to bring the case to a federal court. *Clapper* was a sequel to a major shift on Article III standing in *Lujan v. Defenders of Wildlife*,<sup>9</sup> which undercut citizen lawsuit substantially. One year before *Clapper*, the Supreme Court insisted upon trespass theory of privacy in *United States v. Jones*,<sup>10</sup> substantially rolling back the revolution in *Katz v. United States*.<sup>11</sup>

It looks like we are witnessing an ongoing “constitutional counter-revolution.”<sup>12</sup> While it is necessary and worthwhile to engage the Supreme Court rulings with doctrinal critiques, this Article aims to look at the issue of privacy from a slightly different angle—that is, to look at the dynamics of the judicial decision-making by taking national politics into consideration. In recent years, Professors Jack M. Balkin and Sanford Levinson argued that national politics, specifically partisan politics in judicial appointments, was a key factor in understanding constitutional revolutions in the United States.<sup>13</sup> According to this argument, accumulated appointments of judges on the bench by a dominant party may lead to “partisan entrenchment,” which may explain switch of doctrinal positions between the liberals and conservatives on key constitutional questions.<sup>14</sup> The theory effectively illuminates the cycles of doctrinal changes from the *Lochner* era to the New Deal/Civil Rights era, and then through the Reagan era which covers up to today.<sup>15</sup> The framework fits well with the abovementioned

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8. *Id.* at 414.

9. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 571–73 (1992). For a discussion of the standing doctrine after *Lujan*, see generally Cass R. Sunstein, *What’s Standing after Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163 (1992); Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141 (1993); Richard J. Pierce Jr., Comment, *Lujan v. Defenders of Wildlife: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170 (1993).

10. See *United States v. Jones*, 565 U.S. 400 (2012).

11. See *Katz v. United States*, 389 U.S. 347 (1967).

12. See Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1050 (2001) (“We are in the middle of a paradigm shift that has changed the way that people write, think, and teach about American constitutional law.”).

13. See *id.* at 1066 (“Constitutional revolutions are the cumulative result of successful partisan entrenchment when the entrenching party has a relatively coherent political ideology or can pick up sufficient ideological allies from the appointees of other parties.”).

14. See *id.*

15. See Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 TEX. L. REV. 215, 218–19

privacy cases—the conservative majority in the United State Supreme Court clearly turned the tide against the Warren Court and the early Burger Court. On the other hand, however, the theory seems too neat for the Fourth Amendment jurisprudence, which is unanimously considered a mess for all its critics—liberal and conservative. On the crucial question of dramatically increased collection of data by the government, Balkin and Levinson noted that “there may be no meaningful division between the Democratic and Republican Parties with regard to the imperatives for, and the broad outlines of, the National Surveillance State.”<sup>16</sup> That seems to suggest that partisan politics has its own limit when it comes to the question of privacy.

Drawing cases from two related areas of law—fingerprint and DNA (deoxyribonucleic acid) data—this Article proposes a modified framework, built on the Balkin-Levinson emphasis on national politics: First, national politics understood as partisan rivalry cannot account for what I call doctrinal lock-in in this Article, where I will demonstrate that in different stages of American politics—the *Lochner* era, the New Deal era, and Civil Rights era—courts across the nation ruled predominantly in favor of public data collectors—state and federal law enforcement in fingerprint cases. From the 1990s, when DNA data became hot targets of law enforcement, the United States Supreme Court followed the path of fingerprint law.<sup>17</sup> In other words, what is striking in fingerprint and DNA cases in the United States is not doctrinal flip flop, but doctrinal continuity—despite the change of regimes and dominant parties.<sup>18</sup>

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(2019) (using the partisan entrenchment theory to explain doctrinal shifts on judicial review); Jack M. Balkin, *The Recent Unpleasantness: Understanding the Cycle of Constitutional Time*, 94 *IND. L.J.* 253, 254–65 (2019) [hereinafter Balkin, *The Recent Unpleasantness*]; Jack M. Balkin, *How to Do Constitutional Theory while Your House Burns Down*, 101 *B.U. L. REV.* 1723, 1744–50 (2021); JACK M. BALKIN, *THE CYCLES OF CONSTITUTIONAL TIME* (2020) [hereinafter BALKIN, *THE CYCLES OF CONSTITUTIONAL TIME*]. Balkin’s work was further development from two articles by Barry Friedman and Keith E. Whittington. See generally Barry Friedman, *The Cycles of Constitutional Theory*, 67 *L. & CONTEMP. PROBS.* 149 (2004); Keith E. Whittington, *The New Originalism*, 2 *GEO. J.L. & PUB. POL’Y* 599 (2004).

16. Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 *FORDHAM L. REV.* 489, 528 (2006) (using the partisan entrenchment theory to explain transformation of the United States into a “National Surveillance State”).

17. See *infra* Part III.B.

18. “Regime” is used as a term of art, see Balkin, *The Recent Unpleasantness*, *supra* note 15, at 258–70 (“The Cycle of Regimes”); BALKIN, *THE CYCLES OF CONSTITUTIONAL TIME*, *supra* note 15, at 12–29 (2020) (“The Cycle of Regimes”). A “regime” is understood as national politics dominated by one of the political parties which “sets the

Second, the phenomenon of doctrinal lock-in demands reframing the concept of national politics. This Article proposes to redefine national politics as the interaction between the establishment (the regime) and external challenge. The doctrinal lock-in reveals the limited ability or willingness of the establishment to take up the question of privacy in the political process thus respond to the demands from society at large. To illuminate this point, a comparison with a multi-party democracy can be helpful. Conventional comparative law on privacy focus on Continental Europe. However, this Article chooses Japan, an even better example for this purpose because Japan's judiciary is well known for being conservative or weak.<sup>19</sup> In Japan, the notion of privacy came much later than that in the United States—it was established in 1964 by a Tokyo District Court ruling.<sup>20</sup> However, in the 1970s and 1980s, privacy was transformed from a tort law to a constitutional issue.<sup>21</sup> While the transformation was driven by a broad and general constitutional awakening in the Japanese society, privacy became more politically charged when fingerprint became the focal point of agitation in the “fingerprinting refusal movement.” The movement was spearheaded by the Zainichi Koreans who fought for constitutional recognition of privacy in fingerprints.<sup>22</sup> Litigants were joined by lawyers and bar associations who helped frame their arguments, support groups and journalists who gave voice to their perspectives, as well as historians who dig out the secret connection of fingerprint with Japan's colonial past. The refusal movement became Japan's civil rights movement. In this context, the Supreme Court of Japan recognized fingerprint privacy as a constitutionally protected right in 1995. More recently, a Nagoya district court ruled in favor of a plaintiff who requested police to expunge his fingerprint and DNA data after acquittal. This was an unprecedented ruling in Japan's

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baseline of what is considered possible and impossible politically. It structures the basic ideological assumptions of the politics of its time.” BALKIN, *THE CYCLES OF CONSTITUTIONAL TIME*, *supra* note 15, at 13.

19. For an overview of Japan's judiciary, see generally David S. Law, *Decision Making on the Japanese Supreme Court*, 88 WASH. U. L. REV. 1365 (2011); David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEX. L. REV. 1545 (2009); Shigenori Matsui, *Why is the Japanese Supreme Court So Conservative*, 88 WASH. U. L. REV. 1375 (2011).

20. *See infra* Part II.B.

21. *See infra* Part II.B.

22. *See infra* Part II.B. “Zainichi Koreans” (在日朝鮮人、在日韓国人、在日コリアン) referred to ethnic Koreans in Japan who suddenly became “foreigners” at the end of World War II when the Japan surrendered. *See infra* note 152 and accompanying text.

history. No doubt that the Nagoya ruling is an outlier, but it shows that courts in Japan, under certain conditions, are responsive to social demands,<sup>23</sup> and in doing so, they are open to the high level of protection of privacy on par with European standards.<sup>24</sup>

Third, the contrast between the judicial lock-in in the United States and the responsive courts in Japan begs explanations that go beyond the Balkin-Levinson framework. Further studies are needed to understand why the United States is lagging behind in responding to privacy compared with other Western democracies.<sup>25</sup> This Article aims to contribute to this inquiry by proposing a tentative hypothesis in the relationship between national politics and privacy: in Japan, when privacy becomes political, it creates pressure on the establishment, thus forces the judiciary—however conservative it is—to

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23. Examples from other areas of law include employment, and the “big four” pollution cases. See Frank K. Upham, *Stealth Activism: Norm Formation by Japanese Courts*, 88 WASH. U. L. REV. 1493, 1494 (2011) (discussing cases in employment, divorce and protection against discrimination, “[m]y argument is that Japanese courts are willing to deviate from established doctrine, including statutory provisions, to create social norms that they consider desirable and that they do so under circumstances where American courts would refrain because of considerations of the appropriate judicial role.”); Daniel H. Foote, *Judicial Creation of Norms in Japanese Labor Law: Activism in the Service of – Stability*, 43 UCLA L. REV. 635 (1996) (discussing the active role that courts in Japan played in employment disputes); FRANK K. UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* 28–77 (1989) (discussing Minamata litigations). Recently, Professor David G. Litt of Keio University observed that some judges in Fukushima nuclear liability cases have shown similar willingness to rule in favor of plaintiffs. See David G. Litt, *Japan’s Nuclear Restarts in the Courts* (paper presented on October 27, 2022 at the Asian Law Center, University of Washington School of Law) (discussing judges in the Fukushima nuclear plant liability cases). In general, courts’ role is limited. See Eric A. Feldman, *Fukushima: Catastrophe, Compensation, and Justice in Japan*, 62 DEPAUL L. REV. 335 (2013).

24. See *S. & Marper v. United Kingdom*, 1581 Eur. Ct. H.R. (2008). In general, data protection under Japanese law is considered by the European Commission adequate by European Union standards, thus Japan was the first foreign country to be recognized. See Commission Implementing Decision (EU) 2016/419 of 23 January 2019 Pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the Adequate Protection of Personal Data by Japan under the Act on the Protection of Personal Information, 2019 O.J. (L 76) 1. By contrast, in July 2020, the Court of Justice of the European Union (CJEU) ruled that the United States did not meet the adequacy standards. See *Case C-311/18, Data Protection Commissioner v. Facebook Ireland*, ECLI:EU:C:2020:559 (Jul. 16, 2020).

25. For example, in climate area, see JOHN S. DRYZEK ET AL., *GREEN STATES AND SOCIAL MOVEMENTS: ENVIRONMENTALISM IN THE UNITED STATES, UNITED KINGDOM, GERMANY, AND NORWAY* (2003) (explaining why the United States was lagging behind in climate policy despite its more open legal system compared with Great Britain, Germany and Norway).

accommodate social demands in order to maintain public trust.<sup>26</sup> By contrast, in the United States, when none of the political parties is willing to take up privacy, privacy remains apolitical, leaving the judiciary shielded from the pressure from society at large.

In the remainder of the Article, Part II provides a sketch of national politics in the United States and Japan around the question of privacy. Part III tracks the fingerprint litigation in the United States between 1900 and 1986, and DNA data litigation from 1991 to 2013. Part IV tracks fingerprint and DNA litigation in Japan.

## II. PRIVACY IN NATIONAL POLITICS

The primary goal of this Part is to provide historical background of privacy discourse in both the United States and Japan, in preparation for the more doctrinal exposition in Parts III and IV. The key consideration in this Part is the origin and development of the notion of privacy as a legal right as well as its relations with national politics.

### A. Privacy and National Politics in the United States

#### 1. The Progressive Movement and Police Powers

After the Warren and Brandeis article in 1890,<sup>27</sup> a number of privacy-based claims were brought to the courts.<sup>28</sup> This coincided with the adoption of the fingerprinting method by police departments in major metropolitans in the United States.<sup>29</sup> For those courts in fingerprint cases found the concept of privacy important; on doctrinal/operational level, however, they cited two other sources for support. One such source was Christopher G. Tiedeman (1857–1903), the author of *A Treatise on the Limitations of Police Power*, published in

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26. See John O. Haley, *The Japanese Judiciary: Maintaining Integrity, Autonomy, and the Public Trust*, in *LAW IN JAPAN: A TURNING POINT* 99–135 (Daniel H. Foote ed. 2007); John O. Haley, *The Role of Courts in “Making” Law in Japan: The Communitarian Conservatism of Japanese Judges*, 22 *PAC. RIM L. & POL’Y J.* 491 (2013); John O. Haley, *Constitutional Adjudication in Japan: Context, Structures, and Values*, 88 *WASH. U.L. REV.* 1467 (2011).

27. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 *HARV. L. REV.* 193, 193 (1890) (defending and discussing “the right to be let alone”).

28. The earliest case is in New York, in *People ex rel. Joyce v. York*, 59 *N.Y.S.* 418 (N.Y. Sup. Ct. 1899). For discussion of the case, see *infra* text accompanying notes 186–87.

29. See U.S. DEP’T OF JUST., *THE FINGERPRINT SOURCEBOOK* 16 (2011), <https://nij.ojp.gov/library/publications/fingerprint-sourcebook>.



1886.<sup>30</sup> Tiedeman, writing in 1885, had the sensitivity of addressing the issue of police supervision of habitual criminals,<sup>31</sup> where he even referred to the police's use of photographs to keep a record of convicted criminals which could be shared with other police departments via the "rogues' gallery."<sup>32</sup> Tiedeman's comprehensive coverage of the issue was a helpful reference, and his critique was considered favorably by judges who tried to justify the right of privacy.<sup>33</sup> Tiedeman was inspired by and frequently cited Judge Thomas M. Cooley,<sup>34</sup> the other source of support. Judge Cooley, the advocate of the right to be let alone, elaborated on constitutional constraints on unreasonable searches and seizures under the Fourth Amendment in his *Constitutional Limitations* (1868).<sup>35</sup> Judge Cooley served on the Michigan Supreme Court from 1865 to 1885.<sup>36</sup> Not only that he was considered one of the most influential lawyers in the country,<sup>37</sup> he was also an active advocate of privacy of telegrams along with a corporate giant—the Western Union.

Judge Cooley's and Tiedeman's influences quickly diminished after the Supreme Court's ruling in *Lochner v. New York*,<sup>38</sup> when the Progressive lawyers Roscoe Pound, Louis D. Brandeis, Benjamin N. Cardozo, Karl Llewellyn, and Jerome Frank mobilized to lead the

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30. See CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT (St. Louis, 1886). *People ex rel. Joyce*, 59 N.Y.S. at 418 (referencing Professor Tiedeman's treatise); *Owen v. Partridge*, 82 N.Y.S. 248, 251 (N.Y. Sup. Ct. 1903) (referencing Professor Tiedeman's treatise).

31. See TIEDEMAN, *supra* note 30, at 124–31.

32. See *id.* at 124.

33. See, e.g., *Owen*, 82 N.Y.S. at 251–52 (discussing privacy concerns in photographing a person merely suspected of a crime).

34. See David N. Mayer, *The Jurisprudence of Christopher G. Tiedeman: A Study in the Failure of Laissez-Faire Constitutionalism*, 55 Mo. L. REV. 93, 118 n.89, 134 n.137 (1990).

35. See THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 299–308 (1868).

36. See generally Alan Jones, *Thomas M. Cooley and the Michigan Supreme Court: 1865–1885*, 10 AM. J. LEGAL HIST. 97 (1966) (providing overview of Judge Cooley's career on the Michigan Supreme Court).

37. See generally Paul D. Carrington, *The Constitutional Law Scholarship of Thomas McIntyre Cooley*, 41 AM. J. LEGAL HIST. 368 (1997) (discussing the influence of Judge Cooley's legal scholarship); Paul D. Carrington, *Law as 'The Common Thoughts of Men': The Law-Teaching and Judging of Thomas McIntyre Cooley*, 49 STAN. L. REV. 495 (Feb. 1997) (providing an intellectual history of Judge Cooley).

38. See *Lochner v. New York*, 198 U.S. 45 (1905).

efforts for legal reforms that led to the New Deal.<sup>39</sup> Progressive lawyers' notions of police power is described by Ernest Freund, *The Police Power* (1904).<sup>40</sup> Like Tiedeman, Freund also noted the identification measures taken in United States prisons and was critical of them.<sup>41</sup> Freund went further. He suggested a more constructive judicial review policy: "It is certainly better to deny the power of photographing in such cases, except under authority of a statute restricting it to its proper purpose and providing safeguards against its abuse."<sup>42</sup>

By emphasizing purpose and safeguards against abuse, Freund's suggestion is strikingly modern—it is more in line with the twenty-first century privacy regulation. In trying to offer a proper policy of judicial review to balance private and public interests, Freund anticipated the modern-day principle of proportionality—in his words, "proportionateness"—as the measure of reasonableness of a statute: "[T]he maintenance of private rights under the requirements of the public welfare is a question of proportionateness of measures entirely."<sup>43</sup>

Freund used the principle of proportionateness throughout his book.<sup>44</sup> If adopted, it would have been a major step forward in developing the norms of judicial review in the United States. Unfortunately, Freund's more balanced and sophisticated suggestions were not taken up. After *Lockner*, "police power" became an icon that represented a much broader debate for the Progressives in their agenda to reform the legal system as a whole, including the judicial reform. Privacy was thus sidelined.

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39. See generally Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906) (detailing the causes of dissatisfaction with the administration of justice). Both Cooley and Tiedeman were considered by the Progressives as ideological opponents as they were labeled as adherents of the laissez-faire constitutionalism. See CLYDE JACOBS, *LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS M. COOLEY, CHRISTOPHER G. TIEDEMAN AND JOHN F. DILLON UPON AMERICAN CONSTITUTIONAL LAW* (1954); ARNOLD PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895* (1976); BENJAMIN TWISS, *LAWYERS AND THE CONSTITUTION* (1942). For more contemporary commentaries of Tiedeman, see generally Louise A. Halper, *Christopher G. Tiedeman, Laissez-Faire Constitutionalism and the Dilemmas of Small-Scale Property in the Gilded Age*, 51 OHIO ST. L.J. 1349 (1990); Mayer, *supra* note 34.

40. See generally ERNEST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* (1904).

41. See *id.* at 101-03.

42. See *id.* at 102-03.

43. *Id.* at 60.

44. See *id.*

In fact, Brandeis himself had been preoccupied by other agenda;<sup>45</sup> therefore he did not come back to the issue of privacy until forty years after his 1890 article, and twelve years after his appointment to the Supreme Court, in *Olmstead v. United States*.<sup>46</sup> In *Olmstead*, the majority ruled that wiretapping was not a “search” under the Fourth Amendment.<sup>47</sup> In his powerful dissenting opinion,<sup>48</sup> Brandeis declared that “every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.”<sup>49</sup> While Brandeis had become increasingly aware of the big government by now,<sup>50</sup> privacy was still not among the top priorities of the Progressives. Brandeis remained a prophet, but a privacy prophet only.

## 2. The Welfare State

It was President Franklin Delano Roosevelt that led the New Deal, the most significant reform in American history. On January 11, 1944, Roosevelt delivered his State of the Union speech,<sup>51</sup> in which he

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45. See LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY, AND HOW THE BANKERS USE IT* (1913); MELVIN I. UROFSKY, *LOUIS D. BRANDEIS: A LIFE* (2012).

46. See *Olmstead v. United States*, 277 U.S. 438 (1928).

47. See *id.* at 469.

48. See *id.* at 471–85 (Brandeis, J., dissenting).

49. *Id.* at 478.

50. See JEFFREY ROSEN, *LOUIS D. BRANDEIS: AMERICAN PROPHET* 67 (2016). Justice Brandeis clearly showed more sensitivity to citizens’ rights than Justice Holmes, the author of *Buck v. Bell*, where Justice Holmes upheld Virginia’s eugenics law. See *Buck v. Bell*, 274 U.S. 200 (1927); see also ADAM COHEN, *IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK* (2017); PAUL A. LOMBARDO, *THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND BUCK V. BELL* (2010). For contemporary critics, *Buck* clearly shows the racial and class prejudices during the Progressive era. See generally THOMAS C. LEONARD, *ILLIBERAL REFORMERS: RACE, EUGENICS, AND AMERICAN ECONOMICS IN THE PROGRESSIVE ERA* (2016). In law, critics of the *Buck* decision date back to 1950s. See, e.g., John B. Gest, *Eugenic Sterilization: Justice Holmes vs. Natural Law*, 23 TEMP. L.Q. 306, 309–10 (1950); Harry Kalven, Jr., *A Special Corner of Civil Liberties: A Legal View I*, 31 N.Y.U. L. REV. 1223, 1230–34 (1956); Yosai Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 STAN. L. REV. 254, 254 (1963); Robert J. Cynkar, *Buck v. Bell: Felt Necessities v. Fundamental Values*, 81 COLUM. L. REV. 1418, 1419–20 (1981); Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30, 30–35 (1985).

51. See President Franklin Delano Roosevelt, State of the Union Message to Congress (Jan. 11, 1944) (transcript available at FDR Library website at: <https://www.fdrlibrary.org/address-text> [<https://perma.cc/8MPJ-FSN6>]).

proposed the Second Bill of Rights.<sup>52</sup> This included: the right to a useful and remunerative job, the right to livable wages, a farmer's right to make a decent living, the right to have a market free from monopolies, the right of every family to a decent home, the right to medical care and health, the right to protection from economic fears, and the right to a good education.<sup>53</sup>

Criminal law continued to expand, together with the technological progress. The Dash Report, issued in 1959,<sup>54</sup> showed the extensive use of eavesdropping in the criminal law area. To administer welfare, government agencies needed data.<sup>55</sup> A growing number of fingerprint cases focused on the collection of data, in areas that are not traditionally criminal law or law enforcement.<sup>56</sup> Courts across the United States supported the collection and storage of fingerprints.<sup>57</sup> With the introduction of computers in the 1950s, databanks became more widespread.<sup>58</sup> The use of government data, however, became more intense. The most outrageous example was the midnight mass raids

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52. *See id.* ("We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all—regardless of station, race, or creed.")

53. *See* CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 13 (2004).

54. *See* SAMUEL DASH RICHARD F. SCHWARTZ & ROBERT E. KNOWLTON, *THE EAVESDROPPERS* (1959) [hereinafter *THE DASH REPORT*].

55. *See* *Whalen v. Roe*, 429 U.S. 589, 605 (1977) ("The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed.")

56. *See id.*

57. *See, e.g.,* *Davis v. Mississippi*, 394 U.S. 721, 727 (1969) ("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."); *Eddy v. Moore*, 487 P.2d 211, 216 (Wash. Ct. App. 1971) ("There can be no denying of the efficacy of fingerprint information . . . identification in the apprehension of criminals and fugitives. Law enforcement agencies must utilize all scientific data in society's never-ending battle against lawlessness and crime. When arrested, an accused does not have a constitutional right of privacy that outweighs the necessity of protecting society and the accumulation of this data, no matter how mistaken the arrest may have been."); *Smith v. United States*, 324 F.2d 879, 882 (D.C. Cir. 1963); *Napolitano v. United States*, 340 F.2d 313, 314 (1st Cir. 1965) (finding that the "[t]aking of fingerprints . . . is [a] universally standard procedure, and [there is] no violation of constitutional rights").

58. *See generally* ARTHUR R. MILLER, *THE ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS, AND DOSSIERS* (1971) (addressing the clash between privacy and technology in the computer age).

by welfare agencies.<sup>59</sup> Motivated in part by the concerns of the legal rights of welfare recipients,<sup>60</sup> Charles A. Reich published an article in *Yale Law Journal*, "The New Property."<sup>61</sup> Reich argued in the article that the welfare state was changing citizens' relationships with the government: their wealth was increasingly dependent on grants, subsidies, licenses—Reich called this "largess"—from the welfare state, blurring the traditional distinction between public and private.<sup>62</sup> In response, law must "draw a new zone of privacy," so as to "establish institutions to carry on the work that private property once did but can no longer do."<sup>63</sup> For this purpose, Reich called for constitutional control on governmental powers, giving welfare recipients legal rights to hold government accountable.<sup>64</sup>

Reich's "new property" was like that of Judge Cooley and Tiedeman, trying to redefine the individual through the lens of constitutional concepts of liberty and property.<sup>65</sup> Unfortunately, judges who cited Reich in the 1960s took his much more ambitious framework narrowly. The Pennsylvania Bar Association funded a study project for Samuel Dash, which led to the Dash Report, mentioned earlier.<sup>66</sup> The Dash Report made a big splash.<sup>67</sup> In 1962, the New York City Bar

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59. See Charles A. Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347, 1347 (1963) ("In many states, and in the District of Columbia, it has become common practice for authorities to make unannounced inspections of the homes of persons receiving public assistance. Often such searches are made without warrants and in the middle of the night."). It was not until 1967 that the Supreme Court of California declared the mass raids unconstitutional. See *Parrish v. Civil Serv. Comm'n of Cty. of Alameda*, 425 P.2d 223, 225 (Cal. 1967) (en banc).

60. See Charles A. Reich, *The New Property after 25 Years*, 24 U.S.F. L. REV. 223, 235 (1990) [hereinafter Reich, *The New Property after 25 Years*] ("While I was working on the article that eventually was published as *The New Property*, I discovered that welfare recipients were subjected to the same type of arbitrary official action as passport applicants, physicians, and candidates for admission to the bar."); see also Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1256 (1965) (arguing for a "radically new approach to the field of social welfare").

61. See Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 778 (1964).

62. See *id.* at 778–80.

63. *Id.* at 778.

64. See *id.* at 779–85.

65. Reich, *The New Property after 25 Years*, *supra* note 60, at 230 ("New property is an effort to preserve traditional values, a truly conservative idea. New property is designed to safeguard the individual as old property was expected to do.").

66. See generally THE DASH REPORT, *supra* note 54.

67. A symposium was hosted immediately after the Dash Report. See generally Symposium, *The Wiretapping-Eavesdropping Problem: Reflections on The Eavesdroppers*, 44 MINN. L. REV. 811 (1959).

Association set up a Special Committee on Science and Law, which supported study of privacy by a group led by Alan F. Westin.<sup>68</sup> Westin was alarmed by the emerging computer revolution which was also happening. He was among the first to see the databanks as a potential threat to privacy.<sup>69</sup> Westin appeared in front of congressional committee hearings, advocating stronger protection of privacy in a variety of areas.<sup>70</sup>

### 3. The American Rights Revolution

During the 1960s and mid-1970s, America was divided by national politics: the Civil Rights movement, the Vietnam War and protests against it, the assassination of President Kennedy, President Lyndon Johnson's "wars" on poverty and crime, and President Nixon's Watergate scandal, etc. In fingerprint cases, this is reflected in cases where protesters were arrested and fingerprinted at police stations.<sup>71</sup> This is also a period when the Supreme Court embraced the notion of privacy in its rulings. In *NAACP v. Alabama*, the Court held that the freedom to associate and privacy in one's association were protected by the Fourteenth Amendment.<sup>72</sup> In *Griswold v. Connecticut*, the Court

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68. See Alan F. Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's: Part I—The Current Impact of Surveillance on Privacy*, 66 COLUM. L. REV. 1003, 1003–04 (1966); Alan F. Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's: Part II—Balancing the Conflicting Demands of Privacy, Disclosure, and Surveillance*, 66 COLUM. L. REV. 1205, 1205–06 (1966); ALAN F. WESTIN, *PRIVACY AND FREEDOM* (1967) (evaluating the conflict between privacy and surveillance). The first work on computers and privacy was Vance Packard in his book *The Naked Society*. See generally VANCE PACKARD, *THE NAKED SOCIETY* (1964).

69. See ALAN F. WESTIN & MICHAEL A. BAKER, *DATABANKS IN A FREE SOCIETY* 1 (1972); JERRY M. ROSENBERG, *THE DEATH OF PRIVACY* 1 (1969); MILLER, *supra* note 58, at 1 (Computers and data banks are "dramatically increasing man's capacity to accumulate, manipulate, retrieve, and transmit knowledge.").

70. See *Privacy and the Right of Fed. Emps.: Hearings on S. 3779 before the Subcomm. Const. Rights of the Comm. on the Judiciary*, 89th Cong. 233–62 (1966); *Fair Credit Reporting: Hearings on S. 823 Before the Subcomm. on Fin. Insts. of the Comm. on Banking and Currency*, 91st Cong. 73–97 (1969).

71. See, e.g., *United States v. Hirsch*, 440 F. Supp. 977, 978 (E.D.N.Y. 1977) (holding that Vietnam draft evader was not entitled to having his fingerprints, photographs, or biographic information returned to him by government).

72. See *NAACP v. Alabama*, 357 U.S. 449, 466 (1958) ("We hold that the immunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of the members to *pursue their lawful private interests privately* and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment." (emphasis added)).

upheld married couples' rights to receive contraceptive advice.<sup>73</sup> In doing so, it recognized explicitly the right of privacy as a constitutionally protected legal right.<sup>74</sup> In *Katz v. United States*, the Court finally embraced the position of Justice Brandeis and held that eavesdropping violated the privacy of the accused under the Fourth Amendment.<sup>75</sup> It is here the Court famously announced that, "the Fourth Amendment protects people, not places."<sup>76</sup> Finally, in *Roe v. Wade*,<sup>77</sup> the Court announced that the Due Process Clause of the Fourteenth Amendment protected the right of privacy, including a woman's right to terminate her pregnancy.<sup>78</sup>

Despite all the progress made in the realm of privacy rights, the fingerprint cases suggest that there was still a predominant policy in favor of data collection and storage, based on a limited and rigid notion of privacy.<sup>79</sup> This is because in national politics, the "Security State" continued to expand the big government on top of the Welfare State.<sup>80</sup> President Lyndon Johnson established a Commission on Law

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73. See *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.").

74. See *id.* at 485 ("We have had many controversies over these penumbral rights of 'privacy and repose.' These cases bear witness that the *right to privacy* which presses for recognition here is a legitimate one." (emphasis added) (citation omitted)).

75. See *Katz v. United States*, 389 U.S. 347, 358 (1967).

76. *Id.* at 351.

77. See *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228 (2022).

78. See *Roe*, 410 U.S. at 153 ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

79. See, e.g., *Maryland v. King*, 569 U.S. 435, 459 (1958) ("By the middle of the 20<sup>th</sup> century, it was considered 'elementary that a person in lawful custody may be required to submit to photographing and fingerprinting as part of routine identification processes.'" (quoting *Smith v. United States*, 324 F.2d 879, 882 (D.C. Cir. 1963))); *United States v. Laub Baking Co.* 283 F. Supp. 217, 223 (N.D. Ohio 1968) ("Fingerprinting as a police procedure is, in a sense, *sui generis*."); *State v. Inman*, 301 A.2d 348, 354 (Me. 1973) ("Many courts have held that peace officers have a common law power to fingerprint persons who have been arrested.").

80. See generally Marcus G. Raskin, *Democracy Versus the National Security State*, 40 L. & CONTEMP. PROBLEMS (1976) (discussing the National Security State).

Enforcement and Administration of Justice in July 1965.<sup>81</sup> The Commission issued a report in 1967, *The Challenge of Crime in a Free Society*.<sup>82</sup> Meanwhile, government's databanks grew with phenomenal speed.<sup>83</sup> In 1960, J. Edgar Hoover, Director of the Federal Bureau of Investigation (FBI), told Congress that the FBI Identification Division had built a centralized fingerprint file that kept 154 million sets of fingerprints,<sup>84</sup> among which 119 million sets were in the Civil File, representing sixty-two million persons.<sup>85</sup> Congressman Frank T. Bow (Ohio) was shocked by the number and commenting "[w]e have a population of 165 or 170 million people and this seems like a remarkable number. I wondered how close we come to complete coverage."<sup>86</sup> However, it was not only the scale of the federal databanks which was growing at full speed; with computers and automation, databanks were increasingly connected, thus information could be shared. For example, in 1965, New York State set up its Identification and Intelligence System (NYSIIS) and connected with the FBI's National Crime Information Center in 1968.<sup>87</sup> By 1970, NYSIIS has collected seven million fingerprint records and 2.5 million of those records were computerized.<sup>88</sup> In 1974, a Senate study found that fifty-four of the United States federal government agencies had 858 databanks, containing more than 1.2 billion records of individuals.<sup>89</sup>

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81. See generally DOUGLAS T. STUART, *CREATING THE NATIONAL SECURITY STATE: A HISTORY OF THE LAW THAT TRANSFORMED AMERICA* (2008) (discussing the rise of the Security State in the United States).

82. See PRESIDENT'S COMM'N ON L. ENF'T & ADMIN. OF JUST., *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967).

83. See *Criminal Justice Data Banks—1974: Hearings on S. 2542, S. 2810, S. 2963, and S. 2964 Before the Subcomm. on Const. Rights of the Comm. on the Judiciary*, 93rd Cong. 2d Sess. (1974).

84. See *Departments of State and Justice, The Judiciary, and Related Agencies Appropriations for 1961: Hearings Before the Subcomm. of the H. Comm. on Appropriations*, 86th Cong. 382 (1960).

85. See *id.* at 344.

86. *Id.* at 382.

87. See *Federal Data Banks, Computers and the Bill of Rights: Hearings Before the Subcomm. on Const. Rights of the Comm. on the Judiciary*, 92nd Cong. 662–64 (1971) (statement of Dr. Robert R. J. Gallati, Director of the New York State Identification and Intelligence System).

88. See *id.* at 663 ("Within NYSIIS are contained over 7 million fingerprints with nearly 500,000 prints being processed annually.").

89. See STAFF OF SUBCOMM. ON CONST. RIGHTS OF THE COMM. OF THE JUDICIARY, 93D CONG., *FEDERAL DATA BANKS AND CONSTITUTIONAL RIGHTS: A STUDY OF DATA SYSTEMS ON INDIVIDUALS MAINTAINED BY AGENCIES OF THE UNITED STATES GOVERNMENT* 31–33 (Comm. Print. 1974).



In the early 1970s, while concerns of privacy among American citizens were mounting,<sup>90</sup> the judiciary was shifting to the Security State mode. In 1969, Chief Justice Warren Burger was appointed to the Supreme Court, ending the liberal era of the Court that existed under Chief Justice Earl Warren, from 1953 to 1969.<sup>91</sup> Part of the shift in ideology was that the Burger court gradually rolled back the progress made by the Warren Court.<sup>92</sup> Legal scholars like Arthur Miller, having witnessed the changing technology, pressed for a more novel notion of privacy that put emphasis on the control of personal information.<sup>93</sup> However, in fingerprint cases, courts across the United States insisted the traditional tort theory—trespass—applied to privacy.

## B. Privacy and National Politics in Japan

Japan is an illuminating contrast with the United States. The notion of privacy was officially recognized for the first time in 1964 by the Tokyo District Court, in a defamation case on Yukio Mishima's novel *After the Banquet* (宴のあと).<sup>94</sup> The ruling occurred in the

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90. See generally *Privacy: The Collection, Use, and Computerization of Personal Data: Joint Hearings on S. 4418, S. 3633, S. 3116, S. 2810, and S. 2542 Before the Ad Hoc Subcomm. on Priv. and Info. Sys. of the Comm. on Gov't Operations and the Subcommittee on Const. Rights of the Comm. on the Judiciary*, 93rd Cong. (1974) (demonstrating a rising concern over privacy rights).

91. Chief Justice Burger was nominated May 21, 1969, and confirmed by the Senate on June ninth of that year. See Warren E. Burger, 1969-1986, SUP. CT. HIST. SOC'Y, <https://supremecourthistory.org/chief-justices/warren-burger-1969-1986/> (last visited Oct. 2, 2023).

92. Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 261-62 (1984).

93. See MILLER, *supra* note 58, at 1 (raising concerns over changing technology that has "dramatically increase[ed] man's capacity to accumulate, manipulate, retrieve, and transmit knowledge"); see also Charles Fried, *Privacy*, 77 YALE L.J. 475, 475 (1968); Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 49-50 (1974).

94. See *Arita v. Hiraoka*, Tōkyō Chihō Saibansho [Tokyo Dist. Ct.] Sept. 28, 1964, 385 HANREI JIHŌ [HANJI] 12 (Japan) [hereinafter *After The Banquet Case*]. For commentaries on the case, see Takahisa Sugano, *Privacy in Japan*, 3 COMP. & INT'L L.J. S. AFR. 225, 225-27 (Jul. 1970); Lawrence W. Beer, *Defamation, Privacy, and Freedom of Expression in Japan*, 5 L. JAPAN 192, 204-05 (1972); TATSUHIKO YAMAMOTO, ET AL., *Shōsetsu wa puraibashī o shingai suru no ka, utagenoato' jiken* [Does a Novel Infringe on Privacy?], in JIKEN, KENPŌ HANREI KARA MIRU NIHON [JAPAN AS SEEN FROM CONSTITUTIONAL PRECEDENTS] (2016) (no translation available). Mishima's book has been translated into English, see YUKIO MISHIMA, *AFTER THE BANQUET* (trans. Donald Keene 1971).

midst of awakening of the notion of legal rights in Japan.<sup>95</sup> This is a period of time characterized by high profile lawsuits like the Minamata (水俣病) cases,<sup>96</sup> as well as political protests and agitations such as the Sanritsuka (三里塚) farmers' protests against land-taking in the Narita Airport case, and the anti-Vietnam War protests in Japan.<sup>97</sup> By the early 1980s, liberal scholars transformed privacy from a tort law right to a constitutional right under Article 13 of the Japanese Constitution.<sup>98</sup> Beginning from the 1980s, the Zainichi Koreans joined the efforts in their fight against fingerprinting law. It was through the Zainichi Koreans' litigation that the Supreme Court of Japan was forced to recognize privacy as a constitutional right.<sup>99</sup> National politics is the key in understanding the doctrinal shift.

### 1. The 1964 "After the Banquet" Case

In *After the Banquet* case, plaintiff was a politician—a former Minister of Foreign Affairs during the World War II, and unsuccessful candidate for the position of Governor of Tokyo in 1959. He also divorced his wife after the election. Mishima's novel, plaintiff claimed, invaded his privacy because the novel was based on these well-known facts. The Tokyo District Court recognized plaintiff's privacy right and ruled in favor of the plaintiff, finding that Mishima was liable under Article 709 of the Civil Code.<sup>100</sup> However, the reasoning of the Court was broader than a regular tort case. In discussing privacy, the Court

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95. See Ichiro Kato, *The Concerns of Japanese Tort Law Today*, 1 L. JAPAN 79 (Rex Coleman trans. 1967) (original published in Japan in 1964); Tokiyasu Fujita, *Kōkenryoku no Kōshi to Kenri Shuchyo [Exercise of Public Powers and Claim of Private Rights]*, 80 KOKKA GAKKAI ZASSI [JOURNAL OF THE ASSOCIATION OF POLITICAL AND SOCIAL SCIENCES] 123 (Dec. 1966); 45 (Jan. 1967); 25 (May 1967); 29 (Aug. 1967). For more general context, see *CHANGING JAPANESE ATTITUDES TOWARD MODERNIZATION* (Marius B. Jansen et al. eds. 1965).

96. The first civil lawsuit was filed in June 1967 at Niigata; in Kumamoto, the first civil suit was filed on June 14, 1969. See TIMOTHY S. GEORGE, *MINAMATA: POLLUTION AND THE STRUGGLE FOR DEMOCRACY IN POSTWAR JAPAN 179–97* (2001); UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN*, *supra* note 23; JULIAN GRESSER ET AL., *ENVIRONMENTAL LAW IN JAPAN* (1981).

97. See generally DAVID E. APTER & NAGAYO SAWA, *AGAINST THE STATE: POLITICS AND SOCIAL PROTEST IN JAPAN* (1984) (telling the story of Japan's selection of the village of Sanruizaka for the new Tokyo International Airport).

98. See Yasuhiro Okudaira, *Forty Years of the Constitution and Its Various Influence: Japanese, American, and European*, in *JAPANESE CONSTITUTIONAL LAW* 8 (Percy R. Luney, Jr. & Kazuyuki Takahashi eds., 1997).

99. See *infra* Part IV.

100. See *After the Banquet Case*, *supra* note 94, at 29.

resorted to the general notion of “personality rights” (*jinkaku ken*, 人格権) and the Japanese Constitution:

[T]he idea of the dignity of the individual, as a fundamental principle of modern law and the foundation of the Japanese Constitution, is based on mutual respect for each other’s personalities and the protection of one’s self from unreasonable interference. It goes without saying that the private affairs of others should not be allowed to be made public without a justifiable reason.<sup>101</sup>

Prior to the ruling in the *After the Banquet Case*, Michitaka Kainō (戒能通孝1908–1975) had started advocating the notion of privacy in the late 1950s. Kainō, a professor at Tokyo Metropolitan University (東京都立大学), came to the privacy issue from his primary interests in citizens’ rights. In 1959, Hiroshi Hokama (外間寛1932–) translated Samuel Warren and Louis Brandeis’ 1890 article *The Right To Privacy* into Japanese and had it published in *Law Times Journal*.<sup>102</sup> In 1962, Kainō and Masami Itō (伊藤正己 1919–2010), a professor of law at Tokyo University, edited the first collection of essays on privacy law in Japan, *Privacy Studies*.<sup>103</sup> One year later, Itō published a book on privacy.<sup>104</sup> In its formative years, the notion of privacy was predominantly influenced by America.<sup>105</sup> In addition to the translation of the Warren and Brandeis article, both Kainō and Itō were inspired by and familiar with Anglo-American law and used English and American cases in their discussions. They were joined by Sanji Suenobu (末延三次1899–1989), a specialist on Anglo-American law recently retired from Tokyo University, who examined in great detail privacy litigation

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101. *Id.*

102. See Hiroshi Hokama, Puraibashī no kenri [*The Right to Privacy*], 31 Rōtaimujānaru [L. TIMES J.] 18–28 (1959) (Japan).

103. See PURAIBASHĪ KENKYŪ [PRIVACY STUDIES] (Michitaka Kainō & Masami Itō eds., Nippon Hyoron Shinsha 1962) (Japan).

104. See Masami Itō, PURAIBASHĪ NO KENRI [THE RIGHT OF PRIVACY] (Iwanami Shoten 1963). For discussion of Itō, see Masumi Shizawa, *Wagakuni ni okeru puraibashī-ken no kakuritsu* [*The Establishment of Right to Privacy in Japan*], 54 TŌYŌDAIGAKU DAIGAKUIN KIYŌ [GRADUATE SCH. BULL. OF TOYO U.] 39, 48 (2017).

105. The German law influence was Kiyoshi Igarashi (五十嵐清1925–2015), who was professor of comparative law at the Hōkkaidō University. Igarashi wrote on the notion of privacy from West Germany perspective. See Kiyoshi Igarashi, *Nishi-doitsu ni okeru shiseikatsu no watashi-hō-teki hogo: Jinkaku-ken riron no hatten* [*Protection of Private Life by Private Law in West Germany: The Development of General Personality Theory*], 11 Hokudai hōgaku ronshū [HŌKKAI DŌ U. L. REV.] 94–117 (1961). This article was collected in PRIVACY STUDIES. See KENKYŪ, *supra* note 103, at 151–206.

cases in English and American courts.<sup>106</sup> However, the cases were mostly tort cases involving one's likeness, and or defamation. Therefore, in the area of private law, according to the categories of the Civil Law tradition, Kainō and Itō managed to bring the constitutional aspect of privacy into this early discussion. Japanese scholars universally put privacy in the category of "personality rights"—in April 1962, the Japanese Comparative Law Society (*hikakuhō gakukai*, 比較法学会) adopted this position officially at its annual conference, which was focused on the comparative study of privacy rights.<sup>107</sup>

## 2. Constitutional Awakening

Privacy is articulated in the subsequent years as a constitutional principle, by lawyers and scholars like Kōji Satō (佐藤幸治1937-). Satō graduated from Kyoto University in 1961 and became an assistant professor in the faculty the next year. Satō witnessed the Japanese society going through the turmoil of the 1960s. For Satō, it is the State power that was the center of concerns and, thus, the Constitution was the key.<sup>108</sup> On the other hand, Satō studied in the United States in 1967 and was exposed to the privacy debates, particularly those of Alan F. Westin.<sup>109</sup> In his 1970 article entitled *A Constitutional Examination of the Right to Privacy: From Public Law Perspective*,<sup>110</sup>

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106. See Sanji Suenobu, *Eibei hō ni okeru himitsu no hogo* [Protection of Secrets in Anglo-American Law], in PRIVACY STUDIES, *supra* note 103, at 43–86. This article was first published in 1959 in another book by Suenobu. See Eibei hō no kenkyū, [STUDIES OF ANGLO-AMERICAN LAW] (1959). Suenobu, like Kainō, came from his interests in citizens' rights, as reflected in his work, *Jinken sengen-shū* [A COLLECTION OF HUMAN RIGHTS DECLARATIONS] (Yasaka Takagi, Sanji Suenobu & Toshiyoshi Miyazawa eds. 1957).

107. See Gakkai kiji [Events of the Society], 24 HIKAKU-HŌ KENKYŪ [COMP. L. J.] 82 (1963); see also Kiyoshi Igarashi, *Comparative Study on the Right of Privacy*, 24 HIKAKU-HŌ KENKYŪ [COMP. L. J.] 154 (1963). Reports from this symposium included: Anglo-American law (by Masami Itō), German law (by Kiyoshi Igarashi), Soviet law (by Tsuwao Inago [稲子恒夫]), and French law (by Yasuyuki Takahashi [高橋康之]).

108. See Noboru Yanese, *Debates Over Constitutionalism in Recent Japanese Constitutional Scholarship*, 19 Soc. Sci. JAPAN J. 193, 193–94 (2016).

109. See Kyōtodaigaku meiyō kyōju satō kōji-shi ni kiku: Jiko jōhō kontorōruken to kojīn jōhō hogo no kongo [Interview with Kōji Satō, Professor Emeritus of Kyoto University: The Right of Self-Control and the Future of Protection of Personal Information], HH NEWS & REPS. (Oct. 7, 2009), [https://www.hummingheads.co.jp/reports/interview/s091007/interview43\\_01.html](https://www.hummingheads.co.jp/reports/interview/s091007/interview43_01.html) [<https://perma.cc/5452-VTY8>].

110. See Kōji Satō, *Puraivu~ashī no kenri (sono kōhō-teki sokumen) no kenpō-ron-teki kōsatsu (ichi)— hikaku hōteki kentō* [A Constitutional Examination of the Right to Privacy: From Public Law Perspective], "Hōgakurōnsō" dai 86, 1–53 (1970) [86 KYOTO L. REV. 1 (1970)] [hereinafter *Public Law Perspective I*]; Kōji Satō, *Puraivu~ashī no kenri (sono kōhō-teki sokumen) no kenpō-ron-teki kōsatsu (ni) hikaku hōteki kentō* [A Constitutional Examination of the Right to Privacy: From Public Law

Satō noted that, since the *After the Banquet* case, privacy studies were largely from a tort law perspective, and Satō proposed to look into privacy from a constitutional—public law—perspective.<sup>111</sup> For this purpose, Satō adopted Charles Fried’s notion of privacy as the right to control information about ourselves.<sup>112</sup> Satō’s detailed survey of American law in his article included a wide range of public law areas, from the welfare state, to wiretapping, covering leading cases including *Burger v. United States*,<sup>113</sup> and *Katz v. United States*.<sup>114</sup> The survey ended with the 1968 Omnibus Crime Control Act, Title III.<sup>115</sup> The timing of Satō’s article is crucial for the understanding of his idealism—Satō was writing at a time that the Supreme Court of the United States was at the height of the Warren Court showing some firm position on privacy.<sup>116</sup> Japanese comparative lawyers brought this idealism home to their own country with equal enthusiasm.

The pressure for constitutional recognition of privacy was not limited to academics. The 1960s and 1970s witnessed a vibrant sociopolitical activist in the Japanese society, and a growing embracement of the Constitution in the fight for human rights.<sup>117</sup> The Supreme Court of Japan began to reflect on and develop the notion of privacy as well. In *Hasegawa v. Japan*, a case decided in December 1969, the Supreme Court ruled unanimously that police violated Article 13 of the Constitution when they took photographs of demonstrators in a

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*Perspective*], “Hōgakuronō” dai 87, 1–40 (1970) [87 KYOTO L. REV. 1 (1970)] [hereinafter *Public Law Perspective II*].

111. See *Public Law Perspective I*, *supra* note 110, at 5–6.

112. See *id.* at 12; see also Fried, *supra* note 93, at 482 (“Privacy is not simply an absence of information about us in the minds of others; rather it is the *control* we have over information about ourselves.”).

113. See *Burger v. United States*, 388 U.S. 41 (1967). For a discussion of the *Berger* case in Kōji Satō’s article, see *Public Law Perspective II*, *supra* note 110, at 11–14.

114. See *Katz v. United States*, 389 U.S. 347 (1967). For a discussion of *Katz* in Satō’s article, see *Public Law Perspective II*, *supra* note 110, at 16–18.

115. See Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (Jun. 19, 1968) (codified at 34 U.S.C. §§ 10101–755). For a discussion of the Act in Satō’s article, see *Public Law Perspective II*, *supra* note 110, at 32–40.

116. See, e.g., *Katz*, 389 U.S. 347; *Berger*, 388 U.S. 41.

117. See generally Tetsuo Naka, *Jinken Saiban undō to kenpō* [*Human Rights Litigation Movement and the Constitution*], 27 WASEDA HŌGAKU KAISHI [WASEDA L.J.] 199 (1976) (providing an overview on the human rights battles in post-war Japan); see also Christopher A. Ford, *The Indigenization of Constitutionalism in the Japanese Experience*, 28 CASE W. RES. J. INT’L L. 3, 13–22 (1996). Lawrence W. Beer, *The Public Welfare Standard and Freedom of Expression in Japan*, 43 WASH. L. REV. 1095, 1095–99 (1968) [hereinafter Beer, *The Public Welfare Standard*]; John M. Maki, *The Constitution of Japan: Pacifism, Popular Sovereignty, and Fundamental Human Rights*, 53 LAW & CONTEMP. PROBS. 73, 81–86 (1990).

public demonstration.<sup>118</sup> Without using the word, the Court embraced the notion of privacy by confirming that Article 13 protects citizen's "liberty of living a private life" (国民の私生活上の自由) from the interference by the police when they are exercising state power.<sup>119</sup>

In the following years, more scholars embraced the idea that privacy was a constitutional issue.<sup>120</sup> In 1976, Yasuhiro Okudaira (奥平康弘1929–2015), a constitutional law professor at Tokyo University, published an essay treating privacy as a constitutional issue.<sup>121</sup> Like Satō's earlier article, Okudaira's was also based on survey of United States law, especially the Fourth Amendment cases.<sup>122</sup> Like Satō, Okudaira demonstrated the trend of the U.S. Supreme Court requiring search warrants in criminal search cases, therefore, a "warrantism" (*reijyō siūgi*, 令状主義).<sup>123</sup> In 1977, the *Law Times* (法律時報) hosted a symposium on the thirtieth anniversary of the Constitution and the right of privacy was clearly recognized as one of the legal rights under the Constitution,<sup>124</sup> and included one piece contributed by Masao Horibe (堀部政男1936–), then a professor from Hitotsubashi University.<sup>125</sup> Horibe tracked the past thirty years of development of privacy in constitutional theories in Japan.<sup>126</sup> He noted that as computers were introduced in Japan from the 1970s, there was also an increased awareness of privacy.<sup>127</sup> All of these scholars became influential scholars and textbook authors in the area of constitutional law in Japan.

118. See Saikōsaibansho [Sup. Ct.] Dec. 24, 1969, 23 KEISHŪ 1625 (Japan) [hereinafter Hasegawa v. Japan]. For an English translation of the judicial opinion, see Hasegawa v. Japan, in *THE CONSTITUTIONAL CASE LAW OF JAPAN: SELECTED SUPREME COURT DECISIONS, 1961–70* 178–82 (Hiroshi Itoh & Lawrence Ward Beer eds. 1978).

119. Hasegawa v. Japan, *supra* note 118, at 1625.

120. In 1972, Masanari Sakamoto (1945–, 阪本昌成), a young research assistant based in Hiroshima University, published an article, Masanari Sakamoto, Kenpō to puraibashī [*Privacy and the Constitution*], 22 *Kōbe hōgaku zasshi* [KOBE L. REV.] 43 (1972). Sakamoto's article was based on a survey of United States caselaw.

121. See Yasuhiro Okudaira, Kenpo eno puraibishii kenri ni tsuite no kōsatsu [*An Examination of Rights of Privacy in the Constitution*], in *Kōhō riron: Tanaka Jirō kyōju e no tsuitō* [THEORIES OF PUBLIC LAW: TRIBUTES TO PROFESSOR JIRŌ TANAKA] 61–104 (Tokyo: Yuhikaku 1976).

122. See *id.*

123. See *id.* at 102.

124. See Kenpō san rei-nen no riron to tenbō [*Theory and Prospects of 30 Years of the Constitution*], 49 *Hōritsu jihō* [L. TIMES] (1977).

125. See Masao Horibe, Puraibashī [*Privacy*], 49 *Hōritsu jihō* [L. TIMES] 66–73 (1977).

126. See *id.*

127. See *id.*

### 3. Article 13

With increased recognition of privacy as a constitutional concern, it was only natural for Kōji Satō, to push this a further step. In 1981, in his book *The Constitution*,<sup>128</sup> Satō included privacy as part of the freedoms protected by the Constitution.<sup>129</sup>

The Supreme Court of Japan in the *Zenko* (Prior Criminal Records) case in April 1981 showed signs that it was getting more open to the idea of privacy.<sup>130</sup> A driving school instructor in Kyoto was fired.<sup>131</sup> For defense, the school asked the Kyoto Bar Association to obtain government records of the instructor.<sup>132</sup> The information revealed the instructor's prior criminal convictions.<sup>133</sup> The instructor then sued the Kyoto Bar Association for infringing upon his privacy.<sup>134</sup> The Supreme Court affirmed the lower court's ruling that the local government's exercise of power was illegal.<sup>135</sup> In the majority's opinion, the Court did not use "privacy," but noted that "prior criminal records and experiences have a direct impact on a person's reputation and creditability."<sup>136</sup> The Court reasoned, local governments in Japan retained criminal records for the purpose of local election qualification inquiry,<sup>137</sup> however, the local government, recklessly (漫然と) shared the information, thus it was illegal exercise of government power.<sup>138</sup> Masami Itō, who had started serving on the Supreme Court from 1980,<sup>139</sup> wrote his own supplemental opinion. Justice Itō stated:

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128. See Kōji Satō, *Kenpō* [CONSTITUTIONAL LAW] (Tōkyō: Seirin Shoin 1981).

129. See *id.*

130. See Saikōsaibansho [Sup. Ct.], Apr. 17, 1981, No. 3, 35 MINSHŪ 620 (Japan) [hereinafter *Zenko*]. For more details of the case—including lower courts' rulings—see LAWRENCE W. BEER, *FREEDOM OF EXPRESSION IN JAPAN: A STUDY IN COMPARATIVE LAW, POLITICS, AND SOCIETY* 329–30 (1984); Dan Rosen, *Private Lives and Public Eyes: Privacy in the United States and Japan*, 6 FLA. J. INT'L L. 141, 156–57 (1990).

131. See *Zenko*, *supra* note 130, at 620.

132. See *id.*

133. See *id.*

134. See *id.*

135. See *id.*

136. *Id.*

137. See *id.*

138. See *id.*

139. Professor Masami Itō served on the Supreme Court of Japan from January 19, 1980 to September 20, 1989. See Saikōsaibansho hanji ichiranpyō [*List of Supreme Court Justices*], CTS. IN JAPAN, [https://www.courts.go.jp/saikosai/about/sai-bankan/hanzi\\_itiran/index.html](https://www.courts.go.jp/saikosai/about/sai-bankan/hanzi_itiran/index.html) (last visited Sept. 29, 2023).

Personal information, so far as one does not want others to know, even if it is true, remains one's privacy that is protected by law. If incidentally disclosed without permission, one's privacy is breached, a tort has been constituted without any doubt. In this aspect, whether the disclosure was caused by a private person, or by a state or local public entity, does not matter.<sup>140</sup>

Here, even though he did not refer to the Constitution, Justice Itō clearly brought the notion of privacy beyond tort law.<sup>141</sup> In his book published in March 1982, less than a year after the *Zenko* case, Justice Itō included privacy as part of the category of “fundamental human rights” under the Constitution.<sup>142</sup> In December 1983, the Germany Constitutional Court ruling in the *Census Act Case*,<sup>143</sup> where the constitutional right of privacy was recognized as the informational self-determination. This landmark ruling in Europe was quickly picked up by scholars in Japan,<sup>144</sup> as it was not only relevant in the context of constitutional law debate in Japan but also, the ruling clearly vindicated what the scholars were advocating. In the 1984 book *The Constitution of Japan Annotated*, put together by the most recognized experts of constitutional law in Japan,<sup>145</sup> Satō contributed the chapter on Article 13.<sup>146</sup> Here, he divided the notion of privacy into three categories: (1) the right to be let alone, or peaceful and quiet privacy (静穏のプライバシー); (2) the right to control information about oneself (自己についての情報コントロール権), or informational privacy (情報のプライバシー); and (3) the right to make important decisions about self, or personal autonomy privacy (人格的自律のプライバシ

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140. *Zenko*, *supra* note 130, at 620 (Itō, J., concurring opinion).

141. *See id.*

142. *See* Masami Itō, Kenpō [THE CONSTITUTION] 228–31 (Tōkyō: Koubondō 1982).

143. *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 15, 1983, 65, BVerfGE 1 (Ger.) [hereinafter *Census Act Case*]. For commentaries, see Paul Schwartz, *The Computer in German and American Constitutional Law: Towards an American Right of Informational Self-Determination*, 37 AM. J. COMP. L. 675, 686–89 (1989) (discussing the *Census Act Case*).

144. *See* Tsuneo Suzuki, *Nishidoitsu renpō kenpō saibansho no kokuseichōsa hanketsu* [*Census Ruling of the Federal Constitutional Court of West Germany*], 818 JURISUTO [JURIST] 76 (1984) (discussing the German Constitutional Court ruling).

145. *See generally* HIGUCHI YŌICHI ET AL., CHŪSHAKU NIHONKOKU KENPŌ [THE CONSTITUTION OF JAPAN ANNOTATED] (Tōkyō: Seirin Shoin 1984).

146. *See id.* at 290–97.



—).<sup>147</sup> Satō emphasized that fundamentally, at the core in the right of privacy is the right to control one's own information.<sup>148</sup>

#### 4. Fingerprint Privacy

If so far, the push for constitutional recognition of privacy had been largely academic, the liberal scholars were soon joined by more political forces in the early 1980s that looked more like the Civil Rights movement in the United States. This was the “fingerprinting refusal movement,” a social movement that linked Article 13 of the Constitution and fingerprint together.

Japan did not have any law that required fingerprinting for her citizens. However, requirement for foreigners was introduced in 1952 through the Aliens Registration Act (ARA, 外国人登録法),<sup>149</sup> which took effect in 1955. The Act required that applicants submit fingerprints in their applications for the registration;<sup>150</sup> violation could lead to imprisonment with hard labor for less than a year, and fines.<sup>151</sup> This caused immediate resistance from the Korean residents in Japan (Zainichi Koreans) because as part of the legacy of the colonial past, a large number of Koreans in Japan were deprived of citizenship and thus became “foreigners” when Japan surrendered after being defeated in World War II.<sup>152</sup> The ARA also created the alien registration card, which the Zainichi Koreans were required to carry everywhere they went.<sup>153</sup>

Protests soon broke out, and petitions filed, high profile lawsuits were filed in the court.<sup>154</sup> In September 1980, Han Jong-Suk (韓宗碩,

147. *See id.* at 291.

148. *See id.*

149. *See* Gaikokujin Toroku Ho [Alien Registration Act], Law No. 125 of 1952 (Japan) [hereinafter Alien Registration Act].

150. *See id.* art. 14.

151. *See id.* art. 18(8).

152. *See* GEORGE HICKS, JAPAN'S HIDDEN APARTHEID: THE KOREAN MINORITY AND THE JAPANESE 51–52 (1997).

153. *See* Alien Registration Act, *supra* note 149, art. 4.

154. In the Hitachi case in 1974, Pak Chong-sok, a second-generation Zainichi Korean, passed a written test and an interview, was thus offered a job at a Hitachi software office in Yokohama. *See* Yokohama Chihō Saibansho [Yokohama Dist. Ct.] June 19, 1974, Showa 45 (wa) no. 2118, 744 HANJI 29 (Japan). However, when it learned that Pak was a Zainichi Korean, Hitachi rescinded the offer. Pak filed a suit with the Yokohama District Court, which ruled against Hitachi. *See id.* Throughout the litigation, known as the Hitachi Struggle, Pak was supported by Zainichi Korean communities and their Japanese sympathizers. *See id.* The victory in court encouraged the political movements and Pak himself joined and became a leader in the

ハン・ジョンソク), a first-generation Zainichi Korean, broke the silence by refusing to be fingerprinted. Han was found guilty by the Tokyo District Court in August 1984.<sup>155</sup> The case became the most prominent one in a wave of “fingerprint trials,”<sup>156</sup> and Han is identified as the one who fired the first shot in the social movement called “fingerprint refusal movement.”<sup>157</sup> The movement reached its peak in 1985, reaching more than 10,000 refusals.<sup>158</sup> In Part IV, we will examine how the refusal movement pushed for constitutional recognition of privacy in fingerprint.

### III. FINGERPRINT AND DNA LITIGATION IN THE UNITED STATES

In less than ten years after the publication of Warren-Brandeis article on privacy,<sup>159</sup> fingerprint cases were brought to courts across the nation. The discussion of fingerprint and DNA litigation in the United States aims to show two levels of what I call doctrinal lock-in. First, in fingerprint cases (1900-1986), initial state laws in Illinois, Pennsylvania, and Massachusetts limited fingerprint collection to

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fingerprint refusal movement. See generally Junichi Tsukajima, *Gaikokujintōrokuhō ni okeru shimon ōnatsu seido-tō no kaihai undō: Omoni Kawasaki kara no shiten to shite* [The Reform and Abolition Movement on Fingerprinting Related to Alien Registration Law: Perspectives from Kawasaki], 79 HŌSEIDAIGAKU DAIGAKUIN KIYŌ [HOSEI UNIVERSITY BULLETIN OF GRADUATE STUDIES] 137 (2017).

155. See Tōkyō Chihō Saibansho [Tokyo District Court], Aug. 29, 1984, HANREI JIHŌ [HANJI] 1125 (Japan). For a summary of the case, see Kenji Urata & Akihiko Kimijima, *Major Judicial Decisions*, 6 WASEDA BULLETIN OF COMPARATIVE LAW 75, 80–81 (1987); HICKS, *supra* note 152, at 96; Amy Gurowitz, *Mobilizing International Norms: Domestic Actors, Immigrants, and the Japanese State*, 51 WORLD POLITICS 413, 431 (1999).

156. See HICKS, *supra* note 152, at 96.

157. See generally Michael Strausz, *Minorities and Protest in Japan: The Politics of the Fingerprinting Refusal Movement*, 79 PAC. AFFS. 641 (2006) [hereinafter *Minorities and Protest in Japan*] (discussing the fingerprinting refusal movement); Michael Strausz, *Immigration and Democracy in Japan*, in THE OXFORD HANDBOOK OF JAPANESE POLITICS 471–89 (Robert J. Pekkanen & Saadia M. Pekkanen eds. 2020); Toshiho Terashima, *Shimon ōnatsu kyohi no shisō to ndo* [Refusing to Be Fingerprinted I], 43 ŌSAKAFURITSUDAIGAKU KIYŌ [BULL. OF THE OSAKA PREFECTURE U.] 17 (1995) [hereinafter *Refusing to Be Fingerprinted I*]; Toshiho Terashima, *Shimon ōnatsu kyohi no shisō to ndo* [Refusing to Be Fingerprinted: Ideas and the Movement: II], 44 ŌSAKAFURITSUDAIGAKU KIYŌ [BULL. OF THE OSAKA PREFECTURE U.] 16 (1996) [hereinafter *Refusing to Be Fingerprinted II*].

158. See *Minorities and Protest in Japan*, *supra* note 157, at 650; *Refusing to Be Fingerprinted II*, *supra* note 157, at 19 (noting that the Ministry of Justice had a record of 11,019 people refusing fingerprinting).

159. See Warren & Brandeis, *supra* note 27, at 193 (providing one of the first discussions for privacy rights).

convicted criminals.<sup>160</sup> This was largely ignored by state courts.<sup>161</sup> The highest courts in Indiana, New York, and Maryland upheld law enforcement's collection of fingerprints from all arrestees, thus greatly expanding the pool of fingerprints.<sup>162</sup> By around 1910, this position had been established and never challenged in subsequent years.<sup>163</sup> Similarly, DNA data collection went through the same expansion from convicted felons to all arrestees, this time upheld by the United States Supreme Court in 2013 in *Maryland v. King*.<sup>164</sup> The second level of doctrinal lock-in is equally striking: the *Maryland* ruling, more than a century after first fingerprint cases in state courts, repeatedly referred to the analogy with fingerprint, and followed their reasoning. Therefore, doctrinal lock-in, not flip flop, is the most striking character in fingerprint and DNA litigation.<sup>165</sup>

#### A. Fingerprint Litigation: 1900–1986

Fingerprint identification was adopted in the United States in the 1890s.<sup>166</sup> “Rogues’ Gallery” was perhaps an early example of government database.<sup>167</sup> Thomas Byrnes, Inspector of Police and Chief of Detectives at New York City, wrote a book in 1886, which had multiple references to the “rogues’ gallery.”<sup>168</sup> In Chicago, it was under Michael P. Evans, head of the Identification Bureau of the Chicago Police Department,<sup>169</sup> “[a] perfect record of every person held for crime by the grand jury, for a number of years past, with their photographs, bodily

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160. See *infra* Part III.A.

161. See *infra* Part III.A.

162. See *infra* Part III.A.

163. See *infra* Part III.A.

164. See *infra* Part III.B.

165. See *infra* Part III.B.

166. SIMON A. COLE, SUSPECT IDENTITIES: A HISTORY OF FINGERPRINTING AND CRIMINAL IDENTIFICATION 134–35 (2001). For more information on the history of fingerprinting, see generally DOUGLAS G. BROWNE & ALAN BROCK, FINGERPRINTS: FIFTY YEARS OF SCIENTIFIC CRIME DETECTION (1954); GEORGE EMRICK HARRIS, A TREATISE ON THE LAW OF IDENTIFICATION: A SEPARATE BRANCH OF THE LAW OF EVIDENCE (1892).

167. See COLE, *supra* note 166, at 20 (discussing the first reported use of a ‘Rogues Gallery’ in 1858).

168. See THOMAS BYRNES, PROFESSIONAL CRIMINALS OF AMERICA 94, 135 (1886). For more information on the life and career of Thomas Byrnes, see J. NORTH CONWAY, BIG POLICEMAN: THE RISE AND FALL OF THOMAS BYRNES, AMERICA’S FIRST, MOST RUTHLESS, AND GREATEST DETECTIVE (2011).

169. See JOHN J. FLINN, HISTORY OF THE CHICAGO POLICE 454–55 (1887) (“The Chicago police department boasts of the most perfect ‘rogues’ gallery’ of any city in the United States, and its perfection is due to the admirable management of Michael P. Evans.”).

marks, and descriptions of the most minute character, is preserved in the Chicago rogues' gallery."<sup>170</sup> In 1888, Chicago was the first American city to adopt the Bertillon system,<sup>171</sup> a body measurement system named after its French inventor Alphonse Bertillon. In 1889, Illinois and Pennsylvania passed laws to officially adopt the Bertillon system.<sup>172</sup> The following year, Massachusetts followed suit.<sup>173</sup> In 1896, the New York State legislature passed a law regarding identifying persons held for crime.<sup>174</sup>

In late 1904, Chicago adopted a fingerprint identification system by the Bureau of Identification led by Michael Evans.<sup>175</sup> In March 1905, California established the Bureau of Criminal Identification, which adopted both the Bertillon and fingerprint systems.<sup>176</sup> Fingerprinting, as a new identification method, was quickly embraced by state prisons and police departments across the United States.<sup>177</sup>

### 1. Fingerprint and Police Powers: State

A number of cases were brought to the courts. One such case was in front of the Indiana Supreme Court. In *State ex rel. Bruns v. Clausmeier*,<sup>178</sup> a prisoner in county jail, while waiting for his trial in

170. *Id.* at 455.

171. See *Captain Evans and the Chicago Bureau*, 1 FINGER PRINT MAGAZINE 4 (1919).

172. See An Act for the Identification of Habitual Criminals, Ill. Laws 1889, 112 (1889) (repealed 1973); An Act for the Identification of Habitual Criminals, No. 109, 1889 Pa. Laws 103 (1889) (repealed 1992).

173. See An Act to Provide for the Registration and Identification of Criminals, ch. 395, 1890 Mass Acts 269 (1890); An Act to Provide for the Registration and Identification of Criminals, in the Penal Institutions of This State, by the Bertillon System, No. 183, 1891 Mich. Pub. Acts 240 (1891).

174. See An Act to Facilitate the Identification of Criminals, Ch. 440, 1896 N.Y. Laws 401 (1896). For similar statutes, see An Act to Facilitate the Identification of Criminals, ch. 337, 1896 R.I. Acts & Resolves 47 (1896); An Act to Facilitate the Identification of Criminals, ch. 25, 1907 N.H. Laws 25 (1907); An Act to Facilitate the Identification of Criminals, Ch. 5, 1911 Me. Laws 6 (1911).

175. See *Captain Evans and the Chicago Bureau*, *supra* note 171, at 4.

176. See An Act to Create a State Bureau of Criminal Identification, ch. 399, 1905 Cal. Stat. 520, § 6 (1905).

177. See An Act to Amend the Prison Law, in Relation to the Bertillon System, ch. 501, 1913 N.Y. Laws 1185 (1913); An Act Relative to the Identification of Prisoner, ch. 360, 1910 Mass. Acts 290 (1910). In 1921, Chief of Police in Berkeley, California, August Vollmer, observed that "Bertillon's system of identification is being rapidly displaced by the finger print method." August Vollmer, *The Bureau of Criminal Records*, 11 J. AM. INST. CRIM. L. & CRIMINOLOGY 171, 172 (1921).

178. See *State ex rel. Bruns v. Clausmeier*, 57 N.E. 541 (Ind. 1900).

court, was photographed and measured according to the Bertillon method by the sheriff, and subsequently brought a libel suit against the sheriff.<sup>179</sup> The prisoner largely based his libel argument on a theory of privacy, especially the risk of sharing his photographs and measurements in the “rogues’ gallery.”<sup>180</sup> The Court, however, did not accept the argument. The Court rather determined that a sheriff had broad discretion here:

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 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, and the color of his eyes, hair, and beard, as was done in this case, he could lawfully do so.<sup>181</sup>

In coming to this far-reaching conclusion,<sup>182</sup> the Court made no reference to any statutory foundation for it, not even any legislative debate in the Indiana Legislature.<sup>183</sup> The Court referred to other jurisdictions’ cases—but they are dicta because they were not based on the exact factual pattern here—a prisoner, prior to conviction, asks for

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179. See *id.* at 541. The Bertillon method was likely adopted in Indiana in 1895. Perry R. Clark, *Barred Progress: Indiana Prison Reform, 1880–1920* 20 (May 2008) (Master’s Thesis, Indiana University). In the 1896 report, the Indiana Board of Charities noted that “[t]he Bertillon system of registering and identifying criminals has been introduced.” *BD. OF STATE CHARITIES, SEVENTH REPORT OF THE BOARD OF STATE CHARITIES MADE TO THE LEGISLATURE OF INDIANA* 33 (1897).

180. See *Clausmeier*, 57 N.E. at 541 (The prisoner argued that the sheriff was “maliciously intending to ruin [his] fair name and reputation, and to bring [him] into public infamy, disgrace, and scandal, by holding [him] up to scorn, ridicule, contempt, and execration, and to impair his enjoyment of general society by imputing and implying that [he] had committed a crime and was a rogue and a criminal, by associating the picture of [him] with the pictures of criminals, and representing [him] as a criminal . . .”).

181. *Id.* at 542.

182. Almost half a century later, the Indiana Supreme Court noted the status of *Clausmeier* ruling, in *State ex rel. Mavity v. Tyndall*. See *State ex rel. Mavity v. Tyndall*, 66 N.E.2d 755, 758 (1946) (“As to the making of the fingerprints and photographs appellant concedes that the arresting officers were within their rights. This is the modern rule which the frequently cited case of *State ex rel. Bruns v. Clausmeier* . . . helped establish.”).

183. The Indiana Board of Charities had proposed the Bertillon system to the Indiana legislature in 1890. See *BD. OF STATE CHARITIES, FIRST REPORT OF THE BOARD OF STATE CHARITIES MADE TO THE LEGISLATURE OF INDIANA* 32 (1890) (“The Board strongly recommends the use of this [Bertillon] system in the prisons of our State, as use that is now obligatory in several States of the Union.”).

photographs and measurements not to be shared with other police departments.<sup>184</sup> In fact, the law in all existing law in Illinois, Pennsylvania and Massachusetts limited the photographs and Bertillon measurements to “convicts,”<sup>185</sup> not to every prisoner.

In New York, in the case *People ex rel. Joyce v. York* (1899),<sup>186</sup> a convict filed a motion for a peremptory writ of mandamus for the purpose of compelling the police to remove his pictures from the “Rogues’ Gallery.”<sup>187</sup> The County Supreme Court was not convinced. A similar case, *Downs v. Swann*, came to the Court of Appeals of Maryland in 1909.<sup>188</sup> Here, plaintiff William F. Downs, a clerk in the office of the Baltimore City Register, was arrested on charges of embezzlement.<sup>189</sup> When the police were about to take a photograph and the Bertillon measurements including finger prints, Downs filed a motion to restrain the police from doing so, specifically, preventing the sending of the photographs and measurements to the “Rogues’ Gallery.”<sup>190</sup> The question for the court was whether the police “may lawfully provide themselves, for the use of their department of the city government, with the means of identification of a person arrested by them upon a charge of felony, but not yet tried or convicted . . . .”<sup>191</sup> Unlike the Indiana Supreme Court in *Clausmeier*, the Maryland Court of Appeals was apparently aware of the delicacy of the issue—it noted that

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184. Cases cited in *Clausmeier* included *Firestone v. Rice*, 38 N.W. 885 (Mich. 1888), and *Diers v. Mallon*, 64 N.W. 722 (Neb. 1895) (both holding that a sheriff was not liable for damages in handcuffing plaintiff without warrant because the sheriff had discretion to keep prisoner safe and secure after apprehension), and *Rusher v. State*, 21 S.E. 593 (Ga. 1894) (holding that independent facts discovered in consequence of a coerced confession made by a prisoner were admissible in evidence).

185. See An Act for the Identification of Habitual Criminals, Ill. Laws 1889, 112, § 1 (“persons convicted of any felonious offense”); An Act for the Identification of Habitual Criminals, No. 109, 1889 Pa. Laws 103, § 1 (“ . . . persons convicted of any felonious offense”); An Act to Provide for the Registration and Identification of Criminals, ch. 395, 1890 Mass Acts 269, § 1 (1890) (“Every convict now under imprisonment in the state prison or who is hereafter committed thereto, every convict now under imprisonment in the Massachusetts reformatory upon sentence for felony or who is hereafter committed thereto upon such sentence, and every convict now under imprisonment in any jail or house of correction upon a sentence of not less than three years for felony or who is hereafter committed thereto upon such sentence . . .”).

186. See *People ex rel. Joyce v. York*, 59 N.Y.S. 418 (N.Y. Sup. Ct., 1899).

187. See *id.* at 418.

188. See *Downs v. Swann*, 73 A. 653 (Md. 1909).

189. See *id.* at 654.

190. See *id.*

191. *Id.*

[t]he right of the Police authorities to employ the Bertillon process for the identification of *convicted* criminals has been *recognized* in most, if not all, of the jurisdictions in which the subject has received consideration, although several courts and text-writers have either questioned or denied the right to subject to that process persons accused of crimes before their trial or conviction.<sup>192</sup>

However, despite the awareness, the Court did not analyze any statutory text, but cited *Clausmeier*,<sup>193</sup> and found the ruling persuasive. In affirming the lower court's ruling denying Down's motion, the Maryland Court of Appeals offered a proviso that

we must not be understood . . . to countenance the placing in the rogues' gallery of the photograph of any person, not a *habitual criminal*, who has been arrested, but not convicted on a criminal charge, or the publication under those circumstances of this Bertillon record.<sup>194</sup>

The Court clarified that, as a matter of principle, *habitual criminals* are treated differently.<sup>195</sup> In doing so, the Maryland Court of Appeals not only ignored the fact of the case—that Downs had not been proved a habitual criminal—but also shifted the core of policy, from conviction-based to accusation-based police power.<sup>196</sup>

192. *Id.* at 655.

193. *See id.* ("The question in the form in which it is now presented to us formed the subject of recent review in the case of *State v. Clausmeier* . . . where it was held that a sheriff may lawfully take the photograph, measurement, weight, name, residence, place of birth, occupation, and personal characteristics of an accused person committed to his custody for safe-keeping, if in his discretion it is necessary to prevent the escape of the accused, or to facilitate his recapture, if he should do so." (citation omitted)).

194. *Id.* at 656 (emphasis added).

195. *See id.* ("Police officers have no right to needlessly or wantonly injure in any respect persons whom they are called upon in the course of their duty to arrest or detain, and for the infliction of any such injury they would be liable, to the injured person, in the same manner and to the same extent that private individuals would be.").

196. *See id.* This shift towards accusation-based police power was prevalent in other jurisdictions as well. *See, e.g.,* *Mabry v. Kettering*, 117 S.W. 746, 747 (Ark.1909) ("The authorities cited by appellants in support of their claim for a temporary injunction clearly recognize the principle that public officers, charged with the enforcement of criminal laws, and having in their custody individuals charged with crime, may use photographs for the purpose of identifying the individual accused." (emphasis added)); *People v. Sallow*, 165 N.Y.S. 915, 922 (1917) ("The courts have also frequently affirmed the power to take, preserve, and make reasonable use of data for the identification of persons accused of crime.").

In the 1930–1940s, the right of privacy was not gaining ground. In New Jersey, the Court of Chancery was invited to address the question in *Bartletta v. McFeeley*.<sup>197</sup> In this case, Frank J. Bartletta, a prominent businessman in Hoboken, New Jersey, was arrested on charges of crimes.<sup>198</sup> He was immediately taken to a room to be fingerprinted and photographed over his protest.<sup>199</sup> Bartletta brought a complaint in court, arguing that it was unlawful for the police to photograph or fingerprint an accused person before trial and conviction.<sup>200</sup> Judge Bigelow, Vice Chancellor, writing for the Chancery Court, stated that, “I am convinced that this is not the law.”<sup>201</sup> Furthermore, the judge stated, “[f]anciful rights of [an] accused person[] cannot be allowed to prevent the functioning of the police and so to jeopardize the safety of the public.”<sup>202</sup>

In 1976, the United States Supreme Court ruled in *Paul v. Davis* that constitutionally protected privacy was limited to “matters relating to marriage, procreation, contraception, family relationships, and child rearing and education,”<sup>203</sup> therefore, a photograph and name of plaintiff included in a flyer of “active shoplifters” was not a deprivation of privacy.<sup>204</sup> The ruling reinforced already limited protection of fingerprint in state courts. Here the State of Washington is a good example. Prior to the *Paul* ruling, in *Eddy v. Moore*,<sup>205</sup> an appellate court, inspired by *Griswold v. Connecticut*, recognized the constitutional right of privacy.<sup>206</sup> However, a few years later, in *State v. Adler*, another appellate court rejected the constitutional right claim, asserting that “*Paul* . . . stands for the proposition that the constitutional right of

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197. See *Bartletta v. McFeeley*, 152 A. 17 (N.J. Ch. 1930), *aff'd*, 156 A. 658 (N.J. 1931) (per curiam). New Jersey adopted fingerprint system in 1921. See Act of Mar. 29, 1921, ch. 102, 1921 N.J. Laws 167; see also *Tell-Tale Fingerprints*, 44 N.J. L.J. 105–08 (1921) (discussing the Edward H. Schwartz’s fingerprint method, which became the model among police chiefs in the United States).

198. See *Bartletta*, 152 A. at 17.

199. See *id.*

200. See *id.* at 18.

201. *Id.*

202. *Id.*

203. *Paul v. Davis*, 424 U.S. 693, 713 (1976).

204. *Id.*

205. See *Eddy v. Moore*, 487 P.2d 211 (Wash. Ct. App. 1971).

206. See *id.* at 217 (“We believe the right of an individual, absent a compelling showing of necessity by the government, to the return of his fingerprints and photographs, upon an acquittal, is a fundamental right implicit in the concept of ordered liberty and that it is as well within the penumbras of the specific guarantees of the Bill of Rights ‘formed by emanations from those guarantees that help give them life and substance.’” (quoting *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965))).



privacy does not include the interest an individual possesses in his arrest record including his photograph and fingerprints."<sup>207</sup>

## 2. Fingerprint and Police Powers: Federal

On the federal level, we have the Second Circuit's 1932 ruling in *United States v. Kelly*.<sup>208</sup> Here, Mortimer Kelly was arrested by prohibition agents in New York on the charge that he had sold to the agents one quart of gin.<sup>209</sup> On the day of arrest, Kelly's fingerprints were taken for the use of the Bureau of Prohibition.<sup>210</sup> Kelly filed an action in district court asking that the fingerprints should be returned. The Second Circuit downplayed the issue by framing the issue in the traditional doctrinal perspective—that finger printing is “no more than an extension of methods of identification long used in dealing with persons under arrest for real or supposed violations of the criminal laws.”<sup>211</sup> The Court then characterized the new technology from its particular function in modern society—that fingerprint “has become especially important in a time when increased population and vast aggregations of people in urban centers have rendered the notoriety of the individual in the community no longer a ready means of identification.”<sup>212</sup> The Court then cited *Downs v. Swann*, *State ex rel. Bruns v. Clausmeier*, and other cases,<sup>213</sup> and concluded:

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.<sup>214</sup>

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207. See *State v. Adler*, 558 P.2d 817, 820 (Wash. Ct. App. 1976).

208. See *United States v. Kelly*, 55 F.2d 67 (2d Cir. 1932). For a collection of the view in other jurisdictions, see A. R. W., Jr., Annotation, *Right to Take Finger Prints and Photographs of Accused before Trial, or to Retain Same in Police Record after Acquittal or Discharge of Accused*, 83 A.L.R. 127 (1933).

209. See *Kelly*, 55 F.2d at 68.

210. See *id.*

211. *Id.* at 69.

212. *Id.*

213. See *id.* (first citing *Downs v. Swann*, 73 A. 653 (Md. 1909); then citing *State ex rel. Bruns v. Clausmeier*, 57 N.E. 541 (Ind. 1900); then citing *O'Brien v. State*, 25 N.E. 137 (Ind. 1890); then citing *Marby v. Kettering*, 122 S.W. 115 (Ark. 1909); then citing *Shaffer v. United States*, 24 App. D.C. 414 (D.C. Cir. 1904); and then citing *Bartletta v. McFeeley*, 157 A. 17 (N.J. Ch. 1930)).

214. *Id.* at 70.

In reaching this conclusion, the Second Circuit explicitly declared that statutory authorization was not required for fingerprinting, and as a result, statutory limitations on the power to take fingerprints were irrelevant.<sup>215</sup> In the same way, the Second Circuit rejected another statutory limitation: Kelly argued that many of the statutes and the decisions in common-law states have allowed finger printing only in case of felonies.<sup>216</sup> The Second Circuit, however, considered this limitation immaterial by holding that “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.”<sup>217</sup>

The issue was never taken up by the United States Supreme Court. However, in *Davis v. Mississippi*,<sup>218</sup> some of the dicta statements turned out to be fundamental in fingerprint privacy cases. According to the Supreme Court,

[f]ingerprinting 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.<sup>219</sup>

In the following years, this statement became the guidance for federal courts to assess privacy interest in fingerprint.<sup>220</sup> In *Hayes v. Florida* (1985),<sup>221</sup> the Florida police went to the defendant’s home to obtain his fingerprints; when he refused, he was arrested and taken to the police station and fingerprinted there.<sup>222</sup> The Supreme Court ruled that the investigative detention at the station for fingerprinting

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215. *See id.* (“Where a statute imposes a duty, it carries by implication every reasonable means necessary to effectuate the desired end . . . . 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.” (citation omitted)).

216. *See id.*

217. *Id.*

218. *See Davis v. Mississippi*, 394 U.S. 721 (1969).

219. *Id.* at 727.

220. *See, e.g., United States v. Sanders*, 477 F.2d 112, 113 (5th Cir. 1973) (citing *Davis*, 394 U.S. at 727) (holding that defendant’s Fourth and Sixth Amendment rights were not violated by admission into evidence against him of a palm print taken while he was legally in custody of law enforcement on another matter); *United States v. Sechrist*, 640 F.2d 81, 85–86 (7th Cir. 1981) (citing *Davis*, 394 U.S. at 727) (holding that no probable cause was necessary to take fingerprint impressions when the juvenile was already in lawful custody).

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

222. *See id.* at 812–13.

purposes violated the defendant's rights under the Fourth Amendment.<sup>223</sup> However, the reason for this ruling given by the Court was intriguing—the Court explained that what the police did wrong was not that they took fingerprints from the defendant, but that they intruded in his home,<sup>224</sup> because, according to the Court

[t]here is . . . support in our cases for the view that the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch.<sup>225</sup>

Therefore, the Supreme Court confirmed its dicta in *Davis* that the Fourth Amendment does not protect privacy in fingerprinting.<sup>226</sup>

### 3. Expungement Cases

In the New York State case of *Owen v. Partridge*,<sup>227</sup> plaintiff Owen was arrested without a warrant. He was taken to the police headquarters, where he was photographed and measured following the Bertillon method.<sup>228</sup> However, the next morning he was discharged. Owen then filed a lawsuit demanding the photograph and measurements be destroyed on the theory of the right of privacy.<sup>229</sup> Having noted the New York Court of Appeal's ruling in *Roberson v. Rochester Folding Box Co.*,<sup>230</sup> the County Supreme Court stated that "our Court of Appeals has finally repudiated the doctrine that the right of privacy has any existence in law or is enforceable in equity."<sup>231</sup> The Court held that "[i]t is settled . . . that any invasion of one's right to be let alone can be remedied only by a statutory enactment directed against the particular

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223. *See id.* at 815–16.

224. *See id.* at 817 (“[N]either reasonable suspicion nor probable cause would suffice to permit the officers to make a warrantless entry into a person’s house for the purpose of obtaining fingerprint identification.” (citing *Payton v. New York*, 445 U.S. 573 (1980))).

225. *Id.*

226. *See id.*

227. *See Owen v. Partridge*, 82 N.Y.S. 248 (N.Y. Sup. Ct. 1903).

228. *See id.* at 249.

229. *See id.*

230. *See Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902).

231. *Owen*, 82 N.Y.S. at 252 (citing *id.*).

case.”<sup>232</sup> Two months after *Owen*, in *In re Molineux*,<sup>233</sup> another county Supreme Court came to the same conclusion on a motion by a plaintiff who had been arrested but later acquitted. Four years later, a similar case was brought to Kings County Supreme Court in *Gow v. Bingham*.<sup>234</sup> The Court, sympathetic to Gow’s sufferings, considered the acts of the police “not only a gross outrage, not only perfectly lawless, but they were criminal in character.”<sup>235</sup> However, the Court lamented that Gow “has mistaken his remedy.”<sup>236</sup> A writ of mandamus, the Court explained, had its limits:

In the absence of special statutory authority, a writ of mandamus only lies to compel one to do what ought to be done in the discharge of a public duty, and not to undo what is improperly done, even though it may have been done under the color of performance of public duty.<sup>237</sup>

When the same issue came to Louisiana Supreme Court, the Court had a different opinion in *Iitzkovitch v. Whitaker*.<sup>238</sup> The Court here was willing to recognize the right of privacy, and noted that “[e]very one who does not violate the law can insist upon being let alone (the right of privacy).”<sup>239</sup> The Court granted an injunction on the inspector of police to prevent him from publicizing the plaintiff’s photographs in the rogues’ gallery.<sup>240</sup> Louisiana is not alone in the debate. Rhode Island passed a law in 1911 requiring that record of identification, including photographs and physical measurements, “shall be destroyed” upon demand if such a person is acquitted or otherwise exonerated.<sup>241</sup> In 1927, the New York legislature passed an amendment

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232. *Id.* at 253.

233. *In re Molineux*, 83 N.Y.S. 943 (S. Ct. 1903), *aff’d*, 69 N.E. 727 (N.Y. 1904).

234. *See People ex rel. Gow v. Bingham*, 107 N.Y.S. 1011 (S. Ct. 1907).

235. *Id.* at 1018.

236. *Id.*

237. *Id.* Gow later filed tort claims against officer Kuhne and was conferred damages. *See Hawkins v. Kuhne*, 153 A.D. 216 (N.Y. App. Div. 1912), *aff’d*, 101 N.E. 1104 (1913).

238. *See Iitzkovitch v. Whitaker*, 39 So. 499 (La. 1905).

239. *See id.* at 500. The Louisiana Court noted the recent ruling on right of privacy by the New York Court of Appeal in *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538 (1902) and the ongoing debate about right of privacy. *See id.* at 501.

240. *See id.* at 500 (“We think that the publication of an innocent man’s photograph in the rogues’ gallery gives rise to sufficient grounds to sustain an injunction.”).

241. An Act Relating to the Photographing and Measurement of Persons Charged with a Crime, ch. 719, 1911 R.I. Pub. Laws 138, 138–39 (1911).

to the Penal Law,<sup>242</sup> requiring photographs and fingerprints be returned on demand, unless the person had previous convictions.<sup>243</sup>

In the 1940s, the right of privacy was not gaining ground. In New Jersey, the Court of Chancery was invited to address the question in *Fernicola v. Keenan*.<sup>244</sup> Here the complainant was arrested on a charge of assault and battery. He was taken to police headquarters in Newark, where he was photographed and fingerprinted.<sup>245</sup> However, a grand jury was not able to issue an indictment. Complainant claimed he was innocent, and he asked the court to issue a decree to have his photographs, negatives, fingerprints returned to him.<sup>246</sup> Judge Bigelow, the Vice Chancellor, writing for the Chancery Court, again, was not impressed by the arguments based on privacy. According to Judge Bigelow, when a man of good repute has a false charge, "it seems to me that the police should destroy his fingerprints and photograph, or remove them from the Rogues' Gallery."<sup>247</sup> However,

in the absence of statute, discretion in the matter belongs to the police. Since they are responsible for our safety, it is for them to decide whose identification papers will be apt to assist them in the performance of their duty. It is not for the court to make the decision.<sup>248</sup>

Judge Bigelow's opinion was not shared by his colleagues in the Court of Chancery. In *McGovern v. Van Riper*, Judge Kays gave much more weight to the right of privacy and concluded that there was "no right to publish or disseminate [complainant's] fingerprints, photographs, etc., in advance of conviction. . . ."<sup>249</sup> Judge Bigelow's opinion, however, prevailed later, when it was largely embraced by the Superior Court of New Jersey in *Roesch v. Ferber*.<sup>250</sup>

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242. See An Act to Amend the Penal Law, in relation to Finger Prints, ch. 544, 1927 N.Y. Laws 1332 (1927) (codified as amended at N.Y. PENAL LAW § 516).

243. For court rulings based on Section 516 of the Penal Law, see generally *Troilo v. Valentine*, 40 N.Y.S.2d 442 (N.Y. Sup. Ct. 1943); *Campbell v. Adams*, 133 N.Y.S.2d 876 (Sup. Ct. 1954); *People v. Havern*, 251 N.Y.S.2d 350 (Wash. Cnty. Ct. 1964).

244. See generally *Fernicola v. Keenan*, 39 A.2d 851 (N.J. Ch. 1944).

245. See *id.* at 851.

246. See *id.*

247. *Id.* at 851–52.

248. *Id.* at 852.

249. *McGovern v. Van Riper*, 43 A.2d 514, 525 (N.J. Ch. 1945).

250. See *Roesch v. Ferber*, 137 A.2d 61, 68–73 (N.J. Super. Ct. App. Div. 1957). For commentaries on *Roesch*, see Robinson O. Everett, *New Procedures of Scientific Investigation and the Protection of the Accused's Rights*, 1959 DUKE L.J. 32, 45–46

Compared with the “mainstream” views, the Indiana Supreme Court was more open to the idea of privacy in *State ex rel. Mavity v. Tyndall*.<sup>251</sup> Here, John L. Mavity, a locomotive engineer and fireman, was arrested on a public street in Indianapolis on charges of misdemeanors.<sup>252</sup> He was fingerprinted and photographed. The arrest records were sent to both the Indiana State Police, and the Federal Bureau of Investigation (FBI) at Washington, D.C., in addition to those retained and filed at the police headquarters in Indianapolis.<sup>253</sup> However, a few days later, the charges were dismissed. Mavity thus demanded return of the data sent to the Indiana State Police and the FBI.<sup>254</sup> The Indiana Supreme Court ruled that complainant was entitled to an injunction against the exhibition of his photograph in the “rogues’ gallery,”<sup>255</sup> but not a return of data sent to State Police and the FBI. The Court distinguished exhibition to the general public, and file-sharing with the FBI, stating “[a]s long as the photographs are filed away from public gaze they would seem to be in the same category as the filed fingerprints.”<sup>256</sup>

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(1959); *Recent Cases*, 106 U. PA. L. REV. 299, 303–06 (1958). For more on the rights of persons acquitted to have their fingerprints returned to them, see generally Lester Eisenstadt, Note, *The Right of Persons Who Have Been Discharged or Acquitted of Criminal Charges to Compel the Return of Fingerprints, Photographs, and Other Police Records*, 27 TEMP. L.Q. 441 (1954).

251. See generally *State ex rel. Mavity v. Tyndall*, 66 N.E.2d 755 (Ind. 1946).

252. See *id.* at 756.

253. See *id.* at 756–57.

254. See *id.* at 757.

255. See *id.* at 762.

256. *Id.*

The 1960s saw expansion of the New York and New Jersey position conquering the States of Illinois,<sup>257</sup> California,<sup>258</sup> Delaware,<sup>259</sup> Florida,<sup>260</sup> District of Columbia,<sup>261</sup> and Washington;<sup>262</sup> in the 1970s,

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257. See *Poyer v. Boustead*, 122 N.E.2d 838, 843 (Ill. App. Ct. 1954) ("At the time of the hearing on the complaint for injunction there had been no determination whether any or all of the defendants were innocent or guilty, and until that was done the chief of police had a right to retain in his possession these photographs and fingerprints."); *Kolb v. O'Connor*, 142 N.E.2d 818, 824 (Ill. App. Ct. 1957) ("The rights of the individual must be subordinate to the safety of the public. The question involved here is one of public policy. The legislature has not indicated what the public policy of the State should be. Without a specific mandate of the legislature ordering the return to an arrested person of all records of identification held by sheriffs or police departments we are constrained to hold that such departments may retain in their files records of identification such as were here taken, for the purpose of such limited exhibition as is here involved."); *People v. Lewerenz*, 192 N.E.2d 401 (Ill. App. Ct. 1963) ("We agree with the position of the Superintendent of Police that the Criminal Court of Cook County has no jurisdiction to order the return of photographs, finger prints and other means of identification."); *Village of Homewood v. Dauber*, 229 N.E.2d 304, 305 (Ill. App. Ct. 1967) (holding that Defendant, who was convicted of a misdemeanor traffic violation was not entitled to return of fingerprints and photographs taken at the time of arrest).

258. See *Sterling v. City of Oakland*, 24 Cal. Rptr. 696, 699 (Ct. App. 1962) ("[P]laintiff can rely on no statute [regarding the return or destruction of fingerprints of those accused], and the failure of the Legislature to enact the proposed bill, in one form or another, is some evidence that the Legislature does not consider it necessary or proper or expedient to enact such legislation."); *Loder v. Mun. Ct.*, 553 P.2d 624, 627 (Cal. 1976) (finding that no statute requires that Plaintiff's arrest record be returned or destroyed).

259. See *Walker v. Lamb*, 254 A.2d 265, 267 (Del. Ch. 1969) ("In conclusion, I find on the basis of the foregoing that while plaintiff claims that the retention of his fingerprints and photographs by the authorities is a source of embarrassment and humiliation and will likely result in pecuniary loss, that he has failed to state a claim upon which relief can be granted in this Court. If an actionable tort has been committed, plaintiff has his remedy at law for damages . . .").

260. See *Purdy v. Mulkey*, 228 So. 2d 132, 139 (Fla. Dist. Ct. App. 1969) ("[I]n the absence of statutory direction or authority for the return or expunging of such records in given circumstances, or of strong overriding equitable considerations, the decision as to whether the records shall be retained, for the obvious public purposes, is one of discretion which is reposed in the sheriff, and not in the courts.").

261. See *Spock v. District of Columbia*, 283 A.2d 14, 17 (D.C. 1971) ("We . . . hold that in the absence of specific statutory authority, destruction of records of the Metropolitan Police Department cannot be ordered."). The Court of Appeals tried to accommodate the privacy concerns with a moderate compromise, stating "[i]t is the conclusion of this court that in cases where the arrested person affirmatively demonstrates non-culpability, the police records of that arrest, including all forms and copies thereof, just like the court records, should be made to reflect that fact." *Id.* at 19.

262. See *Monroe v. Tielsch*, 525 P.2d 250, 251 (Wash. 1974) (en banc) (denying petitioners request to completely expunge juveniles arrest records finding that it would be contrary to underlying philosophy of juvenile law). For more information on the rights to the return of arrest records, see generally Gary D. Spivey, *Right of*

Arizona,<sup>263</sup> Maryland,<sup>264</sup> Minnesota,<sup>265</sup> and Louisiana.<sup>266</sup> On the federal level, the circuit courts were divided in the 1960s and 1970s, with the Seventh and Tenth Circuits sharing the same trend unfolding in the States referred to above;<sup>267</sup> and the Fifth Circuit, and the D.C.

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*Exonerated Arrestee to Have Fingerprints, Photographs, or Other Criminal Identification or Arrest Records Expunged or Restricted*, 46 A.L.R.3d 900 (1972).

263. See *Beasley v. Glenn*, 520 P.2d 310, 312 (Ariz. 1974) (“The individual’s interest is outweighed by the public’s interest in the possession of information concerning persons who may again be charged with some activity which requires the making of records. Public records, since they are required to be kept by law, can only be destroyed pursuant to law, and, hence, the destruction of public records is a matter to be regulated by statute.”).

264. See *Doe v. Commander, Wheaton Police Dep’t*, 329 A.2d 35, 42 (Md. 1974) (finding that an equity court is empowered to entertain petition of expungement of criminal arrest records).

265. See *City of St. Paul v. Froysland*, 246 N.W.2d 435, 435 (Minn. 1976) (“Even where the record of conviction itself has been expunged from official records, defendant is not entitled to the return of identification data (photographs, fingerprints, etc.) when the conviction, entered upon a plea of guilty, was subsequently set aside pursuant to completion of a satisfactory probationary period . . .”).

266. See *State v. Nettles*, 375 So. 2d 1339, 1341 (La. 1979) (“The record of the arrest is a matter of public record. In the absence of statutory authority, a court’s privilege to expunge matters of public record is one of exceedingly narrow scope . . . Only under extraordinary circumstances may a court order records made under statutory authority to be destroyed or expunged.”).

267. See *Herschel v. Dyra*, 365 F.2d 17, 20 (7th Cir. 1966) (affirming the federal district court’s ruling, which dismissed plaintiff’s request for expungement of arrest records, the Seventh Circuit held “the Superintendent of Police is justified and, indeed, duty-bound to compile and retain arrest records of all persons arrested, and that the execution of that policy does not violate plaintiff’s right of privacy.”); *United States v. Linn*, 513 F.2d 925, 927 (10th Cir. 1975) (“[A]n acquittal, standing alone, is not in itself sufficient to warrant an expunction of an arrest record.”).



Circuit being slightly more open to the idea of privacy.<sup>268</sup> The United States Supreme Court was silent on the issue.<sup>269</sup>

#### 4. Mandatory Fingerprinting

The first case on the constitutionality of state law making fingerprint mandatory is by the Kansas Supreme Court in *City of Wichita v. Wolkow* (1921).<sup>270</sup> In this case, an ordinance in Kansas required every pawnbroker and secondhand dealer to keep at his place of business a register in which he shall enter in writing a minute description of all property taken or purchased, including fingerprints of the person from whom such property was received.<sup>271</sup> The Supreme Court of Kansas recognized the “considerable inconvenience,” however, “the good intended to be accomplished is so manifest that the court does not feel authorized to declare the ordinance arbitrary or unreasonable.”<sup>272</sup> This is because, the Court reasoned, the special character of the business, which “naturally and necessarily includes transactions with . . . lawless persons” who use the market to dispose of stolen

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268. See *United States v. McLeod*, 385 F.2d 734, 750 (5th Cir. 1967) (“We therefore hold that the district court should enter an order requiring the appropriate officials of Dallas County to return all fines, and to expunge from the record all arrests and convictions resulting from the prosecutions which form the basis for these suits.”); *Morrow v. District of Columbia*, 417 F.2d 728, 741 (D.C. Cir. 1969) (It is clear, however, that the government of the District of Columbia has no absolute right to do what it wishes with police arrest records.”); *Menard v. Mitchell*, 430 F.2d 486, 494–95 (D.C. Cir. 1970) (“We are not unaware of many considerations which might lead to the conclusion that the maintenance of arrest records is a matter properly committed to the discretion of the Department of Justice, subject of course to such rules as Congress and the President may see fit to impose. But such discretion, assuming it exists, may not be without limit. Particularly troublesome is the possibility, by no means eliminated on the present record, that information in the FBI’s files may be used for many other than the law enforcement purposes for which its retention may be justified.” (internal footnotes omitted)); *Sullivan v. Murphy*, 478 F.2d 938, 968 (D.C. Cir. 1973) (“The principle is well established that a court may order the expungement of records, including arrest records, when that remedy is necessary and appropriate in order to preserve basic legal rights.”); *Menard v. Saxbe*, 498 F.2d 1017 (D.C. Cir. 1974); *Utz v. Cullinane*, 520 F.2d 467, 491 (D.C. Cir. 1975) (“The District of Columbia sought to protect its own citizens through passage of the Duncan Ordinance. In light of the substantial obstacles which an arrest record poses to an individual’s pursuit of happiness and enjoyment of freedom and liberty, and the particularly heavy toll which such records have had on minorities in this country and in this city, such action was eminently reasonable.”).

269. However, the United States Supreme Court made a decision that shaped the jurisprudence. See generally *Younger v. Harris*, 401 U.S. 37 (1971).

270. See *City of Wichita v. Wolkow*, 202 P. 632 (Kan. 1921).

271. See *id.* at 633.

272. *Id.*

property.<sup>273</sup> Therefore, according to the Court, those in this special business “may reasonably be required to use the safeguards provided by this ordinance, and by so doing they are not deprived of any right vouchsafed to them under the state or federal constitution.”<sup>274</sup>

Almost two decades later, a strikingly similar case was brought to the Indiana Supreme Court, in *Medias v. City of Indianapolis*.<sup>275</sup> In 1937, the city of Indianapolis adopted an ordinance that required pawnbrokers to keep a record showing the name, residence, age, color, height, weight, complexion, style of beard and dress, as well as thumb print of every person making a pledge or sale for money.<sup>276</sup> Finding the ruling in *Wolkow* persuasive, the Indiana Supreme Court came to the same conclusion.<sup>277</sup> Similar to Indianapolis and Wichita, in New York City, the commissioner of licenses established a rule in 1930 that required dealers of secondhand articles to submit fingerprints when they seek renewal or apply for an original license.<sup>278</sup> A business owner who sold secondhand sewing machines brought a case against the Commissioner of Licenses in *Itzkowitz v. Geraghty*.<sup>279</sup> Not surprisingly, the county Supreme Court found no violation of the Constitution without even an examination of court cases.<sup>280</sup>

In the meantime, fingerprinting is spreading to other industries and occupations. In fact, part of the justification in *Itzkowitz v. Geraghty* was that the county Supreme Court noted that fingerprinting was used in different areas from banking, to post office, municipal services, and even the Marines Corps, the Army and the Navy.<sup>281</sup> In 1941, a cook and a waiter brought a case to the same court in *Friedman v. Valentine*,<sup>282</sup> on the ground that a city regulation required every person in the employ of a cabaret who comes in contact with the patrons be fingerprinted. The county Supreme Court was unequivocal in holding that “the regulations extending the requirements of

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273. *Id.* at 634.

274. *Id.*

275. *See Medias v. City of Indianapolis*, 23 N.E.2d 590 (Ind. 1939).

276. *See id.* at 592.

277. *See id.* at 595.

278. *See M. Itzkowitz & Sons, Inc., v. Geraghty*, 247 N.Y.S. 703, 704 (Sup. Ct. 1931).

279. *See id.*

280. *See id.* at 705.

281. *See id.* at 704–05.

282. *See Friedman v. Valentine*, 30 N.Y.S.2d 891 (Sup. Ct. 1941), *aff'd*, 266 A.D. 561 (N.Y. App. Div. 1943).

fingerprinting to employees of licensees of cabarets is a lawful and proper exercise of power.”<sup>283</sup> The same court observed that,

[f]ingerprinting of licensees has been a standard practice in New York city for years. The department of licenses will issue licenses only after the applicant has been fingerprinted in the following occupations or businesses, among others: auctioneer, billiard and pool table parlor, employment agency, express wagon, sightseer guide, junkdealer, keymaker, locksmith, laundry, massage operator, public porter, second-hand dealer and ticket broker.<sup>284</sup>

The Court was not wrong in the observation. What was questionable, however, was the role of the judiciary—it was overly deferential to the city lawmakers by merely endorsing the expanded use of fingerprint and did not try to provide safeguards.<sup>285</sup>

From this background, the ruling of the California Supreme Court in *Perkey v. Department of Motor Vehicles*,<sup>286</sup> despite its own unusual context, was simply natural. In 1981, California passed a new section in the Vehicle Code,<sup>287</sup> requiring each applicant for a driver’s license to submit a fingerprint to the Department of Motor Vehicles. Christopher Ann Perkey’s application for a renewal of her driver’s license was denied when she refused to be fingerprinted.<sup>288</sup> Perkey then brought a lawsuit contending that the collection and retention of fingerprints for unrestricted use in a statewide identification system violated her

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283. *Id.* at 896. The position of the *Friedman* court was confirmed some years later when a similar challenge to the same regulation was brought to the same court. See *Simone v. Kennedy*, 26 Misc.2d 748, 212 N.Y.S.2d 838, 840 (Sup. Ct. 1961) (finding that the Court is bound by the holding in *Friedman*).

284. *Friedman*, 30 N.Y.S.2d at 896.

285. See, e.g., *Kelly-Sullivan, Inc. v. Moss*, 22 N.Y.S.2d 491 (Sup. Ct. 1940), *aff’d*, 260 A.D. 921 (N.Y. App. Div. 1940) (fingerprinting of ticket broker employees); *Norman v. City of Las Vegas*, 177 P.2d 442 (Nev. 1947) (fingerprinting requirement for applicants seeking employment in establishments selling alcoholic beverages); *Goodman v. Liebovitz*, 410 N.Y.S.2d 502 (Sup. Ct. 1978) (fingerprinting of potential grand jurors is constitutionally permissible); *Thom v. New York Stock Exchange*, 306 F. Supp. 1002 (S.D.N.Y. 1969), *aff’d*, *Miller v. New York Stock Exchange*, 425 F.2d 1074 (2d Cir. 1970) (fingerprinting all employees of member firms of national securities exchanges registered with Securities and Exchange Commission and employees of affiliated clearing as condition of employment is permissible).

286. See *Perkey v. Dep’t of Motor Vehicles*, 721 P.2d 50 (Cal. 1986) (en banc).

287. See *id.* at 51; see also CAL. VEH. CODE § 12800(c) (West 2023) (“Each application for an original or a renewal of a driver’s license shall contain all of the following information: . . . A legible print of the thumb or finger of the applicant.”).

288. See *Perkey*, 721 P.2d at 51.

right of personal privacy under the California Constitution.<sup>289</sup> Mandatory fingerprinting by now has become widely adopted,<sup>290</sup> but this is the first case that came to the highest court in California.

The specific context of this lawsuit was the 1974 amendment to the California Constitution, which added the right of privacy.<sup>291</sup> This was started as Proposition 11 (the Privacy Initiative) in 1972, campaigned on by politicians in the California Legislature, joined by activist groups, businesses, and eventually approved by a majority vote of all residents in California.<sup>292</sup> In the first several years immediately after the 1974 amendment, the California Supreme Court showed a strong position on the question of privacy.<sup>293</sup> However, the Court

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289. *See id.* at 52.

290. In *People v. Stuller*, the California Court of Appeal for the Fourth District noted that “[i]n California there are many non-criminal situations in which fingerprints are required of a registrant or applicant for a license.” *People v. Stuller*, 89 Cal. Rptr. 158, 166 (Ct. App. 1970). It then offered a list of areas that required fingerprinting, which included collection agencies and their employees; private detectives; humane officers; peace officers; insurance agents, brokers, and solicitors; and applicants for a license to carry a concealed weapon. *See id.* In that case, in question was a municipal ordinance that required hotel bartenders to register with the police, which included fingerprinting. *See id.* at 162. The Court ruled that the ordinance was “a valid exercise of the municipality’s police power.” *Id.* at 166.

291. Article I, section 1 reads: “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.” CAL. CONST. art. 1, § 1.

292. *See* David A. Carrillo, et al., *California Constitutional Law: Privacy*, 59 SAN DIEGO L. REV. 119, 126–33 (2022); J. Clark Kelso, *California’s Constitutional Right to Privacy*, 19 PEPP. L. REV. 327, 416–33 (1992).

293. *See, e.g.,* *White v. Davis*, 533 P.2d 222, 233 (Cal. 1975) (en banc) (“[T]he general concept of privacy relates, of course, to an enormously broad and diverse field of personal action and belief . . .”); *Valley Bank of Nevada v. Superior Court*, 542 P.2d 977, 979 (Cal. 1975) (en banc) (“A constitutional amendment adopted in 1974 elevated the right of privacy to an ‘inalienable right’ expressly protected by force of constitutional mandate. Although the amendment is new and its scope as yet is neither carefully defined nor analysed by the courts, we may safely assume that the right of privacy extends to one’s confidential financial affairs as well as to the details of one’s personal life.” (internal citation omitted)); *People v. Privitera*, 591 P.2d 919, 921 (Cal. 1979) (en banc) (“[I]f the right of privacy were implicated in this case the challenged statute would, arguably, be judged under the compelling state interest standard.”); *City of Santa Barbara v. Adamson*, 610 P.2d 436, 440 n.3 (Cal. 1980) (en banc) (noting the federal right to privacy “appears to be narrower than what the voters approved in 1972 when they added ‘privacy’ to the California Constitution.”); *Comm. to Def. Reproductive Rights v. Myers*, 625 P.2d 779, 796 (Cal. 1981) (“We therefore conclude that the protection afforded the woman’s right of procreative choice as an aspect of the right of privacy under the explicit provisions of our Constitution is at least as broad as that described in *Roe v. Wade*. Consequently, we further conclude that the asserted state’s interest in protecting a nonviable fetus is subordinate to the woman’s

switched its position back to “normal” after 1981.<sup>294</sup> Shortly before the *Perkey* case, the Court of Appeal ruled that San Francisco’s city ordinance requiring pawnbrokers to take fingerprints of their customers did not violate a right to privacy in California.<sup>295</sup> The 1986 ruling in *Perkey* was exactly such a turning point.

In its ruling in *Perkey*, the California Supreme Court followed the growing “consensus” in recognizing that “fingerprinting alone does not improperly infringe upon an individual’s right of privacy,”<sup>296</sup> and that “it does not readily offend those principles of dignity and privacy which are fundamental to our notion of due process.”<sup>297</sup> Therefore, the Court found no violation of the Fourth Amendment in the federal Constitution. Naturally, *Perkey* also raised the issue under Article I, Section 1 of the California Constitution—the collection and dissemination of fingerprints for identification use by various governmental agencies and private entities.<sup>298</sup> On that issue, the Court brushed aside the issue and ruled that,

the DMV’s dissemination of fingerprint data to third parties for purposes unrelated to motor vehicle safety is unlawful under several provisions of the Civil and Vehicle Codes. Therefore, the court need not reach the related question of whether petitioner’s privacy rights are violated by dissemination of such data.<sup>299</sup>

The *Perkey* ruling suggests that a constitutional revolution in California, by 1986, was finally tamed by the “mainstream” position among courts across the country.

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right of privacy.”). For a review of the aforementioned cases, see Kelso, *supra* note 292, at 434–42.

294. See Kelso, *supra* note 292, at 442 (“*Myers* is the last significant case from the California Supreme Court interpreting the privacy clause.”).

295. See *Miller v. Murphy*, 191 Cal. Rptr. 740, 748 (Ct. App. 1983). A few years before *Miller*, the Court of Appeal for the Third District ruled—in a case very similar to *Perkey*—that the requirement that an applicant submit to a full-face photograph in order to renew his license did not violate the applicant’s right to privacy. See *Stackler v. Dep’t of Motor Vehicles*, 164 Cal. Rptr. 203, 207 (Ct. App. 1980).

296. *Perkey v. Dep’t of Motor Vehicles*, 721 P.2d 50, 53 (Cal. 1986) (en banc).

297. *Id.*, at 53.

298. See *id.*

299. *Id.* at 53–54.

## B. DNA Litigation

In 1985, British geneticist Alec Jeffreys made the first use of the DNA (deoxyribonucleic acid) technology for identification purposes.<sup>300</sup> In the United States, courts across the country embraced the technology with enthusiasm.<sup>301</sup> The analogy with fingerprint identification is reflected in the title of an article in the *ABA Journal*, calling it the “new fingerprint.”<sup>302</sup>

### 1. DNA from Convicted Felons

In April 1990, the General Assembly in Virginia enacted a law requiring all convicted felons to have a sample of their blood taken for DNA analysis to determine identification characteristics specific to the person.<sup>303</sup> It also authorizes that the identification characteristics of the profile resulting from the DNA analysis be stored and maintained by the Bureau in a DNA data bank.<sup>304</sup> In October 1990, Lawrence Jones, a convicted felon, filed a suit in *Jones v. Murray* to challenge the constitutionality of the law under the Fourth Amendment.<sup>305</sup> The federal court for the Western District of Virginia largely relied on the “special needs” theory derived from earlier Supreme Court cases on blood testing and urine testing,<sup>306</sup> and held that “this Court believes

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300. See COLE, *supra* note 166, at 291.

301. For a discussion on how courts responded to the introduction of DNA technology, see generally Laurel Beeler & William R. Wiebe, Comment, *DNA Identification Tests and the Courts*, 63 WASH. L. REV. 903 (1988); Debra Cassens Moss, *DNA - The New Fingerprints*, 74 A.B.A. J. 66 (1988); D. H. Kaye, *The Admissibility of DNA Testing*, 13 CARDOZO L. REV. 353 (1991); David H. Kaye, *DNA Evidence: Probability, Population Genetics, and the Courts*, 7 HARV. J. L. & TECH. 101 (1993).

302. Moss, *supra* note 301, at 66.

303. See Act of April 9, 1990, Ch. 669, 1990 Va. Acts 999 (1990) (codified as amended at VA. CODE ANN. § 19.2-310.2).

304. See *id.* at 1000.

305. See *Jones v. Murray*, 763 F. Supp. 842 (W.D. Va. 1991), *aff'd in part, rev'd in part*, 962 F.2d 302 (4th Cir. 1992), *cert. denied*, 506 U.S. 977 (1992).

306. See *Schmerber v. California*, 384 U.S. 757, 771–72 (1966) (holding that compulsory blood test without a search warrant was justified by the need to secure evidence of blood-alcohol content); *Skinner v. Ry. Labor Exec. Ass'n*, 489 U.S. 602, 620 (1989) (holding that drug and alcohol test based on blood and urine samples from railroad employees was justified by the “special needs” of the federal government); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 666 (1989) (holding that required urinalysis test for drug content on United States Customs Service employees was reasonable under the Fourth Amendment because it served “special government needs”); *Griffin v. Wisconsin*, 483 U.S. 868, 872–73 (1987) (holding that probation officer’s search of probationer’s home was reasonable under the Fourth Amendment because it was conducted following a state regulation in response to a “special need”

the establishment of a data bank can be classified as a *special need* even if the data bank will be used in solving future crimes.”<sup>307</sup> The next step was to do a balancing test to consider the extent of intrusion of privacy in relation to the significance of the State interest. On this issue, the federal court adopted a position that would be repeated again and again in subsequent court rulings, finding “[t]he State undoubtedly performs a search in extracting plaintiffs’ blood. Yet, this search is minimal.”<sup>308</sup> On this point, the court found the analogy with fingerprint helpful by citing and discussing *Davis v. Mississippi*, and then it made inferences from the fingerprint jurisprudence and applied those to the DNA case.<sup>309</sup> The court concluded that “[t]o the extent that the DNA analysis reveals identification characteristics, the Court believes the plaintiffs indicate no legitimate expectation of privacy.”<sup>310</sup>

On appeal, the Fourth Circuit affirmed the district court’s ruling on the Fourth Amendment.<sup>311</sup> In its opinion, the Fourth Circuit found the analogy with fingerprinting more persuasive and thus gave fingerprinting more prominence in its reasoning.<sup>312</sup> It acknowledged that taking blood samples “may be considered a greater intrusion than fingerprinting,”<sup>313</sup> however, relying on the Supreme Court’s blood test cases, the Fourth Circuit concluded that the intrusion is “not significant.”<sup>314</sup> Noting that the governmental justification for DNA testing “relie[d] on no argument different in kind from that traditionally advanced for taking fingerprints and photographs,”<sup>315</sup> the Fourth Circuit

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of the state probation system). For commentaries of the special-needs doctrine, see generally Jennifer Y. Buffalo, Note, “*Special Needs*” and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule, 32 HARV. C.R.-C.L. REV. 529 (1997); Jennifer E. Smiley, Comment, *Rethinking the Special Needs Doctrine: Suspicionless Drug Testing of High School Students and the Narrowing of Fourth Amendment Protections*, 95 NW. U. L. REV. 811 (2001).

307. *Jones*, 763 F. Supp. at 845 (emphasis added).

308. *Id.* at 847.

309. *See id.* at 847–48 (“Similarly [to fingerprinting] . . . the only characteristics available for use by the government are the DNA’s identification characteristics.” (emphasis added)).

310. *Id.* at 849.

311. *See Jones v. Murray*, 962 F.2d 302, 308 (4th Cir. 1992).

312. *See id.* at 306–07 (“As with fingerprinting, therefore, we find that the Fourth Amendment does not require an additional finding of individualized suspicion before blood can be taken from incarcerated felons for the purpose of identifying them.”).

313. *Id.* at 307.

314. *Id.*

315. *Id.*

found it convincing, even “with additional force because of the potentially greater precision of DNA sampling and matching methods.”<sup>316</sup> Eight years later, in 2000, when the same question was raised in front of the Supreme Court of Virginia, the Court fully embraced the Fourth Circuit’s position holding that the DNA statute did not violate the State Constitution either.<sup>317</sup>

## 2. DNA from All Arrestees

Other states enacted similar laws.<sup>318</sup> However, the “special needs” did not stand still—they were expanding. In 2002, the Virginia legislature amended the DNA statute,<sup>319</sup> requiring DNA samples from every person arrested for a violent felony.<sup>320</sup> Like Virginia, the Maryland DNA Collection Act, first enacted in 1994,<sup>321</sup> expanded the

316. *Id.*

317. See *Johnson v. Virginia*, 529 S.E.2d 769, 779 (Va. 2000) (“We agree with this conclusion [of the Fourth Circuit in *Jones v. Murray*] and hold that it is equally applicable to the guarantee against unreasonable searches and seizures set forth in Article I, Section 10 of the Constitution of Virginia.”).

318. See, e.g., *State v. Olivas*, 856 P.2d 1076, 1081–86 (Wash. 1993) (en banc) (finding that Washington’s Statute—requiring warrantless involuntary DNA tests of convicted offenders—does not violate the Fourth Amendment).

319. See An Act to amend and reenact §§ 19.2-310.2, 19.2-310.4, 19.2-310.5 and 19.2-310.7 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 19.2-310.2:1 and 19.2-310.3:1, relating to DNA analysis for persons arrested for a violent felony, ch. 753, 2002 Va. Acts 1258 (2002).

320. Virginia Code § 19.2-310.2:1 (2003) provides, “Every person arrested for a violent felony as defined in § 19.2-297.1 or a violation of §§ 18.2-89, 18.2-90, 18.2-91, or § 18.2-92, shall have a sample of his saliva or tissue taken for DNA (deoxyribonucleic acid) analysis to determine identification characteristics specific to the person. After a determination by a magistrate that probable cause exists for the arrest, a sample shall be taken prior to the person’s release from custody.” *Id.* The Supreme Court of Virginia had no problem in holding that this section did not violate the Virginia Constitution in *Anderson v. Commonwealth of Virginia*. See *Anderson v. Virginia*, 650 S.E.2d 702, 704–05 (Va. 2007).

For commentaries, see generally, Tracey Maclin, *Is Obtaining an Arrestee’s DNA a Valid Special Needs Search under the Fourth Amendment—What Should (and Will) the Supreme Court Do*, 34 J.L. MED. & ETHICS 165 (2006); D. H. Kaye, *Who Needs Special Needs—On the Constitutionality of Collecting DNA and Other Biometric Data from Arrestees*, 34 J.L. MED. & ETHICS 188 (2006); David H. Kaye, *A Fourth Amendment Theory for Arrestee DNA and Other Biometric Databases*, 15 U. PA. J. CONST. L. 1095 (2013); D. H. Kaye, *The Constitutionality of DNA Sampling on Arrest*, 10 CORNELL J. L. & PUB. POL’Y 455 (2001).

321. See An Act Concerning State Police – Statewide DNA Base System and Repository, ch. 458, 1994 Md. Laws 2185 (codified as amended at MD. CODE ANN., PUBLIC SAFETY § 2-504) (formally cited as MD. CODE Art. 88B, § 12A). In 2004, the Court of Appeals of Maryland upheld the constitutionality of the DNA statute in *State of Maryland v. Raines*. See *Maryland v. Raines*, 857 A.2d 19, 25 (Md. 2004).



authority in 2008 to collect DNA samples from arrestees who are charged for crimes of violence or burglary.<sup>322</sup> In 2012, a constitutional challenge of the Act was brought to the Maryland Court of Appeals.<sup>323</sup> The Court, after meticulous analysis of cases across the United States, concluded that by allowing DNA collection from persons arrested, but not yet convicted, the Maryland law “is unconstitutional, under the Fourth Amendment totality of the circumstances balancing test.”<sup>324</sup> The most crucial factor, according to the Maryland Court, was the presumption of innocence for an arrestee,<sup>325</sup> which led to a different expectation of privacy compared to that of a convicted felon:

Although arrestees do not have all the expectations of privacy enjoyed by the general public, the presumption of innocence bestows on them greater protections than convicted felons, parolees, or probationers. A judicial determination of criminality, conducted properly, changes drastically an individual’s reasonable expectation of privacy.<sup>326</sup>

For the Maryland Court, this factor tipped the balance in favor of the arrestee. A related factor reinforced this inclination. The Maryland Court rejected the analogy of DNA data with fingerprint data.<sup>327</sup> The information derived from a fingerprint “is related only to physical characteristics and can be used to identify a person, but no more.”<sup>328</sup> However, a DNA sample “contains . . . much more than a person’s identity.”<sup>329</sup> Here, the Maryland Court departed from the approach that

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322. See An Act Concerning Public Safety – Statewide DNA Data Base System – Crimes of Violence and Burglary – Sample Collections on Charge – Postconviction DNA Testing, ch. 337, 2008 Md. Laws 3221 (codified as amended in MD CODE ANN., PUBLIC SAFETY, § 2-504(a)(3)(i)). Section 2-504(a)(3)(i) provides: “In accordance with regulations adopted under this subtitle, a DNA sample shall be collected from an individual who is charged with: 1. a crime of violence or an attempt to commit a crime of violence; or 2. burglary or an attempt to commit burglary.” § 2-504(a)(3)(i).

323. See *King v. Maryland*, 42 A.3d 549 (Md. 2012), *rev’d*, 569 U.S. 435 (2013).

324. *Id.* at 556.

325. See *id.* at 563 (“At the heart of this debate (and the present case) is the presumption of innocence cloaking arrestees and whether legitimate government interests outweigh the rights of a person who has not been adjudicated guilty of the charged crime, and is somewhere closer along the continuum to a person who is not charged with a crime than he or she is to someone convicted of a crime.”).

326. *Id.* at 577.

327. See *id.* at 576 (“We do not embrace wholly the analogy between fingerprints and DNA samples advanced . . . by the State in the present case.”).

328. *Id.* at 576–77.

329. *Id.* at 577.

focused on the physical intrusion aspects, and shifted the focus to the kind of information revealed by the intrusion. Because of this, the Maryland Court determined that “[w]hile the physical intrusion of a buccal swab is deemed minimal, it remains distinct from a fingerprint.”<sup>330</sup>

Three months after the Maryland ruling, the United States Supreme Court granted certiorari.<sup>331</sup> In June 2013, a divided Supreme Court reversed the Maryland ruling.<sup>332</sup> This is the first U.S. Supreme Court ruling on DNA data collection, and so far (as of December 2022), the only one. The Supreme Court shifted the focus back to the physical intrusion, as it “is of central relevance to determining” whether the search is reasonable.<sup>333</sup> The majority found the analogy with fingerprint essential stating, at its final conclusion:

When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee’s DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment.<sup>334</sup>

The majority noted that there were differences between cheek swab and fingerprinting, but “[t]he additional intrusion upon the arrestee’s privacy beyond that associated with fingerprinting is not significant.”<sup>335</sup>

The dissenting opinion was unusual—it was Justice Scalia’s, joined by Justices Ginsburg, Sotomayor, and Kagan.<sup>336</sup> The dissenting opinion rejected the majority’s principal argument that the DNA was for identification purposes.<sup>337</sup> Interestingly, the dissenting opinion

330. *Id.* at 576.

331. *See* *Maryland v. King*, 567 U.S. 1301, 1304 (2012).

332. *See* *Maryland v. King*, 569 U.S. 435, 466 (2013) (5-4 decision). By the time the lawsuit was in front of the Supreme Court, twenty-eight States and the Federal Government had adopted laws similar to the Maryland Act authorizing the collection of DNA from arrestees. *See* Brief for States of California et al. as Amici Curiae Supporting Petitioner, No. 12-207, Jan. 2, 2013, 2013 WL 98697 (U.S.) (Appellate Brief).

333. *King*, 569 U.S. at 446.

334. *Id.* at 465–66.

335. *Id.* at 459.

336. *See id.* at 466–82 (Scalia, J., dissenting).

337. *See id.* at 472 (“The truth is, known to Maryland and increasingly to the reader: this search had nothing to do with establishing King’s identity.”). After a long discussion, Justice Scalia came to his conclusion: “it is safe to say that if the Court’s identification theory is not wrong, there is no such thing as error.” *Id.* at 476.

also considered the analogy with fingerprint “inapposite.”<sup>338</sup> It rejected the majority’s narrative of fingerprinting as well:

As fingerprint databases expanded from convicted criminals, to arrestees, to civil servants, to immigrants, to everyone with a driver’s license, Americans simply “became accustomed to having our fingerprints on file in some government database.” But it is wrong to suggest that this was uncontroversial at the time, or that this Court blessed universal fingerprinting for “generations” before it was possible to use it effectively for identification.<sup>339</sup>

Many commentators would agree with the dissenting opinion.<sup>340</sup> State courts soon followed and changed their positions.<sup>341</sup> In the following ten years, the Supreme Court has not revisited the issue, nor has there been shown any sign of a fundamental change of its position.<sup>342</sup> The decision in *Maryland v. King* and the majority’s interest in claiming continuity with fingerprint jurisprudence is not merely convenient for the majority. It also shows a striking consistency in the judiciary’s mentality in a span of a century in the history of America.

#### IV. FINGERPRINT AND DNA LITIGATION IN JAPAN

Unlike the doctrinal lock-in in America, fingerprint and DNA litigation in Japan went through a slow but decisive doctrinal transformation—the gradual recognition of privacy in fingerprint and DNA data under Article 13. If liberal constitutional law scholars in Japan

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338. *Id.* at 476.

339. *Id.* at 479 (citations omitted).

340. See generally Tracey Maclin, *Government Analysis of Shed DNA Is a Search under the Fourth Amendment*, 48 TEX. TECH L. REV. 287 (2015); David H. Kaye, *Why So Contrived—Fourth Amendment Balancing, Per Se Rules, and DNA Databases after Maryland v. King*, 104 J. CRIM. L. & CRIMINOLOGY 535 (2014); Natalie Ram, *DNA by the Entirety*, 115 COLUM. L. REV. 873 (2015).

341. After the Supreme Court ruling in *Maryland v. King*, Alonzo King, Jr. filed another suit based on the Maryland State Constitution, in which the Maryland Court of Appeals ruled that the DNA statute did not violate State constitution, following the Supreme Court’s jurisprudence. See *King v. Maryland*, 76 A.3d 1035, 1041–42 (Md. 2013). Similarly, the Supreme Court of California found that the California DNA statute, which is similar to that in Maryland, did not violate the State constitution. See *People v. Buza*, 413 P.3d 1132, 1150–51 (Cal. 2018).

342. In *Riley v. California*, 573 U.S. 373 (2014), the Supreme Court set certain limits to the search incident upon arrest. In *Birchfield v. North Dakota*, 579 U.S. 438 (2016), the Court ruled that the Fourth Amendment does not permit warrantless blood tests incident to arrests for drunk driving. However, neither case showed any interest of revisiting the issue in *Maryland v. King*.

have finished conceptual groundwork on Article 13 by the mid of 1980s, as shown in Part II, it was the Zainichi Koreans that pushed through in the 1990s and accomplished the transformation through their legal and political actions—the Civil Rights movement in Japan. This Part aims to show that it was national politics, through the agency of Zainichi Koreans assisted by civic groups, the bar, and the smaller political parties, as well as international politics, put enough pressure on a conservative judiciary to accomplish this transformation.

#### A. Introduction of Fingerprint to Japan

Henry Faulds, is a British missionary who lived in Japan from 1874 to 1886, where he discovered fingerprinting and the value of it as an identification tool.<sup>343</sup> Japan dispatched a delegation to the National Prison Association meeting at Quincy, Illinois, on October 17, 1904.<sup>344</sup> Shigema Ōba (大場茂馬), formerly a judge at Kobe and Nagoya then studied in Germany at the University of Munich in 1905–1908, and he became interested in fingerprinting. In 1907, Kiichiro Hiranuma (平沼騏一郎), an official from Japan’s Ministry of Justice, was on trip in Europe to study the penal system, where he met with Ōba and encouraged him to study fingerprinting. With Ōba’s assistance, Hiranuma led the efforts in the Ministry of Justice in October 1908 to issue a directive,<sup>345</sup> requiring fingerprinting in all prisons across Japan.<sup>346</sup> In April 1911, the Tokyo Metropolitan Police set up its Fingerprint Bureau and began fingerprinting all criminal suspects.<sup>347</sup> According to Shinzo Uno, the policy of taking fingerprints was rather liberal, with no limitation to convicted criminals:

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343. See COLE, *supra* note 166, at 98; *Fingerprints on Earthenware Pots Led to Development of Dactylography in Japan*, 19 JAPAN REP. 5, 5 (Jul. 1, 1973); Ian Nish, *Henry Faulds, 1843–1930*, in 4 BRITAIN AND JAPAN: BIOGRAPHICAL PORTRAITS 196 (Hugh Cortazzi 1994).

344. See M. W. McClaughry, *History of the Introduction of the Bertillon System into the United States*, 3 FINGER PRINT MAG. 3, 4 (Apr. 1922).

345. See YUNDARU KIM, NIHON NO SHIMON SEIDO [FINGERPRINTING IN JAPAN] 64 (1987).

346. The leading role that Kiichiro Hiranuma played at the Ministry of Justice on introducing finger-printing in Japan is fully credited in a report in May 1925 by the Japanese delegation to the International Police Conference in New York City. See Shinzo Uno, *A Brief History of the Fingerprint System as Obtained at Present in Japan*, in PROCEEDINGS OF THE 1925 MEETING OF THE INTERNATIONAL POLICE CONFERENCE 166, 166–69 (1925).

347. See Asako Takano, *Biometric Technologies and Mobilities: Controlling Workers and Citizens in Manchukuo*, in DOCUMENTING MOBILITY IN THE JAPANESE EMPIRE AND BEYOND 189, 196 (Takahiro Yamamoto ed. 2022); CHARLES EXLEY, SATŌ HARUO AND

Fingerprints of those whom it was deemed necessary out of all who were either arrested on criminal charges or sentenced to detention by the Criminal Case Section of the Office or by the various police stations under its jurisdiction were taken.<sup>348</sup>

In 1912, Hiranuma became the Attorney General (検事總長) and held that position for almost ten years.<sup>349</sup> Among his contemporaries, Hiranuma was known as ruthless prosecutor—the English language journal *Japan Magazine* described him in 1918 as “the terror of criminals and scandal-mongers and grafters of every description.”<sup>350</sup> By August 1923, the police departments in Osaka and Fukuoka also started taking fingerprints.<sup>351</sup> In May 1925, at the International Police Conference, the Japanese delegation led by Shinzo Uno even showed a film on police work during the Tokyo earthquake.<sup>352</sup>

Another leader is Masahiro Ōta (太田政弘, 1871–1951), who studied fingerprint identification in Germany and became superintendent of the police in the Home Department.

#### B. Japan’s Civil Rights Movement

Fingerprinting was introduced by two pieces of legislation in the early 1950s. The first was the Immigration Control and Refugee Recognition Act (1951).<sup>353</sup>

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MODERN JAPANESE LITERATURE 80 (2016). For more information about the evolution of fingerprinting technology in Japan, see generally ASAKO TAKANO, SHIMON TO KINDAI—IDŌ SURU KARADA NO KANRI TO TŌCHI NO GIHŌ [FINGERPRINTING AND MODERNITY: MANAGEMENT OF MOVING BODIES AND THE TECHNIQUE OF CONTROL] (2016); Isaac C. K. Tan, *Science and Empire: Tracing the Imprint of Dactylography in Manchuria, 1924–1945*, 32 JAPAN F. 531 (2020).

348. Uno, *supra* note 346, at 167.

349. See *Hiranuma kiichirō* [Kiichiro Hiranuma], REKISHI GA NEMURU TAMA REIEN [TAMA CEMETARY WHERE HISTORY SLEEPS], [http://www6.plala.or.jp/guti/cemetery/PERSON/H/hiranuma\\_k.html](http://www6.plala.or.jp/guti/cemetery/PERSON/H/hiranuma_k.html) (last visited Aug. 2, 2023) (providing biographical information for Hiranuma).

350. M. Moriyama, *The Hiranumas*, 9 JAPAN MAG. 273 (1918) (discussing Kiichiro Hiranuma and his brother Yoshiro Hiranuma, a law professor at Waseda University). The article further stated: “The merciless manner in which [Kiichiro Hiranuma] hunts them to their lairs is the talk of the country. His zeal in unearthing crime and exposing all forms of dishonesty and deceit is well known to all.” *Id.*

351. See Uno, *supra* note 346, at 168.

352. See *War Without End*, TIME, MAY 25, 1925, at 5 (reporting on the International Police Conference held in New York City, N.Y., May 12–16, 1925).

353. See *Shutsunukoko Kanri Osobi Ho* [Immigration Control and Refugee Recognition Act], Cabinet Order No. 319 of 1951 (Japan).

### 1. Fingerprinting Refusal Movement

In the refusal movement, Zainichi Koreans had their support groups, including the Korean Christian Church in Japan (KCCJ, 在日大韓基督教会) as well as youth and women groups that organized public gatherings and protests.<sup>354</sup> On January 15, 1985, KCCJ organized a public gathering in Tokyo, announcing 892 of their church members joined the refusal movement.<sup>355</sup> They also enjoyed broader support from the Japanese society. On February 23, 1985, Saburō Ito (伊藤三郎), mayor of Kawasaki, declared that he would not report those who took part in the refusal movement.<sup>356</sup> In October 1985, the Japan Federation of Bar Associations (JFBA) issued a statement denouncing the fingerprint requirement.<sup>357</sup> It specifically declared that the measure had violated the privacy right under Article 13, which protected the fundamental human right of controlling one's own information.<sup>358</sup> *Asahi Shimbun*, the liberal national newspaper, covered the political actions of the Zainichi Koreans. On May 3, 1987, the Constitution Day, *Asahi's* Osaka-Kobe Bureau was attacked by the right-wing extremists and two journalists were killed.<sup>359</sup> A generation of historians brought a critical examination of Japan's colonial history. Historian Bunmei Sato (佐藤文明1948–2011), authored a key book *Historical Examination of Koseki*, published in 1988.<sup>360</sup> Another book was by Yuichi Higuichi (樋口雄一1940–), in a study of *Kyowakai* (協和会, literally “harmony society”), an association forced upon the Korean residents in

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354. See *Refusing to Be Fingerprinted II*, *supra* note 157, at 18.

355. See *id.*

356. See Junichi Tsukajima, *Kawasaki no zainichikankoku Chōsen hito ni miru tabunkakyōsei hatten no gendai-shi-teki kōsatsu: Omoni minzoku sabetsu to tatakau shimin undō no shiten kara* [A Historical Examination of Kawasaki in the Development of Multicultural Symbiosis Seen from Koreans in Japan: Perspectives from the Viewpoint of Citizen Movement (Mintouren Movement) against Ethnic Discrimination] 168 (Sept. 15, 2019) (Ph.D. Dissertation, Hosei University).

357. See *Gaikoku hito ni taisuru shimon ōnatsu seido ni kansuru ketsugi* [Resolution on Fingerprinting System for Foreigners], NIHONBENGOSHIRENGŌKAI [JAPAN FEDERATION OF BAR ASSOCIATIONS] (Oct. 19, 1985), [https://www.nichibenren.or.jp/document/civil\\_liberties/year/1985/1985\\_4.html](https://www.nichibenren.or.jp/document/civil_liberties/year/1985/1985_4.html).

358. See *id.*

359. See *Asahi Shimbun*, *Tokushū Hanshin shikyoku shūgeki jiken 30-nen o koete* [Special Edition: Hanshin Branch Office Attack Incident, After 30 Years], ASAHI.COM, <https://www.asahi.com/top-ics/word/%E6%9C%9D%E6%97%A5%E6%96%B0%E8%81%9E%E9%98%AA%E7%A5%9E%E6%94%AF%E5%B1%80%E8%A5%B2%E6%92%83%E4%BA%8B%E4%BB%B6.html> (last visited Aug. 29, 2023).

360. See Bunmei Sato, *KOSEKI URAGAE SHIKO* [A HISTORICAL EXAMINATION OF KOSEKI] (1988).

Japan during World War II.<sup>361</sup> In 1991, Hiroshi Tanaka (田中宏, 1937–), another author and activist, published a book on *zainichi* foreigners in post-War Japan.<sup>362</sup>

Also at play in the mid of these domestic demands was international pressure.<sup>363</sup> Pressed by civic groups such as the Japanese Civil Liberties Union, the bar, Japan ratified major international human rights covenants in 1979, and in 1982, the Refugee Convention.<sup>364</sup> In September 1984, South Korean President Chun Doo-hwan took the opportunity of his visit to Japan to urge abolishing the fingerprint requirement.<sup>365</sup> In the coming years, the fingerprint requirement became a focal point in the diplomacy with South Korean.

In 1982, the Japanese government's response to the refusal movement was a crackdown. On October 26, 1982, the Minister of Justice decided that as a matter of policy, those who refused fingerprinting would be denied re-entry, regardless of their status of residence, even if they have permanent resident status.<sup>366</sup> About one month later, on November 30, an American citizen, originally from Pittsburg, Pennsylvania, was denied a re-entry permit because he refused to submit fingerprints.<sup>367</sup> The Tokyo District Court upheld the decision, finding no violation of the Constitution, nor statutory law.<sup>368</sup> A more dramatic case was Choi Sun Ae (崔善愛, チェソンエ), whose re-entry permit was denied on June 24, 1986, because of her refusal to submit

361. See Yuichi Higuchi, *KYŌWAKAI: SENJIKI CHOSENJIN TO SEI SOSHIKI NO KENKYŪ* [KYŌWAKAI: STUDY OF A CONTROL ORGANIZATION FOR THE KOREANS DURING THE WAR] (1986).

362. See Hiroshi Tanaka, *ZAINICHI GAIKOKUJIN: HŌ NO KABE, KOKORO NO MIZO* [FOREIGNERS IN JAPAN: LEGAL BARRIERS AND BROKEN HEARTS] (1991).

363. See Gurowitz, *supra* note 155, at 434. Yasuhiko Saito, *Japan and Human Rights Covenants*, 2 *Human Rights Law Journal* 88, 88–90 (1981); Kenneth L. Port, *The Japanese International Law Revolution: International Human Rights Law and Its Impact in Japan*, 28 *STAN. J. INT'L L.* 139, 150–52 (1991). For more information on the human rights movements in Japan, see generally *THE CHALLENGE OF JAPAN'S INTERNATIONALIZATION* (Hiroshi Mannari & Harumi Befu eds. 1983); *THE INTERNATIONALIZATION OF JAPAN* (Glenn D. Hook & Michael A. Weiner eds. 1992). Yuji Iwasawa, *Legal Treatment of Koreans in Japan: The Impact of International Human Rights Law on Japanese Law*, 8 *HUMAN RIGHTS Q.* 131 (1986).

364. See Gurowitz, *supra* note 155, at 428–29.

365. See Evelyn Colbert, *Japan and the Republic of Korea: Yesterday, Today, and Tomorrow*, 26 *ASIAN SURVEY* 273, 275 (1986).

366. This policy was revealed and used as reference in a District Court case. See *Tokyo Chisai* [Tokyo District Ct.], Mar. 26, 1986, Showa 57 (row c) no. 195, 590 *HANREI JIHŌ* [HANJI] 32 (Japan); see also TANAKA, *supra* note 362, at 89.

367. See *Tokyo Chisai* [Tokyo District Ct.], Mar. 26, 1986, 1189 *HANREI JIHŌ* [HANJI] 23 (Japan), *aff'd on appeal*, *Tokyo Kōsai* [Tokyo High Ct.] Sept. 29, 1988, 689 *HANREI JIHŌ* [HANJI] 281.

368. See *id.*

her fingerprints.<sup>369</sup> Choi, a third-generation Zainichi Korean, planned to study abroad in the United States at Indiana University. Choi filed a suit at the Fukuoka District Court and raised issues under the Constitution and international law. The District Court ruled against Choi in September 1989.<sup>370</sup> At trial, it was noted that Choi had refused fingerprinting earlier, on January 9, 1981; but the Ministry nevertheless had granted her the re-entry permit on April sixth. The Fukuoka District Court assessed Choi's arguments based on Article 13, but it downplayed the privacy concern by insisting that fingerprints did not tell a person's private life, like a person's desires, feelings or faith. The Court recognized that fingerprinting may cause certain mental anxiety because it is often associated with crimes and criminal investigation; however, it is permitted by the Constitution as it is justified by public interest (公共の福祉).<sup>371</sup>

## 2. The Constitution

Choi's argument in her case showed an increased effort to frame the fingerprint as a privacy issue at the end of 1980s.<sup>372</sup> In July 1989, Article 13 of the Constitution was raised in front of the Tokyo High Court, but the Court avoided the issue by ruling the case on procedural matters.<sup>373</sup> In November 1992, in the Kathleen Morikawa case of the American citizen who refused to take fingerprint, the Supreme Court of Japan also avoided the Article 13 issue.<sup>374</sup> A loosening of the

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369. See Fukuoka Chisai [Fukuoka Dist. Ct.] Sept. 29, 1989, Showa 61 (row c) no. 15, 1330 HANREI JIHŌ [HANJI] 15 (Japan).

370. See *id.*

371. On appeal, the Fukuoka High Court vacated the District Court's ruling on re-entry permit on the theory that the Minister abused his discretion. See Fukuoka Chisai [Fukuoka High Ct.] May 13, 1994, Heisei 1 (line Ke) no. 7, 855 HANREI TAIMUZU [HANTA] 150 (Japan), *aff'd*, Saikōsaibansho [Sup. Ct.] Apr. 10, 1998, Heisei 6 (row) no. 153, 52 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 776; see also *Supreme Court Dismisses Korean's Fingerprint Refusal Case*, JAPAN TIMES (Apr. 10, 1998), <https://www.japantimes.co.jp/news/1998/04/10/national/supreme-court-dismisses-koreans-fingerprint-refusal-case/> [<https://perma.cc/E84T-ZKU5>] (discussing case).

372. See generally Kikuo Kakaie, *Shimon ōnatsu seido o meguru giron e no jakkan no gimon* [Several Questions in the Debates on Fingerprinting System] 4 Kenpō ronsō [CONST. REV.] 1 (1997) (reviewing court cases from 1984 to the 1995 Supreme Court decision).

373. See Tōkyō Kōsai [Tokyo High Ct.] July 6, 1989, 1320 HANREI JIHŌ [HANJI] 165 (Japan).

374. See Saikōsaibansho [Sup. Ct.] Nov. 16, 1992, 166 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 575 (Japan). The Kathleen Morikawa case was brought to the Yokohama District Court in June 1984, three months before the Han Jong-Suk ruling.



position finally came in December 1995, when the Supreme Court of Japan ruled that the privacy right under Article 13 of the Constitution covered fingerprinting.<sup>375</sup> In this case, Japanese American missionary Ron Fujiyoshi, a resident of Hawaii, had moved to Japan and stayed in Kobe since 1981. The Supreme Court stated:

Article 13 of the Constitution protects citizens' liberty in their private life when state power is exercised. As an individual's liberty in private life, anyone should have the freedom from being forced to fingerprinted. Without justifications, government agency cannot take fingerprint by force, contrary to the same article of the Constitution. Such guarantee of liberty equally extends to foreigners on Japan's soil.<sup>376</sup>

The Supreme Court's recognition was a moderate step forward in opening the door for privacy to come into play in fingerprinting cases. In Fujiyoshi's case, however, the Court found, despite the recognized privacy interest, "public welfare" (公共の福祉) still set limits on how far the privacy interest could reach.<sup>377</sup>

### C. Fingerprint, DNA Data and Privacy

#### 1. The Bar

Shortly after Japan's Supreme Court's ruling in the Fujiyoshi case in 1995, the Japan Federation of Bar Associations (JFBA) noted the issue of expungement of fingerprints and photographs. On September 17, 1997, it publicized a petition to county police department chiefs, National Police Agency Commissioner, Minister of Justice, the Senate and the House Leaders,<sup>378</sup> urging them to expunge the fingerprints and photograph records of the accused after acquittal. If not

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*See id.*; *see also supra* notes 346–50 and accompanying text (discussing Han Jong-Suk ruling). Article 13 of the Constitution was raised by defense counsel at the trial court, but it was dismissed. *See* Urata & Kimijima, *supra* note 155, at 80.

375. *See* Saikōsaibansho [Sup. Ct.] Dec. 15, 1995, 49 SAIKŌ SAIBANSHO MINJI HANREISHŪ [KEISHŪ] 842 (Japan).

376. *Id.*

377. *See* Beer, *The Public Welfare Standard*, *supra* note 117, at 1097.

378. *See* Muzai kakutei-sha shimon shashin haiki jinken kyūsai mōshitate jiken (*keikoku kankoku*) [*Petition Concerning Cases of the Accused Applying for Expungement of Their Fingerprints and Photographs after Acquittal*], NIHON BENGOSHI RENGOKAI [JAPANESE FED'N OF BAR ASS'NS] (Sept. 17, 1997), [https://www.nichibenren.or.jp/document/complaint/year/1997/1997\\_4.html](https://www.nichibenren.or.jp/document/complaint/year/1997/1997_4.html).

expunged, the JFBA stated, it would be illegal for the police to keep fingerprints and photographs of the accused. It also urged the Senate and the House to enact a law to clarify this issue.<sup>379</sup>

The petition, however, met with complete silence.<sup>380</sup> Ten years later, in December 2007, JFBA issued another public statement on collection, retention, use, and expungement of DNA data.<sup>381</sup> Specifically, JFBA called for clear rules that would require expungement when the accused is acquitted, or the prosecution is dismissed, or when prosecution is dropped after the accused is cleared of suspicion, or the data is illegally obtained.<sup>382</sup>

Several incidents happened in this period. Exactly one year after JFBA's opinion, on November 13, 2008, Shibuya (渋谷) police came to clear up the homeless camps in the Shibuya Station area and the Miyashita Park (宮下公園).<sup>383</sup> According to the lawyers, the police took photographs and fingerprints from all the homeless people in the area. In a public statement, lawyers representing the homeless demanded that the police destroy the personal data collected in this raid.<sup>384</sup> Another incident happened on November 24, 2008,<sup>385</sup> when a Manseibashi (万世橋) police officer demanded to check petitioner's leather bag while he was walking in Akihabara (秋葉原) area. After petitioner handed the officer the bag, a Swiss Army multitool knife was found in the bag. The officer said the blade was longer than standard. Petitioner followed the officer to the Akihabara Kōban—a police

379. *See id.*

380. *See* Yuusuke Honda, *Keisatsu saishu shimon Beikoku ni teikyō jishhi hōan ga Shūin tsūka* [Fingerprints Collected by Police to be Shared with the U.S., Implementing Law Passed by the Senate], Akahata [RED FLAG] (Apr. 21, 2014), [https://www.jcp.or.jp/akahata/aik14/2014-04-21/2014042101\\_03\\_1.html](https://www.jcp.or.jp/akahata/aik14/2014-04-21/2014042101_03_1.html).

381. *See generally* NIHON BENGOSHI RENGOKAI [JAPANESE FED'N OF BAR ASS'NS], KEISATSUCHŌ DIENUĒ-GATA DĒTABĒSU SHISUTEMU NI KANSURU IKEN-SHO [OPINION ON THE NATIONAL POLICE AGENCY'S DNA DATABASE SYSTEM] (2007), <https://www.nichibenren.or.jp/en/document/opinionpapers/20071221.html> [<https://perma.cc/D6QR-QMHD>] [hereinafter JFBA OPINION 2007].

382. *See id.* at 2.

383. *See generally* HŌMURESU SŌGŌ SŌDAN NETTOWĀKU [HOMELESS SUPPORT NETWORK], SHIBUYAKEISATSUSHO NI YORU NOJUKU SEIKATSU-SHA E NO SHIMON SAISHU SHASHIN SATSUEI KŌI NI TAISURU IKEN-SHO [OPINION ON SHIBUYA POLICE'S TAKING OF FINGERPRINTS AND PHOTOGRAPHS OF CAMPERS] (2008) <http://www.news-pj.net/old/request/pdf/2008/ikensho-20081218.pdf> [<https://perma.cc/NVX8-BGV4>] (discussing this incident).

384. *See id.* at 4.

385. Facts of this case was in a statement by Yūtarō Kikuchi who is the chairman of the Tokyo Bar Association. *See* YŪTARŌ KIKUCHI, TOKYO BAR ASS'N, JINKEN SHINGAI KYŪSAI MŌSHITATE JIKEN NI TSUITE (KEIKOKU) [HUMAN RIGHTS VIOLATION INCIDENT PETITION], (Mar. 18, 2014), <https://www.toben.or.jp/message/20140318.pdf> [<https://perma.cc/VTN6-2YCK>].

office—and then was taken to the Manseibashi police station, where photograph and fingerprint identification were taken by force. Two months after, on January 27, 2009, a prosecutor decided to drop the case.<sup>386</sup> Lawyers who represented the petitioner called the taking of fingerprints an illegal search.

Similar incidents happened outside the Tokyo metropolitan area as well. In Fukuoka (福岡), on September 18, 2008, after a homicide was discovered in the Odo Park (小戸公園), Fukuoka police came to the park and, without warrant, took fingerprints, thumbprints, and DNA samples from eleven of the campers.<sup>387</sup> The Fukuoka Bar Association and Fukuoka Human Rights Commission jointly issued a petition to the National Public Security Commissioner and National Police Agency Chief, demanding more stringent regulation and scrutiny of taking of DNA data, as well as destruction of the data that had been illegally collected.<sup>388</sup>

## 2. U.S.-Japan Agreement on Fingerprint Sharing

The issue became political in April 2014, when the issue was touched upon by politicians in the midst of legislative deliberation over a bill that eventually became a statute on sharing of fingerprint data with the United States based on a bilateral agreement.<sup>389</sup> Shortly after the bilateral agreement was signed, a bill prepared by the Cabinet Legislative Bureau was sent to the House Cabinet Committee for

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386. *See id.* at 3.

387. Facts of this case was in the joint statement by Nobutoru Ichimaru [市丸信敏], President of the Fukuoka Bar Association and Tsuneyoshi Maeda [前田恒善], President of the Fukuoka Human Rights Protection Commission. *See* TSUNEYOSHI MAEDA & NOBUTORU ICHIMARU, KANKOKU-SHO [PETITION LETTER] (Nov. 22, 2010), [https://www.fben.jp/jinkenkyusai/data/20101122\\_02.pdf](https://www.fben.jp/jinkenkyusai/data/20101122_02.pdf) [<https://perma.cc/27KN-MJB8>].

388. *See id.*

389. *See* Jūdaina hanzai o bōshi shi, oyobi kore to tatakau ue de no kyōryoku no kyōka ni kansuru Nipponkoku seifu to Amerikagasshūkoku seifu to no ma no kyōtei no jisshi ni kansuru hōritsu [An Act Implementing the Agreement between the Government of Japan and the Government of the United States of America on Enhancing Cooperation in Preventing and Combating Serious Crime], Law No. 57 of 2014 (Japan), <https://www.sangiin.go.jp/japanese/joho1/kou-sei/gian/186/meisai/m186080186035.htm> [<https://perma.cc/HGZ6-2WZA>] [hereinafter Act Implementing Agreement Between U.S.-Japan]. For the agreement between the United States and Japan, see Agreement between the Government of Japan and the Government of the United States of America on Enhancing Cooperation in Preventing and Combating Serious Crime, Japan-U.S., Fed. 7, 2014, Treaty No. 19-05, [https://www.mofa.go.jp/mofaj/ila/trt/page22\\_000956.html](https://www.mofa.go.jp/mofaj/ila/trt/page22_000956.html) (last visited Aug. 31, 2023).

deliberation on April sixteenth. House member Seiken Akamine (赤嶺政賢) from Okinawa, a member of the Japanese Communist Party, questioned the rationale of the bill. It was disclosed that the fingerprints of three million Japanese may be subject to an automated querying system in the agreement. This includes the fingerprints of (1) convicted criminals, (2) adults who have been arrested, who have been prosecuted, or not; and (3) adults who are subject to arrest.<sup>390</sup> On April 18, the JFBA issued a public statement,<sup>391</sup> urging the Diet to vote against both the Agreement and the bill implementing it. At the Senate Cabinet Committee deliberation on May 27, Senator Yamashita Yoshiki (山下芳生), a member of the JCP, raised concerns of privacy and the discrepancy with Japanese domestic law.<sup>392</sup> The bill was passed and became law on June 4, 2014.<sup>393</sup> However, the debates in the Diet raised more awareness of the issue and the fact that the U.S.–Japan Agreement would take effect in 2019 added a sense of urgency.

### 3. The Nagoya Litigation

Consider the Nagoya District Court fingerprint ruling in January 2022.<sup>394</sup> Plaintiff Yasumasa Okuda (奥田恭正), a pharmacist in Nagoya city, in this case as a neighbor of a house under construction, was arrested and detained on a charge that he used violence on an employee of the construction company. Plaintiff was tried in court but was acquitted at the Nagoya District Court. Plaintiff then filed a suit against the Aichi (愛知) County and the State for damages, and a

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390. See Kanpō: Dai 186-kai kokkai Shūgiin naikaku iin kaigi-roku dai 13-gō (Heisei 26-nen 4 tsuki 16-nichi) [Official Gazette: Records of the 186th Diet House of Representatives Cabinet Committee, 13th Sess. (Apr. 16, 2014)], [https://www.shugiin.go.jp/inter-net/itdb\\_kaigirokua.nsf/html/kaigirokua/000218620140416013.htm#p\\_honbun](https://www.shugiin.go.jp/inter-net/itdb_kaigirokua.nsf/html/kaigirokua/000218620140416013.htm#p_honbun) (last visited Aug. 30, 2023).

391. See NIHON BENGOSHI RENGOKAI [JAPANESE FED’N OF BAR ASS’NS], NICHIBEI JŪDAI HANZAI BŌSHI TAISHO KYŌTEI OYOBI SONO JISSHI HŌAN NI TAISURU IKEN-SHO [OPINION ON THE JAPAN-U.S. AGREEMENT ON PREVENTING SERIOUS CRIME AND THE BILL IMPLEMENTING IT] (Apr. 18, 2014), <https://www.nichibenren.or.jp/document/opinion/year/2014/140418.html> [<https://perma.cc/SW3D-Y3G4>].

392. See The Senate, Kanpō: Dai 186-kai kokkai Sangiin naikaku iinkai kaigi-roku dai 17-gō (Heisei 26-nen 5 tsuki 27-nichi) [Official Gazette: Records of the 186th Diet the Senate Cabinet Committee, 17th Sess. (May 27, 2014)], at 13–14, <https://kokkai.ndl.go.jp/simple/detail?minId=118614889X01720140527&spkNum=0#s0> [<https://perma.cc/MC69-2NBQ>].

393. See Act Implementing Agreement Between U.S.-Japan, *supra* note 389.

394. See Nagoya Chisai [Nagoya District Court], Jan. 18, 2022, Hei 18 (wu) no. 3020, [https://www.courts.go.jp/app/hanrei\\_jp/detail4?id=91066](https://www.courts.go.jp/app/hanrei_jp/detail4?id=91066) [<https://perma.cc/WD7P-DATH>] [hereinafter Nagoya District Court Judgment].

request to expunge the fingerprints, DNA, photographs and mobile phone data retained by the police as a result of the arrest, based on the right to privacy. On this point, Plaintiff particularly built his case on Article 13 of the Japanese Constitution, following a popular theory of “the right to control one’s own data” (自己情報コントロール権).<sup>395</sup> This right to control, according to the Plaintiff, included the collection, management, use, disclosure and share with others of one’s personal data. Plaintiff argued in court that because the personal data was obtained as a result of the arrest and subsequent search with warrant, after the acquittal, however, the criminal proceeding was over, the purpose of keeping the data was lost from that point.<sup>396</sup> If the data was retained for the purpose of criminal investigation in the future, then that purpose is unconstitutional under Article 13.<sup>397</sup>

The defense was similar to what we have seen in the United States: that the police followed the relevant national statute and implementing regulations, as well as specific rules on fingerprint collection, thus the police lawfully collected the data.<sup>398</sup> In terms of data retention, the national statute—Act on the Protection of Personal Information Held by Administrative Organs—sets limits on the use of data outside the purposes of collection, it also provides safeguard measures for misuse of data, including criminal liabilities.<sup>399</sup>

The Nagoya District Court considered, in addition to the argumentation by both sides, an expert opinion on German criminal procedural law on DNA data collection and use,<sup>400</sup> a law review article on police data collection,<sup>401</sup> a Senate committee’s conference minutes,<sup>402</sup> and the 2007 opinion of the Japan Federation of Bar Associations.<sup>403</sup> The Court also considered the European Court of Human Rights ruling

395. *See id.* at 26.

396. *See id.* at 27.

397. *See id.*

398. *See id.* at 28.

399. *See id.*; *see also* Gyōsei kikan no hoyū suru kojinhōhōhogonikansuruhōritsu [Act on the Protection of Personal Information Held by Administrative Organs], Law No. 59 of 2003, *translated in* Japanese Law Translation, <https://www.japaneselawtranslation.go.jp/ja/laws/view/131> [<https://perma.cc/229R-46NG>].

400. *See* Nagoya District Court Judgment, *supra* note 394, at 80–82.

401. *See id.* at 83. For the law review article, *see* Masahiro Tamura, *keisatsu ni okeru jōhō no shutoku oyobi kanri ni taisuru gyōsei hōteki tōsei* [Administrative Legal Control Over Information Acquisition and Management in the Police], 50 SANDAI HOGAKU 67 (2017). T

402. Nagoya District Court Judgment, *supra* note 394, at 83–84.

403. *See id.* at 84.

in *S. & Marper v. United Kingdom*.<sup>404</sup> The factual pattern in *S. & Marper* was similar: complainants were arrested but acquitted shortly after or the charge was dropped, they demanded that their arrest records including fingerprints and DNA destroyed. They litigated in the United Kingdom domestic judicial system, all the way to the United Kingdom Supreme Court.<sup>405</sup> The European Court of Human Rights ruled in *S. & Marper* that the United Kingdom law that allowed retention of fingerprints, DNA profiles of persons suspected but not convicted of offences violated Article 8 of the European Convention of Human Rights.<sup>406</sup>

Convinced by the above evidence, the Nagoya District Court ruled in favor of the plaintiff by upholding the request to have his fingerprints and DNA profiles destroyed.<sup>407</sup> The Court recognized that fingerprint and DNA data were essential privacy information for a person's private life, and that means, according to the court, the freedom that the public authorities cannot access to it in secret.<sup>408</sup> Even if the authorities, out of public interests, has a need to access, there has to be statutory bases for such access and legal checks on such access.<sup>409</sup> When there is no longer such a need to retain data, complainants can claim the right to have the data destroyed.<sup>410</sup>

## V. CONCLUSION

The contrast between the United States and Japan on privacy of fingerprint and DNA data is perhaps a surprise for many observers. After all, the notion of privacy was started in the United States, a country that is proud of its powerful judiciary that has produced *Marbury v. Madison*. By contrast, the judiciary in Japan is often portrayed by

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404. See *id.* at 84; see also *S. & Marper v. United Kingdom*, 1581 Eur. Ct. H.R. (2008).

405. See *R. v. Chief Constable of South Yorkshire Police* [2004] UKHL 39 (HL) (appeal taken from Eng.).

406. See *S. & Marper*, 1581 Eur. Ct. H.R. ¶ 125. The ruling of the European Court of Human Rights eventually pushed the United Kingdom to amend its laws in compliance with the European standards. See *Crime and Security Act 2010*, c. 17 (U.K.); see also Merris Amos, *The Dialogue between United Kingdom Courts and the European Court of Human Rights*, 61 INT'L & COMP. L.Q. 557 (2012) (providing a discussion about the connection between the United Kingdom and the Human Rights Court). The European Court confirmed its position in a more recent decision. See *Gaughran v. United Kingdom*, 45245/15 Eur. Ct. H.R. (2020).

407. See Nagoya District Court Judgment, *supra* note 394, at 97.

408. See *id.* at 84.

409. See *id.* at 92.

410. See *id.* at 97.

American commentators as conservative and weak, as noted earlier. Privacy in the constitutional texts in both countries is not enumerated, so it is up to the courts' interpretation. And yet, the courts in the United States refused to recognize privacy in fingerprint and DNA data as constitutionally protected rights; while in Japan it is recognized.

This Article tried to offer a hypothesis to explain the difference, based on national politics. In the two-party system in the United States, when both parties gave low priority to privacy, the issue was left to the judiciary who felt little pressure from society at large to recognize privacy as a fundamental right. This is reflected in the stunning doctrinal lock-in in fingerprint and DNA cases in the span of a century, despite the changes of regimes—from *Lochner* era to the New Deal, the Welfare State, the Civil Rights era, and the Burger Court, or changes in technology. In Japan, a country long dominated by one party—the LDP, plaintiffs and their support groups, civic groups and activists, the bar, liberal scholars, and smaller political parties tend to work together to challenge the regime, and they found privacy a key vehicle for such political actions. It is national politics that put pressures on the judiciary and forced it to gradually recognize privacy as a fundamental right.

Of course, this Article is based on cases from two narrow areas of law—fingerprints and DNA data. It does not question or deny the doctrinal cycles in other areas. The aim here is merely to call for broadening our inquiry in the diagnosis of the constitutional problems America is facing today.