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REQUIRING A THUMBPRINT FOR NOTARIZED TRANSACTIONS: THE BATTLE AGAINST DOCUMENT FRAUD

VINCENT J. GNOFFO*

In statesmanship get the formalities right, never mind about the moralities. - Mark Twain 1895.¹

INTRODUCTION

The murder of Nellie Quinn in her room in New York City in early 1908 presented a baffling case until investigators found a whiskey bottle containing fingerprints.² Fingerprinting was among the newest technology in criminology in the early 1900s. Shortly after the crime, authorities arrested George W. Kramer and matched his fingerprints to those on the bottle.³ Kramer confessed when the authorities confronted him with the fingerprint evidence.⁴ Also in 1908, on February 24, the residence of Dr. Harry Pritchard at 22 East 91st Street was burglarized.⁵ Unfortunately for the burglar, he had handled a soup ladle upon which he had left behind various impressions of his fingers.⁶ The authorities, suspecting him of having committed the crime, arrested Herman

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1. JOHN BARTLETT, BARTLETT'S FAMILIAR QUOTATIONS 527 (16th ed. 1992).

2. EVANS NAT'L MFG. AND SUPPLY CO., FINGER PRINT INSTRUCTION BOOK 84 [hereinafter EVANS]. Evans discusses the "bottle test" which is a method that one can utilize to acquire fingerprints surreptitiously. *Id.* at 80. It suggests cleaning an ordinary whiskey bottle and then handing the bottle "under some pretext or other" to the person whose prints you desire. *Id.* The person will likely grasp the bottle because people usually take what one hands to them. *Id.* After you retrieve the bottle, you will have impressions of that person's fingerprints. *Id.*

3. *Id.* at 84.

4. *Id.*

5. *Id.*

6. *Id.*

Kaplan.⁷ They compared Kaplan's fingerprints with the finger impressions found on the ladle, and the prints were the same.⁸ Subsequently, Kaplan pleaded guilty to the burglary.⁹

Just as authorities a hundred years ago found thumbprint evidence to be effective in identifying criminals, this Article heeds the words of Mark Twain and suggests a thumbprint requirement on notarized transactions. This Article also discusses the use of notary journals evidencing such transactions to deter document fraud, similar to the successful procedure enacted into law in California. Part I of this Article discusses the tradition and the rationale behind the notary's utilization of a journal in notary transactions. Part II traces the history of fingerprinting, including the law's approval of the use of fingerprinting in criminal cases. Part III addresses contemporary fingerprinting concerns including the privacy right to decline from having one's personal fingerprints disseminated to the public. Part III also addresses overkill in the requirements prior to obtaining a notarization. Part IV analyzes the California procedure mandating a thumbprint for certain notarized real estate transactions. Finally, Part V proposes model language for states to incorporate into their notary statutes to establish a thumbprint requirement for notarized documents.

I. THE NEED FOR A NOTARY JOURNAL

Maintaining an accurate notary journal is perhaps the most important method by which a notary public can deter fraud and protect all the parties concerned.¹⁰ The journal typically contains

7. *Id.*

8. EVANS, *supra* note 2, at 84.

9. *Id.* Evans provides several interesting anecdotes. For example, it recounts that in 1910 authorities captured two burglars, one of whom was injured, whom they suspected of robbing a household in Flatbush. *Id.* at 85. Investigators fingerprinted both men, but the New York files contained no record of the injured man's prints. *Id.* That man insisted that he had never been arrested before and that the other burglar had induced him to burgle the Flatbush residence. *Id.* at 85-86. Captain Faurot searched his files, and while there was something familiar about the injured burglar's fingerprints, he could find no duplicate. *Id.* at 86. Then a thought hit him. *Id.* Some months earlier, there had been a robbery in Brooklyn, and the thief had left behind a thumbprint upon a cut glass rose jar. *Id.* The Identification Bureau had enlarged the print and kept it on file. *Id.* Captain Faurot compared the Bureau thumbprint to the wounded burglar's thumbprint and found a match. *Id.* He went to the hospital where the injured burglar lay and asked him: "When you broke into that house on the Park Slope three months ago why didn't you take that cut glass roses bowl?" *Id.* "It was too heavy to carry away," the burglar replied. *Id.*

10. NAT'L NOTARY ASS'N, THE NOTARY RECORDBOOK: HOW A JOURNAL OF NOTARIAL ACTS PROTECTS THE PUBLIC 2 [hereinafter NOTARY RECORDBOOK]. See also *Handing Your Notary Journal to the Government for Safe-Keeping: It May Not Be as Safe as You Think*, NOTARY, Sept./Oct. 1997, at 5 [hereinafter *Notary Journal*] (stating that the notary holds a high level of public trust that

critical information like the date and type of notarization, the method utilized to identify the document signer, and the name, address, and signature of the document signer.¹¹ Moreover, the notary journal is an official public record and therefore protects the document signer, the notary, and the public from fraud and loss.¹² The journal protects these interests by enabling authorities to access important information and seek out the wrongdoer. Further, the journal shields the integrity of the notary and of each notarization because it supplies independent physical evidence of the notarized transaction.¹³

The notary journal deters forgers and impostors who are not willing to leave an incriminating signature and a thumbprint in a recordbook.¹⁴ Forgers know that the thumbprint they leave in the notaries' journal can be evidence that eventually convicts them.¹⁵ Further, the journal entries assist law enforcement authorities in catching and prosecuting impostors.¹⁶ Moreover, a properly maintained journal shows that the notary exercised reasonable care in identifying the signer and performing the notarial act thereby protecting the notary from unwarranted allegations.¹⁷ Finally, the journal entry assists the notary in recalling the exact circumstances of a notarization which would otherwise be difficult to remember, especially if the event has occurred many years ago.¹⁸

Presently, only California requires the document signer to place his or her thumbprint into the notary's journal.¹⁹ Increasingly, however, notaries are asking signers to provide their print as part of the notarization process.²⁰ A thumbprint in the journal provides proof that a signer appeared before the notary and alerts the signer to the importance of the notarization.²¹ Moreover, a journal thumbprint affords an effective weapon against fraud since a forger, like a burglar, is unwilling to leave a print behind at the

incorporates the duty to serve the public's interest by maintaining a journal to provide proof of the validity of the notary's performances).

11. NOTARY RECORDBOOK, *supra* note 10, at 5-6. *Accord* MODEL NOTARY ACT § 4-102(a) (Nat'l Notary Ass'n 1984).

12. NOTARY RECORDBOOK, *supra* note 10, at 2. *See also* *Notary Journal*, *supra* note 10, at 4 (maintaining that the "notary journal protects the public by ensuring that the notary performs properly").

13. NOTARY RECORDBOOK, *supra* note 10, at 2.

14. *Id.*

15. *Id.* at 3.

16. *Id.*

17. *Id.* *See also* *Notary Journal*, *supra* note 10, at 4 (stating that the "notary journal is [the] most important protection against accusations of wrongdoing").

18. NOTARY RECORDBOOK, *supra* note 10, at 3.

19. CAL. GOV'T CODE § 8206(a)(7) (West 1992 & Supp. 1996); *A Journal Thumbprint: The Ultimate ID*, NAT'L NOTARY MAG., May 1996, at 11 [hereinafter *Thumbprint: The Ultimate ID*].

20. NOTARY RECORDBOOK, *supra* note 10, at 6.

21. *Id.*

scene of a crime.²²

II. A BRIEF HISTORY OF FINGERPRINTING AND THE UTILIZATION OF FINGERPRINTING IN THE CRIMINAL SETTING

A fingerprint is an impression formed by the underside of every human finger and is useful for identification purposes because no two people possess exactly the same print.²³ The ancient Assyrians and Chinese utilized the first recorded fingerprints in conjunction with the signing of legal documents for the purposes of identification.²⁴ Similarly, the Babylonians pressed fingerprints into clay to identify the author of writings and to protect against forgery.²⁵ In modern times, a set of fingerprints is obtained by placing the fingertip into an ink or a special chemical and then rolling the finger end onto a receiving surface or, most recently, by placing the fingertip onto a template and digitally scanning the print into a computer database.²⁶

The Czech physiologist Johannes Evengelista Purkinje probably produced the first modern study of fingerprints in 1823 though few took note of it at the time.²⁷ Late in the 19th century, British scientist Sir Francis Galton developed a new classification system using prints from all ten fingers which is the basis of identification systems still in use today.²⁸ In the 1890s, British police

22. *Id.* at 7.

23. 4 ENCYCLOPEDIA BRITANNICA *Fingerprint* 781 (15th ed. 1992).

24. 25 ENCYCLOPEDIA BRITANNICA *Police Technology* 966 (15th ed. 1992); 10 FUNK & WAGNALLS NEW ENCYCLOPEDIA *Fingerprint* 177 (1986).

25. 25 ENCYCLOPEDIA BRITANNICA, *supra* note 24, at 966. Specifically, the Babylonians utilized cuneiform writings which were writings composed of wedge-shaped characters impressed into clay. AM. HERITAGE DICTIONARY ENG. LANGUAGE 455 (3d ed. 1992).

26. *See* EVANS, *supra* note 2, at 8 (stating that the finger should be rolled onto the receiving card because a rolled print gives the whole contour of the finger and a larger area than the plain print). Evans suggests using black fingerprint ink to produce the print. *Id.* at 7. One can still probably purchase the one-quarter pound collapsible tubes which contain the ink. *Id.* To avoid the mess which intrinsically accompanies ink, however, it may be preferable to utilize non-ink devices such as chemicals or computers to retrieve the print. *See Thumbprint: The Ultimate ID*, *supra* note 19, at 9 (stating that inkless devices have led to the advent of widespread use of fingerprinting). *See also* Ted Appel, *Thumbprint Law Targets Fraud, Scams Tracking Down Impostors Will Be Easier*, PRESS DEMOCRATE, Mar. 16, 1996, at R1 (discussing the technique of placing the finger or thumb on a pad treated with a colorless chemical and then rolling it onto paper that reacts to the chemical to achieve a print); David Foster, *State of ID: Fingerprinting Fervor Leads America Into Brave New World*, CHI. DAILY L. BULL., July 15, 1997, at 3 (discussing "biometrics," the computerized method of identifying people by utilizing different body parts including retinas and wrist veins).

27. 10 FUNK & WAGNALLS, *supra* note 24, at 177.

28. *Id.* *See* EVANS, *supra* note 2, at 5 (stating that Galton was the first person to study fingerprinting in depth). From the 20 years that Galton

official Sir Edward Richard Henry began utilizing fingerprints to identify criminals in Bengal, India.²⁹ Then in 1901, as assistant commissioner of the metropolitan police, Henry officially introduced the Galton-Henry system of fingerprint classification to Scotland Yard in London.³⁰ Thereafter, law enforcement agencies throughout Europe and the United States quickly adopted the use of fingerprinting for identifying criminals, displacing the Bertillon system of identification of individuals by means of body measurements which was the predominant system of identification prior to fingerprinting.³¹

To this day, law enforcement officials utilize fingerprints found at crime scenes as significant evidence to connect an individual with the crime.³² Officials can directly photograph visible prints found in dirt, blood or soft surfaces or utilize dusting techniques to unearth latent fingerprints which are not ordinarily visible.³³ The dusting powder clings to residual oils and fats in the print, and as a police official removes the excess powder with a brush, the latent print is revealed.³⁴ On porous surfaces such as

studied fingerprinting, he concluded that one could not determine the character of a person from their print. *Id.* at 89. As part of Galton's study, he had acquired impressions from the fingers of various classes of people. *Id.* The gathered impressions were from the "highest statesmen down . . . to the idiots at Rorenth Asylum [in] London." *Id.* The ridges on the idiot's finger tips resembled those on the statesman's. *Id.* Furthermore, while the fingerprints of a child most resemble those of the parent that the child resembles, the prints are not so close as to cause mistakes in identifying the patterns. *Id.* at 90. Moreover, the fingerprints of twins are markedly distinct. *Id.*

29. 10 FUNK & WAGNALLS, *supra* note 24, at 177.

30. *Id.*; 4 ENCYCLOPEDIA BRITANNICA, *supra* note 23, at 781. See also EVANS, *supra* note 2, at 11 (discussing the classes of fingerprinting). While Purkenje proposed nine classes of fingerprints and Sir Galton offered three, Henry preferred utilizing four classes which are the same four classes utilized by authorities today. *Id.* Henry classified the fingerprints as arches, loops, whorls, and composites. *Id.* Loops that point towards the thumb are ulnar and loops that point to the little finger are radial. *Id.* at 12. Authorities group irregular patterns as composites if they cannot be given a definite classification under another grouping. *Id.* at 32. Arches form 5%, loops 60% and whorls and composites 35% of all prints. *Id.* at 34.

31. 10 FUNK & WAGNALLS, *supra* note 24, at 177. See also 4 ENCYCLOPEDIA BRITANNICA, *supra* note 23, at 781 (discussing the Galton-Henry system of classifying fingerprints); EVANS, *supra* note 2, at 5 (stating that the Galton-Henry classification system has withstood the test of time worldwide and will probably never be superseded). While it may be impossible to distinguish twins photographed and measured by the Bertillon system, one can easily note differences in their fingerprints. EVANS, *supra* note 2, at 90.

32. 25 ENCYCLOPEDIA BRITANNICA, *supra* note 24, at 970.

33. *Id.* at 970-71.

34. *Id.* at 971. See EVANS, *supra* note 2, at 79 (discussing the ridges on the fingers as containing small pores that secrete perspiration in a continuous flow). Authorities can easily find fingerprints on glass, silverware, steel or other polished surfaces, and light woodwork. *Id.* One may develop a print on a light surface by dusting the print with a dark powder and removing the ex-

paper, the chemical ninhydrin can reveal latent fingerprints including those that are several years old.³⁵

Once police technicians collect them, experts classify fingerprints by their general shapes and contours, by noting the finger positions of the pattern types, and by counting the ridges in loops and tracing the ridges in whorls.³⁶ They identify fingerprints by matching a significant number of individualities known as points.³⁷ The points are the ridges and dots in the fingerprint pattern.³⁸ A basis exists for identifying a fingerprint if one finds sufficient points with spatial relationship to other points.³⁹ In current practice, usually only twelve points are necessary to identify a fingerprint, and some circumstances allow a lesser number of points to establish an identification.⁴⁰ Alternatively, the utilization of computer technology allows the matching of ninety or more points per finger.⁴¹

Courts, like law enforcement agencies, consider fingerprint identification significant evidence. In 1911, the Illinois Supreme Court upheld a jury verdict to convict a murder suspect and to sentence him to death based substantially on fingerprint evidence.⁴² Although Jennings' attorney fought against the admission of the fingerprint evidence, the court allowed the evidence and the ac-

cess powder with a brush. *Id.* Similarly, one may utilize white powder to reveal prints on dark surfaces. *Id.*

35. 25 ENCYCLOPEDIA BRITANNICA, *supra* note 24, at 971.

36. 4 ENCYCLOPEDIA BRITANNICA, *supra* note 23, at 781.

37. 25 ENCYCLOPEDIA BRITANNICA, *supra* note 24, at 971.

38. *Id.* See also EVANS, *supra* note 2, at 58 (discussing the effect of scars, creases and calluses on the print quality). While fingers may acquire deep scars caused by burns, ulcers or other injuries that destroy tissue, the finger's ridges will not be obliterated unless the injury was harsh enough to destroy the sweat glands. *Id.* If such an event destroyed the ridges, one would classify the print as if the finger were missing entirely. *Id.* Small scars, on the other hand, usually heal to the point of leaving no permanent mark whatsoever. *Id.* Authorities do not note the scar in the classification if the scar is not severe enough to destroy the pattern. *Id.* at 59. Likewise callused fingers transmit a good impression if one demonstrates care when he obtains the print. *Id.* Even thick calluses fail to destroy the ridges. *Id.*

39. 25 ENCYCLOPEDIA BRITANNICA, *supra* note 24, at 971.

40. *Id.* One can identify palm prints and footprints in the same manner as fingerprints. *Id.*

41. Jennifer K. Constance, Comment, *Automated Fingerprint Identification Systems: Issues and Options Surrounding Their Use to Prevent Welfare Fraud*, 59 ALB. L. REV. 399, 401 n.17 (1995).

42. *People v. Jennings*, 96 N.E. 1077, 1084 (Ill. 1911). On September 19, 1910, an apparent burglar murdered Clarence B. Hiller, a husband and father of four children, in his home on West 104th Street in Chicago. *Id.* at 1078. The following morning the Chicago Police Department's Bureau of Identification found four fingerprints on a newly painted porch railing. *Id.* at 1080. They sawed off the rail, took it to headquarters, and photographed the prints. *Id.* Thereafter, the authorities arrested Thomas Jennings for violating his parole and fingerprinted him. *Id.* Jennings' fingerprints matched the prints found on the porch rail. *Id.*

companying expert testimony which compared Jennings' fingerprints to the fingerprints found at the scene thereby establishing Jennings' presence at the murder.⁴³ After the conviction, one of the jury commented, "[t]he fingerprints, and the fingerprints alone, convinced us that Jennings was guilty."⁴⁴

Similarly, the high courts of nearly every nation have found that fingerprint evidence is admissible.⁴⁵ In 1912, the Federal Court of Australia, sitting at Melbourne, upheld the conviction of a burglar where the prosecutors had only fingerprint evidence to establish the burglar's guilt.⁴⁶ The burglar left imprints on a beer bottle from which he drank at the burgled residence.⁴⁷ In upholding the conviction, the Australian high court stated that it considered fingerprints even more reliable than a written signature.⁴⁸

In 1969, the United States' high court acknowledged the validity of fingerprinting in identifying wrongdoers.⁴⁹ The Court stated, "fingerprinting is an inherently more reliable and effective crime-solving tool than eyewitness identifications."⁵⁰ Thus, the U.S. Supreme Court has sanctioned the use of fingerprints as evidence even where people's lives and liberty are at stake.⁵¹

III. DISPELLING CRITICAL CONCERNS

Despite the obvious advantages of requiring a thumbprint in notarized transactions to deter fraud as evidenced in the criminal setting, the idea has encountered some criticism. The critics' concerns range from social stigma and privacy concerns to chaos, impossibility and overkill. Their anxieties, however, appear unwarranted.

A. Stigma and Privacy

In the 1980s, the American Civil Liberties Union and other civil-libertarian groups opposed legislation to mandate notary journal prints.⁵² Some opponents hypothesized that fingerprinting procedures carried a social stigma associated with criminals.⁵³ Others claimed that fingerprinting was an invasion of privacy.⁵⁴

43. *Id.* at 1081, 1083.

44. EVANS, *supra* note 2, at 87. On January 16, 1912, Jennings was hanged. *Id.* at 88.

45. *Id.* at 86.

46. *Id.*

47. *Id.*

48. *Id.*

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

50. *Id.* at 727.

51. *See generally id.*

52. *Thumbprint: The Ultimate ID*, *supra* note 19, at 10.

53. *Id.* at 9.

54. *See* Tracey E. Kaplan, *Fingerprinting New York State Job Applicants: Invasion of Privacy or Valid Means of Identification?*, 25 COLUM. J.L. & SOC.

Furthermore, critics believed that fingerprinting procedures created "a system of social control," that "Big Brother" would be watching.⁵⁵

The critics were mistaken on all counts. First, fingerprinting today does not hold the stigma that it may have carried in the past because society no longer associates fingerprinting "exclusively . . . with criminal bookings."⁵⁶ For example, the Federal Bureau of Investigation (FBI) has gathered thousands of children's fingerprints in their databanks to aid in the search for missing children.⁵⁷ Investigative authorities employ fingerprints to identify casualties of train, sea and air accidents.⁵⁸ Many states and large cities require fingerprints on a variety of mundane documents such as drivers' licenses.⁵⁹ Additionally, testators have used fingerprints in lieu of, or in conjunction with, signatures on their wills.⁶⁰

All told, some one thousand federal and state laws allow fingerprint checks of persons like lottery employees, day-care providers, school custodians, nursing-home employees, tow-truck drivers, military personnel and firearm owners.⁶¹ Similarly, some private entities fingerprint credit card holders, bank customers, and employees. Astonishingly, nearly "one million people in New York State alone have submitted [to] fingerprint[ing]" including all lawyers, public school employees, school bus drivers, public art gallery employees, military personnel, mothers and their newborn babies, accountants, police officers and most doctors.⁶² Furthermore, in New York and California, lawmakers are utilizing mandated fingerprints to help abate welfare fraud.⁶³

PROBS. 91, 92 (1991) (quoting from Memorandum from Louis L. Levine, Office of the Industrial Commissioner (June 5, 1973) (opposing Assembly Bill No. 3032) which states that to fingerprint employees is "antithetical to basic democratic principles . . . is demeaning and [is] an invasion of an employee's civil rights").

55. Kaplan, *supra* note 54, at 92. *But see* Foster, *supra* note 26, at 3 (stating that society should not "sweat Big Brother, at least not yet").

56. *Thumbprint: The Ultimate ID*, *supra* note 19, at 10.

57. *Id.*

58. Kaplan, *supra* note 54, at 95.

59. See James J. Killerlane III, Note, *Finger Imaging: A 21st Century Solution to Welfare Fraud at Our Fingertips*, 22 FORDHAM URB. L.J. 1327, 1334 (1995) (stating that "drivers in California, Texas, and Colorado must give their fingerprints to obtain [a] driver's license"). *But see* Foster, *supra* note 26, at 3 (stating that the Florida pilot program to collect electronic thumbprints from driver's license applicants only lasted for three months).

60. Kaplan, *supra* note 54, at 95.

61. Foster, *supra* note 26, at 3.

62. Killerlane, *supra* note 59, at 1345-46.

63. See *id.* at 1365 (stating that the system has proven to be successful). In two New York counties where the test had taken place, 145 out of 3344 persons, or 4.3%, refused to participate in the finger imaging process and provided no justifiable reason for declining. *Id.* at 1339. See also Constance, *su-*

Second, the United States Constitution does not prohibit the use of notarial fingerprinting. While the United States Supreme Court in *Griswold v. Connecticut*⁶⁴ recognized that the Bill of Rights creates a "zone of privacy," that zone does not extend to minimal intrusions like fingerprinting.⁶⁵ In *Davis v. Mississippi*,⁶⁶ the Supreme Court concluded that fingerprinting does not violate the Fourth Amendment of the Constitution per se because fingerprinting does not involve "probing into an individual's private life and thoughts that marks an interrogation or search."⁶⁷ Likewise, in *Hayes v. Florida*,⁶⁸ the Court found that briefly detaining a person, "if there is a reasonable suspicion that the [person] has committed a criminal act," for the purpose of fingerprinting was permissible.⁶⁹

Finally, critical concerns that mass fingerprinting would lead to social control also seem unwarranted.⁷⁰ First, authorities will

pra note 41, at 400 (describing how authorities utilize fingerprints to minimize welfare fraud). First, the agency will provide the potential welfare recipient with information regarding the finger imaging process. *Id.* at 402. Next, the agency requires that the applicant provide information such as his or her name, social security number and date of birth. *Id.* Finally, the applicant will provide a fingerprint and the computer will search for a match. *Id.* If the agent does not find a match, then the application procedure continues. *Id.* If the agent does find a match, then the agent consults the applicant regarding the accuracy of the applicant's originally supplied information. *Id.*

64. 381 U.S. 479 (1965).

65. Constance, *supra* note 41, at 403-04. Constance states further that: [C]oncerns about invasion of privacy are misplaced and unjustifiable with regard to a mere procedure which records an individual's fingerprints. Although a finger imaging requirement may be personally intrusive, it cannot be said to involve a violation of a privacy interest deserving the protection of the Federal Constitution. Fingerprinting is not punitive in nature, but rather a means of identification which is useful in many circumstances, including the enforcement of laws. Individuals engaging in 'identification fraud' have cost the United States billions of dollars a year.

Id. at 405 (citations omitted). See also Governor Mario M. Cuomo, *Keeping Fraud Out of Welfare*, *NEWSDAY* (Suffolk), July 27, 1994, at A32 (stating that "[f]inger imaging is simply a method of identifying people, as is photo identification for a driver's license"); Killerlane, *supra* note 59, at 1349 (stating that many Americans felt that the Social Security bill which Franklin D. Roosevelt signed into law on August 14, 1935 was an invasion of privacy).

66. 394 U.S. 721 (1969).

67. *Id.* at 727.

68. 470 U.S. 811 (1985).

69. *Id.* at 817.

70. Cf. Killerlane, *supra* note 59, at 1349 (stating that people unnecessarily feared that the social security registration system would "lead to the regimentation of American society," but today, social security numbers are a customary part of our lives). New York has demonstrated that it at least has no design to effect social control through fingerprint collection. In order to alleviate concerns that police or immigration officials might utilize fingerprints contained in its welfare data banks, New York prohibits the disclosure of fingerprinting data "for any purpose other than the prevention of multiple [welfare]

utilize the fingerprints for identification purposes only when a problem with the notarized document arises. Second, the fingerprints will remain in the notary journal and on the document, and will not become part of a vast government database. Lastly, the print protects document signers and does not incriminate them.

B. No More Mess and Impossibility

Thanks to modern non-ink devices, gone are the days of using the messy black ink technique to produce finger impressions.⁷¹ One new technique involves placing the finger or thumb on a pad treated with a colorless chemical and then rolling it onto paper that reacts to the chemical.⁷² Another even more highly technological technique involves finger imaging, the digital retrieval of fingerprints.⁷³ To obtain a finger image, one places the finger or thumb on a template attached to a computer which scans a reproduction of the print into the computer's memory.⁷⁴ Once this is accomplished, one can use the computerized image to distinguish between millions of fingerprints stored in the memory.⁷⁵

When it is impossible to obtain a fingerprint, the notary can simply note this in their journal and proceed with the notarization by obtaining the other required pieces of identification. Obviously, this situation occurs when the person requesting the notarization does not possess any fingers or thumbs. Similarly, there will be instances where the person's fingertips do not contain the arches, loops and whorls that compose the identifiable characteristics of a typical fingerprint.⁷⁶ Both cases are exceptions, however, and are not fatal to the notarization process so long as the notary records

enrollments." N.Y. SOC. SERV. L. § 139-a(3)(b)(McKinney Supp. 1995) *quoted in* Constance, *supra* note 41, at 418-19.

71. *Thumbprint: The Ultimate ID*, *supra* note 19, at 10.

72. Appel, *supra* note 26, at R1.

73. Constance, *supra* note 41, at 401.

74. *See id.* (stating that the computer converts the relationship of a print's minutiae points, the ridges, and the contours into a digitized representation of the fingerprint). *See also* Killerlane, *supra* note 59, at 1334 (explaining that biometrics, another computer-facilitated identification system, is the digitized scanning or recording of unique personal characteristics like a fingerprint, a retinal print or a voice pattern, and comparing that recording against a verified database for identification); Foster, *supra* note 26, at 3 (mentioning "biometrics," the computerized method of identifying people by using body parts such as wrist veins).

75. *See* Constance, *supra* note 41, at 401 (stating that the computer can search for a print at the rate of over 500 prints per second). The computer conducts a mathematical search to find matches. *Id.* Subsequently, prints can appear on the screen for visual comparison. *Id.*

76. *See* Foster, *supra* note 26, at 3 (discussing the story of a native of India who attempted to furnish her fingerprints during the process of becoming a United States citizen but from whom technicians could not obtain useable prints despite having inked and rolled her smooth fingertips onto cards eleven times).

the reason in their notary journal.

C. Thumbprints As Best Evidence

One author has stated that "[r]equiring a notary to obtain the signer's ink thumbprint in addition to all of the other vital information in a notary journal . . . is illogical and unreasonable. It is overkill."⁷⁷ While that author considers a thumbprint requirement to be overkill, in reality a mandated thumbprint, "whether on a murder weapon, the door knob to a burglarized room, or in a [n]otary journal," is the ultimate identifier and the best way to deter fraud.⁷⁸ Furthermore, requiring a thumbprint for notarized transactions comes in the wake of a long line of formalities which society has employed to deter fraud. For example, for certain contracts to be enforceable, the statute of frauds requires them to be evidenced in writing and signed by the parties charged with the contracts.⁷⁹ Additionally, society utilizes a recording system in real estate transactions and requires one to file documents of title with the county.⁸⁰ Indeed, some counties even keep a copy of the original document.⁸¹ One needs only to read the hundreds of reported legal cases involving forged documents and falsified notarizations to appreciate that help is desperately needed to supplement the fraud deterrent purpose of notarizations.

IV. THE CALIFORNIA PLAN

California legislation effective January 1, 1996, mandates thumbprints for certain real estate transactions and comes after a three-year pilot program in Los Angeles County.⁸² The California legislature exempted only deeds involving a reconveyance or foreclosure from the thumbprint requirement.⁸³ Because the program was so successful and effective in Los Angeles, the expansion of the

77. *Requiring Ink Thumbprints in Notary Journals Misses the Mark*, NOTARY, Nov./Dec. 1996, at 5 [hereinafter *Requiring Ink Thumbprints*]. The author further opines that mandated thumbprinting is outside the scope of the notary's role. *Id.*

78. See *Thumbprint: The Ultimate ID*, *supra* note 19, at 9 (discussing the benefits of requiring a thumbprint in the notary journal).

79. STEVEN H. GIFIS, L. DICTIONARY 463 (3d ed. 1991). The statute of frauds, patterned after an English statute enacted in 1677, affects contracts including contracts for the sale of land, contracts in consideration of marriage, contracts not to be performed within one year of their making and contracts to answer a creditor for the debt of another. *Id.*

80. Bradley Inman, *The Net Is Hauling in Public Data, Cutting out Government Control*, SAN DIEGO UNION TRIB., Feb. 23, 1997, at H4.

81. Interview with Michael L. Closen, Professor at The John Marshall Law School (Dec. 12, 1997).

82. Timothy J. Moroney, *Review of Selected 1995 California Legislation Business Associations and Professions*, 27 PAC. L.J. 451, 451-52 (1996).

83. Appel, *supra* note 26, at R1.

program statewide produced virtually no opposition.⁸⁴

One can trace the origin of the Los Angeles "Anti-Real Estate Fraud" program to forged title transfer signatures and impostors who deceived mostly low income and elderly homeowners.⁸⁵ This prompted the Los Angeles County Supervisor to commence a real estate task force in 1991.⁸⁶ Real estate fraud began to rise dramatically in the early 1970s as property values increased and homeowners had accumulated more equity in their homes.⁸⁷ In Los Angeles County alone, con-artists cheated 1151 residents out of some \$131 million dollars between July 1990 and November 1992.⁸⁸ Even title insurance, purchased at the time of sale, could not protect these victims because it only protected them against events occurring prior to their purchase and not those that occurred after they took title.⁸⁹

According to a National Notary Association (NNA) report, the pilot program which mandated a thumbprint was a "remarkable success" and "dramatically reduced fraud."⁹⁰ The NNA subsequently recommended that notaries nationwide utilize thumbprints in notarizations to deter fraud.⁹¹ Likewise, prosecutors, law enforcement agents and consumer affairs investigators, whose forgery caseloads plummeted, advocated the pilot program.⁹² For these reasons and the others set forth in this Article, the remaining states should follow in California's footsteps and adopt legislation that requires notarial thumbprints.

V. MODEL STATUTORY THUMBPRINT PROVISION

First, this section sets forth proposed model statutory language in italicized and indented print. Next, an explanation follows the proposed language to reveal the model statute's purpose, how that purpose is achieved, and how the language differs from the current California legislation. Finally, this section addresses

84. Moroney, *supra* note 82, at 452 n.10.

85. *Thumbprinting: 'The Notary's Best Anti-Fraud Weapon' Now*, NOTARY BULL., June 1995, at 13.

86. *Id.*

87. Corrie M. Anders, *With Home Fraud Down, L.A. Project Getting Thumbs Up*, SAN DIEGO UNION TRIB., June 4, 1995, at H14.

88. ASSEMBLY JUDICIARY COMM., COMM. ANALYSIS OF AB 1828 at 1 (May 3, 1995).

89. Marsha K. Seff, *New Rule of Thumb Helps Put Finger on Scam Artists*, SAN DIEGO UNION TRIB., Oct. 22, 1995, at H1.

90. *Thumbprinting: 'The Notary's Best Anti-Fraud Weapon' Now*, *supra* note 85, at 1. One author states that "there is no empirical evidence establishing that a drop in California real estate fraud was the proximate result of this experimental notary procedure." *Requiring Ink Thumbprints*, *supra* note 77, at 5. There is no evidence that it was not, however.

91. *Id.* at 13.

92. Anders, *supra* note 87, at H14.

whether a notary must or may require a thumbprint from all document signers.

If the notary is notarizing a document, the notary shall require the party signing the document to place his or her right thumbprint on the document and in the notary's journal. If the right thumbprint is not available, the notary shall have the party use his or her left thumb or any available finger. Otherwise the notary shall note in the journal the reason for the unavailability of a thumbprint or fingerprint.

The model statutory language mandates a thumbprint on the notarized document and in the notary's journal for several reasons. First, it deters criminal impostors who seek notarizations of forged signatures.⁹³ No one who forges a signature would volunteer to leave an incriminating piece of evidence like a thumbprint behind.⁹⁴ Second, it produces difficulties for a con-artist who attempts to escape with a forged document and easier for authorities to catch these violators.⁹⁵ Third, it deters signers from falsely stating that an impostor forged a signature and that the signer "never personally appeared before the [n]otary to have the document notarized."⁹⁶ Finally, a thumbprint requirement alerts all signers to the seriousness of the document they are about to sign.⁹⁷

Unlike the California law, the model language mandates a thumbprint from the document signer in all transactions, not just real estate.⁹⁸ The thumbprint can be a useful weapon against all fraud, not just fraud involving real-estate. Further, one must place their print on the signed document to complement the print in the notary journal. A print on the document will aid the authority in tracking down the culprit without requiring the authority to first find the notary in order to compare the recorded print with that of the suspect. Also, authorities can more immediately confirm or dispel that a suspect utilized a notary to fraudulently notarize a document.

93. *Thumbprint: The Ultimate ID*, *supra* note 19, at 9.

94. *Id.*

95. See Seff, *supra* note 89, at H1 (discussing how a "thumbprint absolutely gives us a suspect and an extremely powerful tool for prosecution").

96. *Thumbprint: The Ultimate ID*, *supra* note 19, at 9.

97. *Id.*

98. See Appel, *supra* note 26, at R1 (discussing how California's pilot-program of requiring thumbprints only relates to real estate transactions). See also EVANS, *supra* note 2, at 92 (discussing the ways that different entities can utilize fingerprints). For example, insurance companies can place a print "on the policy at the time of its issuance and again when the policy expires" or the policy holder dies, since "the print remains the same even after death [and before] decomposition sets in." *Id.* Additionally, banks can keep a customer's prints on file and utilize the prints for comparison with the drawer's checks. *Id.* at 93. Similarly, banks can utilize prints on letters of credit. *Id.* at 94.

Finally, the model language provides that a notary must, not may, obtain a thumbprint for every notarized transaction or otherwise note in the journal the reason for not acquiring the print. A top administrator of Oregon's notary program, however, has stated that journal thumbprints cannot be required, but are optional, as a condition of notarization in Oregon.⁹⁹ Further, the administrator asserted that notaries cannot refuse to perform a notarization if the signer refuses to leave a thumbprint in the notary's journal.¹⁰⁰ He noted that Oregon statutes do not mandate thumbprints for any notarization.¹⁰¹

Yet, as the Los Angeles pilot project has shown, states should adopt legislation that requires thumbprints to accompany the notarization process because mandated thumbprints are the notaries' best weapon against fraud. In the alternative, if one refuses to leave behind a print, the notary should note in his or her journal the reason for the print's absence. Likewise, the notary should be wary of the signer and take extra precautions, such as asking for more identification from the signer, to prevent fraud.

CONCLUSION

"It must be remembered that the use of fingerprints as a means of identification is only in its infancy and its use will be universal almost in every walk of life in the near future."¹⁰² The use of electronic means to produce and store fingerprint information could aid in taking society into that foreshadowed future. The Immigration and Naturalization Service (INS), for example, has begun to employ state-of-the-art electronic scanners to take fingerprints of alien petitioners and "be better able to prevent fraud and improve efficiency."¹⁰³ Like the INS, notaries could utilize such technology to "weed out impostors" in notarized transactions.

Notaries could also use electronic reproductions of fingerprints in conjunction with the coming of electronic documents as a method to ensure the validity of these documents and as a deterrent against persons who might falsify such documents. Indeed, Utah has recently licensed the first "Certification Authority" (CA), which is a special type of notary who provides services to allow authentication of digitally signed electronic documents in the "booming" practice of electronic commerce.¹⁰⁴ As Scott Lowry,

99. *Thumbprints Not Required*, NOTARY BULL., Dec. 1997, at 13.

100. *Id.*

101. *Id.*

102. EVANS, *supra* note 2, at 92.

103. *Immigration Service Takes on the Fingerprinting of Aliens*, NOTARY BULL., Feb. 1998, at 1 (quoting Doris Meissner, INS commissioner).

104. *First Company Licensed to Verify Digital Signers*, NOTARY BULL., Feb. 1998, at 4. The *Notary Bulletin* predicts that we may eventually see special "online notaries" to complement the "traditional notary." *Id.*

president of Digital Signature Trust Company, the company which acquired the first CA license, has stated, their "purpose is to provide the certification and authentication that produces . . . confidence."¹⁰⁵ Requiring thumbprints on documentation could provide such necessary confidence in notarized transactions.

105. *Id.*

