

## PROSECUTING ATTORNEYS IN A DEMOCRACY – A CALIFORNIA PERSPECTIVE

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### ABSTRACT

A prosecuting attorney in a democracy is very important in the processing of criminal cases – from pre-filing to final appeal. Much of the involvement of the District Attorney, both before a criminal case is filed, and during the prosecution of the case, stems from the “Exclusionary Rule”. It is the usual case that the police will bring their investigation, their arrest warrant or search warrant affidavit to a District Attorney to review it prior to taking it to the judge. In this connection, District Attorneys will themselves reject 5–10% of the warrant requests submitted to them for approval, often asking law enforcement to do some further investigation before resubmitting the warrant. Furthermore, because of the Doctrine of Separation of Powers, only the District Attorney or the California State Attorney General can make the decision to file or not file a case. This Article illustrates the impact of such discretion. The problem of democracy is strictly connected to the process of DA’s selection, what has also been here presented. Another fundamental issue is a role of DA in *voir dire*, mainly because jury trials are guaranteed by the federal Constitution and are associated with the idea of democracy. Separation of Powers and Judicial Control of the DA, the police, and the sentencing of those convicted of crimes have been analyzed from the perspective of the California law. Additionally, the article includes final comments on the technological progress and its impact on criminal law and democracy. All the conclusions have been made in reference to Author’s experience as Assistant DA in California.

**Keywords:** California criminal procedure, District Attorney, democracy

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## 1. INTRODUCTION

A prosecuting attorney in a democracy is very important in the processing of criminal cases – from pre-filing to final appeal.

What is a Prosecuting Attorney? In California the prosecutor is called the District Attorney. In other States the name might be Commonwealth's Attorney, or State's Attorney, and in the federal system, the prosecutors are called US Attorneys. For ease of reference here I will refer to the prosecutor as the District Attorney. Persons who review reported criminal case decisions from America must notice that the caption of the case varies from State to State. In some jurisdictions the name of the case will be "Commonwealth vs. Smith (the defendant), in others, State vs. Smith, or in the federal system, United States vs. Smith, and in California, People vs. Smith. Significantly, all criminal prosecutions are brought in the name of the government, and in California, all criminal cases are brought in the name of "The People". Thus, at the beginning of a jury trial it is common for the prosecutor to announce, "Ready for the People, Your Honor", and in making court appearances the prosecutor will often be referred to in this way, as the Judge asking, "Are the People ready to proceed?", or "What is the position of the People on this motion?" etc. When testimony starts, the prosecutor will say, "The People call (witness named) as our next witness<sup>1</sup>.

## 2. THE ROLE OF THE DISTRICT ATTORNEY IN STATE CRIMINAL PROSECUTIONS – ARRESTS AND SEARCHES, WITH AND WITHOUT WARRANTS

Much of the involvement of the District Attorney, both before a criminal case is filed, and during the prosecution of the case, stems from the "Exclusionary Rule". Imposed on all 50 States by the U.S. Supreme Court in 1961, the Exclusionary Rule, generally, prohibits evidence that has been

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<sup>1</sup> California Government Code Sec. 100(a): The Sovereignty of the State resides in the People thereof, and all writs and processes shall issue in their name. (b) The style of all process shall be "The People of the State of California" and all prosecutions shall be conducted in their name and by their authority.

illegally seized, and statements that have been illegally obtained, from being admitted into evidence against the accused individual. The main reason for the Rule, according to the Supreme Court, is to DETER the police from making illegal searches and arrests—that is – to deny the use of the evidence is the only way to stop the police from violating the U.S Constitution prohibition against unreasonable Searches and Seizures<sup>2</sup>.

Because all that follows a finding of an illegal search or arrest will be excluded under the “Fruit of the Poisonous Tree Doctrine”, there are crucial decisions that need to be made about what the police can do, and when and where they can search, with or without a Search or an Arrest warrant. The District Attorney is intimately involved in these decisions on many occasions, because the consequences of a mistake can be the loss of the evidence seized, and all that was seized thereafter because of the initial violation. Thus, it is the usual case that the police will bring their investigation, their arrest warrant or search warrant affidavit to a District Attorney to review it prior to taking it to the judge. In this connection, District Attorneys will themselves reject 5–10% of the warrant requests submitted to them for approval, often asking law enforcement to do some further investigation before resubmitting the warrant.

A Search Warrant and an Arrest Warrant are both court orders, signed by a judge and ordering a search of a specific location for items of evidence. Both the location of the search and the items to be seized must be described in detail. This is known as the “particularity” requirement, and stems from the very language of the U.S. Constitutions’ 4<sup>th</sup> Amendment<sup>3</sup>.

In California, Search and Arrest Warrants, like criminal complaints, (see fn.1) are captioned: “The People of the State of California” followed by language of the judge’s order—for the police to search a particular place for specific items of evidence, and in the case of an Arrest Warrant, naming the person with particularity to be arrested and the charge. These are Court Orders, which are not issued unless an affidavit or statement under oath

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<sup>2</sup> Mapp v. Ohio 367 U.S. 643 (1961).

<sup>3</sup> U.S. Constitution, 4<sup>th</sup> Amendment: “The right of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the places to be searched, and the person or things to be seized”.

is submitted to the judge, demonstrating that there is “probable cause” to believe that at a particular place specific evidence will be found, or in the case of an arrest warrant, that there is probable cause to believe that a particular individual committed an offense. In the usual case this means an address of the residence or business to be searched, and the name, date of birth and other identifying information about the person to be arrested. In some unusual cases it is impracticable to get an actual address – This is not required – only that the location of the search be described “with particularity”. Thus, attaching a “Google Earth “photo or some other specific descriptor to the warrant and incorporating it by reference is permissible. In the usual case the law enforcement officer swearing to the affidavit does so in writing – but an oral statement, tape recorded, and later transcribed and made a part of the Court file is sufficient, the Judge authorizing the search etc. during a recorded telephone call. This procedure is used more and more in cases where time is of the essence.

Property subject to seizure via a Search Warrant is also described “with particularity”. The warrant will not call for the seizure of “evidence that so and so committed a crime” or “stolen property” or other general non-specific terms. No, the warrant will state something like this: “A white, long sleeved cowboy hat”; “a green jade sculpture depicting 3 elephants in a row, all on wooden bases, approximately 6 inches in height”, “Phone records for the following telephone number(---)-- -- --- – showing all long distance toll calls during the following period of time; January 1, 2019 to October 31, 2019”.

A good “test” of whether the warrant meets the “particularity” requirement is to ask if a police officer having no knowledge at all of the underlying criminal case could look at the warrant and determine for him or herself: where to search and what to look for.

Another important point is that the Supreme Court has said the US Constitution demands that impartial judges make the decision to search a residence unless well recognized exceptions are present, e.g. Hot pursuit, emergency, a crime being committed in plain sight of the officer, and others:

“(...) the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who happen to make arrests. Security against unlawful

searches is more likely to be obtained by resort to search warrants than by reliance upon the caution and sagacity of officers while acting under the excitement that attends the capture of persons accused of crime. Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause”<sup>4</sup>.

Prosecuting attorneys and law enforcement officers have significant training and continuing education requirements to ensure that the police actions do not run contrary to the constitution, and result in evidence being suppressed, or cases lost. Of course, there are many nuances, exceptions, and reported case law that further define the ins and outs of arrests and searches and some of it not so simple at all. Police officers trying to navigate in the wake of controlling precedent need and rely on the District Attorney to guide and advise them, when time permits, in the investigation. This is another reason why the District Attorney is very much involved in the investigation of major cases, often before an arrest is even made.

### 3. REVIEW AND FINDING OF CRIMINAL CHARGES

Once an arrest is made the cases will be submitted to the District Attorney for the filing of criminal charges. If the suspect is at large and the police present sufficient evidence for the case to be filed, an affidavit in support of an arrest warrant will also be prepared—resulting in the warrant being available on line throughout California in the case of misdemeanors, and throughout the United States for felony cases. In many cases the submission of the case to the District Attorney pre-cedes the arrest. The decision whether to bring (file) criminal charges is one of the most important decisions we as District Attorneys make. In the usual case the reports are submitted to the District Attorney by a Court officer of the law enforcement agency bringing the cases to the District Attorney. Recently

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<sup>4</sup> United States v. Lefkowitz, 285 U.S.452, 464 (1932).

this is done, more and more, electronically-This saves time, and has added benefits not available in pre-digital times.

A criminal case is not supposed to be filed by the District Attorney unless we feel that the defendant is guilty of the charge and that there is admissible evidence sufficient to prove the truth of the charge, “beyond a reasonable doubt”. In some cases, usually those in which the whereabouts of the suspect defendant is unknown, a case might be filed with the thought that upon arrest additional evidence may be uncovered: DNA, stolen property, etc., or incriminating statements might be obtained-usually after a valid waiver of the suspects Constitutional right against self-incrimination<sup>5</sup>.

In making the filing decision, and other decisions as the case continues its course through the system, the discretion given to the District Attorney is extremely broad: e.g., to file or not; the level of the charge (felony or misdemeanor); the specific charge selected; to file against all suspects or to grant immunity to some in exchange for testimony; to seek an arrest warrant as opposed to sending the suspect a letter to appear in court; to allow the suspect to be released on bail or on the suspects promise to appear; to file the case under California’s Three Strikes law, thus severely increasing the punishment; to seek the death penalty; to file the case in adult court against a juvenile given the nature of the offense, and to enter in to a “plea bargain” with the suspect.

Not every case submitted to the District Attorney is approved for prosecution (filed). For one reason or another about 6–10 % of such cases are rejected at the filing desk. The attorney who reviews the cases (“the

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<sup>5</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966). *Miranda* of course is the famous case wherein the U.S. Supreme Court ruled that an in-custody defendant must be advised of his or her Constitutional Rights against self-incrimination, to consult with their attorney before and during questioning, and to have a lawyer appointed to represent them before and during questioning if they cannot afford to hire one. Before statements are admissible the Judge must find that the suspect knowingly and intelligently waived these rights. Thus, every law enforcement does not leave the station house without his or her “*Miranda*” card, listing the 4 rights and the required waiver questions. In *America*, if a defendant is facing even 1 day in custody he or she is entitled to a free lawyer if they cannot afford counsel. *Argersinger v. Hamlin* (1972) 407 U.S. 25.

filing Deputy”)<sup>6</sup> is usually a veteran prosecutor, not a new or recent hire, as the decision to file is probably one of the most important decisions that we make. The District Attorney has almost unlimited discretion to file or not to file – a fact that makes an unethical, ignorant, or lazy prosecutor so dangerous in our system. The filing deputy has to have the necessary knowledge and experience to determine if the case is winnable, the evidence is admissible, that the statute of limitations has not run, and the many, many additional filing options even if the decision is made to approve the prosecution. So specialized are some of the charges that the cases go directly to veteran prosecutors assigned to specific kinds of cases, e.g. child molestation, sexual assault, domestic violence, elder physical and financial abuse and drugs. In these latter cases the filing deputy will be the Deputy District Attorney assigned to handle the case from beginning to end, thus eliminating the need, say, in sexual assault cases, of the alleged victim having to repeat her story again and again as the prosecutor on the cases changes from investigation, filing, preliminary hearings, and the jury trial.

Once the filing Deputy decides to reject a case it is often referred back to the law enforcement agency for further investigation, and in some cases is resubmitted and ultimately filed. If a law enforcement officer, or the victim, believes that the rejection of the case was unwarranted, there is an appeal process internally that requires the case to be reviewed by a Supervising District Attorney, and in some cases by the District Attorney herself<sup>7</sup>.

Because of the Doctrine of Separation of Powers, only the District Attorney or the California State Attorney General can make the decision to file or not file a case. Thus, if law enforcement or an individual victim believes that the rejected filing was in error, they may request the Califor-

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<sup>6</sup> The District Attorney of each of California’s 58 Counties is an elected official, whose name appears on the ballot every 4 years. People can and do run against an incumbent district Attorney. The elected District Attorney can usually appoint his or her top Assistants, but the line prosecutors are civil service employees – all of whom can exercise the full power and discretion of the District Attorney, subject of course to direct guidance or policy as set in place by the elected official. These line prosecutors are commonly referred to as Deputy District Attorneys.

<sup>7</sup> The current District Attorney of Santa Barbara County, Joyce E. Dudley, is only the 2<sup>nd</sup> female elected District Attorney in the history of Santa Barbara (beginning in 1850).

nia State Attorney General to file the case – and in very rare cases this has been done. A private person, unlike in some of our Sister States, may not institute a criminal action. Only the District Attorney or State Attorney General may do so for State charges. A private citizen cannot “swear out a complaint” as is done in some jurisdictions, and even a Judge is not authorized to order the filing of a criminal case<sup>8</sup>.

To illustrate the discretion vested with the District Attorney, it has also occurred that cases were rejected for filing even though the guilt of the defendant was virtually uncontested. For example, a case where a defendant was prosecuted, convicted and sent to prison for multiple forgery counts, and not sentenced to prison for consecutive terms. The District Attorney can reject the filing of additional checks, given the thought that further prosecution will add nothing to the overall enforcement of the criminal law. A second Santa Barbara cases is also illustrative: an elderly woman driving her husband home from the hospital following chemotherapy, inadvertently crossed over the center line on a rural two-lane road, hitting and killing an on-duty California Highway Patrol officer coming the opposite direction on his motorcycle. It is a misdemeanor to drive on the wrong side of the road, and where death results, it is a misdemeanor manslaughter case – punishable by up to 6 months in jail. The driver turned in her driver’s license right after the accident, was not herself under the influence of drugs or alcohol, had a spotless record, and was fully insured. A complaint was rejected – the thought being – what is the criminal system going to accomplish here under these unique facts? Should we try to send her to jail?

#### 4. CONFLICT OF INTEREST

Beginning on the filing desk, and continuing for the duration of all criminal cases, significant effort is made to avoid a conflict of interest, or the appearance of impropriety. For example, a good friend and political supporter of the elected District Attorney is arrested, or a criminal referral

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<sup>8</sup> People v. Municipal Court (Siple) 27Cal.App 3d 193 (1972).



arrives for filing consideration. In other situations, the relatives of someone in the District Attorney's Office are either witnesses or victims of crime, and a criminal case is pending against an individual. In these cases where an objective observer would be troubled by the possibility of special favoritism or treatment, or the appearance of impropriety, the usual recourse is to refer the entire case to the California State Attorney General's Office. That office has line prosecutors who handle such cases and thus avoid the conflict of interest. In the event the request to take over the case is denied, the usual procedure is to assign the case to a different geographical part of the office – another city in the same jurisdiction – where the principals involved are unknown to the assigned Deputy District Attorney. When this is done, documentation is produced and provided to the attorney representing the defendant, showing that the conflict has been seen and the steps that were taken to minimize the conflict. In the event the attorney for the defendant feels that the steps taken are insufficient, they still have the option to file appropriate requests with the Court, seeking removal of the District Attorney and the appointment of the Attorney General. These steps help ensure fairness in the treatment of the defendant and to minimize the suggestion that an individual is receiving special treatment or interest because of the conflict<sup>9</sup>.

## 5. THE ELECTION OF DISTRICT ATTORNEYS AND JUDGES IN A DEMOCRACY JUDICIAL OFFICERS

In Santa Barbara County, like in the all of California's 58 Counties, the District Attorney is elected to a 4-year term, and must stand for

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<sup>9</sup> *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 266: "The importance, to the public as well as individuals suspected or accused of crimes, that these discretionary functions be exercised with the highest degree of integrity and impartiality, and with the appearance thereof...cannot be easily overstated. The public prosecutor is a representative not only of any ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape, or innocence suffer."

re-election every 4 years. It is not unusual from time to time for individuals to mount campaigns against a sitting District Attorney or Judge. Judges of the Superior Court – the trial courts, in these same Counties, run for election for 6-year terms. Appeals from the Superior court are resolved by the California Courts of Appeal, and in some cases, by the California Supreme Court. Unlike elections to positions on the Superior Court (the trial court) elections for the Courts of Appeal and Supreme Court are not contested by one person running against another. Rather, when the term of the judge is due to expire, the Judge will appear on the ballot with the voter being asked to retain or not retain the Judge. This occurs every 12 years at the same time as the general election. If the majority votes “no” the seat becomes vacant and is then filled by the Governor of California.

Thus, for both the elected District Attorney and for Judges of the Superior Court, they must stand for election every term – and can – and do have opposition candidates run against them. Probably the most significant California non-retention of Judges occurred in 1986. There, led by a “white paper” prepared by the California District Attorneys Association, detailing many cases, the public was presented with a record of 4 Justices of the California Supreme court who were regularly reversing death penalty cases, often for what seemed to the public as a trivial reasons. The 4 Justices were painted as opposed to the death penalty in widespread pre-election advertisements. These were usually accompanied by the gut-wrenching facts of the cases themselves<sup>10</sup>. The voters overwhelmingly voted “NO” for three of the 4 targeted Justices, (57%-65%) and they were then removed forever from the Supreme Court. A similar result occurred in 2010, when 3 Justices of the Iowa Supreme court lost retention elections following their decision to legalize same-sex marriage<sup>11</sup>. A final example involves the “Recall” of Judge Aaron Pesky, a Judge of the Superior Court in Santa Clara, California. In 2016 he granted probation to a defendant in a mul-

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<sup>10</sup> E.g., *People v. Stankewitz* (1982) 32 Cal 3d 80,85 (Stankewitz and others kidnapped the female victim off the parking lot of a convenience store, drove to a secluded location where Stankewitz ordered her out of the car, put the gun a foot from her head and shot her dead. He returned to the car saying to his friends; ‘Did I drop her, or did I drop her?’ One replied “you dropped her” and they all then laughed.

<sup>11</sup> *Varnum v. Brien* 763 N.W. 2d 862 (Iowa 2009).

ti count sexual assault case, in what many observers felt was too lenient a sentence. It was also suggested that the lenient sentence stemmed from the fact that the defendant was a college athlete. Signatures were gathered sufficient to have a “recall” election – and the voters removed the judge from the bench. The elected District Attorney in Santa Clara County opposed the recall, but agreed the sentence was too lenient<sup>12</sup>.

## 6. THE DISTRICT ATTORNEY

Like judges, but with much more frequency, elected District Attorneys face opposition when their 4-year term is ending. They must then run for re-election. If no one files the required paperwork to challenge the incumbent – or if only one person files the necessary documents, then only one name appears on the ballot and the election is a foregone conclusion. Elected District Attorneys are often anxious as the filing date draws close, to see if they will have any opposition.

Money and politics now play a significant role in these elections. For example, with the legalization of Marijuana in California, large growers are capable of making significant campaign contributions to the candidate of their choice, not just the District Attorney, but other elected local officials. The same is true of casino gambling-illegal in California – with one notable exception: land upon which a recognized Indian Tribe is located can, and do, run full scale casino type gambling establishments – and a huge amount of money is involved. These interests can, and do, make significant political contributions to state and local elected officials, and can do so with respect to a candidate running for District Attorney, Judge, or any other State or local office. Santa Barbara County is home to one such casino, which in operation is indistinguishable from similar establishments in Nevada, where gambling is licensed and legal.

Many candidates for District Attorney, Sheriff, and some other State and local office refuse to accept contributions from marijuana growers and

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<sup>12</sup> “California Judge Recalled for Sentence in Sex Assault Case”, *Harvard Law Review* 132: 1369 (Feb. 2019), <https://harvardlawreview.org/topics/feminist-legal-theory/>.

casino operators, as the public in general does not like it. Nevertheless, the ability of such interest to make large donations is a dangerous situation.

Superimposed on the issue of money is outright opposition to an elected District Attorney, coupled with support for an individual running for the office who is seen as more “progressive” meaning less inclined to seek harsher sentences, to be more sensitive to race issues, and often campaigning on a promise to not seek the Death Penalty in any case, to not use various enhancements that increase the sentence dramatically (like alleging prior convictions or gang membership), and to make the police more accountable for police shootings and use of force in everyday encounters (often of a minority member of the community). Currently in California it is fair to say that most of the attention is drawn to the election for Los Angeles District Attorney. That office, the largest local prosecuting office in the United States, nearly 1,000 Deputy District Attorneys! The 2020 election will pit the incumbent against a former Public Defender as well as the former District Attorney of San Francisco, who recently quit that position, moved to Los Angeles, and is running for District Attorney of Los Angeles County. Like with other larger counties in California, it is expected that George Soros and the Open Society group will funnel large amounts of money into the campaign of their chosen candidate. This was attempted last year in three other counties here in California, but the incumbents were all re-elected. In other jurisdictions throughout the United States huge contributions have enabled these “progressive” individuals to become the elected District Attorney.

Crime remains a problem in America. Chicago, Illinois, with a population of less than 3 million people had 518 homicides in 2018. The overwhelming majority of Chicago shootings is Black on Black crime, causing some to say that criminals are the worst racial profilers. In 2019, 38 law enforcement officers have been killed by gunfire from suspects; police shootings have resulted in 896 individuals being shot and killed by the police in 2019 so far.

## 7. TRIAL BY JURY – DEMOCRACY IN ACTION

It is difficult to imagine any one thing more illustrative of Democracy in America than the Jury Trial. Most individual's participation in government is limited to voting and being on jury duty. The whole process itself stands in stark contrast to other systems.

Some basic legal principles have now been decided by our Supreme Court and by the very terms of our Federal and State Constitutions.

Who is entitled to a jury trial in a criminal case? The U.S. Supreme court has held that if the individual is facing a penalty of 6 months in jail or longer then the Federal Constitutions provision guaranteeing a right to trial by jury is applicable<sup>13</sup>. Thus, in some States, most misdemeanors do not permit trial by jury, and the same is true for misdemeanor federal criminal offenses, e.g., a protester being arrested for trespassing on a military base. In California however, under our State of California Constitution, all persons who face the possibility of 1 day in jail are entitled to a full jury trial.

Very recently the Supreme Court decided that a unanimous verdict is required to convict the defendant of a serious crime. Crimes that carry a punishment of less than 6 months in custody are not required by the Federal Constitution to be tried by a jury<sup>14</sup>.

In California, our State's Constitution mandates that the jury will consist of 12 persons and, by statute, that the verdict must be unanimous – 12 out of 12 to convict or acquit an individual<sup>15</sup>.

Juveniles (individuals under the age of 18 who are being prosecuted in Juvenile Court) and not as adults in the regular adult courts, are not entitled to a jury trial<sup>16</sup>.

The Jury Services Section-a part of the Superior court – obtains the names and addresses of all persons in the jurisdiction who have a California driver's license. This information is added to another group of names

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<sup>13</sup> *Blanton v. City of North Las Vegas* (1989) 489 U.S. 538. [Penalty also included a \$1,000 fine, driver's license restriction and attendance at alcohol and driving class].

<sup>14</sup> *Ramos v. Louisiana* 590 U.S. (2020).

<sup>15</sup> Calif. Const., Art. 1, Sec 16.

<sup>16</sup> *McKeiver v. Pennsylvania* (1971) 403 U.S. 528.

and addresses obtained from the County Voter Registration lists. These lists are combined, and duplicates eliminated. Those on the list then are sent a juror questionnaire – asking if the address information is correct, if they are over the age of 18, a phone number, and if the individual can speak and understand English. The questionnaire also asks if the individual has suffered any felony convictions, and, significantly, if the person is a U.S. Citizen. In California and in some other states, non-citizens can obtain a valid driver's license, but, as of now, still cannot vote in general elections. The only exemptions are for peace officers and nursing mothers. Thus, it is not unheard of for trial judges, district attorneys, criminal defense attorneys, doctors, nurses etc. to be included in the jury pool called for a particular case. In addition, in many states individuals who have a felony conviction – usually for possession of drugs – can now have that conviction expunged following either the legalization of the drugs, or by statutory changes making the crime a misdemeanor, and thus not a bar to serving on a jury in America.

Once the questionnaire is returned to the Jury Services Section a computerized list then is prepared of those persons eligible for jury service. Many California Counties have branch courts spread throughout the County, and cases from one particular area are usually tried in that same area, thus making it convenient to the witnesses and to the jurors who have to serve in the trial. An example of this is the well-known prosecution of pop singer Michael Jackson, then a resident of Santa Barbara County. His alleged crimes occurred, not in the area of the City of Santa Barbara, but closer to the Judicial District served by the Superior Court in the City of Santa Maria (also in the County of Santa Barbara)<sup>17</sup>. A third district serves Santa Barbara County cases that are closer to the City of Lompoc, and all three cities have a number of Superior Court Judges who serve there in both civil and criminal Departments.

The usual course of a criminal case is for the defendant to enter a not guilty plea, prepare and file certain pre-trial motions, and, in felony cases, to determine at a preliminary hearing whether there is probable cause for

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<sup>17</sup> The “Neverland” Ranch is located in Santa Barbara County. The trial, including jury selection, lasted 4 ½ months, ending with an acquittal on all counts on June 15, 2005. Jackson died 4 years later in his Los Angeles home from an overdose of propofol.

the case to move forward. As can be seen below, most criminal cases settle, either by way of an outright plea or following a “plea bargain”.

If a criminal case cannot be settled, the trial date will be set about 2–3 weeks in the future, on a date certain. Once that happens then the Jury Services personnel send out a juror summons – it is a Court Order – commanding those individuals to appear at the date and time set for the jury trial. In the typical case about 100 persons are summoned. Those who do not appear are contacted, if possible, to determine the reason for non-appearance – usually because they have moved, died, forgetfulness, and in some cases, no excuse is given. In these infrequent cases the Court will usually set a hearing ordering the person to appear to show cause why they should not be held in contempt for court for failing to appear. These individuals spend a few sleepless nights awaiting the hearing on their possible contempt!

Once those on the Summons appear, some excuses are taken – usually sickness or immediate health concerns, and then the entire group – now usually 90–100 persons it taken to the courtroom of the judge assigned to the trial. They fill the courtroom as the lawyers for the parties, and their clients, await them while seated at counsel tables between the Judge and the Jurors. In a criminal case the defendant(s) are three with their lawyer, and the Deputy District Attorney.

The Judge takes the bench, introduces the parties and tells the jurors that the case is a civil case or a criminal case, and introduces the parties. Since this article dwells on criminal prosecution in a Democracy, the remainder of the initial procedure will be directed. Unlike many other jurisdictions, and obviously including jurisdictions where there is no jury at all and the Judge or Judges are very well informed about what the case is about in America, and in California, the jurors know virtually nothing about the case.

The Judge then proceeds to tell the prospective jurors a short basic summary of what the case is about; e.g., This is a criminal case; the names of the defendant(s) and their lawyer, the name of the Deputy District Attorney, and then a short statement similar to this: “The defendant is charged with the misdemeanor offense of driving while intoxicated: The witnesses who are expected to be called are ( gives names); the trial is expected to last 5 days, etc. and other basic information. In a more

serious case, e.g. a bank robbery where someone was shot and killed, the jury would be told that the case involves an alleged bank robbery where a person was killed – the name of that victim – the location and date of when the alleged crime happened, and a list of all the witnesses. At this point the prospective jurors are still sitting in the courtroom, and no one is sitting in the seats reserved for the jurors at the trial [The jury box]. The judge will then take excuses that any jurors want to give (a student who has a final exam in a few days; a health issue; a home care issue of a relative; financial hardship, etc.) Often jurors are deferred – and told they will be called back soon on another case when the excuse they offer will no longer be an impediment to their serving on a jury. In the typical case about 10 of the 100 or so persons called will be excused or deferred. The Judge then asks the Court Clerk to “fill the jury box”. The Clerk then draws the names randomly from those prospective jurors who have not been excused or deferred. Twelve names are called and those 12 persons take the first 12 seats in the jury box.

The Judge will then question each of the 12 prospective jurors individually, usually asking them their occupation and that of their spouse, the occupation of any adult children, whether they have served on a jury before, and if they have any knowledge of the current case or know any of the witnesses. Prospective jurors with only a casual knowledge of the case (e.g.: “I read something about it in the paper some time ago”) are usually not removed from the jury box “for cause”. Thereafter the District Attorney questions the 12 individuals, followed by questioning by the defense attorney(s). These questions are usually more case specific. For example, the prosecutor might ask about criminal cases that involved the juror or a member of the juror’s family; prior incidents where the juror had a bad experience with a police officer, etc. The defense attorney might ask about pro-law enforcement group memberships, friends who are employed by law enforcement, and if race is in play, some quite specific questions to explore the area of racial bias: asking if the juror has friends who are Black, Hispanic, or if they have ever been the victim of a crime, and if the perpetrator was a member of a particular race.

It is not unusual at all for a juror, when asked if they have ever been the victim of a crime, to become very emotional, often being unable to even respond at all. The judge will then take the juror out of the jury box and



into the judge's chambers – with counsel and the defendant present, and individually question the juror. A common example that occurs frequently is the still very under-reported instances of sexual assault or child molesting. Many instances are revealed by these jurors, who never reported the offense at all. Such jurors are mostly excused from the case by the judge.

In those cases where the juror's answers might indicate that they cannot be fair to both sides, the judge can, and does, remove the juror from the jury box and replaces them with another prospective juror. The process then repeats itself for that juror. Finally, each side may then disqualify any of the jurors for no reason at all, just so the disqualification is not for a prohibited reason (e.g. race, religion, ethnicity, etc.)<sup>18</sup>.

The number of jurors who each side can disqualify for no reason at all depends on the penalty set for the criminal offense: if it is death or life imprisonment, each side gets 20 challenges of prospective jurors – all for no reason at all – just so it is not a discriminatory one. If the penalty is more than 90 days in custody, each side gets 10 challenges, and if 90 days or less, each side gets 6 challenges<sup>19</sup>.

Once each side passes on their opportunity to challenge a prospective juror, the Judge will order the 12 individuals to stand and they are then sworn on as the jurors who will decide the case. This process described above is tedious and time consuming, but very important. In a misdemeanor case the jury selection process just described can take a day or two before the jurors are finally selected. In major criminal cases the jury selection process can take much longer – 3–4–5 days or longer in some cases.

One thing that adds to the time jury selection takes is that in many cases the Judge will declare a need for alternate jurors, in case a juror gets

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<sup>18</sup> *People v. Wheeler* (1978) 2 Cal.3d 258. If for example the prosecutor excuses a number of black jurors by use of the not for cause challenge – the defense can then, and does, make a “Wheeler” motion – asking the trial judge to make inquiry from the prosecutor as to why the jurors were excused. The prosecutor has to have reasons based in fact from the record. Judge can, and do, grant the Wheeler motion in those cases where the judge finds the explanation for the dismissal of a prospective juror are inadequate. In that case the entire panel is sent home, a new trial date is set, and the entire process starts over again. In addition, if a judge makes a finding that the prosecutor violated the “Wheeler” prohibitions, the judge will refer the prosecutor to the California State Bar for possible discipline.

<sup>19</sup> California Code of Civil Procedure, Sec. 231.

sick or incapacitated during a long trial<sup>20</sup>. In this situation the judge picks an appropriate number of alternate jurors – usually 2 to 6, and then the entire jury selection process starts over again for the alternate jurors, who are also now sitting in the “jury box” being questioned in the same fashion by the judge and the attorneys. Each side can also challenge any of the alternates for no reason<sup>21</sup>, in which case the process starts again for the prospective juror called to replace the one thus removed. This stretches the time for jury selection even further.

In recent years it is not unusual at all in major cases for the defense, and sometimes the prosecution, to hire a “jury consultant”, a person with psychological training in most cases, who provide questions to the lawyers to ask the jurors and who give a profile of what kind of juror will be most likely to favor a particular side of the case. In addition, it is increasingly common for such consultants, or others working for the prosecution or the defense, to be present in the courtroom and using the internet to “google” or check prospective juror’s “Facebook” page for clues on any bias or leanings of the prospective juror.

The jury selection process, from initial questionnaires to final selection demonstrates the impact of this democratic institution on how criminal cases are processed in America, and the participation of everyday citizens in deciding guilt and innocence in criminal prosecutions. Jurors are ordered by the judge not to do any independent investigation of any kind, including internet searching, and that they must decide the case based only on the evidence presented to them during the trial.

It should be remembered that if the crime is so newsworthy, and pre-trial publicity is so intense so that many prospective jurors know much more about the case than would normally be the case, the Court can order the ‘venue’ of the trial changed, resulting in the entire case being transferred to another of California’s 58 counties, with the jury selection process and everything else being conducted there – far away from intense

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<sup>20</sup> This writer had a multi-victim murder case that lasted 3 months.

<sup>21</sup> The number of challenges for the alternates is the total of alternates declared necessary by the judge. Thus, if the Judge declares 4 are necessary, then each side gets 4 challenges insofar as these alternates are concerned. These jurors sit for all of the trial, and if they are needed, the Court will usually draw a name at random to replace a juror who was removed for some reason.

pre-trial publicity in the original county where the offense is alleged to have occurred. Once it is all said and done, the 12 jurors who eventually decide the case will still know very little about it when the trial starts but will know more than almost anyone else when the trial is over.

The criminal jury decides guilt only in California, and not the punishment, with the exception of imposing the death penalty as opposed to life in prison without possibility of parole. Currently the Governor of California has suspended all death sentences. In this connection there are currently 734 inmates on California's death row. Approximately 33% are Caucasian, 36% Black, 24% Hispanic and 6% other. All but 21 are males. Since the Death Penalty was re-enacted by the voters in California some years ago 15 were executed, while 23 committed suicide and 69 died of natural causes.

#### 8. SEPARATION OF POWERS AND JUDICIAL CONTROL OF THE DISTRICT ATTORNEY, THE POLICE, AND THE SENTENCING OF THOSE CONVICTED OF CRIMES

Some decisions made by the District Attorney can be reviewed by a judge. For example, almost all felony offenses except the most serious [e.g., murder, arson, rape, robbery, residential burglary and kidnapping] can be filed as a misdemeanor offense by the District Attorney. That decision is not reviewable. It results in the maximum punishment being less than 1 year in custody and the individual will not suffer felony conviction on their record. However, if the District Attorney files such a case as a felony and not a misdemeanor, the Judge at sentencing can overrule the district Attorney and declare that the offense is a misdemeanor. Both the District Attorney and the Judge are to consider the same factors: what did the person do factually? How old is the suspect? What is the criminal record of the suspect? What were the damages if any? To give two examples – if an 18-year-old steals a car and gets caught, has no record, no damage was inflicted, and there was nothing unusual about the facts of the case, this is going to be filed as a misdemeanor by the District Attorney. If the person stealing the car is 30 years old, has a long record, engaged in a high-speed chase with the police, fought with them on arrest, and totaled the stolen car, this is going to be filed

as a felony. Another example – the crime of felony theft sets the amount of \$950 dollars as the cut – off between a felony and a misdemeanor. If a person steals more than \$950, the District Attorney can file that case as a felony, making the maximum punishment 3 years in prison. Many, many cases are filed by the District Attorney as a misdemeanor even though the amount taken exceeds \$950. However, if a lawyer were arrested for stealing money from his clients’ trust fund, and the amount exceeded the \$950 amount, chances are good that the case would be filed as a felony, given the violation of a position of trust by the lawyer. In all of these cases however, if the District Attorney files the case as a felony, at sentencing the judge can review it and does, in some cases reduce the charge to a misdemeanor. Because the Judge has this power, it tends to form the exercise of discretion by the District Attorney towards a misdemeanor filing in close cases, so as to avoid the time and expense of a felony prosecution when the end result is likely to be a misdemeanor<sup>22</sup>.

#### 9. PLEA BARGAINING – MAKING A DEAL WITH THE DISTRICT ATTORNEY TO SETTLE THE CASE

Our Supreme Court in 2012 noted that in over 90 percent of criminal cases the case results in a guilty plea. Many, many of these cases are resolved via a plea bargain – an agreement made between the District Attorney and the defendant, his or her lawyer, and approved by the Court. In misdemeanor cases to plead guilty the judge requires a written waiver of rights form to be filled in, signed, and filed, detailing the exact terms of the agreement. In felony cases the form runs almost 10 pages long. While it is true that the Court can reject a plea bargain, in practice it is extremely rare for this to happen. As the Supreme Court noted, quoting with approval from a law journal: “To a large extent...horse trading between prosecutor

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<sup>22</sup> California Penal Code sec. 17 (b). In addition, even in a felony case where probation is granted, the court upon motion of the defendant, can later reduce the crime to a misdemeanor following the successful completion of probation. This will result, for example, in clearing the felony from the persons record, making them eligible to vote, etc. See California Penal Code Sec 1203.3(a)(b).

and defense counsel determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it IS the criminal justice system.<sup>23</sup> Given that there can be no plea bargain without the agreement of the District Attorney, and given that the majority of felony cases are disposed of via a plea bargain, one can see that it is in fact the District Attorney that is actually making the sentence determination in the overwhelming majority of criminal cases. This again emphasizes the importance of exercising discretion fairly, and why failure to exercise one's discretion at all is in fact an abuse of that discretion. So – while the Doctrine of Separation of Powers mandates that the Judicial Branch and the Executive branch shall not exercise the powers of the other, as a practical matter in criminal cases it is just not the case in fact.

Some control over this is found in the power to dismiss a case once it is filed. That may only be done by the Court, usually upon request of the District Attorney, and sometimes as a sanction for illegal, or unethical misconduct by the prosecutor. The Courts records are required to note the reason for the dismissal, so that the public is informed. This serves to prevent criminal matters from being handled in an improper way, of for improper motives ( for example – if a simple traffic ticket is to be dismissed, or a murder charge, it must be done by the Court with reasons given-hopefully preventing “ticket-fixing” in minor cases and avoiding favoritism in others)<sup>24</sup>.

## 10. VICTIM/WITNESS ASSISTANCE PROGRAMS

When I first became a prosecutor there was no such thing as Victim-Witness Assistance Programs. Santa Barbara County first hired a Witness Coordinator, then in the 1970's that position became one dealing with witnesses as well as victims. Today there are numerous Victim Wit-

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<sup>23</sup> Missouri v. Frye (2012) 566 U.S. 133, citing Scott & Stuntz, Plea bargaining as Contract, 101 Yale. L. J. 1909, 1212 (1992).

<sup>24</sup> California Penal Code Sec. 1385 (a) The judge may, either on his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal shall be state orally on the record.

ness employees, working in the District Attorney's Office, providing a host of services to victims and witnesses. These include keeping the victim informed of the status of the case, referral to community services, counseling, temporary restraining order assistance, transportation to and from court, restitution assistance and victim compensation assistance. In California every defendant convicted of a misdemeanor or a felony is required to pay a victim restitution fine. This fund can be drawn on to fund counselling, for example to a sexual assault victim, relatives of murder victims, etc. This short description does not even scratch the surface of the assistance provided by these employees.

In addition, in domestic violence cases and sexual assault cases, these victim/witness assistants are often in touch with the victim the day of or the day following the crime and stick with that victim throughout the duration of the prosecution. Many are bi-lingual so they can deal personally with non-English speaking crime victims. They are invaluable to the assigned prosecutor and provide tremendous support to the victims of crime.

## 11. FINAL COMMENTS

The Road Ahead<sup>25</sup>

“Where are we now and where are we going?”

In one word---“Privacy!”

As a California prosecutor I remember when our State Supreme Court decided that bank records were off limits without a search warrant – a different result from federal cases and interpreting our own California Constitution. Look what they said in reaching that decision in 1974:

“For all practical purposes, the disclosure by individuals of their financial affairs to a bank is not entirely volitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account. In the course of such dealings, a depositor reveals many aspects of his personal affairs, opinions, habits and associations. Indeed,

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<sup>25</sup> “The Road Ahead” – published in 1995, and written by Bill Gates, the CEO and founder of Microsoft—and discussing the computer/internet impact on all of us.

the totality of bank records provides a virtual biography the logical extension of the contention that the bank's ownership of records permits free access to them by any police officer extends far beyond such statements to checks, loan applications, and all papers which the customer has supplied to the bank. To permit a police officer access to these records merely upon his request, without any judicial control as to relevancy, and to allow the evidence to be used in any subsequent criminal prosecution against a defendant, opens the door to a vast and unlimited range of very real abuses of police power"<sup>26</sup>.

Contrast that to today – when so much information is available – with no legal process at all, simply by doing a Google search on a person, a business, or a group. We all have had the experience of searching some question on the internet – say, for example, flights from LAX to Poland. The very next thing that happens, almost instantaneously, is a bombardment of ads asking if I want to learn Polish, what hotel do I want, cheap flights to Krakow, and what tours are available to me! My supermarket knows what I buy; my Facebook page reveals what I “like”, and my I Phone has my life history on it!

The entire field of criminal prosecution, jury selection, criminal offenses, and what is a lawful search etc. is changing. It used to be the case that if patrol officers did not make an arrest for crimes committed in their presence, it fell to detectives to go in to the field, interview witnesses, run down leads, use informants, etc. in an attempt to develop probable cause to arrest, and ultimately to prosecute. Now the law enforcement officers are solving many crimes while they sit at their desk in the station house – using the computer and linking to high-tech real time crime centers, scouring billions of data points, including arrest records, property records, commercial data bases, Web searches, social media postings, examining the “fit-bit” devices worn by victims and or suspects, and collecting data from police cameras, license plate scans, facial identification<sup>27</sup> iris scans and, of course, cell phones.

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<sup>26</sup> *Burrows v. Superior Court* (1974) 13 Cal. 3d 239, 247.

<sup>27</sup> California has now banned – for 3 years, law enforcement from using cameras connected to a facial recognition data base. AB 1215, signed into law and effective January 1, 2020.

It is now extremely common for residential or commercial security cameras to be accessed for leads, often capturing the suspect in a case whose likeness is then put on the Internet, television, in the local newspaper, with the result that large numbers of perpetrators are identified given the proliferation of the image of the suspect. The new investigative devices work by and large to the detriment of criminals. One system, using multiple microphones spread throughout high crime areas, called “shot – spotter” – can triangulate the location and sequence of gunshots, distinguish them from a car backfiring, and send an instant notification to the area law enforcement agency.

With respect to cell phones, in 2014 the U.S. Supreme Court departed from precedent dating back more than 50 years, in ruling that the police may not search a suspect’s cell phone “incident” to a lawful arrest, without a search warrant<sup>28</sup>. Prior to this case, if a suspect was lawfully arrested the police could search the suspect and everything he or she was wearing or carrying, incident to the arrest. No probable cause was needed, and there were of course many cases where suspects were found with contraband (e.g., drugs) or a stolen credit card, and successfully prosecuted for these crimes despite the fact that the evidence was found, not because the police suspected the contraband to be on the subject, but simply because it was on the suspect at the time of a lawful arrest. That is still the law, generally, but now with the exception of searching the contents of a cell phone. Now, under the Riley case, a search warrant is required, and the warrant must be supported by probable cause. The court explained at length that the cell phone, and its contents, are so full of private information, that a new rule was required to protect privacy, as the contents of the phone, in many cases, contain a person’s whole life. The same is true for data from the carrier regarding the location of where the phone was at a particular date and time<sup>29</sup>. In this latter case, without a search warrant, law enforcement obtained location points for the suspects cell phone, suspecting him in a string of robbery offenses. The data stretched over 4 months and included 12 thousand different date points as to where the suspect was at any given date and time.

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<sup>28</sup> Riley v. California (2014) 573 U.S. 373.

<sup>29</sup> Carpenter v. United States (2018) 585 U.S.--, 138 S. Ct 2206.



The flood of digital information, and the ability of law enforcement to take advantage of this trove of information, increases every day. Things like firearm/projectile/ casing comparisons, which were done one item at a time, can now be inputted into a system that scans the entire data base for a possible match, and then the firearms expert can take a look at specific possible matches.

Finally, there is DNA. It is less than 35 years since it was first used in a criminal case, and when it first came to law enforcement's attention it was met with skepticism. But soon DNA testing was not only freeing inmates after a wrongful conviction, it also began to assist in the identification and conviction of many others. It used to take a significant amount of time to do the testing – now that time frame is shrinking daily – from months, then to weeks, to days, and ultimately hours for testing results.

Great strides were made in filling the DNA data base of the states (California's DNA data base is the 4<sup>th</sup> largest in the world) following U.S. Supreme Court approval of the taking of a DNA sample at arrest, as part of the search incident to a lawful arrest/and or identification<sup>30</sup>. Most recently law enforcement has also turned to genetic genealogy. In April of 2018 the police arrested Joseph DeAngelo, a former police officer, for 13 murder counts in six different California Counties<sup>31</sup>. DeAngelo (named by the press and law enforcement as “The Golden State Killer”) was linked to the murders by use of crime scene DNA and matches submitted after a relative submitted their own DNA sample to an on line ancestry company. There are obvious privacy issues in play here as law enforcement uses this technology to identify perpetrators in these serious crimes<sup>32</sup>. The same tech-

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<sup>30</sup> Maryland. King (2013) 569 U.S. 435. King was arrested in 2009 for an assault charge, and a DNA sample obtained as part of that arrest. The sample was matched in a ‘cold case’ hit to a 2003 rape case. King unsuccessfully appealed the rape conviction claiming the DNA swabbing was unlawful.

<sup>31</sup> Four of the 13 murder victims were from Santa Barbara County – in both cases the suspect entered the home of a couple, tied them up, put dishes on the male and told him not to move or he would kill the woman. After raping the female victim, the suspect killed them both.

<sup>32</sup> Just weeks ago the US Department of Justice issued guidelines to govern the growing use of genealogical databases in criminal investigations: Effective in November of 2019 the guidelines prohibit the surreptitious use of DNA databases – no fake names to sneak

nology is used in non-criminal matters, e.g., allowing in some cases infants kidnapped years and years ago to be reunited with surviving relatives after an ancestry data-base search, or finding a long-lost twin where both were adopted at birth by separate adoptive parents.

Despite occasional problems, the American jury seems to be working well<sup>33</sup>. Prosecutors can count on one hand the number of times where they were thunderstruck by a jury's decision. Given that the right to a jury trial is in both the US and California Constitution, it is going to be with us for a long time. Also, the whole system of electing the chief prosecutor, electing the judges, and calling on persons who are citizens by sending them a postcard to show up and decide guilt or innocence is about as democratic as one can imagine. The system is basically fair, with the reach of American justice feared by cross border criminals like El Chapo Guzman. Guzman, a Mexican drug lord, was captured in Guatemala, extradited to Mexico and imprisoned. He escaped by bribing his guards; arrested in 2014 he escaped again by digging a tunnel under his maximum-security jail cell. In 2016 he was arrested in Mexico after a shootout with the police, extradited to the USA on drug charges, convicted by an American jury in a public trial in 2019 and is now serving a life sentence.

In 2016, Otto Warmbier, a 23 year old American college student was arrested in North Korea, and found guilty in a secret trial for attempting to steal a propaganda poster, given 15 years, and dies a few days after he was released and brought back home, never regaining consciousness from head injuries inflicted after his arrest.

Compared to American justice, and many others, these systems are separated by more than geography.

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a crime scene sample in to a database; identification of the submitting entity as a law enforcement agency; prohibitions on using genetic genealogy companies that do not advise participants that law enforcement may use the same service, and a general prohibition that it only be used in homicide, sex crimes, or victim identification matters. See "United States Department of Justice Interim Policy-forensic Genetic Genealogical DNA Analysis and Searching" (<https://www.justice.gov/olp>).

<sup>33</sup> Neil Vidmar, Valerie P. Hans, *American Juries: The Verdict* (2007).

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