

Daily Journal

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VETERANS: Los Angeles' first veterans treatment court has the potential to emerge as the nation's very best. By Ben Gales and Paul Freese of Public Counsel, **PAGE 5**

BOOK EXCERPT: Exploring the connection between John Smith's dream of colonization and the law. By Christopher Tomlins, **PAGE 6**

ANTITRUST: Affirmative steps companies should take to preserve the confidentiality of legal advice. By David H. Evans, Christopher Cusmano and Richard Oliver of Chadbourne & Parke, **PAGE 7**

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State Approves New Greenhouse Gas Rules

Emissions Targets Will Force Sweeping Land-Use Changes

By **Richie Duchon**
Daily Journal Staff Writer

The California Air Resources Board voted Thursday to approve final greenhouse gas reduction targets that regions throughout the state must meet through sweeping changes to regional transportation and development planning.

"California is leading the nation in tackling smart and comprehensive land-use planning that will improve our quality of life, help reduce harmful emissions and lay the groundwork for economic growth and job creation in the 21st century economy," Gov. Arnold Schwarzenegger said in a statement applauding the board's vote.

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The new targets, part of a 2008 law, are intended to compel local governments to grow in a way that reduces vehicle miles traveled and increases the use of public transit and other forms of alternative transportation.

They also are likely to result in lawsuits as interest groups wrangle over meeting the objectives set by SB 375.

SB 375 gave the board final authority to propose and set emissions targets, but required input by the state's 18 metropolitan planning organizations, which proposed their own targets for 2020 and 2035.

The board's approval of final targets Thursday put it in opposition to the Southern California Association of Governments, which had proposed emissions targets well below what the board finally approved: an 8 percent greenhouse gas reduction by 2020 and 13 percent by 2035.

SCAG, which represents 19 million people in six counties, was the only region in the state that was out of line with state's proposed emission reduction targets.

The board acknowledged that SCAG and other regions could only meet their targets given certain conditions, including restoration of previous levels of state transportation funding, which has been slashed during recent state budget cycles. The board agreed to revisit targets

for Southern California in February.

"If we don't get assistance from the state and federal government, there's no way we're going to make those numbers. I can tell you it's not going to happen. Put that down in stone," said San Diego County Supervisor Ron Robert, who is an air resources board member.

SCAG could appeal the board's decision, but would be unlikely to prevail in court, said Bill Devine, a partner with Allen Matkins Leck Gamble Mallory & Natisis.

"SB 375 delegated authority to CARB to establish the greenhouse gas reduction targets. It did provide for input and recommendations by the [various regions] but left CARB with final authority. Thus, [there's] no obvious avenue for a legal challenge by SCAG," Devine said.

The targets irked some in the real estate development and construction industries, who say the high targets will dramatically increase the cost of transportation and would be bad for the state's fragile economy.

Advocates for urban infill and transit-oriented development celebrated the targets.

"This will help people who want to bring market-rate, low-priced housing for families who would rather raise kids in cities than in suburbs," said Mott Smith, principal with Civic Enterprises and an adjunct real estate professor at the University of Southern California. "I've been through the law pretty thoroughly, and this is not really about making it difficult for the sprawl developers — it's about making things easier for infill developers."

Even as the air resources board moved the SB 375 process forward, an initiative on the November ballot could effectively throw a wrench in the process.

Proposition 23 would suspend the state's landmark greenhouse gas reduction law, AB 32.

Legal experts say SB 375 is entirely independent of AB 32, but their goals are derived from the same set of goals designed by the air resources board, leaving SB 375 an open legal target.

"If Prop 23 passes, the litigation will start immediately," said Scott Anders, director of the Energy Policy Initiatives Center at the University of San Diego School of Law, which authored a recent report on the effects of Prop 23.

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California Air Resources Board Chair Mary Nichols

Associated Press

Death Row Inmate to Be Executed — Or Maybe Not

By **Rebecca Beyer**
Daily Journal Staff Writer

SAN FRANCISCO — Albert Greenwood Brown Jr., a convicted rapist and murderer whom a Riverside County jury sentenced to death, is scheduled to die on Wednesday.

The 56-year-old man, who raped and killed a 15-year-old girl in 1980 after being released from his prison term for an earlier rape, has been on death row since 1982. His death warrant was read to him on August 31. On that same day, an "intravenous sub-team" examined his veins to determine their size, location and resilience in preparation for his lethal injection.

There's only one problem: No one seems to know for sure whether Brown's execution can go forward at all because of pending challenges to the state's lethal injection process in both state and federal courts.

Executions in the state have been on hold since 2006 when U.S. District Judge Jeremy D. Fogel of San Jose ruled California's execution process was unconstitutional. After the state came up with a new process, a state court ruled it had not followed procedure to allow for sufficient public comment and also enjoined it from carrying out executions. California's latest attempt at revising the process is being challenged as well in a new case.

In August, before courts could rule on

See Page 8 — DEATH

Bell Prosecutions Will Turn On Unusual Theories

By **Brandon Ortiz**
Daily Journal Staff Writer

LOS ANGELES — Are the city of Bell officials who lavishly lined their pockets with taxpayer dollars fools or knaves?

Legal observers say that is the question jurors will confront if Los Angeles County District Attorney Steve Cooley's case against eight city officials and council members goes to trial.

And that's just one of the tricky legal issues emerging as civil and criminal charges pile up in the scandal emerging from the primarily working-class community of 40,000 people.

This week Cooley filed sweeping criminal charges against City Administrator Robert Rizzo — who was making \$800,000 a year before resigning in July —, assistant city manager Angela Spaccia and six elected city officials.

Calling the case "corruption on steroids," Cooley accused Bell officials of using the city as their own personal piggy bank to misappropriate more than \$5.5 million, including being paid for meetings that never took place and handing out \$1.5 million in illegal loans to employees.

Rizzo, charged with 53 felonies, is accused of writing his own employment contract without council approval and

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GUEST COLUMN

Familial DNA searching can provide investigative leads in unsolved cases and also exonerate deserving inmates, argues former county prosecutor **Rockne Harmon**.

By **Rockne Harmon**

Familial DNA searching burst into the limelight with its recent success leading to the identity of the "Grim Sleeper" in Los Angeles, a serial killer who had terrorized the area for over 18 years and committing at least 10 murders. The topic was not a new one, however, having been discussed in various public meetings for the past four years. Surprisingly only two states have formally adopted familial DNA search policies, California and Colorado.

CODIS (Combined DNA Index System) has provided the means to solve previously unsolved cases when DNA evidence profiles match convicted offenders. However these offender matches (cold hits) only occur

about 25 percent of the time. Familial DNA searching is based on well-known principles of genetic inheritance. People inherit half of their DNA from their mother, half from their father. Familial DNA searching provides an opportunity to develop investigative leads for some of the remaining 75 percent of the cases that have been uploaded (approximately 200,000) and remain unsolved. It is a simple choice between trying to do something to solve these crimes, or simply waiting until the offender is included in the database, if that latter would ever happen.

The process is relatively straightforward. Once the profile is searched and no direct offender hit occurs, special software can be used to try to determine if the CODIS database contains a DNA profile indicative

of a possible close relative of the person who left the DNA at the crime scene. There are two parts to this process. First, the software ranks candidate offenders in order of likelihood that they are closely related to the person who left the DNA. There will always be an appreciable number of candidates on this list. For example, in California with a database of well over 1 million offenders, the candidate list typically is set as the top 150 candidates. Next, all of the offender candidates' samples are subjected to additional DNA typing, using existing Y chromosome testing. This testing can strongly establish the existence of a close familial relationship (typically father-son or brother-brother) between the person who left the evidence and

See Page 6 — FAMILIAL

DAILY APPELLATE REPORT

CIVIL LAW

Environmental Law: Agency's decision approving public land exchange to private ownership is arbitrary by failing to determine environmental effects under Mining Law of 1872. *Center for Biological Diversity v. U.S. Dept. of the Interior*, U.S.C.A. 9th, DAR p. 14953

Immigration: Derivative applicant spouse on deceased spouse's asylum application is not entitled to relief where adverse credibility finding as to deceased spouse was supported. *Saval v. Holder*, U.S.C.A. 9th, DAR p. 14950

Probate and Trusts: Court must independently interpret trust document and apply liberal constructions in ascertaining testator's intent in absence of conflicting evidence. *Estate of Cairns*, C.A. 1st/1, DAR p. 14943

Probate and Trusts: Court errs by concluding trustee had no reasonable cause to defend litigation and awarding

attorney fees under Probate Code Section 17211(b). *Uzyel v. Kadisha*, C.A. 2nd/3, DAR p. 14911

CRIMINAL LAW

Criminal Law and Procedure: Defendant's sentence of life in prison without parole for repeated sex offenses under "two strikes" law does not violate Eighth Amendment. *Norris v. Morgan*, U.S.C.A. 9th, DAR p. 14972

Criminal Law and Procedure: Court errs in denying habeas petition despite evidence of possible autopsy contamination pointing to ineffective assistance of counsel in failing to investigate possibility. *Rossum v. Patrick*, U.S.C.A. 9th, DAR p. 14983

Criminal Law and Procedure: Subordinate term for consecutive offense must consist of one-third of middle term of imprisonment imposed for other felony conviction where consecutive term was imposed. *People v. Sanders*, C.A. 2nd/8, DAR p. 14936

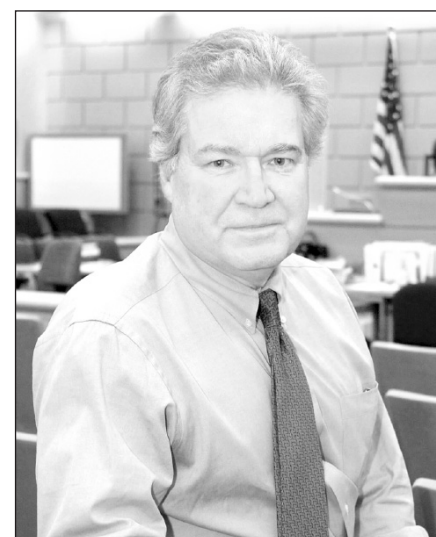
Summaries and full texts appear in insert

BRIEFLY

The U.S. Food and Drug Administration restricted access to Avandia, and overseas regulators recommended suspension of GlaxoSmithKline's marketing efforts for the diabetes drug in Europe on Thursday.

Thousands of people have sued the London-based drugmaker over Avandia after heart attacks, strokes and other side effects. Because of new data showing high cardiovascular risk, the FDA required that GlaxoSmithKline develop a risk evaluation and mitigation strategy, indicating that Avandia should only be taken by type 2 diabetes patients who can't control their glucose with other medications or who can't take Actos, the only other drug in the same class as Avandia. GlaxoSmithKline will suspend promotion of Avandia in all countries where it operates, but will respond to inquiries from doctors and patients. Sales of the drug totaled \$1 billion in the first half of this year.

MORE NEWS



Thank You From the Bench

After a 30-year civil litigation career, Los Angeles County Judge John Kralik has a reputation as an "extremely positive person" on the bench. **PAGE 2**

Chief Justice George's Tenure Praised

It's tough being chief justice of California, U.S. Supreme Court Justice Anthony M. Kennedy noted on Thursday in a talk at the opening of the State Bar's annual meeting in Monterey. **PAGE 3**

The Daily Journal is soliciting nominations for our annual list of the top ADR professionals in California. To receive a nomination form, email nominations@dailyjournal.com. Submissions are due **today**. The list will be published Oct. 20.

The Colonial Dream's Tie to the Law

By Christopher Tomlins

The following is an excerpt from the introduction to "Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580-1865" by Christopher Tomlins (Cambridge University Press).

John Smith's dream of what migrating Englishmen might make of themselves in America has been represented as a foundational statement of colonial New England's economic culture. It was that, and much more besides. Smith had a shrewd grasp of the process of English colonizing, of its desires and difficulties, its greed and grandiosity, its will to destroy and to create. His writings display a canny realization of the absolute centrality of work and labor to success in colonizing. And, though he had no means of knowing how things would unfold, he clearly understood that colonizing's effect on the social and civic identities of all those it touched might well be transformative. This book takes as its subject all three aspects of John Smith's dream.

The intimacies of colonizing, work, and civic identity, and their transformative interrelationships, are pronounced. Their common connective tissue, I argue here, the bridge from one to the next, is law.

Richard Hakluyt the elder — a lawyer — sets our scene when, a quarter century before Jamestown was settled, he situated the problematic of colonizing at the intersection of three related processes: "manning" new territories (recruiting migrant populations); "planting" them (transporting population and mixing it with land and other resources); and "keeping" them — claiming sovereignty (*imperium*), securing occupancy, and realizing jurisdiction (*dominium*, or in other words possession or rule). To address and manage the problematic, colonizers required means to "frame" their enterprise; that is, to define its terms and mobilize human and material resources to give those terms effect. Law would be their means. As a technology, a means of doing and making do, law could furnish the institutional capacities to establish migration and settlement overseas as legitimate, organized processes. As a discourse, a means of knowing and making known, law would supply the

arguments that enabled colonizers to justify — to themselves, to their rivals, to those they displaced — taking what they could keep and keeping what they had taken. And as a modality of rule, the

expression of sovereignty, law was integral to the creation and implementation of governance — the concrete realization of jurisdiction, which is to say the recreation of existing territories as well-ordered "new commonwealths" and the installation of both once and future inhabitants in transformed identities (the indigenous alienated, the newcomers domesticated). All this was what obtaining entailed.

In none of these aspects was the "law" of colonizing the common-law monolith "time out of mind of man" beloved of its protectors and inheritors. Given the growing turmoil in the high politics of the English constitution, common-law immemoriality and supremacy might be ever more heatedly claimed; nevertheless, the law of colonizing was a construct from many sources. The Roman law "received" by later medieval Europe was the *ius commune* of the sixteenth century, the point of legal reference for England's continental rivals in the colonizing exploits on the edge of which the English hovered. English discourses of keeping created claims to sovereign possession by drawing on ideologies of right and habitation embedded in that law — in *ius gentium* (nations) and *naturale* (nature), in expositions of just war and conquest — no less than the vernacular arcana of common-law tenures, and English ideologies of waste and improvement. Actual English designs for transatlantic jurisdictions drew on a plethora of organizational models —

crown-licensed adventures and conquests, chartered corporate enterprises seeking commodities and "trafficking," direct crown rule, delegated seigneurial privilege. And on the ground, where the business at

hand went forward — that is, the actual performance of work, the hard graft of creating commodities, constructing colonies, building empire — law proved not only protean but plural in the extreme, refracting New World circumstance through the multiple regional cultures of early-modern England from which migrants came, creating distinctive legal cultures of work and labor that, for some, would sustain degrees of civic freedom unknown in England.

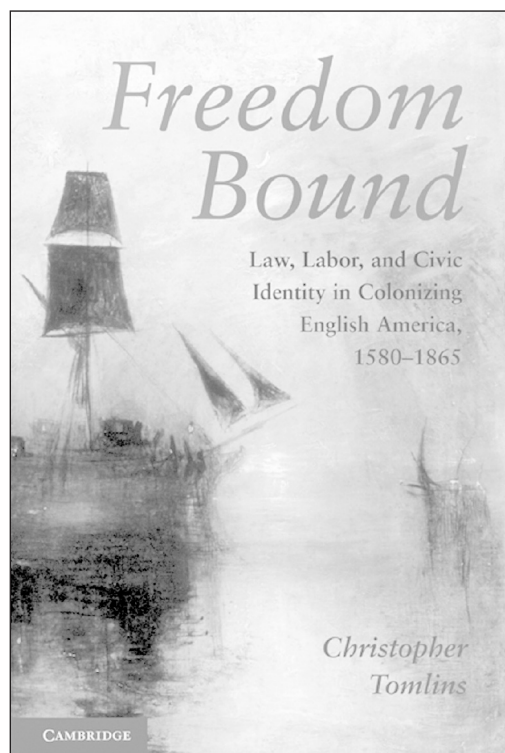
New civic lives are always a possibility when you create new commonwealths. Colonizing meant the kind of quotidian piecemeal transformations that can add up to profound change: transformations realized in the daily acts of taking possession, and in the manner of working the fields once possession was secured; transformations in the status of those who worked; transformations in the way rule was exercised over them, and by them. These were transformations of which, by the end of the seventeenth century, even the metropolis had become aware. By then, for some at least, Captain John Smith's dream was coming true.

[F]or Smith, the promise of the New World's abundance lay precisely in the prospect that there, those of small means might overcome their bondage to necessity through the exercise of their own transformative capacities, from which might arise a

new-made world of their own, and also new relational "action" — a politics of law that included them — to sustain it. In what follows we shall see that Smith had reason to dream, but that posterity would nevertheless eventually awaken to a distinct experience of modernity in which it became clear that the dream of freedom had been made possible for some only by the profound liabilities — the containment both figurative and literal, both relative and absolute) — they had imposed on others...looming labor disciplines, patriarchy, slavery. Chapter 10 ends the book with an account of the mid-nineteenth century's climactic demand for containment's continuation, articulated in *Dred Scott v. Sandford* (1857), and the disintegration of the republic of 1787 that followed Lincoln's answering refusal.

Lincoln's refusal to countenance the terms on offer in *Dred Scott*, I argue, meant an end to the particular constellation of law and labor and civic identity examined here. Refusal entailed a final reckoning with slavery, the elemental evil (absolute containment) to which the mainland colonies had yoked themselves two hundred years before. This was not a reckoning that could be brokered by law: in *Dred Scott* the law at the heart of this book stood revealed as co-conspirator in the constellation of un/freedom upon which the New World's new commonwealths, and the slaveholders' successor republic, had been built. And so instead the reckoning was brokered by war.

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Familial DNA Testing: A Proactive Approach to Unsolved Cases

Continued from page 1

the offender in the database.

In California's protocol, law enforcement is not involved in the familial search part of the process. The list of 150 candidates is not disclosed to law enforcement. Only after the Y chromosome testing is performed and only if the results strongly support the likelihood that the evidence was left by a close relative of the offender is the name of the offender disclosed to law enforcement. At that point law enforcement can utilize this powerful investigative lead to determine which close family member to focus their investigation on. Law enforcement can then use any number of lawful investigative techniques to identify the suspect family member, obtain a DNA sample, and determine whether there is a match between the reference sample and the crime scene evidence.

The process is not guaranteed to succeed. Prior to the "Grim Sleeper" success, California had performed familial DNA searching in nine cases. Each search produced its list of about 150 candidates and Y chromo-

some testing failed to establish the existence of a close familial relationship in any of those cases; thus no investigative leads were provided to law enforcement in any of those nine cases. The first search done for the "Grim Sleeper" case produced no leads. At the time of the first search, the DNA profile of the son of the ultimate suspect had not yet been added to the DNA offender database.

The success in California produced immediate interest in the subject in states such as Virginia and Texas. (See "Use of familial DNA searches in Va. Debated," *Richmond Times-Dispatch* July 19, 2010; "Experts say Texas might solve Twilight Serial Rapist cases with family DNA," *Wichita Falls Law Enforcement Examiner* July 25, 2010). While it might seem that law enforcement has a vested interest in seeing the full potential of DNA realized through this technique, few law enforcement agencies or entities have weighed in on the subject of familial searching to date. Perhaps there is a lack of awareness for its potential. Certainly the potential will not be realized if only two states out of 50 develop and adopt the process. The FBI, which regulates searches of the national network of states' databases, has shown little interest in developing, supporting, or encouraging states to adopt their own familial DNA searching protocols.

Law enforcement in the United Kingdom has been utilizing familial searching for several years. In previous public presentations, UK law enforcement has shown that familial DNA search investigative leads have resulted in convictions in about 12 percent of the cases. How does this compare with

how often CODIS offender hits result in criminal convictions? Little is known on the ultimate contribution CODIS makes towards solving crimes. Few jurisdictions have attempted to track data from offender cold hits to convictions. Several years ago, California endeavored to track offender cold hit data to case disposition. During that project, known as "CHOP" (Cold Hit Outcome Project), it was determined that California's offender cold hits resulted in conviction about 13.5 percent of the time. While the UK measure of efficiency is based on a small number of familial search efforts, 157, it should provide encouragement to U.S. law enforcement that familial DNA searching might double the efficiency of what CODIS provides in helping solve cold cases.

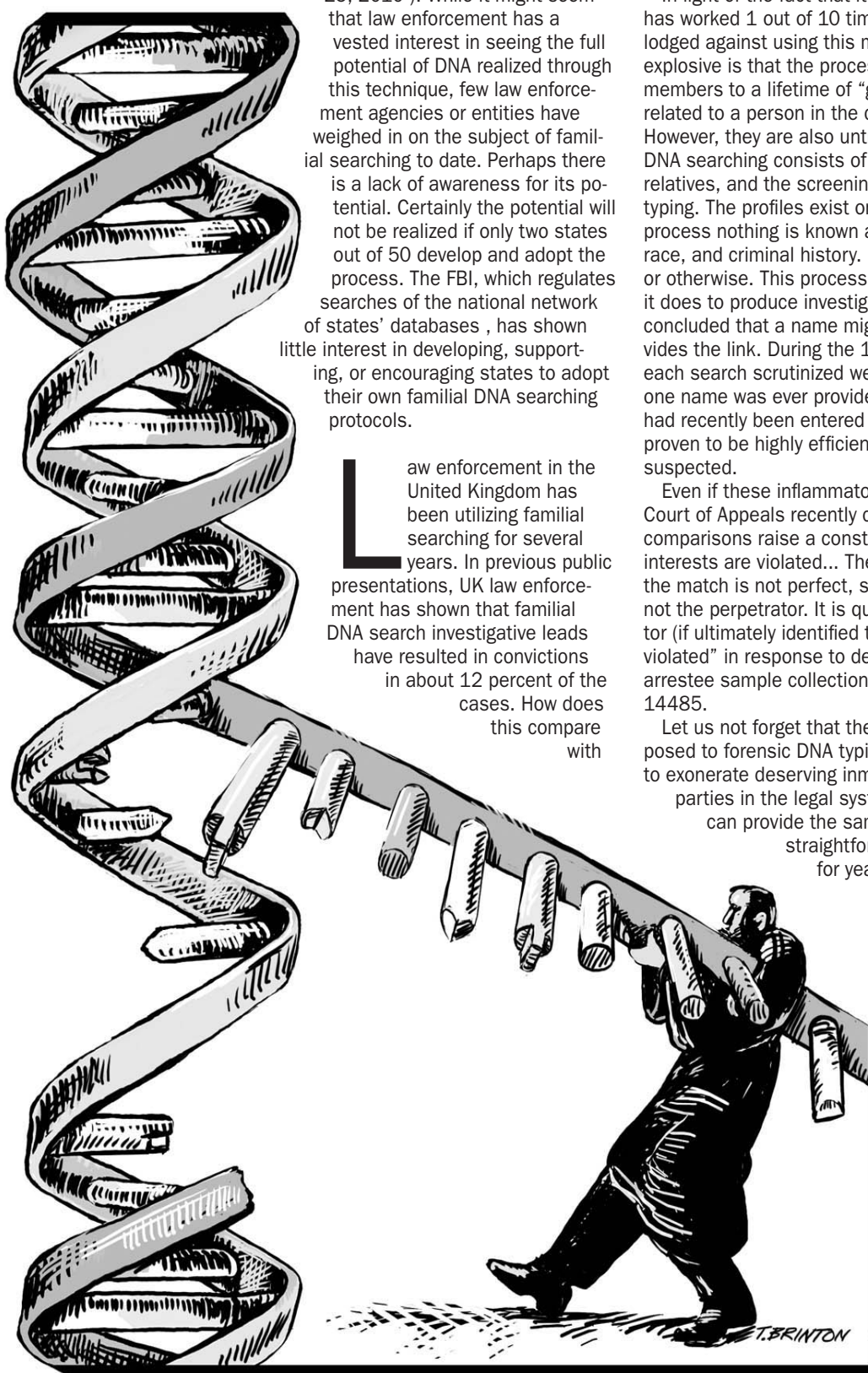
In light of the fact that it works in the U.K.'s experience, and that it has worked 1 out of 10 times in California, what objections have been lodged against using this method to solve crimes? Perhaps the most explosive is that the process subjects innocent racial minority family members to a lifetime of "genetic surveillance," simply because they are related to a person in the database. These are inflammatory allegations. However, they are also untrue. As was previously described, familial DNA searching consists of two steps, the search/ranking of candidate relatives, and the screening of those candidates using Y chromosome typing. The profiles exist only as identification numbers. Throughout this process nothing is known about any of the candidates — no names, race, and criminal history. No one is exposed to any surveillance, genetic or otherwise. This process exists as much to eliminate candidates as it does to produce investigative leads. It is only after the two steps are concluded that a name might be disclosed, but only if the Y testing provides the link. During the 10 familial DNA searches to date in California, each search scrutinized well over one million offender profiles. Only one name was ever provided, it was the son of the "Grim Sleeper" who had recently been entered into the database. The entire process has proven to be highly efficient in deciding who should not be scrutinized or suspected.

Even if these inflammatory statements were true, the 9th U.S. Circuit Court of Appeals recently commented that, "...it is not clear that familial comparisons raise a constitutional privacy issue or, if they do, whose interests are violated... The familial match is not implicated; by definition the match is not perfect, so the government knows that the match is not the perpetrator. It is questionable whether the rights of the perpetrator (if ultimately identified through the use of familial comparisons) are violated" in response to defendant Jerry Pool's challenge to the federal arrestee sample collection process. *United States v. Pool*, 2010 DJDAR 14485.

Let us not forget that the founders of the Innocence Project were opposed to forensic DNA typing until they realized the potential it provided to exonerate deserving inmates. It is simply a matter of time before all parties in the legal system recognize that familial DNA searching can provide the same truth-finding process for everyone that straightforward DNA comparisons have been providing for years.



Rockne Harmon retired in 2007 after 33 years as a prosecutor for the Alameda County district attorney's office. He was the driving force behind the California Attorney General's decision to implement familial DNA searching in California that led to the arrest of the "Grim Sleeper" serial killer in 2010.



SUBMIT A COLUMN

The Daily Journal accepts opinion pieces, practice pieces, book reviews and excerpts and personal essays. These articles typically should run about 1,000 words but can run longer if the content warrants it. For guidelines, e-mail legal editor Sharon Liang at sharon_liang@dailyjournal.com.

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