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PERSPECTIVE

The O.J. Inquisition: A United States Encounter With Continental Criminal Justice

*Myron Moskowitz**

*Editor's Note***

October 3, 1995 marked the end of the O.J. Simpson double murder trial, which lasted 474 days and was billed "the trial of the century." After less than four hours of deliberation, the jury acquitted Mr. Simpson of all charges. The following article is a dramatization of how a case similar to the Simpson trial might be handled by a civil-law European criminal justice system.

Utilizing an unusual format, Professor Myron Moskowitz examines and illustrates the differences between the United States and civil-law European criminal justice systems. The author uses a play script inspired by the events in the trial of O.J. Simpson, set before a European Court. The script consists of fictitious conversations among a fictitious prosecutor, defense attorney, officers of a mock European Court, and two professors. The dialogue illustrates the differences between the two legal systems and the historical and sociological premises that inform them.

* Professor of Law, Golden Gate University. The author would like to thank Professors Rudolph B. Schlesinger, Mirjan Damaska, Abraham S. Goldstein, Richard S. Frase, Craig M. Bradley, Lloyd L. Weinreb, Bernard Segal, Robert C. Calhoun and Joseph J. Darby for their helpful comments on an earlier draft of this article.

** Due to the unusual format of Professor Moskowitz's academic commentary, the *Journal* has chosen not to apply its standard conventions in order to preserve the dramatic nature of the dialogue.

*News Item:*¹ Due to pervasive public criticism of the United States “adversarial” criminal justice system, all parties have agreed to try the double murder trial in a neutral European nation, where the case will be handled under the “inquisitorial” legal system. When asked if it would be difficult to adjust to a new system in the short time remaining before trial, one of the attorneys replied, “No problem. There’s probably a few minor differences between our systems, but we should be able to pick them up as we go along.”

Scene I: A courtroom in Europe. Ms. Clare and Professor Schmrz sit at the prosecution table. Mr. Crane and Professor Grbzyk sit at the defense table. At another table sit the victims’ families and their attorney, Ms. Smith. Behind the tables, guarded by bailiffs, stands the Accused, and behind him is a gallery packed with spectators. All face a long, raised bench.

Crane: I must be nuts, letting you talk me into this. What now? They put my client on the rack and turn the screw ’til he talks?

Grbzyk: *(laughing)* That went out in the 18th century. You Americans have the wrong impression of the inquisitorial system. It’s probably the most widely used legal system in the world today. It was started by the Catholic Church, and after the French Revolution, it was further developed by the French and the Germans. It then spread to the rest of Europe, except for the British Isles. Many African, South American, and Asian countries have also adopted it. It’s used much more today than your Anglo-American “adversarial” system. It’s -

Crane: Can the lecture, Professor. Here they come.

Grbzyk: *(whispering)* Straighten your robe.

Everyone stands. Nine people enter the courtroom from a side door. Three of them, wearing black robes, take the three center seats behind the bench. The other six wear red-and-white sashes, and they take the other seats. The man in the middle

1. To the author’s knowledge, no person living or dead has engaged in any of the conversations that make up the dialogue of this perspective.

dons a red beret, then places a large book in front of him and opens it.

Presiding Judge: The People of the State of California versus Mr. Sampson. Are counsel ready?

Clare: Yes, your honor.

Crane: *(bowing)* Ready, your majesty.

Smith: Ready, your honor.

Clare: Excuse me, your honor. I don't know who this person is.

Smith: I'm Sally Smith, attorney for the families of the victims.

Clare: What are you doing here? This is my case, a criminal case, not a civil case. You don't belong here.

Presiding Judge: Ms. Clare, we allow the alleged victim to intervene and appear by counsel in our criminal trials. Who has a greater interest in seeing that justice is done than the victim?

Clare: The State does, your honor. I represent the State, she doesn't. That's how it's done in the United States.

Presiding Judge: But you haven't always done it that way. As I recall, in the early days of England and the United States, a criminal prosecution was usually brought by the victim, who also paid for it. Only recently, with the development of public prosecutors like yourself, has the status and the involvement of the victim withered away.

Clare: Maybe it's coming back. Some states now allow victims to take part in sentencing hearings.

Presiding Judge: In any event, we go further here, at least in trials of serious crimes. If the defendant is convicted, he might even be ordered to pay

damages to the victim. You, of course, do represent the State, but the victim may also appear by counsel. Now let's get to work. I will call as the first witness -

Crane: Uh, excuse me, my lord.

Presiding Judge: Yes, Mr. Crane?

Crane: We seem to be forgetting something.

Presiding Judge: Forgetting?

Crane: Aren't we going to *voir dire* the jurors? You know, ask them a few questions to see if they're biased? Bounce a few out on peremptory challenges? That sort of thing. That comes first, doesn't it?

The Presiding Judge stares at Crane, then cracks up laughing. The whole courtroom joins in—except for Crane and Clare.

Presiding Judge: Very good joke, Mr. Crane. We will now call the first witness. Bailiffs, please bring the Accused forward.

Crane: (*sputtering*) The Accused? That—this man is my client! The defendant! You can't make him testify—

Presiding Judge: (*annoyed*) Sit down, Mr. Crane. If you don't understand our procedure, perhaps Professor Grbzyk can enlighten you during a recess. Now, Mr. Sampson, let me ask you—

Clare: Excuse me, judge.

Presiding Judge: Now what? Yes, Ms. Clare?

Clare: I believe it's the prosecution's duty to present the state's case. So if you don't mind, I'll question the witness.

Presiding Judge: (*frowning, slamming down his gavel*) We'll take a recess, so our U.S. friends may better acquaint themselves with continental procedure.

Scene II: A small cafe next to the courthouse. Crane and Grbzyk sit at one table drinking coffee. Clare and Schmrz sit at another table.

Crane: What are these people, animals? They've never heard of due process? No wonder they're always going to war. (Sipping some espresso and making a face.) Bitter, bitter, bitter.

Grbzyk: Sugar? Relax, Mr. Crane. You Americans didn't invent civilization, you know. There's more than one way to run a justice system.

Crane: You call this justice? I can't even *voir dire* my jurors.

Grbzyk: They're not jurors, at least not in the U.S. sense.

Crane: Those six people without the robes. Judges or jurors?

Grbzyk: Jurors, sort of. They're called lay assessors. They're ordinary people, like your jurors, selected at random from the population. The parties have no right to question them or to remove any of them, so long as they meet our minimal qualifications of age, citizenship, and the like. You don't need to, really, because they can't decide the case by themselves anyway.

Crane: What do you mean?

Grbzyk: The tribunal is a "mixed panel" of professional judges—the three people in the robes—and the lay assessors. The panel decides the case by a two-thirds majority.

Crane: Now just a minute. You're not telling me that the judges go into a room with these lay assessors and deliberate with them?

Grbzyk: I'm afraid I am. You seem shocked.

- Crane: Of course I'm shocked. What kind of a jury do you have when judges vote with the jurors?
- Grbzyk: Well, the jurors—as you insist on calling them—can outvote the judges. There are six jurors and only three judges.
- Crane: Look, Professor, I wasn't born yesterday. Jurors think judges walk on water. When a judge—when *three* judges—tell the jurors what they think, what juror is going to disagree?
- Grbzyk: I concede that it does not occur very often.
- Crane: Why not get rid of the jurors and be done with it? Be up front and let the judges decide the case.
- Grbzyk: This does happen in minor cases. But in major cases, we want some lay involvement. Also, we have the lay people vote before the judges vote, so the lay people will not be influenced by the judges' votes.
- Crane: But they know what the judges think anyway because they heard the judges during the pre-vote discussion.
- Grbzyk: I suppose this is so.
- Crane: Where does the judge instruct these lay assessors on the law? In open court or behind closed doors, in the deliberation room?
- Grbzyk: We have no formal jury instructions, as you do. During deliberations, the judge will explain the law to the assessors. I've seen your U.S. jury instructions. They are usually in the language of statutes or appellate court opinions. They may be legally correct, but they're very difficult for lay people to understand. Your judges are reluctant to depart from them by even a single word, for fear of reversal on appeal. In our system, the judge explains the law to the assessors in simple language. If they have trouble getting it, the judge may discuss it with

them informally until they understand. This all happens in the deliberation room.

Crane: Makes sense, I guess. I've often wondered how much U.S. jurors really understand when the judge reads them those long, legalistic instructions. But in your system, the lawyers have no idea what the judge is telling the jurors. Suppose he makes a mistake? How would I ever know about it?

Grbzyk: After the tribunal decides the case, one of the judges will write the judgment. It is not a simple "guilty" or "not guilty" verdict, as you have. It will spell out what law the tribunal applied, in detail.

Crane: But that's written after the tribunal already voted. Maybe the judge told the jurors something different from what he wrote in the judgment.

Grbzyk: No European judge would do a thing like that, Mr. Crane.

Crane: You sure seem to trust these guys.

Grbzyk: I suppose we do. It's good to get an outsider's perspective on one's legal system, Mr. Crane. Perhaps we can learn a lot from each other.

* * * *

Clare: I can't believe this. I schlepped all the way to Europe, and I can't even question a witness?

Schmrz: Madame must have patience. Your turn will come.

Clare: Oh yeah? When? After the verdict? It's my case to try, isn't it?

Schmrz: Not exactly. Do you understand why our system is called "inquisitorial?"

Clare: After the Spanish Inquisition?

Schmrz: No, Madame. We have become a bit more civilized since then. It is inquisitorial because it is based on the tribunal's duty to inquire, to find the truth. In your adversarial system, the parties are responsible for presenting the evidence, pretty much in any way they see fit. The judge merely makes sure that everyone behaves, and the jury sits passively and listens. When the lawyers are done, the jury decides. Neither the jury nor the judge takes any active part in investigating the case, seeking out evidence, or otherwise finding out what happened. This is not so in the inquisitorial system. Here, our judges are responsible for finding the truth themselves.

Clare: Do they do that in civil cases too?

Schmrz: No. Our method of litigating civil disputes is different from yours, but it is built on the same basic premise: the state has very little stake in the outcome of civil litigation. In both Europe and the United States, the state provides a proper forum for the resolution of private disputes, but it cares little about who wins a particular case. True, the state establishes substantive rules of law, in order to cause certain results in society, and these rules are enforced partly through private litigation. But in a particular case, the state provides the playing field and the umpire, that's all. For example, if the parties choose to settle in the middle of a case—even on that which might seem unjust to an outsider—the judge will seldom hesitate to terminate the litigation. If the parties are satisfied, the state has no further interest in the matter. This is so in both of our systems. What seems odd to us, however, is that in the United States you treat *criminal* cases pretty much the same way, even though the state clearly has an interest in seeing that the guilty are convicted and the innocent are freed. In Europe, we operate openly on this principle. This is why the state inquires: the state itself cares about the outcome.

- Clare: So that's why the presiding judge does the questioning?
- Schmrz: Yes. When he is done, you and Mr. Crane will have a chance to ask additional questions.
- Clare: If there's anything left to ask about.
- Schmrz: I grant that this is unlikely, if the presiding judge is thorough.
- Clare: This is ridiculous. Why am I even in the courtroom? I might as well read a book or take a nap.
- Schmrz: Our prosecutors have been known to do both, on occasion.
- Clare: Look, Professor, you don't seem to realize what's at stake for me here. This is *my case*. If I lose, I'm back in Compton Muni Court prosecuting parking tickets.
- Schmrz: Lose? I don't understand.
- Clare: What's to understand? Lose. You know, like the Super Bowl or the World Series. If you win, I lose.
- Schmrz: Ah, I see. The adversarial system is 'speaking. But in our system, prosecutors never lose.
- Clare: Never lose? So the game is fixed?
- Schmrz: No. There is no "game." Prosecutors never lose, but they never win, either. They simply don't think in terms of winning or losing. If the tribunal acquits the defendant, the prosecutor feels no sense of having lost the case. He has done his job, and the tribunal has done its job. His responsibility is to assist the tribunal in finding a just result, not to "win."
- Clare: How "un-American."
- Schmrz: Quite so, I'm afraid.

Clare: But what about the prosecutor's career? Doesn't he move up the ladder by winning his cases?

Schmrz: Our prosecutor is a civil servant, not a political figure. He advances by faithfully performing his duties. Whether the tribunal convicts or acquits the defendant is of no consequence.

Clare: It's certainly of consequence where I come from. My community fears crime, and they want convictions. If I don't get 'em, I'm out.

Schmrz: You are employed by your community, is that correct?

Clare: Sure. The county board of supervisors pays my salary.

Schmrz: So naturally you must please them. But our prosecutors do not work for local governments. All are employed by our central government in the capital. They are not unduly concerned with the ephemeral reactions of the communities in which they happen to be based. When a prosecutor is promoted, she will probably be transferred to another city anyway.

Clare: That certainly would affect how they see their cases.

Schmrz: Madame, you should stop thinking of "my case" and "their cases." The case belongs to the tribunal, not to the lawyers.

Clare: Very lofty, Professor, but let's get down to practicalities. I question witnesses because I *know* the case, backwards and forwards. I investigated the case and I prepared for trial, so I know what to ask and how to follow up answers with more questions. The judge can't do that, because he comes into court cold. He doesn't know the case.

Schmrz: This judge does.

- Clare: How?
- Schmrz: Did you notice the large book the presiding judge has been looking at?
- Clare: Yes. I thought it was a law book.
- Schmrz: Not quite. It is called a dossier. It contains the report of the examining magistrate.
- Clare: Who's she?
- Schmrz: The examining magistrate is another judge, who investigates the case before trial, after the police have completed their investigation. She interviews all witnesses and writes reports on what they said. She also sees that physical evidence is gathered and any needed scientific tests are performed. She then compiles all of these documents into the dossier, which she gives to the judge who will preside at the trial. This is the French system. Some countries, like Germany, have eliminated the examining magistrate, and the prosecutor prepares the dossier.
- Clare: Hold on. You mean to tell me that before the trial even begins, the judges and jurors have read a whole report on the case?
- Schmrz: Not all of them. Just the presiding judge and perhaps one other judge, who might be responsible for writing the judgment. The presiding judge needs the dossier in order to perform his job of questioning witnesses.
- Clare: But he votes, and he can influence the others during deliberations. In the U.S. of A. we would never tolerate a judge or juror who had read a whole detailed report on the case before the trial even began. I'm no bleeding heart liberal, mind you, but even a slimeball criminal defendant is entitled to a fact-finder who hasn't already made up his mind.

- Schmrz: Perhaps we trust our judges more than you trust yours.
- Clare: It's not just a matter of trust. It's a matter of the limits of the human mind. While your presiding judge is questioning the witnesses, he is also supposed to be making up his mind on how to vote. How can anyone do both at the same time? Sure, he can throw out easy, softball questions to witnesses. But sometimes the best way to get to the truth is through tough, hardball cross-examination. That's often the best way to deal with a liar. How can a judge do that and still be a neutral fact-finder? I couldn't do it, and I don't think you could either. That's why it's better to have people like me and Crane cross-examine. We can be as tough or tricky as we want, and it doesn't matter, because we don't decide the case.
- Schmrz: I see your point. Of course, keep in mind that we do allow the attorneys to question a witness when the presiding judge is done.
- Clare: So they do the cross-examining?
- Schmrz: Not in the way you describe. The presiding judge usually does such a complete job that there is little left to ask, and the attorneys don't want to offend the judge by implying that he was less than thorough. So at most, they might ask a question or two, usually very politely. Most of them have had little or no experience with U.S.-style cross-examination.
- Clare: That must make it pretty easy for someone to lie in your courts—and get away with it.
- Schmrz: The presiding judge is a very stern and prestigious figure. One would not lightly lie to him. And if the tribunal believes that the defendant has lied, that might well affect the sentence it imposes on the defendant.
- Clare: In the United States, it's probably a little easier for a defendant to concoct a lie that sounds plausible, because he doesn't testify until after

he's heard the prosecution case. Here, he can't do that, because he goes first.

Schmrz: He does go first, but he is nevertheless familiar with the prosecution case before he testifies. Before trial, we allow the defendant to see the complete dossier, which contains summaries of the testimony of each witness. However, those summaries might not be as detailed as the in-court testimony of witnesses, still yet to come. So our defendants might be taking a chance by inventing or embellishing stories.

Clare: You let him see the whole dossier?

Schmrz: We do. Both the prosecutor and the defense counsel may examine the dossier before trial. We believe in complete pre-trial discovery. There are no secrets.

Clare: Discovery is much more limited in the United States. We don't want to give the defendant a chance to adapt his story to what the prosecution witnesses are going to say, and we don't want him to intimidate or bribe prosecution witnesses.

Schmrz: But here the defendant has probably already told his story to the examining magistrate, as have the prosecution witnesses. They are not likely to change their stories much at trial, and if they do not appear, their written statements may be considered anyway.

Clare: Even though they're hearsay?

Schmrz: Hearsay? What is that?

Clare: Oh, boy. Toto, we're not in Kansas anymore.

* * * *

Crane: OK, Professor, I'm beginning to get a glimmer of how your system works, though I can't say I like it—yet. But how can they call the Accused as

the first witness? Don't you have any privilege against self-incrimination here?

Grbzyk: In a way. After your client answers some general questions about his background, the presiding judge will advise him that he has the right not to answer questions about the crime itself. But defendants rarely assert that right.

Crane: Why not? I've had a lot of clients I'd never put on the stand. Why open them up to cross-examination and have their stories ripped apart?

Grbzyk: Remember, the presiding judge has read the dossier. He knows there is evidence that the defendant committed the crime, and he wants the defendant's response.

Crane: So he's presumed guilty, before the trial even starts?

Grbzyk: No. In former times, a conviction could be based on the dossier alone. Today, however, the tribunal may not convict the defendant unless the evidence produced at the trial firmly convinces the tribunal that the defendant is guilty. But let's be practical. The person who prepared the dossier—the examining magistrate or the prosecutor—is an experienced, unbiased government official. If she has determined that there is sufficient evidence to go forward with the trial, everyone knows there is a good chance the defendant is guilty. In the United States, you like to pretend otherwise, but that's just pretense, isn't it?

Crane: Well, maybe it is. I've always wondered if jurors really follow the judge's instruction to give no weight to the fact that the police have arrested the defendant and the prosecutor has brought the case to trial. I guess it's what you might call a "useful fiction."

Grbzyk: We believe in honesty.

- Crane: Hmm. Before you get too cocky, Professor, answer this, if you will. Suppose I tell my client just to clam up when the judge questions him about the crime?
- Grbzyk: If the defendant fails to respond, the judge will assume the worst. And the defendant knows it.
- Crane: But that's using the defendant's silence against him. We don't allow that, at least not openly.
- Grbzyk: We do. Who knows more about the crime than the defendant, and what good is served by his silence? In any event, there's another reason for him to talk.
- Crane: Which is?
- Grbzyk: In your system, the trial is about guilt, and only about guilt. Sentencing comes later. We don't do it that way. Our trials are about *both* guilt and sentencing. If the tribunal finds the defendant guilty, the judgment will also contain the sentence. So the presiding judge must develop evidence not only about whether the defendant committed the crime, but also about what sentence he deserves if he did it.
- Crane: You're kidding! You mean that evidence about his prior record, his whole life—everything *we* consider in *sentencing*—comes in at his *trial*?
- Grbzyk: Quite correct. Does that bother you?
- Crane: Bother me? No, it *kills* me. How can you give a guy a fair trial on whether he committed *this* crime when you know that he has four priors, went AWOL from the Army, and stole two bits from the church collection box when he was a kid? In the United States, we call this stuff irrelevant and prejudicial and keep it out of the trial.
- Grbzyk: I suppose we trust our tribunal more than you trust yours. With our judges deliberating along with the lay assessors, the judges will make

sure that the assessors do not draw any improper inferences.

Crane: Yeah, I bet. Anyway, I see your point. At a U.S. sentencing hearing, it is better for the defendant to talk. He's already been found guilty, and if he won't cooperate now, the judge is likely to throw the book at him. If you guys *combine* guilt and sentencing into one trial, I have only one shot at showing the tribunal that the defendant isn't such a bad guy, so I'd better tell him to answer the judge's questions.

Grbzyk: You're learning fast, Mr. Crane.

Crane: I guess there's another reason to have him testify, or maybe a reason not to have him not testify. In the United States, if I allow my client to testify, the D.A. can then introduce his prior felony convictions to show that he's not a very credible witness. The judge will tell the jury not to think he's committed this crime just because he committed the priors, but I don't think most jurors can draw such fine lines. So lots of times I don't put him on the stand just because I don't want the jury to hear about the priors. Over here, the tribunal will hear about the priors anyway, whether he testifies or not. So I might as well put him on.

Grbzyk: Very astute. I hadn't thought of that.

Crane: Still, it doesn't seem fair to put a defendant in a position where he has to hang himself by talking. And if they think he's lying, they can try to nail him for perjury.

Grbzyk: That cannot happen.

Crane: You don't prosecute people for lying under oath?

Grbzyk: We do. But the accused is never put under oath. We want his testimony, but we feel that the threat of perjury would unfairly put too much pressure on him.

- Crane: *(shaking his head)* Weird. You people are really weird.
- Grbzyk: Perhaps when you see how all the pieces fit together, we will seem less weird.
- Crane: What about *before* the trial? Can the police or the examining magistrate question the defendant, get a confession out of him, and then use it at the trial?
- Grbzyk: Generally, yes. But whenever a suspect is to be questioned, he must first be advised of his right to silence and his right to counsel.
- Crane: Sounds familiar.
- Grbzyk: It should. Some countries have explicitly based these requirements on your *Miranda*² decision.
- Crane: Interesting. I've seen a few U.S. decisions cite European practices as authority for some new idea, but it's pretty rare.
- Grbzyk: It should be rare. It's a dangerous thing to do. One shouldn't graft a feature from a different system until one fully comprehends how the entire system supports that feature.
- Crane: I'm not sure I get what you're saying.
- Grbzyk: You will, as you learn more about our system.
- Crane: So, do your defendants exercise their *Miranda* rights, or do they waive them?
- Grbzyk: Before the police, they often waive them, as do your defendants. But when the examining magistrate questions a defendant, usually she will not allow a waiver of the right to counsel.

2. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 15 L. Ed. 2d 694 (1966).

- Crane: So once the guy gets a lawyer, the lawyer tells him not to answer the examining magistrate's questions, right?
- Grbzyk: Quite the contrary. The lawyer almost always advises him to answer.
- Crane: Even though his answers might be used against him in the dossier?
- Grbzyk: Yes. Don't forget, if he refuses to answer, he will be faced with the same questions at trial, and—as we discussed earlier—he will pretty much have to answer them then.
- Crane: So he might as well look cooperative from the get-go, to minimize his sentence.
- Grbzyk: Correct. And if he confesses before trial, there is not much point in refusing to confess again at the trial.
- Crane: Each aspect of this thing seems to support the other.
- Grbzyk: Quite so. And there is another reason for him to answer the examining magistrate's questions. The magistrate also has the power to decide whether the defendant is detained or released pending trial.
- Crane: So if he wants to stay out of the pokey, he'd better be nice.
- Grbzyk: You Americans are very practical, Mr. Crane.
- Crane: So are you Europeans. Your whole system seems designed to get a confession as soon as possible, even though you go through the motions of telling the guy he doesn't have to answer.
- Grbzyk: He does have the right not to answer. But we see no point in encouraging him to exercise that right, the way you Americans do. Our goal is to find the truth, and the defendant is in a very good position to help us accomplish that task.

What is wrong with asking him to tell us what he knows?

Crane: We've had some bad experiences with that, going back to the Star Chamber in England and "third degree" interrogations in the United States, with the police beating and threatening people if they won't talk.

Grbzyk: So have we. Don't forget the Spanish Inquisition, and we did allow torture until the 19th century. But that is all behind us now, and torture and threats are illegal. So long as they are, why shouldn't we simply ask the defendant to tell what happened?

Crane: It's just not right for the government to intrude into someone's mind, into his private thoughts.

Grbzyk: But you intrude into private thoughts quite frequently, don't you? Any non-defendant witness may be compelled to testify about his thoughts, so long as they are relevant and no recognized privilege applies. In this very case, police officers were compelled to testify about what they thought about many things, including probable cause to search and their beliefs about race and interracial marriage.

Crane: True, but a defendant in a criminal case is different. The government has many more resources than the defendant. They should have to prove the case without using him to help them.

Grbzyk: So in the adversary system, you handicap the prosecution in order to make the game fair, even if this detracts from finding the truth?

Crane: Look, the prosecution has plenty of ways to prove the truth. They have investigators, crime labs, the FBI, and the whole government apparatus when they need it. In the usual case, the defense has just one lawyer and, if you're lucky, maybe an investigator or two.

- Grbzyk: Yes, but in a given case, all the government's resources might be insufficient. In this case, for example, the prosecution must prove its case by inference, with blood samples, DNA tests, and evidence of motivation and opportunity. But only one person who is still alive saw exactly what happened and knows exactly what his mental state was when (and if) he did it. That's the defendant himself. Why not allow the court to ask him?
- Crane: Maybe it comes down to this. We don't think it's right to make people incriminate themselves with their own words.
- Grbzyk: Strange. When European parents find cookies missing from the cookie jar and ask their child what happened, they do not expect the child to answer, "It's not right to ask me to incriminate myself." Are U.S. parents different?
- Crane: Of course not, but criminal defendants aren't kids. A kid who steals cookies might be sent to his room for an hour, but a criminal defendant will be sent to a very small cell for a very long time, and maybe to the gas chamber. The parents are trying to help the kid learn how to behave. The government is *not* trying to help the defendant in any way, shape, or form. It's not the same.
- Grbzyk: You seem to dislike our reliance on confessions, Mr. Crane. But U.S. attorneys advise most of their clients to confess, don't they?
- Crane: We do?
- Grbzyk: Yes. Isn't that what you do during your plea bargaining? You advise your client to plead guilty, in order to obtain the benefits of the bargain. Isn't that pretty much a confession?
- Crane: I hadn't thought of it like that.
- Grbzyk: So perhaps your system relies on confessions just as much as ours does.

- Crane: Interesting. Even though our systems look really different on the surface, maybe there are similarities, once you look a little deeper.
- Grbzyk: Possibly. But it is risky to assume that “we are all the same, at bottom.” There might in fact be some real differences. And now we must return to court.

They rise and begin walking, as do Clare and Schmrz.

- Clare: Is the inquisitorial system the same throughout Europe, Professor?
- Schmrz: Yes and no. There are fundamental features that do not vary much. Judges, not the parties, are responsible for developing the evidence. The judge receives a dossier before the trial begins. There are other common features I will explain when we have more time. There are variations, however. In smaller cases, what you call misdemeanors, the tribunal might consist of only one judge and two lay assessors. Some countries use tribunals where judges outnumber lay assessors. Germany, for example, uses three judges and two lay assessors in cases of serious crime. And some countries use no lay assessors at all except in major cases. The procedure you will see in this case is somewhat typical, but other countries might differ a bit. Italy has a sort of hybrid system.
- Clare: Our adversary system also varies somewhat from state to state. I guess it’s the same here.
- Schmrz: Exactly. A very good analogy.

Scene III: The Courtroom

- Presiding Judge: Thank you for your testimony, Mr. Sampson. We appreciate your candor. A truly amazing story. Oh, excuse me. Does counsel have any further questions for the accused?

Clare: I guess not, your honor. You seem to have asked everything I was going to ask.

Crane: Your astute questioning would put most U.S. lawyers to shame. No questions, your grace.

Presiding Judge: Why thank you, Mr. Crane. How very kind.

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Presiding Judge: Detective Farmer, please tell us what happened when you went to the home of the accused.

Farmer: I went there to tell him his ex-wife had been killed. But his gate was closed, and no one answered the intercom. So I climbed over the gate. I found this glove on the driveway. (He displays a glove.) It matches a glove we found at the murder scene.

Crane: Objection, your honor. That glove was obtained in violation of the Fourth Amendment.

Presiding Judge: The what, Mr. Crane?

Crane: Sorry, Judge. Wrong country. We contend that Detective Farmer conducted an illegal search by hopping the gate without a warrant.

Presiding Judge: So?

Crane: So? So the glove can't be used in evidence.

Presiding Judge: Why not? It is relevant evidence, is it not?

Crane: That doesn't matter. If it was obtained by an illegal search, it goes out. Everyone knows that.

Presiding Judge: Not everyone in Europe knows that, Mr. Crane. We assume that the tribunal should consider all relevant evidence. We do not employ the exclusionary rule, as you call it in the United States, except in extreme cases.

Crane: Then how do you make your police behave?

Presiding Judge: All of our police work for the Ministry of Justice, which is part of our central government. When the Minister issues an order, every policeman in the country must obey it, or suffer demotion or termination of employment. In the United States, this cannot happen. You have many hundreds of independent cities, counties, and states, each running its own police department. The only institution you have for setting minimum standards of behavior for all policemen is your Supreme Court. And the only tool your Supreme Court has for enforcing those standards is to order that illegally-obtained evidence be excluded.

Crane: True, your honor, but even here in Europe, with a more transient population and an increase in crime, your cops will tend to feel the pressure to harass certain people. And the cops' bosses will tend to look the other way. That's why courts need to keep out illegally-seized evidence in order to deter the police from doing that kind of stuff.

Presiding Judge: The circumstances you describe have not afflicted Europe as much as the United States.

Crane: Times change, Judge.

Presiding Judge: You're quite right, Mr. Crane. Times do change. Some European countries have begun to experience more police abuses, and some have begun to apply an exclusionary rule to evidence obtained by certain acts, such as illegal wiretapping. As yet, none has gone so far as the United States. In our tradition, the goal of a criminal trial is to find the truth, not to serve other ends. But who knows what the future will hold?

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Presiding Judge: Detective Farmer, what did Mr. Crawford tell you about the activities of the accused that night?

Crane: Objection, your honor. That calls for hearsay.

Presiding Judge: Hearsay, counsel? We do not recognize such an objection.

Crane: What? I thought the point of an inquisitorial trial is to find the truth. In the United States, the key to making sure that witnesses tell the truth is cross-examination. Detective Farmer is here in court, so I can cross-examine him as to what he says he heard from Mr. Crawford. But Crawford isn't here, so if he was mistaken or lying about what he told the detective, I can't bring that out by cross-examining him. That's why we exclude hearsay, your honor, and you should too.

Presiding Judge: You give good reasons for according less weight to hearsay, Mr. Crane, but why exclude it entirely? Isn't it worth something? It might help us to see the entire picture, and what's the harm in letting Mr. Farmer tell us what he heard?

Crane: Jurors aren't well-trained and experienced enough to make the fine distinctions that you are making. They might not see the difference between hearsay and what the detective saw himself. They might give too much weight to the hearsay.

Presiding Judge: But I will be there to help them make these distinctions. Don't forget: in our system, the judges and the lay assessors deliberate together.

Crane: So you have no rules of evidence? Everything comes in?

Presiding Judge: Not everything. Evidence must still be relevant to the case, and we do recognize certain privileges, as you do. A doctor may not testify as to what his patient told him, nor may a lawyer tell what his client told him. We want to encourage patients and clients to speak freely to professionals. But your stricter rules of evidence are built on the premise that untrained lay people, your jurors, might easily become

confused or distracted if you did not limit what they could hear. We have no such problem, for we do not treat our lay assessors as a separate body.

Crane: I think I'm starting to catch on to something. I can't just compare a feature of our system with a similar feature of your system. Each part is affected by other parts. I really have to consider the system as a whole.

Presiding Judge: Quite so, Mr. Crane. People often look at an isolated aspect of a system, find it attractive, and assume that it may be transferred intact to another system. This is a mistake. Both the adversarial and the inquisitorial systems are integrated systems. Each piece is affected and supported by every other piece. Transfer a piece without its support system, and it will probably fail or distort some other features that you didn't intend to affect.

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Presiding Judge: Ms. Bruin, did you ever see the Accused strike his ex-wife?

Crane: Objection, your honor. Evidence of prior crimes or bad acts should be inadmissible to show that the defendant has a bad character.

Clare: But it is admissible to show that he had a motive to kill, or a pattern of behavior that is consistent with the method of killing. That's what this evidence shows, your honor.

Presiding Judge: An interesting dispute. I would expect you to make these arguments at the end of the trial, when you try to persuade the tribunal how much weight we should give to any evidence that he struck her. But why are you arguing this now?

Crane: If I'm right, then the evidence is inadmissible. You and your fellow judges and jurors shouldn't even be hearing it. It's too prejudicial. Once

you hear it, you might not be able to put it out of your minds.

Presiding Judge: Mr. Crane, in U.S. bench trials, your judges often hear evidence, rule it inadmissible, and then go on to decide the case. You trust *them* to disregard such evidence. Why don't you trust *me*?

Crane: Of course I trust *you*, your honor, but I'm not so sure about these lay jurors. They don't have your training and experience. They might convict just because this evidence shows that the defendant is a bad guy, not because he committed the killings.

Presiding Judge: Recall the response I made to your hearsay objection. I will be in the deliberation room to advise the lay assessors how to perform their jobs, and to prevent them from acting improperly. Your U.S. jurors are not so well monitored as ours. Objection overruled.

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Presiding Judge: Doctor, please tell us the results of your DNA testing on the hair samples.

Crane: Objection, your honor. We haven't heard any convincing evidence that DNA testing is scientifically valid.

Presiding Judge: Such evidence would be helpful, to be sure, but I am not aware of any statute that prevents us from hearing the doctor's testimony.

Crane: There's no statute, your honor, but I've got a case. In *People v. Glump*, the court held that a defendant was denied a fair trial when a technician testified about a breathalyzer test without evidence that the device they used was scientifically valid.

Presiding Judge: So?

Crane: So that case is precedent for my position, your honor. *Glump* seems to stand for the larger principle that—

Presiding Judge: Counsel, I do not care about *Glump*. We do not treat precedent as you do in the United States. In your common-law system, the law evolves through the application of the law to specific facts, so your published decisions are very important in determining what the law is. But in our system, the law is fixed by the Legislature, and it is changed by the Legislature, not by the courts. Evolution depends on changing values, and we leave the examination of values to our legislative bodies. So we have little need for case precedent.

Crane: All right, judge, here's my trump card: *Glump* was decided by the U.S. Supreme Court. Now will you pay a little more attention to it?

Presiding Judge: Not much, at least in the way you want me to use it. If I am unsure as to the meaning of certain terms used in a statute, I might find guidance in a reported decision, especially from such a prestigious body as the Supreme Court. But the facts of the case—breathalyzers, DNA, whatever—mean little or nothing to me. If you can show me something in this *Glump* decision that explains the meaning of a statute that applies to our case, I'll be happy to look at it, Mr. Crane.

Crane: Sorry, your honor, *Glump* doesn't do that.

Scene IV: On the Courthouse steps

Clare: I needed this break. My head is still spinning.

Schmrz: The adjustment must be difficult for you.

Clare: I guess I can handle it. If I can handle Crane, I can do any . . . Speak of the devil.

Crane and Grbzyk approach.

- Crane: How you doin', Ms. D.A.?
- Clare: Not bad, Counselor. Just ruminating over the peculiarities of this inquisitorial system. Do you understand it?
- Crane: Perfectly. No problem at all. I'm a quick study.
- Clare: Yeah, sure.
- Crane: Now that you mention it, I might be a little shaky on a couple of nuances. I have to admit I'm having trouble predicting how this case is going to come out. It's hard enough to make predictions in our own courts. Here, with all these foreigners—well, it worries me.
- Clare: I was thinking the same thing.
- Crane: I don't want my client convicted of two first degree murders.
- Clare: And I don't want to go back to Los Angeles with nothing but an acquittal to show for it.

They eye each other.

Crane and Clare: *(together)* Let's deal!

They huddle.

- Clare: Plead him guilty to just one first degree charge, and I'll drop the second charge.
- Crane: Are you kidding? He'd still get life. One charge of involuntary manslaughter. That's my absolute top offer.
- Clare: Very funny. How about—
- Schmrz: Excuse me. What are you two doing?
- Crane: We're plea bargaining.
- Schmrz: Plea bargaining?

- Clare: Yes. We do a little horse-trading, and maybe we can come to an agreement. I drop or reduce some charges, and perhaps agree to recommend a certain sentence. In return, he agrees to plead guilty.
- Crane: If, of course, my client agrees.
- Schmrz: In the United States, you bargain over justice like farmers bargain over horses? You consider this dignified?
- Crane: Is it less dignified than pushing a guy to confess, Professor?
- Grbzyk: At least our practice leads to the truth and a just result. Plea bargaining does just the opposite. According to the evidence we heard, your client is either guilty of two murders or guilty of no crime at all. How can you even consider a single manslaughter charge?
- Clare: But that's what bargaining is all about. Each side gives up something. I want two murders, and he wants no crime at all. So we cut a deal.
- Crane: And there's something you're overlooking. As I understand it, your sentences are pretty reasonable compared to ours. You mostly use fines, and when you do incarcerate people, it's usually for short terms. In the United States, our potential sentences are extremely high, and sometimes the legislature fixes the punishment and gives the judge no discretion to lower it for a particular defendant who doesn't deserve that much. So plea bargaining is our way of reaching a just result.
- Clare: Why are your sentences so low? Don't you want to stop crime?
- Schmrz: Of course we do. But we do it by curing the offender of his deviant ways and reintegrating him into society as soon as possible. The state assumes a parental role with the offender. By contrast, your system seems to be adversarial in

more ways than one. Not only is the prosecutor the adversary of the defendant, so is the state itself. We prefer to see offenders as potentially decent citizens who have temporarily gone astray.

Clare: We used to see them that way, but at some point we gave up. These days, heavy criminals are treated as permanent outcasts. We don't see "reintegration" as a realistic possibility, so we pretty much lock 'em up and throw away the key.

Grbzyk: Do you think this is an effective way to reduce crime?

Clare: Sure. If they're in jail, they can't commit crimes—at least not on the law-abiding community.

Grbzyk: But they will eventually get out. When they are released, do their punishments make them less likely to commit more crimes?

Crane: No way. They'll be *more* likely to commit new crimes. We don't spend much effort trying to teach prisoners to adjust to society and earn their way honestly, so they just learn more about being criminals. And sentences being as long as they are, often these guys are pretty angry when they get out. We treat them as outcasts, so that's what they become.

Grbzyk: It seems odd. You punish your defendants more severely than we do, in order to reduce crime, and yet your crime rates are much higher than ours. What conclusions may we draw from this?

Crane: It's pretty obvious, isn't it? Harsh punishments don't work.

Clare: That's ridiculous. You could just as logically conclude that because of our high crime rates, we *need* harsher punishments to prevent them from going even higher.

- Schmrz: One cannot infer causation just from correlation. High crime rates and high punishments often go together, but we cannot be sure whether either one has any causal impact on the other.
- Grbzyk: Mr. Crane, earlier you seemed troubled by our quest for confessions. But a confession is an important step on the road to rehabilitation. Until the offender admits he did wrong, how can he change his ways? A good confession cleanses the soul.
- Crane: So because we don't plan to do much to rehabilitate him, it doesn't matter much whether he confesses?
- Clare: That's a bit of an overstatement. When a judge has discretion in sentencing, he will tend to go easier on a defendant who admits his crime. And the same is true of parole boards. So we do get a lot of confessions, at least after trial.
- Grbzyk: Here in Europe, of course, the trial is about both guilt and sentencing, so he can't very well hold off confessing 'til after the trial. So it is important that he confess at trial.
- Schmrz: I'd like to return to this plea bargaining for a moment. Once the lawyers arrive at a bargain, is that final? Does the judge have no say in whether the bargain does justice to the state and to the victim?
- Clare: Well, the judge can reject the deal. But he's usually happy to accept it. It saves the court the expense and trouble of a trial.
- Schmrz: But by reducing the charges you, the prosecutor, have effectively reduced the sentence. Is this proper? Are you trained in the sociological and psychological aspects of sentencing?

- Clare: Not really, but neither are our judges. My guess is probably as good as theirs. And if they think I'm really off the mark, they can reject the deal.
- Schmrz: In Europe, the prosecutor may recommend a certain sentence, but she does not make the final determination, even partially. That is for the court, not the prosecutor.
- Grbzyk: This plea bargaining is legal in your country?
- Clare: Legal? It's essential! In most places, less than twenty percent of our cases go to trial. The rest are plea bargained. If they weren't, we'd be up to our eyeballs in trials. We'd probably need five times more prosecutors, judges, jurors, courtrooms, bailiffs, and all the rest. Since every defendant has the right to a speedy trial, I'd have to dismiss a lot of cases if I couldn't plea bargain.
- Grbzyk: I don't understand. If people in the United States really believe that the adversary trial is the best way to achieve justice, shouldn't they be more than willing to pay whatever it takes to try *every* case?
- Clare: Tough question. I guess they're not *that* committed to the adversary trial. They may like the general idea of it, but when it comes to paying for it, they'd rather pay for more cops or more prisons, where they can *see* some effects on crime.
- Schmrz: U.S. citizens are such a peculiar lot. Because they like the general idea of the adversary trial, they have made it so elaborate that they can afford to give it to only one out of every five defendants! Strange, very strange. Wouldn't it be better to make the trial less complex, so that more defendants could have a trial? That might make plea bargaining unnecessary.
- Clare: I never quite looked at it that way. In any event, the way things are right now, we can't live without plea bargaining.

- Schmrz: And we can't live with it. Here it is illegal.
- Crane: Illegal? Why? If the parties agree to settle their case, why should that bother the court?
- Schmrz: Because the case belongs to the court, not to the parties. The tribunal may not convict or sentence the defendant unless it first hears the evidence, and if the evidence shows that the defendant committed a certain crime, the tribunal may not reduce the crime just because the prosecutor agrees to it.
- Clare: So every case goes to trial?
- Schmrz: Every case, Madame. At least every major case.
- Clare: But not if the defendant pleads guilty.
- Schmrz: There is no such thing as a guilty plea in our system. That would be permitting the parties rather than the court to determine the truth, which is not permissible. Every case goes to trial. At the trial, the defendant might well admit that the charges are true, and many do so. But the tribunal must nevertheless hear evidence, in order to determine the sentence.
- Clare: That must put a terrible burden on your courts. Trials can take weeks, even months in a murder case. It can take weeks just to pick a jury.
- Grbzyk: You forget. Our "jurors" are picked without the lengthy *voir dire* and peremptory challenges that take so much time in your courts. Most of our trials do not take very long. Because the presiding judge questions the witnesses, we do not take up much time with lawyers' cross-examination and the like. We do not allow many objections to evidence, which may save us more time. We have no need for the lengthy pre-trial hearings on the admissibility of evidence that you have. And the defendant often confesses at trial, because he confessed earlier. Even if he didn't, the dossier usually contains rather strong evidence against him,

and his denials, if seen as false, would affect his sentence, so often he confesses for that reason alone. Because he confesses, very little additional testimony is needed. Most of our trials are really about the sentence, not about guilt.

Crane: So it ends up looking somewhat like one of our sentencing hearings, which we must have whether or not there is a plea bargain.

Grbzyk: Yes, I suppose it does. However, I admit that we have been seeking ways to ease the burden on our system. As our crime rates rise, the volume of cases also rises, and some European countries have adopted devices that resemble your plea bargaining. But in most countries, such things are allowed only for misdemeanors, never for major felonies, such as the present case.

Clare: If your crime rates are rising, you might have to start dealing with organized crime, like we do. Plea bargaining really helps us with that. We bust the little guys, and give them plea bargains to get them to "cooperate" and help us get the big guys. Without plea bargains, we'd have nothing to offer them.

Grbzyk: I see. So U.S. prosecutors work closely with the police?

Clare: Absolutely. Our job is to help the cops fight crime. That's what the public expects of us.

Grbzyk: This is much less so in Europe. Our prosecutors see themselves as more closely allied with the judiciary than with the police. Some countries even allow prosecutors to become judges.

Crane: That must make your judges pro-prosecution.

Grbzyk: The reverse would be more accurate: our prosecutors tend to be "pro-judge," in the sense that they are out to secure justice, not to get convictions. For example, every prosecutor has

a duty to present to the court all evidence that *favours* the defendant, and they readily do so.

Clare: Shocking.

Grbzyk: I'm speaking generally, of course. Individual prosecutors vary, and so do circumstances. Italy has had a serious problem with organized crime, and prosecutors there do work closely with the police and aggressively seek to convict Mafia leaders.

Crane: If your prosecutors tend to think like judges, why not give them the power to plea bargain? You said you trust your judges.

Schmrz: We trust our officials, so long as they do not have much discretion. We fear that discretion may be abused, as has occurred during periods of dictatorship. Perhaps a prosecutor would plea bargain because of political pressure from friends of the accused. We must protect ourselves from such a possibility, so the prosecutor is obliged to bring to trial every charge supported by the evidence and the law, at least in major cases. She has no discretion.

Crane: But you give your *judges* a lot of discretion.

Schmrz: No, we really don't. Under your common-law system, the law is always changing or "evolving," as you might put it. So your judges must have discretion to change the law slightly to adapt it to new situations, as society changes. This is not so in our "civil-law" system. Here, the law is fixed by the legislature, and the judge has no discretion to change it.

Clare: Look, we have a lot of statutes too, and our judges aren't supposed to change them. But they can *interpret* them, and when they do, they have plenty of discretion to plug in whatever policies they happen to like.

Schmrz: I suppose our judges do the same on occasion.

Grbzyk: But we pretend they don't! We prefer to imagine our judges as educated clerks, simply looking up the rules in the codes and telling us what they are. In truth, however, many of our statutes are quite vague, and the judge has some discretion in deciding what they mean. It is somewhat of a paradox.

Crane: Or maybe a "useful fiction," Professor?

Grbzyk: Quite useful, Mr. Crane.

Clare: Anyway, we can't plea bargain, so it's back to the salt mines.

Scene V: At the cafe

The two lawyers and their consultants sit at one table, drinking cognac.

Clare: Usually when I finish a trial, I'm exhausted. This time, I didn't even work up a sweat.

Crane: That's because you didn't do anything. Neither did I. Just about every time we stood up, Judge Big Shot told us to sit down and watch *him* do everything. Who needs lawyers in this crazy system? What's there for us to *do*?

Clare: We help decorate the courtroom. That's why they give us these snazzy black robes. We're not lawyers, we're fashion statements.

Grbzyk: Ah, you feel that you are not as important as you are in the United States. I'm sorry. But you still have significant roles here. Defense counsel may summon witnesses not called by the tribunal, though this rarely occurs. And both counsel are expected to present final arguments to the tribunal, reviewing the evidence and the law, and arguing for a certain verdict and sentence. Both of you did a fine job, by the way, as did the victims' attorney.

Clare: And now we wait for the verdict. I *hate* this part. It drives me batty.

- Crane: What will the verdict look like? Will it be short, like "not guilty" or "guilty, life imprisonment"?
- Schmrz: No, the tribunal's judgment will be quite long. It will set out the facts of the case, in detail, and the law that applies to the case, and explain why the tribunal came to its conclusion, both about guilt and about the sentence. It will discuss the testimony of each witness.
- Clare: Who writes it?
- Schmrz: Usually the presiding judge will assign this task to one of the other judges. It is never written by a lay assessor.
- Clare: Most U.S. courts require that the verdict be unanimous. Is that so here?
- Schmrz: No. A majority vote is sufficient in some countries. We require a two-thirds vote.
- Crane: Suppose one of the judges disagrees with the judge who writes the decision. Will he write a dissenting opinion?
- Schmrz: No. That would be unthinkable. It would tend to undermine the court's authority. The public must believe that every court decision is unanimous.
- Crane: Even if it wasn't?
- Schmrz: Even if it wasn't.
- Crane: So much for honesty, Professor. What are you afraid of? Do you think people won't obey the decision or respect your courts if they know someone disagreed with it? Are your institutions so fragile that they can't stand a little dissent?
- Schmrz: I admit, it is troubling.
- Clare: It should be. In the United States, some states allow less-than-unanimous votes by juries in

some cases, and such votes must be announced in open court. In our appellate courts, judges often write dissents. We've had some very important Supreme Court cases decided on five to four votes, and people obey them. Dissent doesn't necessarily lead to anarchy.

Schmrz: At the present time, even our highest courts never reveal that a judge dissented. I suppose a dissent implies either that the majority was incompetent, or that reasonable judges have the discretion to interpret the law in different ways. We do not want either message sent to the public.

Crane: Look, this is all very interesting, but I'm having trouble concentrating, waiting for the verdict. I hate this part too. If I lose, it's all over.

Grbzyk: Not quite, Mr. Crane. You still have your right of appeal.

Crane: What's to appeal? The presiding judge seemed to know what he was doing. I don't think he made any mistakes. With virtually no rules of evidence, what mistakes are there to make, anyway? An appellate court would throw me out: no mistakes, no reversal.

Grbzyk: You might argue that the judgment is not supported by the law or the evidence.

Crane: But then I run up against presumptions, don't I? In the United States, the appellate court looks at the reporter's transcript of the trial and presumes that the jury resolved every credibility battle in favor of the judgment, so if the cop said one thing and my client said another, I'm out of luck. And the appellate court also presumes that the jury drew any reasonable inferences that support their verdict.

Grbzyk: So even if the jury in fact did not do these things, the appellate court nevertheless presumes that they did?

- Crane: Exactly. I guess that's all our appellate courts can do, because the jury never explains their verdict, they just say "guilty." So the appellate court never knows how the jury really reasoned their way to the verdict.
- Grbzyk: But this is not so in our system. The judgment must fully explain the tribunal's reasoning, including why it believed one witness rather than another. So the appellate court sees what the tribunal actually thought, not what it might have thought. And if the appellate court is not persuaded by such reasoning, it might well reverse the judgment.
- Crane: You talk about the tribunal's reasoning. There are nine people on this tribunal, but the judgment is written by just one of them. Is it likely that nine people would have exactly the same reasoning, especially when three of them are professional judges and the others aren't?
- Grbzyk: Probably not. Another "useful fiction," perhaps.
- Crane: Do the appellate judges read the transcripts of the trial to see if they support the judgment?
- Grbzyk: I'm afraid there are no transcripts, Mr. Crane. We have no court reporters at our trials.
- Crane: But how do the appellate judges know if the judgment correctly summarizes the testimony? If I'm arguing a case on appeal, how can I show that the facts stated in the judgment are inaccurate?
- Grbzyk: Our trial judges receive many hours of training in writing judgments, and I suppose we trust them to summarize the testimony honestly.
- Crane: Amazing. Well, I hope this tribunal acquits my client, so I don't have to deal with one of your appeals.
- Schmrz: Sorry, Mr. Crane, but an acquittal is no guarantee that you won't face an appeal. In our

system, the prosecutor may appeal too. This is important to us, as it helps to ensure that the trial court follows the law. We strive for consistency in all of our courts. And if the appellate court reverses, your client may be tried again.

Clare: Really? In the United States, I think one or two states allow prosecutors to appeal, but only to get an advisory opinion on some important issue. And if the prosecutor wins, it doesn't affect the defendant. He can't be retried. That would violate his right against double jeopardy.

Schmrz: Here he may be retried. We do have concepts similar to your double jeopardy, but they have no application to an ongoing case. So the prosecution may appeal, and if the appellate court reverses, the defendant may be retried.

Crane: The way we see it, once a jury acquits him, that's it. A jury's verdict is sacred.

Schmrz: Sacred when it acquits, but not when it convicts? Why should you allow the defendant to appeal, but not the prosecution? How does that make sense?

Crane: We don't allow a conviction to stand if it doesn't square with the law. But if the jury acquits because the jury doesn't agree with the law, the verdict stands. The jury "nullifies" the law, just for that case. It doesn't happen often, but we view it as an outlet for public disagreement with a law that's not too popular, like laws against smoking a small amount of marijuana, for example.

Schmrz: For us, the very notion of allowing a tribunal to nullify a law is inconceivable. We would never allow it, not even in a single case. As I said earlier, we do not tolerate discretion lightly, and this seems to be discretion run wild. It could never happen here, because judges sit with our lay assessors. Even if it did happen, the tribunal's written decision would reveal what

they had done, and it would never stand up on appeal.

Crane: There's another reason why we allow a retrial after a conviction, but not after an acquittal. The prosecution can afford another trial, but the defendant can't. Even if he has the money for another trial, or the state is paying his lawyer, it is just too difficult emotionally. And if the prosecutor could retry him once, why not two or three times? Eventually, they would wear him down to the point that he would probably rather take a plea bargain. So once there is an acquittal, that has to be the end of it.

Grbzyk: Let's not forget the sentence. I believe your double jeopardy doctrine does not prevent prosecutors from appealing improper sentences. The same is true here. And the defense attorney, of course, may also appeal an improper sentence.

Crane: Thanks a lot.

Grbzyk: And even if you don't appeal, the prosecutor may appeal on the defendant's behalf.

Clare: Why would I do a thing like that?

Schmrz: Because it is your duty to do justice, Madame.

Crane: Justice? She's never heard of it.

Clare: This place is really weird.

Crane: That's what *I* said.

Clare: Do prosecutors really do that?

Schmrz: Not often. If the trial court might have erred against the defendant, usually the defendant will appeal.

Grbzyk: Of course, the defendant who appeals risks the imposition of further costs if he loses.

- Crane: You mean his attorney's fees?
- Grbzyk: Yes, of course, but not only that. Every losing defendant is assessed certain court costs, not including the prosecutor's costs. And if the victim intervened, the losing defendant must also pay the victim's attorney's fees.
- Clare: That's a lot more than most of our states require. I guess your system can discourage a defendant from dragging out the trial, or from appealing.
- Grbzyk: I suppose so, but that is not its purpose. We simply feel that it is just to compel a guilty person to make the state and the victim whole.
- Clare: Does it work the other way? If he is acquitted, does the state make him whole by paying his attorney's fees?
- Grbzyk: Yes, as a matter of fact it does.
- Clare: We don't do that in the United States.
- Grbzyk: Perhaps that is because you sometimes acquit people not because they are innocent, but for extraneous reasons. You release the guilty where illegally seized evidence is excluded, and without such evidence you cannot obtain a conviction. This is not likely to happen in our system. If we acquit a man, he is probably truly innocent, so he should suffer no loss at all.
- Crane: In the United States, none of this stuff would matter much, as the overwhelming majority of criminal defendants are indigent. They couldn't even pay for my lunch. In those cases, the state has to pay for their lawyers, usually public defenders.
- Grbzyk: We do the same, at least in cases of serious crime. And indigent defendants cannot be required to pay any costs. In such cases, the issue of making the state and the intervenor whole is really moot.

- Schmrz: Your client, of course, is not indigent, Mr. Crane. In fact, some have accused him of spending so much money on his defense that he is trying to "buy an acquittal."
- Crane: Look, in the usual case, the prosecution uses or has access to many more resources than the defense. They have several lawyers available in the D.A.'s office, and they have their own investigators, plus the whole police department, a crime lab, and other agencies like the F.B.I. to turn to for help. And all this against a single defense lawyer with little investigative help. Do people accuse the prosecutors of trying to "buy convictions?" Of course not. In Mr. Sampson's case, the resources are almost equal for a change, so we have about as good a chance as the prosecutors to show the jury the whole story. That's not unfair. What's unfair is what happens in the other ninety-nine percent of the cases.
- Schmrz: I hadn't thought of it that way.
- Crane: In some cases, a U.S. defendant doesn't even have a lawyer. Our Supreme Court has held that a defendant has a constitutional right to represent himself, without a lawyer, if he's stupid enough to go that route. It's his case, so he can handle it as he likes. Do you allow this?
- Schmrz: No. Every defendant must have counsel.
- Clare: Why? It's the defendant's neck, isn't it?
- Schmrz: Madame forgets. In our countries, the proceedings are held not for the benefit of the parties, but for the state. It is the duty of the tribunal to find the truth, and defense counsel is better qualified than the defendant to aid this effort.
- Clare: Remarkable. Everything we talk about seems to keep coming back to the same fundamental concepts. Where do they come from? Why does the United States start with the notion that the

parties run the trial, and Europeans start with the notion that the state runs it?

- Grbzyk: An excellent question. Perhaps the United States has a very different attitude towards government and authority than we do.
- Schmrz: I agree. To put it bluntly, Europeans trust authority, and Americans don't. Speaking generally, of course.
- Crane: That's true about us. The easiest way to get elected to government office in the United States is to attack government, especially the central governments in Washington and the state capitals.
- Grbzyk: But it goes well beyond campaign slogans. In the United States, you display your mistrust of authority by dividing it up. Europeans are not so afraid of concentrating it. Our judges have a great deal of power. They investigate the case before trial, examine all the witnesses during trial, and then deliberate right along with the lay assessors. Everyone else, the lawyers, the lay assessors, takes a back seat to the judges. This concentrates most of the power in one institution: the judges.
- Crane: I don't think U.S. citizens would tolerate that.
- Grbzyk: Quite so. Your judges may be respected, but in a trial of a major crime, they have very little power compared to European judges. But your fear of the concentration of power goes even further. In your system, *no one* individual has much power because you divide it into so many pieces. The prosecutor, not a judge, investigates the case. The lawyers, not the judge, present the evidence at trial. The judge sits primarily as an umpire, making sure that the lawyers obey the rules. And your jury, not the judge, decides who wins. But then the judge may set aside a verdict of conviction if he feels it is not supported by the evidence, and the judge, not the jury, sentences the defendant. But often your legislature has severely limited the judge's

discretion in sentencing, so he has little to do except apply the legislature's predetermined formula. Then an appellate court decides if the whole thing was done properly. And your press keeps watch to tell the world if any of these actors has behaved improperly. Everyone—lawyers, jurors, judges, the legislature, reporters—has a little piece of the power. No one has it all, or even a major part of it.

- Clare: You make us sound like a bunch of paranoids.
- Schmrz: That's for you to decide. I'm merely stating the facts.
- Crane: Perhaps this is why the U.S. system seems so complicated. Because we don't trust judges, we use a bunch of untrained amateurs: the jurors. But because we don't totally trust a bunch of amateurs we've never seen before, we have to take a lot of time questioning them and selecting them. Then we need complex rules of evidence to keep them from hearing stuff we don't think they can evaluate properly. Because we don't want too much power in judges, we have the lawyers investigate the case and examine and cross-examine the witnesses, which takes more time. And because our jurors don't know the law, the judge must spend time instructing the jury on the law. You don't have any of these things under your inquisitorial system.
- Clare: Our adversarial system doesn't seem very efficient.
- Grbzyk: No, it doesn't. Our trials usually take a fraction of the time yours take. One study showed that the average European trial for a serious crime takes about one day.
- Crane: Maybe so, Professor, but a monarchy is more efficient than a democracy. Kings can make decisions a lot quicker and cheaper than a bunch of quarrelsome legislators.

- Grbzyk: Touché, Mr. Crane. I catch your drift. Maybe our authoritarian mentality is showing. A vestige of the past, perhaps.
- Clare: And maybe ours is a case of democracy run amok.
- Crane: Wait a minute. Don't forget plea bargaining. Your trials might take less time than ours, but in your system every case goes to trial. Our trials are longer, but over 80% of our cases don't even go to trial. Plea bargained cases are handled at least as efficiently as your trials, maybe more so.
- Grbzyk: It seems ironic. You have this elaborate structure for your trials, no doubt for good reasons, but then you totally dispense with this structure in the great majority of your cases. Apparently, whatever reasons you have for your complex trial system are not good enough to persuade you to keep it for most of your cases. Is this not weird?
- Clare: Our "elaborate structure," as you call it, is mainly for the benefit of the defendant. If he's willing to waive it, that's his right. Nothing ironic about that. We respect the right of the individual to decide what's best for him.
- Grbzyk: And we view the features of our system as being there for the state, not the parties.
- Schmrz: I suspect that the jury is the fulcrum of your system. Suppose you just eliminated the jury, and all of your criminal cases were to be decided by judges. How would your citizens react?
- Crane: I'm not sure. The jury might be on the way out. In civil cases, especially business disputes, more and more cases are being handled by arbitrators. Most criminal cases are still tried by juries, but there have been changes that tend to make the jury somewhat less attractive, at least to defense attorneys. Traditionally, juries have been made up of twelve people, and their verdicts have had to be unanimous. But now

some states allow juries of as few as six people, and some allow less than unanimous verdicts, like ten to two.

Clare: Sure. It's cheaper with fewer people. And nonunanimous verdicts make a hung jury less likely, so we have to re-try cases less often. That saves money, as well as the burden on citizens called for jury duty.

Crane: It also means you get more convictions, and that makes me a bit less eager to have a jury trial. What kind of a jury do I get? I used to be able to *voir dire* jurors pretty extensively, to find out what these strangers were really like. Now, in a lot of jurisdictions, the judge does most or all of the *voir dire*.

Clare: That saves a lot of time.

Crane: It sure does. The judge asks them "Can you be fair?" Then he gets the expected answer, and swears 'em in! When I did *voir dire*, I would try to draw out a juror's true feelings about whether they would automatically believe a cop's testimony, how they feel about the crime charged, and whether they could put aside their personal feelings and follow the judge's instruction on reasonable doubt.

Schmrz: But you still have your peremptory challenges.

Crane: Yes, but how can I exercise them intelligently if I don't know how the juror feels about these things? Sometimes I just have to go by what the juror looks like.

Clare: Watch out with that one. You're treading on dangerous ground.

Crane: Right. The courts have held that an attorney, criminal or civil, prosecution or defense, may not exercise a peremptory because of a juror's race or sex. So I can't go by what they look like, and I can't get into their heads. I'm flying blind.

Clare: Come on. Don't you hire high-priced jury consultants?

Crane: I have to, because I can't do much else. Consultants give me ideas about body language, jurors' occupations, and other things that indicate what these people are like. That's about all that's left for me to go on. But it's a rare case where I have a client that can afford a jury consultant. In most criminal cases, particularly where the defendant is indigent, the defense attorney has to pick jurors by the seat of his pants.

Clare: It's no better for prosecutors. I live by the same rules you do. I need my *voir dire* and peremptories to get rid of flakes who might cause a hung jury. It's very expensive to re-try cases. It's well worth spending a little extra time and money up front to get a jury of sensible people, so we can try the case just once and get it over with.

Crane: It's sad to see this weakening of the American jury. People used to view the jury as fundamental to our notion of individualism. A jury protects the accused from the government, and the judge is seen as part of the government.

Clare: The prosecution needs protection too. In a lot of cases, I'd rather make my pitch to twelve ordinary citizens than to one judge, who might be some liberal appointed by a liberal governor.

Crane: Come on. You know very well that most of them are ex-D.A.'s appointed by a conservative governor.

Clare: Are you kidding? Let me tell you about a case I had in front of Judge

Schmrz: An interesting dispute. It would not arise here.

Clare: Why not?

Schmrz: As you indicate, your judges are usually appointed by elected officials, and elected

officials often have definite philosophies about crime, punishment, and the like. They will tend to select people with a similar philosophy. And those people will have displayed their outlooks by their prior work. Most of them were former prosecutors, defense attorneys, personal injury lawyers, corporate lawyers. Whatever. Your governor has a pretty good idea how each of these specialists views the world, and he appoints accordingly.

Crane: And some of our judges are elected, usually after campaign battles over law and order.

Schmrz: Yes. These matters are relevant to the tasks your judges perform, which often involve much discretion in fact-finding, sentencing, and establishing the law. In our system, we try to minimize the judge's discretion, so her values are not important.

Clare: How do you pick your judges?

Grbzyk: In a way, we don't. They pick themselves. Let me explain. We do not have law schools as such, the separate post-graduate institutions that you have. Our law students are undergraduate university students, who study with the law faculty. At the end of their studies, they make a choice: to become lawyers or to become judges. If they wish to become lawyers, they must apprentice with a law office for a year or two, and then take a state examination. If they choose the judiciary path, they must pass a special state examination upon graduation. It is quite competitive, and very few are accepted. The candidate's political beliefs are wholly irrelevant to whether he or she is accepted.

Clare: Aren't they kind of young to be judges?

Grbzyk: Of course. But before they are allowed to handle cases, they must serve apprenticeships with experienced judges. Then they are assigned small civil and criminal cases. As they gain more experience and demonstrate their

competence, they may be promoted to higher courts and be assigned more significant cases. Note that all three of the judges in our case are quite mature.

Clare: So politics has nothing to do with it?

Grbzyk: Nothing at all—we hope. Our judges are civil servants, not politicians. Each has political beliefs, of course, like any citizen does, and different judges might have different attitudes towards crime, sentencing, and the like. But a judge's political beliefs should have as little to do with her job as the court clerk's political beliefs affect his job.

Clare: Politics isn't necessarily a bad thing, you know. If a governor is elected on a tough-on-crime platform, he appoints tough-on-crime judges because that's what the people want.

Grbzyk: If our people choose to get tough on crime, they may elect legislators to enact statutes that do this. It is not the judge's place to make such choices.

Crane: So let's get to the bottom line, Professor. Which system is better?

Grbzyk: Better? Your question is very revealing, Mr. Crane. It displays a common assumption that a legal system may be appraised apart from the society it serves. But it can't. It cannot be constructed by experts and imposed from above. A nation's legal system emerges from the attitudes of its people. Asking which country's legal system is better is like asking which country's people are better.

Crane: So our system is complex and messy because we are complex and messy?

Clare: No. Our system breaks up power because Americans don't want power concentrated.

Schmrz: And our system concentrates power because this is more efficient, and because it does not

particularly bother our people. We have had kings, queens, and other strong leaders for centuries, so perhaps our people have gotten used to it, even though they now claim to favor democracy. Also, as discussed earlier, we operate under the principle, or perhaps the illusion, that our judges have little discretion, that they merely apply the law mechanically.

Crane: Times change, Professor.

Schmrz: Indeed they do, Mr. Crane. Italy has recently changed its legal system. It is moving away from the inquisitorial system and toward your adversarial system. The Italians have retained their mixed panel, but they have taken away the power of judges to present the evidence, giving it to the lawyers.

Clare: Really? That's great! Why did they do it?

Schmrz: They say that they now realize that the adversarial system gives greater respect to the rights of the individual.

Crane: That's true. The parties have the most at stake, so their lawyers should control the presentation of the case.

Grbzyk: Of all Europeans, I think the Italians are most similar to the United States in your dislike of concentrations of power. They would rather spread it out.

Schmrz: These are the justifications given by the Italians, officially. But others suspect that something else is at work. For years, one of the most popular television programs in Italy has been your "Perry Mason," where a handsome trial lawyer always manages to win at the last moment. You know how Italians love a dramatic spectacle, like opera.

Clare: So we put on a better show than you do?

- Grbzyk: That we must concede. U.S. trials have much better Nielsen ratings than European trials.
- Crane: The adversarial system demands a lot more from lawyers than the inquisitorial system does. Are Italian lawyers up to it?
- Schmrz: That remains to be seen. It will be difficult. Many Italian lawyers prepare for trial simply by reviewing their code books. They have no training in cross-examination, preparation of experts, and the like.
- Crane: Those are the bread and butter tasks of U.S. lawyers. We take courses in those skills, read books on them, and practice them every day in court, for years. You can't learn them in a day.
- Schmrz: The transition will not be easy.
- Clare: I've never heard of a country grafting an important feature of one system onto another type of system, like the Italians are doing. Is it really possible?
- Schmrz: A good question. I'm not sure that the Italians have thought that question through carefully enough. If and when their lawyers learn the U.S. style of trial advocacy, perhaps other aspects of their system will also have to change, or else they might have to give up the notion of letting lawyers control the evidence. I'm not sure that one can just plonk a major foreign feature into an existing system without radically altering the entire system.
- Crane: Professor, you didn't like my question about which system is better. So let me rephrase it. Which system does a better job of finding the truth?
- Grbzyk: You insist on pinning me down, eh? Well, let me begin by passing along a little saying I once heard: "An innocent defendant should prefer to be tried in Europe, while a guilty defendant should prefer to be tried in the United States."

- Crane: Wonderful! A supreme compliment to the skills of U.S. defense lawyers—like me, naturally.
- Clare: (*shaking her head*) Look at him. He's proud of it!
- Crane: Just kidding, Counsel. Prosecutors have no sense of humor.
- Grbzyk: The saying implies, of course, that the inquisitorial system does a better job of finding the truth.
- Crane: Who said the saying, a European?
- Grbzyk: This I must admit.
- Schmrz: Let's examine the issue a little more closely. I suppose the key difference we should focus on is *who decides* what is the truth. You use lay jurors and we use professional judges, sometimes along with lay people. But as you pointed out, Mr. Crane, lay people tend to go along with judges. Isn't it rather obvious that professionals are better at their jobs than amateurs? Professionals have been selected for their aptitude, then they are trained, and then they spend much more time at their jobs than amateurs ever could. A research biologist stands a much better chance of finding the true cause of cancer than does some barber or baseball player. By the same token, judges are bound to be better at finding the truth at trial than jurors could ever hope to be.
- Crane: Wait a minute. Judges are trained to know and apply *the law*. They don't take courses in law school on how to figure out who's telling the truth. And another thing: criminal trials aren't about finding the cure for cancer.
- Schmrz: Sometimes they seem like it. In the trial we just observed, several scientists testified about the accuracy of DNA evidence. It was very technical, and I must admit that I had some difficulty following it at times. Who was better

able to understand it? Judges, all of whom have had university training and several years of listening to expert witnesses, or jurors, who might not have graduated from high school, and who might be seeing the inside of a courtroom for the first time?

Crane: But this case isn't typical. Most criminal trials don't involve heavy scientific disputes. Most turn on a rather simple question: who's telling the truth and who's lying? A robbery victim points to the defendant and says, "That's the guy who robbed me," and the defendant testifies "I was home watching TV when the robbery occurred." A diploma in biology isn't going to help you figure out which one is right. And there's no reason a judge should be any better at it than a barber or a ballplayer.

Clare: I'm not so sure about that. Judges hear defendants make up stories day in and day out. After a while, they get a pretty good ear for it. But some jurors are so naive they'll buy any cock-and-bull story.

Crane: And some judges always believe the cops—or say they do, anyway. They have to work with the police every day, and they want to stay on good terms with them, especially if the judge is looking for an appointment to the next court up. Judges get more points for being pro-cop than being pro-defendant. And as for defendants making up stories, sure, some do. The judge hears a few of these and then decides that *all* defendants are probably lying. They get jaded. That's why we need jurors. They're not prejudiced, and they bring a fresh look to things.

Clare: You mean they're more likely to fall for your tricks. A lot of defense lawyers make a career out of confusing jurors.

Crane: Be nice to me, Ms. D.A. Without me, there's no you. An adversarial system with only one adversary is like the Dodgers showing up for the World Series with no opponent. There's not

much point to it. Under this inquisitorial system, we're both out of work.

Schmrz: Not quite, but your roles would be substantially diminished.

Clare: That's true. I'd probably get more convictions here, not having to deal with juries and exclusionary rules and the like. But I wouldn't have much to do with getting them. It wouldn't feel like winning. Not as much fun.

Crane: Ha! The truth comes out. You *like* battling me. See, we're *both* products of the adversarial system. Maybe U.S. prosecutors have more in common with U.S. defense lawyers than they do with European prosecutors.

Clare: Perish the thought. Anyway, Professor, I see another problem with your view. Lots of times the "truth" we are looking for isn't just a "whodunnit." It involves values. The law says that murder should be reduced down to voluntary manslaughter if the defendant killed because of some "reasonable provocation." So if the defendant kills because the victim recently molested the defendant's kid, we don't punish him as much as we would a Mafia hit man. But what a "reasonable" provocation is can be a tough question. Is it reasonable when someone says something racist to you? Is it reasonable if someone raped you last week? This isn't a question of "truth," it's a question of values. Twelve jurors might bring the values of the community into the decision better than one or even three judges could.

Schmrz: But such "values" are never considered by our tribunals. These questions are decided by our legislatures, not our courts. We expect courts to apply the law, not to make it.

Clare: Our judges make law all the time. And I guess our juries also do it occasionally.

- Crane: Jurors' experiences can be important even in a whodunnit case. I once had a Latino client who wouldn't look the judge in the eye when testifying because he came from a country where that was seen as a threat or an assertion of dominance. And you just don't do that with someone like a judge. The judge thought he was lying. But some of the jurors were Latino and knew about that, so they believed him, and they acquitted him.
- Clare: I've had cases like that. Often twelve jurors have had experience with life that no one judge could have.
- Crane: You know, some judges never get out of the courtroom. And when they do, they just hang out in country clubs with their buddies, other judges, a few doctors, and lawyers. They don't know much about real life on the streets, where most criminal defendants come from.
- Schmrz: I suppose the same might be said of some of our judges.
- Clare: It's more of a problem in the United States than here in Europe. We have a very diverse population, with racial and ethnic groups from all parts of the world. In Los Angeles, we probably have over fifty different language groups, just in one city. And these people have different cultures and customs. No single judge, no matter how much he gets out in the world, can possibly know as much about these cultures as twelve jurors.
- Grbzyk: Perhaps our mixed tribunal obviates some of these difficulties. Our lay assessors may bring some real life into the tribunal's deliberations.
- Clare: Sort of a compromise, isn't it? You have the benefit of professional judges running things, but you also get input from the public, through the lay assessors. Sounds like a good idea.

- Grbzyk: Quite so. It satisfies both needs. Wouldn't such a compromise be an improvement over your jury system?
- Crane: Maybe, but as we saw in court today, it would probably bring a lot of other changes along with it. No more hearsay rules, no jury instructions, no *voir dire*, and no peremptory challenges. And judges telling jurors how to vote. That's a lot of baggage to bring in just to get a mixed tribunal.
- Clare: Baggage, or benefits? Many people see those things you mentioned as technicalities, well worth getting rid of.
- Crane: Let's not overstate the amount of power our jurors have. Granted, they deliberate alone, without a judge with them, unlike the way you do it. But we limit them in a way you don't. Take that evidence of prior crimes which I tried to keep out. Your lay assessors would hear this evidence, and then in the deliberation room the judge might try to talk them out of misusing it. In our system, the judge would screen this evidence, and keep the jury from even hearing it at all if he felt it was only marginally relevant and too prejudicial.
- Schmrz: Yes. I am quite struck by the amount of time you spend in the United States on objections and pre-trial motions involving whether jurors will be allowed to hear certain evidence. It seems to reflect a certain lack of confidence in their ability to find the truth.
- Grbzyk: You know, this problem of finding the truth is not confined to criminal cases. We deal with it all the time in everyday life. An employer discovers money missing from the petty cash box. Does she just listen to the employee's explanations, or does she try to find out the truth herself?
- Clare: Obviously, the latter. Are you suggesting that the inquisitorial system is more "natural" than the adversarial system?

- Grbzyk: Perhaps.
- Crane: It's more "natural" only if you see the state in a paternalistic role. Maybe you Europeans see the state as Big Daddy, but most in the United States don't.
- Schmrz: Consider an institution many regard as quite paternalistic, the Catholic Church. The Church has had experience with both models when judging whether certain people were worthy of sainthood. The Church initially used the inquisitorial model, but this became too loose, sanctifying many candidates whose qualifications were questionable. So they changed to an adversarial system, establishing the office of Promoter of the Faith to argue against any proponents of a particular candidate.
- Grbzyk: The proponents called the Promoter the "devil's advocate," didn't they?
- Schmrz: Yes. Each side had its lawyers, and the case was tried before the Pope's representatives. It worked quite well for several centuries. But the whole process became so lengthy and cumbersome that it was recently abandoned. The process is now more inquisitorial.
- Grbzyk: What about scientists? Do they seek the truth through an adversarial model, an inquisitorial model, or neither?
- Schmrz: Probably through a blend of each. An individual scientist may act as an unbiased inquisitor, initially, but once he publicly proposes a new thesis, the process might well become somewhat adversarial, where he defends his thesis, other scientists attack it, and the remaining scientific community sits as the tribunal. It is a tribunal of professionals, of course, not lay people.
- Crane: I think we're overlooking something here. Finding the truth, whatever that is, is

important. But it's not the only thing. We have juries for other reasons as well.

Grbzyk: Such as?

Crane: Well, we talked earlier about how Americans don't really trust government that much. Criminal cases are about basic moral decisions, what the morals of a community are all about. Our communities want to be involved in making those decisions. They don't want to leave it all to the judges.

Grbzyk: Don't they elect the legislators who enact the criminal laws?

Crane: Yes, but that's not enough. The laws are abstract. A real case is concrete. It hits home.

Clare: I'm just trying to imagine what it would be like with no juries. People would probably think that all these judgments, both convictions and acquittals, were coming down from on high, from the top. I can just see the accusations of racism, sexism, classism, elitism, and other "isms" flooding the newspapers. When people see a case decided by fellow citizens, they are more likely to accept it.

Crane: Not always. Look at the riots resulting from the Rodney King case, when a California jury acquitted the white cops who beat up a black man.

Clare: True, but that was an aberration, an all-white suburban jury trying a case that should have been tried by a racially-mixed jury in Los Angeles. That proves my point. If a mixed Los Angeles jury had acquitted those cops, I don't think the riots would have happened.

Schmrz: Are you saying that even if your jury is more likely to be mistaken than our judges, the jury is still better because it makes the judicial system and its rulings more acceptable to your people?

Clare: Yes. Some things are more important than being right all the time.

Crane: And maybe we are saying only that it works better *for us*. In Europe, your local populations are not as diverse as ours. Perhaps it is less important to have a cross-section of the people deciding criminal cases. Maybe your judges are not all that different from the rest of the community, just a little better educated. So your people are more willing to accept judgments from judges.

Schmrz: Europe is changing. We now have more mobile populations, with more intermixing. So perhaps our needs will become similar to yours. Our crime rates are rising, and illegal drugs are becoming more of a problem, as they have been in your country for some time. Italy is changing, and it is also changing its legal system. Maybe other countries will follow suit.

Crane: I'm beginning to see why my question about which system is better didn't make a lot of sense. Maybe there is no "better." It all depends on what a particular society wants and thinks it needs.

Schmrz: We see another problem with juries. It is very important to us that the law be certain, consistent, and predictable, and that our officials be seen as having very little discretion. As an institution, the jury runs counter to these objectives. Because they are untrained novices, jurors are quite unpredictable and they appear to have wide discretion. Allowing them to return general verdicts, without explaining their reasons, tends to confirm this.

Clare: I'm not sure that using judges is much better. True, an individual judge might be pretty predictable. An experienced local lawyer can usually tell you how Judge X will rule, if she's been on the bench for a while. But the lawyer will also predict that Judge Y will rule just the opposite. This seems to make "the law" not very

predictable. It all depends on which judge the case is assigned to.

- Schmrz: That is not so much of a problem for us. As I explained earlier, our judges are not selected for their political philosophies. In addition, they are all trained in the same way, they are required to explain their decisions, and allowing both sides to appeal tends to ensure that they will follow the law. These features make judges consistent with each other and with their own prior rulings.
- Clare: The role of juries in U.S. law is important, but let's not overstate it. Except in death penalty cases, the jury usually has no say about what sentence the defendant receives. That's for the judge, and most of our jurisdictions do allow both the prosecution and the defense to appeal sentencing decisions. This helps to make the sentencing more consistent and predictable.
- Crane: I'm trying to imagine what it would be like if our juries did the sentencing. It could get pretty wild. Each jury is made up of twelve different people, most of whom have never decided a case before. If the law gave them a lot of leeway in sentencing, say one to ten years for armed robbery, some juries would give one and some would give ten.
- Clare: The same thing can happen with judges, as a group. One judge might give one year, and another ten. But at least a given judge will tend to be pretty consistent.
- Crane: Right. If the case has been assigned to a particular judge, the sentence becomes somewhat predictable. That's very important for plea bargaining. When I try to convince a client to accept a deal, he wants to know what will happen if he rejects the bargain and goes to trial. If I can't give him a pretty good idea of this, he's likely to take his chances and go to trial.

- Clare: So if sentencing were left to the jury, we'd probably have fewer plea bargains and more trials, which would require more resources.
- Crane: This all assumes, of course, that the legislature allows leeway in sentencing. These days, a lot of them don't.
- Schmrz: Does it also assume that you will continue to bifurcate your trials, trying guilt and sentencing separately?
- Crane: Yes. Even if we gave sentencing to the jury, we couldn't give it to them at the same time as the guilt issue. First, it would mean that evidence relating to sentencing would come in, maybe evidence of the defendant's prior criminal lifestyle, and you just can't trust a jury to decide guilt fairly when they've heard that stuff. Second, it's just too confusing for a bunch of lay people to decide more than one issue at a time. It would take them forever to come back with a verdict. And if we required a unanimous verdict, they'd probably never come back.
- Clare: Your system of combining the two issues in one trial is probably more efficient than ours.
- Schmrz: Yes, but it works only because we have professional judges deliberating with the lay assessors. I agree with Mr. Crane. It would never work if we used only the lay assessors.
- Clare: So maybe our jury system is really a compromise. We use juries, for all the reasons we discussed, but we limit their input to only half the case: the question of guilt. They play no part in the sentencing half, which is just as important.
- Crane: With one exception.
- Clare: Yes, capital cases. There the penalty is so extraordinary that we don't want the state to impose it without the consent of the community, at least twelve of its members.

- Grbzyk: Your comments on the truth intrigue me. Under your adversarial system, do lawyers *want* the tribunal to learn the truth?
- Clare: I do. The truth is, the defendant is guilty.
- Crane: There's an unbiased opinion for you.
- Clare: Actually, it is. I spend a lot of time before trial talking to witnesses and examining the physical evidence. And I get to see a lot of evidence the jury probably *won't* see, such as illegally seized evidence and his prior record. These things might persuade me that he's guilty even if the jury later acquits him. But if what I see convinces me that he's innocent, I don't take the case to trial. I dismiss it. I don't want to convict an innocent man. So when I take a case to trial, I know he's guilty. For me, that is the truth.
- Crane: Very noble, Counsel. But you don't always *know* someone is innocent or guilty. Suppose you aren't sure. Suppose some guy is accused of rape, he claims the woman consented, she denies it, and you aren't sure who's telling the truth. Do you take it to trial?
- Clare: That's a tough one. A lot depends on whether I think I can get a conviction. I don't like to lose. It makes it harder for me to drive a tough plea bargain if people aren't afraid that I'll win if the case goes to trial. And losing isn't much of a career booster, quite frankly. So if I think he's guilty, but I'm not sure the evidence shows it beyond a reasonable doubt, I might dismiss or plea bargain instead of trying it. I have enough trouble finding time to prosecute the guys I know I can nail. I don't need to waste time with weak cases.
- Crane: Don't dodge the issue. Suppose you have your doubts, but you're getting political pressure to prosecute—maybe from some women's group. Do you go to trial?

Clare: My inclination is to leave it to the jury. That's their job, not mine.

Crane: A clever way of covering your rear end. If you dismiss or plea bargain, the women's group will say you sold them out. But if you go to trial and lose, maybe they'll blame the jury and not you.

Grbzyk: Let me make sure I understand you, Ms. Clare. Even if you're not convinced he's guilty, in your role as an advocate you argue that he is? You try to persuade the jury that she's telling the truth and he isn't?

Clare: I guess I do. Once I get into trial, I want to win.

Grbzyk: In our system, no prosecutor would argue that the accused is lying if she did not in fact believe that he was.

Clare: When I get to trial, defense attorneys seem to bring out the worst in me.

Schmrz: What do you mean?

Clare: When I first look at a case, I'm very objective, seeing all sides of it pretty fairly. At that point, I might be willing to dismiss or settle. But as I get closer to trial, I become more of an advocate, and I hone down my arguments and my rebuttals to my opponent's arguments. But the odd thing is, I usually convince *myself* with my arguments. Sometimes I look back on how I felt when I first saw the case, when I was very dubious about it, and I can't figure out how I became so sure that the case should come out only one way. It's a strange transformation.

Crane: It's not peculiar to prosecutors. It happens to me too. It happens to all U.S. litigators, even in civil cases. There's nothing wrong with it. It's inherent in the adversary system. How can you persuade a jury if they don't feel that you believe what you're saying?

Schmrz: So U.S. lawyers are all actors, pretending to believe something they don't?

- Clare: But you can't pretend. The jury will see through it. That's why you have to convince yourself first.
- Grbzyk: A peculiar psychological task, isn't it?
- Crane: It is, and a lot of people don't understand it. They just think lawyers are liars, saying things they don't believe just to win. It's not that simple.
- Clare: Anyway, I don't feel so bad about it. Defense counsel will urge the jury to acquit the defendant, even when he *knows* the defendant is guilty. He's certainly not out for the truth.
- Schmrz: I'm not convinced that *either* of you are out for the truth. I happened to read some newspaper reports which discussed some evidence that the Accused may have become agitated by something the victims did soon before the killings. This would tend to show that he did not premeditate the killing, which would have reduced the crime to second degree murder. If it showed a reasonable provocation, it might even have reduced it to voluntary manslaughter. And yet neither of you introduced this evidence. Why?
- Crane: I took the position that the prosecution couldn't prove that he even committed the killings. I didn't want to confuse the jury with any arguments that assumed that he did commit them.
- Clare: I charged him with first degree murder. So naturally I wouldn't want to put in any evidence that detracted from that.
- Schmrz: So each of you, for different reasons, deceived the tribunal, correct?
- Clare: That's putting it pretty strong. I think he premeditated, so why should I help him by

putting on evidence that tends to show that he didn't?

Schmrz: You think he premeditated, but isn't it the *tribunal's* task to determine whether he did or not? And you deprived it of the opportunity to do so. This would never happen in our system. The prosecutor has a duty to present all evidence which is relevant to the case, no matter which side it seems to help. The task of the tribunal is to find the truth, not to decide which side has presented the better case.

Crane: I don't think I deceive the court when I don't put on evidence I know about. It's not the job of a defense attorney to help the court find the truth. My duty is to my client. I can't tell him to lie, and I can't put on false evidence. That *would* be deceiving the court.

Schmrz: A fine line, to be sure.

Crane: Is it? Is it much different from refusing to plead guilty when I know he's guilty? I do that when the prosecution has a weak case. I just try to poke holes in the prosecutor's case and hold her to her burden of proving the case beyond a reasonable doubt. If I succeed and get my client off, I've done my job well, even if he is actually guilty.

Schmrz: So his guilt has no effect on you?

Crane: I wouldn't say that. Like the prosecutor, I don't like to lose. And if I lose at trial, my client's sentence will be greater than it would be if I had gotten him a decent plea bargain. So if the prosecutor has a strong case, I'll probably advise my client to bargain.

Clare: Now who's dodging the issue? Suppose I have a weak case, but *you* know your client is guilty. You'll *still* urge the jury to acquit him. You know it and I know it.

Crane: Correct.

- Schmrz: Morally, you have no problem with that, Mr. Crane?
- Crane: Of course not. Look, I'm no different from any other decent citizen. I don't want a rapist running loose to threaten my wife or daughter. As a citizen, I want this guy put away for a long time if he did it. But as his lawyer, I want him to walk.
- Schmrz: How can you want two inconsistent results? And why put yourself in such a difficult position?
- Crane: That's the same as asking me why I became a lawyer. I did it because I believe in our system, the adversary system. I think it works. Without me, or someone like me, doing what I do, the adversary system just couldn't work properly.
- Schmrz: Many people feel that U.S. criminal defense lawyers are . . . how should I say it?
- Crane: I'll say it for you. We're greedy shysters, manipulators, liars, out to get mass murderers off on technicalities, et cetera, et cetera. I've heard them all.
- Schmrz: Do those accusations bother you?
- Crane: I don't mind heat. I get plenty of it from prosecutors and judges, in court. That comes with the territory. But it does bother me when people don't understand how defense attorneys contribute to the rendering of justice. Basically, they just don't understand the adversary system.
- Schmrz: Justice? Are you seeking justice when you urge a jury to free a guilty man?
- Crane: See, that's the problem. You think *my* job is to find a just *result* and urge the jury to come back with that verdict. It isn't. Under the adversary system, it's the *system's* job to come up with a just result. That's not the job of *each player* in

the system. Let's look at another player, the bailiff. His job is to take care of the jury. But he hears the evidence and arguments, and he might come to his own conclusions. When he escorts the jury into the deliberation room, is he supposed to tell them what he thinks is the just result? No way. That's not his role. Same with me.

Schmrz: So justice emerges from each player carrying out his or her limited role?

Crane: Yes, but only if every actor plays his role properly. Clare's role is to prosecute, my role is to defend, and the jury's rule is to decide who's right. If I play her role, or she plays mine, or either of us plays the jury's role, it doesn't work. We're sort of like an automobile engine. The pistons go up and down, the gears go from side to side, and some of the rods even go backwards. Everything seems to be going in a different direction, but when all of them work together properly, the whole car goes *forward*, just where you want it to go.

Schmrz: An attractive analogy, Mr. Crane. But the bailiff is not actively trying to free a man who might be guilty. You are. How can you expect the U.S. public to look kindly on you?

Crane: It's not easy. And we haven't done a very good job of explaining to the public how we help *them*. Look at it this way. There are two possibilities, my client will either be convicted or he'll be acquitted. Either way, I help society. If he's convicted, the fact that I tried hard to get him acquitted lets us all sleep better, knowing that it's very unlikely we are punishing an innocent man, because I made sure the jury knew every weakness in the prosecution's case. And if my efforts help get him acquitted, we can be *sure* we're not punishing an innocent man.

Grbzyk: But sometimes your efforts have nothing to do with guilt or innocence. When you urge the court to exclude relevant evidence because the police forgot to obtain a search warrant, or to

exclude a confession because the police forgot to read the defendant his *Miranda* rights, you seek to prevent the jury from finding the truth about guilt or innocence. Aren't these the sorts of technicalities the public complains about?

Crane: Look, my job is to make the arguments for my client, and that's all. I can't decide anything, and I can't make the rules. That's the court's job. If the public doesn't like the rules, they should blame the courts and the legislatures, not me. I'm just the messenger: I tell the court when the rules have been broken.

Grbzyk: That seems reasonable. But if people don't like the rules, I suppose they'll blame the first person that mentions them. You.

Crane: Right. The basic problem is that people don't appreciate why we have these rules. The exclusionary rule protects all of us from unreasonable searches and arrests, and the *Miranda* warnings make sure that the police don't coerce defendants into confessing. You can agree or disagree with these policies, but you can't fairly call them "technicalities." They're not like rules about what size paper your briefs have to be written on; they deal with fundamental rights. If they make it a little harder to find the truth in some cases, it's well worth the price. I just wish the public understood that.

Grbzyk: The U.S. public sometimes sees the arguments that lawyers present as rather fanciful. Shouldn't you take responsibility for the arguments you make?

Crane: I should, and I do. All good lawyers make creative arguments. The public doesn't realize that lawyers in an adversarial system have to push the envelope, to test the outer edges of the rules. That's part of our job. If we didn't, the law would never change, and we wouldn't be representing our clients to the fullest. And don't worry, if we cross the line between creative and

fanciful, the judge won't hesitate to shoot us down.

Schmrz: Intellectually, you present a persuasive case, Mr. Crane, as one might expect from an intelligent lawyer. But let's talk about your *feelings* for a moment. I believe that's fashionable in California these days. How do you *feel* when a jury acquits a man you know to be guilty?

Crane: That doesn't happen often. But when it does, I don't lose any sleep. I just make doubly sure my doors are locked.

Schmrz: So you feel content?

Crane: Content? When I win, I feel terrific!

Schmrz: The verdict reinforces your belief in the system, I suppose.

Crane: The system? When the jury walks through that door with a verdict, who's thinking about the system? Half the time, I'm not even thinking about my client! I'm thinking about one thing: *victory*. A lawyer in the adversarial system is like an athlete or a soldier, at least when we're caught up in the emotions of a trial. Who would think of asking a pro football player *why* he wants to win the game? We're the same way. I'm not sure whether we're born that way or the adversarial system makes us that way, but that's what happens.

Clare: During trial, I feel the same thing. I might think about the rights and wrongs of it all before the trial begins, but once the judge bangs that gavel, I just want to win. Period.

Schmrz: Of course, winning is profitable for both of you, is it not? Doesn't a good record enhance your careers?

Crane: Sure it does. That's how I get clients and she gets promotions. But that's not what keeps us going during a trial. Then we're warriors, not

career climbers. I'll balance my checkbook later.

Grbzyk: Remarkable. I suppose this competitive drive is what creates the drama we spoke of earlier.

Clare: Yes. We are very competitive, and most of our trial lawyers want to be Perry Mason, each in their own way.

Grbzyk: I don't think our lawyers have these feelings, at least not to the degree you exhibit them.

Clare: They don't know what they're missing. Say what you will about the adversarial system, but it sure is fun, at least for the lawyers.

Grbzyk: Even when you lose?

Clare: Of course not. But the thrill of winning makes you forget your losses, 'til the next one, anyway. It is pretty much like competitive sports, I suppose.

Grbzyk: We Europeans think competition is more suited to the soccer field than our law courts. In the United States, you seem to treat the quest for justice as just a game.

Crane: It's a game, all right, but it's not *just* a game. The competitive spirit is the gas that makes the car go. It's the energy that drives the adversarial system—a very good system, I might add. It gets to the truth, most of the time, while still serving other values we think are important.

Schmrz: Does it? How can you have such faith in a system that might result in an acquittal of a client you know to be guilty? Doesn't that show that your adversarial system is faulty?

Crane: Not necessarily. Maybe it just shows that humans aren't perfect. Until we develop an infallible lie detector machine, we'll have to rely on fallible people to decide whether other people

are telling the truth. And they won't always get it right. Do your judges always get it right?

Schmrz: Probably not, but when the defendant confesses, our judges are less likely to get it wrong. And we do get more confessions than you do.

Crane: But look at how you get them. As I said before . . .

Clare: Please, Crane. Once is enough.

Crane: Now wait a minute, Clare. I . . .

Schmrz: Pardon me for raising this, but I can't help noticing a certain tension between you two. Do you dislike each other?

Clare: Not at all. Crane and I get along pretty well, considering.

Schmrz: Considering?

Clare: Considering we're on opposite sides, of course.

Schmrz: Opposite sides? If Mr. Crane's analogy is correct, you are both parts of the same automobile engine, each working to move the car forward towards the same destination: a just result. Your goals are the same, aren't they? Why should there be any animosity at all between you?

Clare: Good question. I guess when you represent the same side over and over, you develop certain attitudes about crimes and cops. I have mine, he has his. And the two usually conflict.

Crane: And don't forget the emotions we talked about. When you get all worked up at trial a few times, always on the same side, it tends to worm its way inside you, and it stays there.

Clare: True. Also, different personality types are attracted to one side or the other. Prosecutors' offices tend to draw in people who are straight, orderly types.

- Crane: So I'm crooked and disorderly?
- Clare: Not necessarily. But you and your ilk do tend to be more like rebels. You're not too likely to pick prosecutors as your drinking buddies and vice-versa.
- Crane: Conceded. We tend to distrust big government, cops, and the establishment generally. You don't. You wear pin stripes and wing-tips, and we wear flashy ties and pony tails.
- Grbzyk: Could either of you switch sides?
- Clare: Me? Defend criminals? Never in a million years.
- Crane: Actually, I used to work as a prosecutor. But I couldn't do it now. I can't work for a bureaucracy. I'm just not the organization-man type. But I'm glad I did it. It taught me a lot about how the opposition operates.
- Schmrz: The "opposition"—again. Is this healthy, this loyalty to one side only? And is it necessary to the adversarial system?
- Clare: I never really thought about it. How could it be any different? You can't represent both sides.
- Schmrz: British barristers do. A barrister might be retained by the prosecutor's office in one case, and then by the accused in the next case. Some tend to specialize in representing one side or the other, but many take each case as it comes. They are vigorous advocates in the particular case, put it behind them when it is over, and then become just as vigorous in the next case. It works, and no one has suggested that it diminishes the adversarial nature of British practice.
- Grbzyk: Maybe the United States should try this.

- Crane: Professor, didn't you warn me earlier against comparing one feature of another system with your own without looking at the whole system? I know a bit about the Brits. They separate their lawyers into solicitors and barristers. Solicitors tend to work one side of the street: either the prosecution or the defense, not both. They prepare the case for trial, just like our prosecutors and defense attorneys do. But then the solicitor brings in a barrister as a trial specialist to try it. So the lawyer with the most contact with the client, the solicitor, sticks to one side, just like our lawyers.
- Grbzyk: I stand corrected, Mr. Crane.
- Clare: Still, it's an intriguing idea, the more I think about it. Maybe each of us would have a little more respect for the other side if we took one of their cases occasionally. We could try it out, in some sort of test program.
- Schmrz: There is something else you might try: the inquisitorial system. Some American critics of your system have proposed this, believing that it would be much more efficient. Some have even pointed to the present case as an example of how expensive and inefficient the adversarial system can be.
- Crane: That might have had a chance a while ago, but not now.
- Schmrz: Why is that?
- Crane: Sentencing. In recent years, our sentences have gone through the roof. Mandatory minimums, consecutives, three-strikes-and-you're-out, truth-in-sentencing laws. It's getting worse all the time.
- Schmrz: I don't understand. I grant that your sentences are much higher than ours, but why would this preclude your adoption of the inquisitorial system? What is the connection?
- Crane: Let's forget about the lawyers for a moment and just think about the defendant. If you are

charged with a crime in the United States, the prosecution is out to clobber you. They want to put you in a miserable place for a very long time, and sometimes they want to kill you. They might have good reasons for this. I appreciate people's frustrations about crime. But reasonable or not, it's clear that the prosecutors are not looking after *your* interests, so you have to do it yourself. It doesn't matter whether you're guilty or innocent. You're going to resist; it's human nature. And when you do, the government is going to fight even harder. So the system is inherently adversarial from the start—*with or without* lawyers and judges. All the lawyers and judges do is insist on some procedures that make the fight a little more civilized.

Clare: Makes sense, I guess. But I don't see how this explains the differences in systems. Doesn't the prosecution *always* want the defendant punished, even in the inquisitorial system?

Schmrz: It depends on how you are using the word "punish." When my child misbehaves, I punish him in order to reform his behavior and make him a better person, not to hurt him. I punish him because I love him.

Clare: Come on, Professor, tell the truth. When your kid wrecks the furniture, you punish him because you're angry at him, and also to cut down the expense of buying new chairs, don't you? It's not all just for him.

Schmrz: I confess, those motives are also present, along with the ones I mentioned. I want to help him, and I am also annoyed and want to protect my household. Is your decision to prosecute based on the same mixture of motives?

Clare: I guess not, at least for most major crimes. If I'm going after an adult armed robber, I try to satisfy my community's anger at people like him, and I want him off the streets for as long

as possible. Usually, I'm not trying to help him at all.

Schmrz: Will he receive any help in prison?

Crane: Are you kidding? Years ago, we tried to rehabilitate prisoners: teach them to read and learn a trade, so they might get a job when they get out. In fact, rehabilitation was seen as one of the main purposes of punishment. But today people just want the two things Ms. Clare just mentioned: to hurt the guy and to get him out of the way. Any help he might get in prison is incidental, and most of them get very little.

Clare: I suppose it's true. Today, for most defendants, the sentence he receives has little to do with any notion of how long it might take to rehabilitate him.

Schmrz: You say "most." Are there exceptions?

Clare: Sure. If I have a young defendant without much of a record, I might give him a break, maybe get him into a diversion program to help him break a drug habit, or recommend a suspended sentence on condition he behaves himself and gets a job. If I don't have an angry victim pushing me, I might try to help him.

Grbzyk: This is the approach the inquisitorial system takes with almost all defendants. Perhaps I would not go so far as to say that we hurt them because we love them, as Professor Schmrz does his child. But we start with the assumption that they are redeemable.

Schmrz: Not all of them, of course. Terrorists who kill innocent people probably evoke the same response in our community that the average burglar does in yours.

Clare: Are you telling me that your defendants think the state is trying to help them by prosecuting them, so they don't have much incentive to fight?

- Schmrz: I wouldn't go quite that far, but I would say this. The average robber would not feel that a state that fines him or sentences him to four or six months in prison hates him, even if it does not love him. On some level, he might believe that he did wrong and deserves some loss of freedom for a while. But if the state were to imprison him for ten years for the same crime, he might think that depriving him of a substantial part of his life was much more than just desserts.
- Crane: It's worse than that. A ten-year sentence is society's declaration that he is worthless, that he has no chance for redemption, that his community *does* hate him. While a six-month sentence might conceivably reform him, there is little chance that a ten-year sentence will do so. He has effectively been declared an outcast for the rest of his life. He'll never see this as for his own benefit, and he won't take it without a fight. Any system that threatens him with this will necessarily be an adversarial system.
- Grbzyk: Ms. Clare, you mentioned your occasional sympathy for young offenders. Wasn't your juvenile court system built on similar premises?
- Clare: Yes. It was intended to punish juveniles like you punish your child: to protect society *and* to help the kids grow up to be good citizens. There was supposed to be an element of love in it, sort of.
- Grbzyk: Did this approach affect the way juvenile court trials were handled?
- Clare: Yes. They were set up to be pretty nonadversarial. No juries, no defense lawyers, and relaxed rules of evidence. The kid didn't need those things to protect him, because the court was out to help him, not to hurt him.
- Crane: That was the idea, but it didn't work out that way. Kids were thrown into miserable detention homes, which were like jails, and often their "sentences" were set according to what they had

done, not what they needed. It began to look so much like adult court that our Supreme Court required states to give them some of the same rights that adult defendants get, like defense lawyers. It became an adversarial proceeding because the state was trying to punish them, not help them. If the proceeding is based on hostility rather than concern, it will always be adversarial.

Schmrz: So, I see why you said that the nature of the sentence may affect the nature of the adjudicatory system.

Crane: Yes. Earlier, I compared a U.S. adversarial trial to a baseball game. Maybe for the lawyers it is. To us, it's mainly a game—a big game, but still a game. But the defendant has much more at stake. For him, it's more like a bullfight. The matador is trying to kill the bull, and the bull is fighting for his life. That's the essence of it. You can change the weapons, the costumes, or the players. You could even give the bull a lawyer. But if they're still trying to kill the bull, the adversarial nature of the contest won't change. The bull will never quietly accept an "inquisitorial" decision that he should die. He'll always fight back.

Schmrz: The bull is innocent, of course.

Crane: True, but that doesn't matter much. Even a guilty bull, or a guilty defendant, will resist when his enemy is trying to take his life or a substantial part of it. And he should. Even if you're guilty, that doesn't mean you deserve the penalty they're trying to inflict on you.

Schmrz: How would your bull-defendant react to an inquisitorial system, if the United States were to adopt it?

Crane: I can just imagine me telling him, "Joe, I won't bother cross-examining the key witnesses against you, because we can depend on the judge to try to get to the truth. You should just get up there and confess. Don't worry, you can

trust the prosecutor and the court to look out for your interests." He'd say, "Counselor, are you nuts? Those guys are trying to put me away for twenty years. That is *not* in my interests, no matter what I did. If you won't fight back for me, I'll get a lawyer who will." See, the inquisitorial system just doesn't mesh with the high sentences.

Grbzyk: Are these harsh sentences wise? I understand that your communities are concerned about crime, but they might do more to stop crime if they directed their efforts more toward rehabilitation?

Clare: Rehabilitation is pretty tough to do. When you punish your child, you can do a lot to see that the punishment helps him, or at least doesn't hurt him, because you control most of his life. You make sure that he is well-fed and housed, that he does his homework, and develops a good character and work habits. You have some say over the company he keeps. The punishment might help him, because the rest of his life is in good shape. That's just not true of most criminal defendants in the United States. They live in rough neighborhoods where they hang out with criminals, they go to lousy schools, and they often have bad home situations. A prosecutor can't do anything about this. Neither can the judge, and neither can the prison warden. We can't take "the whole person" and help him the way you help your kid. So we punish to help us, not to help the defendant. That's all we can do.

Schmrz: In our villages, or in neighborhoods of our cities, there are often support systems that enable us to help wayward offenders, even adults. Couldn't your society do something to change the conditions you describe?

Clare: Maybe we could, but we don't. Those are political questions that are much larger than the question of whether we should have an adversarial or inquisitorial legal system. Some

voters think we should do more for the poor, and others think it's hopeless or too expensive to try, and they're too angry with criminals to care about helping them. Right now, the second group seems to be having its way. But whatever the people decide, we in the legal profession are stuck with their decisions. We're just the tail, not the dog. Our criminal legal system is a symptom of how those larger political questions are handled. At the moment, U.S. prosecutors can't help the defendant much. So we try to hurt him. And when we do, he fights back.

Schmrz: Does it follow that you must give him the tools to fight with, like defense lawyers and juries?

Crane: It does follow. When you have a lot of cops and prosecutors trying to hurt people rather than help them, some are bound to make mistakes and commit abuses. So the defendant needs protections. You can't allow an aggressive prosecution without giving the defendant the power to defend himself.

Schmrz: Is there a consensus on that point among your citizens?

Crane: In the abstract, I'm not sure. But when just one case of serious injustice hits the newspapers, like an innocent guy getting railroaded, most people do insist that protections be built into the system.

Clare: Same thing happens on the other side. If just one man gets off or gets out and commits another serious crime, the public demands that we change the whole way we deal with criminal cases.

Crane: Yes. We've been talking as if our system is based on a careful weighing of all the things we've been talking about. But often we set policy by sound bites. Maybe that's why we sometimes seem so erratic. Somebody commits a crime the public sees as particularly heinous, and some politician gets a lot of mileage by pushing an increase in the penalty for that

crime. Over time, this happens with *several* crimes, and gradually that changes the standard. So the sentences for *all* crimes get ratcheted up, even though we never sat down and decided that this would be a good idea for a coherent system.

Grbzyk: In Europe, where prosecutors are not so aggressively seeking long sentences, there is not as much need for protections for the defendant, which make up the heart of your adversarial system.

Crane: Right. Until we change to a sentencing approach that shows more concern for the defendant, I don't think we can change to an inquisitorial-type system.

Clare: But that doesn't mean we can't consider adapting certain features from the inquisitorial system that might improve our adversarial system.

Crane: Like what?

Clare: Well, for example, we might

A young man comes up to Grbzyk and whispers in his ear.

Grbzyk: A fascinating question, but we must defer it to another day. Now, we should return to court. The tribunal is ready to announce its judgment.

They all rise and begin walking.

Schmrz: So, my friends, you have learned much about our inquisitorial system?

Clare: Yeah. Thanks for the tips. But the funny thing is, something else happened, something I never expected. By looking at your system and comparing it with ours, I picked up some insights into *our* system. I've been an American lawyer for quite a while, and I thought I knew our system inside out. I do, in a way, but I've been so busy climbing the trees that I never had

a good look at the forest. I just took juries, hearsay rules, and opponents like Crane for granted, without seeing how it all fit together. I guess a goldfish doesn't know what her bowl really looks like until she gets out and sees another bowl.

Crane: It's been an eye-opener, all right. I thought things like the jury trial, the exclusionary rule, and the privilege against self-incrimination were engraved in stone, like the Ten Commandments. They're not. You can have a just and civilized legal system without them. You do, and you don't seem to be savages, except for your coffee. Americans view those things as fundamental rights because

Clare: Just because they're American.

Grbzyk: And we do the same. We accept and expect certain features just because of who we are.

Schmrz: But people change. And when they do, maybe they can learn from other cultures.

All exit, into the courthouse.

—CURTAIN—