

Money Talks, Clients Walk

Opinion: For reform, look to the Europeans

BY JOHN H. LANGBEIN

IN THE MEDIA HOOPLA THAT HAS SURROUNDED the O. J. Simpson murder case, the networks have subjected the public to a daily barrage of instant replays and supposed expert analysis—all of it from lawyers deeply entrenched in the modern American criminal-justice system. Our attention has been directed to matters ranging from Marcia Clark's wardrobe to the bickering of prosecutors and defenders. We have been lectured incessantly about the canards of racism and the past shortcomings of the Los Angeles Police Department. But the broadcast media's interpreters of the events have said not a

word about the real lesson of the Simpson case—about the way the case exposes the deep structural flaws that prevent the American criminal-justice system from ever working well.

There are two defining (and interconnected) characteristics of American criminal justice that set it apart from the smooth-functioning systems of other advanced Western countries—Holland, Scandinavia, Germany, Switzerland and elsewhere. One is the failure to have a thorough, impartial, judge-supervised investigation of the facts in the pretrial process. The other is the license that we give lawyers to engage in truth-defeating distortion and trickery at trial.

The framers of our Constitution, who guaranteed the right to a jury trial, would not recognize the system we have today. At the end of the 18th century, jury trial even for serious crimes was a rapid and relatively informal procedure, in which lawyers were seldom present. Jury trials took minutes, not months. Over the past 200 years, criminal lawyers have slowly and insidiously transformed the criminal trial into a monster so complex and time-consuming that we can afford to use it only for a handful of cases—especially for political pageants like the Watergate trials or Oliver North, and for rich guys like O. J. Simpson.

Money is the defining element of our modern American criminal-justice system. If Simpson walks, as most lawyers think he will, what will have decided the outcome is not that O.J. is black, but that he is rich. He can afford to buy what F. Lee Bailey, Alan Dershowitz, Johnnie Cochran and the others have to sell: the consultants on jury packing, the obliging experts who will contradict the state's overpowering DNA and related evidence, and the defense lawyer's bag of tricks for sowing doubts.

casting aspersions and coaching witnesses.

By contrast, if you are not a person of means, if you cannot afford to engage the elite defense-lawyer industry—and that means most of us—you will be cast into a different system, in which the financial advantages of the state will overpower you and leave you effectively at the mercy of prosecutorial whim. If you are sufficiently destitute, you can have a state-supplied defense lawyer, and, if you are quite lucky, that person will be competent. But public defenders have huge caseloads that they could not possibly take to trial even if they wished. Depending on your jurisdiction, up to 99 percent of cases of serious crime are processed in the dirty back rooms of plea bargaining.

Our lawyer-dominated system of criminal justice has truly achieved the worst of both worlds. For the wealthy, there is the near-free-pass that elite defense counsel sells to the O.J.s and the William Kennedy Smiths of the world. For the rest of us, there is a system of barely restrained prosecutorial power, in which the prosecution is effectively judge and jury in its own cause, with no serious control on its power to force the defendant to accept the prosecutor's terms.

Ours is a criminal-justice system worthy of some banana republic where the rich often act with impunity and the authorities terrorize the peons at will. Knowledgeable Europeans look at the American criminal-justice system with amazed disbelief. They live under high-safeguard criminal-justice systems that give full trial to every case of serious crime. Of course, all legal systems, including the Europeans', encourage caught-in-the-act defendants charged with less serious offenses to admit guilt and pay fines without

the further nuisance of trial. But cases of serious crime are always fully tried. In many European systems, jurorlike lay judges sit with professional judges in a single panel that decides both guilt and sentence. Such courts deliver virtually all of the benefits of jury trial, but vastly more rapidly—and at a fraction of the cost.

How can the great European democracies run such effective, fair and trouble-free criminal-justice systems? The answer is easy. They have modernized their procedures while we have not. They place the investigation of serious crime under the direction of impartial magistrates whose job is not to convict (or to defeat conviction) but to find the truth. In the pretrial process defense lawyers in these systems work with the police rather than against them, making sure that the police investigate exculpatory as well as incriminating evidence. The resources and advantages of the state, which in our system are mostly allied against the accused, are made available to develop defenses. The modern European trial is an investigation into the truth, not a staged battle of partisans committed to distortion.

The American trial bar urges us to dismiss the European mod-

els. Most European countries have lower crime rates and less intense ethnic divisions. True enough, but that's hardly an excuse for the American mess. Precisely because criminal justice is such a gigantic enterprise in the United States, we cannot (and should not) pretend that the way to handle such matters is through O.J.-style spectacles.

Nor do we need European models to make the most obvious reform: preventing the lawyers for the prosecution and defense from picking and choosing among prospective jurors to find those most predisposed to ignore the evidence and favor a particular side. The standard for juror selection should be the same that governs the disqualification ("recusal") of a judge. Seat the first 12 jurors called, unless one is related to the parties or involved in the events.

There is one great set of winners in American criminal justice: the lawyers. Now grown immensely wealthy and powerful, the elite criminal bar constitutes an entrenched vested interest for the perpetuation of our failed system. Wrapping themselves in the Constitution they have distorted, they pretend that the framers visited this catastrophe upon us. Nothing could be farther from the truth. The lawyers did it to us, and one of the blessings of serious European-style reform in the United States would be to cut the lawyers down to size. They won't go quietly.

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