(Intro music)

Amanda Pampuro: Welcome to Sidebar, a podcast from Courthouse News. I'm your host, Amanda Pampuro, and I'm joined today by Hillel Aron.

Hillel Aron: How are you, Amanda?

AP: I'm pretty good. What are we talking about today?

HA: All right, bear with me here. I got the idea for this episode a couple years ago when I saw that movie "Anatomy of a Fall." Have you seen it?

AP: No, I don't think so.

HA: It's this French movie that won the top prize at the Cannes Film Festival, I think it was in 2023. It's about a woman who's accused of killing her husband, and it's basically a courtroom drama. To be honest, I didn't love this movie, but I was transfixed by the courtroom scenes, specifically by how dissimilar they were from American trials that I've covered.

(Clip from "Anatomy of a Fall")

AP: What makes their trial so different?

HA: Well, to start, there's not one, but three judges and the judge in the middle, she wears red in the movie. She's the one calling the witnesses. Even though there are lawyers who question the witnesses, the judge throws in questions, too, at any time, as does the defendant. The defendant can question the witness and the judge can question the defendant at any time, even if she's not on the stand.

AP: Yeah, I just read that true crime book, "People Who Eat Darkness," and there's a trial in Japan with a three-judge panel. The witnesses speak to the judges with their back to the gallery. So, you can't even see their facial expressions.

HA: It might sound weird, but I had never really considered that trials in other countries would be so different.

AP: So, today we're going across the pond.

HA: That's right. We're going to be looking at judicial systems in the United States, France and England, and we're going to ask the big questions: Why are they so different? Why do the English lawyers wear wigs? And we are going to decide definitively which one is better.

AP: Really?

HA: Maybe.

(Music break)

HA: Okay, so a couple months ago, I was covering a big trial here in Los Angeles, a bellwether civil trial about the effects of social media on teenagers. There were a lot of reporters covering it, and I met a French journalist from the Agence France-Presse.

AP: Not bad. Pal mal.

HA: And yes, I did just watch a YouTube video on how to pronounce that. Anyway, we had lunch and we talked a bit about the differences between trials in the U.S. and France. And so, a few weeks later I interviewed him over Zoom.

Benjamin Legendre: My name is Benjamin Legendre and I'm a journalist for the global news agency AFP.

HA: Say that last name again.

BL: Oh, Benjamin Legendre. Yeah, usually in the U.S. people say Le-Gender.

HA: He said that one key difference is that a judge is involved early in the investigation, way before there's even a trial.

BL: For biggest crime like homicides, genocides, rape or drug trafficking, there is a neutral judge that is supposed to investigate and find any evidence that you're guilty and to find any evidence that you are innocent. The judge has to investigate in both directions. And obviously he does the investigation with the help of the police. We call it le juge d'instruction.

HA: Once the case gets to trial, it can almost be a little anticlimactic, like an administrative hearing.

BL: The trial is mainly aimed at making everything public, and the discussion publicly open with the idea that once you discuss it publicly, new interpretations will arise. But you don't have to discuss the legitimacy of any exhibit or evidence, because everything has been sorted through before trial. If you reach the trial and you get a not guilty verdict, that's a big, big surprise.

HA: This is one reason why there are very few courtroom dramas that come out of Europe. Like we said, the judge is a much more powerful figure in French trials than in American ones. And the judge sitting in the middle wearing red, he's actually called the president. And the other two judges are the assessors or assistants. And the president really runs the trials. He decides which witnesses to call. If he wants to call an expert, he'll pick the expert.

AP: Instead of having each side call their own experts like we do here.

HA: Exactly. The president will also join the jury for deliberations, and he'll clarify evidence, something you would never see in the U.S. as a result, there aren't like a million objections that take up so much time in American trials. Here's Benjamin again.

BL: The idea that the judge is a referee, and the trial looks more like a sports game between two teams with a lot of rules and at some point, there is this huge effort to decide what is admitted and what is not admitted into the fight. Yeah, that's very surprising for me because for my French perspective, every evidence, if you tell the truth, should be admitted. And all this game of one attorney raising an objection, and the judge saying sustained or overruled is very surprising. And it reminds me of those American sports where it's all about gaining small inches or yards.

HA: As you can see, these two legal systems are very different. And they even have two different names. The continental system practiced in France and in most of Europe is called inquisitorial law.

AP: And that's with a stronger, more active judge.

HA: Right. And the idea is that the judge is trying to find out the truth. Our system, which comes from England and is shared by other former English colonies like India and Canada, is called adversarial law.

AP: And that's when the two sides fight it out and the judge is more of a referee.

HA: Exactly. The prosecution gets a lawyer, the defendant gets a lawyer, and they each do whatever they can to convince the jury that they're right. I spoke with Walter Olson, he's a senior fellow at the Cato Institute, though he's better known for one of the oldest and most popular legal blogs of all time, Overlawyered, which ran from 1999 to 2020.

Walter Olson: We know that the adversarial system not only replicates the bickering of a really dysfunctional family in some ways. In the courtroom, you've got the lawyers, you know, sometimes holding themselves back and being civilized and other times turning it into, you know, this emotional circus and Europe doesn't approve. It doesn't go in for that. And so in the European systems, rather than sitting back while the lawyers play a game of, you know, call it what you will, tennis or badminton, the European judge will be much more active in deciding what questions should be asked of witnesses, in deciding in what order issues should be taken up, all of those sorts of things.

AP: What's the history here? How did we get two different systems?

HA: All right, should we do our brief historical interlude now?

AP: Let's do it.

HA: Okay, so the history we're going to go all the way back to the Middle Ages, let's say the year 1100 or something like that.

AP: There were trials back then?

HA: There were, but they were not like our trials. These were trials of ordeal.

AP: Trials of ordeal!

HA: I talked to Professor Carlton Larson about this. He teaches constitutional law and legal history at UC Davis.

Carlton Larson: Until the 1210s, criminal trials were adjudicated both in England and on the continent through ordeals. That is, it wasn't a jury. It wasn't a fact-finding proceeding. It was a procedure conducted through the Catholic Church. And the theory was that God had spoken through these ordeals and had answered the question.

HA: So, if you were accused of a crime in England, say you set fire to a church, or you murdered your cousin with a broadsword, you would go through one of four trials by ordeal. There was ordeal by cold water, where the suspect is tied up and slowly placed in a pond. And if you sink, you're innocent. And if not, you're guilty.

AP: That wasn't just for witches?

HA: No. Then there's ordeal by hot water, where the accused is forced to dip their hand in a pot of boiling water or oil to retrieve a stone. And then they look at the injury, the wound, and if it heals properly, you're innocent. But if it festers or gets infected or something, you're guilty.

AP: More like trial by germ theory.

HA: Right? There was ordeal by iron, which is pretty much the same thing. You have to hold a hot iron and walk a short distance, like nine feet, and then they look at the wound later. And lastly, this is my favorite one. There's ordeal by cursed morsel.

AP: Cool. What a great name.

HA: Yeah. Let's let the professor explain this one.

CL: Cursed morsel is used for clergy. They were given a piece of bread that had feather in it. And then they were forced to eat it. And if they swallowed it just fine, they were innocent. If they choked on the feather, then they were guilty.

AP: A feather? When I hear cursed morsel, I think like a poison cookie.

HA: Yeah, this one doesn't sound that bad to me.

AP: Way better than the burning ones. What about trial by combat, like in Game of Thrones?

HA: Right, so, there really were trials by combat. In England, they were used for civil trials. So, you know, if I sued you and you disagreed, we would have a big duel about it. They also had them in Europe. And in fact, there's a great book about trial by combat in France called The Last Duel.

AP: They made a movie out of it.

HA: Yeah, the movie is not as good. Very weird performance by Ben Affleck in there. At any rate, the trials by ordeal were standard in English criminal law from the 500s all the way up through 1215.

CL: Now, the Catholic Church in 1215 at the Fourth Lateran Council, decided that this was not appropriate, that priests should not be participating in this because it involved priests in the shedding of blood. It required God to work a miracle whenever a priest asked them to do. But it was not part of a sacrament. So, therefore it was inappropriate and so they had to come up with something else. And England by that point had already developed 12-person civil juries. And so, they were able to transfer the 12-person jury from the civil context over to the criminal context. And that's essentially the 12-person criminal jury that we have to this day.

HA: And that's the beginning of the English common law system, where the law just kind of starts to build on itself using other older cases as precedent. Now, on the continent, in France, Spain, Germany and the rest of Europe, they move away from trials by ordeal too, but into something different, in part because they don't have civil juries at the time.

CL: They ultimately developed, would call sort of an inquisitorial system, based ultimately on Roman law, where the final decisions of guilt are generally are left to judges and not to laypeople. And so, the continent is really one of the major divides in, in the legal systems of the world in that those that follow the common law use.

HA: Juries ultimately decide guilt and innocence, and the continental based inquisitorial system is much more dependent on judges, and they expect judges to do the actual work of fact finding which English common law judges just do not do. That said, both systems start out basically as inquisitorial, with judges controlling the flow of trials, and for a while lawyers aren't even present. English trials in the 1600s were once described as a ‘relatively spontaneous bicker between accusers and accused.’

CL: Even as recently as the 18th century, it actually looked quite different in the sense that in most cases, the accused did not have an attorney. The trials would be very quick. Many trials were five minutes from beginning to end, from the very opening of the case to a jury verdict, five minutes, a half hour trial would have been viewed as something exceptionally long. And so, in the 18th century, everybody got a jury trial. There was no plea bargaining. Actually, judges discouraged plaintiffs from pleading guilty. But what you received was in many ways significantly procedurally deficient compared to what a modern criminal trial would look like.

AP: And this system gets carried over to America, I'm assuming.

HA: Yeah. So, during the Salem witch trials in 1692, which we discussed a few years ago in an earlier episode we did, none of the accused had attorneys. Would you like to read a section from friend of the show, Stacy Schiff's amazing book, "The Witches"?

AP: Sure. "In the absence of lawyers, there were no points of procedure to be discussed. There was no voir dire, no cross-examination. The justices represented both parties interrogating the suspect as well as her accusers."

HA: Yeah, it's basically just inquisitorial law because without lawyers, it's not very adversarial. Why don't you read that second snippet?

AP: "A 17th century magistrate did not hesitate to tell jurors what they thought or how to evaluate evidence. He might direct them to find a defendant guilty. In the absence of sufficient evidence, strong suspicion would do. Reasonable doubt with still two centuries in the future." So, when did lawyers become a mainstay at criminal trials?

HA: It's hard to say for sure, but there is some evidence that this is actually an American innovation. In 1701, Pennsylvania put it in their charter that all criminals should have the same privileges of witnesses and counsel as their prosecutors. And there's some evidence to suggest that when England began to make similar reforms, it was actually following the Americans' lead. But in America in the mid-1700s, lawyers are everywhere. And they play a key role in the revolution that is to come. Of the 56 men who signed the Declaration of Independence, do you know how many were lawyers?

AP: Most?

HA: Twenty-five.

AP: Oh, so almost half.

HA: Of the first 10 presidents, seven were lawyers. And another one went to law school but never practiced.

AP: So, this is what they mean when they say we are a nation of lawyers.

HA: Definitely. So, when Alexis de Tocqueville visits the United States in 1831, he writes in his famous book, "Democracy in America," "In America, there are no nobles or men of letters, and the people is apt to mistrust the wealthy. Lawyers consequently form the highest political class and the most cultivated circle of society." And he later adds, "They fill the legislative assemblies and they conduct the administration. They consequently exercise a powerful influence upon the formation of the law and upon its execution." And one of the curious features of American law is that our civil system leans heavily on precedent on common law. The civil law code isn't spelled out very well. And Tocqueville argues that that's a feature, not a bug. It's the way the lawyers want it. Here's Walter Olson again.

WO: A population that is full of jailhouse lawyers, whether or not they've ever been to jail, automatically terms and thinks in terms of my rights rather than Parliament should fix this at some point, you know. No. Why wait on them? My rights are being violated. Let's go to a court and convince the judge. Those are two different ways of approaching it and the American way, for all that it has some very real costs, might lead to more resistance to the government trying to get away with bad things. Britain, for example, kept parliamentary superiority or parliamentary sovereignty or whatever they call it, in which the judges are supposed to eventually yield to the power of Parliament, speaking for the people to make the law what they want it to be. Now, we, of course, with our written, explicit constitutional government, but also with the way in which our courts interpret it. Many more questions have judges as the final resolvers.

AP: Now we're comparing the U.S. and the U.K. they're both adversarial, right?

HA: But they're still pretty different, and not just because of the wigs. I spoke with Lissa Griffin. She's a professor of comparative law at Pace University.

Lissa Griffin: People used to say, if you're innocent, you're better off in the U.K. If you're guilty, you're better off in the U.S.

HA: If you think about inquisitive and adversarial law, not as two different systems, but as a sort of continuum, with France being on one end and the U.K. being somewhere in the middle, the United States would be all the way on the other side.

AP: We're hyper adversarial.

HA: That's right. Professor Griffin calls it adversarial on steroids. I asked her why we're that way.

LG: Part of it is a reaction to the rights that the defense does have. In other words, if the defendant has the right to remain silent, why shouldn't the prosecutor have the right to keep his witnesses, their witnesses, silent? I mean, so some of it is, I think, in reaction to all of the protections, but some of it is just cowboy stuff. I mean, I would also say that we are the most punitive. I mean, aside from like four other countries that have the death penalty, right? We're on a very short list, but our sentences are so long and our prosecutors have so much power to bring any charge they want. Also, a lot of our prosecutors are elected. State prosecutors are elected. That's not true in any other country I know of.

AP: Right, local district attorneys are politicians, and many of them want to run for higher office on a tough on crime platform.

HA: Another thing is that in England, barristers will work both sides of the aisle. The work for the defense and the work for the prosecutors. So, they sort of have both of that experience. But also, like in France, England just has more laws that are more specific about crime and punishment.

LG: In England, if you want to plead guilty at the earliest opportunity, which I guess is when you're arraigned, you get a third off your sentence. If you plead guilty later, you get a quarter off your sentence, right? So, it's not up to the prosecutor. You're not bargaining with someone's time. It's statutory. I think that's really healthy.

HA: Walter Olson has written a lot about how our legislators tend to write laws with a lot of wiggle room.

WO: Our legislators behave differently. They think they're doing the clever and self-serving thing when they write vague laws. And typically the ethic in other countries remains. I believe what the correct ethic is, which is you ought to be anticipating as many of the possible applications and situations as you can, and clarifying if there is a statute of limitations, put it in and make it a number. If people are going to be able to sue for damages, then list the kind of damages that they can and cannot sue for. So why do American legislators so often adopt something with vague standards, saying the public interest shall govern and reasonable care should be taken and on through? Do not create a hostile environment? But I argue, and a lot of other people argue, that Congress has shrewdly followed its own incentives for re-election by not writing things down to the level of detail where they would have to disappoint someone who would be realizing that they were losing out on an issue important to them. Instead, they can blame the judges for the eventual decision that interest group A is going to lose an interest. Group B is going to win. When we wind up finally giving meaning to that vague provision.

AP: All right, let's get down to brass tacks. Which system is better?

HA: The journalist answer here is just to say that each system has its strengths and weaknesses and reflects the national character of its respective countries.

AP: Boring!

HA: Right, okay, so cards on the table. I cover a lot of trials here in Los Angeles. And they're long. They're mostly boring, but most frustratingly, they are not about the truth. Instead, each side offers a very slanted, hyperbolic version of events, and it's left to the jury to decide which one is more believable. And a few people I've talked to have said the whole point of trials in France is to come to the truth. Here's Professor Griffin again.

LG: The inquisitorial model sort of posits an absolute truth that the judge can get to. We have an adversarial system which sort of is aimed at the truth, but I think I like to think, really, that it's aimed at getting the result that society will accept. Okay, so in other words, both sides fighting as hard as they can will yield the a reliable result.

HA: So, the journalist in me says, yes, of course, we should have a system that aims to uncover the truth. But Benjamin Legendre told me the system has a downside, that it's idealistic, but it lacks the pragmatism of U.S. courts. A good example of this is plea bargains, which are basically compromises. Both sides can avoid a long, costly trial with an uncertain outcome, but the defendant gets a reduced sentence and certain facts uncovered in the investigation might remain a secret. Until pretty recently, there were actually no guilty pleas in France. That's begun to change a bit, but guilty pleas still aren't always accepted. A few years ago in 2021, there was this French billionaire. He's sort of like the Rupert Murdoch of France. He tried to plead guilty to corruption charges, and the court said, 'No, you're going to trial.'

BL: His name is Vincent Bolloré. He tried to get to get away from a trial through that procedure. And the prosecutor agreed. But an independent judge said that it was impossible to do that for a famous person. And a famous person should deserve a public trial.

HA: And when it comes to regulating big corporations like Meta and Google, the courts do a pretty bad job of this in Europe, in part because these companies are very reluctant to plead guilty, and the public is reluctant to accept the guilty plea. Of course, the flip side of this is that the French Parliament takes a much more active role in regulating corporations. Earlier this year, the lower National Assembly passed a bill that would ban kids under the age of 15 from using social media without their parents' consent. That's currently waiting approval by their Senate. I think in a sane country, this is how you regulate companies by passing laws.

AP: But we don't do that here.

HA: We don't. So, here it's left to the courts. Thousands of plaintiffs are suing the big social media companies for alleged harms done to kids. And although they recently won a couple of landmark cases, this is likely just the beginning of a long process that's going to play out over the next decade. And there's no guarantee that it's going to lead to any meaningful change. Now, Walter Olson has defended our system well.

WO: I don't think it would have lasted this long if it didn't have anything to recommend itself. We are the country where you are going to have a tribune who is going to think of nothing but your interests, who is going to go out there and go to bat for you against what might be a government that is facing off against you and be willing to break some crockery, be willing to make the judge feel uncomfortable, have really nothing but your vindication in mind. Not as much depends on how the judge is steering the case.

HA: I also asked Lissa Griffin which system is the best, and she sort of tried to be diplomatic, but I could tell which way her heart was leaning, and I finally forced out an answer.

LG: I understand why the systems are different. On paper, the English system seems better because it isn't as partisan, but it is adversarial. Again, I think we're sort of stuck in our history of revolution. We're stuck with the language of our Constitution, which helps and hurts. But I'd like to see a less adversarial—

HA: Wigs. Maybe we should get the wigs.

LG: You know, there's something very cool about that stuff.

HA: Why do they wear the wigs?

LG: Tradition. Respect, I think. I mean, it's silly, it looks silly, but there's something quite impressive about it, actually. When you sit in the courtroom.

HA: Maybe you have to see it in person. In movies, it looks absolutely ridiculous.

LG: Yeah.

AP: I like the wigs, too.

HA: Come on.

AP: Hey, don't get adversarial with me.

HA: All right.

AP: That's gonna do it for this episode of Sidebar. Many thanks to our guests, Benjamin Legendre, Walter Olson, Lissa Griffin, and Carlton Larson.

AP: And many thanks to you, the listener. If you liked this episode, be sure to drop us a review on Apple Podcasts. For more legal news from around the world, head on over to courthousenews.com and follow our various social media channels. Next time on Sidebar: Since the early days of the automobile, people have dreamed of the time when all they had to do was sit back and enjoy the ride. Self-driving cars are finally here, but the utopian future we expected is still rife with roadblocks. Hop in the back seat with reporter Kirk McDaniel for a road trip through the heart of the autonomous driving dilemma.

(Outro music)