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STRONG CRITICISM OF THE AMERICAN SYSTEM OF TRIAL BY JURY

— BY YALE KAMISAR

I GRIEVE FOR MY COUNTRY to say that the administration of the criminal law in all the states in the Union (there may be one or two exceptions) is a disgrace to our civilization.

What makes the difference between the administration of the criminal law in England and in this country? In the first place, the English judges have retained the complete control over the method by which counsel try the case, restraining them to the points at issue and preventing them from diverting the minds of the jury to inconsequential and irrelevant circumstances and considerations.

Second, the English judges have reserved the power to aid the jury by advising them how to consider the evidence and expressing an opinion upon it. In this way the sophistical rhetoric and sentimental appeals of counsel are made to lose their misleading effect, and the jurors are brought to a sense of their responsibility in deciding the actual issues of fact as to the guilt or innocence of the defendant upon the evidence before them.

The institution of trial by jury has come to be regarded as such a fetish in our country that state legislatures have

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exalted the power of the jury and diminished the power of the court. Legislatures have seemed to resent any intervention by the judge in the trial of a criminal case beyond a very colorless and abstract statement of the law to be applied to the case. So jealous have legislatures become of the influence of the court upon the jury that it is now an error of law for the court to express his opinion upon the facts, although he leaves the ultimate decision, of course, to the jury. The opportunity which this gives defense counsel to pervert the law, and the wide scope which the system in restricting the judge gives to the jury of following its own sweet will, of course, doubles the opportunity for miscarriages of justice. The function of the judge is limited to that of the moderator in a religious assembly.

The counsel for the defense, relying on the diminished power of the court, creates, by dramatic art and by harping on the importance of unimportant details, a false atmosphere in the courtroom which the judge is powerless to dispel, and under the hypnotic influence of which the counsel is able to lead the jurors to vote as jurors for a verdict which, after all the excitement of the trial has passed away, they are unable to support as men and women.

Another problem is the difficulty of securing jurors properly sensible of the duty which they are summoned to perform. In the extreme tenderness the state legislatures exhibit toward persons accused as criminals, and especially as murderers, they allow peremptory challenges to the defendant far in excess of those allowed to the state. This very great discrepancy between the two sides of the case allows defense counsel to eliminate from all panels every person of force and character and standing in the community, and to assemble a collection in the jury box of nondescripts of no character, weak and amenable to every breeze of emotion, however maudlin or irrelevant to the issue.

If the power of the court by statute to advise the jury to comment and express its opinion to the jury upon the facts in every criminal case could be restored, and if the state and the defendant were deprived of peremptory challenges in the selection of a jury, 25 percent of those trials which are now miscarriages of justice would result in the conviction of the guilty defendant, and that which has become a mere game in which the defendant's counsel play with loaded dice, would resume its office of a serious judicial investigation into the guilt or innocence of the defendant.

Some people may consider the preceding remarks a gross overreaction to the "not guilty" verdict in the O. J. Simpson case. Others may think these remarks are right on the money. In any event, they were made long before defense lawyers had the assistance of any experts in selecting a jury and long before anybody accused defense lawyers of "playing the race card."

Every word of attack on the American system of criminal justice and trial by jury, in particular, that appears in this piece, was uttered in a commencement address at the Yale Law School on June 26, 1905. (I have only substituted "men and women" for "men.") The speaker on that occasion some 90 years ago was a lawyer who had already acquired considerable stature — and was to achieve a good deal more. His name was William Howard Taft, a future President and a future Chief Justice of the United States.

(The full text of Taft's remarks appear in volume 15 of the Yale Law Journal at pp. 1-17.)

This piece also appeared in the Los Angeles Daily Journal and the Detroit News, Oct. 16, 1995. Yale Kamisar is the Clarence Darrow Distinguished University Professor of Law.