Strong Criticism of the American System of Trial by Jury

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STONG 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 prevent-
ing them from diverting the minds of the
jury to inconsequential and irrelevant
issues of fact as to the guilt or innocence
which counsel try the case, restraining
our country that state legislatures have
of the defendant upon the evidence
all the states in
England and in this country? In the first
place,

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 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 court-
room 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 consid-
erable 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.

(THIS 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.