1995

Strong Criticism of the American System of Trial by Jury

Yale Kamisar
University of Michigan Law School, ykamisar@umich.edu

Follow this and additional works at: http://repository.law.umich.edu/articles

Part of the Comparative and Foreign Law Commons, Courts Commons, Criminal Law Commons, and the Judges Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
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 facts, although they leave the ultimate decision, of course, to the jury.

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, 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.