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DISCOVERING WHO WE ARE: AN ENGLISH PERSPECTIVE ON THE SIMPSON TRIAL

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I start from the premise that no criminal justice system can be considered strong that is not built on a strong trial system. This is not to say that all cases have to go to trial; most will not. But some cases will go to trial, and a society needs to be confident that its trial system is strong enough to handle those cases. This is particularly true of cases where the crime charged is serious, such as murder, aggravated assault, or rape. Some of these cases may also be high publicity cases, such as the Rodney King beating case, the O.J. Simpson case, and the Lemrick Nelson case (accused of the stabbing death of Yankel Rosenbaum), where large numbers of citizens care about the issues at stake and are looking at the system with the expectation that it will acquit or convict with a high degree of reliability. It is dangerous for a society when citizens lose confidence in its trial system. A criminal justice system cannot cure deep societal problems, such as the racial divide that exists in our country, but a criminal justice system with a weak trial system can exacerbate those problems. I think we have serious problems with our trial system, and I fear that the problems will only get worse if we don't scrutinize the current system and consider major structural changes.

Professor Allen points out quite eloquently that the American system is a "grown" system while other systems are "made" systems. That is certainly true. If you look at European systems, they are built in detailed codes of criminal procedure that combine the sorts of things that one would find scattered in a variety of sources in American jurisdictions: state statutes, rules of criminal procedure, state evidence rules, federal constitutional decisions, state constitutional decisions, etc. When European countries contemplate changes in their systems, they have an easier time studying and evaluating such changes as parts of the whole. By contrast, reform in the United States will be far more

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difficult to achieve. What institution has the responsibility for seeing how all the pieces of the system fit together and for suggesting reforms that may impact several discrete bodies of law? Reform is further complicated by the fact that we have a federal system.

I strongly agree with Professor Allen's warning that we need to be careful about the unintended consequences of reform efforts. But I see the doctrine of unintended consequences as responsible in large part for the crisis of confidence that the system is facing. Our system of criminal trials has evolved tremendously over the last thirty years, and I think some of the changes, even though they were well-motivated, have indirectly altered the tenor of trials. Evolution teaches us that not every species evolves for the best. Some become too specialized for their environment and their numbers decrease and they may even eventually die off. Although our trial system is not dead, it is far from healthy.

But where do we go by way of reform? The starting point has to be an attempt to gain some perspective on our trial system. The reason I study foreign legal systems was summed up best not by a lawyer but by a writer, Thomas Mann, in *Joseph in Egypt*: "For only by making comparisons can we distinguish ourselves from others and discover who we are, in order to become all that we are meant to be."¹ It is toward that goal of discovering who we are that I ask you to imagine that the Simpson case had been tried in England. I offer this comparison not to suggest that the English trial system is without flaws or that the English system provides easy answers to our problems, but as a way of suggesting some general directions for reform that we need to explore.

If the Simpson case were to be tried in England, the first thing that would be striking to Americans would be the location of the defendant in the courtroom. The defendant doesn't sit in the well of the courtroom. He would be seated next to a bailiff in a small box at the back of the courtroom called "the dock," far removed from his own attorneys.

At the Simpson trial, the defense lawyers complained about the difficulties they had "personalizing Mr. Simpson" to the jury. The problems would be much more difficult in an English courtroom. There is, I think, a symbolic aspect to the dock. In

1. THOMAS MANN, *JOSEPH IN EGYPT* (1933), *quoted and translated in* DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY*, at v (1994).

England, they seem to have decided that it is the defendant who is on trial and it is much harder to move the focus of the trial off that point.

By comparison, we Americans are unsure of the proper focus of the trial. A dramatic example of this uncertainty in the system was the Colin Ferguson case, which took place on the other coast and at the same time as the Simpson case took place in Los Angeles. Here was a gunman who had shot and killed six people on the Long Island Railroad and who had wounded seventeen others. Mr. Ferguson was permitted to walk around the well of the courtroom, as if he were a lawyer, cross-examining people whose lives had been, in some cases, permanently scarred by him. Was Mr. Ferguson on trial or was he the host of the trial? Because he has the right to a fair trial, does he somehow own the trial? And what does it mean for the legal profession that Mr. Ferguson can conduct his defense from the space where lawyers work as if he were a lawyer? In England, a defendant may represent himself but he must do so from the dock at the back of the courtroom. He wouldn't be allowed into the well of the courtroom because that area is reserved for members of the legal profession.

As I watched the Simpson case, I saw a trial that often seemed to lack focus. At times I could not tell who was on trial. Was it Dennis Fung, the prosecution, Mark Fuhrman, the Los Angeles police department, or maybe even society in general? Maybe what we want in our trial system is to have juries make judgments about the fairness of society or the wisdom of our laws. But then we ought to have very different rules of evidence, very different jury instructions, and very different trials. But I have one warning: a trial system that is too ambitious and tries to do many things may not end up not doing anything very well.

One reason that it is harder for the defense to attack the prosecution in English courtrooms has to do with the structure of the English adversarial system. The prosecutor, like the defense attorney, is a barrister hired to present that particular case. The tradition of switching sides is alive and well in England. Barristers know what it is like to be on the other side of the case, they have less invested in the matter and, as a result, they are a bit more courteous to each other and certainly far less strident than American lawyers. Expressed another way, the level of ideological commitment required to be a defense or prosecution barrister is less than for an American lawyer. To give but one example: in

Colorado, my students tell me, you will not get hired by our state public defender system if you put on your resume that you have worked in a prosecutor's office during law school.

There are other ways the English system controls the level and kind of adversariness at a criminal trial. In England, you won't find the prosecution or defense barrister asking a consultant for advice on the appropriate clothing to wear for this kind of case or this sort of jury. You definitely won't see the prosecution barrister wearing an angel pin to show affiliation with the victim as we saw in the Simpson case. Instead, English barristers all dress in equally silly clothing: ridiculous wigs, stiff dickey collars, and robes. We can laugh about their silly dress but little things make a difference. The barristers, like the judge who wears the same attire, stand out in the courtroom as part of the judicial system. They even sit together at the same bench in the front of the courtroom. By contrast, what are the limits of American advocacy? Is there not a difference between representing a defendant and becoming the alter ego of the defendant? Is there not a difference between presenting the defendant's side of the case and trying to manipulate the jury at every turn? When I read trial magazines and advocacy materials, I am concerned that we are cheapening ourselves and undermining our trial system at the same time. I bridle at the gamesmanship and antics that are being taught and touted as good advocacy. Perhaps that is the inevitable evolution of adversary systems. If it is, then the system will die out.

Let me continue with my contrast of the behavior of the lawyers in the two systems. In England, you won't hear a defense barrister on the courthouse steps assuring the press that his client is innocent or a prosecution barrister insisting that the case against the defendant is overwhelming. Neither barrister can make any statements to the press. When I heard Johnny Cochran talking to the press night after night, I had no idea whether he was speaking personally or as an advocate, and I can't imagine the public knew either. I think that this contrast between what is expected professional behavior of advocates in the two countries raises some serious questions about what it means to be a lawyer and an advocate in the United States.

Another control on the level of advocacy in English trials stems from the ethical prohibition that bars a barrister from rehearsing witnesses or even meeting with witnesses other than an expert or the client. Because of this ethical restriction, the

system has to take a somewhat more relaxed view of the rules of evidence and allow the opposing barrister some flexibility in examining a witness who has not been through the sort of dress rehearsal that the American system encourages.

Rehearsing witnesses and putting them through practice direct and cross-examinations is improper in Europe, as well as in England. They want witnesses to testify in their own way and in their own words, free of the influence of lawyers. We are the exception, and I am afraid that we are continuing to go in that direction. Some big law firms have mock courtrooms built into their office space so witnesses can be better prepared, consultants can give them performance tips, and different trial strategies can be better tested and evaluated. I think this is a very unhealthy trend. A trial is, after all, only a trial. It is not a war and ought not be conceived of that way or carried out that way. Wars are expensive and they are bitter affairs to be avoided if at all possible. You cannot fight wars very often. By contrast, England has trial lawyers who actually go to trial—often—and who make their living and get paid for being on their feet in the courtroom. You cannot do that if you have to litigate in the chaos and confusion that characterized the Simpson case.

Having touched on the First Amendment, I should mention how differently the balance is drawn between freedom of the press and a fair trial in the two countries. In England, the press, under pain of contempt, is tightly restricted as to what it can publish prior to or during trial. This has many implications, but to give one obvious difference that is applicable to a case like the Simpson case: it means that there is much less need to lock up jurors. English lawyers tell me the Simpson jury definitely would not have been sequestered in England prior to the start of deliberations. I don't know if that is true, but at least the jurors wouldn't need to sit next to a censor when they watched television or find their newspaper cut to ribbons before reading it.

I am not a First Amendment expert so I will quickly leave this area. But before I do, I will just point out that English lawyers tell me that a defendant would not be permitted to publish a book during trial and that jurors who talked after the trial about what went on in the jury room, let alone wrote a book about it, would be considered in contempt of court.

Let us move on to another major difference between the two systems: the timing of the defendant's decision to testify. In England, Mr. Simpson would have had to make up his mind

whether or not he was going to testify at the very start of the defense case. It is the practice in England that the defendant must be the first witness for the defense if he chooses to testify. The defendant already has had the enormous advantage of having heard all of the prosecution witnesses. Why should he have the additional advantage of being able to shape his testimony to that of the defense witnesses as well? But in *Brooks v. Tennessee*,² decided in 1972, the Supreme Court struck down a Tennessee provision that required the defendant to testify first on the defense case. The Court ruled that this violated the privilege against self-incrimination and due process. I know enough about the history of the privilege against self-incrimination and our trial system to know that the origins of the privilege had nothing to do with the timing of the defendant's evidence. And as for due process, I can't refute the Court's conclusion that a rule that forces the defendant to decide at the start of the defense case whether to testify is "fundamentally unfair." But if, as I have been told by friends on the Internet, the English rule conforms to the practice in Ireland, in Scotland, in New Zealand, and in all the states of Australia, I see no reason why the Court should have condemned the Tennessee rule. This is not a big deal in the vast majority of trials, but that is precisely the point. Criminal procedure is a lot harder and more complicated than we may have thought. The Bill of Rights is not a code of criminal procedure; if you try to turn it into such a code, your system will be incomplete and lacking in balance. The result will be a system that is weak and ineffective.

In suggesting that our system of defendants' rights is extreme, it may sound like I want to see even more defendants locked up in a criminal justice system where conviction often carries with it the risk of a sentence that is harsh and vengeful. But I suggest that the relationship between punishment and procedure is a complicated one and that we should not be surprised to find that a system that is extreme in its procedures would also be extreme in its punishments.³ When a system lacks confidence in its own procedures, it finds ways to avoid trials. In

2. 406 U.S. 605 (1972).

3. I have argued elsewhere that there is a synergy between punishment and procedure such that extremes in one encourage extremes in the other. See William T. Pizzi, *Punishment and Procedure: A Different View of the American Criminal Justice System*, 1996 CONST. COMMENTARY 55, 66-69.

the United States, the system has evolved so that very few defendants can risk asserting their constitutional rights. Mandatory minimums, harsh sentencing guidelines, tough habitual sentencing provisions, and the like are largely American phenomena and a natural outgrowth of a system that is too adversarial, too complicated, and too unreliable to be used regularly for the determination of guilt or innocence. In short, I question how well our system actually serves the interests of defendants.

Judge Ito has been strongly criticized at this Symposium for his handling of the trial, especially his failure to control the courtroom and impose limits on the conduct of the lawyers. I worry that the failure of Judge Ito to control the courtroom is symptomatic of structural problems in the system. Here I would suggest two such problems. First, a trial system that tolerates extremes in advocacy, perhaps even desires such advocacy, and a trial system that is uncertain about what a trial should be about is going to make it much harder for judges to control such trials. Second, as Professor Allen pointed out, the relationship of trial courts to appellate courts makes trial judges more reluctant to intervene. I want to concur strongly on that point. One month into the trial a *National Law Journal* poll of lawyers showed that 70% believed Simpson would not be convicted and, equally interesting, 37% said that Ito had already committed reversible error.⁴ Both statistics are amazing, but I want to focus on the latter statistic. This statistic suggests to me that the relationship between trial courts and appellate courts may have changed in the last twenty or thirty years so that the authority of trial judges to control the courtroom has been undercut.

English judges don't have to worry as much about reversal. It is hard to get a case to an appellate court on other than a purely legal issue and much, much harder to get a case reversed. Even where there is a basic error in the jury instruction, for example, there will be no reversal if the appellate court is convinced of the defendant's guilt. By contrast, we have built a system that encourages appeal in the United States—Supreme Court decisions basically require a defense attorney to file an appeal after trial in the United States⁵—and our appellate courts

4. Andrew Blum, *Poll: More Lawyers See O.J. Walking*, NAT'L L.J., Feb. 27, 1995, at A1.

5. *Anders v. California*, 386 U.S. 738 (1967), requires defense counsel who

reverse for trial courts' errors that do not call into question the fairness of the trial. Concrete questions of guilt or innocence, of substantive fairness, come to be subsumed by an obsession with procedural correctness.

Let me conclude with a few contrasts having to do with juries. In England, peremptory challenges are not permitted today and I have never seen questioning of prospective jurors at any trials I have observed. The number of peremptories was gradually decreased in England, going from seven to three and finally to zero. The judge does have authority in England to accept a verdict of 10-2 after two hours of deliberations so there is less risk of the irrational holdout. In contrast to England's gradual simplification of jury selection, what have we done with jury selection over the last ten years? We have made it even more complicated thanks to *Batson v. Kentucky*⁶ and its progeny. Even though we know that our system is already incredibly complicated, somehow we cannot resist adding ever more procedure to the system.⁷ I don't know about the wisdom of abolishing peremptory challenges, but can't we at least minimize the problems of discrimination that necessitated *Batson* by cutting way back on the number of peremptories we permit? In routine criminal and civil cases in some states, the lawyers are permitted ten peremptories a side.⁸ I question the way the system is using scarce resources.

But it would be hard to convince trials lawyers to simplify jury selection and cut down on peremptories because many of them think that who you get on the jury is crucial to the outcome. The Simpson trial exposed many problems with the way evidence was gathered, preserved, and presented. But even if the police and the crime scene investigators had done a perfect job, would it have made any difference to the result? Lots of defense

believe there is no merit to an appeal to file a brief that goes through each possible issue and explain why each issue lacks merit. The appellate court is then to review the brief to determine if the appeal lacks merit. Thus, there is appellate review even of a case that a lawyer believes lacks any merit.

6. 476 U.S. 79 (1986). See generally William T. Pizzi, *Batson v. Kentucky: Curing the Disease But Killing the Patient*, 1987 SUP. CT. REV. 97.

7. See William T. Pizzi, *Soccer, Football and Trial Systems*, 1 COLUM. J. EUR. LAW 369 (1995) (arguing that the American confidence in elaborate procedures is partly cultural).

8. In *J.E.B. v. Alabama ex rel. T.B.*, 114 U.S. 1419 (1994), the Court had before it a simple paternity case in which each side had ten peremptory challenges.

lawyers, including Bryan Morgan, who spoke earlier at this Symposium, think the case was over for the prosecution once the jury was picked. A trial system is only as strong as its weakest part, and no matter how well the evidence rules are crafted or how well the investigatory procedures are designed, if the fact-finders cannot be trusted, the system will be weak. When jury consultants tell us that to be understood by jurors, instructions should be aimed at a sixth grade level, I have my doubts about our jury system. There is a lot of romance, rhetoric, and flag waving that surrounds juries. But at some point, the system needs to make an honest evaluation of the strengths and weaknesses of the jury system. Is there not perhaps some way to reform the process and keep a substantial citizen involvement in the criminal justice system, without turning issues at trial over to a group of fact-finders who have no background in fact-finding and very minimal training in what it takes? I raise the issue here to suggest that maybe we have an additional lesson to learn from England. It is often remarked that "the backbone of the English system" is its system of lay magistrates. Lay magistrates are nonlawyers who sit on panels of three and who hear ninety-eight percent of the criminal cases in that country.

England strikes me as much more realistic about the weaknesses of juries than we are. In the criminal cases I have seen, even two- or three-day trials, the judge always summarizes the evidence and sometimes comments on the evidence. The summarizing of the evidence by the judge is considered an integral and important part of the trial. The judges take careful notes in their own hand throughout the trial in order to be in a position to do an accurate summary for the jury.

There are obvious tradeoffs in permitting a judge to summarize and comment on the evidence. Obviously, the judge can influence the jury in the summary, sometimes unfairly. But other common law systems seem willing to run those risks, believing that juries need guidance from the judge. American populism, on the other hand, prohibits judges from commenting on the evidence or even providing a summary in many states.⁹ But even in jurisdictions that allow judges to summarize the evidence, such

9. See Jack B. Weinstein, *The Power and Duty of Federal Judges to Marshall and Comment on the Evidence in Jury Trials and Some Suggestions on Charging Juries*, 118 F.R.D. 161 (1988).

as our federal courts, judges are clearly reluctant to use their power.

Notice the position in which we put jurors compared to the English system: jurors in the American system are faced with a trial system that is more ambitious in what it asks of them. Jurors have to sort out the facts in a trial setting that is often far more contentious and adversarial than in England, and yet they get less help from judges in going about the difficult task of evaluating the evidence.

What I have said in my remarks today should not be taken as suggesting that the English legal system doesn't have flaws or that there are not weaknesses in its trial system. England has had a lot of problems, especially with terrorism cases, which have their own exceptional and extreme procedures. Some of you may be familiar with the movie "In the Name of the Father," which was based loosely on the case known as the "Guildford Four." And there have been a number of such cases that were later reversed: the Maguire Seven, the Birmingham Six, and so on. But I give the English credit. When public confidence was shaken, they didn't pretend all was well or claim that the problems were limited to terrorist cases. They formed a Royal Commission, as they do every fifteen or twenty years. The latest commission was chaired by a nonlawyer and had a majority of nonlawyers on it. They studied the system from top to bottom. They commissioned their own empirical studies and surveys. They even went up to Scotland and over to France to see if they should propose radical changes in their system. We desperately need similar scrutiny of our trial system. We ought not be frightened by it but ought rather to seek it out and welcome it.