

St. John's University School of Law

## St. John's Law Scholarship Repository

---

Faculty Publications

---

2018

### The Missing American Jury: Restoring the Fundamental Constitutional Role of the Criminal, Civil, and Grand Juries

Anna Roberts

*St. John's University School of Law*

Follow this and additional works at: [https://scholarship.law.stjohns.edu/faculty\\_publications](https://scholarship.law.stjohns.edu/faculty_publications)



Part of the [Constitutional Law Commons](#), [Evidence Commons](#), and the [International Law Commons](#)

---

This Book Review is brought to you for free and open access by St. John's Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of St. John's Law Scholarship Repository. For more information, please contact [selbyc@stjohns.edu](mailto:selbyc@stjohns.edu).

**The Missing American Jury: Restoring the Fundamental Constitutional Role of the Criminal, Civil, and Grand Juries** by Suja A. Thomas. New York, Cambridge University Press, 2016. 262 pp. \$34.99.

This is a bold book. Professor Thomas urges that the jury—criminal, civil, and grand—be recognized as a fourth “branch” (p. 5). She asserts that procedures that have contributed to the reduction of the jury’s power—including summary judgment and state prosecution without grand juries—are unconstitutional. And, as a Plan B if her constitutional arguments do not prevail, she proposes big changes that include informing juries about sentence exposure, presenting juries with any charges that were offered in plea bargaining, and requiring that juries justify their verdicts.

She backs up her boldness, not only with extensive research documenting “a common history of diminution of power” (p. 89), but also with thoughtful explications of the harm done to the jury and, as a result, to society. The jury is a decider of fates, and Thomas tells a powerful story of how *its* fate has been shaped: at various times and in various ways it has been championed, protected, and powerful, but it is now disfavored and disparaged as useless, and is perhaps all but useless, with its power transferred to branches that *it* was supposed to check.

Thomas is careful to include plenty for those who might resist such a bold vision. You don’t need to find the jury’s diminution unconstitutional to find it regrettable, for

example. In one fascinating chapter, she surveys various countries—including Japan, Iran, Russia, and Ghana—with the aim of demonstrating the widespread embrace of lay decision-making. Thomas is right that this common thread is compelling, and that the differences are too, since we learn that none of the norms that we may associate with the jury is universal: out there in the world juries can be non-unanimous, can consider sentencing and appeals, can review decisions not to charge, can comprise a mix of lay people and professionals, can be forbidden from deliberating, can be required to undergo training, and can be selected in very different ways—and on the basis of more rigorous criteria—than our own. This survey may lead us to fall in love all over again with our own version, or to contemplate other visions; either way, the section provides useful material for those who study and teach the jury.

If there was room for anything more in this ambitious book, I would have loved to hear more about the complications in the powerful story of a jury that is lost and should be re-found. First, I wondered about just how lost it is. Of course, as Thomas states, the vast bulk of convictions are obtained not at trial but through guilty pleas. Thomas persuasively demonstrates the flaws in that arrangement, particularly in light of the fact that what Blackstone described as the “strong and two-fold barrier” (p. 160) of grand and petit jury is so often missing. But is it the case that the jury exercises “almost no authority” (p. 147), plays “almost no role” (p. 2), and “fails to check any governmental actors” (p. 25)? I was curious, for example, about rates of jury acquittal, and about the ability of the jury’s anticipated verdict to shape outcomes—and even prompt dismissals—pre-trial. Second,

while Thomas includes among the reasons to favor juries over judges the fact that juries are freed from some of the incentives and biases that influence judges, and that juries are drawn from a more diverse pool, I would have liked to hear her thoughts on concerns about biases in jury selection and decision-making.

Thomas promises her readers more work to come on her provocative proposals regarding jury and plea-bargaining reform. We await it eagerly.

Anna Roberts

Associate Professor

Seattle University School of Law