

Cambridge University Press

978-1-107-05565-0 - The Missing American Jury: Restoring the Fundamental Constitutional Role of the Criminal, Civil, and Grand Juries

Suja A. Thomas

Frontmatter

[More information](#)

THE MISSING AMERICAN JURY

Criminal, civil, and grand juries have disappeared from the American legal system. Over time, despite their significant presence in the Constitution, juries have been robbed of their power by the federal government and the states. For example, leveraging harsher criminal penalties, executive officials have forced criminal defendants into plea bargains, eliminating juries. Capping money awards, legislatures have stripped juries of their power to fix damages. Ordering summary judgment, judges dispose of civil cases without sending them to a jury. This is not what the Founders intended. Examining the Constitution's text and historical sources, the book explores how the jury's authority has been taken and how it can be restored to its rightful, co-equal position as a "branch" of government. Discussing the value of juries beyond the Constitution's requirements, the book also discusses the significance of juries worldwide and argues jury decision-making should be preferred over determinations by other governmental bodies.

SUJA A. THOMAS is a professor of law at the University of Illinois College of Law. Her research on the jury has received extensive national attention in news outlets such as *The New York Times*, in testimony to the U.S. Senate and House of Representatives, and in federal and state court opinions. She practiced law for many years in New York City, including at Cravath, Swaine & Moore and Vladeck, Waldman, Elias & Engelhard, participating in jury trials and arbitration. Her past experience also includes participating in several criminal trials on behalf of the federal public defender.

Cambridge University Press

978-1-107-05565-0 - The Missing American Jury: Restoring the Fundamental
Constitutional Role of the Criminal, Civil, and Grand Juries

Suja A. Thomas

Frontmatter

[More information](#)

Cambridge University Press

978-1-107-05565-0 - The Missing American Jury: Restoring the Fundamental
Constitutional Role of the Criminal, Civil, and Grand Juries

Suja A. Thomas

Frontmatter

[More information](#)

THE MISSING AMERICAN JURY

Restoring the Fundamental Constitutional Role
of the Criminal, Civil, and Grand Juries

SUJA A. THOMAS

University of Illinois College of Law



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press

978-1-107-05565-0 - The Missing American Jury: Restoring the Fundamental Constitutional Role of the Criminal, Civil, and Grand Juries

Suja A. Thomas

Frontmatter

[More information](#)

CAMBRIDGE
UNIVERSITY PRESS

32 Avenue of the Americas, New York NY 10013

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781107055650

© Suja A. Thomas 2016

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2016

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging in Publication Data

Names: Thomas, Suja A., author.

Title: The missing American jury : restoring the fundamental constitutional role of the criminal, civil, and grand juries / Suja A. Thomas, University of Illinois, Champaign

Description: New York, NY : Cambridge University Press, 2016. | Includes bibliographical references and index.

Identifiers: LCCN 2015050998 | ISBN 9781107055650 (Hardback) |

ISBN 9781316618035 (Paperback)

Subjects: LCSH: Jury--United States.

Classification: LCC KF8972 .T477 2016 | DDC 347.73/752--dc23 LC record available at <http://lcn.loc.gov/2015050998>

ISBN 978-1-107-05565-0 Hardback

ISBN 978-1-316-61803-5 Paperback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party Internet Web sites referred to in this publication and does not guarantee that any content on such Web sites is, or will remain, accurate or appropriate.

Cambridge University Press
978-1-107-05565-0 - The Missing American Jury: Restoring the Fundamental
Constitutional Role of the Criminal, Civil, and Grand Juries
Suja A. Thomas
Frontmatter
[More information](#)

CONTENTS

<i>Acknowledgments</i>	<i>page vii</i>
1 The Missing American Jury: An Introduction	1
PART I The Jury Now	9
2 The Fall of the Criminal, Civil, and Grand Juries and the Rise of the Executive, the Legislature, the Judiciary, and the States	11
3 The Missing Branch	49
PART II The Future Jury	107
4 Interpreting Jury Authority	109
5 Restoring the Jury	147
6 Beyond the Constitution: Affirming a Role for Lay Jurors in America’s Government and World-Wide	187
7 A Branch Among Equals in American Democracy: A Conclusion	235
<i>Index</i>	239

Cambridge University Press

978-1-107-05565-0 - The Missing American Jury: Restoring the Fundamental
Constitutional Role of the Criminal, Civil, and Grand Juries

Suja A. Thomas

Frontmatter

[More information](#)

Cambridge University Press

978-1-107-05565-0 - The Missing American Jury: Restoring the Fundamental Constitutional Role of the Criminal, Civil, and Grand Juries

Suja A. Thomas

Frontmatter

[More information](#)

ACKNOWLEDGMENTS

My interest in the jury stems from a trial over two decades ago. In that trial the plaintiff accused his employer of discriminating against him and then retaliating against him by firing him. Prior to the trial, we spent significant time picking a jury, with each side exercising the ability to challenge jurors for cause and without cause. After evidence was presented in the case, the jury rendered a verdict against the plaintiff on the discrimination claim and in favor of the plaintiff on the retaliation claim, awarding backpay and over \$200,000 for emotional distress. When the employer protested the jury's verdict for emotional distress, arguing that the jury conferred an excessive amount, the judge ordered the award reduced to \$20,000 or required the plaintiff to retry the case. As a young lawyer, I was surprised. I thought a right to a jury trial existed. How could a judge make this decision after a jury deliberated and assessed the value of the distress that the plaintiff suffered. I began to research this procedure of remittitur or the reduction of a jury verdict, and I learned that the Supreme Court had called remittitur "doubtful precedent." After reading the late eighteenth-century English case law on which the Founders had relied to frame our constitutional jury trial provisions, I discovered that no such practice as remittitur where a judge reduced a jury verdict existed at that time. The American judiciary invented it. Later, I saw judges take away other decisions from juries. For example, they would dismiss employment discrimination cases before jury trials when they thought there was insufficient evidence showing discrimination. Again, I looked at the past English case law and found judges could not dismiss cases, ordering such "summary judgment" for one side. My interest in these procedures in civil cases has led me to see parallels between the civil, criminal, and grand juries and their fates, resulting in this book.

A few words about the cover. The cover was the idea of my friend Jeffrey Miller, an accomplished author, who helped me with many questions related to the book. The milk carton is an American symbol

Cambridge University Press

978-1-107-05565-0 - The Missing American Jury: Restoring the Fundamental Constitutional Role of the Criminal, Civil, and Grand Juries

Suja A. Thomas

Frontmatter

[More information](#)

of something that has gone missing that is terribly important and must be found. As described in this book, the jury has disappeared and must be restored.

It is always difficult to put together a list of people to thank, particularly after a project like this that has lasted for several years. I begin by thanking my spouse Scott Bahr, who has given me spectacular comments that have been incorporated into this book. Most importantly, Scott supported me by believing in the significance of this topic. My friend Benjamin Glassman read the draft chapter by chapter and provided invaluable comments. Over the years, I have also worked with students who researched issues related to the jury. Many years ago, my first research assistant Tod Thompson did outstanding work from which I still draw today. I also thank Jessica Bartlett for her excellent research, as well as Kaitlyn Luther, Prachi Mehta, and Joseph Bozdech for their work that has supported this project. Recently, I had the good fortune to work with Allison Slocum who performed a role as a talented editor and as a trusted research assistant.

Several academics and friends helped me with this project in a variety of ways including: Akhil Amar, Vikram Amar, Laura Appleman, Caitlin Borgmann, Paul Caron, Robert Chang, Jack Chin, Jacob Cogan, Ruth Colker, Brooke Coleman, Sally Cook, Elizabeth Daniel, Scott Dodson, Melissa Englund, Margareth Etienne, Roger Fairfax, Marc Galanter, Jim Gardner, Dan Hamilton, Valerie Hans, David Hyman, Eric Johnson, Robin Kar, Karen Kohut, Charlotte Ku, Niki Kuckes, James Kuklinski, John Langbein, Bob Lawless, Andrew Leipold, Jason Mazzone, Darrell Miller, William Nelson, James Oldham, Frank Partnoy, Martin Redish, Jamelle Sharpe, Bruce Smith, Lawrence Solum, Jeffrey Stempel, Steve Subrin, Stephen Vladeck, Melissa Wasserman, Lesley Wexler, and Ingrid Wuerth.

Recently, I had a very useful conversation with my colleague Jacqueline Ross that helped me frame Chapter 6 in which I discuss several juries in other countries. In addition to her guidance and comments on drafts, many people very generously provided their expertise on lay participation in other countries including: Shawn Boyne (Germany), Matilde Cohen (France), Jasbir Dhillon (England), Gennady Esakov (Russia), Hiroshi Fukurai (China), Moosi Ghazi (Iran), Elisabetta Grande (Spain), Cheryl Lloyd-Bostock (England), Renee Morhe (Ghana), Andrew Novak (Ghana), Izabel Nunez (Brazil), Walter Perron (Germany), and Dimitri Vanoverbeke (Japan).

Thanks is also due to my colleague Kurt Lash who read the book proposal and has spoken with me about my work on many occasions.

Cambridge University Press

978-1-107-05565-0 - The Missing American Jury: Restoring the Fundamental
Constitutional Role of the Criminal, Civil, and Grand Juries

Suja A. Thomas

Frontmatter

[More information](#)

ACKNOWLEDGMENTS

ix

I am particularly appreciative of his introduction of me to Cambridge University Press Senior Editor John Berger.

Finally, I want to acknowledge the *Virginia Law Review*, *Notre Dame Law Review*, *Washington University Law Review*, *Ohio State Law Journal*, *Illinois Law Review Slip Opinions*, and *Boston College Law Review*, which have published articles that are relied upon in this book.