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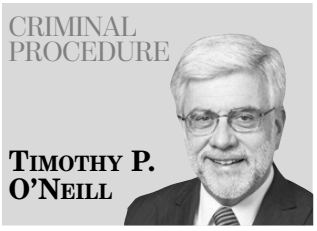
Jury system: Constitution's invisible fourth branch of government



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The book's cover features the proverbial milk carton with pictures of 12 people on the side. The title is "The Missing American Jury: Restoring the Fundamental Constitutional Role of the Criminal, Civil, and Grand Juries" (Cambridge, 2016). It is a provocative new book by Suja A. Thomas, a professor at the University of Illinois College of Law.

The Bill of Rights guarantees not one, but three kinds of juries: the grand jury (Fifth Amendment), the criminal trial jury (Sixth Amendment) and the civil jury (Seventh Amendment). Of these rights, only one, the Sixth Amendment's criminal trial jury guarantee, has been selectively incorporated against the states by the 14th Amendment's due process clause.

As you probably know, the use of trial juries has gone from "occasional" to "rare." In 1962, juries tried 8.2 percent of criminal cases in federal court. By 2013, that declined to 3.6 percent. It is no better in state courts. In 2002, juries decided only 1.3 percent of criminal cases in the 22 most populous states.

It is even worse in the civil area. In 1962, juries decided 5.5 percent of federal civil cases; by 2013, that figure declined to 0.8 percent. And in 2002, juries decided only 0.6 percent of the civil cases in the 22 most populous states.

And we all know the reasons for the decline in juries: As Thomas puts it, they are "the inefficiency, cost, incompetence and inaccuracy of the jury."

Right?

Thomas emphatically says, "Wrong." And she offers an intriguing structural theory explaining and bemoaning the decline of the jury.

She starts with the three branches of government: the executive, legislative and judiciary. Thomas labels these as the "traditional constitutional actors."

She contends that these actors have marginalized the American jury by usurping functions that the jury had historically exercised.

For example, "The executive [now in effect] charges, convicts and sentences despite juries indicting, convicting and sentencing in the past. The legislature can set damages, although only the jury historically had the power. The judiciary circumvents juries by dismissing cases via mechanisms such as the motion to dismiss, summary judgment, acquittal and judgment as a matter of law, procedures nonexistent at our Constitution's founding."

Thomas offers what she characterizes as a "unique view" of the jury. She argues that its centrality in the Bill of Rights shows that "the jury should be recognized as a co-equal of the (three) traditional actors and specifically as a significant check to balance their powers essentially as a (fourth) branch."

Thomas notes that the Constitution gives significant authority to the three traditional branches, and the Supreme Court has properly recognized this. But equally important, the Constitution established divisions between the three branches not only to protect but also to limit the power of each of them.

Unlike the other branches, the jury has a "unique inability to protect its own authority." The other three branches have both the ability and the desire to poach on the jury's power, but the jury lacks the constitutional tools to prevent it.

For example, a law generally cannot be approved unless there is agreement between both houses of Congress and the president; it takes a super majority in Congress to enact a law if the president vetoes it. The president can appoint members of the executive, but Congress has the power to "advise and consent."

And, although the Supreme Court can provide a check on usurpations of power by both Congress and the president, its justices must be appointed by the executive and approved by the Senate.

The jury has similar powers vis-a-vis the other branches. For example, although the executive branch may bring a criminal charge, the jury decides guilt. The legislature makes laws, but the jury decides facts and applies the facts to the law. If a jury acquits, the judiciary is absolutely barred from reversing that decision.

So why has the jury been on a downward spiral in the U.S.?

The problem that Thomas sees is that the doctrines of separation of powers and federalism doctrines that both empower and limit the authority of the three traditional branches do not serve the same function for the jury.

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In the face of this disability, Thomas encourages the three branches to exercise restraint toward the powers of the jury. She supports an "original public meaning" approach to the Constitution as a way to restore the powers that the jury exercised in England at the time of ratification.

So how do those working in the criminal system feel about the decline of jury trials? Two recent newspaper articles present an interesting contrast.

On Aug. 8, The New York Times ran an article titled "Trial by Jury, a Hallowed American Right, Is Vanishing." It included interviews of several federal judges from the Southern District of New York who unanimously lamented the decrease in jury trials.

They described the situation as "a loss" and "hugely disappointing." Not surprisingly, the judges blamed it on the executive and legislative branches. They blamed prosecutors' use of mandatory minimum sentences approved by Congress.

This has resulted in more defendants entering pleas to escape the possibility of even longer sentences if they went to trial and were convicted.

Yet a recent article in the Chicago Tribune suggests that judges may need to share some responsibility as well. A defendant on trial for sexual assault decided to stop the trial and plead after the victim's powerful testimony described how the defendant assaulted her years before when she was only 7 years old. At the sentencing pursuant to the plea, the judge told the defendant, "For you to make her take the stand, I find reprehensible." ("Ex-Elburn Cop Ends Sex Assault Trial, Pleads Guilty," Aug. 17).

The article does not note whether or not this was a jury trial. But the judge's comment raises the issue of whether a criminal defendant truly has a "right" to any trial, either jury or bench.

Criminal courthouses have always had whispered comments about a "trial tax" or "jury trial tax." We need to discuss whether we really believe each criminal defendant has an unfettered right to a trial, regardless of the tragic nature of the case.

You may or may not agree with professor Thomas' solution that we return to the conception of the jury from several centuries ago. But she has written a provocative, closely reasoned book that deserves our attention.