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REVIEW: The Missing American Jury

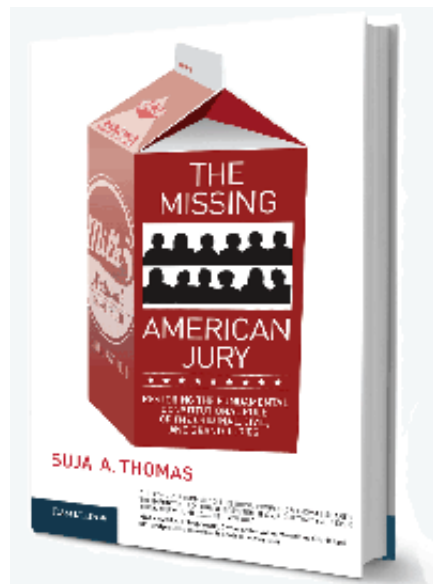
By Judge William Young, U.S. District Court for the District of Massachusetts

Law360, New York (November 23, 2016, 9:38 PM EST) -- Perhaps it is already too late. The American jury, once the crown jewel of our court system, Tocqueville's stunning experiment in direct democracy, the guarantor of our judicial independence, is today all but moribund in the federal courts. It lives on in our state courts but there too the jury is a hollowed out vestige of what it once was, marginalized as never before in our history.

Time was, a trial session spoke of being "down" when it was without a trial; today the same session speaks of "gearing up" for those rare cases that are not disposed of in pretrial proceedings or do not plead out. Today, the average United States district judge tries only four criminal jury trials and one or two civil jury trials in a year, prompting Judge Pat Higginbotham to write "So Why Do We Call Them Trial Courts?" Face it, the American jury system — our nation's most important contribution to the world's jurisprudence — is dying. It is dying faster in the federal courts than in the state courts, and faster on the civil side than the criminal — but it is dying.



Judge William G. Young



Cambridge University Press, 2016

Professor Suja A. Thomas thinks she knows what to do about it. In her superb new book, *The Missing American Jury: Restoring the Fundamental Constitutional Role of the Criminal, Civil, and Grand Juries*, she tells us in no uncertain terms. Her arguments deserve consideration by everyone interested in how our government actually works and how it might recapture the unifying communitarian experience of direct democracy and actual trial by one's peers. Three vitally important points undergird her compelling conclusion.

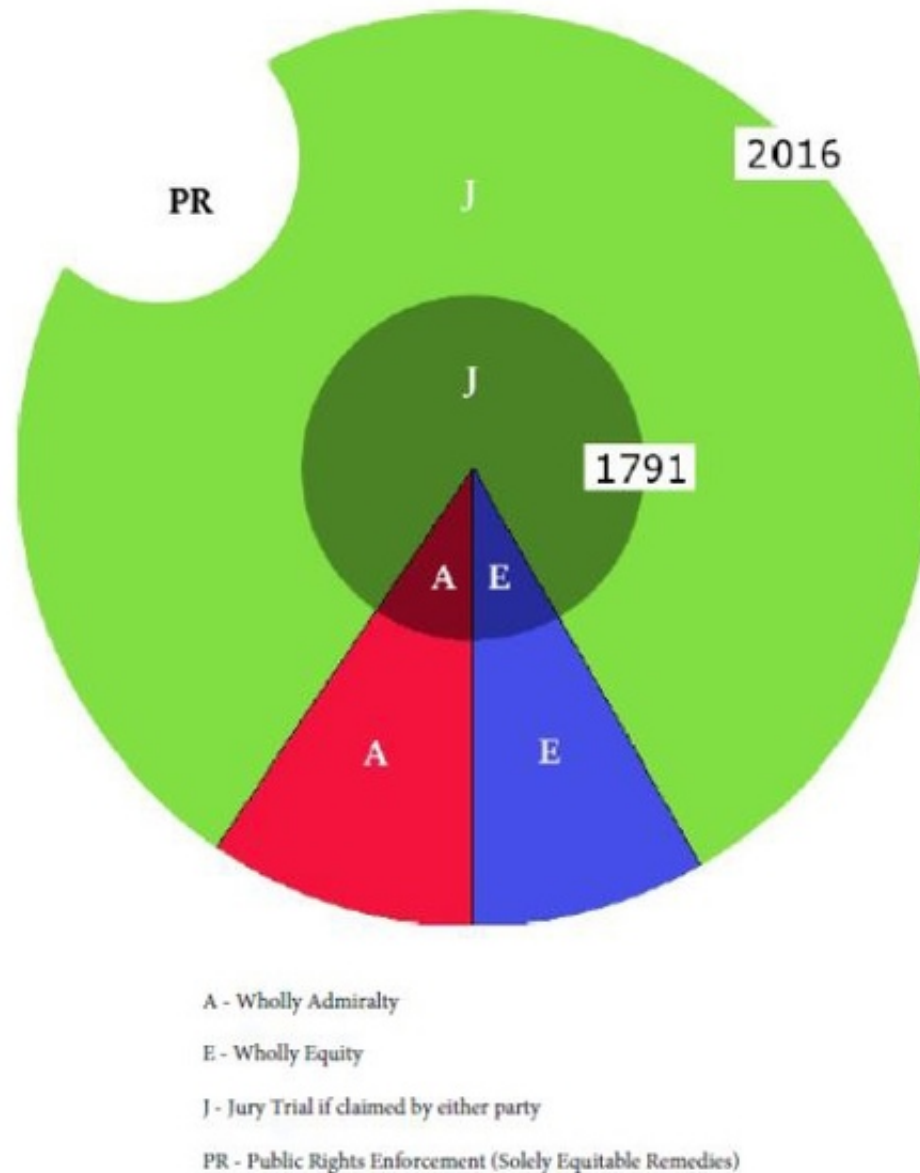
By far the most significant is her rich constitutional analysis of the jury's central role in our form of government. Professor Thomas is an unabashed originalist. If legislatures, judges and the executive branch have arrogated to themselves powers originally exercised by jurors, that derogation of jury power is simply unconstitutional.

Her arguments will find the greatest traction in our criminal practice. After all, Article III of our Constitution states simply and unequivocally, "The trial of all crimes, except in cases of impeachment, shall be by jury" and a five-member majority of the Supreme Court, led until

recently by the late Justice Antonin Scalia, has been assiduous in protecting the jury's role.

Yet it is on the civil side that Professor Thomas' careful parsing of the Seventh Amendment's guarantee of a civil jury trial gives her arguments the potential to work the greatest reforms, restoring to the people their proper role exercising direct democracy within our governmental structure. Like most judges, I've been taught that while jurors are supreme in their constitutional fact-finding role, where there is no genuine issue of material fact judges have the obligation to declare the law. This is not where Professor Thomas starts. For her, if a judge had no power to grant summary judgment at the founding, such power cannot be conjured up in the name of efficiency and its exercise by judges alone is unconstitutional. Constrained as I am by precedent, I never gave this much thought until the Supreme Court declared that implausible civil complaints were henceforth summarily to be dismissed. Unless "implausibility" means a set of factual allegations that no rational jury could possibly believe, Professor Thomas is most assuredly correct. To rule otherwise would launch judges into credibility determinations that lie within the heartland of those powers reserved to the people directly sitting as jurors.

Moreover, Professor Thomas outlines the sweep of the Seventh Amendment's reservation of rights to the people directly in prose so simple, elegant and compelling that everyone can virtually visualize it as I have done below:



It is this robust constitutional conceptualization of the Seventh Amendment that is likely to prove most powerful and enduring.

Of course, Professor Thomas acknowledges that the Supreme Court has held that Congress may assign the adjudication of “new types of [civil] litigation,” i.e. public rights, to executive agencies rather than juries on grounds of cost and efficiency, but she thoroughly debunks the premises upon which such rulings stand. Never, she explains, has any thorough study been done of these so-called “efficiencies.” My own nearly 40 years of judicial service (state and federal) confirms her misgivings. The federal courts have much to learn from the state judiciaries concerning how effectively to marshal lean judicial assets to provide jury trials for their citizens. Indeed, in the federal courts the abandonment of the trial model of adjudication in favor of the current administrative model with its endless pretrial proceedings, status conference and micro-management fosters the very inefficiencies it seeks to prevent while marginalizing the trial judges’ role and stripping it of its moral component. It is not too much to say that the eclipse of juror fact-finding foreshadows the twilight of judicial independence.

This did not “just happen.” The American jury did not sink into desuetude through any lack of interest on the part of the people themselves. Indeed, after 9/11 juror turnout soared to record heights. It peaked and began to diminish only when the president announced that the alleged murderers would be treated as “enemy combatants” tried before military tribunals not juries. (It should be noted that throughout this period the rate of acquittals remained constant, i.e. our people turned out for the country not the executive.)

This is but one example. Professor Thomas demonstrates how, throughout our nation’s history, the jury power has been incessantly diminished by other institutional actors. This is hardly surprising as the jury is quintessentially a local institution. It gathers to perform its constitutional function and then disperses, its unanimous verdict the only official trace of its being. It has no institutional memory, no agenda, and no sense (beyond the judge’s instructions) of its constitutional prerogatives. We would mistrust it if it had.

The founders assumed the people themselves would guard their jury trial rights, and the courts — seeing in the jury the moral ground of their own authority — would patrol the boundaries of that exercise in direct democracy. Notwithstanding the excesses of plea bargaining, this has largely been true in the adjudication of criminal cases. It has not been so on the civil side. Professor Thomas explains in scrupulous detail how the courts themselves generally have diminished the jury’s role and how the Supreme Court in particular has demonstrated a positive disdain for the civil jury.

Professor Thomas devotes a chapter of her book — a supremely ironic chapter — to detailing how other nations are experimenting with jury systems of their own. Comprehensive and informative, this section demonstrates the remarkable capacity of America’s jury system — 90 percent of the jury trials on the planet still take place in the United States of America — to inspire other governments and peoples so to involve their own citizens. It ought quietly shame those of us who hold judicial office to reflect on why the same inspiration seems to have run its course among us.



Suja Thomas, University of Illinois College of Law

In conclusion, perhaps echoing Thomas Jefferson’s admonition, “The jury is the greatest anchor ever devised by human kind for holding a government to the principles of its constitution,” Professor Thomas urges us to think of the jury metaphorically as an actual “branch” of government. It is not a branch of course, just as Vice President Dick Cheney was never a branch of government. Yet the metaphor is apt, for jurors are constitutional actors, one of the six types of constitutional actors that compose our government structure: Article I – senators and representatives; Article II – president and vice president; Article III – judges and jurors. As constitutional actors, jurors have at least four particular constitutional rights: 1) an equal opportunity to sit on the nation’s juries, “the fair cross-section requirement;” 2) the right to be chosen for jury service free of discrimination based on race, gender or ethnic origin, *Batson v. Kentucky*; 3) the right to have the law accurately taught by the judge, on this right hangs the judicial independence of all courts below the Supreme Court; 4) the right to adjudicate all cases properly within their charge whenever either party wants trial by her peers. Professor Thomas’ vitally important book could not be more timely. Today from both the left and the right we are told we’re in the midst of a populist resurgence. Are we?

Here are two tests:

The proposed Trans-Pacific Partnership contains the now thoroughly discredited Investor-State Dispute System whereby a foreign investor can bypass our jury system entirely and look to supra-

national arbitrators to grant it an award against the United States Treasury. Will the Senate ratify such a treaty?

The Supreme Court's starkly overdrawn adherence to the catastrophic failure of consumer arbitration (it amounts to a barrier to court access by common people) has begun to be checked — not by the courts, bound as they are by Supreme Court precedent — but by executive agencies, e.g. the National Labor Relations Board declares employee class action waivers a violation of the National Labor Relations Act; the Consumer Financial Protection Bureau proposes regulations to bar pre-dispute arbitration clauses in the financial area; the Department of Health and Human Services proposes regulations to bar pre-dispute arbitration clauses in nursing homes. Will these efforts continue?

Will the people be reunited with their own courts? If you believe, as I do, that every single jury trial is both a test and a celebration of a free people governing themselves, then Suja Thomas' *The Missing American Jury* is akin to Tom Paine's *Common Sense*. A famous English jurist had it right — "Where the jury sits, there burns the lamp of liberty." Suja Thomas has raised this lamp anew.

William G. Young is a federal judge for the U.S. District Court for the District of Massachusetts. He was nominated by President Ronald Reagan and confirmed by the Senate in 1985, and served as chief justice from 1999 to 2005. Judge Young previously served as a special assistant attorney general of Massachusetts, chief counsel to the Governor of Massachusetts, and associate justice of the Superior Court of Massachusetts. He is a lecturer in law at Boston University School of Law.

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