

GOING, GOING, GONE: THE MISSING AMERICAN JURY

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ABSTRACT.....	248
I. INTRODUCTION	248
II. BEFORE THE BOOK	250
III. THE BOOK	252
IV. BOOK STRENGTHS, WEAKNESSES, AND POINTS OF AGREEMENT AND DISAGREEMENT.....	255
A. <i>Professor Thomas's New Paradigm</i>	255
B. <i>The Rise and Fall of American Juries and the Rise of the Executive, Legislature, Judiciary, and the States</i>	255
V. CONCLUSION	259

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ABSTRACT

Professor Suja A. Thomas's new book, The Missing American Jury: Restoring the Fundamental Constitutional Role of the Criminal, Civil, and Grand Juries,¹ reflects Thomas's national reputation as a prodigious, innovative, and sometimes controversial scholar.² Her unique approach focuses on bringing to life on the written page the historical role of the civil, criminal, and grand juries from England to the contemporary American justice system. Her rare ability to weave historical threads of English common law into her current tapestry of how these three juries have become "enfeebled" typifies her keen use of unearthing historical legal research to illuminate current issues. At bottom, Professor Thomas raises substantial federal constitutional concerns with the declining role that criminal, civil, and grand juries play in contemporary American justice.

"The most stunning and successful experiment in direct popular sovereignty in all history is the American jury."³

I. INTRODUCTION

Suja A. Thomas is a nationally renowned, and sometimes controversial, expert on civil procedure and the American jury. I know this because I am one of her students—though I graduated from law school (1975) sixteen years before she did (1991). I am a student not of the classroom variety, but of her prodigious legal scholarship.⁴

1. SUJA A. THOMAS, *THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES* (2016).

2. Suja A. Thomas has been a Professor of Law at the University of Illinois College of Law since 2008, where she teaches primarily in the areas of civil procedure, evidence, and employment discrimination. Unlike many of her academic colleagues, Professor Thomas had *significant* real-world litigation and trial experience prior to joining the academy. She is a sought-after lecturer on cutting-edge scholarly issues she writes about.

3. William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 69 (2006).

4. See, e.g., Sandra F. Sperino & Suja A. Thomas, *Fakers and Floodgates*, 10 STAN. J. C.R. & C.L. 223 (2014); Suja A. Thomas, *A Limitation on Congress: "In Suits at Common Law,"* 71 OHIO ST. L.J. 1071 (2010); Suja A. Thomas, *Blackstone's Curse: The Fall of the Criminal, Civil, and Grand Juries and the Rise of the Executive, the Legislature, the Judiciary, and the States*, 55 WM. & MARY L. REV. 1195 (2014); Suja A. Thomas, *Frivolous Cases*, 59 DEPAUL L. REV. 633 (2010); Suja A. Thomas & Dawson Price, *How Atypical Cases Make Bad Rules: A Commentary on the Rulemaking Process*, 15 NEV. L.J. 1141 (2015); Suja A. Thomas, *How Atypical, Hard Cases Make Bad Law* (See, e.g., *the Lack of Judicial Restraint in Wal-Mart, Twombly, and Ricci*), 48 WAKE FOREST L. REV. 989 (2013); Suja A. Thomas, *Nonincorporation: The Bill of Rights After McDonald v. Chicago*, 88 NOTRE DAME L. REV. 159 (2012); Suja A. Thomas, *Oddball Iqbal and Twombly and Employment Discrimination*, 2011 U. ILL. L. REV. 215 (2011) [hereinafter *Oddball Iqbal*]; Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 B.C. L. REV. 759 (2009); Suja A. Thomas, *The New Summary Judgment Motion: The*

“Nationally renowned” because who else could obtain cover blurbs for a book from the likes of entrepreneur and owner of the Dallas Mavericks, *Shark Tank* star, and citizen proud of his jury service, Mark Cuban; outspoken and highly regarded U.S. District Judge (retired) and professor at Harvard Law School, Nancy Gertner; famous jury trial and appellate lawyer, David Boies; and all-star legal academics Professors Wayne LaFave, Valerie P. Hans, Lawrence B. Solum, Martin H. Redish, and James Oldham?⁵ “Controversial” because who else has argued in scholarly works that, in civil cases, summary judgment,⁶ motions to dismiss,⁷ and remittitur⁸ are all unconstitutional, and that two U.S. Supreme Court decisions reducing the right to jury trial are “oddball”?⁹

The cover of Professor Thomas’s book almost belies the adage: “You can’t judge a book by its cover.” The cover features a generic milk carton with the book’s title, *The Missing American Jury*, emboldened on it.¹⁰ Professor Thomas provides statistics early in her book that are familiar to those of us who care about the slowly vanishing institution of trial by jury. For example, she cites that by 1962 juries tried only 8.2% of criminal cases in federal courts and, by 2013, that percentage had declined to just 3.6%.¹¹ In civil cases, the decline has been even more dramatic. In 1962, civil juries decided 5.5% of federal cases, dwindling to just 0.8% by 2013.¹² These statistics stand in sharp contrast to the 18% of civil cases that were resolved by trial when the Federal Rules of Civil Procedure became law in 1938.¹³

However, other claims by Professor Thomas are doubtful. On the very first page of her book, she writes: “In high-profile cases, juries are portrayed as fundamental and pivotal to the government of the United

Motion to Dismiss Under Iqbal and Twombly, 14 LEWIS & CLARK L. REV. 15 (2010); Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139 (2007) [hereinafter *Why Summary Judgment*]; Suja A. Thomas, *Why the Motion to Dismiss is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008) [hereinafter *Why the Motion to Dismiss*].

5. SUJA A. THOMAS, *THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES*, cover (2016). Also, in the acknowledgement section at the beginning of the book, Professor Thomas recognizes, for their help with the project, an impressive list of dozens of law professors who are leading scholars in civil and criminal procedure and the American jury. *Id.* at viii.

6. See *Why Summary Judgment*, *supra* note 4.

7. See *Why the Motion to Dismiss*, *supra* note 4.

8. See Suja A. Thomas, *Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731 (2003).

9. See *Oddball Iqbal*, *supra* note 4.

10. THOMAS, *supra* note 5. It appears that the photos of missing children were first placed on milk cartons in about 1984, with different milk dairies being credited as being the first. See, e.g., Brian Palmer, *Why Did Missing Children Start Showing Up on Milk Cartons?*, SLATE (Apr. 20, 2012, 5:53 PM), http://www.slate.com/articles/news_and_politics/explainer/2012/04/etan_patz_case_why_did_dairies_put_missing_children_on_their_milk_cartons_.html.

11. THOMAS, *supra* note 5, at 2.

12. *Id.*

13. Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 12 (2006).

States. They are not, however. Despite frequent highlights in media and pop-cultural displays in movies and television, juries have come to play almost no role in the American legal system.”¹⁴ Professor Thomas confuses frequency with importance. Halley’s Comet and pitching a perfect game are indeed infrequent events, but vitally important to astronomy and related sciences and Major League Baseball. Important jury trials occur every day in courtrooms across the nation, albeit less frequently than before.

As suggested in the remainder of this Book Review, Professor Thomas does admirable and illuminating scholarly work in detailing, for legal professionals and lay folks alike (which is no easy task), the nature of the dramatically decreasing civil, criminal, and grand juries. The plight of these juries comes to life through a detailed, yet understandable, analysis of constitutional text and numerous enlightening historical sources. Professor Thomas’s rare ability to weave the historical threads of English common law and history with the uniquely American experience of criminal, civil, and grand juries presents a modern day tapestry that is complex, yet easily understood. I find Professor Thomas is less compelling in advocating reasonable and realistic cures for the ailment she so ably diagnoses and insightfully describes.

II. BEFORE THE BOOK

Before this book, many, including me, had written about the vanishing civil jury trial.¹⁵ In one article, I retold a story about a judge teaching trial advocacy. The judge shared with his law students a skit, akin to the old Johnny Carson “Carnac the Magnificent” gag, where the answer is given before the question: “Answer: ‘A Tyrannosaurus rex and a jury trial.’ Question: ‘Name two scary things today’s lawyers will probably never encounter.’”¹⁶ In another article, I wrote a spoof obituary about the demise of the American trial lawyer that began:

The American trial lawyer (ATL), who, in innumerable ways, enhanced the lives of so many Americans and made the United

14. THOMAS, *supra* note 5, at 1–2.

15. Mark W. Bennett, *Essay: The Grand Poobah and Gorillas in our Midst: Enhancing Civil Justice in the Federal Courts—Swapping Discovery Procedures in the Federal Rules of Civil and Criminal Procedure and Other Reforms Like Trial by Agreement*, 15 NEV. L.J. 1293, 1300 (2015) [hereinafter *The Grand Poobah*]; Mark W. Bennett et al., *Judges’ Views on Vanishing Civil Trials*, 88 JUDICATURE 306, 306 (2005); see also Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004); John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 524 (2012); Renée Lettow Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, 22 WM. & MARY BILL RTS. J. 811, 813 (2014).

16. *The Grand Poobah*, *supra* note 15, at 1302.

States a fairer, healthier, safer, more egalitarian, and just nation, passed away recently. Although a precise age is uncertain, ATL is believed to have been at least 371 years old at the time of death.¹⁷

On a much more serious note, in 2003, one of my judicial heroes, Judge William G. Young, from Boston, wrote a clarion call open letter to his colleagues—all federal district judges: “The American jury system is withering away. This is the most profound change in our jurisprudence in the history of the Republic.”¹⁸ Judge Young was one of the first federal judges to sound the alarm about the “missing” American jury. In 2015, I wrote: “While jury trials are surely vanishing, there are no vanishing authors discussing the various aspects of civil procedure that affect whether the parties go to trial.”¹⁹ I observed that: “Most commentators agree that the vanishing plaintiff and the vanishing civil jury trial in federal courts are primarily the result of the skyrocketing costs of litigation, especially discovery.”²⁰ I noted that “[o]ne enterprising law student this year estimated that more than 2,500 law review articles discuss ‘the costs associated with discovery.’”²¹ Increasing costs are a usual suspect in virtually every discussion of vanishing civil jury trials.²²

Noted civil procedure scholars Professors Burbank and Subrin had an interesting twist on declining civil jury trials and how the decline affects major law firms, when they started an article with this clever introduction:

It struck us as odd. At some time, probably in the middle 1970s or early 1980s, we heard that major law firms were conducting mock trials so that their young lawyers could experience what it was like to be in a courtroom. This was something new. Historically, young lawyers witnessed cases in real courts, argued motions before judges, and watched partners and older associates try cases. Young lawyers soon tried simple cases before judges and later with juries. This is how they learned to be trial lawyers and not just litigators.²³

This tracks my thesis that a significant reason for the decline of jury trials is the steady decline of real trial lawyers and the rise of the litigation industry. Thus, most members of major law firm “litigation departments”

17. Mark W. Bennett, *Obituary: The American Trial Lawyer, Born 1641–Died 20??*, 39 LITIG. 5, 5 (2013).

18. William G. Young, *An Open Letter to U.S. District Judges*, 50 FED. LAW. 36, 36 (2003).

19. *The Grand Poobah*, *supra* note 15, at 1300 (footnote omitted).

20. *Id.* at 1293.

21. *Id.* at 1300.

22. THOMAS, *supra* note 5, at 137.

23. Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 399 (2011).

have never tried a case, or at least not for many years.²⁴ The insecurity and fear of actually going to trial channels into protracted litigation in the form of boilerplate discovery objections, unnecessary discovery requests, and mountains of discovery that would never ever be needed or used if the case actually went to trial. Hence the difference between a “litigator” and a “trial lawyer.”

More than a decade ago, I wrote about why jury trials are vanishing, noting:

The list of culprits in the legal literature allegedly responsible for the vanishing civil jury trial is surprisingly long, but includes the “usual suspects.” For example, a poll of the leadership of the American College of Trial Lawyers produced the following representative list, in the order most frequently mentioned: Increased use of ADR [alternative dispute resolution], rising litigation costs, rising stakes/amounts at issue, increasing use of summary judgment, uncertainty of outcome, judges’ views of their role as case managers, mandatory sentencing guidelines, stricter requirements for expert evidence post-*Daubert*, lack of trial experience among judges, tort reform, lack of judicial resources, and external market constraints.²⁵

As discussed in the following sections, Professor Thomas’s book takes a very different tack from the mainstream observers of vanishing jury trials briefly described above.

III. THE BOOK

The genius of Professor Thomas’s book is the recurring yet nuanced discussion and analysis of all three types of American juries: civil, criminal, and grand. This novel approach is consistent from the very first sentence of the book to the last chapter. The first sentence on the first page in the abstract, “Criminal, civil, and grand juries have disappeared from the American legal system,” while stating the perceived problem, does so with

24. *The Grand Poobah*, *supra* note 15, at 1300. I even developed a ten question Bennett Multiphasic Litigator Inventory to ascertain the difference between real trial lawyers and litigators (water cooler Clarence Darrows). *Id.* at 1308–10.

25. Bennett et al., *supra* note 15, at 307. Two years earlier, a renowned academic scholar on jury trials, law professor Valerie Hans, noted: “A number of theories about why civil jury trial rates are declining have been advanced, including the expense of trial, the pressures to settle cases, the push toward alternative dispute resolution, an increase in summary judgment, and cultural factors.” Valerie P. Hans & Stephanie Albertson, *Empirical Research and Civil Jury Reform*, 78 NOTRE DAME L. REV. 1497, 1505 (2003).

perhaps an unnecessary rhetorical overstatement.²⁶ The second sentence succinctly sets up the book's thesis: "Over time, despite their significant presence in the Constitution, juries have been robbed of their power by the federal government and the states."²⁷ Unlike many of the prior critiques of the vanishing jury trial, like my own, which focus on practical reasons for its demise, including the mushrooming cost of discovery, Professor Thomas focuses on the structural demise. Calling it the "enfeebled jury," she early on observes that juries have been "removed from the greater constitutional structure."²⁸ She argues that to restore the jury's historical role in America "means preventing the executive, the legislature, the judiciary, and the states from usurping the jury's authority."²⁹ As examples, Professor Thomas argues that trial judges should not be able to dismiss criminal and civil cases by assessing the evidence, legislatures should not be able to shift cases from juries to judges, and states should mandate indictment by grand juries before any plea negotiations.³⁰ Whether one agrees or not (I don't) with these extraordinary and radical solutions to vanishing juries, this is vintage Professor Thomas—outside-the-box thinking.

Part I, "The Jury Now," Chapter 1, "The Missing American Jury: *An Introduction*" does exactly that, unfolding the core themes described above and previewing the remaining chapters.³¹ Chapter 2, "The Fall of the Criminal, Civil, and Grand Juries and the Rise of the Executive, the Legislature, the Judiciary, and the States," is a detailed discussion expounding on Professor Thomas's core thesis that, when America was founded, all three juries were integral not only to the emerging governments in the colonies, but also in England.³² From the founding of America to today, power has shifted from juries to the three branches of the federal government and the states, "the very entities that juries were to check."³³ Chapter 3, "The Missing Branch," introduces Professor Thomas's new and novel theory that she argues accounts for the fall of the three juries and the rise of the three branches of the federal government and the states.³⁴

26. THOMAS, *supra* note 5, at abstract. While civil and criminal jury trials have greatly diminished in number over the past several decades, to write that they have "disappeared" is like saying the Western Lowland Gorilla has "disappeared." Neither have—the Western Lowland Gorilla is already on the endangered species list, and civil and criminal jury trials are headed down the same path without serious intervention.

27. *Id.*

28. *Id.* at 5.

29. *Id.* at 6.

30. *Id.*

31. *Id.* at 1–9.

32. *Id.* at 11–48.

33. *Id.* at 11.

34. *Id.* at 49–106.

It elaborates in historical detail her doctrinal view that the fall of the three juries has “not been associated with the previously unrecognized phenomenon of the traditional actors’ usurpation of the jury’s authority.”³⁵

Part II, “The Future Jury,” Chapter 4, “Interpreting Jury Authority,” asserts that “[t]he American jury today resembles neither its English predecessor nor the jury envisioned by many of the Founders.”³⁶ It poses the straightforward question: “How should the traditional actors [the executive, legislative, and judicial branches of the federal government and the states] interpret the authority of the jury?”³⁷ Chapter 5, “Restoring the Jury,” using “the mechanism of originalism,” examines in-depth “[the] four major modern procedures that affect jury authority.”³⁸ They are: 1) Acquittal of Defendants by Judges; 2) State Prosecution of Defendants Without Grand Juries; 3) Administrative Agencies, Bankruptcy Courts, and Other Congressional Actions; and 4) Summary Judgment.³⁹ Chapter 6, “Beyond the Constitution,” seeks to dispel two notions argued by many that contemporary criminal and civil juries lack value and that people do not need them. For example, “discovery, summary judgment, and settlement effectively substitute for the civil jury trial.”⁴⁰ Professor Thomas argues that the increasing use of lay jurors in other countries, although often different from American juries, demonstrates a “common value” for laypersons in judicial decision making.⁴¹ A prime example is China where, since 2004, “collegial panels of judges and lay jurors decide cases.”⁴² Finally, Chapter 7, “A Branch Among Equals in American Democracy: A *Conclusion*,” introduces four imaginative alternative “requirements” in the absence of “eliminating constitutionally impermissible procedures”—Professor Thomas’s preferred remedy.⁴³ They are “the reasoning requirement” that juries justify their verdict; “the plea offer requirement” that prosecutors present to juries the same plea offer a defendant turned down; “the sentence requirement” that judges inform juries of the sentence associated with each crime; and, last, “the consensus requirement” that appellate courts, including the U.S. Supreme Court, must be unanimous when affirming summary judgment and judgment as a matter of law, where judges substitute their own judgments for juries in dismissing matters.⁴⁴

35. *Id.* at 106.

36. *Id.* at 109–45.

37. *Id.* at 144–45.

38. *Id.* at 147–85.

39. *Id.* at 148–82.

40. *Id.* at 187–88 (footnote omitted).

41. *Id.*

42. *Id.* at 197.

43. *Id.* at 235–37.

44. *Id.* at 236–37.

Professor Thomas presents these four alternative “requirements” as “new ideas . . . briefly introduced here and about which more will be written in the future.”⁴⁵

IV. BOOK STRENGTHS, WEAKNESSES, AND POINTS OF AGREEMENT AND DISAGREEMENT

A. *Professor Thomas’s New Paradigm*

The greatest strength of this book is Professor Thomas’s unique approach to weaving not only the roles of civil, criminal, and grand juries throughout American history, but in illuminating the tapestry that these juries create in the context of their constitutional roles measured against the three traditional branches of government. Professor Thomas significantly adds to the richness of the debate on declining American juries by forcefully arguing that American juries have been marginalized by the traditional “constitutional actors”: the Executive, Legislature, Judiciary, and the role of the states.⁴⁶ The fundamental premise of her new approach is that all three juries at the time of our nation’s founding were integral to the role of government, not only in the fledgling colonies but in England, too.⁴⁷ This is best summed up by her insight that “[t]he traditional constitutional actors now decide matters that juries decided in the past.”⁴⁸ This is a radical departure from the list of usual suspects like cost, delay, inefficiency of discovery, lack of jury predictability, rise of ADR, increase in granting dispositive motions, etc.⁴⁹

The final piece of Professor Thomas’s innovative critique⁵⁰ of the milk-carton-missing American jury is that all three American types of juries should be recognized as coequal of the traditional actors, as an important check on their powers “essentially as a ‘branch.’”⁵¹

B. *The Rise and Fall of American Juries and the Rise of the Executive,*

45. *Id.* at 236.

46. *Id.* at 3.

47. *Id.* at 11. Indeed, as Professors Stephen Burbank and Stephen Subrin have observed:

It is unlikely that there would have been a United States of America without the Bill of Rights, because the founders insisted on assurances of protection for their liberties before they would ratify the Constitution. There would not have been an acceptable Bill of Rights without a right to trial by jury.

Burbank & Subrin, *supra* note 23, at 402 (footnote omitted).

48. THOMAS, *supra* note 5, at 3.

49. *See id.* at 5–6; Bennett, *supra* note 25, at 307.

50. Professor Thomas describes this critique as a “novel argument about the role of juries in the very fabric of our political system.” THOMAS, *supra* note 5, at 5.

51. *Id.*

Legislature, Judiciary, and the States

Professor Thomas superbly and succinctly describes the rise and vibrancy of American juries of the eighteenth century. The founders understood, as Professor Thomas explains, informed from their past in England, that juries “restrained the government and preserved liberty.”⁵² The founders also understood what could happen without juries. The dreaded Star Chamber of the motherland was not a jury, but a court of law made up of judges, members of Parliament, and other leaders.⁵³ Professor Thomas notes that the founders “wanted juries” in their new government.⁵⁴ Both “[t]he First and Second Continental Congresses asserted Americans’ entitlement to criminal and civil juries.”⁵⁵ In part, the Declaration of Independence was adopted by the colonists “because the King repeatedly had deprived them of trial by jury.”⁵⁶ Even before the Constitutional Convention, all the states with written constitutions provided some right to jury trials.⁵⁷

In sum, criminal, civil, and grand juries played significant roles in both England and the colonies in the late eighteenth century. All three juries provided important checks on governmental power.

Professor Thomas points to the rise of plea bargaining as a major reason for the decline of criminal jury trials in America.⁵⁸ She describes guilty pleas at the founding of America as “highly atypical” and plea bargaining as “not viewed positively.”⁵⁹ It is certainly true that when there is plea bargaining and an offender pleads guilty, there is no trial by jury. In my experience of having sentenced more than 4,000 defendants in federal courts from Iowa to Arizona and in the District of the Northern Mariana Islands, defendants plead guilty in the hopes of obtaining a lesser sentence. This is in large part due to the harshness of the Federal Sentencing Guidelines and the myriad of draconian mandatory minimum sentences that Congress has so enthusiastically passed.⁶⁰ The decline in federal criminal jury trials exists for far different reasons than federal civil jury trials. Less

52. *Id.* at 11.

53. *Id.* While some historians argue the enduring reputation of the English Star Chamber is undeserved, it has become “a synonym for secrecy, severity and extreme injustice.” Daniel L. Vande Zande, *Coercive Power and the Demise of the Star Chamber*, 50 AM. J. LEGAL HIST. 326, 326 (2008–2010); see generally Thomas G. Barnes, *Star Chamber Mythology*, 5 AM. J. LEGAL HIST. 1, 1–11 (1961).

54. THOMAS, *supra* note 5, at 11.

55. *Id.*

56. *Id.* at 11–12.

57. *Id.* at 12.

58. *Id.* at 25–26.

59. *Id.* at 26.

60. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 87–89 (The New Press rev. ed. 2012).

harsh sentences would change the evaluation of the risk–reward decision to go to trial. In my view, plea bargaining is not the evil Professor Thomas alleges, but the result of the reality of harsh sentences. There would be many more criminal jury trials if the sentences were not so harsh.

Professor Thomas also criticizes the U.S. Supreme Court for failing to recognize and allow juries to be told that they can engage in “jury nullification”⁶¹ and acquit a guilty defendant if they disagree with the facts of prosecution.⁶² While Professor Thomas has developed a fine and well-deserved reputation for thinking outside traditional legal boxes, advocating jury nullification because it heightens the role of the jury is, with respect, a wacky argument that undermines the rule of law. Most jury nullification arguments focus on the alleged “right” of a jury to acquit a defendant who is guilty under the law and the evidence because of a higher moral justification.⁶³ “Some scholars define jury nullification as the jury’s refusal to convict a criminal defendant even though there is proof beyond a reasonable doubt that the defendant’s behavior has satisfied the statutory elements of a crime.”⁶⁴ However, juries could just as easily under “jury nullification” convict the innocent defendant because they don’t like her, or her race, religion, accent, ethnicity, political affiliation, etc., etc. This is one reason why I think the notion of “jury nullification” is wacky.⁶⁵

More troubling to me is Professor Thomas’s argument that the “power of American criminal juries has been further reduced where judges acquit defendants who have been convicted by juries.”⁶⁶ This argument runs contrary to Professor Thomas’s assertion that juries are necessary to both restrain government and protect liberty.⁶⁷ What greater restraint on the governmental power granted to a jury than to set aside a verdict of guilty and protect the liberty of the defendant where the evidence is insufficient to

61. While there are many definitions of “jury nullification,” *Black’s Law Dictionary* defines it as: A jury’s knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury’s sense of justice, morality, or fairness.

Aaron McKnight, *Jury Nullification as a Tool to Balance the Demands of Law and Justice*, 2013 BYU L. REV. 1103, 1104–05 (2013) (citing BLACK’S LAW DICTIONARY 936 (9th ed. 2009)).

62. THOMAS, *supra* note 5, at 31. *Sparf v. United States*, 156 U.S. 51 (1895), “held that the constitutional right to jury trial does not give a jury the right to decide questions of law or to reject the law as presented to it by the court. . . .” Jonathan Bressler, *Reconstruction and the Transformation of Jury Nullification*, 78 U. CHI. L. REV. 1133, 1134–35 (2011).

63. McKnight, *supra* note 61, at 1107.

64. *Id.* at 1105 (footnote omitted).

65. Wacky, as I think instructing jurors on their alleged right of nullification in Professor Thomas’s view does not lack some support among scholars and a limited number of federal judges. *See, e.g.*, Bressler, *supra* note 59, at 1133.

66. THOMAS, *supra* note 5, at 31.

67. *Id.* at 11.

convict or a constitutional right of the defendant has been abridged in the jury trial? Significantly, this power of a judge is rarely exercised.⁶⁸

I find much more agreement with Professor Thomas's discussion of the demise of civil jury trials. Her discussion of the overuse of both motions to dismiss and summary judgment by judges leading to far fewer jury trials is consistent with both her beliefs and mine expressed in our prior scholarly articles.⁶⁹ Professor Thomas writes: "[I]t is clear that courts use summary judgment to dismiss many cases, including factually intensive cases, like employment discrimination cases, reducing the number of cases decided by juries."⁷⁰ This is one result of the transformation of real trial judges to managerial judges. In her classic law review article on this subject, Professor Judith Resnik, from Yale Law School, concluded her article with this last prophetic sentence: "I fear that, as it moves closer to administration, adjudication may be in danger of ceasing to be."⁷¹

I applaud Professor Thomas for including the always-ignored grand jury in her discussion of the missing American juries. She correctly notes that many states do not require grand juries and the U.S. Supreme Court has never required the states to empanel grand juries.⁷² Thus, in many states, an individual can be charged with a crime by a state court prosecutor filing a simple piece of paper, often called an information.⁷³ Requiring greater use of grand juries in the states would provide some greater protections against individuals being charged with crimes without sufficient evidence to do so—or at least evidence being reviewed by more than a single prosecutor. Professor Thomas is correct that, in 1938, the adoption of Rule 7 of the Federal Rules of Criminal Procedure permitted a defendant to waive a formal indictment.⁷⁴ However, I disagree with her conclusion that this has effected "significant change."⁷⁵ In my experience, defendants are rarely asked to waive formal indictment.

Professor Thomas, like most lawyers in my view, occasionally overreaches in her generalities. Here are some examples. In arguing that power has shifted "significantly" from juries to the judiciary, she cites as a prime example that defendants may waive their right to trial by jury and be

68. Joy Radice, *The Reintegrative State*, 66 EMORY L.J. 1315, 1372 (2016–2017).

69. See sources cited *supra* notes 4, 15, and 18; see also Mark W. Bennett, *Essay: From the "No Spittin', No Cussin' and No Summary Judgment" Days of Employment Discrimination Litigation to the "Defendant's Summary Judgment Affirmed Without Comment" Days: One Judge's Four-Decade Perspective*, 57 N.Y.L. SCH. L. REV. 685 (2012–2013).

70. THOMAS, *supra* note 5, at 35 (footnote omitted).

71. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 445 (1982).

72. THOMAS, *supra* note 5, at 38.

73. See, e.g., TENN. CODE ANN. § 40-3-101 (1975).

74. FED. R. CRIM. P. 7(b).

75. THOMAS, *supra* note 5, at 37.

tried by a single judge.⁷⁶ Only once in my twenty-three years as a federal district court judge has a defendant ever asked to waive a jury. Plus, it was his decision to do so. Voluntary decisions by the occasional defendant for strategy reasons to waive a jury and be tried by a judge hardly constitute a “significant” shift of power. Another glaring example is Professor Thomas’s claim that “juries have come to play almost no role in the American legal system.”⁷⁷ Tell that to the thousands of defendants each year convicted of first-degree murder by juries or numerous companies that civil juries have imposed millions of dollars of punitive damages on.⁷⁸ Finally, she claims that acquittal by judges is unconstitutional, even though no state or federal court, let alone the U.S. Supreme Court, agrees with her.

One of the most unique chapters of Professor Thomas’s book is the penultimate chapter: “Beyond the Constitution, *Affirming a Role for Lay Jurors in America’s Government and World-Wide*.”⁷⁹ This chapter demonstrates the breadth of Professor Thomas’s insights and research because it discusses the resurgence of lay jurors world-wide. This is not a topic I have ever read about in the numerous articles about vanishing jury trials in America. She discusses a broad range of diverse countries from around the world: England, Brazil, China, France, Germany, Ghana, Iran, Japan, Russia, and Spain.⁸⁰ Professor Thomas also includes in this chapter several significant tables that allow a quick comparison between the ten foreign nations discussed and the United States on everything from plea bargaining, to questions by jurors, to acquittal for insufficient evidence after verdict.⁸¹

V. CONCLUSION

[T]he jury system is the handmaid of freedom. It catches and takes on the spirit of liberty, and grows and expands with the progress of constitutional government. . . . Rome, Sparta and Carthage fell because they did not know it, let not England and America fall because they threw it away.⁸²

76. *Id.* at 46.

77. *Id.* at 2.

78. See generally Andrew W. Marrero, *Punitive Damages: Why the Monster Thrives*, 105 GEO. L.J. 767 (2017).

79. THOMAS, *supra* note 5, at 187.

80. *Id.* at 191–214.

81. *Id.* at 216–17.

82. Charles S. May, Commencement Address to the University of Michigan Law School (Mar. 1875), in J. W. DONOVAN, *MODERN JURY TRIALS AND ADVOCATES* 165–90 (New York: Banks & Brothers 2d rev. ed. 1882).

Like most of Professor Thomas's incredible body of scholarly work, she not only thinks outside the traditional legal-thinking box, but offers a refreshing, creative, and inimitable approach to the vexing problem of vanishing trials. There is much new, original thinking here to digest and cogitate on. Her structural argument that the three branches of government and the states have robbed criminal, civil, and grand juries of their vitality rings true to me, but only to a point. I wholeheartedly agree, for example, that in civil cases, the expanded use of motions to dismiss and summary judgment by increasingly managerial types of trial judges has had a profoundly negative effect on litigants' access to jury trials. Thus, changing the rules by heightening the standards upon which these motions should be granted would be a substantial and much-needed step in revitalizing the role of civil juries in our civil justice system.

Other suggested "solutions," like stripping judges of the power to set aside a jury verdict of guilt in criminal cases for insufficient evidence or serious trial errors, strike me as ill-advised and contrary to the founders' desires for fair jury trials. To protect the same precious rights the founders and drafters of the Bill of Rights were concerned about, trial judges, subject to existing appellate review, need the power to right those rare jury mistakes that deprive the accused of due process. The founders weren't suggesting trial by jury without due process, but fair jury trials—obviously, the fairness is ensured by the judge and appellate review. Indeed, early in her book, Professor Thomas recognizes "the essential role that juries can play to preserve civil liberties and civil rights."⁸³ Judges need to play that same role when juries do not. Moreover, this happens so rarely⁸⁴ that, even if Professor Thomas's ill-advised suggestion was adopted, it would have no impact on the broader missing jury trial problem. Indeed, when judges grant a motion for a new trial, there is a second trial, unless the case is resolved by plea—generating more, not less, criminal jury trials.

At bottom, there is much new original thought in Professor Thomas's book that is a must-read for anyone interested in the rise and fall of American juries—"[t]he most stunning and successful experiment in direct popular sovereignty in all history."⁸⁵ Any thoughtful set of strategies to revive the American jury must take seriously the ideas offered in Professor Thomas's book. In my view, this is not enough. Even if all of Professor Thomas's suggestions were adopted, it would not be sufficient to restore the proper role of juries in the American legal system.

The issues of skyrocketing cost, delay, and way too much discovery also need to be addressed. I once again suggest that we have discovery

83. THOMAS, *supra* note 5, at 7.

84. Radice, *supra* note 68.

85. Young, *supra* note 3.

backwards in our civil and criminal justice systems.⁸⁶ Where liberty is at stake, as in federal criminal cases, the broad discovery of civil cases should be utilized.⁸⁷ Where primarily money is at stake in civil cases, the much more truncated discovery of federal criminal cases is more appropriate.⁸⁸ In my view, this switch in discovery philosophy would significantly reduce the cost of civil litigation and increase jury trials. On the criminal side, greater discovery by the defense would better inform the decision to take a case to trial by jury. Switching discovery in criminal and civil cases and adopting Professor Thomas's view of juries as something akin to the existing three branches of American government—the core of Professor Thomas's book—raises greater hope that American juries are not going, going, gone.

86. *The Grand Poobah*, *supra* note 15.

87. *Id.*

88. *Id.*