

THE AMERICAN LEGAL SYSTEM AND CIVIC ENGAGEMENT



Why We All Should Think Like Lawyers

KENNETH A. MANASTER

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CIVIC ENGAGEMENT

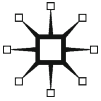
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To Guy Manaster, My Brother

“To communicate the spirit of the judges to the minds of all the citizens...”

Alexis de Tocqueville
Democracy in America

CONTENTS

<i>Acknowledgments</i>	ix
1 The Citizen's Task	1
2 The Citizen's Obstacles	9
3 Conventional Guidance	21
4 The Law's Tools and Traditions	39
5 The Citizen as Juror	73
6 Inescapable Differences	91
7 Guidance from the Law	103
8 Conclusion: About Responsibility	143
<i>Appendix: Reviewing the Guidance</i>	147
<i>Notes</i>	153
<i>Index</i>	201

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THE CITIZEN'S TASK

Everybody has an opinion. Each of us has a point of view on at least one issue of public concern. Around election time, and at most other times too, we somehow reach our individual conclusions on topics of the day, big and small. Most of us find frequent opportunities to express those opinions as well. This is obviously just as it should be in a democracy, especially one that so highly values free speech. We share and test our ideas through “the eternal arguing that is the essence of American democracy.”¹

The premise of this book is that the ordinary citizen could form his opinions on public issues—and fulfill his civic responsibility—more intelligently and confidently if he had more guidance on how to do it. More specifically, he could benefit from perspectives on how to evaluate the information and arguments swirling around him, seek out additional information if he thinks he needs it, and reach conclusions about what makes sense and what does not. The individual who is better oriented and equipped in these ways can contribute much more effectively to a rational and civil discussion of these issues. As is widely recognized, in recent years there has been a serious and disheartening paucity of such public discussion. This book, drawing from the tools and traditions of the American legal system, offers guidance to aid the citizen in understanding public issues and participating in the type of responsible public debate these challenging issues deserve.

Our democracy has been aptly described as “an engine for producing a diverse menu of conversation about public affairs, largely carried on in public.”² John Locke, too, spoke of “the variety of opinions and contrariety of interest which happen in all collections of men.”³ Through the noisy, chaotic expression of our opinions, we create the evolving character, values, and concerns of our society. More concretely, we choose the leadership and shape the policy directions of our government. Alexander Hamilton, in *The Federalist No. 71*, emphasized “that the deliberate sense of the community should

govern the conduct of those to whom they intrust the management of their affairs.”⁴ This “deliberate sense” is the combined result of the opinions, and ultimately the voices and votes, of individual men and women. A bedrock principle of modern American democracy—“today’s most honored notion of citizenship, the ideal of the ‘informed citizen’”—is that we each have this opportunity to think for ourselves and express our own conclusions on public issues.⁵

This opportunity is sometimes described as a *privilege* the citizen enjoys. California voters, for example, are officially advised, “It is a wonderful privilege in a democracy to have a choice and the right to voice your opinion.”⁶ At other times, we speak of the citizen as having a *duty* to make up his mind about public issues and give voice to his conclusions. From this perspective, at a minimum, each of us should express our views through voting. More frequently, the formation and expression of our opinions take place through other means: private conversations with friends, relatives, and coworkers; classroom discussions with fellow students and teachers; participation in political campaigns and community groups; letters to the editor, Internet blogs, emails and other writings; calls to radio and television talk shows; and in many other settings.

Although this individual responsibility is not a legally enforceable duty, its importance has long been emphasized by political leaders and commentators. Justice Louis Brandeis of the Supreme Court believed “that public discussion is a political duty.”⁷ President Truman reportedly said, “The highest office in a democracy is that of a citizen.”⁸ More sharply, Thomas Jefferson observed that “people who expect to be ignorant and free expect what never was and never will be.”⁹

A modern scholar has acknowledged, albeit skeptically, “the widespread conviction that it is the responsibility of a citizen in a democracy to have opinions about everything, or at least everything that pertains to the conduct of this country’s affairs.”¹⁰ Similar doubts about this expectation were well expressed by the central character in a leading British novel:

People may indeed have a certain duty to think about great affairs and form their opinions. But life being what it is, how can ordinary people truly be expected to have “strong opinions” on all manner of things...? There is, after all, a real limit to how much ordinary people can learn and know, and to demand that each and every one of them contribute “strong opinions” to the great debates of the nation cannot, surely, be wise.¹¹

Other commentators over recent decades have described the citizen’s duty more positively, even eloquently:

Universal suffrage, by giving all a share in the control of the government, makes it mandatory for every man to become a statesman."¹²

Democracy offers more but also requires more from the individual than any other form of society... In a democracy... it is [the individual's] personal responsibility and that of educational institutions to prepare him for participation in community affairs... The individual must be independent and informed and conscious of the choices before him. He must develop the capacity to weigh values and know the implications and consequences of his decisions.¹³

There is a fundamental difference between shouldering the rights and responsibilities that come with citizenship—engagement, participation, debate—and merely inhabiting the land.¹⁴

Democracy is only effective to the extent that the public are well informed about issues and can think independently and critically about those issues.¹⁵

The claim of democracy is that every man decides for himself. The use of one's natural faculties to determine for oneself what is true and false and good and bad is the American philosophic method.¹⁶

However this responsibility may be phrased, meeting it is not easy for anyone. It is difficult to understand the ever-changing issues confronting us in twenty-first-century America, and perhaps it always has been. Public issues are usually complicated, and we are often barraged with arguments and asserted "facts" thrust before us by those who want to persuade us to share their views. Again, this is as it should be. In a society that cherishes freedom of speech, we should welcome the incessant contest of information and argument, even though it often seems confusing and overwhelming.

Unfortunately, when we try to discern how to meet our individual civic responsibility, we find very little guidance available to us, either as children in the educational system or as adults in the working, and voting, worlds. "In the schools, the young have been exposed to an education which has been far more effective in preparing for academic learning and vocation than for an understanding of the processes and problems of democratic society."¹⁷ This obviously is a serious failing, especially in light of the importance of education in a democracy. The critical role of American education was emphasized by Justice Thurgood Marshall:

Education serves the essential function of instilling in our young an understanding of and appreciation for the principles and operation of our governmental processes. Education may instill the interest and provide the tools necessary for political discourse and debate. Indeed, it

has frequently been suggested that education is the dominant factor affecting political consciousness and participation.¹⁸

There is no substitute for the kind of education Justice Marshall describes. There is, however, an additional area of our public life in which guidance can be found for enhancing individual capability to meet our civic duty. This guidance comes from the American legal system, which prides itself on using structured processes for reaching decisions based on solid evidence and purposeful policy. Every day judges and jurors rely on these processes to help guide them toward decisions in complex disputes. Lawyers perform a central role in these processes, as they marshal evidence and arguments both to highlight the facts and reasoning behind the positions they want judges and juries to accept, and also to challenge opposing positions.

This book will explain the core tools and traditions of the law that are used by lawyers, judges, and jurors. As should be obvious, these three categories of participants in the legal system do not all use the law's methods in exactly the same ways or for the same purposes. Nonetheless, the tools and traditions explained here characterize in a variety of ways the work people do in all three of these roles. These methods of the law are, in other words, the foundation and common denominator of the work of lawyers, judges, and jurors. This book's guidance for the citizen builds on this foundation.

Occasionally, we speak of "the court of public opinion" to describe the ongoing discussion of controversial issues. Certainly, any comparison would be imperfect between a court of law, with its established procedures and decorum, and the diverse, everyday arenas in which people try to inform and persuade each other about public issues. Nevertheless, the law's well-established methods for reaching decisions can be drawn from to help citizens reach their decisions on public issues.

When we speak of "public issues," the governance and welfare of our society are our most prominent concerns, and they will be the most frequent reference point here. They are the issues found in "each day's serious reported news, the iron core of information that is at the center of a functioning democracy," as distinguished from merely "pleasant and diverting stories."¹⁹ Our purpose here, however, is not to evaluate the relative importance of some kinds of issues as compared to others. Lots of people focus frequently on matters that virtually everyone knows do not raise any broad, serious concerns. Public debates—at times, really, just widespread gossip or tabloid publicity—regularly dissect, for example, the steps and missteps of established or

newly minted celebrities. These topics, too, probably can be included within the broad scope of public issues in this exploration of guidance on how to understand and evaluate them.²⁰

This book rests on four important assumptions. First, it assumes that the individual citizen is likely to be interested at some times in some issues. It conversely assumes that he or she is not, nor even should be, interested at all times in all issues. In a society as complex and contentious as ours, with so many people so busy with so many obligations and pastimes, it would be unrealistic in the extreme to assume otherwise.

Second, it is assumed here that the function of public opinion is not for voters, individually or collectively, to constantly convey to their representatives exactly what positions those officials should adopt on specific issues. Certainly citizens often should and do express their preferences on issues to both their elected leaders and other government officials. In doing so, they are pursuing what political scientists view as a “delegate” model of democracy, in which citizens’ expressed preferences guide the actions of the government. To a considerable degree, however, a “trustee” model characterizes our society. In that view, officials are charged to exercise their own best judgment on behalf of the citizenry, even if messages from the voters are absent, ambiguous, or contrary.²¹ Regardless of which model or combination of models best describes American democracy,²² the need remains for informed, thoughtful citizens to understand various issues. They then are able to apply their understanding to the selection of their leaders, and to the communication of their ideas to those leaders and other government functionaries.

A third assumption, grounded in the many kinds of differences that characterize the American people, is that not all individuals or communities are equally well positioned to delve into and understand public issues and to express their views effectively. By virtue of many factors—education, economic status, life experiences, regional needs and interests, and many other circumstances—our inclinations, opportunities, and abilities to grapple with specific issues are not evenly distributed among us. “Indeed, greatly unequal citizen contributions to any ongoing dialogue about public matters seems an irreducible fact of our public life.”²³ A major, recent study of political participation described the situation this way:

One of the hallmarks of democracy is that the concerns and interests of each citizen be given equal consideration in the process of making decisions that are binding on a political community. Nevertheless, . . . the

disparities in political voice across various segments of society are so substantial and so persistent as to preclude equal consideration.²⁴

In particular, that study documents “the association between socioeconomic status and political voice.”²⁵ It confirms the serious reality that “economic inequality undercuts the possibility for political equality.”²⁶

With this reality in mind, the guidance to be offered here is not simply intended to benefit intellectual or economic elites who might be broadly advantaged in these respects, at least regarding some types of national issues. Instead, it is hoped that different aspects of what is suggested here will be of potential utility to all citizens. Not all of the ideas offered will be equally accessible and comfortable for everyone, of course, but the intention is that at least some of them, sometimes, can be beneficial to anyone.

A final assumption is that it is worthwhile to focus on the ideal operation of the legal system, even though in reality it often falls short. It is no secret that on a daily basis, the law, and the work of lawyers and others within it, are far from perfect. Not all lawyers always honor their ethical and professional responsibilities. Indeed, not all lawyers unfailingly employ the methods often capsulized as “thinking like a lawyer.” Nevertheless, it is assumed here that most of what is done by lawyers, judges, and jurors comes close to the ideal, at least close enough to provide a solid model to extrapolate from, in developing guidance for the ordinary citizen.

This inquiry will begin by summarizing, in chapter 2, some of the major obstacles citizens face in trying to understand issues and reach sound conclusions on them. Chapter 3 will summarize sources of guidance conventionally available to help us form our opinions. This will be followed by the pivotal portion, chapter 4, a survey of the tools and traditions of legal analysis and decision making. The discussion will turn next, in chapter 5, to the embodiment of those tools and traditions in our expectations for how jurors perform their role. Since our society expects so much of ordinary citizens when they are called to serve as jurors, it is worthwhile to ask whether similarly high expectations can be applied to all of us in our everyday roles as voices and voters in our democracy.

Chapter 6 will summarize some of the inescapable differences between the ways in which the law’s tools aid decision making in legal contexts and the ways in which opinions are formed and decisions made in broader, much less structured public arenas. After acknowledging these differences, the discussion will turn, in chapter 7, to the

applicability of the law's methods to the citizen's task. The analysis will demonstrate how the methods of the law can help guide Americans in forming their opinions and conclusions on public issues. For the reader's convenience and assistance, main points of that guidance will be reviewed in the brief Appendix as well.

Hopefully, as chapter 8 will summarize, it will be shown that there is something useful to be borrowed from the legal arena—something to help the confused, overwhelmed, ordinary American who aims to be a responsible citizen.

THE CITIZEN'S OBSTACLES

Even under the best of circumstances, the citizen's task is not easy. By definition, public issues involve matters bigger than the immediate, private concerns of the individual. A person who wants to make intelligent contributions to discussion of public issues must find the time and energy to think and learn about them. Many people are disinclined to do so. Leo Tolstoy pointed this out in *War and Peace* long ago:

Personal interests of the moment are always so much more significant than the general issues that because of them the latter are never felt—not even noticed, in fact. The majority of the people paid no attention to the general course of events but were influenced only by their immediate personal interests.¹

Alexis De Tocqueville did so as well, in *Democracy in America*:

It is difficult to draw a man out of his own circle to interest him in the destiny of the state because he does not clearly understand what influence the destiny of the state can have upon his own lot.²

Political scientists debate whether modern technology makes the citizen's job easier or more difficult. The greater flow of information, especially through electronic means, would seem to make it easier to know what is going on, what is at stake, and what needs to be decided in the public realm. "It seems there are fewer and fewer excuses for citizens to claim ignorance and sit democracy out."³ Some scholars posit that the electronic media's capacity to provide information quickly, conveniently, and comprehensively, including widespread dissemination of political analysis, will produce a significant increase in political participation.⁴ In particular, the possibilities opened up by the Internet are unprecedented:

The Internet can convey everything that television, magazines, radio, and newspapers do, and in a more timely manner with an easily accessible interface. The Internet can convey every type of visual and audio information on demand. Yet, beyond being simply a compilation of the previous mass media, the Internet presents the first two-way mass conversation . . . One can discover an issue, research that issue and respond to it, and then respond to the responses or even chat about it, and distribute it to networks of other people from any of a multitude of mobile or fixed computing devices.⁵

Many observers, however, see a bleaker picture. In the words of a journalism professor,

It is hard to reconcile the students' lack of knowledge [of critical public issues] with the notion that they are a part of the celebrated information age, creatures of the Internet who arguably have at their disposal more information than all the preceding generations combined. Despite their BlackBerrys, cellphones, and Wi-Fi, they are, in their own way, as isolated as the remote tribes of New Guinea. They disprove the notion that technology fosters engagement, that connectivity and community are synonymous.⁶

Another study of the Internet's impact observed, "People are using the Internet to gather information in increasing numbers with a clear upward trend, though whether this is resulting in actual learning is unclear."⁷

Regardless of which perspective is most accurate, it is undeniable that the American citizen faces great obstacles to the discharge of her civic duty. The obstacles seem to fall into four overlapping categories, which will be discussed next:

- A. The issues are more complex than ever.
- B. The volume of information the citizen encounters is greater than ever.
- C. The distortion and bias embodied in the information barrage, and its resulting untrustworthiness, are great, perhaps greater than ever.
- D. The opportunities, both of time and place, available to the individual for careful, reflective study of the issues seem smaller than ever.

Each of these obstacles has been studied in depth by scholars in various fields. They will only be summarized here, however, as what matters now is the combined effect of these obstacles—discouragement. Citizens increasingly feel confused, distrustful, overwhelmed, and resigned when considering their ability to understand issues and express opinions on them with confidence and clarity. This trend was confirmed

in the recent finding “that people under thirty today are less likely than they were fifty years ago to read books or newspapers, watch the news on television, or have interest in and factual knowledge about politics.”⁸

A. COMPLEXITY

Considering the complexity obstacle, we find an array of daunting issues. Speaking even of the early years of the twentieth century, one scholar observed, “The sea of modern life threatened to engulf everything before it. Everywhere observers recognized a growing complexity of human affairs.”⁹ Certainly life has not gotten any simpler in the succeeding decades and on into the twenty-first century.

To name some of the most prominent recent issues, we confront global economic interdependence and recession, climate change, international terrorism, diminishing quality in public education, the health care crisis, abortion, stem cell research, medical marijuana, political campaign financing, same-sex marriage, and the futures of Iraq and Afghanistan.¹⁰ Under most of these broad topics, there also are more specific questions and subtopics, which often are difficult to understand separately and which cumulatively make the broader issue seem way beyond our ken. For example, how much of global climate change is caused by human influences? What is the future for climate temperatures if we do nothing? Who is the pertinent “we”? What are the most promising technological, economic, and legal steps to take to diminish the rate of global warming? What are their benefits and costs, particularly as related to economic growth and jobs? Can we do better than just slow the rate of warming and instead actually reverse warming trends?¹¹

Similar batches of subsidiary questions could be identified for most of these high-profile, much-talked-about issues. There undoubtedly are experts who can offer informed answers to many of the questions. But can the nonexpert, the ordinary citizen, hope to understand the questions and evaluate possible answers to any of them? Again, it is not easy, as we face “staggeringly complex issues of war and social justice” and more.¹² Nevertheless, we talk about these issues, float our ideas about what should be done, and try to make the best choices we can among political candidates who claim to have good answers and to be well equipped to lead us toward good solutions.

In other words, we try to cope, and sometimes even try just to deny how complicated things are:

You and I exist in an extraordinarily complicated environment, easily the most rapidly moving and complex that has ever existed on this

planet. To deal with it, we *need* shortcuts. We can't be expected to recognize and analyze all the aspects in each person, event, and situation we encounter in even one day. We haven't the time, energy or capacity for it. Instead, we must very often use our stereotypes, our rules of thumb, to classify things according to a few key features and then to respond without thinking when one or another of these trigger features is present.¹³

Facing the complexity problem, we understandably attempt to simplify issues or ignore them. "People turn away from news that confuses them."¹⁴ Even the Internet, with the vast variety of information it makes readily available, does not overcome this tendency: "While the Internet is freer and more accessible than any media or medium in history, users can use it to avoid anything with which they may disagree or simply choose not [to] see."¹⁵

Attempting to find "shortcuts" to simplify our cognitive processes, at times we do thoughtfully seek reliable sources of helpful information on issues. However, we often instead just retreat and do not even try to find added knowledge or sources of guidance to help us function as well-informed citizens. It thus has been suggested that voter turnout in America "may be low because people are called on to vote so often and on so many things... The number and complexity of items on the typical American ballot adds to the information costs; the fact that there always is another election just around the corner makes it easier to rationalize not doing one's civic duty."¹⁶

"Because of the increasing tendency for cognitive overload in our society, the prevalence of shortcut decision making is likely to increase proportionately."¹⁷ One shortcut is loyalty to a political party that appears generally to favor issue positions the individual finds appealing. When such loyalty rests on the individual's own continuing effort to understand the issues and to confirm that the party's values correspond with his own, then reliance on the party is a constructive shortcut. It is a practical and sensible substitute for a more intensive, personal comprehension of issues. It is a form of "rational ignorance," a choice to "leave the political information gathering to others" as "our jobs, families, hobbies, and other interests leave us little time for in-depth study of political issues."¹⁸

In contrast, if adherence to party positions lacks such personal inquiry and a readiness to occasionally stray from the party line, and instead becomes merely blind loyalty, then this shortcut is nothing more than a default. It is an abdication of personal engagement with the issues. Growth in the numbers of so-called independent voters,

who shun unwavering party loyalty, would seem to be encouraging in this respect.¹⁹

Nevertheless, the challenge of grappling with complex issues, and the temptation to oversimplify or ignore them, persist. If the challenge is not met and the temptation not resisted, a thoughtful, informed citizenry diminishes, as the following two statements rather harshly assert:

Too often in the great debates of our time . . . each side envisions a particular characterization of the opposition. In reality, the positions on either side of these debates are often well argued. The debates exist because the issues in question are complex. To ignore this complexity is to become a characterization yourself.²⁰

But closing one's mind to complexity isn't mere intellectual laziness; it's a fundamental evasion of freedom.²¹

Further aggravating our difficulty is the tendency of news media, especially television, to blur the line between information and entertainment, at the expense of the former. This tendency has been criticized, but remains strong:

Today's news is pseudo-news, entertaining bits of fluff that lead viewers and citizens away from the really important information that truly affects our lives . . . There is a real conflict in the news business between news that is useful and necessary—news that news directors think people *need* to know about, even if it is unpleasant or difficult—and news that news directors think that people *want* to know about and will watch—no matter how inane or pointless.²²

As Dan Rather put it, television news has been “dumbed down and tarted up.” The purpose of television news now seems primarily to be to “glue eyeballs to the screen” in order to build ratings and sell advertising. This was a point made by Jon Stewart, the brilliant host of *The Daily Show with Jon Stewart*, when he visited CNN's *Crossfire*: There should be a distinction between news and entertainment. It really matters. The subjugation of news by entertainment seriously harms our democracy: It leads to dysfunctional journalism that fails to inform the people. And when the people are not informed, they cannot hold government accountable when it is incompetent, corrupt, or both.²³

For their part, the news media do little to provide a model of public discourse. Media commentary, attuned to the standards of spectacle and diversion, is typically confrontational and ideological, consisting of exchanges among people who have already made up their minds. Media accounts tend to focus on personalities rather than issues.²⁴