

**Beyond Judging: Considering the Critical Role of
Non-Judicial Actors to a Functioning Legal System**

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The remote and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.
Holmes, OW, The Path of the Law, 10 Harv.L.Rev. 457 (1897)

When Justice Holmes first gave this advice to Boston University law students in 1897, he was obviously encouraging his audience to be aware of and to appreciate the transcendent qualities of the law. In the same speech he warned the young lawyers about the legal community's propensity to explore substantive legal niches so intensely that it failed to appreciate broader legal principles:

Applications of rudimentary rules of contract or tort are tucked away under the head of railroads or telegraphs or go to swell treatises on historical subdivisions such as shipping or equity, or are gathered under an arbitrary title which is thought likely to appeal to the practical mind, such as mercantile law.²

Holmes urged his audience to look beyond "text books and the case system" to gain a broader appreciation for the law; "If a man goes into law it pays to be a master of it, and to be a master of it means to look through all the dramatic incidents and try to discern the true basis of prophecy."³

Yet, Holmes had a practical side as well. After all, he is the Justice who explained that "The life of the law has not been logic, it has been experience."⁴ He encouraged practicing lawyers to master the art of legal "prophecy" because predicting legal outcomes is precisely why most clients seek out lawyers.

Modern practicing lawyers cannot be faulted for considering incompatible Justice Holmes' directives to cherish the transcendent qualities of law while mastering the art of prophecy. Indeed, modern lawyers might consider Holmes' competing directives to be

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² Holmes, OW, The Path of the Law, 10 Harv. L.Rev. 457 (1897).

³ Id.

⁴ Holmes, OW, The Common Law (1881).

mutually exclusive. On the one hand, the practicing lawyer must ply his trade in such a way as to gain the experience and background to understand the “life of the law.” But, how is one to know which experiences matter? How does the law advance through experience? In short, how does one translate experience to law? More problematic still is Holmes’ invocation of the “universal law”. How does the practicing lawyer gain insight into the “universal law?” How do we recognize the elements of the “universal law?” What is the source of the “universal law?” And, more fundamentally, is there a “universal law?” Holmes admonitions call on lawyers to understand the profession on two levels: the first involves the experiences that make up the practice of law and the second is that combination of factors that makes what lawyers do and the fora in which they do it, important.

Regrettably, Holmes warnings foretold an ever present tension for the practicing modern lawyer: while she longs to understand more broadly how the law operates writ large, she must commit her time to becoming demonstrably expert in a specific practice area in order to assist her clients in navigating an increasingly complex legal landscape. All too often, the tension is resolved when young lawyers abandon their efforts to understand the larger forces at play in the law and resign themselves to pursuing specific knowledge or resolving immediate problems at the expense of deeper understanding.

The tension between specialization and universality is not, however, unique to practicing lawyers. Academic lawyers likewise have grown predisposed to focusing so completely on the particulars of their chosen disciplines that they have hardly a moment to consider how their work fits into a larger picture. At the risk of offending all non-judicial lawyers, one might argue that it is this divide between the specific and the general that renders practicing lawyers less versatile and academic lawyers less relevant than their predecessors. Nowhere is the separation between specialization and universality more pronounced than in the realm of what was once considered “trial practice” but has come to be referred to as “litigation.” While litigators devote countless hours to the nuances of “e-discovery”, “deposition training” and “effective advocacy in mediation”, academic lawyers who study legal systems, particularly legal philosophers, bore deeper and deeper into subjects like judicial decision-making, the ideological bias inherent in judicial systems or the linguistic deconstruction of judicial opinions. As both camps of the legal profession spin themselves into increasingly tighter and less useful orbits, the profession, as a whole, spends very little time analyzing what we do and why it matters to a properly functioning legal system. One worries, that the profession may lose its grasp on those aspects of a legal system that bind it to a society and that bind a society to it.

The press of current events, however, may prompt both practicing and academic lawyers alike to look up from their work and consider the larger context of their efforts. Within the United States, practitioners and legal commentators are trying to describe and react

to post-recession changes to the legal universe that are so broad-based and transformative that they have earned the moniker “The New Normal”. Clients, emboldened by a surplus of lawyers, demand increasingly esoteric specialization from their counsel. Meanwhile, fundamental components of the American Justice system have fallen into disuse and neglect. Jury trials have all but disappeared on the civil and criminal fronts and discovery costs have driven clients to identify dispute resolution processes that are both cheaper and more efficient than participation in the American justice system. Lawyers, especially trial lawyers, are fast becoming obsolete. The trend toward practical, non-judicial problem solving is not lost on law schools. As fewer and fewer clients opt for the ordeal of litigation, demand for young lawyers has atrophied. Law schools have responded by reducing class size, expanding the curriculum to offer more clinical and practical classes, compromising student entrance standards and reducing the size of the faculty. In short, the legal community in the United States is contracting.

Paradoxically, other nations continue to look to the United States legal system as a model for a stable and fair judicial system. Developing nations, both as a condition of receiving US foreign aid and of their own volition, adopt US procedures and practices as well as substantive US law. Our politicians insist that the American jury trial is “The Gold Standard” for administered justice even as participants in US courts prove less and less inclined to avail themselves of the process. The developing world looks to the United States judicial system for practices and processes that may help their national justice systems keep pace with economic and political development. The United States stands more than willing to offer those emerging systems assistance in developing legal systems capable of inspiring fidelity to law even if US policy makers do not truly understand the ingredients of the US system that are likely to generate that fidelity. Remarkably, much of the exporting of US legal doctrines, procedures and practices is ostensibly done to promote respect for the “Rule of Law”, a phrase that Professor Brian Tamanaha points out, is frequently uttered and rarely understood.⁵

This article will identify, from one practitioner’s point of view, some elements of the US justice system that make the US justice system worthy of emulation. The article will argue, however, that the worthy elements of the US justice system are not likely the technical procedures or highly refined substantive law that domestic lawyers identify as the most advanced aspects of the US justice system. To the contrary, the article will argue that the most essential elements of the US justice system are precisely those democracy promoting components of the system that are disfavored as messy and costly. Before exploring those elements, however, we will first examine the paradox of a legal intelligentsia that proselytizes about the US justice system abroad while lamenting its tarnished record at home. Second, we will consider how US legal philosophers’

⁵ Tamanaha, *The Rule of Law* (2009) at 3.

conceptualization of the US legal system has evolved in a direction which actually diverts attention from some of the most unique, fundamental and democratizing aspects of the system. Third, we will consider the origins of those democratizing aspects of the system that are so critical to the maintenance of the bonds which bind the system to society and society to the system. Finally, we will consider whether those democratizing aspects of the US legal system might properly reflect a larger principle favoring the collective wisdom of individuals over the specialized knowledge of a select few.

A. The Paradox of Promoting Abroad a Justice System That We Choose to Avoid at Home

It is hardly controversial to note that, in the wake of the economic collapse of 2008, profound changes in the American legal system have emerged that threaten time-honored judicial traditions and further tarnish the standing of the legal profession.⁶ It is only slightly more controversial to point out that the profound changes in the US justice system have actually been on the march for several decades. More than a decade ago in remarks to the American Law Institute, Chief Judge Patrick Higginbotham of the Eleventh Circuit described the combination of circumstances that were changing the US justice system. Judge Higginbotham pointed out that a number of factors were combining to create the perception that the US justice system was a fundamentally flawed, costly and unattractive mechanism for the resolution of disputes:

. . .but I realized as I began to look at some data over this 30-year period that something is changing in a fundamental way, because over the past 30 years – and here is the point I want to raise for you – our trial courts are ceasing to be trial courts; that can have fundamental consequences.

You chart the cases that are tried in the United States District Court, and what you will see with all the categories of cases, in each of the categories substantively over which records are maintained, there has been a decline for 30 years. Remarkably, you chart it from the upper left hand corner, it goes right down to the lower right hand corner, on the criminal side as well. . .

Magistrate judges, and I mean no criticism of them as an institution; they do exactly what I would do if I were a magistrate judge: They are writing opinions. Discovery has become an end in itself facilitated by the nigh open access to magistrate judges. That is where the litigation process is. We are not trying cases, the cases are not filed with the expectation that they will be tried, they are filed with the expectation that they are going to be settled. You cannot maintain a standard of relevance that has meaning and content, no matter how you write it or how careful you are. Not even Ed Cooper and our other brilliant Reporters

⁶ McCormack and Bodnar, “Honesty is the Best Policy, It’s Time to Disclose Lack of Jury Trial Experience” (2010) 23 *Geo. J. Legal Ethics* 155, 156-157.

of the rules are able to articulate meaningful measures of relevance when a trial is not a real part of the process. The fact is that it has to be measured against trial and lawyers increasingly don't know what trial is. You are out wallowing around taking discovery, and it is not going to be tried, the people who are taking the depositions couldn't try it, and that is one of the reasons it is not going to be tried (*Laughter*). . .

What consequences does this have on this process? Staffs, growing staffs. We (the Fifth Circuit) have over 40 lawyers in New Orleans who are there processing these cases. My colleagues have four law clerks; the district court, they have law clerks; magistrates, they have law clerks; clerks have lawyers hired to process these things, increasing bureaucracy. This is an administrative agency, and that is what it looks like, and talks like. The United States District Courts shouldn't function like the State Highway Department, because when they do, the quality of the people who are willing to stand for these jobs, which already pay less and will now lack the prestige and the sense of contribution that draws people that you want to the bench; they will not be there. And those courts will not be there when you need them.⁷

Subsequent empirical evidence suggests that Chief Judge Higginbotham's unflattering assessment of the US justice system may be spot on. In particular, the number of cases resolved by jury trial has long been declining at an alarming pace. According to McCormack and Bodnar, the result of the decline is that "there is an entire generation of litigators for whom trial is merely a theoretical concept."⁸ Writing primarily on the subject of civil litigation, McCormack and Bodnar echo the voices of numerous commentators lamenting the disappearance of the jury trial.

The days of the trial lawyer are essentially gone. Even the term "trial lawyer" has fallen out of favor over the past four decades as a majority of "trial lawyers" now describe themselves as litigators. Since the 1960's there has been a steep decline in the actual number of civil jury trials and the number of civil jury trials as a percentage of the cases filed in both state and federal courts. While there is no single reason for the decline, the ever increasing costs of trials, the increased availability of alternative dispute resolution ("ADR") methods, and clients' loss of faith in the jury system have all been contributing factors. . .⁹

McCormack and Bodnar recognize that, for practicing lawyers, "[s]ome may view this trend of moving from "antiquated" jury trial skills to "modern" [Alternative Dispute

⁷ Proceedings of the American Law Institute, Annual Meeting, May 15, 2001 at 173-177.

⁸ McCormack and Bodnar *supra*, note 6 at 156.

⁹ *Id.*

Resolution (ADR)] skills as a natural and beneficial evolution. It certainly appears to be the model of most large civil law firms.”¹⁰ That evolution, however, is not without its consequences for uninformed clients:

A litigator’s lack of jury trial experience can potentially subject a client to numerous and subtle disadvantages regardless of the forum used to resolve the dispute. Specifically, this lack of experience has the potential to negatively affect a litigator’s ability to (1) objectively advise whether to pursue a trial or an alternative resolution forum; (2) effectively and efficiently conduct pre-trial discovery; (3) make accurate ‘jury-value’ predictions; (4) objectively assess a settlement offer, (5) effectively negotiate the best possible settlement for the client; and, (6) effectively assist the client in mediation.¹¹

The more troubling fact about the disappearance of the jury trial is that lawyers ascending to the bench frequently have little or no jury trial experience. While Bodnar and McCormack do not take up the issue of an inexperienced bench, as it is tangential to their primary thesis, Judge Higginbotham met the issue head-on in another article describing his concerns about American trial courts:

The decline in trials has another defining characteristic: it has created over time a judiciary and a bar with a new shared culture, which takes as a given that civil cases are to be settled if summary judgment is not granted. With fewer trials there are fewer lawyers with trial experience and, consequently, fewer judges taking the bench with trial experience. When Clyde LaPorte and Attorney General Herbert Brownell set the experience required for appointment to the federal district court, their letter of agreement insisted that the American Bar Association (ABA) should not find a person who lacked “substantial trial experience” to be qualified to preside over a trial court, and that trial experience was also important for a prospective nominee to the court of appeals. This understanding could not practically be enforced today, given that only prosecutors and criminal defense lawyers regularly try cases.¹²

Surprisingly enough, the gradual extinction of the jury trial is as real for the criminal bar as it is for its civil counterpart. In the criminal arena, sentencing guidelines, repeat offender statutes and minimum mandatory penalties have significantly reduced the number of criminal cases being tried.¹³

¹⁰ Id. 157.

¹¹ Id. at 157.

¹² Higginbotham, P., *The Present Plight of the United States District Courts*, 60 Duke L.J. 745, 755-56 (2010).

¹³ Id. at 756. *See also*, Rakoff, *infra*, note 28 at 3-4.

The bench and bar's aversion to jury trials is not likely to be reversed any time soon. Indeed, once the jury trial becomes something unusual and exotic, lawyers, judges and clients will have to overcome substantial uncertainty before returning to the jury trial as a mechanism for dispute resolution. McCormack and Bodnar note that:

Unfortunately, once developed, a bias against jury trials is likely to reinforce itself in a positive-feedback-system manner: litigators will not risk a jury trial because they lack previous jury trial experience – without trying jury trials, litigators never gain jury trial experience – lack of experience influences future decisions not to pursue a jury trial . . . and round and round the system churns, reinforcing the bias as it goes.¹⁴

More to the point for present purposes, McCormack and Bodnar identify the consequences of this positive feedback loop on the system as a whole when they observe: “[w]ithout jury verdicts, the public ceases to have a function in determining issues like reasonableness, causation and damages. Questions of evidence are never presented. Jury-value ceases to be known in most categories of claims. Settlements are then controlled by the corporate repeat players in the system on one side and individual participants on the other.”¹⁵ As discussed later in the article, the demise of the jury trial is but one facet of the bureaucratization of the American legal process. While Bodnar and McCormack are principally concerned with the lack of jury trial experience within the practicing bar and the resulting misperceptions of the general public about the central place of the jury trial within the American legal system, they do not frequently turn their attention to the unintended consequence of those developments: namely, that the democratizing aspects of the American legal system are falling victim to the unwillingness of lawyers and judges to use them as they were intended.

Yet, policy makers in the United States certainly believe that there are aspects of the American justice system that warrant replication. As Professor Tamanaha reports, “According to an article in *Foreign Affairs*, several decades and hundreds of millions of dollars have been expended on developing the rule of law around the world with minimal positive results.”¹⁶ What precisely does it mean to export or develop the rule of law in developing countries? In *Exporting U.S. Criminal Justice*, Allegra M. McLeod details US policy to promote the exporting of principles and practices of the United States criminal justice system. McLeod notes that “[i]n the years leading up to and following the end of the Cold War, the US government embarked on a new legal transplant project carried out through the foreign promotion of US criminal justice techniques, criminal

¹⁴ Id. at 18.

¹⁵ Id. at 24.

¹⁶ Tamanaha at 4 (citing Thomas Caruthers, “The Rule of Law Revival” 77 *Foreign Affairs* 95 (1998)).

procedures, and transnational crime priorities.”¹⁷ McLeod observes about the US policy of exporting criminal justice practices:

In the view of some, this amounts to legal imperialism: an ‘open and declared imposition on the part of foreign powers.’ Others maintain that ‘the core of democracy is the Rule of Law, and the [US Justice Department’s] Criminal Division is its greatest ambassador.’ Alternately celebrated and condemned, US efforts are associated with a ‘revolution in Latin American criminal procedure, the introduction of plea bargaining in Russia, a new rights-protective criminal procedure code in Indonesia, prison construction in Mexico, and new transnational crime statutes in states across the globe.’¹⁸

McLeod’s writes to inform us of what she suggests is misguided US policy that may actually have negative consequences for the intended beneficiaries:

[m]y central thesis is that US criminal justice export has played a critical role in shaping how states and non-state actors respond to a range of global challenges – namely with reference to US-style criminal justice frameworks – but that this approach suffers from a deep democratic deficit. With little regard for the concerns of the citizens of foreign states, US criminal justice export incentivizes foreign adoption of US crime control priorities, perpetuates US-style legal institutional idolatry (which is often tied to systemic dysfunction) and impoverishes our collective capacity to imagine alternative, more effective and more humane avenues of responding to shared problems.¹⁹

McLeod suggests that the “democratic deficit” she identifies is the cause of discontent among national actors in countries to which the United States exports criminal justice. She notes that:

In his study of the Latin American procedure reforms, Professor Langer relates anonymous interviewees’ comments that Department of Justice officials were ‘explicitly exporting the US criminal procedure code.’ Interviewees related that it ‘was very difficult to imbue the DOJ officials with the vision that the reason they were going overseas was not to export the US model, but rather to let the country decide the type of justice they wanted to have.’ Even DOJ officials themselves apparently conceded that ‘DOJ pushed the US model on everybody and was very insensitive culturally’ . . .²⁰

¹⁷ McLeod, *Exporting U.S. Criminal Justice*, 29 *Yale L. & Policy Rev.* 83 (2012)

¹⁸ *Id.* at 84.

¹⁹ *Id.* at 88.

²⁰ *Id.* at 126-27.

The absence of the recipient country's democratic acceptance of reforms advocated by the US missionaries means that there is little reason to believe that the reforms generate the desired advances in adherence to the "rule of law". McLeod notes that:

Nevertheless, no reasoned theory explains how these practices will concretely benefit recipient states or other interests. Rather, US criminal justice export programs merely assume these practices will bring about stability, reduced crime, and economic growth. In some contexts, this adherence to US priorities manifests as an unwavering allegiance without consideration of actual effects on the ground, and wholly lacks any empirically or theoretically substantiated causal story connecting US-promoted reforms to pledged outcomes. In other instances, the confusion of weak association with causation functions as support for uncritical attributions of success to US projects – demanding, in effect leaps of faith.²¹

Aside from the obvious overtones of imperialism, McLeod's observations about US programs that export US criminal justice procedures and practices raise several important questions about whether US policy makers have packaged for export those elements of the US justice system most essential to its operation.

It is hard to reconcile the observations of Higginbotham, Bodnar and McCormack and many other commentators about the withering away of important US justice system institutions and McLeod's observations about the US's enthusiastic export of that system to foreign lands. In the hopes of minimizing the cognitive dissonance, perhaps it is wise to revisit Holmes' ruminations on the subject of how a judicial system's operations impact those "*general aspects of the law . . . which give it universal interest.*". Plowing that field will require us first to consider the substantial contributions of legal philosophers on the subject of justiciable outcomes. As we shall see, considering the work of legal philosophers leads predominantly to the theoretical study of judicial decision-making. We are likely to raise questions about whether judicial decision-making is as central to the work of a legal system as the volume of work devoted to the subject by legal philosophers might suggest. Indeed, in this article I will argue that the legal philosopher's preoccupation with judicial decision-making might actually have detracted from a broader analysis of legal systems as a whole. To fully consider that possibility the article will resurrect some historically significant concepts central to the study of legal systems not the least of which is the notion of reciprocity which was widely championed by Professor Lon Fuller but which traces its roots to ancient Greece and Rome. Finally, the article will discuss how important reciprocity is to the proper functioning of a healthy legal system. In particular, the article will explore how historical notions of reciprocity

²¹ Id. at 139.

translate into modern concepts of “public reasoning” and how important the notion of reciprocity is to the effective operation of legal systems.

B. Philosophers and Judges

Academic legal philosophers are prone to consider the effectiveness of a legal system from the perspective of the jurists who preside over it. There are several complimentary explanations for the academic predisposition to study judges; first judges are simply easy targets since they issue rulings that display the quality of their reasoning and typically carry their names. Second, judges are certainly more readily identifiable, in part due to their recurring roles in the legal drama, than jurors, witnesses and other actors who typically recede into the shadows after their singular performance on the legal stage. Third, some of the ground-breaking work of the American Legal Realists established the parameters of the discussion about legal systems and brought the focus of observers to the realities of judicial humanness. Moreover, the academic focus on judicial actors is not surprising since most legal philosophers have been trained as lawyers and analyze the progress of law through reported decisions (usually appellate decisions) that aspire to doctrinal clarity while enjoying the benefits of reasoned reflection.

For all of these reasons, the academic focus on judicial actors certainly permeates the literature of legal philosophy. Indeed, the first sentence of Ronald Dworkin’s seminal work, “Law’s Empire” reads: “It matters how judges decide cases.”²² At some level, legal philosophers seem to default to the study of judicial decision-making despite their best efforts to the contrary. For example, in his 2003 work on “virtue jurisprudence” Professor Lawrence Slocum posits that “a full account of the implications of virtue ethics and epistemology for legal theory is a very large topic.” He goes on to recognize that the issues raised by virtue jurisprudence include the proper ends of legislation, developments in the law of legal ethics and the impact of virtue jurisprudence on the age-old debate between natural law theorists and their opponents. Having identified such a broad range of issues inherent in the concept of virtue jurisprudence, Slocum proceeds, however, to focus his attention on the “implications of a virtue-centered approach for a normative theory of judging.”²³

By defaulting to the question of how judges decide cases Dworkin and Slocum are in good company. In the groundbreaking published debate between Professor Lon Fuller and Professor H.L.A. Hart, the two preeminent legal scholars of their day explored some of the issues that have come to dominate legal philosophy in the half century since, including the question of how judges decide cases. In “Positivism and the Separation of

²² Dworkin, R., *Law’s Empire*, (1986) at 1.

²³ Slocum, L., *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, Loyola Law School Research Paper no. 2003-2004 (2003) at 181.

Law and Morals,” Hart introduced the concept of judicial decision-making by recounting how the “Legal Realists” of the 1930’s exposed the reality of judicial bias by examining how a judge might decide a case involving a “Legal rule [that] forbids you to take a vehicle into a public park.”²⁴ Hart pointed out that whether someone may bring an airplane into the park turns on one’s definition of “vehicle”. Hart proceeded to explain that, when interpreting legal rules, “[I]here must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out.”²⁵ Hart called these interpretational conundrums “problems of the penumbra”²⁶ Using the problems of the penumbra as a stepping off point, Hart turned to the question of whether judges faced with such problems are actually forced to decide not what the law is, but, what the law ought to be. The thoughtful observations set forth in Hart’s work framed many of the doctrinal issues that dominate the jurisprudential debate today.²⁷

The evident preoccupation of legal philosophers with the act of judging is, however, detrimental to a full appreciation of the American judicial system for several reasons: First, it inexplicably ignores or at least subordinates disproportionately the roles of non-judicial actors to the role of the judge. The United States Constitution and the Constitutions of most states provide for trial by jury. The Founding Fathers considered the guarantee of trial by jury to be one of the most fundamental protections of individual liberty. As Thomas Jefferson put it “I consider [trial by jury] as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.”²⁸ Professor Landsman has chronicled the central place of the jury system in the evolution of American political principles:

It is not surprising that in the 1760’s, as the disputes between the colonies and the mother country sharpened, the jury was in the thick of the confrontation and often rejected royal decrees. This became so serious a challenge to Imperial authority that London, through a series of acts, sought to shift cases out of colonial courts where juries held sway into forums like the Admiralty Courts where no jury was required. The colonial reaction was swift and challenging. The Stamp Act Congress of 1765 declared: ‘trial by jury is the inherent and invaluable right of every British subject in these colonies.’ The First Continental Congress a decade later echoed the same view: ‘the respective colonies are

²⁴ H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *Harv.L.Rev.* 593, 606-607 (1958).

²⁵ *Id.*

²⁶ *Id.*

²⁷ For an excellent discussion of how Hart set the tone of the debate within legal philosophy *See*, Priel, D., *H.L.A. Hart and the Invention of Legal Philosophy*, *Comparative Research in Law & Political Economy*. Research Paper N0. 17/2011, <http://digitalcommons.osgoode.yorku.ca/clpe/55>.

²⁸ Rakoff, *Why Innocent People Plead Guilty*, *The New York Review of Books*, <http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilt>. . .

entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the law course of that law.” Finally, when the colonies cast off obedience to the Crown in the Declaration of Independence, they listed as a key grievance denial of ‘the benefits of trial by jury.’ In the Revolutionary Era the jury was the voice of the people, the democratic outlet for sentiments otherwise stifled by an Imperial bureaucracy unwilling to heed the opinions of the governed.²⁹

Professor Landsman goes on to echo Jefferson’s sentiments about the democratizing role of the jury:

The jury’s development was far from finished but its core role as a democratic counterbalance to government authority in both criminal and civil matters was clearly established. Looking at the American jury some fifty years after the adoption of the Constitution, the celebrated French observer, Alexis de Tocqueville, noted its essentially ‘political’ nature. By this he meant that the jury was a critical attribute of democracy, ‘one form of the sovereignty of the people. . . as direct and extreme a consequence of the dogma of sovereignty of the people as universal suffrage.’³⁰

While the declining use of the jury trial is the most frequently cited example of the bureaucratization of the American judicial function, that bureaucratization also has tangential consequences that are equally troubling. For example, evidence is supposed to find its way into courtrooms through witnesses. Percipient witnesses and experts alike inform the process and promote the righteous disposition of disputes. Moreover, in an adversary system, arguments and evidence make their way to the trier of fact only through the thoughtful presentation of advocates. Judges are discouraged from superimposing on the parties their judicial sensibilities of how a case should be tried or what arguments a party should make, even where the judge’s instincts might be beneficial to a party’s position. Indeed, the central role of advocates is nowhere more evident than in a federal criminal case where, arguably, the entire dispute is framed by the prosecutor’s charging decisions.³¹ Yet, when we focus disproportionate attention on the decisions of judicial actors we tend to minimize the inputs from other participants. Thus, studying a judicial system by focusing primarily on the decisions of judges is akin to trying to learn how to bake a cake by tasting other cakes: while the observer’s taste buds are tickled and his waistline expands, in the final analysis, despite tasting hundreds

²⁹ Landsman, Stephan, *The Impact of the Vanishing Jury Trial on Participatory Democracy*, Pound Civil Justice Institute, 2011 Forum for State Appellate Court Judges at 5 (2011).

³⁰ *Id.* at 6.

³¹ See, Jed S. Rakoff, Why Innocent People Plead Guilty, <http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilty/>.

of cakes, he knows little more about how to make a cake than when he first set out on his quest.

Accordingly, it is a central thesis of this article that an ordinary citizen's respect for legal processes and her fidelity to law is, at least in the American judicial process, a function of the operation of the process through juries and other mechanisms of citizen participation. In the final analysis, the disposition of a lawsuit is frequently the product of a collection of people, some professionals, some not, who have joined together for the sole purpose of bringing about the orderly resolution of a dispute. Extraordinary focus on the work of the judge misses the point that justice is not the exclusive province of state-sanctioned Solomons. After all, the essential goal of any judicial system is to cultivate non-lawyer commitment to the system; convincing lawyers to accept the binding authority of a judicial decision amounts to preaching to the converted. The real conversion of souls involves convincing the body politic that the judicial branch of government is sufficiently fair, predictable and just to warrant their allegiance. To that end the participation of average people in the disposition of important disputes is instrumental to most common citizen's fealty to the American legal system.

Second, focusing primarily upon the judicial application of legal rules to "hard cases", as Dworkin describes them or "problems of the penumbra" as Hart characterizes them, implies that the body politic will evaluate the legal system on the success of judges in correctly deciding cases that fall beyond the bounds of established authority. The historical evidence suggests otherwise. Few legal historians would argue that decisions such as *Dred Scott v. Sanford*, *Plessy v. Ferguson* and *Korematsu v. United States*, deserve universal approval for the wisdom and reasoning expressed there.³² Yet, on the same day that the Supreme Court decided those cases it decided other cases, each with its own disappointed litigant, and the system continued to function. Indeed, history suggests that ordinary citizens understand that some cases are simply harder than others. *Gore v. Bush* is perhaps the clearest and most recent example of the American people's evident recognition that judges must decide hard cases – one way or another – and the body politic will accept that decision, even where it disappoints one-half of the population.

Even disagreement with judicial decisions in hard cases that clearly impact the average person's moral sensibilities do not result in wholesale abandonment of the judicial process. Consider for a moment *Roe v. Wade*, arguably the most controversial Supreme Court decision of our time. Whatever one's views on the issue of women's reproductive rights or the quality of Justice Blackmun's opinion, there can be little doubt that a significant portion of the American population believes that the Supreme Court did not decide *Roe v. Wade* correctly. While the same might be said of the Supreme Court's

³² For an excellent exegesis on the decision in *Dred Scott*, *Plessy* and *Korematsu*, see Justice Breyer's discussion of those cases in "Making our Democracy Work: A Judge's View, Knopf (2010).

decision in any number of other controversial cases, there is little doubt that *Roe v. Wade* touches on moral and legal issues that have a unique capacity to stir the passions of observers. Yet, opponents of *Roe v. Wade* have not, on the whole, abandoned the American judicial system. To the contrary, in courtrooms all across the nation, on a daily basis, ordinary citizens, legal professionals and jurists committed to the proposition that *Roe v. Wade* was wrongly decided nevertheless lend their time and efforts to assist in the disposition of ordinary disputes and, by most accounts, are just as committed to the justness of those resolutions as they are opposed to *Roe v. Wade*. Thus, experience suggests that the ordinary citizen's sense of obligation to the American legal system is not based upon how judges decide hard cases and certainly not upon judges deciding hard cases correctly.

Another important reason to avoid the legal theorists' trap of over-emphasizing the work of judges is that few actual judges compare favorably with the ideals described by legal philosophers. While Dworkin, Hart and Slocum have done an admirable job of describing the personal attributes we would all like to see in a judge, it is likely that they have missed the mark for at least three reasons: First, there is little reason to believe that most judges will possess the attributes of a virtuous jurist as described by Slocum and certainly not all of the attributes possessed by Hercules as described by Dworkin. In many jurisdictions, judges are elected. They must first decide to throw their hats into the political ring thereby inviting the full weight of public scrutiny attendant to that decision. They also frequently must proceed through the same vetting process that other candidates endure and they must impress the same political operatives that other political candidates set out to impress. Anyone who has closely observed this process recognizes that it favors the ambitious and ego-centered prospective jurist. Moreover, it would be naïve to assume that those political operatives that dole out party endorsements, union or trade association endorsements or solicit political contributions on behalf of a judge will be as deferential to the "judicial virtues" as we might like. Indeed, it is just as likely that judicial candidates, as ambitious and competitive human beings, will kowtow to their political benefactors and assume the perspective, if not the political ideology, of the political collective from whence they came. Appointed judges suffer a less public but no less comprehensive vetting. They are subjected to judicial selection committees, extensive background checks and political log-rolling in the appointment process. While their pathway to the bench is less of a bare knuckle brawl than that of their elected brethren, it is an ordeal nonetheless. Thus, the process of judicial selection is stacked against the egoless, impartial and non-opportunistic candidates preferred by Slocum and Dworkin and favors instead their politically astute, ambitious and ego-centered counterparts.

Finally, emphasizing the role of judges in deciding "hard cases" involving unsettled law has the almost certainly unintended effect of suggesting that cases involving unsettled

law present the greatest challenges facing the American legal system. Yet, anyone who has ever watched a sporting event knows that, as often as not, the hardest decisions are factual. Was the receiver in bounds? Did he have possession of the ball? Was the infielder's foot on the bag? Deciding the vast majority of these "hard cases" has little or nothing to do with interpreting the rules.³³ Rather, the decision-maker must decide what happened and judges are frequently not the finders of fact that resolve the most critical factual issues. In most cases, absent a waiver of the right to a trial by jury, deciding what happened is the exclusive province of a small collection of ordinary citizens. Juries decide that one of their number drove his car negligently to the detriment of another. They decide how much compensation the injured party deserves. They decide whether the government can prove that a citizen committed a crime. In short, they are the conscience of our communities and we have entrusted to them very difficult factual decisions and, on a remarkably grand scale, we are prepared to live with their decisions. But this article is not intended to be just another paean to the jury trial; the disposition of disputes in the US judicial process has historically involved contributions of citizens in numerous ways - take for instance live witness testimony. Witnesses are the actors in our legal passion play. Their stories, motives, biases, indeed their very credibility, provide the central themes for our legal dramas. Without witnesses and juries, the presentation of legal disputes amounts to little more than an empty, stilted recitation of historical events noticeably devoid of any human feeling. Much also can and will be said here about the critical roles of grand jurors, pro se litigants, the press, learned commentators, and others whose roles either parallel or operate a check on judicial behavior.

C. *Reciprocity and Fidelity to Law*

One of the few preeminent legal philosophers to celebrate the central role of citizen interaction on the operation of the American legal system was Professor Lon Fuller. In

³³ In his seminal work, *Law's Empire* (1986) at 11-15, Ronald Dworkin anticipates the argument that a legal system—at least one in the American tradition – cannot be entirely understood by dissection of the legal reasoning of its judges. Dworkin acknowledges that a legal system consists of a wider variety of influences than mere judicial reasoning. Yet, Dworkin limits his analysis to the more confined topic of judicial reasoning because he concludes that the broader influences of a legal system are simply too unwieldy to be tamed. To prove the futility of the broader inquiry, Dworkin notes that it was Oliver Wendell Holmes:

[w]ho argued most influentially . . . for this kind of 'external' legal theory; the depressing history of social-theoretic jurisprudence in our century warns us how wrong [Holmes] was. We wait for illumination, and while we wait, theories grow steadily more programmatic and less substantive, more radical in theory and less critical in practice.

The reader will obviously have to decide for herself whether Dworkin's explanation meets the objection. Suffice it to say, that this article will attempt to avoid the pitfall identified by Dworkin by confining itself to the operation of a justice system and not focusing on the operation of law as a whole.

his book, “The Morality of Law,” Fuller criticized the legal positivist movement for its emphasis on a hierarchical conception of law making. Fuller recognized that ordinary people play a role in creating law: litigants, juries and witnesses are all essential to the development of the law in the common law tradition. Employing a critique of “analytical positivism” as a vehicle to introduce the concept of an interactive relationship between lawgivers and citizens, Fuller observed:

. . . the analytical positivist sees law as a one-way projection of the authority, emanating from an authorized source and imposing itself on the citizen. It does not discern as an essential element in the creation of a legal system any tacit cooperation between lawgiver and citizen; the law is seen as simply action on the citizen – morally or immorally, justly or unjustly, as the case may be.³⁴

Fuller considered the relationship between lawgiver and citizen central to a complete understanding of a legal system. Indeed, he criticized the positivists for failing to recognize the *social dimension* of a legal system.

The positivist sees the law at the point of its dispatch by the lawgiver and again at the point of its impact on the legal subject. He does not see the lawgiver and the citizen in interaction with one another, and by virtue of that failure he fails to see that the creation of an effective interaction between them is an essential ingredient of the law itself.³⁵

Fuller saw the interactive aspects of a legal system as a natural extension of the reciprocity of duties exchanged between citizens in a flourishing society. According to Fuller, even the most basic of moral and legal duties are marked by the notion of reciprocal obligation: “What the Golden Rule seeks to convey is not that society is composed of a network of explicit bargains, but that it is held together by a pervasive bond of reciprocity.”³⁶ Fuller recognized that imbedded in his argument for a role for reciprocity is the “implicit notion of a sort of anonymous collaboration among men by their which their activities are channeled through the institutions and procedures of an organized society.”³⁷ It is the reciprocal demands that a legal system imposes on lawgivers and citizens alike that *generates fidelity to law*.

Fuller, of course, is not the first thinker to identify the central role that reciprocity plays in the administration of justice. In Book V of the *Nicomachean Ethics*, Aristotle recognized that “the view is also held by some that simple reciprocity is justice. This was the doctrine of the Pythagoreans, who defined the just simply as ‘suffering reciprocally

³⁴ Fuller, *The Morality of Law*, Yale University Press (1964) at 192.

³⁵ *Id.* at 193.

³⁶ *Id.* at 20.

³⁷ *Id.* at 22.

with one another.” Unlike Fuller, Aristotle cautioned not to overstate the role of reciprocity in justice and he noted that reciprocity does not coincide with either distributive or corrective justice. Instead, Aristotle noted, in a foreshadowing of Fuller’s thinking, that reciprocity is important because it is inextricably intertwined with the practice of mutual exchange:

But in the interchange of services justice in the form of reciprocity is the bond that maintains the association: reciprocity, that is, on the basis of proportion, not on the basis of equality. The very existence of the state depends on proportionate reciprocity; for men demand that they shall be able to requite evil with evil – if they cannot, they feel they are in the position of slaves – and to repay good with good – failing which, no exchange takes place, *and it is exchange that binds them together.*³⁸

Cicero likewise identified notions of reciprocity between law giver and subjects. In Book III of *Laws*, Cicero suggests that:

Command shall be just, and the citizens shall obey them dutifully and without protest. Upon the disobedient or guilty citizen the magistrate shall use compulsion by means of fines, imprisonment or stripes, unless an equal or higher authority *or the people forbid it; the citizen shall have the right to appeal to them.* After the magistrate has pronounced sentence, either of death or fine, there shall be a trial *before the people for the final determination of the fine or other penalty.*³⁹

In addition, Brian Tamanaha has identified the reciprocal nature of at least the fundamental laws in Germanic customary laws. According to Tamanaha, under the

³⁸ Aristotle, *Nicomachean Ethics*, Book V, translated by Rachman as reprinted in “The Great Legal Philosophers,” Ed. Clarence Morris (1985)(emphasis added). It is no doubt true that the context of reciprocal exchange discussed by Aristotle was much different than the context Fuller likely had in mind. As described by Professor Tamanaha:

Fifth Century BC Athens, at the height of its glory, took great pride in being a democracy governed directly by its citizens. The overarching orientation of Athenians was toward the *polis*, the political community. Every male citizen over thirty years of age, of whatever class or wealth, was eligible to serve (for pay) on juries that decided legal cases; they also served as magistrates, on the governing Council (with a rotating head), and on legislative assemblies, with positions filled by lot. To insure accountability, magistrates presiding over cases could be charged with violations of the law by complaints from private citizens. Owing to these characteristics “democracy was synonymous for the Athenians with the ‘rule of law’”. Athens did not have a class of legal professionals or state officials who monopolized the production of law or the delivery of legal services. Law was – literally – the product of the activities of its citizens.

Tamanaha *supra* at 7.

³⁹ Marcus Tullius Cicero, *Laws*, Book III, as reprinted in Morris *supra* at 53.

“right of resistance” the king was dependent upon the approval of his subjects in order to retain his crown.

The legendary Germanic “right of resistance” according to which any king who breached the law was subject to abandonment by the people, was a stark manifestation of the belief of the supremacy of law over kings. The king and his people both stood under a mutual obligation to preserve the law from infringement or corruption and in some cases when the king clearly failed to do his duty we find his subjects taking matters into their own hands and deposing him. *The key underlying notion was fealty, in which both ruler and ruled were bound to the law; law imposed reciprocal, albeit unequal, obligations that ran in both directions, including loyalty and allegiance.*⁴⁰

The long intellectual history recognizing the connection between reciprocal exchange and fidelity to law is important when one considers the intellectual moorings of those strains of jurisprudence that would emphasize the consequences of judicial decision-making (at the expense of precedent and predictability) or the ideological or class based analysis (frequently to highlight historical systematic oppression or marginalization). Observers over the centuries have recognized that it is precisely the reciprocity of exchange that imbues a legal system with its legitimacy. Those who favor outcomes based upon consequentialist judicial decision-making models or ideological decision-making models might be hard pressed to identify a unifying principle with as powerful a historical presence as reciprocal exchange.

In light of the long jurisprudential tradition acknowledging the role of reciprocity in law, why have so many legal philosophers abandoned the study of reciprocity in favor of deeper and deeper dives into judicial decision-making, judicial bias and meta-jurisprudence? One possibility, as suggested by Professor Dan Priel and, independently, by Professor Nicola Lacey, harkens back to the competing Harvard Law Review articles authored by Professors Hart and Fuller in 1958.⁴¹ According to Professor Priel, Hart dictated the terms of future debate by focusing primarily on the origin of law rather than the origin of obligation to the law. As Priel explains:

Let us spell this out: Hart’s claim is that one can be under a legal obligation when one treats the law as a threat to be avoided, and someone else treats law as

⁴⁰ Tamanaha at 24.

⁴¹ See, Priel, Dan “H.L.A. Hart and the Invention of Legal Philosophy” (2011). *Comparative Research in Law & Political Economy*. Research Paper No. 17/2011, <http://digitalcommons.osgoode.yorku.ca/clpe/55>, and, Lacey, Nicola, “Out of the Witches Cauldron?: Reinterpreting the Context and Re-assessing the Significance of the Hart-Fuller Debate,” *University of Oxford, Legal Research Paper Series, Paper no 51 Electronic Copy available at <http://ssrn.com/abstract=2126511>*, (2012)

reason for action. Is this not simply people believing that they are under an obligation? I think Hart's response to this question would be: "That's all there is to it. To look for something more than that, for anything deeper, is to maintain remnants of an old 'metaphysical' worldview Hart associated with natural law."⁴²

According to Priel, the consequences of Hart's dominance of the field of legal philosophy are substantive:

All this comes at a price: legal philosophy is alive but it owes whatever life it currently has to a kind of Faustian bargain: legal philosophy will continue to live as a distinct discipline, but the price for being alive is that it will be so separate from other disciplines to seem to be existing in its own separate world. Academic lawyers, even those with theoretical inclinations and interests rarely see the point of many jurisprudential debates. Legal philosophers, aware of this, sometimes respond with a sneer: other academic lawyers are not smart and sophisticated enough or sufficiently well-read in philosophy, to understand the issues legal philosophers are dealing with. But the truth is that moral and political philosophers, against whom it is much harder to make these claims, are not much interested either and . . . do not seem to understand the point of what legal philosophers do.⁴³

Professor Lacey likewise notes that Hart's initial thrust in the debate left Fuller to reply on Hart's terms and, in the process, to minimize the broader cross-disciplinary approach to legal obligation championed by Fuller:

In essence, my argument will be that Fuller was at an inevitable disadvantage, not only because he was merely responding, and hence drawn into a battle whose terms of engagement were set by Hart, but also because of the very different worldviews with which the two men approached questions of legal theory. Because of Hart's agenda-setting position, the terms of the debate are those of analytic legal philosophy: and the reception of the debate has, understandably, both interpreted and evaluated Fuller's argument largely in terms of criteria internal to that discipline. But while Hart's Holmes lecture can justly be seen as exemplary of his broader contribution, Fuller's most original interventions in legal scholarship originated not so much in a philosophical view but rather in a broader cross-disciplinary interpretation of legal institutions and processes – a set of interests which justifies Summers' assessment of him as 'the greatest proceduralist in the history of legal theory.' Though, as I shall argue, Fuller might have drawn on this broader work to raise questions about Hart's approach, his

⁴² Priel, *supra*, at 10.

⁴³ *Id.* at 16-17.

detailed interest in legal processes potentially giving him a certain advantage in the debate, he did not do so nearly as effectively as he might have done – an omission which itself proceeds from some interesting aspects of his scholarly approach and personality.⁴⁴

Many judges and practicing lawyers will no doubt consider questions about whether Hart correctly identified the proper domain of legal philosophy as simply too esoteric to have any impact on their daily affairs. We should be mindful, however, of the fact that generations of law students and law professors have looked to the Hart-Fuller debate and the subsequent published works of these two authors as the defining event on the subject of obligation to law. Hart's contention that obligation is a function of law being properly adopted and eagerly enforced undoubtedly shifted attention away from Fuller's thoughts on the question of moral obligation to law that can be traced back to the reciprocal obligations between citizens that arise from their mutual participation in the social venture. When we assume, as Hart did, that obligation is created unilaterally and independent of reciprocal obligation, we can be dismissive of the role of public involvement in the justice system. Law's validity, in that case, stems from its origins and its enforcement. If what Hart envisioned is what law has become, or always was, it is only fitting that we remain preoccupied with judicial decision-making and that courts continue on their inevitable path to "managerial judging".⁴⁵ If, on the other hand, Fuller has a point when he tells us that "the creation of an effective interaction between [lawgiver] and [legal subject] . . . is an essential ingredient of the law itself" then we would do well to consider the opportunities for reciprocal interaction within the judicial system.

To be fair, Fuller's notion of reciprocity is central to a theory of law that is both larger and smaller than I will attempt to put forward here. It is larger because Fuller's concern is with *law qua law*. In the "Morality of Law" Fuller explores aspects of the exercise of legislative and executive power as well as judicial power. Thus, Fuller's explanation of reciprocity and fidelity to law transcends the mere operation of a judicial system and seeks to account for the political and philosophical underpinnings of legislative and executive authority. On the other hand, Fuller's theory is smaller than the theory discussed here because he left much of the detail of identifying the circumstances likely to generate fidelity to law to future contributors and it is to this task that we will now turn our attention.

⁴⁴ Lacey, *supra*, note 39 at 5.

⁴⁵ Higginbotham, *The Present Plight of the District Courts* at 759 (quoting Carrington and Crampton).

D. *Reciprocity in Practice*

To lawyers who spend a significant portion of their time in a courtroom, the idea that non-judicial actors play a significant role in the practice and procedure of American trial courts is self-evident. While one cannot deny the trial judge's central role in the proceeding, one likewise cannot deny that the judge's role is often largely passive, or at least theoretically so. Trial judges do not examine witnesses, they do not select evidence for admission, they do not formulate arguments, they do not testify and, while they may oversee and enforce the issuance of subpoenas, they do not frequently decide who shall be haled before the court. Instead, the parties, in conjunction with their counsel, determine how an issue will be framed or how a fact will be proved. The presentation and receipt of evidence and argument can only be described as a reciprocal exchange between the finder-of-fact and the myriad of non-judicial actors who contribute to the resolution of a dispute. More importantly, trial judges only decide what they are asked to decide; a vast array of issues affecting the outcome of a dispute are resolved by the parties in the ordinary course of the litigation process. The outcome of each of those strategic decisions will have a profound impact on what the judge must decide and when she will decide it. Non-judicial inputs into the litigation process typically fall into one of three categories: direct participation by litigants; direct participation by non-parties; and, indirect participation by non-parties.

Examples of direct participation by a party in the trial process include:

- **Pro se litigants:** Parties proceed pro se in any number of circumstances. Pro se appearances are quite common in municipal and small claims courts. Representation by counsel is, in fact, unusual in cases such as minor contract disputes, landlord-tenant disputes, traffic offenses and minor crimes. When parties appear on their own behalf, trial courts and their staffs are particularly careful to protect the interests of the parties proceeding without counsel. Procedural rules are often relaxed to pave the way for those untrained in the law to present evidence and make argument. Not all litigants who choose to act as their own lawyers appear in the local courts, however. Defendants in criminal cases will frequently attempt to proceed without the assistance of counsel. In many of these cases, especially where the defendant has a realistic chance of incarceration, courts will appoint monitoring counsel to provide some support to the criminal defendant proceeding pro se. In addition, an increasing volume of cases are filed by prisoners attempting to use the federal courts to vindicate federal or state rights allegedly denied to them by prison officials. The role of pro se litigants in the American justice system is frequently overlooked by legal scholars, social scientists and other observers of the American legal process. Participation by pro se litigants introduces an uncontrolled variable into American courtrooms. Yet, there is no doubt that, for Americans proceeding pro se to resolve minor disputes, their interaction with the American justice system takes place without lawyers in magisterial courtrooms designed expressly to resolve minor disputes between citizens when the amount in controversy or

the prospective punishment makes the formalities of higher level courtroom proceedings unnecessary and excessive.

- Jury selection: Active participation by a party in the selection of a jury is a mainstay of the American jury trial. In many jurisdictions, jury selection provides an opportunity for the party to gauge potential jurors' receptivity to her theory of the case. Other jurisdictions abide by a much more truncated jury selection process. In all events, however, the party has an opportunity to assist in the selection of those peers who will decide her case. It is of some significance that the jury selection process frequently proceeds with little or no active involvement by the judge;
- Testimony and the presentation of evidence: The parties select the evidence to be presented to the court, the order in which it is presented and the form it will take. The court has no duty to request evidence, suggest evidence or compel the production of evidence that a party has not elected to present. Many cases are determined by failures of proof that can be traced to strategic decisions by a party or his counsel about the introduction of evidence. While the trial judge has decisions to make about the admissibility of evidence, he is not charged with ensuring that a trial record contain every possible item of evidentiary value. In short, a trial court is, for the most part, a passive recipient of qualified evidence; and,
- Allocution: Allocution is the right to be heard in a criminal case. It provides the convicted defendant an opportunity to bring to the attention of the sentencing court circumstances that might have a bearing on sentencing, regardless of their relevance to the primary issue of guilt. Allocution is frequently used by convicted defendants to apprise the court of unusual facts or circumstances that might have contributed to the defendants' lapse in judgment or it might be used to apprise the sentencing court of changes in lifestyle or attitude that could favorably impress the sentencing judge

The American justice system also provides opportunities for non-parties to participate directly, frequently as decision-makers in the judicial process:

- Jury service: The most obvious opportunity to participate as a decision-maker in the American justice system is service as a trial juror. Commentators and academics have, from time-to-time, criticized the jury as unwise particularly as increasingly complex matters are entrusted to the judgment of untrained citizens.⁴⁶ Indeed, participants themselves frequently grouse about the obligation to sit as a juror, especially if the cases are long or notorious. Yet, by and large, it is the right to have a dispute tried by a jury that most clearly separates the American justice system from most other justice systems. By most accounts, the jury is an integral part of the American justice system and its

⁴⁶ Criticisms that juries lack the necessary sophistication or education to decide complex cases is also contrary to recent developments in the study of collective intelligence. That work, described later in this article, suggests that a jury's collective intelligence is actually quite capable of understanding complex legal principles. Anyone who has observed mock jury deliberations or legal focus groups knows this to be true.

presence as a democratizing force is both its saving grace and the reason it is the bane of the well-heeled or well-connected litigant.⁴⁷ Perhaps just as important as the jury's role in protecting fellow citizens from the sovereign is the effect that jury service has on jurors. Professor Landsman harkened back to Tocqueville's observations to emphasize that

Tocqueville discussed not only the systemic implications of jury trial but also its influence on individual citizens as jurors. Tocqueville believed that jury service could “instill some of the habits of the judicial mind into every citizen,” “teach each individual not to shirk responsibility” and serve “as one of the most effective means of popular education.”⁴⁸

In short, de Tocqueville recognized the reciprocal impact of jury service; the parties to the dispute were judged by their peers and the jurors came to understand their role as dispute resolvers. It is the type of reciprocal interaction that is central to Fuller's notion of interaction between the lawgiver and the subject:

- Jury Nullification: Jury nullification is the practice of voting in a criminal trial for acquittal in the face of compelling evidence of guilt. Jury nullification may signify an evolution in communal standards long before the legal machinery can adapt or it may reflect collective wisdom of the jury that, on the facts before them and under the circumstances as they have come to understand them, a finding of guilt is unwarranted. The very real phenomenon of jury nullification reminds us that the disposition of a real dispute is not a one-way projection of authority, emanating from an authorized source and imposing itself on the citizen;⁴⁹ and,

- Grand Jury Service: Service on a grand jury is another opportunity to wrest control of the justice process from the sovereign. In the grand jury context, however, the branch of government that is being displaced, or at least supplemented, is the executive branch. Prosecutors in the federal system, in many states, and in most states when it comes to capital cases, must convince grand jurors to authorize charges before a fellow citizen can be arrested and brought before the court. Grand jury service is conducted in secret session. A grand jury typically consists of more jurors than a petit jury and grand jurors can assume a more active role in the investigation of crimes in their communities. While the grand jury process has been the subject of criticism and ridicule, it is undeniable that the grand jury stands between a prosecutor and the accused.

⁴⁷ See, Rakoff, *Why Innocent People Plead Guilty*, *supra* note 29.

⁴⁸ Landsman, *The Impact of the Vanishing Jury Trial on Participatory Democracy*, 2011 Forum for State Appellate Court Judges, Pound Civil Justice Institute (2011).

⁴⁹ The most representative case of reciprocity through jury nullification involves state juries' nullification of attempts to prosecute people for possession of marijuana. See, Steve Silverman, How Jury Nullification Accelerates the Drug War's Demise, <http://www.flexyourrights.org/jury-nullification-drug-war-demise/> last visited on March 1, 2015.

Anyone who has had the pleasure of attending grand jury sessions as a prosecutor or a defense lawyer (in Pennsylvania, grand jury witnesses may be accompanied by counsel) can attest to the careful thought and deliberation that many grand jurors give to their task. Admittedly, grand jurors' interests are naturally piqued when considering high-profile cases and in particular, those involving political scandal or notorious crimes. On the whole, however, grand jurors are engaged, inquisitive and skeptical even in the most mundane of matters. The grand jurors act as a constraint on overzealous prosecutors and a buffer for anxious and frightened witnesses.

- **Non-Party Testimony:** It is only through witnesses that a court can properly be advised of the facts giving rise to a dispute. Witnesses offer evidence that is either presumptively reliable, in the case of fact witnesses, or demonstrably instructive, in the case of expert witnesses. Witnesses of both types are subject to cross-examination, once described as the “greatest engine for the discovery of the truth known to man.” Indeed, Professor Slocum has identified the judicial capacity for human empathy for witnesses and litigants as one of the virtues essential to a virtuous judge.⁵⁰ In my own practice, I remind clients before each trip to the courtroom that they are about to engage in a very human endeavor. A witness' appearance, the coherence of her testimony, the confidence in her delivery can all have an impact upon the attitude of the fact finder. Witnesses whose testimony reads well on paper may nonetheless be unable to communicate effectively or may become unglued under the pressure of the courtroom. In short, judicial proceedings are not unlike other forms of human interaction; they bear the imprint of those that participate in the case in very human and nuanced ways. It is not just the judge or the fact-finder that defines a judicial proceeding, it is instead the relationship between the actors and between the actors and the substantive law that set the stage for credible efforts to justly resolve real disputes. The movement away from live testimony in civil and criminal cases is, in light of the importance of live testimony in the common law trial tradition, lamentable. Here, Higginbotham's warnings ring true; one example of the sad state of affairs when it comes to witness testimony is the scene that plays out daily in courtrooms across the county where lawyers strain to present a matter to the court based on affidavits, deposition testimony or declarations when the actual presentation of testimony would not only be more informative, but, it would provide the court an opportunity to evaluate the credibility of the witness that she will be denied on a strictly paper record.

These are but a few examples of the human interactions endemic to the ideal of the practice of law. At some level, these opportunities for citizen participation seem rare or trivial to most observers of the American justice system. We must recognize, however, that these avenues of citizen participation seem rare only because they represent an aspect of the system that has been largely abandoned. The opportunities for citizen participation in the justice system have historically played an important role in raising

⁵⁰ Slocum, *supra*, note 23.

civic awareness, empowering citizens and democratizing the American judicial process. In short, while we typically associate jury trials with citizen participation, there are many other opportunities for citizens to participate in the American justice system. Our failure to embrace and preserve those opportunities is symptomatic of the average citizen's withdrawal from public life.

The system's unwillingness to promote participation is contributing to the evolution of our courts in the direction of what Judge Higginbotham describes as "ministerial judging." Indeed, given this broader perspective of the interactive and reciprocal nature of the historical US legal system, it is no wonder that Higginbotham laments the current state of America's federal courthouses:

On any given day, a walk through a typical federal courthouse is likely to find most of its courtrooms dark. That a courtroom is not to be closed except in the most limited circumstances is a constitutionally footed principle, and these dark courtrooms by definition defy the objective of openness in government. . . . The move toward paper courts has increasingly shrunk the categories of persons appearing in open court – other than federal employees – to defendants being sentenced. District courts have become more remote and more detached from people. With the sentencing guidelines, fewer criminal cases are being tried. And the bar has lost its significant role in court-appointed cases, displaced by federal public defenders. This leaves the criminal side of the docket to federal employees and a narrow range of private counsel who appear for the few defendants who can pay. In the occasional civil jury trial, there will be only six to eight jurors – a reduction from twelve-member juries enacted despite virtually all serious studies finding that changes in jury size alter the dynamics of deliberation in undesirable ways.⁵¹

One bright note in the area of citizen participation in the judicial process is the evolution of social commentary exploring the processes, outcomes and social impact of case dispositions. In the modern American justice system, reciprocal influences abound in the form of the commentary and criticism that is a by-product of a public proceeding. Litigation outcomes and judicial decisions are increasingly the subject of commentary and review from a wide array of constituencies, both within and beyond the legal system. Of course, the commentary and review with the most direct impact on the behavior of trial court judges is appellate review. Appellate courts, enjoying the benefits of time and distance, engage in a thorough review of the decisions made in the court below. Multi-judge panels engage in the limited, reasoned, consideration of lower court rulings that, in most cases, produce an articulated basis for affirming or rejecting the work of the lower court.

⁵¹ Higginbotham, *Duke L.Rev.* at 749.

Moreover, the legal profession itself plays an important, if frequently overlooked role, in maintaining reciprocity and balance in a judicial system. Professor Tamanaha points out the role that the organized bar plays as a control on judicial and political power:

Though seldom given detailed attention by liberal theorists, all liberal accounts of the rule of law presuppose the presence of a robust legal tradition. Alex de Tocqueville's, classic study, *Democracy in America*, published a half-century after the independence of the USA, emphasized the danger of populist tyranny posed by democracy. Helping to mitigate this risk, according to de Tocqueville, was the legal profession. With a specialized body of knowledge that emphasized rationality and an orientation to the values of legality, lawyers were a reckonable social force. He wrote: "Men who have made a special study of the laws derive from this occupation certain habits of order, a taste for formalities, and a kind of instinctive regard for the regular connection of ideas, which naturally render them very hostile to the revolutionary spirit and the unrelenting passions of the multitude.

Tamanaha concludes his thoughts on the legal professions' role in advancing the 'rule of law' with a tribute and a warning:

The legal profession, then, is located at the crux of the rule of law. In contemporary societies persons trained in law comprise a notable social force that monopolizes legal activities. Given that liberal theorists uniformly allocate a special place for an independent, neutral judiciary as the final preserve of the rule of law, the rule of law could not conceivably function without this group committed to the values of legality. This position, however, also renders the legal profession, judges in particular, uniquely situated to undermine the rule of law.⁵²

⁵² Tamanaha, *supra* at 58. Professor Tamanaha expounds on the focus of his warning later in the work:

The ultimate risk of this theme of the rule of law, and the social, political and ideological developments that accompanied it, is that the *rule of law* might become *rule by judges*. Whenever rules of law have authority, and judges have the final say over the interpretation and application of the law; judges will determine the implications of those rules of law. Recall that the theoretical debate over legal indeterminacy expired with a consensus that a degree of indeterminacy coexists with a substantial amount of predictability, at least in the US legal system. Once any degree of indeterminacy is recognized, it follows that the claim that judges merely speak the law is implausible. When, in addition, ignorance, weakness, subconscious bias, corruption, and the desire for power are admitted as human traits, the possibility that rule by law may become rule by judges is no longer a benign possibility but a matter of real concern.

Id. at 124.

Beyond participants in the legal system itself, an active and broad based intellectual community routinely reviews and comments on the quality of case outcomes. Indeed, the range of commentators has increased exponentially over the past quarter-century. Law professors, academic lawyers and law students have long engaged in the publication of law reviews and books that explore the bases for case outcomes. The legal-intellectual community's deep interest and comprehensive research on topics offers a valuable counterweight to judicial decisions, especially trial court decisions, that are often influenced by time constraints and other pressures related to dispute resolution. Yet, members of the legal academy no longer have a monopoly on the field of legal commentary; in the past two decades the day-to-day, gavel-to-gavel coverage of notorious trials has become commonplace. The public has the benefit of observing the judicial process aided by the color commentary of professionals who are typically knowledgeable and experienced, while perhaps a bit hyperbolic. Finally, the proliferation of blogs, online publications and internet web-sites has converted the announcement of any meaningful decision to a newsworthy event. In sum, critical analysis of legal outcomes is no longer the exclusive province of trained legal professionals. A multitude of observers now opine on the outcome of legal cases and their voices create a constant and vigilant check on the quality of legal outcomes. The proliferation of social commentary, however, is no substitute for direct citizen participation. While Americans may be better informed as a result of courtroom commentary and criticism, it goes without saying that observation and participation are two different things. Indeed, observation may be personally illuminating, but, both the system and the actor benefit from active participation.

Social commentary aside, it seems self-evident that the vitality and reciprocal exchange that is a product of active courts is lost, or at least greatly diminished, by the "move to paper courts".⁵³ As Judge Higginbotham explained in the context of United States District Courts:

The United States District Courts are the most vital judicial institution in this country. Their courageous history of protecting the constitutional rights of the disfavored and the downtrodden has earned their great prestige and solidified their venerable role in American governance. Federal trial courts cannot maintain this status if they become indistinguishable from state highway departments; but on the present trajectory, this is their destination. If this bleak picture comes to pass, live tenure cannot be defended, and Article III "trial" courts will become indistinguishable from the thousands of administrative law judges. Civil service is just over the horizon.⁵⁴

⁵³ Higginbotham, *The Present Plight of the United States District Courts* at 749.

⁵⁴ *Id.* at 762.

Confronted with the fact of diminishing public participation in the judicial system, one might expect younger lawyers, unaffected as they are by the mist of legal nostalgia, to respond by asking “so what?” After all, cases are still being resolved, litigants have grown comfortable with the thought of negotiated settlements and some litigants openly embrace the role that non-party, non-judicial mediators and other ADR actors play in reaching negotiated resolutions of disputes. Accordingly, our younger colleagues might ask, aside from paying homage to legal history, advancing theoretical notions of reciprocity of obligations, and clinging for dear life to antiquated vehicles for public participation in the legal process, why is public participation in the legal process a superior means of dispute resolution? A proper response to this question requires, at least, some exploration of the concept that lies at the heart of democracy: collective wisdom.

E. Legal Decisions and Public Reasoning

The give and take within a legal system, when the system is permitted to run its natural course in terms of inputs, outcomes and public review, is consistent with the notion of “public reasoning” described as a central tenet of democratic life by Amartyan Sen in his work “An Idea of Justice”. There, Sen contemplates the relationship of public reasoning to notions of justice in the practice of law. Sen observes that:

It is frequently asserted that justice should not only be done, but also, ‘be seen to be done’. Why so? Why should it matter that people actually agree that justice has been done, if it has in fact been done? Why qualify or constrain or supplement a strictly juridical requirement (that justice be done) by a populist demand (that people in general can observe that it is being done)? Is there confusion here between legal correctness and popular endorsement – a confounding of jurisprudence with democracy?

It is not, in fact, hard to guess some of the instrumental reasons for attaching importance to the need for a decision to be *seen* to be just. For one thing the administration of justice can, in general, be more effective if judges are seen to be doing a good job, rather than botching things up. If a judgment inspires confidence and general endorsement, then very likely it can be more easily implemented. Thus, there is not much difficulty in explaining why that phrase about the need to justice to be ‘seen to be done’ received such ringing endorsement and approving reiteration right from the time it was first uttered by Lord Hewert in 1923 (In *Rex v. Sussex Justices Ex parte McCarthy*, [1923] All ER 233). And yet it is difficult to be persuaded that it is only this kind of administrative merit that gives the observability of justice such decisive importance. The implementational advantages of getting approval all around are not of course in doubt, but it would be odd to think that Hewart’s foundational

principle is based on nothing other than convenience and expediency. *Going beyond all that, it can plausibly be argued that if others cannot, with the best of efforts, see that a judgment is, in some understandable and reasonable sense, just, than not only is its implementability adversely affected, but even its soundness would be deeply problematic. There is a clear connection between the objectivity of a judgment and its ability to withstand public scrutiny . . .*⁵⁵

Thus, Sen suggests that public acceptance of the process of judicial dispute resolution is fundamental to the cultivation of fidelity to law. While academics and practicing lawyers appear predisposed to operate from the premise suggested by Dworkin's axiom that "[i]t matters how judges decide cases," Sen's observations suggest that serious students of the judicial system must acknowledge that judges do not always decide cases and, when they do, they rarely decide them in a vacuum. Indeed, at least in the American legal system, disputes are subject to the influence of judicial and non-judicial actors. In cases that carry weighty social overtones, like the internment of Japanese Americans during World War II, the teaching of creationism, or the impact of prolonged isolation on prisoner mental health, the process of public reasoning undoubtedly plays a role in exposing the nuances and, at times, the error of judicial decision-making. Alternatively, even in cases of high profile criminal or civil trials, public reasoning is at work through the numerous opportunities afforded non-judicial actors, often disinterested citizens, to impact judicial outcomes.

The value of open courts, observable decisions and participation by non-judicial actors is twofold. First, as Sen and others have pointed out, open courts foster transparency, understanding and acceptance of the judicial system and its products. The notion that justice is to be seen to be done is a reflection of the fact that people will more readily accept that which they understand to be the product of an open and impartial process. The second benefit to open and active courts, however, centers on the qualitative benefits of citizen participation. In this context, the premise is that decisions that are influenced by a sufficiently broad cross-section of the America public are more likely to reflect the collective wisdom of American attitudes and prejudices. In her recent article entitled, "*Democratic Reason: the Mechanisms of Collective Intelligence in Politics*," Professor Helene Landemore explores the question of whether a random collection of decision-makers is preferable to an oligarchy of the best and the brightest when it comes to political decision-making.⁵⁶ Landemore posits that:

However counterintuitive that claim may sound, an oligarchy of even the best and brightest need not be generally smarter than the rule of the many. This is so because of the crucial role of one component of collective wisdom, namely

⁵⁵ Sen, *The Idea of Justice* (2009) at 393-94.

⁵⁶ Landemore, and Elster, *Collective Wisdom: Principles and Mechanisms*, Cambridge University Press (2012).
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“cognitive diversity” or the existence within the group of multiple ways to see the world and interpret it. Applying the theoretical findings of Lu Hong and Scott Page about the relative importance of cognitive diversity and individual ability for collective problem-solving and predictions, I argue that since an ideal oligarchy of even very smart rulers can be assumed to display less cognitive diversity, at least over the long term, than an ideal democracy (direct or indirect), the few can in general and on the long run not match the epistemic competence of many moderately smart but diversely thinking individuals. In other words, to the extent that cognitive diversity is more likely to exist in the larger than the smaller group, I argue that democracy is more conducive to collective wisdom than any version of the role of the few.

Landemore explains that she is building upon important work in collective intelligence, including work by legal philosophers, Cass Sunstein and others, that has led her

. . .to defend that view that as a collective decision-procedure democracy is more epistemically reliable than oligarchy. This is so because, even assuming that we could identify the best few, they would either not be numerous enough and therefore cognitively diverse enough, to compete with the many averagely smart people (in a direct democracy), or they would not be cognitively diverse enough over the long run (in a representative democracy).⁵⁷

Professor Landemore suggests that the problem with oligarchical decision-making is that the oligarchy is, by definition, lacking in the diverse attitudes and opinions necessary to a fully informed decision. By reducing the number of people who decide and review important decisions the US justice system runs the risk that it will deviate seriously from the historical premium attributed to citizen participation in the justice system. Professor Landsman seizes upon a similar idea when criticizing juries of less than a dozen jurors:

First, by halving the size of the jury far fewer citizens will have an opportunity to participate in the adjudicatory process, thereby reducing the democracy-enhancing impact suggested by Tocqueville and demonstrated by Gastil. What society loses is its potential voters and potentially engaged citizens. Perhaps as important, a smaller jury does not offer nearly as much room for minority participation. Where, for example, a minority group represents ten percent of a community’s population, the switch from twelve to six virtually guarantees that there will be no minority presence on a large majority of the juries constituted. When minority group members do sit on a smaller jury they will have few allies who might support their views and they are likely to be overborne. Scientific research indicates that diverse juries engage in longer and more detailed

⁵⁷ Id.

deliberations. A minority presence affects the behavior of all jurors, making for greater sensitivity to minority views. Jury downsizing undermines the quality of democratic exchange as well as the number of citizens who experience it.⁵⁸

The effect of public reasoning on the operation of the judicial system operates to reinforce the bonds of reciprocity that bind society to the judicial system and foster the idea of fidelity to law.

Academics and practicing lawyers must share their views on the impact of public reasoning on the function of judicial systems. There is a richness and complexity to the operation of a well-functioning justice system that goes beyond the endless dissection of judicial biases and preferences and perhaps even eclipses the topic of judicial decision-making. Much of that complexity is lost when we accept, as Hart suggested we must, that all properly enacted laws deserve equal treatment or when our attention is disproportionately focused on the judicial actors who move the system along. As justice systems emerge around the world and foreign observers look to US academics and practicing lawyers to help them understand how the judicial branch of government promotes the rule of law, those observers should see a robust exchange between academic and practicing lawyers that credits not only the fine judges that preside over our courtrooms but the earnest men and women from all walks of life who commit themselves, however briefly, to advancing a just resolution of disputes.

F. *Conclusion*

Philosophers from Fuller to Sen have recognized that law is not the exclusive plaything of lawyers and judges. Indeed, the purpose of a legal system is not to create some self-contained collection of rules the defining characteristic of which is its internal logic. To the contrary, a legal system must be a functional apparatus that serves as the mechanism for resolving real disputes for real people. Accordingly, as Sen and Fuller suggest, the legitimacy of a legal system may have less to do with “getting the right answer” and more to do with the idea that justice must “be seen to be done”.

Legal thinkers, in particular legal philosophers, have made assumptions about the nature of a citizenry’s obligation to law that we now have reason to question. As emerging countries develop legal systems and established countries endure the constant evolution of legal principles, it becomes critical that legal thinkers devote serious thought to the time-honored idea that obligation is as much a function of reciprocal obligation as it is of legal provenance. Without due regard for the value of reciprocal interaction in a legal system we cease to value those institutions that serve as vehicles to facilitate that interaction. As a human undertaking, it may be too much to expect that legal systems

⁵⁸ Landsman, *supra*, note 48.

will arrive at the “one right answer”. Indeed, it may be quite enough to ensure that citizens and judges made reasonable choices based upon fair procedures and rational interpretations of substantive law. Perhaps the most important thing to remember is that justice is an aspiration as much as a guiding principle. Flawed decisions are inevitable, but, systems willing to expose those decisions to public reasoning and reciprocal participation are our best hope of correcting historical errors. Holmes suggestion that we try to “glimpse the Universal law” may require us to challenge orthodoxies in our manner of thinking about the law. It may require us to recalibrate when we strike the balance between fairness and efficiency. It may require us to reclaim some part of the legal system from highly specialized lawyers and judges. In the end, we may actually have to recognize that the legal system, to function properly and to maintain the proper balance between citizen and sovereign, may require the active participation of ordinary citizens who accept the responsibility of participation.