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The Virtue of Ordered Conflict: A Defense of the Adversary System

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David Barnhizer*

The Virtue of Ordered Conflict: A Defense of the Adversary System

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I. INTRODUCTION

We live in an explosive moment, during which our traditional sense of community is in the process of “disintegrating.”¹ We know where we came from, but not where we are going. Much like the Athenian “democracy” described by Aristotle, ours had originally been restricted to white male property owners, and this had a profound impact on the shape, texture, and fairness of the resultant system.²

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* Professor of Law, Cleveland State University. I thank Sue Barnhizer, Veronica Dougherty, Michael Davis, David Goshien, Arthur Landever, David Snyder, and James Wilson for their insightful critiques of earlier versions of this essay.

1. See, e.g., FRANCIS FUKUYAMA, *THE GREAT DISRUPTION: HUMAN NATURE AND THE RECONSTITUTION OF SOCIAL ORDER* 5 (1999); WILLIAM STRAUSS & NEIL HOWE, *THE FOURTH TURNING* 203 (1997).
2. In Athens, the status of voting citizen did not include women, barbarians, aliens, or slaves. See *THE POLITICS OF ARISTOTLE* (Peter L. Phillips Simpson trans. 1997) [hereinafter *ARISTOTLE*].

Interest groups not part of the dominant system were excluded from participating in the processes of power and governance other than in subservient roles. There has been significant movement toward the inclusion of disparate voices in our political system by which power and opportunity are allocated, but it is a transition that is far from complete even as we begin the twenty-first century. An inevitable consequence of this greater inclusiveness is that we have entered a period of profound disquiet in which new voices have arisen from all directions to demand shares of social goods they feel have been wrongly denied or to which they feel entitled. It remains an open question which of the dynamic "micro-communities" of interest that have emerged as cause and consequence of the opened system are capable of surviving or whether there will be a reaction sufficient to suppress or reconfigure some of the competing agendas. One undeniable point, however, is that the terms of social discourse that had historically been restricted to a relatively narrow band of dominant interests are unlikely to again exist in the United States.

In *The Leviathan*, Thomas Hobbes described six factors that lead to the weakening, and even the dissolution, of a political community.³ Hobbes' factors are:

1. The belief that every private man is Judge of Good and Evil actions.
2. The belief that whatever a man does against his conscience, is sin.
3. The belief that Faith and Sanctity, are not to be attained by Study and Reason, but by Supernatural Inspiration or Infusion.
4. The belief that he who has the Sovereign Power is subject to the Civil laws.
5. The belief that every private man has an absolute propriety in his goods: such as excluded the Right of the Sovereign.
6. The belief that the sovereign power may be divided.⁴

My underlying thesis is that American society is in increasing danger of falling victim to the tendencies against which Hobbes warned, and that we need to understand and deal with the ultimate implications this holds for our political community. Otherwise, we risk ending up with a severe case of ideological balkanization that will undermine and weaken our social system. My concern is that we are well on the way to a state of ideological civil war. If we succumb further it will mean a political culture in which there is little real communication, but only destructive vilification, jockeying for political advantage, and a refusal or inability to make or accept the compromises and limits that are critical aspects of a working democratic society. Even though dealing with these potential difficulties is important, the simple truth is that we would be wise to aim at strategies that seek to mitigate the conflicts rather than pursue approaches that seek to extinguish competing views and values of which we disap-

3. See THOMAS HOBBS, *THE LEVIATHAN* (C.B. MacPherson ed., Penguin Books 1968).

4. See *id.* at 363-68.

prove. This is why ensuring widespread access to the adversary system with its formalized rules of conflict is essential — essential for virtually all positions and claims, not simply the most currently popular or politically powerful.

The profound import of the changes we are experiencing is difficult to overstate. Many of the effects are being felt in the expanding demands for rules and order being imposed on the legal system. Alan Hunt argued that “[t]he central problematic of juristic theory has been to provide a socially persuasive — that is relevant to a particular socio-historical situation — account of the grounds of legitimacy of the existing legal order and through that of the existing social order.”⁵ Yet at the point where we most need a “socially persuasive account” we are in an increasingly intense situation of dispute and conflict over what should be the terms of that account.

In analyzing the lamentable conditions he witnessed emerging in Europe, Albert Schweitzer observed that we face one of the most critical challenges in our history.⁶ He warned that the sheer magnitude of what we are experiencing represents a unique situation.⁷ If this warning is correct, our history may provide less guidance in finding answers than we would like. One of the most critical differences Schweitzer and others have perceived is captured in his description of the rise of ever more sweeping and pervasive institutional control over our lives. While institutions have always played key roles in shaping our lives and culture, the expansion of their dominance, capability and persuasiveness, and the lack of positive behavioral values within the primary secular institutions have combined into a profoundly dehumanizing and inescapable force.

In terms of understanding how we should deal with the social transformation we have been experiencing for more than a generation, Schweitzer argued:

[N]o historical analogy can tell us much. The past has, no doubt, seen the struggle of the free-thinking individual against the fettered spirit of a whole society, but the problem has never presented itself on the scale on which it does to-day, because the fettering of the collective spirit . . . by modern organizations, [by] modern unreflectiveness, and [by] modern popular passions, is a phenomenon without precedent in history.⁸

It is important to understand the implications of Schweitzer’s three-part analysis. The troubling difference he identifies is being powered by not a single isolated factor but the powerful combination of dehumanizing institutional control with the enhanced techniques provided by our “persuasion machinery.” Added to this is the lack of deep and

5. ALAN HUNT, *THE SOCIOLOGICAL MOVEMENT IN LAW* 135 (1978).

6. See ERICH FROMM, *THE SANE SOCIETY* 201-02 (1955).

7. See *id.*

8. *Id.*

keen critical thought and the reliance on fads, stereotypes and unreflective political passions that have coalesced into a system that seems incapable of being effectively managed or engaging in honest discourse. That is the context in which we are attempting to construct a socially persuasive account strong enough to guide our difficult choices. The problem, however, is that we cannot construct a substantive moral account on which enough of us can agree. Given this reality we must more than ever be willing to submit our disputes to mitigation and partial resolution through the processes of the adversary system. We are caught within the dynamics of a culture whose primary characteristics are conflict and change. For the foreseeable future we must rely on the authoritative processes of the adversary system as a central device by which that conflict and change are managed.

II. THE IDEA OF ORDERED CONFLICT

A premise developed in this essay is that ordered conflict is a necessary, productive, and inevitable part of our society and that it is implicit in the idea of ordered liberty. James Madison recognized the need to balance competing interests in his analysis of factious groups. Madison's insight rests at the center of my argument. In *Federalist No. 10*, Madison set out the idea of faction in the following words:

By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.⁹

Madison described two "cures" for faction. One is to "destroy the liberty" that allows it to bloom, the other is to give "to every citizen the same opinions, the same passions, and the same interests."¹⁰ He concluded that both "solutions" are impractical. The truth, Madison argued, is that the "latent causes of faction are . . . sown in the nature of man, according to the different circumstances of civil society."¹¹ Factions are natural and even necessary. The adversary system is the mechanism by which we balance the inevitable and often healthy disputes between factions. As our political system has become increasingly complex and factious the adversary system's processes of ordered conflict have become even more vital. If the truth be known, most of us would prefer the noise and irritation of contention to the silence and subordination of tyranny.

Ordered conflict is a desirable element of a free and diverse society, not some lingering social disease that should be eradicated. There is a virtue as well as a necessity in ordered conflict that serves vital social purposes. The virtue of ordered conflict arises from a combination of

9. THE FEDERALIST No. 10, at 57 (James Madison) (Jacob E. Cooke ed., 1961).

10. *Id.* at 58.

11. *Id.*

the release of social tension resulting from the use of ritualized systems of dispute resolution and by the pressurized infusion of social needs and ideas into an adversary process that achieves at least intermediate or partial resolutions of disputes, even if only temporary. If this is accurate, attempting to suppress conflict based on flawed and idealized theories of human perfectibility and the illusion of an harmonious society denies this essential aspect of our humanity and tries to capture a genie in a bottle. Not only can it not be done, it should not be done.

Madison was obviously not the first to appreciate the natural stresses of human society. Conflict and disputes over comparative individual worth and principle are inevitable in any context within which humans function. Hobbes told us:

[M]en have no pleasure, (but on the contrary a great deale of griefe) in keeping company, where there is no power able to over-awe them all. For every man looketh that his companion should value him, at the same rate he sets upon himself: . . . Hereby it is manifest, that during the time men live without a common Power to keep them all in awe, they are in that condition which is called Warre; and such a warre, as is of every man, against every man.¹²

In a somewhat less dramatic vein, Derek Bok, former president of Harvard, suggested that competition “is very much a reflection of our culture – we believe in competition . . . [people like competition] but they want a kind of wise restraint that is probably asking too much of human nature.”¹³ Nor are the competitive and acquisitive elements of human nature recent developments. Lao Tzu observed well over 2000 years ago that “[i]t is the way of heaven to take from what has in excess in order to make good what is deficient. The way of men is otherwise. It takes from those who are in want in order to offer this to those who already have more than enough.”¹⁴

The ordered conflict mediated by the adversary system offers mechanisms for negotiating intermediate solutions needed for the integrity, resilience and elasticity of our social system. Even the conflicts produced by the tensions of expansive doctrines involving free speech and others of an equally fundamental character aimed at allowing the introduction of controversial positions in the face of the disapproval of dominant interests are essential forms of ordered conflict designed into our adversarial system. This allows for the venting of hostility that, if repressed by powerful interests that disapprove of the particular position, tend to build up explosive internal stresses in ways that weaken the spirit of the democratic system. Otherwise, the intransigent value conflicts allow for no face-saving and compromise,

12. HOBBS, *supra* note 3, at 185.

13. William Glaberson, *The Lawyers: Legal Gamesmanship May Take Toll* (visited Oct. 22, 2000) <<http://www.nytimes.com/library/politics/092498clinton-le-gal.html>> (quoting Derek Bok).

14. LAO TZU, *TAO TE CHING* 139 (D.C. Lau trans., Penguin Classics 1963).

which renders a dynamic society brittle and fragile. Because our deeper value-based positions require an external power to blame for the compromises we make, we need to be able to point to an authoritative source of power is capable of overawing us in a kind of "She who must be obeyed" sense.

Thus, ordered conflict with its underlying threat of force serves important purposes. Our competitive disputes are symptoms of needs that reflect our never-ending search for justice as well as our demand for a greater share of goods to which we think we are entitled. Ordered conflict is the way in which we give a civilized voice to our anger and perceptions of personal injustice. Ordered conflict is also a vital method through which we negotiate our way through fundamental and rationally incompatible disputes and through which we create approximations of solutions. Approximations of solutions are all we can realistically hope to accomplish for many of our conflicts, because our most critical disputes reflect the intersection of incommensurable values. There either cannot be a meeting of the minds on a rational or evidential level, or there cannot be a full transition of the members of one camp into another.¹⁵

At its foundation, the law is a political system that allocates social goods, rights and obligations.¹⁶ Justice Blackmun began *Roe v. Wade*¹⁷ with Justice Holmes' dissenting observation in *Lochner v. New York*: "[T]he Constitution is made for people of fundamentally differing views . . ."¹⁸ The legal system is not a self-contained theoretical construct of ideal justice, but reflects, diffuses, and balances competing claims for political and economic power. In this vein, Roscoe Pound told us that "[c]onflict and competition and overlapping of men's desires and demands and claims, in the formulation of what they take to be their reasonable expectations, require a systematic adjustment of relations, a reasoned ordering of conduct, if a politically organized society is to endure."¹⁹

15. See THOMAS GREEN, *THE ACTIVITIES OF TEACHING* 43 (1971).

16. This is obviously not an original observation. For analysis, see John Finnis, *Allocating Risks and Suffering: Some Hidden Traps*, 38 CLEV. ST. L. REV. 193 (1990); David Luban, *Incommensurable Values, Rational Choice, and Moral Absolutes*, 38 CLEV. ST. L. REV. 65 (1990); see also CASS R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* (1997). Sunstein offers the insight that "we value things, events, and relationships in ways that are not reducible to some larger and more encompassing value. The second claim is that human goods are not commensurable. By this I mean that such goods are not assessed along a single metric." *Id.* at 70. He concludes that "efforts to insist on a single kind of valuation and to make goods commensurable, while designed to aid in human reasoning, may actually make such reasoning inferior to what it is when it is working well." *Id.*

17. 410 U.S. 113 (1973).

18. *Id.* at 117.

19. Roscoe Pound, *The Paths of Liberty*, in *NEW PATHS OF THE LAW* 3 (1950).

Like any political system, ours tends to be organized according to how the most powerful interests define what they need and desire. Among the most critical tools for acquiring and protecting political and economic power are lawyers, legislatures, administrative bureaucracies, and judges. Control of these institutions of power and allocation of social goods is best achieved through adhering to the pretense that these institutions are operating according to principles such as fairness and justice, while informally using the institutions to serve special interests. Thus, powerful institutions and private corporations angered by the communal "truth-finding" judgments of juries either do not admit their true motivations or attack populist juries directly. These interest groups have sought to cloak their efforts to change the rules of the system in language of fairness, the need to constrain greedy lawyers, and the importance of "tort reform."²⁰

III. IMPERFECTIONS IN THE ADVERSARY SYSTEM

Speaking of the virtue of ordered conflict does not suggest that there are only positive aspects of ordered conflict. Jerold Auerbach warned:

The legal process can be threatening, inaccessible, and exorbitant — usually it is all of these for the least powerful people in society. It is more likely to sustain domination than to equalize power. Litigation expresses a chilling, Hobbesian vision of human nature. It accentuates hostility, not trust. Selfishness supplants generosity. Truth is shaded by dissembling. Once an adversarial framework is in place, it supports competitive aggression to the exclusion of reciprocity and empathy.²¹

20. See William Glaberson, *Ideas & Trends: The \$2.9 Million Cup of Coffee; When the Verdict Is Just a Fantasy*, N.Y. TIMES, June 6, 1999, at A1. Lawyers advance their clients' interests in almost any way possible. This even includes using strategies that consume and demean their own profession — such as the oft-proclaimed "litigation explosion." Glaberson reported that one scholar indicated that "[t]he story of tort reform across the country is that it is one of the most carefully developed and exquisitely executed political campaigns ever," and includes statistics relating to the award of punitive damages — a main argument of the corporate defenders in their quest for legislative "reforms." *Id.* Glaberson asked:

Huge punitive damage awards, for example, have become everyday events, right? Actually, a study of courts in the nation's 75 largest counties conducted by the National Center for State Courts found that only 364 of 762,000 cases ended in punitive damages, or 0.047 percent. OK, but isn't it true that more and more liability claims are filed every year? Actually, a study of 16 states by the same center showed that the number of liability suits has declined by 9 percent since 1986.

Id.

21. JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* vii (1983) [hereinafter AUERBACH, *JUSTICE WITHOUT LAW?*]. Auerbach has described the evils of the social system and legal profession. He recognized the severe limits of alternative approaches to dispute resolution of the kind now being prescribed as cures for the deficiencies of the adversary process—admitting the adversary system, while problematic, is a necessary evil in an anonymous society which has increased greatly in its scale of

Anne Strick, in *Injustice for All*, described the many problems of the adversary system and argued that it subverts the justice it claims as its purpose.²² All the criticisms are true to some extent. There are numerous defects in the adversary system that must be challenged and remedied. These include the tragic hypocrisy of the criminal "justice" system as well as the tendency of the most powerful interests to capture the relevant parts of the system's operational machinery and create rules that serve their own agendas. But in the conflicted and complex political system in which we live there are no workable alternatives.

While this situation falls dismally short of any social ideal, the simple fact is that humans are a disputatious species. We dispute in part because disputes are sources of acquiring power and defending the positions of power we already hold. Many people dispute because they enjoy the tension of conflict and competition. If grounds for disputing did not exist in sufficient number, we would need to create them. We dispute in order to be able to distinguish ourselves from one another. We dispute to claim a greater "piece of the pie" and to acquire status and a unique identity. The processes of social disputing result in a splintering of issues into shards comprising increasingly tinier pieces of the available social goods, but nonetheless create some kind of social currency in which more people can take shares. This actually creates new sectors of power and an even greater number of micro-communities of interest and thus allows wider allocations of the newly created splinters of power.

Conflict and competition should not be underrated as necessary stimuli for change and growth. Edmund Burke wrote that challenge is the force that drives us to improve through the necessity of inventing ways to overcome obstacles, observing that "[d]ifficulty is a severe instructor, set over us by the supreme ordinance of a parental Guardian and Legislator, who knows us better than we know ourselves He that wrestles with us strengthens our nerves, and sharpens our skill. Our antagonist is our helper."²³ While such Burkeian observations have fallen into disfavor in a culture that seeks a kind of progressively perfectible and proper human, they represent fundamental and relatively immutable truths of human nature. Difficulty, challenge, conflict and competition are natural and essential parts of being human. Because we do not want to see ourselves as

operation and lost any real sense of local and tight-knit community. See, e.g., *id.*; JEROLD S. AUERBACH, *UNEQUAL JUSTICE* (1976). Locke and others have also described the important role of the legal system as umpire. See JOHN LOCKE, *OF CIVIL GOVERNMENT SECOND TREATISE* 67-68 (Henry Regnery ed., 1955).

22. See ANNE STRICK, *INJUSTICE FOR ALL: HOW OUR ADVERSARY SYSTEM OF LAW VICTIMIZES US AND SUBVERTS JUSTICE* 124 (1977).

23. EDMUND BURKE, *REFLECTIONS ON THE FRENCH REVOLUTION* 315 (Charles W. Eliot ed., Harvard Classics 1909).

base creatures and fear qualities we might think reflect that character, we declare unacceptable aspects of our human nature to be eliminated from our species through exercise of the power of reason.²⁴ Ironically, as we become even more disputatious as a result of the increasing diversity and stresses of our system, we seek a "return to Eden" by advancing ideals of harmony and community that can not work in our conflicted culture.

Joseph Schumpeter described the typical economic system as involving a continuous process of "creative destruction" in which the new system is created by the destruction of the old through an ongoing series of cyclical bursts.²⁵ While our history has been filled with periods of explosive transition, rarely has this been truer than at the beginning of the twenty-first century. Francis Fukuyama concluded that the perceived social decay is not simply classic intergenerational myopia, warning:

Although conservatives like William J. Bennett are often attacked for harping on the theme of moral decline, they are essentially correct: the breakdown of social order is not a matter of nostalgia, poor memory or ignorance about the hypocrisies of earlier ages. The decline is readily measurable in statistics on crime, fatherless children, reduced educational outcomes and opportunities, broken trust, and the like.²⁶

In *The Fourth Turning*, William Strauss and Neil Howe described the changes in American society over the past decade:

Americans turned cynical, viewing every social arrangement as unworthy of long-term loyalty, deserving only of short-term exploitation The sense of civil decay developed a powerful momentum; the discrediting of each feature of the civic landscape made the other features look all the more dysfunctional. As institutions adapted to this changing mood, they became more finely tuned to individual needs but worse at meeting (or even pretending to meet) community needs.²⁷

In reading such laments it would be naïve to think that our individual moment of "modernity" is automatically different from all others and somehow more intense and dramatic. This is an easy trap in which to be caught. Clearly, change is a constant. The United

24. Maxine Greene develops this idea in a beautiful book. See MAXINE GREENE, *TEACHER AS STRANGER* (1976). Therein, she describes the dichotomy that emerged from Greek Rationalism, in which the rational part of our being is the "higher" aspect, and the biological and emotive is the "animal" we must tame through the power of Reason. *Id.* at 72. Rollo May, citing Ludwig Binswanger, has called this philosophical split, "the cancer of all psychology and psychiatry up to now." ROLLO MAY, *THE COURAGE TO CREATE* 49 (1975).

25. See JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 162 (1950). Schumpeter offered the view that "[t]he capitalist process not only destroys its own institutional framework but it also creates the conditions for another. Destruction may not be the right word after all. Perhaps I should have spoken of transformation." *Id.*

26. FUKUYAMA, *supra* note 1, at 5.

27. STRAUSS & HOWE, *supra* note 1, at 203.

States has witnessed such transformational events as the Revolutionary War, a vast movement to the Western frontier in the eighteenth and nineteenth centuries, the Civil War, and successive and continuing waves of immigrants. We have seen incredible technological innovations in transportation and communication, and experienced the cultural transition from an agrarian society to an urban industrial system, a change to suburbia in its post-industrial phase. We have endured two world wars and many smaller conflicts. America has muddled its way through the nuclear age and the Cold War, television and the computer, as well as racial and gender revolutions. Yet, as Schweitzer observed, there is something unique about the current process of change. In part this has to do with the degree of penetration of institutional control and institutional culture into our society. But it also results from the reaction to institutional control that has emerged as a consequence of the great expansion of the culture to include — through law — interests that had been traditionally suppressed or limited to specific niches. Along with this expansion of law for purposes of greater inclusion has been the increasing resort to converting almost every issue of consequence to legal currency because of the loss of a core set of social values that had made such comprehensive legalization of everything unnecessary.

The need for a strong adversary system has grown exponentially over the past thirty years. This does not mean law was not needed previously, but that in the past the political system had been able to remain sufficiently closed or restricted. In our dynamic and contentious culture we are engaged in fundamental political “wars” involving deep and incommensurable value conflicts in which there is great anger and very little room for compromise. Opposing interest groups have increasingly brought their disputes into the realm of law, because they recognize that ordinary political processes are stalemated.²⁸ The adversary system retains more of a sense of legitimacy and fairness than can be said for other branches of government that

28. A recent article in *The Plain Dealer* demonstrates the confusion and anger of ordinary citizens against legislators being captured by special interests. See Tom Brazaitis, *Initiatives Meet Defeat – Before Going to a Vote*, *THE PLAIN DEALER* (Cleveland), July 23, 2000, at 21A. The frustration has led to the increased use by citizen-based organizations of ballot initiatives to bypass legislators. The report relates:

Convinced that their elected representatives are in the pockets of special interests, Americans in the 24 states that allow ballot initiatives are trying to take the law into their own hands on issues from animal traps to universal health care. . . . But the very legislators the citizen-lawmakers are trying to circumvent are making it difficult for them to get their issues on the ballot.

Id. The legislators are shortening time periods within which petitions can be circulated, increasing costs, and imposing technical requirements that often have the effect of invalidating petitions.

are seen as irretrievably captured by special interests. Many have therefore sought the force and legitimacy thought to be provided by legal rules and judicial decisions that favor their positions. The problem is that this shift to law and legal institutions in an attempt to capture their decision-making processes has threatened the legitimacy of those institutions.

The struggle to control the institutions and key doctrines of law is being fought from all sides. The judiciary is obviously one of the endangered species. As the realization has grown that judges are key makers of policy through their decisions, special interests have focused their energy and resources on the selection of the judiciary. The cost of judicial campaigns has skyrocketed, and there is little question that the integrity of the judicial institution is being compromised.²⁹ Conservative scholar Walter Berns observed, for example, in criticizing the effects of *Roe v. Wade*:

[W]hat were we taught by *Roe v. Wade*? That the Constitution is on the side of the big battalions or, at least, the most strident battalions. That an up-to-date judiciary is contemptible because it is nothing but a political body but, unlike a political body . . . it pretends not to be. And we were also taught the necessity to form battalions of our own, which . . . is being done on a massive scale.³⁰

In such an explosive context, adherence to due process and willingness to abide by the "fair" decisions of the legislative and judicial branch are more important than ever, as is respect for the integrity of the legal system. But we are seeing a kind of guerrilla conflict approaching a Hobbesian civil war over the control of doctrinal rules of allocation, legal processes and authoritative decision-makers rather than through democratic debate.

Consider the alternatives to an effective and independent judiciary and the importance of preventing any single interest group from cap-

29. See William V. Dorsaneo, III, *Opening Comment to the March 1999 Roy R. Ray Lecture: Judicial Independence and Democratic Accountability in Highest State Courts*, 53 SMU L. REV. 255 (2000)(noting increased attention and criticism to judicial elections in Texas); Donald W. Jackson and James W. Riddlesperger, Jr., *Money and Politics in Judicial Elections: The 1988 Election of the Chief Justice of the Texas Supreme Court*, 74 JUDICATURE 184 (1991)(noting that financing of partisan elections gives the appearance of impropriety); Orrin W. Johnson and Laura Johnson Urbis, *Judicial Selection in Texas: A Gathering Storm?*, 23 TEX. TECH L. REV. 525 (1992)(noting the problems of making judicial districts fair for minority voting); Sheila Kaplan, *Justice For Sale*, COMMON CAUSE MAG., May-June 1987, at 29 (discussing how special interest groups are influencing judicial elections); Hans A. Linde, *The Judge as Political Candidate*, 40 CLEV. ST. L. REV. 1 (1992)(discussing how special interest groups are influencing judicial elections); Justice Hugh Maddox, *Taking Politics Out of Judicial Elections*, 23 AM. J. TRIAL ADVOC. 329 (1999)(stating selection retention removal should be separate from political arena).

30. Walter Berns, *Judicial Rhetoric*, in RHETORIC AND AMERICAN STATESMANSHIP 47, 55 (Glen E. Thurow & Jeffrey D. Wallin eds., 1984).

turing the judiciary. A recent *New York Times* report quoted a Paraguayan citizen bewildered by what was happening in the nation, who asked, "How can people believe in democracy? . . . How can they believe in anything when the president simply decides to ignore an order of the court and nothing happens?"³¹ The article goes on to suggest that Paraguay "now has the trappings of democracy, with periodic elections, a Constitution and separate branches of Government. But there is little confidence in the independence of the courts and the Congress."³² Baruch Ivcher criticized the Peruvian government and was driven from Peru. The facts of Ivcher's demise are, in his own words:

Channel 2 in Lima, of which I was the majority shareholder, broadcast reports on the use of torture by the intelligence service, military involvement in drug trafficking and – this was the *pièce de résistance* – the million-dollar income of the head of the intelligence service, the Government of President Alberto Fujimori apparently decided the station had to be silenced and I had to be punished. . . .³³

This report of Baruch Ivcher's abrupt fall from grace reminds us how crucial control of the levers of decision-making is to preserving even approximations of fair processes of ordered conflict. In the United States, the system depends heavily on the separation and balancing of governmental power. When one branch controls the others, the essence of the Rule of Law is violated. This was made clear in Peru where judicial independence fell to the power of the Executive. It was reported in the *New York Times* that:

[t]o get away with these types of things [in relation to Ivcher and others] the Government needs to control the entire judicial system. Today two-thirds of Peru's judges have only temporary status, meaning that they hold their positions at the pleasure of the Government and cannot act independently. In addition, the National Magistrates' Council, an autonomous body established in the Constitution to appoint and dismiss judges and prosecutors, has been largely gutted.³⁴

In the United States we have the same kinds of pressures to use governmental power to abuse disfavored interests, but we are usually relatively successful at blunting the attacks. In a case related to protests about flag burning that had inflamed public passions, an ACLU spokesperson commented that "[f]ree speech is controversial. It's supposed to be. If we all got along and toed the official line, we should just pack our bags and move to Iraq."³⁵

31. Diana Jean Schemo, *Political Battle Threatens to Destabilize Paraguay*, N.Y. TIMES, Mar. 2, 1999, at A11.

32. *Id.*

33. Baruch Ivcher, Editorial, *Peru's Endangered Dissidents*, N.Y. TIMES, Feb. 4, 1999, at A27.

34. *Id.*

35. *Flag Burning Spurs Debate About Access*, THE PLAIN DEALER (Cleveland), July 3, 1999, at 5B.

Formal conflict resolution procedures are rarely fully committed to truth-finding. Anne Strick reached the conclusion that "the goals of winning on one hand and truth on the other are mutually exclusive . . ." ³⁶ While truth is not irrelevant, it is either not achieved or is subordinated to a stronger priority. The processes are used to achieve preferred outcomes. Those presenting their positions inside the formal strictures of ordered conflict rarely lose sight of the fact that their aim is to win, not to dispassionately offer all facts and arguments that would allow an independent fact-finder to determine actual truth. ³⁷ Everyone is pursuing a desired outcome, and everyone is an advocate for a particular position. Machiavelli warned that the prudent individual must be cunning and deceptive, and that the prince must combine the talents of beast and man in order to survive in a harsh and deceptive world, because

a prudent ruler cannot, and must not, honour his word when it places him at a disadvantage If all men were good, this precept would not be good; but because men are wretched creatures who would not keep their word to you, you need not keep your word to them. ³⁸

He continued, stating, "one must know how to colour one's actions and to be a great liar and deceiver." ³⁹ He asserted that the prince "should appear to be compassionate, faithful to his word, kind, guileless, and devout. And indeed he should be so. But his disposition should be such that, if he needs to be the opposite, he knows how." ⁴⁰

The inevitability of people behaving in this way is guaranteed by the goals they seek. Nor are the worst problems for a society related to the conflicts over material wealth — although conflicts over allocations of wealth and opportunity are important areas of contention and dispute. The greatest threat to the social fabric involves the mediation of disputes over concerns that the competing advocates regard as incommensurable. The degree of rational incommensurability in areas of fundamental conflicts over principles is reflected in *Roe v. Wade*, in which Justice Blackmun wisely and deliberately avoided the question of the point at which human life begins, observing that "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and the-

36. STRICK, *supra* note 22, at 24.

37. *See id.*

38. NICCOLO MACHIAVELLI, *THE PRINCE* 99 (George Bull trans., Penguin 1961).

39. *Id.* Machiavelli tends to be misunderstood and certainly undervalued as a thinker and strategist relevant to our time. *See* J.G.A. Pocock, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975); *see also* MICHAEL A. LEDEEN, *MACHIAVELLI ON MODERN LEADERSHIP: WHY MACHIAVELLI'S IRON RULES ARE AS TIMELY AND IMPORTANT TODAY AS FIVE CENTURIES AGO* (1999) (discussing the value of Machiavelli's book, *The Prince*).

40. MACHIAVELLI, *supra* note 38, at 99.

ology are unable to arrive at any consensus, the judiciary . . . is not in a position to speculate as to the answer."⁴¹

It has been almost thirty years since Justice Blackmun wrote those words, and we still have not been able to answer the question from a moral and political perspective. If change in fundamental values is achievable at all in deeply conflicted areas such as abortion, it must often occur over a generation or more based on experience and the emergence of a new generation of citizens for whom the issues are not as intense. It is almost impossible that this value shift through rational political discourse. Our inability to change through rational discourse has little to do with truth, evidence or good faith. Change in areas of fundamental disagreement will never be a fully rational process because the advocates of the competing interests develop political constituencies. Their identity and interest group allegiance is taken from continued adherence to a particularly powerful stereotype and social movement. Therefore, those who have pledged their allegiance to a cause will not often surrender or modify their positions, both because they are conceptually unable to perceive the validity of new evidence and because they are beneficiaries of their existing commitments.⁴² This inability to see the world differently occurs in part because we need to believe deeply in something, and our beliefs and commitments blind us. But, in many instances, political strength is created by a political leader's professed view on a hotly disputed issue. If the political leader changed positions, his or her power base would disappear. If there were a serious attempt by an "honest" interest group to engage in truth-directed discourse rather than political advocacy, their opponents would use the truth against the group to further their own purposes.

The virtue of ordered conflict must also be understood in the context of managing the new form of social organization characterized by disputing micro-communities and against the backdrop of the unique character of the American culture. Much of the dynamic force that has led to this fragmented situation has been supplied by our inability to agree on allocations and entitlement to social goods on a basis that

41. 410 U.S. 113, 159 (1973).

42. See David Ausubel, *Cognitive Structure and the Facilitation of Meaningful Verbal Learning*, 14 J. OF TEACHER ED. 217 (1963). Ausubel reminded us that "existing cognitive structure . . . [and] individual's organization, stability and clarity of knowledge . . . is the principal factor in the learning and retention of meaningful new material." *Id.* The situation becomes even worse when we consider the barriers of self-interest erected by the human mind. Bernard Cohen brought this to the fore in his observation that "Max Planck . . . is often quoted to the effect that 'new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die, and a new generation grows up that is familiar with it.'" I. BERNARD COHEN, *REVOLUTION IN SCIENCE* 467-68 (1985).

relates to standards of merit. Nor is this surprising because merit is itself a slippery and subjective measuring stick. While Aristotle emphasized the need to allocate social goods according to individual merit, he begged the question by immediately describing the inability of humans to evaluate their own merit objectively.⁴³ He instead conceded our incapacity to judge our own and others' merit accurately because of jealousy and self-interest.⁴⁴

One cause of conflict, of course, is that people tend to place a higher value on themselves and on the concerns they hold dear than is assigned by others, even when they are acting in good faith. But the conflict is not only about achieving a fair level of material wellbeing. Many people strive to acquire more, because that is how they acquire higher status. As if disputes over our individual merit were not enough, we rank ourselves by our power and status in hierarchies — which for many is a form of derivative merit. We aim for ensuring that, however defined, any standards of merit selected reward us — most often at the expense of other communities of interest because that weakens their status.⁴⁵ Such outcomes relate to the fact that the

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43. Our self-interest makes a mockery of Aristotle's "highest virtue" — justice. Aristotle stated that:

[J]ustice is often thought to be the greatest of virtues And it is complete virtue in its fullest sense, because it is the actual exercise of complete virtue. It is complete because he who possesses it can exercise his virtue not only in himself but towards his neighbor also. . . . For this same reason justice, alone of the virtues, is thought to be "another's good," because it is related to our neighbour; for it does what is advantageous to another, either a ruler or a co-partner.

THE NICHOMACHEAN ETHICS OF ARISTOTLE 108 (Sir David Ross trans., Oxford University Press 1954).

44. Disputes over the priority and weight to be given different kinds of arguably meritorious qualities are found even in simple democracies. Few will agree on the terms of distributive justice or on the specific choices of merit that should govern us. See ARISTOTLE, *supra* note 2. In discussing claims of entitlement to rule others, Aristotle describes the disputes over who should be considered best and most virtuous:

[T]he definitions on the basis of which people claim that they themselves deserve to rule while everyone else deserves to be their subjects, are none of them correct. For, in fact, even against those whose claim to deserve control of the ruling body is based on virtue, multitudes would have some argument of justice to make, as they would likewise against those whose claim to deserve it is based on wealth.

Id.

45. Trying to avoid this dilemma is, of course, why John Rawls posited his "original position." JOHN RAWLS, A THEORY OF JUSTICE (1971). In Rawls's "original position," the persons creating the rules of allocation for society operated behind a veil of ignorance that meant they did not know anything about their own position in the society-to-be. See *id.* The thesis is that the rules would be fairer in order to allow for better treatment in case they were one of the less advantaged members of the new society. Rawls's device was artificial and hypothetical, as well as impossible.

standards selected as meritorious lead to greater or lesser allocations of social goods.

This natural human tendency toward competitiveness and the acquisition of wealth, power and status in relation to others often produces destructive forms of conflict. As Hobbes warned, without structure and power to overawe us the lack of security creates a chaotic and unprincipled reality. That reality may be sometimes overstated as a Hobbesian "war of everyone against everyone." But very recent history in Europe, Asia, and Africa suggests the tragic consequences that occur without the existence of a sufficient civil "power to overawe" – one that is simultaneously touched by a public perception of its fairness and provision of citizen access. In so many political systems people are trapped in a culture and tradition without the Rule of Law and are constantly at risk of violence and deprivation. While some fringe enthusiasts of Social Darwinism might praise such a dynamic process as leading to the evolution of the human species through struggle and the need for constant vigilance, few people would actually choose to live in such an environment.

IV. THE ROLE OF LAW IN COPING WITH CONFLICT AND SOCIAL CHANGE

The degree of penetration by a wide range of change agents into American society is such that basic shifts in values and behavior are now being experienced in virtually every area of human activity.⁴⁶ Sandel described the problem as one in which the liberal and conservative debate

does not speak to the two concerns at the heart of our discontent. One [concern] is the fear that, individually and collectively, we are losing control of the forces that govern our lives. The other is the sense that, from family to neighborhood to nation, the moral fabric of community is unraveling around us. These two fears define the anxiety of the age.⁴⁷

This unresolved anxiety has exacerbated already existing conflict and strife dispersed widely through all our most fundamental social and political institutions. Without the adversary system, we would lack the ability to reach the intermediate solutions needed to mute disputes based on fundamental differences in values and interest group agendas. These intermediate solutions are achieved through the process and authority of the mechanisms of the adversary system. This operates either directly through decisions backed by implicit force or indirectly through negotiated outcomes that would have never been achieved absent the looming ultimate power of the legal system

46. Michael J. Sandel, *America's Search for a New Public Philosophy*, *ATL. MONTHLY*, Mar. 1996, at 57-58.

47. *Id.*

that comes into direct play only if the disputants fail to reach a compromise.

The term "ultimate truths" is being used here to represent concern about fundamental questions such as right and wrong, the nature of good, justice, human nature, the role of the state and the extent and quality of its power over individual members of the political community, life and death. These are not mere abstractions. Ultimate truths ground power and authority.⁴⁸ Judgments of "truth" concerning such matters are basic to how any society orders its activities. Particular choices of ultimate truths infused into specific legal doctrines are political devices that are central to determining the allocations of power, privilege, advantage, and disadvantage in society.

The conflicts are created because the ultimate truths are not necessarily either true or ultimate. Even if the "truths" are accepted as abstractly true, the character of law always changes in the processes of its specific application. Law is created by its application to specific contexts and becomes wholly real only then. The infusion of the terms of the social dialogue in the context of a particular cultural moment is one of the fundamental contributions of the adversary system. Only in our attempts to apply the "truths" to specific contexts does it become obvious that competing clusters of deep values are inconsistent and strongly incompatible, even to the extent of being "enemies." Conflict is therefore created at the point when the ultimate truths of a particular doctrine are being considered for infusion into doctrinal rules that will consequently require action and impose sanctions and rewards. This creates an inevitable tension that, badly managed, can threaten the integrity and authenticity of a political community.

This, of course, is at the root of Hobbes's six factors that weaken a political community, because our ultimate truths are grounded in sources derived from our deepest belief systems. This means they are not fully open to true dialogue or adaptation based on rational discourse and evidence.⁴⁹ Our deep beliefs are judgments reached

48. See David Barnhizer, *Prophets, Priests, and Power Blockers: Three Fundamental Roles of Judges and Legal Scholars in America*, 50 U. PITT. L. REV. 127 (1988)(discussing ultimate truths)[hereinafter Barnhizer, *Prophets*]; see also GEORGE P. FLETCHER, *BASIC CONCEPTS OF LEGAL THOUGHT* (1996)(analyzing ultimate values).

49. Crane Brinton spoke of noncumulative knowledge in much the same way. Noncumulative knowledge relates to wisdom, human nature, values and morality. Brinton stated:

Men . . . make certain propositions, entertain certain ideas, about men, about right and wrong action, about beautiful and ugly things. Over two thousand years ago, men of letters were writing in Greek on these matters But our contemporary men of letters are today writing about the very same things the Greek men of letters wrote about, in much the same way and with no clear and certain increase in knowledge.

CRANE BRINTON, *IDEAS AND MEN: THE STORY OF WESTERN THOUGHT* 13 (1950).

through a variety of paths. These include sustained and substantial experience and study, and informed and uninformed choice. But the paths also include propaganda and inculcation, and in the general community those are far more likely sources of "knowledge." This makes it very important to understand the "ultimate truths" as vital tools of power because they are based in a deep-rooted human need to cope with conditions with which we must constantly struggle but cannot consciously understand or answer in any empirical sense. Ultimate truths are primary sources of the competing premises underpinning our system of law and legal doctrine.

It is impossible to have fully rational discourse in a complex community. The dilemma is that the deep value systems upon which the ultimate truths are grounded are not rational or even necessarily consistent with other clusters of belief containing potentially competing deep values. Thomas Green warned that we hold within us multiple and frequently inconsistent value systems and beliefs.⁵⁰ He suggested that we hold our value systems, not as an integrated and seamless whole, but in independent clusters that allow the holding of incompatible beliefs.⁵¹ These are resistant to the infection of fact and evidence, depending on the particular area of activity.⁵²

Humans necessarily hold critical aspects of their lives and beliefs in compartments, because this helps to mute the conscious conflict between our incommensurable systems of thought and behavior. In other words, the ideal of the fully integrated person is an impossible fiction because we have so many different roles to play and responsibilities to fulfill. Hypocrisy, self-deception, and knowing when not to pursue a line of inquiry are invaluable tools for ordinary life. Individuals possess incompatible systems of valuation operating deeply within themselves. Some of these incompatible systems are legitimate and necessary. Others are inadequate and even warped. Ernest Becker has written of the "delicately constituted fiction" of human aspiration, saying:

The world of human aspiration is largely fictitious and if we do not understand this we understand nothing about man Man's freedom is a fabricated freedom, and he pays the price for it. He must at all times defend the utter fragility of his delicately constituted fiction, deny its artificiality.⁵³

The conflicts are concerned with the answers to the "ultimate truths" through the power of the legal system. Frederick Rodell reminded us almost seventy years ago that "law [is] . . . the only alternative to force as a means of solving the myriad problems of the world."⁵⁴

50. GREEN, *supra* note 15, at 43.

51. *See id.*

52. *See id.*

53. ERNEST BECKER, *THE BIRTH AND DEATH OF MEANING* 139 (2d ed. 1971).

54. Frederick Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 43 (1936).

But, although we are in an era in which the legitimate and illegitimate demands for change through law have expanded enormously, we run the risk of undermining the authority and legitimacy of law itself. Aristotle warned, for example, that legal doctrine should not be altered too rapidly because “the law has no power to command obedience except that of habit, which can only be given by time, so that a readiness to change from old to new laws enfeebles the power of the law.”⁵⁵ But it is impossible for law and its primary instrument of dispute resolution – the adversary system – to hide from the strongest demands of its citizens. And those citizens are at each other’s metaphorical throats over powerful issues of both distributive and corrective justice.⁵⁶ The law, and therefore its adversary mechanism, is being asked to mediate demands that are in many ways incommensurable.

Donald Elliott wrote that “[l]aw is a scavenger. It grows by feeding on ideas from outside, not by inventing new ones of its own.”⁵⁷ But law is also more than a scavenger. Law scavenges in a purposeful way to satisfy its needs. Those needs are determined in reaction to social demands that certain conflicts be resolved. Law’s rules for “scavenging” are focused on coping with intense social disputes that have risen to such a level of intensity and awareness that some kind of action is required. It is the adversary system that offers the voice and the process through which the competing social interests can duel over the appropriate allocation of social goods. Of course, it does not only involve the decisions and doctrines of courts. Part of the battle is being fought in the legislative context in which particular rules of allocation are sought by the competing interest groups. But even here, the legislative activity uses the principles on which the Rule of Law is grounded to attempt to establish the key rules that will be applied through enforcement and adversarial disputing. Roscoe Pound described the role of law in the process, asserting that “[l]aw must be stable and yet it cannot stand still . . . [A]ll the writing about law has struggled to reconcile the conflicting demands of the need of stability and the need of change . . . If we seek principles, we must seek principles of change no less than principles of stability.”⁵⁸

The adversary system helps the members of our fragmented political system assert their grievances through law and to defend against

55. ARISTOTLE, *supra* note 2, at 58.

56. See FRANCIS CANAVAN, *THE PLURALIST GAME: PLURALISM, LIBERALISM, AND THE MORAL CONSCIENCE* (1995); *CHALLENGES TO THE ENLIGHTENMENT: IN DEFENSE OF REASON AND SCIENCE* (Paul Kurtz & Timothy J. Madigan eds., 1994); LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, *REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES* (1996).

57. E. Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38 (1985).

58. ROSCOE POUND, *LAW FINDING THROUGH EXPERIENCE AND REASON* 23 (1960).

others' grievances against them. The disputes are increasing. This process of disputing is collectively good in many ways and necessary in any event, but it is painful for people dependent on what is being destroyed or supplanted by the system's decisions that create new rules of allocation. It results in real winners and losers. For many people on the losing end, it represents the end of the world they have known and the beginning of one in which they are rudderless and adrift. In such a dynamic culture, there is a constant tension between those seeking to take advantage of change and those seeking to preserve the existing system or to protect their particular share of social and economic goods. This clash produces intense conflict, which is not surprising, given the consequences for the eventual winners and losers and the reallocations of power the dynamic of transformational change imposes. But if we put stock in ideas such as Schumpeter's claim that transforming changes are inevitable and to some degree natural, the conflicts and their intermediate resolutions are critical elements of the system's survival and overall health. In this sense, the resolutions resulting from ordered conflict can be claimed to be often virtuous because they may advance fairer treatment of previously disenfranchised groups, or at a minimum will at least be of functional importance in managing the political system according to legitimate principles.

Of course, in claiming there is a virtue in ordered conflict, all forms of conflict are not included. The focus here is with the role of the adversary system as a part of the facilitation of ordered conflict within a complexly democratic political system such as is comprehended within the ethos commonly called the "Rule of Law."⁵⁹ This is consistent with John Finnis's suggestion that law is a "cultural object, constructed or posited by creative human decision . . . an instrument . . . we adopt because we have no other way of agreeing amongst ourselves over significant spans of time about precisely how to pursue our moral project well."⁶⁰ He went on to describe law as providing

algorithm[s] for deciding as many questions as possible As far as it can, the law seeks to provide sources of reasoning — statutes and statute-based rules, common law rules, and customs — capable of ranking (commensurating) alternative dispute resolutions as right or wrong, and thus better or worse.⁶¹

The algorithms of law can be found in the structure and content of legal doctrines, which are the formulas judges (and even legislators) apply to the judging of disputes that find their way into the adversary system to the point that decisions are required.⁶²

59. John Finnis, *Natural Law and Legal Reasoning*, 38 CLEV. ST. L. REV. 1, 6 (1990); see generally JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980).

60. Finnis, *supra* note 59, at 6.

61. *Id.*

62. A structure of legal doctrine is offered at the end of this essay.

The adversary system is comprised of mechanisms for dispute resolution such as negotiation, mediation, arbitration and trial. Judges, lawyers, legislators, and even academics have critical responsibilities within the system. The particular mechanism or actor is not the defining characteristic of the adversary system as opposed to the underlying ability to resolve the dispute authoritatively through the power of the state. The adversary system therefore depends on certain basic elements. These include the implicit authority of force, an authoritative decision-maker if disputants cannot otherwise agree, a process offering some degree of fairness, the ability to resort to advocates to voice disputants' positions, and an intelligible set of legal rights and duties. These elements obviously create a system of ritualized and managed conflict as a substitute for private and unmitigated violence. In arguing the "virtue" of ordered conflict of the kind that allows real societies to endure, it should be clear that this is not an endorsement of private violence. Nor am I claiming that ordered conflict as managed through the adversary system is cost-free in terms of what it does to us. But the alternatives are worse.

V. THE ADVERSARY SYSTEM IN A COMPLEX AMERICAN DEMOCRACY

Aristotle described democracy as a corrupt form of government.⁶³ Athenian democracy was an imperfect form of government even in the essentially tribal-level culture reflected in Aristotle's Athens. It was based in a simple and homogenous male-enfranchised Athenian city-state and was never contemplated to work in a large-scale or complex political community.⁶⁴ Aristotle clearly recognized the inherent limi-

63. See ARISTOTLE, *supra* note 2, at 89, 207-45 (discussing the attributes of various forms of political regimes); see generally EMILY HAUPTMANN, *PUTTING CHOICE BEFORE DEMOCRACY: A CRITIQUE OF RATIONAL CHOICE THEORY* (1996); MORTON A. KAPLAN, *LAW IN A DEMOCRATIC SOCIETY* (1993); *THE RULE OF LAW* (Ian Shapiro ed., 1994).

64. Aristotle warned that "[t]here is a limit to the size of a city just as there is to everything else . . . For if any one of these is either too small or too large in size, it will not have the power that belongs to it but will sometimes wholly forfeit its nature and sometimes be in a base condition." ARISTOTLE, *supra* note 2, at 123. Aristotle urges that the size and composition of a city-state is important because:

A city's acts are those of its rulers and of its ruled subjects, and the work of the ruler is to command and pass judgment. But with respect to passing judgment on matters of justice and distributing offices according to merit, the citizens must know what each other is like, for where it happens that they do not, these matters of judgment and offices must be in a base condition. For it is not just to decide them in an offhand way, but that is manifestly what happens where there are many people. Further, foreigners and resident aliens could easily get a share in the regime because, given the excessive numbers, escaping detection will not be hard.

Id. at 124. Compare this with Jerold Auerbach's observation that we have lost the connection between community and law because the urban environment has

tations and potential abuses of the democratic system even when operating on the limited scale and relative homogeneity of the Athenian community. But while recognizing its potential for abuse and imperfection, Aristotle nonetheless concluded that on balance the flawed system of democracy might be reasonably close to the best form of government humans were capable of creating.⁶⁵ Even in its small and homogenous form, the democracy represented by Athens was dependent on the ability of citizens to be able to present their views and positions and to be heard by other citizens and by decision-makers. Disagreements and disputes filled Athenian life. Lawyers, oratory, rhetoric, and advocacy were a central part of the Athenian democracy.⁶⁶

It is obvious that Americans do not live in a simple city-state democracy. We inhabit an incredibly diverse and complex system that we very loosely and often inappropriately describe as democratic and that mixes the participatory principles of citizen democracy with the greater scale of constitutional republicanism. The United States is more accurately understood if its federalist system of government is thought of as a "domestic empire" uneasily contained within its far-flung national borders. But if adversity and the provision of a "citizen voice" were imperative parts of even a simple democracy operating on a small scale and with a far more homogenous culture, such as Athens, the need for effective advocacy is greatly multiplied in our complex republican democratic system in which it is even more difficult for one's voice to be heard.⁶⁷

At some point the sheer numeric magnitude of a political system produces its own complications in terms of system manageability. Institutional scale generates complexities and an increased need for interest groups to be heard in order to avoid being drowned out by the cacophony of competing voices. The combination of scale and complexity produced by the collision of radically different philosophical, moral, and religious beliefs – and the insistence by the holders of those collid-

reached a scale and degree of residential transitoriness that no one knows much of anything about each other. See AUERBACH, *JUSTICE WITHOUT LAW?*, *supra* note 21.

65. He concludes that even with its numerous flaws, democracy is the best real option. The three true forms of government were kingly rule, aristocracy, and constitutional government. The three corrupted forms were tyranny, oligarchy, and democracy. See ARISTOTLE, *supra* note 2, at 58. Aristotle considered democracy the best form in the real world because it had the greatest likelihood to serve the common good of all citizens while the other forms all tended toward the interests of specific classes. See *id.*
66. See, e.g., BRANDT AYMAR & EDWARD SAGARIN, *A PICTORIAL HISTORY OF THE WORLD'S GREATEST TRIALS: FROM SOCRATES TO EICHMANN 1-13* (1967)(discussing Athenian dispute resolution).
67. See AUERBACH, *JUSTICE WITHOUT LAW?*, *supra* note 21.

ing beliefs that they be recognized as legitimate – makes it imperative that social mechanisms allow for the release of internal pressures.

What is being described as the uniquely American form of government we call democracy is a result of the combination of population size, complexity and diversity. Jerold Auerbach warned that our urban environment renders us virtual strangers to each other, meaning there is little awareness of individual merit or sense of community. This has destroyed any sense of being a tightly knit community capable of causing us to fear expulsion from the community or some other sanction based on group disapproval. Such a context of anonymity alters behaviors and attenuates the possibility of accountability in ways that we are still trying to grasp. At the same time, as I suggest in the context of special interest micro-communities, those who are alienated in terms of the geographic, residential and employment environments that have historically provided us with our sense of community are creating different kinds of communities. These communities of interest do have some power over their members' behavior. But the new micro-communities are based on interests, not residence or employment.

Once a system moves beyond an easily manageable and relatively small-scale common culture in which there are shared values and a governing ethos in which the sources of authority are respected and laws are jointly understood, even if not reduced to written form, the political marketplace becomes much more competitive. But it is a marketplace — not of ideas but of power and influence — in which the discourse is outcome-directed rather than rational. While this is inevitable in the political arena, it is even truer when one of the few strong values of that enlarged political community is the competitive free market in which challenge, pursuit of opportunity, and an ideology of wealth-seeking dominate.⁶⁸ In such an environment, achieving a desired outcome depends on having the ability to make your positions heard by the system's decision-makers to the degree that you increase the likelihood they will give you what you desire. But truth is a victim in such a process. This led Jules Henry to conclude that the value systems and institutions of the twentieth century have somehow reversed the truth-seeking spirit of several millennia — essentially resulting in a culture of lies. He argued that “[o]ne of the discoveries of the twentieth century is the enormous variety of ways of compelling language to lie.”⁶⁹

68. In criticizing the effects of market-morality, Jules Henry argues that “[t]he heart of truth in pecuniary philosophy is contained in the following three postulates: Truth is what sells. Truth is what you want people to believe. Truth is that which is not legally false.” JULES HENRY, *CULTURE AGAINST MAN* 50 (1965).

69. *Id.*

In simpler political systems, custom and shared values play significant roles in avoiding and resolving disputes. As a political system becomes larger and more diverse, strong shared values are diluted or are forced to compete with equally strong beliefs, and customary knowledge of the kind required for an entire community to behave in a consistent manner disappears. This creates a vacuum empty of commonly shared values with significant consequences for the political system, which increasingly leads to a dependence on law. Lawrence Friedman captured the role of law in a complex democracy. In his classic, *American Law*, Friedman stated: "In complex societies custom is too flabby to do all the work — to run the machinery of order. Law carries a powerful stick: the threat of force. This is the fist inside its velvet glove . . ."70 He continued by asserting that

law and . . . courts stand at the very core of crucial decisions in the United States. These decisions concern policy in many spheres of life, including the major social questions and such sticky issues as obscenity, abortion, sexual deviancy, personal morality, and drug laws — in short, the whole social revolution.⁷¹

While the adversary system was a central part of the simple Athenian democracy, it is far more necessary in the diverse American system. But if the adversary system is vital to our American democracy, what are its most essential contributions? The answer must begin with the premise that law is an admixture of substance, morality, human nature, and process. At its heart it is a tacit system by which we more or less agree to manage our affairs in a conflicting community and abide by decisions — even (or particularly) when we do not like them. Our willingness to abide is based on the habit of obedience to rules, on fear of the consequences if we do not obey, and on respect for legal and political institutions.

An important part of our willingness to accept the decisions of legal decision-makers as authentic and authoritative is that the system is sufficiently open, and it provides multiple pathways that allow us to bring the issue back through the process of democratic decision making for reconsideration in some form.⁷² This is reflected in John Finnis's argument that:

Political authority in all its manifestations, including legal institutions, is a technique for doing without unanimity in making social choices — where una-

70. LAWRENCE M. FRIEDMAN, *AMERICAN LAW* 257 (1984).

71. *Id.*

72. Leaving open pathways through which unpopular decisions can potentially be altered is an important part of our system, presumably under the heading of "hope springs eternal." In fact, our system of doctrine is based on the ability to change. Bruce Ackerman reminds us that "it is most unlikely that a court will accept a novel legal argument on its initial presentation. Most probably, such an enterprise will only serve to win somebody else's case ten or twenty years from now . . ." Bruce Ackerman, *The Marketplace of Ideas*, 90 *YALE L.J.* 1131, 1139 (1981).

nimity would almost always be unattainable or temporary — in order to secure practical unanimity about how to coordinate our actions with each other, which, given authority, we do simply by conforming to the patterns authoritatively chosen.⁷³

Law is therefore a buffer between the raw force of violent actions we might otherwise take to achieve our interests or to avenge wrongs against us, and a commitment to subordinating our most selfish or aggressive instincts to a process during which we either accept our fates and adjust our positions and behavior accordingly, or organize and work toward achieving our goals in legal ways. The means through which one interest group seeks to attain its goals at the expense of another includes obtaining favorable legislation and interpretations of legal doctrine by judges. This also involves supporting defensive struggles aimed at preventing opponents from being successful in dominating the legal rules governing the area of conflict and therefore being able to impose their preferences. If we are unwilling to accept the system's authoritative judgments, we may attempt to convince legislators to reverse or amend relevant statutes or seek constitutional amendments. We may lobby to create or revise special administrative regulations or request executive orders or other executive actions that advance our goals. We may try to have the decisions of lower courts reviewed and reversed on appeal. Or as many are doing in the context of abortion, we may exercise our legal rights to protest, picket, educate, and seek to have new decision-makers elected or appointed who share our views.⁷⁴

For law to continue to serve its buffering function in our complex system of political organization, certain conditions must be met. While these conditions shift in weight and intensity, they are all necessary pieces of the dynamic organic system of law. The weakening of any element creates risks to the quality of the other elements and the perceived legitimacy of the social order. Compare these considerations with the conditions that exist in the most hotly disputed areas of controversy. They relate to fundamental qualities of value, fairness, institutional respect, access to the system, and the effects of religious belief. Such factors are at the heart of the Rule of Law. These conditions of law's legitimacy include:

1. Belief in the foundations of value underpinning the law;
2. Respect for the ends served by the law;
3. Understanding the power behind the law;
4. Reasonable congruence between the law and individual principles;

73. Finnis, *supra* note 59, at 6.

74. See, e.g., TIM LAHAYE, *THE BATTLE FOR THE MIND* 19-20 (1980)(suggesting the need to elect public officials with "sufficient moral sanity to pass laws prohibiting the distribution of corrupting materials").

5. Non-conflict with fundamental beliefs;
6. Awareness of the consequences of a "loss of law";
7. Respect for the institutions that apply the law;
8. Belief in the fairness of the law's application;
9. Fear of sanctions if the law is violated;
10. Availability of the law to advance one's legitimate ends; and
11. Openness of the legal institutions to alternative views.

Consider the above factors in the context of Hobbes' previously described six factors that weaken a political community and in the context of the improbability there can be a rational meeting of the minds as opposed to a submission to authority on issues such as abortion, capital punishment, racial and other forms of discrimination, and the limits of using government power in defining the rights or behaviors of individuals. Consider the possibility of a meeting of the minds on disputes relating to such concerns as weapons, drug use, pornography and obscenity, "hate crimes," free speech, censorship, property ownership, and privacy. These conflicts are not simply points of reasoned contention among fully rational interest groups. They are fundamental, volatile, and occasionally violent points of intersection of the most deeply held value systems on the part of individuals and institutions maneuvering to impose their view on others.

The intensity of the conflicts in America is suggested in a recent article describing how United States anti-abortion activists are extending their views into Canada. Colin Nickerson reported: "U.S. anti-abortion groups are increasingly engaging in direct anti-abortion crusades north of the border."⁷⁵ Additionally, "[a] campaign of violence and intimidation against doctors who perform abortions has succeeded in shutting down Canadian abortion clinics and frightening physicians so effectively that the procedure is becoming extremely difficult to obtain in many parts of the country."⁷⁶ Consider the meaning of bombings of abortion clinics, murders of doctors who perform abortions, whites who kill blacks simply because of skin color, blacks who kill whites simply because of skin color, arson attacks on churches, and much more.

Even if making political discourse a kinder and gentler process was a desirable goal – which it is not in our complex political system – virtually all of the system's incentives compel a different outcome. The challenge of altering the competitive spirit of political struggle is far beyond our abilities – even if the obstacles were only economic, and they are not. The combination of economics, ego, competitive behavior, and the conflicting nature of the goals sought by members of our

75. Colin Nickerson, *Attacks, Intimidation [sic] Make Abortion Rare in Canada*, THE PLAIN DEALER (Cleveland), July 15, 2000, at 3A.

76. *Id.*

society make it close to impossible for our fundamental disputes to be resolved by cooperative means. Our resolution process requires an advocate's voice. This does not mean that cooperative strategies should not be used, but even cooperative strategies are simply means to achieve one's desired ends most effectively.

The expectation that American society will be able to agree on specific outcomes and directions based on shared rational principles derived from a common set of values ignores the obvious fact that members of our society hold very different beliefs. We have numerous individual points of departure premised on our distinct systems of valuation concerning fundamental principles. The adversary system is an integral tool through which our democracy achieves what Pound called "a systematic adjustment of relations."⁷⁷ The adversary system both reflects and serves the culture of the very diverse and rationally incommensurable political, social, economic and moral systems that comprise our nation.

Part of this expanded need relates to the vastly increased access to the instrumentalities of social choice by an array of interests divergent in character from those that traditionally dominated American discourse. For convenience these are lumped under such headings as difference, diversity and multiculturalism.⁷⁸ "Difference," for example, has become a catchphrase in the past decade but many advocates of difference fail to think about the implications of the expansion in cultural beliefs that is implied by difference. Difference almost inevitably means more disputes over values, not fewer, in part because difference is less an abstract and neutral concept than an explicit or implicit demand. Difference represents more demands for inclusion, and such demands are resisted by those who are already in control of the context that would be affected negatively by the legitimacy of the particular "difference." Difference means more claims to power and participation. Difference means more competing interest groups defending themselves against other groups and trying to obtain what they consider is their rightful share of social and economic power and expanded access to opportunities. In making this statement the implication is not that the challenges created by most of the values reflected in difference are bad — simply that they are such powerful challenges to others' critical values and perceived entitlements that conflicts and resistance by those potentially affected are inevitable.

77. See Pound, *supra* note 19, at 3.

78. "Difference" is defined as "being different; dissimilarity," and as "an instance or point of dissimilarity." RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 551 (2d ed. 1997). To "differ" is "to be unlike, dissimilar, or distinct in nature or qualities. . . ." *Id.* Although the "difference movement" seeks to persuade people to have a greater appreciation for dissimilarity and unlikeness, this is obviously something that is very difficult for many people — both as a general matter and in relation to dissimilarities they consider undesirable and threatening.

The emergence of heightened levels of conflict over basic values is in many ways a positive process. It represents a healthy opening up of the traditional orthodoxy of a dominant culture that had been long able to suppress competing voices. Institutions organize themselves in ways that seek to self-perpetuate. All institutions do this and history has taught us that those who dominate the institutions of power and benefit most from the distributive allocations operate the political system in ways that cement their control.⁷⁹ Therefore, the newly opened process represents an expansion of the availability of effective advocates arguing on behalf of interests that had been systematically excluded from meaningful participation in political and economic processes. It represents the extension of access to advocates to those who were previously powerless.

Why is adversarial access a social imperative? Why is ordered conflict so important in our American cultural moment? This analysis begins with a sense of who we are and what we seek. We are a loosely definable "community" of widely divergent interests and multiple centers of power. We are in fact far more a federation of loosely related and competing communities of interest than a unified and harmonious polity. Our system is based far more on conflict, argument, self-interest and diffusion of power than on rational discourse. Self-interest means that we each begin our reasoning from a different point of departure, i.e., one dominated by our specific interest in a particular outcome. Advocacy in a complex democracy derives from the fact that there is at best a lowest common denominator level of consensus in any area of basic values.

In such a political system, there can therefore be no single rational "right" answer in virtually any area of consequence, but only negotiated or imposed political answers. As Madison indicated, neither dictatorial imposition of a single view or a propagandistic brainwashing in acceptable political thinking are desirable nor viable options.⁸⁰ This fact alone distinguishes us from more homogenous communities in which customary legal regimes were capable of operating on a small scale, in which shared values and a unifying authority mediated discourse, values, and decision-making. The advocate's voice is needed in our ordering of conflict because inherent within virtually any conception of "good" in a functioning political system is the inevitability that it will be in conflict, or at least a strong tension, with other conceptions. The validity and choice of a substantive conception of the good

79. Arthur Brown notes: "Institutions are social systems that shape not only our actions but our values and dispositions . . . [T]o the extent that institutions shape our values and dispositions they can make us stupid . . . [and] stupidity deprives us of our humanity." Arthur Brown, *Foreword* to DONNA H. KERR, *BARRIERS TO INTEGRITY: MODERN MODES OF KNOWLEDGE UTILIZATION*, at x (1984).

80. See *FEDERALIST*, *supra* note 9.

at any particular moment therefore represents only a point in an ongoing dialectical process rather than a collectively agreed absolute.

Our democratic system of enormous diversity, conflicting fundamental values, and diffuse clusters of power, can therefore function effectively only through the voices of powerful advocates and wise judges. Locke observed that law is what helps to hold the system together against individual efforts to take advantage of others.⁸¹ Jerold Auerbach reminded us that, even in the midst of rhetoric about the evils of the adversary system and the need for alternatives, few people would really want to function in a system where we lacked the ability to have our views forcefully argued on our behalf and judgments enforced by legal institutions.⁸² This is because we know we stand on feet of clay but cannot afford to admit their brittleness. Daniel Boorstin described our quandary:

[T]he mystery . . . of law in modern society . . . [is] [h]ow [to] retain any belief in the immanence of law, in its superiority to our individual, temporary needs, after we have adopted a whole-hearted modern belief in its instrumentality? How continue to believe that something about our law is changeless after we have discovered that it may be infinitely plastic? How believe that in some sense the basic laws of society are given us by God, after we have become convinced that we have given them to ourselves.⁸³

The role of the lawyer in this highly vulnerable and assailable process is to be an advocate within a complex system whose competing interests will never be brought into complete balance. The role of the judge is to protect and apply the system's core principles and to manage the rate and quality of change. The role of the legislator is to measure the system's needs with some degree of accuracy, and to use the legislative process to offer access to disputants and to adjust laws to deal with more important ends. Such a system is able to avoid revolution or extreme repression only by providing access to the legal process and by instilling the belief that a grievant's position will be fairly heard. At the center of this system is the expectation that each competing interest is provided a fair chance at prevailing through access to democratic institutions. Deprived of that option, the Social Contract disintegrates. Locke understood the necessity that people see their positions as capable of being considered in the rule of law. The point is not that there is any guarantee of success, but that due process is accorded. This has a tendency to mute and defuse the explosiveness of conflict.⁸⁴

Yet the fairness of the judicial and legislative elements of the process is not guaranteed or consistently applied. There are tragic inequities and abuses that make the adversary system a travesty in too

81. See LOCKE, *supra* note 21, at 67-68.

82. See AUERBACH, *JUSTICE WITHOUT LAW?*, *supra* note 21.

83. DANIEL J. BOORSTIN, *THE DECLINE OF RADICALISM* 75-76 (1969).

84. See LOCKE, *supra* note 21.

many respects. The most basic failure is in the lack of true adversariness in the area of criminal justice. The injustices of our justice system are allowed to continue, in part because we are afraid to push for the required changes. Similarly, a great gap exists between the rhetoric of justice and its reality, particularly when the system deals with the poor and helpless in our society. In considering David Cole's recent work on disparate treatment of racial minorities in the criminal justice system, Stephen Gillers noted: "In theory, the Constitution guarantees indigent defendants effective counsel. In reality, Supreme Court rulings have allowed judges to treat lawyers as effective even when they conduct no investigation, fail to cross-examine crucial witnesses, sleep during testimony or come to court drunk."⁸⁵

While the examples Gillers mentions are relatively exceptional, the quality of representation afforded most defendants in criminal cases is abysmal. One reason we hide from such knowledge is that

this close relation between knowing and [thus being morally responsible for] doing can help us to interpret one cause of the fear of knowing as deeply a fear of doing, a fear of the consequences that flow from knowing, a fear of its dangerous responsibilities. Often it is better not to know, because if you did know, then you would have to act and stick your neck out.⁸⁶

In thinking about things we know are wrong but choose not to deal with, consider, for example, the paucity of resources available to a defense attorney in a murder case where the defendant was in school several miles away from the site of the killing when the crime was committed but still remained in jail for two years. His assigned public defender was responsible for twenty-five cases at a time, with twelve of them murder defenses in which prosecutors were asking for the death penalty. The attorney's office had a single investigator shared by four other lawyers, all of whom had similar caseloads.⁸⁷ Most experienced litigators would strongly assert that it is impossible to do a competent, much less zealous job in that situation. Lest we dismiss this situation as exceptional, compare this with the grossly inadequate level of assistance provided death row inmates in Florida who are appealing their convictions, a system described as a sham.⁸⁸

85. Stephen Gillers, *The Double Standard: Inequality in Criminal Justice May Be a Good Thing for the Favored Classes*, N.Y. TIMES, Mar. 21, 1999, at A13; see DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999).

86. ABRAHAM H. MASLOW, *TOWARD A PSYCHOLOGY OF BEING* 157-58 (2d ed. 1968).

87. See Mike Robinson, *Chicago Teenager Jailed for Months Even Though He Had a Perfect Alibi*, THE PLAIN DEALER (Cleveland), May 22, 1999, at 8A.

88. See Marcia Coyle, *Suit: Death Defense is a Sham: Claim is Fla. Provides Lawyers But Makes It So They Can't Save Inmates*, NAT'L L. J., Dec. 21, 1998, at A1.

Additionally, consider the level of representation provided for people charged with crimes in Texas.⁸⁹ Bob Herbert reported in the *New York Times* that:

It is not uncommon for indigent defendants, some of whom are innocent, to languish in jail for months before a lawyer is appointed to represent them. Many Texas counties have no procedure for the appointment of counsel before an indictment is returned. A court-appointed lawyer in Brownsville who met his client for the first time while a jury was being selected failed to present evidence during the trial that the man was incarcerated at the time he was supposed to have raped a child. The man was convicted, sentenced to life in prison and served five years before a Federal judge ordered him released. A severely mentally ill man accused of punching his grandfather in the arm spent four years in jail awaiting trial in Hidalgo County. A man convicted of murder spent 10 harrowing years on death row before a volunteer attorney investigated his alibi and won his release.⁹⁰

The barely hidden truth in these tragedies reflects a far darker part of ourselves than our fear of facing ourselves and our hypocrisy. That dark side has to do with how we want the system to deal with the marginal and powerless. The most frightening aspect of this system is that it is exactly how we want governmental power to be exercised in order to keep the "underclass" in its "proper" place. Our failure to provide an even minimally adequate quality of representation to people from whom we extract freedom and life represents one of the main junctures at which we want the adversary system to fail in its professed ideals. It is how we want blacks, Hispanics, and the poor and powerless to be treated, in part because we fear them. Because of this injustice, when I speak of the "virtue" of ordered conflict, I am not implying that it achieves its full potential in this respect. As reflected in a recent article, my premise is that critical areas of continuing injustice exist in which we need far more ordered conflict of a significantly more honest nature and greater access to higher quality advocates than is found throughout the criminal justice system.⁹¹

VI. A PERIOD OF INTENSIFYING SOCIAL CONFLICT AND SEARCH FOR IDENTITY

It is difficult to know what path society is taking because the traditional American community is almost mythic, both in terms of its as-

89. See Bob Herbert, *Defending the Status Quo*, N.Y. TIMES, June 17, 1999, at A31. Herbert discusses proposed "reforms" in Texas. He concludes, stating "[b]ut for some folks in Texas the idea of providing even minimal constitutional protections for poor defendants is going a step too far. And one of those folks appears to be that beacon of compassionate conservatism – you've heard of him – George W. Bush."

90. *Id.*

91. See David Barnhizer, *Princes of Darkness and Angels of Light: The Soul of the American Lawyer*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 371 (2000) [hereinafter Barnhizer, *Princes*].

sumed proportions and its actual historical existence. While some will nostalgically recall a "golden age" of a fair and just America, this perspective depends upon who you were at the time. Much like a feudal society, the traditional conception of community was only able to exist in a world where people knew the limits of their assigned roles, knew their "place," and knew how to "steppinfetchit" for their masters. Women, blacks and other denigrated minorities, gays and lesbians, the physically and emotionally disabled, poor people, and many others all "knew their place" in a social structure comprised of clearly defined status and hierarchy. They lacked the legally recognized "voice" required to participate meaningfully in the debate over the allocation of social goods or to speak strongly and collectively against the injustices that characterized their treatment. This silencing of the disadvantaged and marginal, and the relegation of women to stereotyped gender roles has disappeared or at least dissipated over the past few decades.

The speed of the changes and the extent of the opening of political discourse to suppressed interests have stunned society. The consequences of this transformation are now striking the American community with an extraordinary and relentless rapidity. Many are reacting in protest against this "social revolution." The Reverend Tim LaHaye warned that:

[A]moral humanists have moved in, until they control our nation's destiny and are seeking to separate her from God. This is particularly true of our judges, a high percentage of whom make humanistic decisions. Because most judgeships are appointed positions, it will take several years to change that picture. The only way to bring morality back into our judicial system is to elect strong, pro-moral candidates to all federal offices, particularly in the key position of president.⁹²

The rules have changed irreversibly, and the discourse is far more inclusive. Unsurprisingly, because the issues brought into this discourse by the new participants are so volatile and deeply felt, and so vehemently opposed by those at whom they are aimed, it is an aggressive, strategic, and in many ways irrational discourse. Nor is there any internal consistency or connection between the adherents of the newly emerging positions. The advocates of the socially and politically avant-garde do not represent a coherent movement with a common strategy as much as a kaleidoscope of widely divergent activists advancing their specific agendas. The common threads are primarily

92. LAHAYE, *supra* note 74, at 20. See Aric Press & Ann McDaniel, *Judging the Judges: The Courts are Being Re-created in Reagan's Image*, NEWSWEEK, Oct. 14, 1985, at A73 (describing President Reagan's strategy to create a federal court that reflected his supporters' views on race, affirmative action, and abortion). "Unable to win Congress over to its views on social issues, the administration has pinned its hopes on the courts. And it has done so with no apparent irony, despite the longtime insistence of conservatives that courts are the wrong place to make policy." *Id.*

change, demand for a voice, desire for inclusion, and insistence on a share of power. The various advocates are just as likely to be in conflict with another newly emergent interest group that is intent on having its own positions heard and on lodging its claim to social goods. The conflicts take on a more intense character, because the demands for inclusion and respect are grounded in the language of protest, activism, and insistence on greater access to the conditions and benefits of power that interest group advocates believe have been denied them by the previous "community."⁹³

Rather than having a reasoned debate based on sound evidence, interest groups on all sides are engaging in wars of conflicting stereotypes. This is unsurprising because the issues being advocated are a complex mixture of incompatible premises and value systems which are intellectually and emotionally incompatible. It would take a political "Philosopher's Stone" to resolve the challenges. Lacking that magic, we resort to stereotypes. In *Propaganda*, Jacques Ellul reminded us that:

A stereotype is a seeming value judgment, acquired by belonging to a group, without any intellectual labor The stereotype arises from feelings one has for one's own group, or against the "out-group". Man attaches himself passionately to the values represented by his group and rejects the clichés of the out-groups The stereotype, . . . helps man to avoid thinking, to take a personal position, to form his own opinion.⁹⁴

Maxine Greene warned that slogans and propaganda have replaced intelligent dialogue. She stated that slogans are, "rallying symbols" that "in no sense describe what actually exists, yet they are taken — wishfully or desperately — to be generalizations or statements of fact."⁹⁵ Legitimate criticism easily slides toward fanaticism, and many of the most important social disputes have drifted in some ways toward the extremes. This was Michael Sandel's point when he described the current liberal and conservative debate as failing to "speak to the two concerns at the heart of our discontent."⁹⁶ Gabriel Marcel placed what is occurring in America in a context of fanaticism, reminding us of the improbability of effective discourse. Marcel wrote that: "[t]he first . . . observation to be made is that the fanatic never sees himself as a fanatic; it is only the non-fanatic who can recognize him as a fanatic; so that when this judgment, or this accusation, is

93. See, e.g., ERIC HOFFER, *THE TRUE BELIEVER: THOUGHTS ON THE NATURE OF MASS MOVEMENTS* (1951). Therein, he discusses how the "fault finding man of words" attacks a dominant orthodoxy in order to undermine its perceived legitimacy and hold on power. *Id.* at 132.

94. JACQUES ELLUL, *PROPAGANDA* 163, n.3 (Konrad Kellen & Jean Lerner trans., Alfred A. Knopf, Inc. 1965) [hereinafter *PROPAGANDA*].

95. GREENE, *supra* note 24, at 70.

96. Sandel, *supra* note 46, at 57-58.

made the fanatic can always say that he is misunderstood and slandered."⁹⁷

Russell Jacoby approached this dilemma by criticizing the application of the concept of multiculturalism. He discusses what he considers abuses of the idea of multiculturalism.⁹⁸ Jacoby criticized not the idea of multiculturalism but its application, observing that:

The ideas of multiculturalism, cultural pluralism and diversity turn sacrosanct. They become blank checks payable to anyone in any amount, lacking meaning or content. They not only suggest a politics, but often replace politics. However, even with adjectives like radical or transformative attached, what politics do they designate? Apart from the wish to include more voices in the curriculum or different faces at the office, no vision drives multiculturalism. . . . The rise of multiculturalism correlates with the decline of utopia, an index of the exhaustion of political thinking.⁹⁹

This battle of stereotypes is integral to conflicts seeking change and the reallocation of power. People resist change and surrendering the benefits they already possess. Part of the problem is inertia, but another is our inability or refusal to surrender our beliefs in the validity of a particular worldview. It is undeniable that most of the more fundamental demands for inclusion require a shift in the value systems of those who are in control of the rules of the social system or who are the primary beneficiaries of its rules of allocation. We do not want to change our beliefs, rules, or entitlements. Charles Axelrod offered this insight:

Ideas do not float freely among people; they become rooted in commitments, ossified and sustained within intellectual communities; they are cradled among avid sponsors and defenders whose work relies on their stability. Thus the tension of discourse refers not merely to the presence of one language addressing (and straining) another, but to the presence of one language addressing the inertia of another.¹⁰⁰

If this problem of inertia and allegiance to existing positions and values – regardless of contrary evidence – accurately characterizes even the academic and intellectual communities what does it portend for communities of interest that lack commitments to such governing values as truth and innovation? The situation may well be hopeless from the perspective of our ability to achieve truth-based solutions to the most critical disputes. Just how dangerous the battles over stereotyped interest group agendas are to our ability to preserve the integrity of our political community can be understood through reference to Hobbes's six factors presented earlier.¹⁰¹

97. GABRIEL MARCEL, *MAN AGAINST MASS SOCIETY* 136-37 (1969).

98. See RUSSELL JACOBY, *THE END OF UTOPIA: POLITICS AND CULTURE IN AN AGE OF APATHY* (1999).

99. *Id.* at 32.

100. CHARLES AXELROD, *STUDIES IN INTELLECTUAL BREAKTHROUGH, FREUD, SIMMEL, BUBER* 2-3 (1979).

101. See HOBBS, *supra* note 3, at 363-68.

1. The belief that every private man is Judge of Good and Evil actions.
2. The belief that whatever a man does against his conscience, is sin.
3. The belief that Faith and Sanctity, are not to be attained by Study and Reason, but by Supernatural Inspiration or Infusion.
4. The belief that he who has the Sovereign Power is subject to the Civil laws.
5. The belief that every private man has an absolute propriety in his goods: such as excluded the Right of the Sovereign.
6. The belief that the sovereign power may be divided.¹⁰²

Hobbes's first through fifth factors all subordinate the positive will of the democratic community to a perception of divine intent or to the primacy of the individual. It takes little imagination to understand that to the extent that the "right" belief is considered to be divinely inspired, how will the community's positive laws ever be able to trump God's revealed will? This helps explain the depth of feeling on the part of those opposed to abortion, particularly those whose opposition is based on religious belief. In such a context, no human-made law can ever be legitimate unless it completely bans or at least severely restricts abortions. For the most dedicated of anti-abortion protesters, abortion represents the taking of an innocent human life or the denial of the spark of divine spirit that God bequeaths us in His own image. Each is a mortal sin.

Consider the opposing view that a woman's right to control her body and reproductive processes is a form of individual liberty that overrides all other considerations and requirements the community might seek to impose on the individual woman. This relies on the primary value of individual autonomy, which in turn requires the manipulation of basic concepts of the nature and value of human life. The only way to avoid the dilemma is to make one value absolute or to present the fetus as not really representing true life. But the value of human life is a strong principle that no responsible moral actor will dispute. If an individual wants to be able to make a moral choice that does not lead to moral guilt, it is necessary to elevate some other principle such as personal autonomy and choice to a higher moral level than that of human life, or, because many are not comfortable with this particular rationale, to redefine the factual context in ways that allow the conclusion that human life is not involved in the exchange — i.e., "viability."

There is an element of dishonest rationalization in the abortion dispute in which either micro-community sets its preferred moral standard in terms consistent with its political agenda. These perspectives must be placed in a context of gender politics and a history in which many women feel unfairly dominated by the unjust use of male power. This may allow the setting of priorities that serve the micro-community's interests but does not resolve the obvious moral conflict. There can be no agreed upon resolution of such disputes; instead, com-

102. *Id.*

peting views and interests strike an uneasy balance. Even the balance is difficult to achieve. Hobbes feared that the unwillingness to compromise on fundamental issues of this volatile character due to a belief that positive laws violated divinely revealed laws would result in a weak political system. Yet the most powerful and intractable of our current conflicts derive from such beliefs.

Thinking about Hobbes's six factors creates an appreciation of the virtue of the adversary system's ritualistic and ordered processes of conflict resolution. The volatile politico-legal doctrines, including abortion, affirmative action, takings, and religious establishment disputes are conflicts about which we will not be able to achieve full agreement. Expansion of the culture's zone of tolerance and willingness to compromise will only occur over time rather than through a cultural epiphany. It must also be measured in terms of the degree of penetration of the altered values in society rather than the expectation that all citizens will change their views. In fact, as more people begin to gradually shift toward an altered set of values, an intensification and even radicalization of the agendas and behaviors of those who remain opposed may result.

An element of our being able to achieve a degree of compromise is the provision of an opportunity for disparate voices to be heard rather than suppressed. If that opportunity is denied or too muted in its emotional character, it loses its ability to mitigate hostility and intensifies the underlying bitterness. That is arguably what is happening in response to what political conservatives have labeled "political correctness" or the assertion that one group's worldview and sensitivities can be allowed to suppress or trump another's.¹⁰³ Aristotle warned that a sense of fairness and of justice being served were essential elements of any decent society.¹⁰⁴ Access to a society's mechanisms of dispute resolution is part of a perception of at least relative fairness. Without the perception of fairness being widely held by citizens, the members of political societies lack the will to cooperate with others and distrust their political institutions. If this continues too long and becomes too pervasive, the social glue is not strong enough to prevent a weakening, or even disintegration, of the political system.

While we will never be able to reach full social compromise on basic moral positions, the anger created by rigid and unalterable value conflicts are major premises that underlie Hobbes's concerns regarding the weakening of a political community. Loss of the sense of fairness,

103. See, e.g., *THE BETRAYAL OF LIBERALISM: HOW THE DISCIPLES OF FREEDOM AND EQUALITY HELPED FOSTER THE ILLIBERAL POLITICS OF COERCION AND CONTROL* (Hilton Kramer & Roger Kimball, eds., 1999); DINESH D'SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* (1991); ROGER KIMBALL, *TENURED RADICALS: HOW POLITICS CORRUPTED HIGHER EDUCATION* (1998).

104. See ARISTOTLE, *supra* note 2.

the feeling by many citizens of being denied access to critical social goods and opportunities, and the inability or unwillingness to negotiate social compromises have combined to create a period of uncertainty that is profoundly straining the fabric of American society. But such feelings will remain with us and shift as one position gains power at the expense of another.

There is a need to protect against concentrations of power. The Madisonian foundation of our system of government rests on the diffusion of power and the creation of clusters of power that tend to balance and oppose the natural drift of the most powerful interests toward dominance.¹⁰⁵ If, as Hobbes warns, the belief that God sets a pattern of divine laws to guide our behavior and regulate the political community creates a difficulty for society, the “death of God” trumpeted by the Enlightenment creates an equivalent dilemma. A fully secular conception of society in which laws are based solely on the power of humans to make choices of law without some strong source of external or divine authority such as natural law or divine inspiration has resulted in a system in which humans lack deep principles of a kind sufficient to guide their judgments. Daniel Boorstin concluded that:

The discovery, or even the belief that man could make his own laws, was burdensome . . . [N]early every man knew in his own heart the vagueness of his own knowledge and the uncertainty of his own wisdom about his society. Scrupulous men were troubled to think that their society was governed by a wisdom no greater than their own.¹⁰⁶

Many people have little difficulty with making such choices — at least as long as they are in control of the decision-making processes. Conservative Republicans railed against the abuse of governmental power until they moved from the political shadows in the early 1980s and gained control of the levers of power.¹⁰⁷ Our most powerful financial interests long warned of the evils of a world government, but their “wolf crying” ended as soon as they were successful in creating institutions such as the World Trade Organization that allocated control of the rules of trade to them. This provided the ability to trump many conflicting social policies. We are now at the point where globalization rhetoric has helped work one of history’s most significant transfers of national sovereignty to an international body, and this shift repre-

105. See *FEDERALIST*, *supra* note 9, at 56.

106. BOORSTIN, *supra* note 83, at 56.

107. See, e.g., E.J. Dionne, Jr., *Liberals Fear New Judicial Activism*, *THE PLAIN DEALER* (Cleveland), July 14, 2000, at 9B. Dionne wrote:

Attacks on “the imperial judiciary” were once the stuff of conservative arguments against a “liberal activist” Supreme Court. That is about to change. In a shift that is momentous in historical and political terms, liberals are beginning to sound alarms about conservative justices using states’ rights and other doctrines to void environmental, economic and social legislation.

Id.

sents a severe threat to true democratic governance on local and national levels. Paradoxically, the emergence of extremely powerful global trade institutions has been regarded by the private financial interests the institutions serve as a virtue rather than an unmitigated evil.

The recognition that power requires control of decision-making institutions and rules has created a competition to occupy the sources of power and define the rules of decision to ensure that particular interest group preferences are reflected in the choices. This is demonstrated in the seemingly unrelated situations of the American judiciary and globalization rhetoric. In his classic book, *Power*, Adolf Berle warns that control of institutions is the only way by which people can extend their power beyond the limited reach of their fists or guns.¹⁰⁸ Clearly, Berle means that those seeking to capture the ability to dictate rules to others or to protect themselves against others' control requires that they gain possession of the institutions that make and enforce the rules or laws.¹⁰⁹

Justice Rehnquist suggested what almost inevitably happens when people who possess strong agendas and controlling stereotypes are successful in their effort to acquire power. Dissenting in *Furman v. Georgia*, he quoted from John Stuart Mill's, *On Liberty*:

The disposition of mankind, whether as rulers or as fellow-citizens, to impose their own opinions and inclinations as a rule of conduct on others, is so energetically supported by some of the best and by some of the worst feelings incident to human nature, that it is hardly ever kept under restraint by anything but want of power.¹¹⁰

VII. SOCIAL DESPAIR AND ACQUIRING MEANING THROUGH JOINING A MICRO-COMMUNITY

Another reason behind the intense battle for dominance of a desired stereotype is that, while humans are seeking identity and meaning, they are caught in the grip of an enormously powerful and faceless society that relegates the vast majority of people to existences as little more than fungible commodities.¹¹¹ Those who feel they are

108. ADOLF A. BERLE, *POWER* 92 (1967).

109. *See id.*

110. 408 U.S. 238, 267 (1972) (Rehnquist, J., dissenting)(quoting JOHN STUART MILL, *ON LIBERTY* 28 (1885)).

111. *See* MITCH ALBOM, *TUESDAYS WITH MORRIE*, 124-25 (1997). Albom wrote: "We've got a form of brainwashing going on in our country," Morrie sighed. "Do you know how they brainwash people? They repeat something over and over. And that's what we do in this country. Owning things is good. More money is good. More property is good. More commercialism is good. More is good. More is good. We repeat it — and have it repeated to us — over and over until nobody bothers to even think otherwise. The average person is so fogged up by all this, he has no perspective on what's really important anymore."

being ground beneath the wheel of an inhumane economic and social system have limited options. These options include rebelling and seeking an alternative identity outside the system, or accepting their fate and declining into an emptiness that numerous social philosophers have said lies at the heart of humanity.¹¹²

Reasons given for our despair and emptiness include the enormous power, complexity, and contradictory forces of modern society.¹¹³ Walter Lippmann remarked that men have dissolved into "an anonymous mass" because they are "without an authentic world, without provenance or roots;" without, that is to say, "belief and faith that they can live by."¹¹⁴ In two powerful and insightful books, *Technological Society* and *Propaganda*, Jacques Ellul warned of a transformation of social structure and behavior into what he called technique.¹¹⁵ A generation ago, Ellul saw this change occurring to the point we are trapped within a "technological society" that defines and dictates human behavior and causes a progressive loss of our humanity.¹¹⁶

Confronted by complexity and power beyond imagining, and feeling completely incapable of individually mastering the world, people can take several possible paths. One path chosen by many is to seek refuge in powerful institutions that offer a kind of security, legitimacy, and meaning.¹¹⁷ The values of General Motors or Nissan are substituted for personal existential inquiry, and status is acquired through association. Some seek to achieve some form of individual meaning and identity. But even the search for individual meaning is often simply another form of self-deception. Viktor Frankl observed that "there

Id.

112. See, e.g., MARTIN BUBER, *BETWEEN MAN AND MAN* 158 (Ronald Gregor Smith trans., The MacMillan Co. 1947).
113. The power and scale of institutional structures is part of the phenomenon of "technique," which Jacques Ellul describes as shaping modern society. See JACQUES ELLUL, *TECHNOLOGICAL SOCIETY* (John Wilkinson trans., Alfred A. Knopf, Inc. 1964)[hereinafter *TECHNOLOGICAL SOCIETY*]. Ellul wrote: "propaganda seeks to induce action, adherence, and participation—with as little thought as possible." *PROPAGANDA*, *supra* note 94, at 180.
114. WALTER LIPPMANN, *THE PUBLIC PHILOSOPHY* 87 (1956).
115. See *TECHNOLOGICAL SOCIETY*, *supra* note 113; *PROPAGANDA*, *supra* note 94.
116. Ellul describes the shift toward specialization and its costs:
 Technique is of necessity, and as compensation, our universal language. It is the fruit of specialization. But this very specialization prevents mutual understanding. Everyone today has his own professional jargon, modes of thought, and peculiar perception of the world . . . The man of today is no longer able to understand his neighbor because his profession is his whole life, and the technical specialization of this life has bound him to live in a closed universe.
TECHNOLOGICAL SOCIETY, *supra* note 113, at 132.
117. Consider worker attitudes as reflected in an article by Teresa Dixon Murray. See Teresa Dixon Murray, *Many Workers Have Lost Trust as Firms Close Unexpectedly: Corporate Loyalty is Replaced by Corporate Suspicion, Distrust*, *THE PLAIN DEALER* (Cleveland), July 11, 1999, at D1.

are various masks and guises under which the existential vacuum appears. Sometimes the frustrated will to meaning is vicariously compensated for by a will to power, including the most primitive form of the will to power, the will to money."¹¹⁸ Jules Henry described the tendency toward finding a substitute for true human meaning, stating that:

The average American has learned to put in place of his inner self a high and rising standard of living, because technological drivenness can survive as a cultural configuration only if the drive toward a higher standard of living becomes internalized; only if it becomes a moral law, a kind of conscience.¹¹⁹

A fascinating possibility exists regarding the inhumanity of the technological society as it has become linked to our increasingly globalized economy. The ruthlessness and impersonality of the globalized economic entity has become sufficiently manifest that employees are beginning to understand that there is no longer any real security for anyone. Traditionally, when companies hired workers they tended to think of it as an implicit bargain for life in which if the worker demonstrated loyalty and diligence the company would continue the employment. In such a culture, loyalty was understandably owed the company "family."

A recent report in *The Plain Dealer* described a situation in which a troubled company enticed employees to stay on the job during reorganization by promising benefits and severance pay. After several months the company reneged on its promise and declared bankruptcy while leaving the workers unpaid and bitter. It became clear that the promises had been part of a deliberate strategy to obtain worker services without intending to honor the commitments. Journalist Teresa Dixon Murray concluded in this article that "[t]ales of corporate betrayal like the Builders Square shutdown have had a ripple effect on all companies, fueling greater cynicism among a work force that already distrusts employers who seem capable of any degree of ruthlessness or inhumanity, as long as the bottom line is protected."¹²⁰

Compare this situation with a recent and troubling report on a new practice of an increasing number of Japanese companies. The companies are attempting to force long time employees to resign rather than firing them. This reduces the social costs to the company. Generally known as committed to life-long employment arrangements, companies in Japan are altering decades of worker stability with crude ostracism of workers they are attempting to force out of jobs through resignations.¹²¹ Other workers who have been told that the company

118. VICTOR E. FRANKL, *MAN'S SEARCH FOR MEANING* 170 (1985).

119. HENRY, *supra* note 68, at 50.

120. Murray, *supra* note 117, at D1.

121. See Mark Magnier, *Japanese Companies Use Silent Treatment to Force Workers Out*, *THE PLAIN DEALER* (Cleveland), July 25, 1999, at A4.

no longer plans to keep a particular worker have increasingly begun to show their loyalty to the company by engaging in "shunning behavior" in which they refuse to eat with or talk to the employee.¹²² The aim is that the employee will become so dismayed at being shunned that he will quit rather than being fired or laid off. This saves the company the cost of social benefits, and losing face.¹²³ These trends tell us that even if we want the security of comfortable institutions that will act as our "mothers" for life, such safe havens are disappearing. How we will adapt to the loss of institutional security is still an open question.

We have seen the disintegration of an idyllic and somewhat illusory "community" into a myriad of small and independent special-interest micro-communities. This phenomenon now dominates our social and political landscapes. The "micro-communities" have become vital sources of meaning and identity for people trapped in an immense and powerful system. Erich Fromm describes our search for some semblance of identity in a faceless state as one in which:

the individual ceases to be himself; he adopts entirely the kind of personality offered to him by cultural patterns; and he therefore becomes exactly as all others are and as they expect him to be. The discrepancy between "I" and the world disappears and with it the conscious fear of aloneness and powerlessness.¹²⁴

He continues: "The person who gives up his individual self and becomes an automaton, identical with millions of other automatons around him, need not feel alone and anxious any more. But the price he pays, however, is high; it is the loss of his self."¹²⁵

While the movement toward the technological society has intensified since Ellul presented his prescient insights, so has the rebellion against this society's dehumanizing conditions. We may be seeing a counter-revolution in terms of people awakening to their own responsibility for action. More likely, however, the rise in special interest micro-communities is little more than a substitute for the loss of institutional loyalty. It is a method by which we select a belief system that gives us a sense of community, identity and meaning. This rebellion against technocratic and bureaucratic meaninglessness and the search for a niche in which one can find substitute meaning plays a significant role in the conflicts that now characterize our social interactions. Mediating this rebellion without allowing the system to collapse under the stresses generated by the conflict is a vital part of the adversary system.

In seeking to rebel against this effect of modern society, many people have created associations clustered around a core of powerful in-

122. *See id.*

123. *See id.*

124. ERICH FROMM, *ESCAPE FROM FREEDOM* 208-09 (1941).

125. *Id.* at 209.

terests and beliefs. In this way, they exist and have a sense of meaning and power. The problem, however, is that they must hold to these associations and beliefs with a death grip, because it is all that provides them with a sense of meaning and life. The ability to compromise and change is very limited in such a system, because the special interest micro-communities are grounded on the need to believe in something in order to simplify a world that seems out of control. The need for association and group meaning extends to agreeing with fellow "true believers" in order to keep the association strong and supportive.

A serious problem for the adversary system is that the micro-communities that populate our political landscape are not internally critical and self-aware as opposed to being externally directed. They tend to react to perceived external threats rather than being aimed at personal growth and individual meaning. This reaction produces inevitable conflict with other communities of interest whose members oppose (or simply do not fully acknowledge) the desirability of the particular interest group's positions. In fact, the beliefs and identity of a micro-community of interest are largely created and sustained by the conflicts with other interest groups through these reactive relationships. In an odd way, each needs the other. Rather than being a threat, the energy and focus created by the conflict helps define and sustain each interest group.

One way of coping with the facelessness of our world is to adopt a cause in which we believe deeply. It is important that enough other people share the cause so that it achieves the critical mass needed to become a micro-community to which we can pledge allegiance and derive meaning. The shift to religious fundamentalism, some forms of environmental activism, and even the rise of neo-Nazi organizations are a few examples of this phenomenon. Such micro-communities are now found everywhere.

In a social system that possesses the amount of discord that now is represented in our many micro-communities committed to advocating their agendas, the need for reasoned dialogue is great, but to expect it is unrealistic. Law and legal doctrine are after all only another form of politics, and much of our discourse is rationally inadequate and factually dishonest. The democratic dream of rational, truth-based discourse is being honored only in the breach. This ensures that choices of the ultimate truths on which our political-legal doctrines are grounded will be made through the strategic manipulation of political processes, regardless of the consequences.

People have a need to believe in something they see as higher or better than themselves. Of course, while we innocently assume this means a benign power, the meaning of what is higher and better has been submerged in the idea of power itself. In the twentieth century

alone, people committed atrocities almost without number beneath the banners of Nazism, Marxism, racial and ethnic superiority, religion, and other "isms" that justified death, destruction and subjugation of others in exchange for committing and losing themselves to a cause. Many are able to believe in only money, celebrity, and power. They lack any internal system that helps them to define individual integrity. The worship of celebrity and wealth has replaced principled and heroic behavior as something worth patterning one's behavior after. Daniel Boorstin remarked that "[w]e see greatness as an illusion; or, if it does exist, we suspect we know its secret. We look with knowing disillusionment on our admiration for historical figures who used to embody greatness."¹²⁶

Money, celebrity and power have become dominant surrogates for inner principle and wisdom. They are icons that offer visible manifestations of power and success. This obsession with money, celebrity and power has captured the soul of American culture. For far too many, they transmit our "worth" to others. A reason for this dominance is that we prize financial security and status much more than we desire freedom. Although our intellectual rhetoric suggests otherwise, real freedom is an obligation that cannot coexist with license. Freedom carries within it a personal responsibility and accountability that we instinctively avoid. Peter Berger challenged our rhetoric of freedom and concluded that "most of the time we ourselves desire just that which society expects of us. We want to obey the rules. We want the parts that society has assigned to us."¹²⁷ Berger's insight implies that the system of unprincipled surrogates corrupts all other systems and preempts the moral field.¹²⁸ In such a context, disputes will be continual. Truth will be an inconvenience if it is not on your side or a weapon of the moment if it is. There must be a strong mechanism for dealing with conflict – strength usefully thought of as Friedman's "fist

126. DANIEL J. BOORSTIN, *THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA* 51 (1961).

127. PETER BERGER, *INVITATION TO SOCIOLOGY: A HUMANISTIC PERSPECTIVE* 93 (1963). Berger describes the repressive subtleties of an orthodoxy. "Very potent and simultaneously very subtle mechanisms of control are constantly brought to bear upon the actual or potential deviant. These are the mechanisms of persuasion, ridicule, gossip and opprobrium." *Id.* at 11.

128. Edward Wilson captures some of our hypocrisy in the context of altruism, stating that:

Generosity without hope of reciprocation is the rarest and most cherished of human behaviors, subtle and difficult to define, distributed in a highly selective pattern, surrounded by ritual and circumstance, and honored by medallions and emotional orations. We sanctify true altruism in order to reward it and thus to make it less than true, and by that means to promote its recurrence in others. Human altruism, in short, is riddled to its foundations with the expected mammalian ambivalence.

EDWARD O. WILSON, *ON HUMAN NATURE* 155 (1978).

inside the velvet glove."¹²⁹ The mechanism must be strong, or we will not achieve agreement in the most volatile areas of conflict.

The intensity of the conflict and the dishonesty of our discourse are created because fundamental values are being threatened or advocated. In almost every situation, this conflict resembles a series of zero-sum games in which if one interest group appears to advance, another perceives itself as losing. Even though economists and others can demonstrate that the total system tends to benefit collectively over some period of time, this holds no meaning to those who lose something they cherish or fear a shift in the balance of power. A frank assessment suggests that much of what we are experiencing is a zero-sum game in which the entitlements of some are lessened as those of others increase. Given that the existing allocations have been taken for granted as just entitlements by the current beneficiaries and that few of those beneficiaries feel responsible for the past injustices or unfair allocations being complained of by the relevant interest group, this creates a sense of comparative injustice that further disrupts our political community. The competing feelings of unjust distribution and redistribution of the system's benefits can perhaps be dealt with or muted but not fully dissipated.¹³⁰

VIII. HOW DOCTRINE HELPS SHAPE AND BALANCE OUR POLITICAL SYSTEM

The main battleground for competing interests is increasingly found in the struggle to define, create, and control the doctrinal rules that implement our judgments about particular ultimate truths. It is these rules and their interpretations that allocate, preserve, and reallocate power. Judicial doctrines absorb other critical aspects of social, economic, and political values to form interacting systems that are important to human societies. These categories reveal that doctrines influence and reflect virtually every level of human political activity and are an integral aspect of the ability of the Rule of Law to sustain our political system. The categories of elemental doctrines that play fundamental roles in the successful operation of the Rule of Law are outlined below. These categories are offered as a preliminary construct and are not exhaustive. Nor is the listing necessarily internally coherent. The categories are offered primarily as ideas about how we might begin to better understand judicial doctrine as a system that is a vital

129. FRIEDMAN, *supra* note 70, at 257. See LAWRENCE M. FRIEDMAN, *THE HORIZONTAL SOCIETY* (1999). In his latest work, Friedman discusses a diverse range of issues, beginning with what he refers to as the rise of "identity wars and identity politics". *Id.* at vii.

130. See, for example, the collection of thoughts on the necessity for apologies and reparations for alleged violations of human justice in *WHEN SORRY ISN'T ENOUGH* (Roy L. Brooks ed., 1999).

element of our social structure and our process of dialogue and disputation. Doctrine is sketched here in an overarching, systemic sense, rather than from within particular doctrines.

But why is the special nature of ultimate truths and maintaining the fictions we use to sustain our beliefs so important in judicial decision-making and the choice and application of legal doctrine? In part it is because the factual, rational, philosophical, and scientific indeterminacy of the common law means that the judiciary cannot deal with complex legal situations in neat scientific compartments. The judicial task involves interpretation, analysis, distinction, comparison, analogy, identification of hierarchies of principle, divination of purpose and intent, prediction, judgment, and making choices. These patterns of thought emerge from the nature of law cases combined with the role of judges. Legal cases of any complexity are incompatible mixtures of fact, rationality, values, judgment, analogy, scientific assumption, metaphysics, and doctrinal principle.

It is within this context that the judge must exercise judgment to answer many questions that cannot be scientifically or rationally answered. The subject matter of legal doctrine involves factors that resist being compressed into conveniently rational compartments. These kinds of incommensurable and incompressible elements make up the core essences of the difficult doctrines through which we seek to balance and resolve our fundamental value conflicts. They are important aspects of doctrinal formulation. Because "law-knowledge" involves characteristics that are often ephemeral, internal and subjective, political, authoritarian, aesthetic, and value-laden, it allows wide latitude for defensible or at least arguable visions of the good. In many instances, *a priori* principles are little more than preferred assertions worked out in accordance with an individual's sense of the kind of society or legal system he or she prefers and is seeking to create or defend. Often we are unaware these assertions are choices rather than truths.

Doctrine is a form of "soft knowledge."¹³¹ The core language of law is malleable and adaptive, making it a perfect ground for conflicts over interpretations.¹³² Consider the competing linguistic concepts im-

131. See Barnhizer, *Prophets*, *supra* note 48; see also JAMES B. CONANT, TWO MODES OF THOUGHT 44 (1964)(quoting from CHRISTOPHER LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1871))("Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility to the ever-tangled skein . . . should be the business of every earnest student of the law.")

132. See EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 4 (1949). Levi remarked:

The categories used in the legal process must be left ambiguous in order to permit the infusion of new ideas Furthermore, agreement on any other basis would be impossible. In this manner the laws come to ex-

pllicit in a system of knowledge based on equal protection, due process, good faith, mens rea, knowing action, equity, malice, proximate cause, foreseeability, discretion, and reasonableness of belief. These concepts are highly elastic and pliable. This character allows flexible and adaptive responses to changing conditions but also threatens the system. The threat arises because the language of core legal doctrines permits great interpretive latitude that can result in a too rapid change that threatens either the perceived integrity of the system or allows a critical rule to be captured by a special interest.¹³³ These disputes are managed by the adversary system in what has been described in this essay as ordered conflict.

The doctrinal structure set out below represents a system that establishes the operating terms of the political order as it uses law and legal process to achieve its diverse goals. Doctrine is thus inescapably political.¹³⁴ Advocates for competing positions within the American political environment have recognized the shaping effects of legal doctrines. They are competing for dominance of the language and control of the manipulative power of legal institutions, including the judicial system.¹³⁵ This article concentrates on the confluence of the political and systemic functions of doctrine — and the specific choices of judges — because of the importance of this unique political aspect of the operation of the common law device as an indispensable aspect of the American democratic system. As judges create, deflect, define and refine the doctrines that allocate social goods and power, those who benefit from particular interpretations have shown increasingly limited tolerance for positions that would lessen their own advantage, deny them access, distribute rewards to their interest group, or interfere with particular political agendas. The tension is inescapable and is in many ways essential.

The legal system intersects with the allocation, access to, and application of social power. "After all," Friedman said:

press the ideas of the community and even when written in general terms, in statute or constitution, are molded for the specific case.

Id. Levi continued, stating that "[t]he law forum is the most explicit demonstration of the mechanism required for a moving classification system. The folklore of law may choose to ignore the imperfections in legal reasoning, but the law forum itself has taken care of them." *Id.*

133. Francis Bacon observed that judicial decisions are inherently and appropriately limited to the "immediate cause." "It were infinite for the law to judge the causes of causes, and their impulsions one of another: therefore it contenteth itself with the immediate cause; and judgeth of acts by that, without looking to any further degree." FRANCIS BACON, *THE ELEMENTS OF THE COMMON LAWES OF ENGLAND: THE MAXIMES OF THE LAW, REGULA I* (1630).
134. "Doctrine" is defined as "a particular principle, position, or policy taught or advocated, as of a religion or government." *RANDOM HOUSE DICTIONARY*, *supra* note 78, at 578.
135. See LAHAYE, *supra* note 74.

it is through law, legal institutions, and legal processes that customs and ideas take on a more permanent, rigid form. . . . The legal system is a structure. It has shape and form. It lasts. It is visible. It sets up fields of force. It affects ways of thinking. When practices, habits, and custom turn into law, they tend to become stronger, more fixed, more explicit.¹³⁶

One of the most important although subtle aspects of this interaction is reflected in the system of choices we call legal doctrine. Doctrine is not only unconnected idiosyncratic episodes with disparate pieces designed to deal with specific categories of situations. Doctrinal choices and rules represent a rich system of choice by which a political community is defined, integrated with ultimate truths assigned a priority status, and regulated. It is in this manner that power is created and distributed and consequences occur.

Legal doctrine is, both individually and structurally, a central aspect of how distributional goals are achieved, and preserved. This provides the driving force behind the intense conflicts we are experiencing. It is in fact a recognition that we are in a society governed by the Rule of Law, albeit imperfectly and often unjustly. The wisdom of Aristotle's nascent ideas of distributive and corrective justice can be realized through the practical emanations of this structure.

All doctrines have teleological functions – i.e., they are chosen, implicitly or explicitly, to achieve ends. Some of these ends and functions are fundamental and vital, while others are essentially trivial systemic acts involving relatively minor housekeeping. But it is inescapable that doctrine is a conclusion, a formula, a hypothesis about something of importance that supports, and is supported by, a particular institution or set of institutions. Through their formulations of elemental legal doctrines, judges provide syntheses from which insights into the nature of practical wisdom (or practical stupidity for that matter) can be extracted. Because it is goal-oriented, judicial doctrine is obviously not truly neutral. Judicial doctrines are combinations of principles, positions, and policies advocated by the judiciary acting as a critical part of government. Judges, operating within the rules of choice articulated for a powerful institution with critical functions, make important choices about values. These choices are advanced in the form of doctrine, and their acceptance helps to build an orthodox structure of doctrinal principles.

As advocates of competing interests jockey for advantage, American law and the various institutions that create, apply, and interpret laws are the battleground for a political civil war.¹³⁷ The struggle is over which versions of ultimate truths will dominate American society. To the extent that the issues are ultimate (e.g., abortion, capital punishment, rights of the political community, and individual rights

136. FRIEDMAN, *supra* note 70, at 257.

137. See Barnhizer, *Prophets*, *supra* note 48, at 156.

versus those of the community) and are irretrievably thrust into the sphere of law, the answers cannot be as undeniably obvious. If we step back from heated rhetoric and assertions of politically correct "truths," the "rightness" of many claims is not clear, at least not in terms of their specific consequences when converted into action backed by the authority of the State. In such a volatile context, how are judges to know what is right or true and what kinds of values, standards, norms, and methods are being used to make the choices?

IX. DOCTRINE AS A SYSTEM AND STRUCTURE

Doctrinal structures, and the judicial choices that represent the mediating linkages between societal needs, institutional capabilities, and political demands, work to allocate social goods, facilitate critical decision-making, and sustain the foundational rules of our society. This structure and these choices combine to generate the roots of our political system and are critical forces that are simultaneously necessary to a society's stability and which must be challenged by the shifting dynamics of any healthy political community. Remember Pound's assertion that law should seek both principles of change and stability.¹³⁸ The doctrinal descriptions offered here constitute a preliminary and incomplete effort to outline how the principles of change and stability come together in the context of a healthy adversary system.¹³⁹

The doctrinal system is formed of a wide range of specific elements, each possessed of critical primary functions. These primary doctrines include 1) interpretive doctrines, 2) preservative doctrines, 3) doctrines that facilitate or allow change, 4) doctrines essential to maintaining the system's foundation and structural integrity, and 5) doctrines that provide the sources of legitimacy and from which emanate the required authority necessary to sustain citizens' willingness to subordinate themselves to the system's decisions. Some of the more specific doctrinal archetypes include those set out below.

1. *Doctrines of Authority* – Examples include doctrines of the judicial authority of the common law judge, constitutionally derived grants of specific jurisdiction and authority, statutory grants of judicial authority, the doctrine of judicial review, the discretion provided trial judges, and the authority of the Supreme Court.

2. *Doctrines of Structure* – Illustrative doctrines can be found in the "check and balance" rules of the federal and state systems, the idea of the Rule of Law itself, the concept of the adversary system, the

138. See POUND, *supra* note 58, at 23.

139. See Barnhizer, *Prophets*, *supra* note 48 (originally introducing this doctrinal structure). It is offered here not as a final description but to suggest the diversity of doctrine and the critical variety of functions doctrine serves.

law-morality dichotomy, limits on appellate review of both court and administrative decisions, and the significant discretionary latitude given trial judges.

3. *Doctrines of Values* – The Rule of Law, justice as fairness, the “search for truth,” equality and liberty, distributive justice, liberalism and conservatism, democratic or majoritarian values, and the willingness to recognize the authority of the Supreme Court.

4. *Doctrines of System Purpose and Outcome* – Achieving final outcomes, resolving more intense conflicts, preventing unmanageable hostilities, “doing justice,” checking the power of other formal governmental institutions by setting clear bounds, balancing competing interests, redressing abuses, and the use of primarily objective rather than subjective doctrines.

5. *Doctrines of Interpretation* – Stare decisis, judicial review, analogical reasoning (“thinking like a judge”), burdens of proof, limits on appellate review of courts, limits on appellate review of administrative agencies, harmless error versus reversible error, the rational basis test regarding legislative acts, case and controversy, ripeness, invidious discrimination, and inherently suspect categories.

6. *Doctrines of Human Nature and Society* – Mens rea, the “reasonable person” standard, social contract, utilitarianism, capitalism and the market economy, socialism and/or Marxism, the welfare state, the minimal state, the organic state, general welfare doctrines, human dignity, quality of life, equality, liberty, individualism, progress, and Social Darwinism.

7. *Doctrines of the Function and Nature of Law* – To approximate the “perfect society” or Utopia, apply the law of God, balance competing interests, resolve disputes, set the minimally necessary framework, sanction and deter those who would harm the community, seek justice, do what the majority wants, and distribute and redistribute goods and bads according to some system of desert.

8. *Doctrines of Balance* – Judicial review, procedural due process, political questions, ripeness, case and controversy, discretion, jurisdiction, discretionary appellate review, and pluralism.

9. *Doctrines of Limits* – The law/morality distinction, ripeness, case and controversy, political questions, precedent, and objective versus subjective doctrines.

10. *Doctrines of System Preservation* – Political questions, ripeness, case and controversy, jurisdiction, judicial review of legislative acts, and appellate review.

11. *Doctrines of Change and Adaptation* – The evolution of precedent and the grounding in the common law, the adversary system itself, judicial notice of legislative facts, judicial discretion, the sources of judicial authority, the window to “social policy,” the principles for

interpreting legislative history, and the principles of interpreting history.

12. *Doctrines of "Sourcing" of Law and Legal Institutions* – The common law itself, the Constitution, the Federalist Papers, intent of the Framers, legislation and legislative history, democracy, the rational fully knowledgeable human, inherent powers, "police powers," the community, national defense and security.

X. CONCLUSION: DEMOCRACY, CHANGE, AND CONFLICT

What can analysis of the doctrinal system tell us? Schumpeter argued that the process of creative destruction is not only inevitable, but essential for the health of the system.¹⁴⁰ There is no harmonious and steady state condition in nature, politics or economics, regardless of how much we might hope for such an Eden. The idea of the inevitability of change and its creative force is captured in Hegel's dialectic in which a dominant thesis is confronted by an emerging antithesis.¹⁴¹ The result is a synthesis that is neither thesis nor antithesis. What we face today in our volatile social and political environment is a diverse and overlapping intermixture of theses. The ultimate results of the collisions between competing beliefs are less important than the necessity of the continually unfolding syntheses. This intermixture of theses is essential to the health of the social system and the creatively destructive process that gives it life. The questions are never answered and there is no finality.

There is great difficulty in drawing clear lines between illegitimate and destructive conflict and legitimate and necessary conflict. Similarly, illegitimate positions often have to be brought into the sphere of ordered conflict and exposed to scrutiny in order to create the foundation for change. Certainly this has been true for conflicts over race. Nor is it particularly important the lines be clearly drawn as opposed to the disputes being manageable. For many of the most fundamental and powerfully opposed issues, the lines are drawn intermediately by judicial and legislative decisions that create and apply legal doctrine. Even this sorting out of legitimate and illegitimate claims requires the creation of processes involving the opportunity to have a credible hearing of one's positions that allows the playing out of social disagreements among the competing interests.

140. See SCHUMPETER, *supra* note 25.

141. See GEORG WILHELM FRIEDRICH HEGEL, LECTURES ON THE PHILOSOPHY OF HISTORY (John Sibree trans., 1872). Therein, Hegel describes the dialectical nature of the Idea [consciousness of Freedom] as one where it is "self-determined — that it assumes successive forms which it successively transcends; and by this very process of transcending its earlier stages, gains an affirmative, and, in fact, a richer and more concrete shape . . ." *Id.* at 66.

The importance to the political structure of an acknowledged, credible and authoritative means of dispute resolution was a main reason Locke required humans to surrender their inherent rights of self-judgment to the processes of the political community. He observed that "all private judgment of every particular member being excluded, the community comes to be umpire, by settled standing rules, indifferent, and the same to all parties . . ." ¹⁴² Hobbes would tell us that if this subordination of personal values and dispute resolution to community mechanisms and standards of judgment is not done, the community will never be able to transcend the brutish "state of nature." ¹⁴³

The Hobbesian conception of human nature is central to examination of specific doctrinal areas in which courts and elective politics are in collision. These doctrinal "power points" are used as the analytic focus, because our nation is increasingly one in which intransigent special interests across all political persuasions are engaging in an almost irrational discourse instead of honest dialogue. The dialogue and ability to respect others' interests — to a point — is essential for the strength of workable democratic communities. This does not require elegant metaphysics, but demands that we open and conduct a discourse based on common sense and that we recognize that, no matter how angry we might be, there are approaches and attitudes necessary to the survival and health of our most critical operating institutions.

Yet the construction of a community whose members agree to subordinate their right to take individual action to the Rule of Law does not in fact automatically create substantively just, fair, and truth-based resolutions of conflicts. Our representations that the legal system's dispute resolution mechanisms are designed to uncover truth are a necessary fiction that enhances the overall community's tacit acceptance of the legitimacy of the decisions. ¹⁴⁴ Fiction, hypocrisy, and a certain degree of non-critical self-deception are essential elements of our ability to respect the system and to generally follow its dictates. As with tort reform, admitting the truth as to the reality of whose interests are being served is often the enemy of being able to protect and advance those special interests. Truth would expose the

142. LOCKE, *supra* note 21; see A. JOHN SIMMONS, *ON THE EDGE OF ANARCHY: LOCKE, CONSENT, AND THE LIMITS OF SOCIETY* (1993).

143. See HOBBS, *supra* note 3.

144. In response to a lawyer's statement that "[telling the truth in civil litigation] is, of course, a very attractive proposition. But . . . while that might be nice in a perfect world, it is not the way the system operates in litigation in this country," the indignant court in *Monsanto Co. v. Aetna Casualty and Surety Co.*, 593 A.2d 1013 (Del. Super. Ct. 1990) stated that "I am compelled in the strongest way possible to reject counsel's observations as being so repugnant and so odious to fair minded people that it can only be considered as anathema to any system of civil justice under law." *But cf.* Barnhizer, *Princes*, *supra* note 91.

unfairness and hypocrisy of the system; yet we need hypocrisy for our institutions to be able to conduct business as usual.¹⁴⁵

Aristotle captured this idea of implicit hypocrisy more than two millenia ago in describing the role of the advocate, stating that "you must render the audience well-disposed to yourself, and ill-disposed to your opponent; (2) you must magnify and depreciate [make whatever favors your case seem more important and whatever favors his case seem less]."¹⁴⁶ Plato said the advocate "enchants the minds" of the courts of law. The advocate's role is far more deceptive than truth-directed. Nor is the dilemma of recent origin. Plato added that "he who would be a skillful rhetorician has no need of truth — for that in courts of law men literally care nothing about truth, but only about conviction . . ."¹⁴⁷ But the lack of truth and even more importantly the unwillingness to pursue truth as a critical precondition of resolving disputes and obtaining social goods has permeated our entire society. In our "progressive" society, truth has increasingly become the victim of outcome.¹⁴⁸ As undesirable as our "culture of lies" might be, it represents a largely irreversible phenomenon. Coping with the culture we have created leaves us with the need for strong dispute resolu-

145. George Gilder stated: "Idealists . . . always much abominate what they call hypocrisy. But hypocrisy — the insincere expression of unfulfilled ideals — is the means by which the influence of ideals is extended beyond the small circle of true believers." GEORGE GILDER, *WEALTH AND POVERTY* 107 (1981).

146. Aristotle, *Epilogue*, in *THE RHETORIC OF ARISTOTLE* 240 (Lane Cooper ed. & trans., 1932). Never was this more obvious as is reflected in Simpson defense team lawyer Gerald Uelman's statement:

Our purpose was to employ every advantage the law permits to enhance the prospects of our client's acquittal. Our purpose was to utilize every device and stratagem the law allows to weaken and discredit the prosecution's case. The vindication of our client was the beginning, the end, and the substance of our every effort. Anything less would have been a violation of our ethical responsibility to faithfully perform the duties of an attorney-at-law.

Albert W. Alschuler, *How to Win the Trial of the Century: The Ethics of Lord Brougham and the O.J. Simpson Defense Team*, 29 *McGEORGE L. REV.* 291, 293 (1998)(quoting Gerald Uelman).

147. *THE WORKS OF PLATO* 292, 306 (Irwin Edman ed., 1928); see PETER H. SCHUCK, *THE LIMITS OF LAW: ESSAYS ON DEMOCRATIC GOVERNANCE* (2000)(noting particularly Schuck's discussion of legal complexity in Chapter One).

148. Daniel J. Boorstin observes that:

The making of the illusions which flood our experience has become the business of America, some of its most honest and most necessary and respectable business. I am thinking not only of advertising and public relations and political rhetoric, but of all the activities which purport to inform and comfort and improve and educate and elevate us: the work of our best journalists, our most enterprising book publishers, our most energetic manufacturers and merchandisers, our most successful entertainers, our best guides to world travel, and our most influential leaders in foreign relations.

BOORSTIN, *supra* note 126, at 5.

tion systems, ones with a power sufficient to “overawe” competing interests to the extent sufficient to ensure the decisions, once rendered, are complied with.

Rarely will there be a realistic chance that a complete meeting-of-the-disputing-minds will take place in a way that the conflicting positions merge into a jointly agreed on “disputants’ truth.” Though there are claims to the contrary, the adversary system is not directed toward ascertaining truth. It is about obtaining and protecting shares of power for specific interests. One undeniable reality of existing in a society with so many competing demands is that without widespread advocacy for the competing interests, those already in possession of power will dominate the sources and levers of power. While it is easy to argue that such a condition is unfair and even immoral — and it is often both — the vital point is that it is inevitable. There is no way to avoid the continual struggle for power and dominance in complex human political systems. While we can take steps to improve the process, we cannot “fix” the legal system or the roles of lawyers in that system. We cannot alter basic human nature through teaching people to be “nice” and cooperative.¹⁴⁹

The adversary system is the primary mechanism for ensuring the authoritative mediation and resolution of disputes. It does so through provision of a powerful umpire in the form of a judge or similar source of ultimate decision-making. It further achieves this goal through creating the opportunity to have one’s position heard. The only potentially legitimate buffer against abuses of power and the ongoing tendency of interest groups of every sort to seize power to advance their particular interests (including ones with whose principles I am in full agreement) is to provide articulate and strong professional voices for all the competing interests.

Our system will only work through the diffusion of power to ensure that power does not become concentrated in a single group’s hands. This represents a fundamental principle of the American democracy.¹⁵⁰ The irony of this democratic dispersal of power is that diffu-

149. See AUERBACH, *JUSTICE WITHOUT LAW?*, *supra* note 21, at 141. Auerbach describes this occurrence, stating:

The dependence of Americans upon law, and their apprehension about it, are reciprocal. The exercise of freedom, channeled into the acquisitive pursuit of wealth, requires the vigorous assertion of individual rights, which law protects. It also assures incessant conflict between competing individuals, who are virtually unrestrained by any purpose beyond self-aggrandizement. The Darwinian jungle is filled with the excitement of the hunt, but it is a scary place because the hunters simultaneously are hunted. As Americans pursue their quarry, they need protection (provided by law) for themselves, and weapons (also provided by law) against their adversaries.

Id.

150. See FEDERALIST, *supra* note 9.

sion of power into a wider variety of formal and informal clusters increases the probability of interest group conflicts, because it results in more interests being recognized and empowered. More interests are accorded legitimacy and rendered capable of joining the fray. This expansion of the power to compete for greater shares of social goods requires stronger and more sophisticated mechanisms through which the inevitable and continual inter-group conflicts can be mediated.

These considerations make it clear that a key function of the adversary system is to protect and sustain the processes through which all interested people can participate in an effort to be heard. This includes being given a fair chance at persuading the system's decision-makers that the interest group's position should prevail or at least be reasonably infused into a new social synthesis. In fact, as "difference" increases and becomes a strong social virtue it provides legitimacy to an ever-increasing range of interests. The result is that our competitiveness is intensifying and expanding its reach as the more diverse interests each seek their shares of power.

The different interests must have their champions. This critical responsibility has fallen onto lawyers.¹⁵¹ The lawyer as advocate plays a critical role in the insertion of beliefs into the discourse being continually mediated by the legal system. Each of two (or more) distinct beliefs in a particular area of social controversy may be morally justifiable from the perspective of the legitimacy of the particular principle on which it is based, while neither belief, as with the abortion "debate," can really be "proved" as opposed to chosen.¹⁵² Our complex democracy must still function, which requires that the pathways of "resolving" disputes must be kept open and accessible. Providing access for disputing members of the community offers the chance for an approximation of fairness and justice. It also operates as a release valve that keeps the pressures within the political system from becoming so great that they severely weaken or destroy the overall integrity of the community.¹⁵³

151. See Barnhizer, *Princes*, *supra* note 91.

152. See Barnhizer, *Prophets*, *supra* note 48.

153. See Locke, *supra* note 25.