Article

Coping With Partiality: Justice, the Rule of Law, and the Role of Lawyers

Randy E. Barnett*

INTRODUCTION: ENOUGH WITH LAWYER JOKES

I admit it. When lawyer jokes became popular I enjoyed them. A lot. I even agreed with them. When I was in practice, I often found other lawyers to be arrogant, lazy, unprepared, and unethical—indeed more than a few acted illegally as I shall illustrate below. As a prosecutor, I was once chastised by a judge for disparaging the legal profession by referring to "cheap lawyer's tricks" in my closing argument in a murder case. In my view, lawyers deserved to be the butt of humor, and, based as they were on truth, the jokes were genuinely funny. But for some time now, lawyer jokes have ceased to amuse me. Perhaps this is because I now find them to be a socially acceptable substitute for more traditional ethnic and racial humor, but that is not the only reason. It surely is not because I think lawyers have become more competent or ethical since I was in practice.

Lawyer jokes bother me for two reasons. First, they deflect attention away from problems with *the law*. Most of the public's hostility to lawyers is, in my view, a misplaced resentment against

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the law that lawyers are merely exploiting, the type of law—or lack thereof—that law professors have been advocating for generations. True, lawyers make the laws when they assume the role of judges or legislators. But this is not in their capacity of representing clients. And I do not hear many judge or legislator jokes. Second, lawyer jokes undercut the idea of legal representation: that individuals, associations, and companies are entitled to the protection of the laws, the kind of protection that can only be provided by competent, ethical representation. Belittling lawyers belittles the rights of their clients and the ability of any of us to protect our rights.

Neither of these claims is the subject of this Article, so I will not elaborate on them here. Instead, in what follows, I will explain one important, and much overlooked, social function of lawyers. Lawyers help ameliorate a particular instance of what I call the problem of interest[1]—the *partiality problem*. For I believe that it falls to law professors to imbue in their students an understanding of the important role that lawyers play in society, if for no other reason than they will need some emotional armament from the slings and arrows of incessant lawyer jokes and worse. In explaining how the existence of lawyers helps address the problem of partiality, I will also explain how adherence to property rights, freedom of contract, and the rule of law—concepts long disparaged by law professors—help solve the same problem.

I. When Interest Becomes a Problem

The problem of interest takes many forms but traces from the common tendency of persons to make judgments or choose actions that they believe will serve their interests. Put another way, people tend to try to satisfy their subjective preferences (although these preferences may not always be self-regarding). Natural rights theorists acknowledged the pervasiveness of this phenome-

1. I introduced the "problem of interest" in Randy E. Barnett, *Foreword: Can Justice and the Rule of Law Be Reconciled?*, 11 Harv. J.L. & Pub. Pol'y 597, 615-18 (1988), and elaborated upon it in Randy E. Barnett, *The Function of Several Property and Freedom of Contract*, 9 Soc. Phil. & Pol'y 85-93 (1992) [hereinafter Barnett, *Function of Property*]. An explanation of the pervasive social problems of knowledge, interest, and power, and how they are addressed by the liberal conceptions of justice and the rule of law is the subject of my forthcoming book. Randy E. Barnett, The Structure of Liberty: Justice and the Rule of Law (forthcoming Apr. 1998) [hereinafter Barnett, The Structure of Liberty].

non by according the impulse towards self-preservation a central place in their theories. As seventeenth century natural rights theorist Samuel Pufendorf wrote:

> [I]n investigating the condition of man we have assigned the first place to self-love, not because one should under all circumstances prefer only himself before all others or measure everything by his own advantage, distinguishing this from the interests of others, and setting forth as his highest goal, but because man is so framed that he thinks of his own advantage before the welfare of others for the reason that it is his nature to think of his own life before the lives of others.[2]

In an essay on natural law, Pufendorf expanded on his last point:

> In common with all living things which have a sense of themselves, man holds nothing more dear than himself, he studies in every way to preserve himself, he strives to acquire what seems good to him and to repel what seems bad to him. This passion is usually so strong that all other passions give way before it.[3]

The fact that people make choices on the grounds of interest is not, by itself, a problem. Rather, acting out of interest can be considered a problem only against some normative background that distinguishes objectionable from unobjectionable actions. For natural rights theorists, this normative background was supplied by the human need for peaceful social interaction with which self-interested actions can sometimes interfere:

> Man, then, is an animal with an intense concern for his own preservation, needy by himself, incapable of protection without the help of his fellows, and very well fitted for the mutual provision of benefits. Equally, however, he is at the same time malicious, aggressive, easily provoked and as willing as he is able to inflict harm on others. The conclusion is: in order to be safe, it is necessary for him to be sociable; that is to join forces with men like himself and so conduct himself towards them that they are not given even a plausible excuse for harming him, but rather become willing to preserve and promote his advantages.[4]

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2. Samuel Pufendorf, De Jure Naturae et Gentiun Libri Octo (C.H. Oldfather & W.A. Oldfather trans., 1934) (1672).

3. Samuel Pufendorf, On the Duty of Man and Citizen According to Natural Law 33 (James Tully ed. & Michael Silverthorne trans., Cambridge University Press 1991) (1673).

4. *Id.* at 35.

Consequently, for Pufendorf, "[t]he laws of this sociality, laws which teach one how to conduct oneself to become a useful member of human society, are called natural laws."[5]

The social problem created by interest is multifaceted. In this Article, I will focus on just one of three distinct problems of interest: the *partiality problem*.[6] The *partiality problem* is extremely fundamental. It arises from the fact that people tend to make judgments that are partial to their own interests or the interests of those who are close to them at the expense of others. The word "partial" reflects both the cause and consequence of this problem. One meaning of the term is "[p]ertaining to or involving a part (not the whole); 'subsisting only in a part; not general or universal; not total'; constituting a part only; incomplete."[7] In this sense, it is inevitable that individuals can have only a partial or incomplete view of the facts that go into reaching any decision. It is very hard to avoid seeing the world from one's own particular and therefore partial vantage point. Partial judgment in this sense closely resembles the first order problem of knowledge. We know only a fraction of what there is to know and are ignorant of the rest.

But this partiality or incompleteness of vision also leads to a tendency to favor one's own interest which comprises the other meaning of the term partial:

> 'Inclined antecedently to favour one party in a cause, or one side of the question more than the other'; unduly favouring one party or side in a suit or controversy, or one set or class of persons rather than another; prejudiced; biased; interested; unfair. . . . Favouring a particular person or thing excessively or especially; prejudiced or biased in some one's favour. . . .[8]

Partiality, in this sense, is judgment affected by interest.

The dual meaning of partiality suggests that the partiality problem has two realities that are in tension with each other. On the one hand, the pursuit of happiness requires that people pursue their own "partial" vision and serve their own "partial" interests (including the interests of those to whom they are partial). On the

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5. *Id.*

6. In The Structure of Liberty, I examine two additional problems of interest—the *incentive problem* and the *compliance problem*. Barnett, The Structure of Liberty, *supra* note 1, chs. 7 & 8.

7. II The Oxford English Dictionary 265 (2d ed. 1989) (citation omitted).

8. *Id.* (citation omitted).

other hand, their actions are likely to affect, sometimes adversely, the partial interests of others.

We may summarize this problem of partiality as follows. The *partiality problem* refers to the need to (1) allow persons to pursue their own partial interests including the interests of those to whom they are partial, (2) while somehow taking into account the partial interests of others whose interests are more remote to them.

To appreciate the inescapable nature of the partiality problem, try to imagine a race of beings that did not confront it. These beings would act completely impartially, neither favoring their own interests, nor the interests of those they care for. Assuming such a race of beings was imaginable, in my view, they would hardly be attractive. Even if considered attractive, however, we are not and can never be like them. We live in a world of partiality of interests and the liberal conception of justice and the rule of law helps us cope with this and other features of this world.

Though the partiality problem pervades every aspect of human life, it becomes particularly acute when some persons whose viewpoints are influenced by their own interests are called upon to make judgments that are supposed to take into account the interests of other persons remote to them as well as their own. This type of impartial or objective decision is required when deciding among conflicting claims of right in a system of adjudication. Yet it is simply very difficult for persons charged with making such decisions to set their own interests in proper perspective in order to make an impartial assessment.[9]

In what follows, I examine how both justice and the rule of law play important roles in handling this problem of partiality. I then explain how the existence of lawyers representing clients also helps mitigate the problem of partiality.

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9. Within the public choice school of economics, the "interest group theory" explains much about the behavior of government actors by assuming it to be the result of interest rather than the result of impartial judgment. For an example of a sympathetic portrayal of this approach, see Iain McLean, Public Choice: An Introduction (1987) and Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 Chi.-Kent L. Rev. 123 (1989). For a critical appraisal, see Daniel A. Farber, *Democracy and Disgust: Reflections on Public Choice*, 65 Chi.-Kent L. Rev. 161 (1989).

II. JUSTICE AND THE PROBLEM OF PARTIALITY

The degree to which the partiality of one's actions becomes a problem depends upon the extensiveness of the jurisdiction one has over physical resources. Consider the extreme case of one person having jurisdiction over all the resources in the world including other people's bodies. Quite obviously, a partial decision by this ruler will have far more serious consequences for the interests of all others—and will overlook vast amounts of personal and local knowledge—than a regime in which each person has jurisdiction over his own body and some comparatively small fraction of the world's resources. In the former regime, a partial judgment will reflect the interest of just one person, whereas in the latter regime, a multitude of partial judgments will reflect a multitude of interests.

To better appreciate this point, consider a submarine with many different compartments which can each be sealed off from the others should a leak occur. Normally, of course, people on the submarine are free to move unimpeded from one area of the ship to another. When leakage threatens, however, the compartment with the leak can be closed off quickly to limit the extent of the damage to the ship. The problem of partial judgment concerning resource use is analogous to the leak of water in the sub, except that partiality is the norm, not an exception. When partially inevitably occurs, it is important to limit the area it can affect. Were there no compartmentalization of decision making, a single exercise of partiality—like a single leak of water in the submarine—could seriously jeopardize the interests of everyone else.

The classical liberal conception of justice addresses this problem by decentralizing decisionmaking down to the level of individuals and associations. This is accomplished by recognizing *property rights* in physical resources. Since our bodies are physical entities or resources, they are included in the term. As John Locke famously noted, "every Man has a *Property* in his own *Person*. This no Body has any Right to but himself."[10] According to the classical liberal view, to have property in a physical resource—including one's body—means that one is free to use this resource in any way

10. John Locke, Two Treatises of Government bk. II § 27, at 305 (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1967) (1690).

one chooses, provided that this use does not infringe upon the rights of others.

Because this concept of property protects the freedom of private persons, as opposed to government officials, this idea is often referred to as "private" property. However, for present purposes, *several property*—a term favored by Friedrich Hayek—may be more apt.[11] The term several property makes it clearer that jurisdiction to use resources is dispersed among the "several"—meaning "diverse, many, numerous, distinct, particular, or separate"[12]—persons and associations that comprise a society, rather than being reposed in a monolithic centralized institution.

The concept of several property reflects a strategy of decentralizing jurisdiction over resources to the level of those individuals and associations that are most likely to be in possession of personal and local knowledge—including knowledge of their interests. Such a regime not only makes possible the utilization of personal and local knowledge as I discuss elsewhere,[13] it also limits the impact of judgments on the basis of only partial information. We may summarize this as follows: *Decentralized jurisdiction through the device of several property makes possible the effective compartmentalization of partiality.*

The term *several* property is preferable to private property precisely because it emphasizes the plurality and diversity of jurisdictions in a regime governed by the liberal conception of justice. Like the submarine with separate compartments, the jurisdiction of any particular individual or association in such a regime will be bounded or limited. In most (but clearly not all) circumstances, a partial exercise of such bounded jurisdiction will mainly affect the person exercising this judgment.

Where the exercise of jurisdiction on the basis of partial judgment does affect others, the extent of these "external" effects will

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11. *See* Friedrich Hayek, 1 Law, Legislation and Liberty: Rules and Order 121 (1973); *see, e.g.*, Locke, *supra* note 10, § 39, at 314 ("[W]e see how *labour* could make Men distinct titles to *several* parcels of [land], for their private uses; wherein there could be no doubt of Right, no room for quarrel.") (second emphasis added).

12. The Oxford English Dictionary identifies one meaning of "several" as "[e]xisting apart, separate" and a second meaning as "[p]ertaining to an individual person or thing." As a special instance of the second meaning, it gives the following: "Chiefly *Law*. (Opposed to *common*.) Private; privately owned or occupied." XV The Oxford English Dictionary 97 (2d ed. 1989).

13. *See* Barnett, *Function of Property*, *supra* note 1, at 65-76.

be limited. Indeed, the thrust of much of liberal legal theory is to cause actors to "internalize" the costs of their actions by making them liable for the harms their actions cause to others. For example, whole categories of external effects caused by the use of physical force or fraud are prohibited. What "external effects" of partiality remain can often be adjusted by the consummation of mutually satisfactory consensual exchanges that the liberal principle of freedom to contract makes possible. Compartmentalization does not eliminate partiality—something that would be both impossible and undesirable. Instead, it dampens the *problem* of partiality by limiting the range of resources over which a single partial interest will prevail.

To be sure, compartmentalization not only limits partiality, it can also insulate its exercise. To a large degree, this is desirable as it enables individuals to pursue their personal "projects."[14] The ability to pursue personal projects is essential to the pursuit of happiness[15] and, as Loren Lomasky explains, necessarily partial: "Project pursuit . . . is partial. To be committed to a long-term design, to order one's activities in light of it, to judge one's success or failure as a person by reference to its fate: these are inconceivable apart from a frankly partial attachment to one's most cherished ends."[16] And yet in at least two ways, the rights of several property and freedom of contract mitigate the insularity of partiality without seeking to end the pursuit of personal projects.

By requiring consent to rights transfers, decentralized jurisdiction impels people to take the interests of others into account. The most obvious way that the liberal conception of justice mitigates partiality and renders it beneficial to others has been known for centuries. Several property coupled with freedom from contract requires that any individual who seeks jurisdiction over resources owned by another must obtain the owner's consent. And to obtain

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14. In his extensive treatment of this subject, Loren Lomasky offers the following definition of "projects": "[t]hose [ends] which reach indefinitely into the future, play a central role within the ongoing endeavors of the individual, and provide a significant degree of structural stability to an individual's life I call *projects*." Loren Lomasky, Persons, Rights, and the Moral Community 26 (1987).

15. Lomasky contends that project pursuit is an important constituent of personhood itself. "When we wish to understand or describe a person, to explicate what fundamentally characterizes him as being just the particular purposive being that he is, we will focus on his projects rather than on his more transitory ends." *Id.*

16. *Id.* at 27-28.

this consent, he usually must take the owner's interest into account. As Adam Smith noted in *The Wealth of Nations*, if properly constrained,[17] the pursuit of one's own interest and the interest of those one cares about can be a powerful motive for conduct that is beneficial both to self and others.

If Ben wants to build a home on the corner of the land that Ann has cultivated for crops, then he must offer Ann something she would prefer to that which he is asking her to give up. In this way, Ann's partial interests are incorporated into Ben's cost of choice. When pursuing his personal projects, Ann's rights of several property and freedom from contract require Ben to act "impartially" with respect to Ann's interest whether he wants to or not. These principles of justice propel a marketplace of consensual exchanges in which each person, acting partially, incorporates the interests of others into his or her decisions to act or to refrain from acting.

Of course, Ann's several property rights also enable her act "impartially" with respect to Ben by making him a gift of the land. But as Adam Smith recognized, the partiality that is part of human nature is such that we cannot rely on such beneficence.

> Whoever offers to another a bargain of any kind, proposes to do this. Give me that which I want, and you shall have this which you want, is the meaning of every such offer; and it is in this manner that we obtain from one another the far greater part of those good offices which we stand in need of. It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.[18]

Decentralization also makes possible a system of effective checks and balances on partiality. At the constitutional level, checks and balances were part of James Madison's solution to the problem of "faction," by which he meant "a number of citizens,

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17. "Every man, *as long as he does not violate the laws of justice*, is left perfectly free to pursue his own interest his own way, and to bring both his industry and capital into competition with those of any other man, or order of men." Adam Smith, An Inquiry into the Nature and Causes of Wealth of Nations (1776), *reprinted in* 39 Great Books of the Western World 300 (Robert M. Hutchins ed., Chicago, Encyclopedia Britannica 1952) (emphasis added).

18. *Id.* at 7.

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."[19]

Madison's response to this instance of a partiality problem was to divide powers so that each institution could resist the others. While this idea is well-known among constitutional theorists, the fact that several property plays the same function at the level of individuals and associations is usually overlooked.

The fact that persons retain jurisdiction over their respective resources—including especially their bodies—means that they often have a way to retaliate in kind with actions that undercut the interests of a person whose partial judgment has adversely affected others. In this way, the decentralized jurisdiction resulting from several property permits undue partiality which affects the interests of others to be discouraged by a strategy of "tit for tat." When I take action which adversely affects the interests of others, those whose interest I have hurt are in a better position to retaliate in kind than they would be in a regime in which all jurisdiction resided in a single person or association or in very few. The demonstrated ability to retaliate in this way has proven to be a powerful deterrent to the initiation of conduct which adversely affects the interests of other. The existence of such a deterrent also can lead to a general and quite powerful norm of cooperation.[20]

By compartmentalizing the exercise of partial judgment, the liberal conception of justice takes the dangers posed by self-interested action seriously—more seriously perhaps than political theories which seek to repose in a few hands a broad jurisdiction to constrain interested behavior or coercively mandate disinterested behavior. Because whoever holds this broad jurisdiction is a human being, we can expect them eventually to engage in interested or partial behavior which very well may be worse than that which they are supposed to prevent. This leads to the age-old problem of "who guards us from the guardians."

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19. The Federalist No. 10, at 54 (James Madison) (Modern Library ed., 1937) (emphasis added). Indeed, one dictionary includes "faction" in its definition of partial: "favoring one person, faction, etc. more than another; biased; prejudiced." Webster's New World Dictionary 1035 (2d ed. 1980).

20. *See* Robert Axelrod, The Evolution of Cooperation (1984); Robert Sugden, The Economics of Rights, Co-operation, and Welfare (1986).

III. The Rule of Law and the Problem of Partiality

While the liberal conception of justice addresses the general problem of partiality, more obvious perhaps is how the rule of law helps us to handle the problem of partiality in its most acute form—the partiality of decision-makers who ascertain the rights of others. The rule of law requires the formulation of general precepts that can be publicly communicated. To the extent that such precepts are general, they are less likely to be bent by those administering justice to serve the particular or partial interests of a few individuals or associations. The liberal conception of justice and the rule of law is "impartial" insofar as its precepts address the fundamental problems of social life affecting every person in society and that every person has an interest in solving (although this is not to deny that some people will prosper more than others in a regime governed by these principles).

A. *The Rule of Law as a Warning Sensor*

The rule of law requires that knowledge of justice be publicly communicated by means of general precepts. Such publicly accessible precepts can then be used to assess the judgments made by persons charged with administering justice to see if they are deviating from the requirements of the rule of law. When a deviation is detected, further inquiries can be made to see if partiality is the cause. In sum, a duty to conform to the rule of law makes it easier to detect partiality and thereby more difficult for persons responsible for administering justice to act partially.

The way that the rule of law permits us to detect partiality is illustrated by a case my partner and I prosecuted when I was a criminal prosecutor assigned to the auto theft preliminary hearing court for Cook County, Illinois. The case involved a "chop-shop" operation in which stolen cars were disassembled in a garage so that the parts, which could not be easily traced, might be sold separately. The judge in this courtroom, John Devine, was normally rather strict in limiting the scope of the defendant's cross-examination during a preliminary hearing.[21] During this particular hearing, however, Judge Devine unexpectedly and over our objection greatly expanded the scope of cross-examination. During cross-ex-

21. A preliminary hearing is a proceeding in which a judge finds whether or not "probable cause" exists to hold a case for a full trial.

amination of the arresting police officer, surprising information pertaining to the legality of the search was disclosed that damaged our case and of which we had been unaware. Judge Devine found "no probable cause," and the case was ultimately dismissed.

Although we could not prove it, we were convinced that Judge Devine's aberrant behavior, and the police officer's damaging testimony, had been induced by a bribe from the defendant's lawyer. In other words, we believed that a monetary bribe caused Judge Devine's judgment to be partial towards the defendant. For this and other cases in which he accepted bribes, the rule of law ceased to operate in his courtroom and injustice was the consequence.

Judge Devine had a duty to adhere to the rule of law, and for this reason, when he failed to do so, we were able to infer from his flagrant disregard of the rule of law that he was acting partially. This knowledge we obtained of Judge Devine's partiality was the first step toward removing him from the bench—a step that was eventually accomplished when, unbeknownst to me, another of my partners in this court, Terry Hake, later became an undercover agent for a federal investigation known as Operation Greylord.[22] Because Terry knew that Judge Devine was acting in a partial manner, he was able to alert federal investigators to Judge Devine's activities and evidence of his partiality was eventually uncovered. Judge Devine ultimately was indicted, convicted and sent to prison for numerous instances of official corruption.[23] Although Devine was never prosecuted for his handling of our chop-shop case, the lawyer he retained to defend him against charges of corruption was none other than the very same lawyer who had represented the chop-shop operators in our case.

The problem of obtaining compliance with the rule of law is not usually this extreme. Often the desire to deviate from the impartial adherence to the rule of law results from sympathy for one party or antipathy for the other. Sometimes, as with compassion for a crime or accident victim, such sympathy is natural and otherwise laudable; other times, as with the case of a hostility towards a

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22. *See generally* James Tuohy & Rob Warden, Greylord: Justice, Chicago Style (1989). The book discusses John Devine, *see id.* at 20-23, as well as Terry Hake, *see id.* at 58-74 & *passim*.

23. On October 8, 1984, John Devine was convicted on one count of racketeering/conspiracy, twenty-five counts of extortion and twenty-one counts of mail fraud. He was sentenced to 15 years in federal prison. *See id.* at 259. He died while serving his sentence.

particular ethnic or racial group, such antipathy is reprehensible. A gap between interest and the rule of law also may arise when a judge is personal friends with a lawyer for one of the parties or when judges have ideological or religious and moral beliefs that argue for or against one of the parties to a case regardless of what legal precepts of justice require. Obtaining adherence to the rule of law presents a particular problem when judges must run for re-election. Judges may fear an adverse rating from a bar association of which a party's lawyer may be a member or that a finding in favor of the accused in a well-publicized criminal case may be disliked by the electorate.

In each of these examples, while the rule of law imposes duties upon a judge, these duties clash with the personal interest of the judge. Corruption is far more likely to take these insidious forms than to take the form of outright bribery. And judges will often be unconscious of their partiality or that they are acting upon it.

Still, the story of Judge Devine illustrates how adhering to the rule of law serves to protect justice by helping participants and observers to detect partial judgements.

First, if Judge Devine had indeed taken a bribe to decide our case, then he had an interest in finding for the defendant even if the evidence showed that there was probable cause to believe that the defendant was guilty of committing an unjust act. Second, to earn his bribe, Judge Devine found it expedient, perhaps even necessary, to violate the rule of law by changing the rules of evidence just for this case. Had he adhered to the rule of law, it would have been more difficult for him to make an unjust finding that there was no probable cause to pursue the case. Indeed, other judges might adopt an expanded scope of cross-examination without raising a suspicion of corruption because they do so consistently. It was the inconsistency of the judge's ruling in our case as compared with his judgment in other cases, rather than the content of his ruling, that led us to conclude that he was acting out of an illicit interest. Even when their partialities are unconscious, compelling judges to adhere to the rule of law helps them constrain their biases.

It is common to advocate reliance upon *ex ante* precepts of justice as a way of preventing disputes from occurring by informing parties in advance of whether their conduct is permissible or impermissible. We can now appreciate another important reason

why *ex ante* precepts are to be preferred to *ex post* decision-making: discernable *ex ante* precepts of justice enable us to detect partiality in a legal system. When the precepts that communicate justice are sufficiently clear—as the law governing auto theft and the rules of evidence were to my partner and me—deviations from these precepts may indicate that a judge is not acting impartially. Just as Judge Devine's deviation from his normal interpretation of the rules of evidence enabled us to identify him as corrupt, *ex ante* precepts enable other persons observing the operation of a legal system to detect corruption. Such precepts "constrain" a legal system to adhere to requirements of justice, not because *ex ante* precepts are self-enforcing, but because they make enforcement possible.

B. *The Role of Lawyers in Mitigating Partiality*

There is another dimension of a system based on the rule of law that also helps address the partiality problem—the *reliance on lawyers*. We are not accustomed to thinking of lawyers as combating partiality. On the contrary, lawyers are commonly thought to contribute to partiality by the zealous pursuit of their client's interest at the expense of justice. As Lord Brougham famously argued in *Queen Caroline's Case*:

> An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.[24]

Yet, this vision of advocacy notwithstanding, when lawyers' institutional and ethical responsibilities are considered, we may find that lawyers help mediate between the extreme partiality of their clients and the need of the legal system to strive for impartial justice.

Clients are especially partial because they are exclusively concerned, in their capacity as clients, with their own interest. They have little or no vested interest in the just operation of the legal system, which is to say that they have little or no vested interest in

24. 2 Trial of Queen Caroline 8 (Joseph Nightingale ed., 1821).

the impartial administration of justice beyond their interest as a citizen. Clients' immediate interests in the outcome of their cases dwarf their diffused interests as citizens in the administration of justice, in the same way that a domestic industry's immediate interest in receiving protection from international competition usually dwarfs its diffused interest in the benefits of free trade.

Clients are exclusively interested in the outcome of their case, not the fairness by which the outcome is reached, because they are usually one-time players in the legal system or one-sided players who repeatedly find themselves on the same side of legal disputes. For example, a defendant in a criminal case has no interest in viewing the legal system from the perspective of the prosecutor. There is no chance in a million that he will ever be a prosecutor. The same is often true of an individual plaintiff in a civil suit against a large company. There is very little chance that any individual plaintiff will ever be a defendant in a major lawsuit (at least not in any suit that his insurance policy will not cover).

One-time or one-sided players in the legal system, then, have little reason to view their lawsuit impartially. But, such players are almost always represented by lawyers—and lawyers are *repeat players* in the legal system as well as players who often find themselves on both sides of legal disputes.[25] I suggest that, in their nature as repeat players in the legal system, lawyers dampen the partiality of clients and assist in the impartial administration of justice.

There is a common saying that "a lawyer who represents himself has a fool for a client." But what does it mean? Perhaps it means that even a legally-trained client lacks something when attempting to represent himself in a lawsuit. What is that something? I suggest it is a sense of impartiality. True, a lawyer is under an explicit ethical obligation to serve the interests of her client and even to put these interests ahead of her own, as reflected in the quote from Lord Brougham. Yet such an explicit ethical obligation would be unnecessary if it was entirely natural for a lawyer to so act. In other words, if a lawyer's true interests were always entirely the same as a client's, then there would be no need to impose upon the lawyer a duty to act *as though* this was the

25. To the extent that lawyers specialize in particular types of lawsuits as either plaintiff or defense counsel, their ability to mitigate partiality is greatly reduced.

case. Precisely because lawyers are repeat players in the legal system, their interests inevitably tend to diverge from those of their clients. Let me explain why this is so.

Studies of conflict have shown that there is a strong tendency in even the most hostile and competitive of systems for repeat players to seek means of cooperation rather than continued hostility.[26] In World War I, for example, troops who were permanently garrisoned on opposite sides of the trenches learned to cooperate with each other by coordinating attacks so as to minimize the injury to the other side.

> For instance, if A persistently fired a weapon at B without regard for range and accuracy . . . and perhaps 'aimed high', then B attributed A's lack of zeal to choice not chance, for the choice of accurate fire was always possible. By ritualised weapon use, A signalled a wish for peace to B, and if B was of the same mind as A, he reciprocated and ensured that A was not harmed in the subsequent exchange of ritualised fire. Thus, with the most unlikely of means, either adversary could communicate the inclination to live and let live to the other, which, if and when required, established a mutually reinforcing series of peace exchanges. What an outsider might perceive as a small battle, entirely consistent with the active front policy, might be in fact merely a structure of ritualised aggression, where missiles symbolized benevolence not malevolence . . . .[27]

The same number of artillery shells might be fired at the same spot each day so the opponent would know to get out of the way.[28] Patrols would take routes calculated to avoid the enemy and, if confronted accidentally, would give each other a wide berth.[29] The regime of cooperation was reenforced by stern retaliation whenever the peace was broken.[30] And each side developed ways of disciplining their own compatriots who might breach the peace.[31]

Likewise, lawyers who use high-handed or illicit tactics face retaliation from other lawyers. Lawyers who get a reputation for

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26. *See* Axelrod, *supra* note 20.

27. Tony Ashworth, Trench Warfare 1914-1918: The Live and Let Live System 102 (1980).

28. *See id.* at 126.

29. *See id.* at 103.

30. *See id.* at 151-52.

31. *See id.* at 153-75.

using such tactics will pay in countless ways. For this reason, lawyers have a strong stake in their reputation, which is the way that most information about them is conveyed to others. Reputations are often quite specific and surprisingly accurate. I dare say that I rarely met a lawyer who did not live up to, or usually down to, his or her professional reputation. A bad reputation costs a lawyer in countless ways that he or she will never know—which is why many lawyers pay inadequate attention to their reputation. Yet enough lawyers appreciate this phenomenon that they jealously guard their reputations and worry a good deal about them. And it is the job of law professors to tell their students about the need to develop and protect their professional reputations.

Reputations arise as a result of repeated exposure to participants in the legal system. To protect one's reputation requires that one acts in a generally trustworthy way and that one treats others as one would want to be treated. This is not to say that lawyers must or do act prissily. As I already noted, every lawyer also has duties towards her client and knows that all other lawyers share a similar duty. Yet the fact that lawyers are repeat players with a considerable investment in their reputations means that they have the very delicate task of mediating between the exclusively partial view of their clients and the impartial perspective of the legal system. They must tread a difficult path between their responsibility as an agent of a client and their responsibility as an officer of the court.

This means that, for example, although they may be forced by their ethical responsibilities to knowingly allow their clients' to testify falsely at trial,[32] lawyers must also attempt to dissuade the client from committing perjury, and certainly must not suborn or encourage the idea. Although they may be forced to represent a client who has caused extensive injuries to a plaintiff, they must also disclose to the other party pertinent information which may damage their client's interests as part of the discovery process. They may also encourage their clients to agree to a fair settlement of the claim rather than to prolong lawsuits with a series of procedural maneuvers. In these and countless other situations, lawyers pursue their client's interests while at the same time mitigating

32. For a well-known defense of this practice on ethical grounds, see Monroe H. Freedman, Lawyers' Ethics in an Adversary System 27-41 (1975).

their extreme partiality and enabling disputes to be resolved, often by voluntary settlement.

CONCLUSION

Although I think that the lawyer's role as a mediator between the partiality of the client and the impartiality of the legal system is both important and generally neglected, too much should not be made of it. The lawyer should not be blamed whenever the legal system fails to act justly simply because she zealously pursued her client's interests. The inability of even the best legal system to reach infallible results cannot be rectified by forcing the lawyer to disregard completely her client's interest to see that a just outcome is achieved. Forcing the lawyer to assume complete impartiality is simply no substitute for improving the impartial rules governing the operation of the legal system.

The widespread repugnance expressed toward lawyers who represent the guilty truly amazes me. An inability of the police to collect—or the prosecution to convincingly present—sufficient evidence of guilt cannot be solved systemically by forcing the defense lawyer to reveal the truth or to represent the guilty less effectively than they represent the innocent. Indeed, by reducing the pressure on police and prosecutors to do their jobs well, imposing such an obligation on defense attorneys would have the perverse effect of undermining rather than enhancing the incentives to find and effectively present reliable evidence of guilt. That is, police and prosecutors would act far more partially than they currently do if they did not face the prospect of an adversary scrutinizing their actions at some future date.

Although the lawyer cannot assure that a legal system acts impartially, and although it may often appear that the partiality of lawyers is principally responsible when the legal system goes awry, the lawyer occupies a vital middle ground between complete partiality and complete impartiality. Lawyers in a system governed by the rule of law provide a mediating buffer between the interest of the legal system to sacrifice the individual client and interest of the individual. If the legal profession understood and took more time to explain to the public *and to ourselves* the important contributions made by lawyers to a regime of social cooperation, then we could stem the growing resentment of our profession that is reflected in the popularity of lawyer jokes.