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LAW

LAW; A law professor with a beef takes the judge to task and the case to the public.

By David Margolick

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For a variety of reasons judges, particularly those holding exalted appellate posts, enjoy a kind of immunity from criticism from lawyers. Whenever the bar rates the bench, it does it in the way the Zagat Guide rates restaurants: through anonymous surveys.

To most lawyers, publicly carping about adverse rulings is either bad form - judges with any sense of decorum cannot carp back - or bad judgment: while their clients pay the piper, the lawyers move on to the next case, which might just be presided over by the same misguided jurist. Moreover, as officers of the court, lawyers who vent their spleen too vigorously may even be disciplined.

In this namby-pamby world, a recent broadside by Prof. Anthony D'Amato of Northwestern University Law School against Judge Frank Easterbrook of Chicago is particularly surprising. Whether it is a temper tantrum or a serious critique, his message is unusual in its personally vituperative tone and the more general condemnation it contained.

Mr. D'Amato delivered his paper earlier this month in a program on "Deconstruction and the Possibility of Justice" at the Cardozo Law School in Manhattan. It was one of those sessions in which the menus on the printed program (quiche, pasta, tossed salad, fruit and cheese) seemed more related to law than some of the seminar topics ("Critical Theory and Post-Modernism: The Interplay of Ethics, Aesthetics and Utopia in Critical Theory"). Though Mr. D'Amato's talk dealt largely with the specifics of a case he had argued before Judge Easterbrook, it also offered an assault on what he called the "pervasively amoral, technocratic" tone of American legal culture.

Mr. D'Amato, who teaches international law and human rights at Northwestern, was appellate counsel for John Branion, a Chicago physician and civil rights advocate who, the professor contends, was improperly convicted of murdering his wife. It was an attempt to reopen that case that brought Mr. D'Amato before Judge Easterbrook, formerly a professor at the University of Chicago Law School, and two other judges from the United States Court of Appeals for the Seventh Circuit.

Judge Easterbrook wrote the opinion denying the appeal but only, Mr. D'Amato contends, by manipulating, omitting or inventing key facts. Whether or not that is true, Mr. D'Amato used the case to make these more general

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assertions:

* Judges lie in their opinions. Mr. D'Amato says that judges routinely fudge facts but get away with it, either because no one is watching, can fathom their reasoning, or can look beyond "the beautifully bound tomes of court reports, our secular society's equivalent of sacred texts." Practicing lawyers, he writes, "feel that their work is subject to the whim of judges who will play God with the facts of a case, inventing them to make the case come out the way the judges desire," adding, "Some say that if they had known that the practice of law would be like this they would have gone into a different profession."

* In elite legal culture, theories matter more than facts. "Academicians, judges, students, have taught themselves that facts are not important, that the only thing worth grappling with is 'the law.' We are training our students, who will someday fill the ranks of the judiciary, to consider the actual facts of a case to be unimportant."

* Law schools exalt legerdemain over truth, cleverness over character. "Professors will not accept a student who says that the party should simply lose," he writes. "Instead, they encourage students to come up with any arguments at all, however contrived, to win for the client. We encourage glibness, we penalize honesty; we applaud fabrication, we discourage sensitivity of justice."

In the self-flagellating, thanks-I-needed-that world of legal education, Mr. D'Amato's colleagues did not take his attacks on legal education all that personally. Indeed, he says that his paper got good reviews from the Cardozo audience.

The school's dean, Monroe Price, was more tempered. "Like any good criticism, it exaggerates," he said. "It's close to, and sometimes just over the line, separating scholarship from the re-litigation of a lost cause."

As for Judge Easterbrook, he said he had not seen the article, nor would he comment on it. "It would be a mistake, and anything I said couldn't possibly come out right," he said. "I put a long time into writing that opinion. Whatever I have to say, right or wrong, is already in it."

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