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978-1-107-00475-7 - The Lawyer-Judge Bias in the American Legal System

Benjamin H. Barton

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THE LAWYER–JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM

Virtually all American judges are former lawyers. This book argues that these lawyer-judges instinctively favor the legal profession in their decisions and that this bias has far-reaching and deleterious effects on American law. There are many reasons for this bias, some obvious and some subtle. Fundamentally, it occurs because – regardless of political affiliation, race, or gender – all American judges share a single characteristic: a career as a lawyer. This shared background results in the lawyer–judge bias. The book begins with a theoretical explanation of why judges naturally favor the interests of the legal profession and follows with case law examples from diverse areas, including legal ethics, criminal procedure, constitutional law, torts, evidence, and the business of law. The book closes with a case study of the Enron fiasco, an argument that the lawyer–judge bias has contributed to the overweening complexity of American law, and suggestions of some possible solutions.

Benjamin H. Barton is the Director of Clinical Programs and Professor of Law at The University of Tennessee College of Law. His articles have been published in the *Michigan Law Review*, *California Law Review*, and *The Journal of Empirical Legal Studies* and discussed in *Time* magazine, the *New York Times*, and the *Wall Street Journal* law blog, among others. Barton has been twice named the Outstanding Faculty Advisor for UT Pro Bono and has received the Marilyn V. Yarbrough Faculty Award for Writing Excellence. He is the winner of the 2010 LSAC Philip D. Shelton Award for outstanding research in legal education.

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This book draws on previously published articles: “Do Judges Systematically Favor the Interests of the Legal Profession?” 59 *Alabama Law Review* 1 (2007); “The ABA, the Rules, and Professionalism: The

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Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons,” 83 *North Carolina Law Review* 411 (2005); “An Institutional Analysis of Lawyer Regulation – Who Should Control Lawyer Regulation, Courts, Legislatures, or the Market?” 37 *Georgia Law Review* 1167 (2003); “Why Do We Regulate Lawyers? An Economic Analysis of the Justifications for Entry and Conduct Regulation,” 33 *Arizona State Law Journal* 429 (2001); and “The Lawyer-Judge Hypothesis,” in *The Pursuit of Justice: Law and Economics of Legal Systems* (Edward J. Lopez, ed., 2010).

Thanks to the *American Bar Association Journal* for allowing me to use the photograph on the cover. The original publication of the photo can be found at 11 *A.B.A. J.* 371 (1923). It is a photo of the Executive Committee of the American Bar Association in 1923. That year’s executive committee included a future Chief Justice of the U.S. Supreme Court (Charles Evan Hughes), a co-founder of the American Law Institute (Cordenio Severance), a former Congressman from Michigan (John Corliss), as well as other judges, prominent attorneys, and high-level politicians. The photo well captures the power and prestige of the American Bar Association and suggests the genesis of the lawyer–judge bias.