Making Progress the Old-Fashioned Way

Stephen B. Burbank
University of Pennsylvania, sburbank@law.upenn.edu

Follow this and additional works at: http://scholarship.law.upenn.edu/faculty_scholarship
Part of the Biography Commons, Courts Commons, Judges Commons, and the Legal Profession Commons

Recommended Citation
http://scholarship.law.upenn.edu/faculty_scholarship/947

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.
MAKING PROGRESS THE OLD-FASHIONED WAY

STEPHEN B. BURBANK

It has been my pleasure to help the editors of the Law Review put together this set of tributes to a remarkable judge, and it is my privilege to add a brief introduction. Mine is the easy task, not only because I am standing on the shoulders of a distinguished group of thoughtful commentators, but because, as their assessments of the legal contributions of the judge consistently reveal, the qualities and hence the greatness of the judge are inseparable from the qualities of the man. Mining their contributions unearths the same bedrock, which, when assayed, tells us as much about the man as it does about the judge.

In a paper written for an interdisciplinary conference on judicial independence held at the Law School at the end of March, my colleague, Geoffrey Hazard, concluded:

If we assume that judges cannot and should not "simply interpret" the law, then there is an inherent limit to the ideal of judicial independence. In that light, the important question is what else should be looked for in judges beyond technical proficiency, and what should be the mixture of technical proficiency and these other qualities. Benjamin Cardozo in his lectures on The Nature of the Judicial Process set forth as explicit an answer to that question as we have had. And yet Cardozo's explication is Delphic. Perhaps we can do no better.¹

It is thus fitting that, while some of the contributors to this festschrift have explicitly invoked the model of Cardozo when seeking to convey the qualities that make Ed Becker a great judge,² all of them have invoked that model, explicitly or implicitly, in describing the qualities that the judge shares with the man.³

¹ David Berger Professor for the Administration of Justice, University of Pennsylvania.
“Technical proficiency” is an old-fashioned virtue whose purchase is on the wane in academic circles and, I fear, among judges. Brilliance does not require, and may in fact appear to be hindered by, technical proficiency, if by that we mean thorough understanding, and careful attention to the details, of existing legal doctrine. For as Holmes famously observed, “Ignorance is the best of law reformers. People are glad to discuss a question on general principles, when they have forgotten the special knowledge necessary for technical reasoning.” Today we might say that Holmes was being charitable, since he assumed that those who insist on “discuss[ing] a question on general principles” once had “the special knowledge necessary for technical reasoning.”

The reader of these tributes to Judge Becker’s judicial work product emerges with no doubt that the judge possesses technical proficiency, or that he demands the same of those who are fortunate enough to spend a year with him repairing the gaps in their formal legal education. Possessing high intelligence, extraordinary energy, and unbounded intellectual curiosity, Judge Becker adds to those qualities both fascination and patience with the complexities of legal doctrine and willingness, at the end of the day, to abide the mistakes and limitations of authorities he is pledged to respect. Some of these qualities, of course, well describe judges quite different from Ed Becker. The first three are a rare combination in any judge. Yet, I believe, it is those added values of fascination, patience, and, ultimately, humility, that enable him to fructify his technical proficiency, helping to explain “the astonishing breadth, depth, and influence of his work.”

“uniquely honest, energetic, and persistent in search of sensible solutions”); Saltzburg et al., supra note 2, at 1292 (noting the judge’s “‘wisdom and discretion’”) (footnote omitted).

4 See Daniel A. Farber, The Case Against Brilliance, 70 MINN. L. REV. 917 (1986).


6 I use “Judge” rather than “Chief Judge” in the text because this Introduction focuses, as do the individual tributes, on Ed Becker’s judicial work. But see infra note 12. A separate appreciation could and some day should be written about his contributions as an administrator. When it is, I expect that many of the same qualities identified here as causal in the persuasiveness and influence of his judicial work will surface again. So, I expect, will his talent at the piano. See David H. Souter, Tribute to the Honorable Edward R. Becker, 149 U. PA. L. REV. 1229 (2001).

7 For that alone, Yale University, from which Judge Becker received an LL.B. in 1957, should award him an honorary degree.

8 Marcus, supra note 3, at 1273.
In another paper for the recent interdisciplinary conference on judicial independence, another of my colleagues, Kim Lane Schepppele, made the arresting assertion "that a judge bound by statute and a judge bound by the dictates of a party official are different more in degree than in kind."\textsuperscript{9} Her point is akin to that made by Professor Hazard, namely that "there is much to be said for a judiciary that is not constituted of legal technicians indifferent to the practical consequences of their decisions."\textsuperscript{10} Equally, however, there is much to be said for a judiciary whose members start from a platform of, and appreciate the contributions that can flow from, technical proficiency. From that perspective, there is reason for concern that Judge Becker is a member of a dying breed.

The problem starts with, although it is not confined to, formal legal education, which is increasingly provided by those whose utility functions may place brilliance ahead of technical proficiency in their own work and who may in any event owe their primary allegiance to disciplines other than law. If, as Judge Becker's career on both the trial and appellate bench suggests, technical proficiency requires hard work, patience, and thoroughness—in a common law system, the handmaidens of the inductive method—the path for a new judge inclined to follow in his footsteps is steeper and littered with more obstacles than it was for Judge Becker. Many federal trial judges today have far more cases to resolve than did District Judge Becker in the 1970s, and the workload of a member of a United States Court of Appeals is far heavier today than it was when Judge Becker ascended to the Third Circuit in 1982. The pressures to avoid the hard and time-consuming work of traditional adjudication at both levels, whether by settlement in the trial court\textsuperscript{11} or by dispensing with oral proceedings, are far greater now than in Judge Becker's era.


\textsuperscript{10} But in the stark positivism of soviet-style law where most cases were decided, rules possessed simply no room for interpretation; law was applied rigidly and without regard to the softening circumstances of specific cases. Insofar as soviet-style judges were compromised in their independence, it seemed to me that it was far more by positivism than by being instructed what to do in the concrete case as a routine matter.

\textsuperscript{11} Id. at 3.

\textsuperscript{12} Hazard, supra note 1, at 9.

\textsuperscript{11} Of course, "encouraging" settlement is not the only way a trial judge can seek to avoid the hard and time-consuming work that adjudication requires. A judge may also do that by refusing to take seriously a serious motion for summary judgment, an attitude presumably encouraged by the judge's lack of confidence in her technical
argument and using an alternative to published opinions in a court of appeals, have increased during the thirty years since the judge was sworn in. Some of the less-noticed costs of this transformation may be further erosion in the capacity for technical proficiency of our judges and, in any event, further erosion of attributes that distinguish the judicial process from other processes of authority, including the political process. Either would represent a threat to goals that we seek to achieve through judicial independence.

Judge Becker, formerly counsel to the Philadelphia Republican City Committee, is proof that politics need not be the enemy either of judicial independence or of judicial distinction. In this, too, he may be a member of a dying breed. For technical proficiency is a fortuity among judges selected, by whatever appointive or elective system, for their ideology or their willingness to trim their judicial sails to the prevailing winds of interest group politics. With the agenda thus narrowed, so also is the concept of progress, and in the absence of either brilliance or technical proficiency, durable progress may in any event be out of reach.

The future looks even darker, and the example of Ed Becker more luminous, when one realizes that, far from a neutral force in his judicial career, politics has been central to his enormous contributions. Fifteen years ago, "law is nothing more than politics" was a common refrain in law schools, and that view remains a staple of political science studies of judicial behavior. For Ed Becker, the refrain is not a counsel of despair because, for him, law is equally nothing less than politics: the art of seeking to improve the human condition through intelligence, patience, persuasion, and proficiency. As Professor Marcus's discussion of Judge Becker's work in the Japanese Electronics Antitrust Litigation suggests, he made a consequential contribution to the restoration of summary judgment to respectability. See Marcus, supra note 3, at 1265. Unfortunately, his example in that case would be very difficult for most federal trial judges to follow, if only for lack of time.

Bucking this trend, shortly after assuming his current position, Chief Judge Becker urged his colleagues to change their judgment order practices. Subsequently, judgment orders as a means of disposition by his court declined precipitously. Telephone Interview with Toby D. Slavsky, Third Circuit Executive (Mar. 21, 2001).

A judge's political beliefs, his or her policy preferences, should not cause concern unless they hold sway with such power as to be impervious to adjudicative facts, competing policies, or the governing law as it is generally understood. When an individual's belief system about social needs or aspirations is that powerful, it seems fair to speak of ideology. And on this understanding, ideology is revealed as the enemy of judicial independence.

compromise. Whether or not technical competence is a necessary condition for durable, judicially fashioned progress, it surely is not a sufficient condition. And what room is there in tomorrow's politics for patience, for persuasion, or for compromise?

Ed Becker knows that he lives in an imperfect world and that he is a member of an imperfect profession. Because he has made so many contributions to the betterment of the human condition, as citizen, lawyer, and judge, his faith that others, trained as he was and sharing his basic commitments, can do the same is not about to yield to momentary fits of cynicism or the eternity of ideology. In celebrating his accomplishments we not only honor him but share with others reason to hope that his faith is justified.