

AN APPRECIATION OF ARNO BECHT

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How do we say thank you to a man who has given more than thirty-eight years to teaching in our law school? During over thirty of those years I have known Arno Becht, first as his student and then as friend and colleague. This quiet man of inexhaustible patient resolve has touched the lives of thousands of students as he practiced his analytical skills and exacted performance from his students.

I first encountered Professor Becht in 1947. I had been exposed to the theories of common law pleading (now consigned to historical literature) and was then eligible to take his course in Code Pleading. Professor Becht took us through the "Rump" code and other variants before we could come to grips with the relatively new Federal Rules of Civil Procedure. He lifted every rock and made us look under it. I am grateful for that experience, perhaps more grateful now than I was then. I subsequently explored Restitution with Professor Becht. It was about this time in his career that he began to answer what appears to be a professional calling to identify and quantify the role of fairness in the law.

One thing Arno Becht does not like to do is talk about himself. Few of his students know he was born in nearby Peoria, Illinois, that he received his undergraduate degree from Colgate University, his J.D. from the University of Chicago Law School, and his LL.M. and J.S.D. from Columbia University Law School. In the process he acquired a Phi Beta Kappa key and was elected to Order of the Coif. But I suspect the award he cherishes the most came in 1975 when he received the coveted Washington University Alumni Faculty Award. This award is based upon the impact of a teacher on the lives of his students and is in recognition of "the high esteem in which he is held" by them. I had a key role in creating the award in the 1950's and I had a very warm feeling when I saw it presented to Professor Becht.

It is probably appropriate to note the literature that is already a part of Professor Becht's legacy. To do so is to court his quiet displeasure,

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but the exercise may capture, however inartfully, the flavor of this man for whom fairness is more than passion—it is the essence of the law itself.

Professor Becht's early writings dealt with corporate charter amendments that alter the interests of a corporation's stockholders. His J.S.D. dissertation at Columbia University Law School was published in some of the nation's leading law reviews as a four-part series of articles in the early 1950's.¹ According to Professor Becht, courts and analysts should look to the facts and competing economic interests in corporate charter amendment cases rather than trying to fit the issues within rigid legal theories. These competing interests can be equitably balanced only by adopting a more pragmatic approach, recognizing the rights of shareholders to protection and the need of the corporation in some instances to effect a change in its governing documents. Depending upon the nature of the alteration, courts should be either more or less rigid in their interpretation of the enabling language.

This series of articles was concerned with protection of minority shareholders or dissenters from unfair corporate action,² and its theme revolved around the need for the fairness of alterations upon minority shareholders and dissenters. As Professor Becht observed, however, fairness is a difficult concept to define and implement in statutes or decisions.³

Although "fairness" as an explicit test would be difficult to implement, it should still serve as a judicial benchmark and measure of the quality of decisionmaking in this area. Professor Becht suggested that equitable factors can and should be a consideration, notwithstanding

1. Becht, *Corporate Charter Amendments: Issues of Prior Stock and the Alteration of Dividend Rates*, 50 COLUM. L. REV. 900 (1950) [hereinafter cited as *Prior Stock*]; Becht, *Changes in the Interests of Classes of Stockholders by Corporate Charter Amendments Reducing Capital, and Altering Redemption, Liquidation and Sinking Fund Provisions*, 36 CORNELL L.Q. 1 (1950) [hereinafter cited as *Reducing Capital*]; Becht, *Alterations of Accrued Dividends (I)*, 49 MICH. L. REV. 363 (1951) [hereinafter cited as *Accrued Dividends I*]; Becht, *Alterations of Accrued Dividends (II)*, 49 MICH. L. REV. 565 (1951) [hereinafter cited as *Accrued Dividends (II)*].

2. The articles distinguish the kinds of interest or protections afforded the minority shareholder that may be affected by corporate action. The *Columbia Law Review* article discusses issuing new stock with prior interest to previously outstanding stock and the alteration of dividend rates. The two *Michigan Law Review* articles deal with alteration of accrued dividends on cumulative preferred stock. The *Cornell Law Quarterly* article deals with reducing capital and altering redemption, liquidation, or sinking fund provisions, a category broadly classed by Professor Becht as "provisions which protect the stockholder's ultimate right in the property of the corporation." *Reducing Capital*, *supra* note 1, at 26.

3. See *Accrued Dividends (II)*, *supra* note 1, at 589-92; *Reducing Capital*, *supra* note 1, at 9, 27-30.

courts' general reluctance to interfere with business judgment.⁴

In view of the substantive difficulty of implementing a fairness concept, Professor Becht suggested a procedural mechanism that was more likely to produce a fair result. He argued that courts should examine the public interest in allowing the charter amendment and require that the corporation actually prove that interest. Once a dissenter has shown he is economically harmed by the action, Professor Becht suggested shifting the burden of proof to the corporation to show that a public interest is being served and the proposed action is the least intrusive means of accomplishing that result.⁵

Two other written efforts of Professor Becht deserve mention here.⁶ In 1962 he wrote one of a series of articles and comments for a symposium in the *Law Quarterly*⁷ dealing with the ideas presented by Professor Llewellyn in his book, *The Common Law Tradition: Deciding Appeals*.⁸ Professor Becht had perhaps the hardest task, that of summarizing the contents of the book as background for the entire symposium. In his own comments, Professor Becht adds capably to the defense of the appellate decisionmaking system presented by Llewellyn.

Finally, Professor Becht served for five years as author of "The

4. See *Prior Stock*, *supra* note 1, at 942-43.

5. It is probably best to quote the test in Professor Becht's own language:

Accordingly, I propose another solution which seems to be simpler and to avoid the difficulties, especially of valuation, which are inherent in the fairness test. It is based on the assumption that if there is need for an amendment the corporation can prove it, and that in the absence of such proof, it is better to keep the status quo than to force the shareholders into expensive inquiries, whose outcome is likely to be inconclusive. First, require the dissenter to prove that the amendment alters his interest in the property of the corporation, or at least, that it changes them into something whose value is doubtful. Second, require the corporation to prove the specific need which justifies an amendment. Third, if such a proof is made let the majority further sustain the burden of proving that there is no other solution of the difficulty which would not affect the relative priorities of the classes, or which would not affect them as much If the majority fails to sustain the burden of proof on these issues, that is, if it fails to disprove feasible and less drastic alternatives, let the court enjoin the plan entirely, or so much of it as has put pressure on dissenters.

Accrued Dividends (I), *supra* note 1, at 592-93 (footnote omitted). See also *Accrued Dividends (II)*, *supra* note 1, at 584-86; *Reducing Capital*, *supra* note 1, at 9, 27-30; *Prior Stock*, *supra* note 1, at 943-44.

6. Professor Becht's significant work on factual causation, A. BECHT & F. MILLER, *THE TEST OF FACTUAL CAUSATION IN NEGLIGENCE AND STRICT LIABILITY CASES* (1961), is extensively and ably discussed elsewhere in this issue. See Pedrick, *Causation, The "Who Done It" Issue*, and Arno Becht, 1978 WASH. U.L.Q. 645; Phillips, *Reflections on Factual Causation*, 1978 WASH. U.L.Q. 661.

7. Becht, *A Study of "The Common Law Tradition: Deciding Appeals,"* 1962 WASH. U.L.Q. 5.

8. K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960).

Flag," a monthly column in the *Journal of the Missouri Bar* dealing with cases decided by the Missouri Supreme Court. We too often overlook the talent necessary to comment concisely and accurately about the law without the luxury of extended elaboration and argument. Those who were regular readers of this column, and especially members of the Missouri Bar, owe Professor Becht a debt of gratitude for the job he did so well.

Still, it is as a teacher that I remember Arno. Not in the "Paper Chase" style at all. No flights of eloquence. No caustic exhibitions. Rather, a quiet insistence on grappling with facts, on reasoned analysis, and on scrutiny of the available alternatives. Total certainty was rarely the result of his teaching exercises. But nations have often been ill-served by lawyers who were too sure. Give me a teacher who shows the hard road to fairness. Thank you, Arno.