NOTES AND RECENT DECISIONS

adopt a strict construction and narrow the commerce scope of the Act. But
the proper interpretation, as represented by the Standard Oil case,\(^4\) seems
to have prevailed—if at least one of the transactions constituting the dis-
crimination is found to be within the flow of commerce, then the com-
merce requirement is satisfied.

Frederic A. Sawyer

Book Reviews

BIENENFELD, F. R. Rediscovery of Justice. New York, Oxford University

It is easy to guess why the editors of the California Law Review asked
me to review this book. For the author has used materials which, for a differ-
ent and much more restricted purpose, I used some twenty years ago in my
book, Law and The Modern Mind.\(^1\) There I drew on some aspects of the
writings of the child psychologist, Piaget, and of the Freudians, to support
a partial explanation—I listed fourteen others\(^2\)—of the unrealistic demand,
by adults, for unattainable legal certainty. In brief, my partial explanation
was that this demand in part derives from the carry-over into adult years of
emotional attitudes of young children, engendered in the family.\(^3\) This de-
mand, I suggested, when made by adults, signifies emotional immaturity
partly caused by unduly prolonged emotional father-dependence.\(^4\) A mature
society I envisioned as one in which such father-dependence would vanish
after childhood. "Modern civilization," I wrote, "demands a mind free of
father-governance. To remain father-governed in adult years is peculiarly
the modern sin."\(^5\) We should end the "search for the father-judge," so that
"the child indeed becomes father to the man, i.e., each individual becomes
his own father and thus eliminates the need for fatherly authority."\(^6\) Holmes
I described as the "completely adult jurist" who had "put away childish

\(^4\) Supra note 10.

\(^1\) Published in 1930; sixth printing, with new preface, published in 1949.

\(^2\) See 263. Repeatedly I warned that I was proposing a partial explanation, e.g.

\(^3\) I noted (327, note 5) that I was referring to our "quasi-patriarchal society" and
not to a society in which the mother is the "arbiter of conduct." I also pointed out
(75, note) that the word "child" is not a constant, that there are "developmental periods
in the growth of any child."

\(^4\) For recent discussions of my thesis, see STEVENSON, ETHICS AND LANGUAGE 92,
note 8 (1944) ; DE GRAZIA, THE POLITICAL COMMUNITY, c. 2, note 15 (1948). See also,
as to the effect of childish relations to the father on attitudes toward government,
ROSENFARb, FREEDOM AND THE ADMINISTRATIVE STATE 209-211 (1948) ; Levin, Maine,
McLennan and Freud, 11 PSYCHIATRY 177 (1948). "The important place to study law
and order does appear to be the nursery." West, A Psychological Theory of Law, Inter-
pretations of Modern Legal Philosophies 767, 772 (1947).

\(^5\) LAW AND THE MODERN MIND 252 (1930).

\(^6\) Id. at 250. It is interesting to note how Locke, answering Filmer, and from a dif-
ferent angle, said something of the same sort. See the second TREATISE ON GOVERNMENT,
sections 35, 38, 170 (1680).
longings for a father-controlled world. . . . We might say that, being rid of the need of a strict father, he can afford not to use his authority as if he, himself, were a strict father." I should add that in that book I repeatedly warned that I considered psychology not a science but an art, still in its early youth, an art which utilized concepts most of which were "as ifs," with too little recognition by psychologists of that fact.8

Now, seventeen years later, comes Bienenfeld, who, without such warnings, uses those same writings of Piaget and the Freudians for a different and much more ambitious purpose, i.e., to construct a new theory of Natural Law, consisting of a body of "self-evident" and just rules for the correct governance of societies. His conception of Natural Law he employs, in turn, to serve as the foundation of an international Bill of Human Rights.

Briefly stated, Bienenfeld's thesis runs thus: The rules of Natural Law are discoverable in the operative notions of justice within the family.9 Different notions develop at different stages, as the child grows older. At each stage, the child's needs call for "self-evident" rules of justice; those needs, and resultant demands, overlap and must be reconciled. The rules for each stage are "eternal." To the stages of the individual's growth from childhood to maturity there correspond, says Bienenfeld, stages in the development of societies. Thus, according to him, there have been societies which correspond to infancy and require its "self-evident" rules, while other societies, having reached "puberty," require rules appropriate to that period. Since the rules for any particular period are, as to it, "eternal," the correct theory of justice or government is that of "the relativity of natural law."

Mankind, asserts Bienenfeld, "has now apparently reached the age of adolescence" and is "confronted with the tremendous problem" of "maintaining order and authority in a fatherless society." To this problem, he says, different approaches have been made: "the Nazi and Fascist methods, the British way, the American method, the Chinese new order and the Indian . . . ." Only four of these "conceptions of authority in the fatherless society—the British, American, Bolshevist and Chinese—have demonstrated their worth, but they too are in many ways contradictory. Must each conquer or perish? Or can they live together on a basis of mutual agreement? . . . If reason could indicate, for all fatherless societies, the common denominator of the British, American, Russian and Chinese conceptions of government and crystallize them into a minimum Bill of Rights, and if the truth of this statement were accepted, some contribution would be made to the welfare of humanity."

I think that Bienenfeld has exploited some valuable ideas: (1) Our psy-

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7 Law and the Modern Mind 252, 259 (1930).
8 Id. at 21 note, 163, 359-360. See my criticism of Freud in Frank, Save America First 198-201 (1938); Frank, Fate and Freedom 64-68, 351 (1945).
9 Bienenfeld discusses not only the role of the father but also that of the mother. Before I recently read his book, I had written and published my book, Courts on Trial (1949) where (384-388, 395) I put forward, avowedly as "a somewhat fanciful idea," the effect of the "mother-role" on attitudes toward the administration of justice. See also Law and the Modern Mind 15.

Cf. Locke, op. cit. supra note 6 at §§ 52, 53 for remarks about the mother.
Psychologists and anthropologists are discovering what appear to be some universal minimal attitudes in young children, attitudes which may be the germs of some legal rules and governmental institutions. (2) The democratic ideal envisions a society of men free from the thralldom of excessive devotion to, or reaction against, authority of a fatherly kind.

But I think that Bienenfeld has exploited those ideas too glibly, too superficially. His detailed descriptions of children’s attitudes are dogmatically crisp. And, overlooking the writings of many modern anthropologists, he overworks an analogy when he closely parallels the stages in individual development and in social development. This parallel is too pat to be true.

Analogies are indispensable to alert thinking in any field. Natural Science, for instance, could not get along without them. All valuable theories are, in last analyses, but ingenious “just-so stories.” Freud, in a letter to Einstein, written in 1932, after observing that his own psychological theories seemed to amount to a “species of mythology,” asked Einstein, “But does not every natural science lead ultimately to this—a sort of mythology? Is it otherwise with your own physical science?” Yet it is always unwise to push such analogies—such “just-so stories”—too far. Always they should be accompanied by cautious qualifications to red-lamp their partial or “fic-

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12 See Frank, Fate and Freedom 185-186 (1945).

13 Id. at Preface (p. v), 27, 88, 103; Frank, Courts on Trial 200-201, 400 (1949).

14 On October 30, 1949, the York York Times said in an editorial: "Scientists are supposed to concern themselves only with facts. But when it comes to wild romance they eclipse the most extravagant fancies of those who contribute to ‘pulps’ given over to scientific fiction. Back in the eighteenth century Kant and Laplace romanced about the origin of the solar system and told a magnificent tale of a nebula that shrank as it cooled and in the process spun faster and faster until it finally flung off planets. Then Profs. T. C. Chamberlain and F. R. Moulton came along with a poem about a wandering star that entered our part of the heavens and pulled out of the sun the stuff out of which the planets condensed. More recently we have been told that the sun was once a nova that blew up and threw off rings from which the planets were formed.

"Now comes Nobel Prize Winner Dr. Harold C. Urey with a dream which is concerned primarily with the earth, but which deserves recognition for its ingenuity and its departure from accepted notions. We have always been told that the earth must have been an incandescent mass once upon a time, meaning some billions of years ago and that it solidified in the process of cooling. Such musings go back to the time when nothing was known about radio-activity. Dr. Urey knows all about radioactivity, and makes proper allowance for it. A radioactive element like radium is slightly hotter than its surroundings. Here is material for a new theory of the earth’s origin, and Dr. Urey makes the most of it. According to him the earth started cold from a primordial dust cloud. It did not acquire its crust by any process of congealing, if he is right. The radioactive elements that were formed heated up the mass and created the crust. Things got so hot because of the cumulative effect of radioactivity that iron melted and collected at the core, with lighter materials floating up to the surface."
tional" (i.e., “let’s pretend”) character.15 Bienenfeld, too Hegelian, is a captive of the Time Spirit notion.16 Moreover, Bienenfeld arouses skepticism by the use of the outmoded word “self-evident.”17 As a consequence of these several faults, his justification of the several items in his proposed Bill of Human Rights is weakened rather than strengthened by his theory of Natural Law.

His thesis is somewhat akin to the naive patriarchal theory of government put forward by Filmer in the 17th century. Although Locke polished off Filmer, it has been said that Filmer’s theory was “more correct historically and sociologically than the fiction of a social contract so widely used by the leading theories of the day.”18 In the 19th Century, Maine espoused a more sophisticated version of the patriarchal theory.19 Even that version is now considered too rigid, although it was much less so than Bienenfeld’s.

Namier has made this interesting comment: “Whether the theory of an actual paternal origin of government is a correct phylogenetic or logical inference, or merely a psychological delusion, we shall probably never know; but this much is certain, that it is an assumption natural to us all. Correct perception of a psychological fact underlay Sir Robert Filmer’s theory: all authority is to human beings paternal in character, for men are born, not free and independent as some of Filmer’s opponents would have it, but subject to parental authority; in the first place, to that of their fathers. The development of every man, in his individual life, obviously proceeds from subjection to freedom, and it proves arrested growth if full freedom is never reached, and if inwardly he carries on the revolutionary (or counter-revolutionary) struggle long after he himself should have attained uncontending


16 For criticism of that notion, see Frank, Fate and Freedom c. 7 (1945); Frank, A Sketch of An Influence, in the volume, Interpretations of Modern Legal Philosophies 189, 218-222 (1947).

17 See, e.g., Frank, Courts on Trial 416-418 (1949); Frank, Fate and Freedom 298-308 (1945).


19 See Maine, Ancient Law c. 5 (1861; 3d Am. ed. 1885); Maine, Early History of Institutions 64-70 (1888; 7th ed. 1897); Maine, Village Communities 15-16 (1876; 4th ed. 1881). See Maine’s reference to Filmer in Ancient Law at 119. See Levin, op. cit. supra note 4 for an interesting discussion of Maine’s views; inter alia, Levin maintains that Freud was influenced by Maine.
Namier's approach (which resembles that which I adopted in *Law and The Modern Mind*), seems to me defensible, whereas Bienefeld's does not.

Nevertheless, the very faults of Bienefeld's book may stimulate fresh thinking, of a less superficial sort, about the relations of governmental institutions and the traits of childhood. Bienefeld's contrasting summaries of the conceptions of authority in our several modern cultures are sometimes brilliantly suggestive. He shows shrewdness and originality in some of his incidental observations. And the details of his Bill of Rights, grounded in the "law of humanity," deserves careful attention.

Over-optimistic in his aim of working out a family-based Natural Law, Bienefeld, I think, becomes dangerously pessimistic in his last chapter. There he deplores the doctrine of "the greatest happiness of the greatest number . . . as the aim of the State." This doctrine, proclaimed in the late 18th century, led, says Bienefeld, "to the Nihilism and despair of the present age," and "contributed nearly as much to the chaos of our time as did . . . the Nazi ideology."

With those sentiments, I emphatically disagree. True, as Bienefeld says, good laws cannot make people happy. But it is not true that "laws, like all institutions, can, at their best, foster intellectual progress and leave it to the individual to follow his own path to happiness or misfortune . . . ." Certainly in this country, government can promote far more than "intellectual progress." Our government can do far more than any government as yet has done to ensure for the mass of the population that leisure, that freedom from onerous toil, without which individual men cannot follow their own paths to happiness—happiness not in a hedonistic sense but in the sense of the fulfilment by each person of his unique possibilities as a social being. Leisure-class members have had that opportunity. Using intelligently modern technology, we can—within a democracy and inside a profit system—enlarge the leisure class, creating a semi-leisure society which will include all our citizens. Supplied with education for leisure, the "pursuit of happiness,"—equally valued in our Declaration of Independence with "life" and "liberty"—need not be chimerical. That the "pursuit of happiness" will, in all cases, be successful, of course government cannot ensure. But the opportunity to engage in that pursuit need not be in the future, as it has been in ages past, the privilege of a tiny minority. I can understand how one who, like Bienefeld, has lived much of his life in caste-ridden, Continental Europe, should repudiate such an ideal, should regard it as a lure to totalitarianism. But we Americans must not import such foreign-made pessimism.

\footnote{20} Namier, *England in the Age of the American Revolution* 31-32 (1930). When I wrote *Law and The Modern Mind*, I had not read Namier's book, which was published in the same year.

\footnote{21} From *Man for Himself* (1947) passim.

\footnote{22} Concerning the origins of the phrase "pursuit of happiness," see Boyd, *The Declaration of Independence* 3-5 (1945).

The Declaration not only speaks of "the pursuit of happiness" as among men's "unalienable rights" but proclaims, as one of the principles on which the "new government" was to be founded, the need of effectuating "Safety, Happiness," and "Prudence."

\footnote{23} See Frank, *Save America First* 168 (1938).
Political opposition will be strong to a program for spreading broadly the potential benefits of applied modern science. Such a program encounters not only the inertia of fixed habits but also the desire of the few to preserve their present superior leisure status. That opposition will feed on such utterances as Bienenfeld's. Indeed, I suspect that Wormser, who in a recent book joined that opposition, had read Bienenfeld. For, in discussing justice, Wormser virtually paraphrases Bienenfeld when he says that "the 'greatest happiness for the greatest number' is consonant with absolute democracy but not with American ideas of a democracy limited by assurances of protection to minorities." Echoing Bienenfeld, Wormser continues: "Franklin D. Roosevelt popularized the expression 'freedom from want,' which seems, at first glance, to be an excellent objective of justice, yet it is only one of many factors to be taken into account in determining justice. Ask the question: Which is more important, freedom from want or freedom itself? There is no easy answer to this, except for the Russians, who believe that freedom from want is all-important and that freedom itself is of no importance."

Such views, uttered by Bienenfeld or by American imitators, are dangerous to our democracy. They imply that Russia promises freedom from want and that we oppose Russian, or any other form of, totalitarianism, primarily because we dare not so promise since we think freedom from want incompatible with "freedom itself." If that is to be the American position before the world, we should beware. So we were warned, some nine years ago, by Russell Davenport, Wendell Willkie's chief brain truster. Such a dangerous position we need not take. Far better than Russia, and with no sacrifice of "freedom itself," we can liberate our citizens from want and, in the reasonably near future, supply each of them with the opportunity to develop his unique creative potentialities. Moreover, we can help the rest of the globe, before too long, to do the same.

I am not here concerned with ways and means, but with long-range policy. Accordingly, I am not to be understood as taking sides in the current political debates about the so-called "welfare state" or about the desirability of having the stronger labor unions obtain pensions through agreements with corporate employers. But I do cite as relevant some remarks made not by a partisan politician or an economic radical but by Hendershot, financial editor of the moderately conservative New York World Telegram, in a column published December 2, 1949. Answering a statement that the quest for security "has become an obsession among a large proportion of our people," Hendershot said: "Our observations suggest that the quest for security has been an obsession, . . . but until recently it has been manifest primarily by those who make up what has been called the upper crust of our society. . . . As evidence we offer the pension provisions for the people who manage our large corporations. Unfortunately, however, they have not been satisfied with mere comfortable living provisions after they reached retirement age; they desired to be kept in the manner to which they had

25 Davenport, This Would Be Victory, Fortune August 1941, p. 5; see Frank, If Men Were Angels 16-18 (1942).
26 See, e.g., Frank, The New Sin, 28 Sat. Rev. of Lit. 3 (1945).
become accustomed. And they have proposed that the consuming public pay the freight. . . . But now that the rank and file of workers for these same corporations seek protection in their advanced years, it becomes an ‘obsession.’”

But there is a deeper, more perplexing, problem than that of giving such protection to the “rank and file”27: (1) It is one thing to safeguard men against the fears, and the actualities, of economic security; Russian totalitarianism can perhaps some day solve that problem; we can do so by non-totalitarian means. (2) It is quite another thing, however, to solve the problem—now recognized by some of our most conservative industrialists27—of the grave emotional malaise apparently experienced by millions of our factory workers. This malaise, it is said, results from their lack of any sense of personal participation, any sense of individual initiative, in what they do in their working hours. Too many such men, even when they feel economically secure, have, we are told, a feeling of lostness, of functionlessness, and therefore of frustration. Why? Because they have become slaves to machines, minor robot-like participants in huge industrial organizations directed by others. For the millions so situated, it cannot fairly be said, as one of our statesmen has recently said, that they “are thinking of security instead of opportunity,” and that they have departed from a “spirit of self-reliance.” For, to them, it would seem, “opportunity” and “self-reliance” in the economic realm is meaningless, and will continue to be. Yet we have held up to them the ideal of individual enterprise precisely in the economic realm. To inculcate such an ideal in millions of men who, in the very nature of our industrialized society, cannot realize it is necessarily to breed frustration.

The cures now being considered by our more alert industrialists are confined to the industrial realm. To my mind, those cures seem little likely to do the trick. Good wages plus pensions certainly will not. Nor, in all probability, will greater participation in the area of local shop or plant management, since that is too remote from the top management where the really imaginative economic decisions are made. Nor will the individual worker in mass-production industry attain a sense of self-reliance, initiative, by joining in the selection of a few delegates who, to some extent, sit in on the top management. No such device, I think, will yield a feeling of individual

27 Wallace F. Bennett, President of National Association of Manufacturers, said in a speech on September 16, 1949: “Unfortunately, in the face of the magnificent record of American enterprise, in the face of prosperity, in the face of this great material success, the American people are dissatisfied. They have indicated in the past few years that they are beginning to lose faith in the system that has made us great.” He ascribed this dissatisfaction to the failure of management to assume responsibility for the “spiritual product” of factories. Managers, he suggested, must operate the “phantom factories” which create spiritual satisfactions making for happiness. “Too many phantom factories are turning out unhappiness, not happiness . . . . Men and women are more interested in making something out of their lives than in just making gadgets for us.” Unless “basic human values . . . exist in the phantom factories in which men work concurrently in our physical plants, they can have no hope for happiness.” He described five factors as among those necessary in the quest for happiness: the need of a man to be himself; the need to grow; the need to achieve and to be recognized; the need to belong; the need to contribute.
enterprise for the individual worker in such an industry. The cure, it would seem, must be found outside the economic realm—by giving each such worker more leisure to express himself creatively in non-economic pursuits, and by giving him also an adequate education in the creative uses of his leisure hours. Here is a psychological problem Bienenfeld has ignored.

Bienenfeld has also ignored a still deeper-lying psychological problem: Why is it that our society does not move forward with the deliberate purpose of creating a semi-leisure civilization? As I wrote a few years ago:28

"It was in 1933, I think, that someone suggested that it would be calamitous should scientists invent a single machine which, run by a half-dozen men, could supply the material needs of all mankind. For, it was said, such a machine would cause universal unemployment as a result of which everyone would starve. Of course no such machine is in sight. But it is surely symptomatic of a grave defect in our attitudes that it can seriously be thought that such a contrivance would be a calamity. That attitude needs careful attention. For if we harness scientific ideas and methods now available—and here I exclude atomic energy—we will slowly move toward something like that invention. Even without a deliberate, concerted program, every year witnesses the introduction into industry of new machines which turn out more and more goods with less and less human effort. To be sure, as millions of men, for a long time to come, will have extensive, unsatisfied economic wants, labor-saving machines, under adequate guidance, need not spell widespread unemployment. As, however, the machines grow more efficient, the number of hours of labor per man will grow increasingly fewer, so that living standards can rise while the hours of labor required for economic purposes can be reduced. Push that line of thought in your imagination to its logical conclusion and you reach a time when machines will fill all important economic needs with virtually no labor. That time is so far away that we need not concern ourselves with its practical consequences. But the crucial point is this: If we should wisely and systematically apply even our present store of scientific knowledge to the production of goods, then probably by the end of this century most of the human race would enjoy a very considerable measure of material well-being, with no one spending more than a few hours a day on economic activities. Atomic energy can only speed up that process. I doubt whether inertia can alone account for the dread of plenty. I think that a far deeper, stronger root of that dread is to be found elsewhere. Our culture is permeated with a centuries-old asceticism that makes us shudder at the prospect of a society in which most men and women would have many hours of leisure. Most of us regard as a curse a semi-leisure civilization, affording to all men the opportunity for long stretches of un-irksome activities."

Because Bienenfeld ignores those psychological problems, his analysis and his program remain superficial.

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28 Frank, op. cit. supra note 26.

29 As I have elsewhere tried to show, that asceticism does not stem from Calvinism, but goes back at least to Plato. See FRANK, FATE AND FREEDOM 89-112, 257-276 (1945).

* United States Circuit Judge; author of COURTS ON TRIAL (1949), LAW AND THE MODERN MIND (1930), SAVE AMERICA FIRST (1938), IF MEN WERE ANGELS (1942), and FATE AND FREEDOM (1945).