October 1965

Prolegomena to a Psychoanalysis of Law and Justice: Introduction

Franz Rudolf Bienenfeld

Follow this and additional works at: https://scholarship.law.berkeley.edu/californialawreview

Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z380N3G

This Article is brought to you for free and open access by the California Law Review at Berkeley Law Scholarship Repository. It has been accepted for inclusion in California Law Review by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
Prolegomena to a Psychoanalysis of Law and Justice†

Franz Rudolf Bienenfeld*

PREFACE

In the summer of 1956, Professor Albert A. Ehrenzweig visited his friend Dr. Franz R. Bienenfeld in London and discovered the rough draft of this work. Ehrenzweig's promptings encouraged the author to complete the study during the following year, and I visited the author in the summer of 1957 to edit the manuscript. As sometimes happens, the "finished" manuscript was never finished. The author had afterthoughts and revised the original version several times. I returned to Berkeley while the author continued to revise his book. On May 16, 1961, Bienenfeld died.

Shortly before his death, he had sent me a letter saying:

I am not sure whether, at my age and my state of health, I shall be able to finish my book "A Psychoanalysis of Justice and Law" particularly in case some alterations should be required by the publishers or some chapters would not be fully or partly drafted.

I therefore authorize you to publish the book and to alter it according to requirements or according to your own judgment. I am sure Prof. Dr. Alb. A. Ehrenzweig will render advice and assistance.

My legal successors will be informed of the content of this letter . . . .

Upon Bienenfeld's death, I handed the last, although not the final, stage of the manuscript to Professor Ehrenzweig, the godfather of this work, who had it bound and donated it to the library of the law school. Thanks to his initiative and to the enterprise of the editors of the California Law Review will appear as an appendix to Part II.

†The author died before he was able to complete this manuscript. Only one copy of the manuscript was preserved. This copy remained in the Law Library at the University of California until the editors of the California Law Review decided to publish it in two parts. Two other sections, entitled "Strangers" and "Things," by Dr. Bienenfeld were never incorporated into the text. These sections, in addition to another manuscript entitled "The Conception of Obligation," have been bound and placed in the Law Library at the University of California. The text has been left essentially the way it was found. A bibliography prepared by the editors of the California Law Review will appear as an appendix to Part II.

*Franz Rudolf Bienenfeld was born in 1886 and died in London on May 16, 1961. Among his books were Haltungen ohne Verschulden (1930), a standard German-Austrian work on liability; Germans & Jews (1934); and Rediscovery of Justice (1947). Bienenfeld was exiled when Hitler took power in Austria, his Austrian citizenship taken from him, and his property confiscated. He went to London, where he became head of the legal department of the World Jewish Congress. When the WJC was allowed to participate in the United Nations Economic and Social Council, Bienenfeld became the organization's spokesman in the ECOSOC drafting of the Declaration of Human Rights.
fornia Law Review, this work, though it is from the author's point of view still wanting, is now presented to a wider public and has a chance to get the recognition it so fully deserves.

Max Knight*

Some fifteen years ago I paid a visit to my teacher, Karl Llewellyn, whom future generations will recognize as one of the few great original thinkers among those whom he so kindly and yet so scathingly called American jurisprudes. After many years' absence he received me exclaiming: "Have you read that superb job of Bienenfeld's, those first fifty pages of his Rediscovery of Justice?"

I have since read those pages many times and, while Bienenfeld lived, I never ceased to urge him to continue his great work. To this fact I owe his wish expressed shortly before his death that I write the preface to this book. Although he was not permitted to finish it, his friend and editor, Max Knight, was able to preserve for us what many will consider a great step forward in the rejuvenation of our senescent science of legal philosophy.

Natural law, positivism, realism are taught today as the leading "schools of jurisprudence." Many a teacher of legal philosophy must spend weeks or months of sterile endeavor to prove that what appears as a clash between irreconcilable conceptions of law and justice is primarily due to a dramatic confusion of words: for all law is by definition positive law whose creation is in part conditioned by ideas of natural law and whose finding requires realistic evaluation of mental processes.

But a bitter fight of 2000 years cannot be disposed of this simply as a gigantic struggle about nothing. For if great minds persist in misunderstanding each other, there must be a strong emotional reason for their persistence—a reason which itself is worthy of serious study.

It was this study that Bienenfeld began in his first book: If a "positivist" discounts the value judgments of natural law, he does so because these judgments seem to him arbitrary and unverifiable. And so they are. But Bienenfeld has shown that there remains in all of us the verifiable fact of the sense of justice, and that that sense of justice denies us an absolute, objective standard by which to judge the justice of a particular law, because the sense of justice is formed at different times of the child's development. In the "descriptive part" of the present work Bienenfeld restates his earlier views by taking us through the primitive communism of the infant who wants total equality with his siblings, through socialism based on equal need and equal reward, through con-

* J.D., 1935, Vienna University. Editor, University of California Press, Berkeley, California.
servatism that insists on keeping one's own, liberalism that wants freedom from constraint, to nationalism that protects the group. A searching study showing that these necessarily inconsistent judgments underlie the several fields of all law concludes the first part.

As the author points out in his epilogue, earlier psychoanalytical studies were limited to the analysis of criminal law and of the concept of guilt. The second, "analytical," part of the present work demonstrates persuasively that this limitation was due to the erroneous assumption of an earliest Oedipal impulse of aggression and compulsion resulting in guilt. Once, in accord with later psychoanalytical findings, it is understood that an Oedipus "union" precedes the Oedipus complex, that the infant's craving for security in his relation to his mother precedes his rebellion against his father, other legal subjects fall into place. The second part of the book accordingly offers an analysis of the "social law" prevailing between mother and child, the criminal law involving father and child, the constitutional law governing husband and wife, and the law of contracts between siblings. The final chapters describe the absolute obligations as to the protection of life, safety, and property, and the law of procedure as serving the ascertainment of obligations.

If Bienenfeld had been able to complete his work, it could well have become the definitive psychoanalytical study of law and justice. We must be grateful that his work, as it has been preserved, has now at least prepared the path for a new era in jurisprudential research.

Albert A. Ehrenzweig*