Book Reviews

SOCIAL ORDER AND THE LIMITS OF LAW

Iredell Jenkins is mistrustful of the spreading belief in the omnicompetence of law to effect social reform. In a comprehensive, elegant, and unfalteringly cogent study of the nature of positive law—*Social Order and the Limits of Law: A Theoretical Essay* (Princeton, N.J.: Princeton University Press, 1980)—Professor Jenkins equips the reader with an understanding of the nature of positive law that gives force to the mistrust. The problem is that the high hopes and good intentions of the reformers are coupled with a shortsighted and opportunistic view of the relationship of positive law to social aims. According to Jenkins, positive law inevitably gives form and direction to society, but it cannot do so cavalierly and in disrespect of the antecedent and extra-legal "lived relationships" that are the foundation of its authority. Positive law is but a supplemental principle of order, called into being by the distinctive "plasticity" of human being. It must preserve consonance with the prior and more pervasive orders from which it has emerged and which are, on Jenkins's evolutionary theory, conserved within it.

The supposition of the omnicompetence of law to effect social reform is most notable in the wave of "judicial rights-making" inaugurated by the Warren-led Supreme Court. It is contaminated, Jenkins suggests, by weak conceptual foundations as well as by certain characteristics indigenous to the judiciary and the judicial process. The foundation of the enterprise is the recent ascendency of the concept of "human" rights over the established "civil" (or legal) rights and the "natural" rights that afforded to civil rights their original justification. The traditional rights appealed to reason, were essentially protective in character, and required to be exercised by those who held them. For these reasons they were intrinsically self-limiting. By contrast, the new human rights "are beneficial rather than protective. They embody the claim that men are entitled to certain benefits and services, such as food, housing, minimum income, and health care. These rights do not have to be exercised but are simply to be enjoyed.... What men are now claiming as a right is not merely that they be left unhindered in their pursuit of values but that these values be bestowed upon them" (p. 257).

Not only are the new human rights subject to no intrinsic restrictions, but the judicial process through which they are effected contains three self-aggrandizing features, identified by Jenkins as internal momentum, elitism, and irresponsibility. By the "twin pillars of the American legal tradition, judicial supremacy and *stare decisis*..., a particular line of decisions can soon acquire a momentum that is overpowering in its force and rate of ac-

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celeration" (p. 259). Such a line extends tendrils far beyond the intent of the original decisions, into remote areas of society, and to unanticipated effect. Jenkins believes that this is becoming evident in the judicially instituted busing of school children to achieve racial integration, the protection of those accused of crime, the establishment of residency requirements for voting, and the matter of privileged admission as epitomized in the *DeFunis* and *Baake* cases.

On elitism, Jenkins points out that the judiciary—including judges, the more prestigious law schools and legal scholars, many of the larger foundations, and some public figures who support approved causes—constitutes in important ways a partially closed and highly self-conscious establishment. Its dedication to its own principles and values, its assurance of its own rectitude, and its confidence that it expresses the best intelligence and true conscience of its society lend what might be termed subjective momentum to the institutional momentum noted above.

By "irresponsibility" Jenkins refers to the fact that judges do not implement the decisions they hand down. In their detached position they are unlikely to be aware of or sensitive to the social strains and dislocations that implementation of their decisions may cause (p. 261).

Together with incoherence in the notion of human rights, the effect of these features in the judiciary is that judicial rights making may be so ill-considered as to jeopardize the antecedent sources of the authority of positive law and threaten the fabric of society. In particular, Jenkins warns that the new rights making is destined to clash with the traditional protective rights we still hold dear, by requiring judicial (or other governmental) assignment of responsibilities. "The gist of the present situation, then, would seem to me to be this. Like all men of good will, we honor the formula—whether in these words or others—'From each according to his ability, to each according to his needs.' But both our attitudes toward the two injunctions and the steps we take to carry them out are entirely different. Under the impetus of a steadily expanding concept of the new human rights, we are mobilizing an immense political and social effort to satisfy the needs of men. But at the same time, under the influence of the traditional doctrine of individual rights, we reject any proposal that would require men to contribute to society in the measure of their ability (the sole important exceptions are the ineffective ones of taxation and the military draft). We are placing the state under the legal duty to make good all of the basic needs of all men, but we are placing men under no duties of discipline, responsibility, and service to support the effort made in their behalf" (p. 263).

While the case above is presented with striking clarity and force by Jenkins (as paradigms, he analyzes in detail and follows out the implications of *DeFunis* and *Baake*, and also *Watt* v. *Stickney*, in which a federal judge gave legal recognition to the "right to treatment" of persons involuntarily committed to mental institutions), it is not novel, nor does Jenkins represent it as such. He presents it as an illustration of the practical application of the full-

blown theory of positive law set forth in his pages. It is a theory remarkable alike for its comprehensiveness, its cogency, its profundity, its balanced good sense, and its accessibility.

According to Jenkins, positive law is a supplemental principle of order the authority of which is not self-contained but derived from orders antecedent to itself. The need for supplemental order arises from the distinctive nature of man as "the being who is potentially capable of becoming many things; who, since he is finite, can actualize only a limited range of his potentialities; who must, therefore, choose which of the possibilities open to him he is to transform into purposes; and who must, finally, exercise discipline and cultivation if these purposes are to be realized" (p. 234). With man, nature achieves a partial and conditional release from the necessity that grips lower orders of being. The double-edged requirement of positive law is to secure purposiveness within possibility without destroying freedom.

In its broadest meaning, order is determinate sequence in the behavior of distinct entities that are so related among themselves as to constitute organized wholes (p. 20). Analysis of this meaning discloses the universal "dimensions" of order to be the Many, the One, Process, and Pattern. Through evolutionary development, nature moves from Necessity to Possibility to Purposiveness. The function of positive law is to achieve the transition from Possibility to Purposiveness.

Where Necessity predominates, the primary feature of the Many is similarity, the primary feature of the One is subordination, the type of Process is action and reaction, and Pattern is characterized by extreme rigidity. When Possibility predominates, the Many undergoes differentiation, the One is expressed as participation, Process becomes self-determination, and Pattern exhibits flexibility. Where Purposiveness obtrudes, the Many exhibits the characteristic of cultivation, the One becomes the need to create and maintain authority, Process becomes responsibility, and Pattern appears as the quest for social coherence and continuity. (I am bound to say that this skeletal rendering does grand disservice to the rich and illuminating articulation that awaits the reader in the book.)

It is important to indicate that the emergent evolution that is the backbone of Jenkins's theory is deeply invested by a principle of conservation, such that prior orders are retained in the subsequent orders that transcend them. Thus, while positive law appears as a supplemental principle of order in the regime of Purposiveness, it is obliged to respect both Necessity and Possibility as these are conserved in Purposiveness. In Jenkins's words, "Necessity and Possibility...provide the materials and set the conditions of our purposive pursuits. What we do at the level of Purposiveness (largely through law and other institutions) is to give form, content, and direction to our lives, both individually and collectively. But these activities are dependent upon the stable framework that Necessity provides and the fresh potentialities that Possibility makes available" (p. 46).

In a central chapter on the continuity of law, Jenkins argues that all types

of law—laws of nature, moral laws, civil laws—possess at one and the same time expository character, normative character, and prescriptive character. Jenkins recognizes that our supposition that types of law are distinguished by possession of one or another of these characters exclusively introduces unbridgeable bifurcations (and contradictions) into experience. Rather, the types of law are distinguished, according to Jenkins, by the *predominance* in them of one or another of these characters. He very effectively makes the case that, like laws of nature, positive laws exist prior to their formulation (and are hence not purely "posited," or artifactual). Indeed, they preexist in a twofold manner—as embodied on the one hand in habits, usages, customs, and folkways, and on the other hand in the ideals men cherish and the purposes they pursue. When positive law first appears in history it is its expository character that predominates; it serves primarily to regularize and maintain an existing order. Later, as Possibility extends its influence, positive law becomes adjudication to settle differences. Then, as Purposiveness takes hold, positive law becomes a way to provide for orderly change toward definite ends.

But when Jenkins invests laws of nature with normative and prescriptive character, and on the ground that nature as a whole is purposive, we recognize the influence upon his thought of the metaphysics of organicism. Indeed, this influence becomes explicit in a number of passages, e.g., "The world is throughout an arena of becoming, moving toward a future that is foreshadowed in general outline but indeterminate as to its details" (p. 88). What gives cause for concern here is that the political implications of organicism, as worked out by Hegel and the British absolute idealists, are distinctly illiberal, anti-individualistic, and (as Isaiah Berlin warned in his "Two Concepts of Liberty") despotic. The reason is that the authority of the positive law and of government derives not from below but from above—not from the governed, but from the Absolute as the "future that is foreshadowed in general outline but indeterminate as to its details." The Absolute, as the Real, is the ultimate authority—all else is appearance, possessing degrees of reality but infected by unreality. Beneath the Absolute, greater reality (and authority) is possessed by the more inclusive whole. Since society and the State are more inclusive wholes than are individuals, they possess unconditional authority over individuals. This is reconciled with the endorsement of "self-government" by the (patently sophistical, I would say) argument that the Absolute is the "real self" of every individual.

To be sure, it is not established that by his metaphysics of organicism Jenkins is committed to the political implications of that metaphysics as explicated by predecessor-organicists. Nevertheless, Bradley, Green, and Bosanquet were highly skilled dialecticians, and it is with keen interest that we must turn to Jenkins's own doctrine of legal obligation.

It is in antecedent "lived relationships" that Jenkins uncovers the source of both our recognized and our real obligation to obey the law. He says:

"The attitudes and behavior of men toward one another are governed by the sentiment and conviction that relationships that have been established are not to be unilaterally ruptured or altered....That is, we feel obligated—we know and acknowledge that we ought—to abide by arrangements into which we have voluntarily entered and on the fulfillment of which others have relied" (pp. 196-97). He continues: "Law *imposes* an obligation because of its validity; we *acknowledge* this obligation because of the lived relationship we have had with our society. So where Austin says that we *are obliged,* and Hart says that we *have an obligation,* I say that we *recognize ourselves to be obligated.* For Austin, the central fact is *coercion*; for Hart, it is *validity*; for me, it is the *lived authority relationship*" (p. 199).

Jenkins's thesis has some notable advantages over Austin's (which cannot distinguish legal obligation from the coercion of the gunman who demands our money), and over Hart's (for the laws that instigated persecution of Jews in Nazi Germany were valid but ought not to have been written or obeyed). And it is admirable for its rare sensitivity to the constraint imposed upon positive law by the need for congruence with antecedent relationships, attitudes, and initiatives. But it seems questionable to hold that with respect to antecedent "lived relationships" we do in fact recognize ourselves to be obligated. To suppose that all persons recognize themselves to be obligated to antecedent lived relationships *en bloc* would appear to be an unduly conservative estimate of the human disposition. Must we not reckon equally with a disposition to renounce such obligation, as epitomized in "adolescent rebellion?" At most I would think we could attribute to persons in general a disposition to respect the authority of antecedent relations *selectively*. But if the principles of selection vary from person to person, as I think they do, then such respect does not afford a secure foundation of positive law. My conjecture is that Jenkins's thesis that "we recognize ourselves to be obligated" must include a place for *tacit* as well as explicit recognition. But there is danger here, for the tacit dimension can be used by persons in power to claim that they regulate us in our "true" interests, whatever we may say, and that they have the endorsement of our "true" selves as their authority for doing so.

Another conspicuous problem is that the fact that we do feel obligated in our lived relationships does nothing to demonstrate that we ought to feel obligated. Jenkins acknowledges this but contends that a demand for demonstration of the ought is both logically inappropriate and gratuitous. He says: "Our recognition that we are obligated to obey the law—the 'ought' that we here feel and acknowledge—is not derived from more basic premises and proved by some process of logical deduction. Rather, it exists as an experienced occasion—a fact—inherent in certain existential situations....It is empirically existent or nonexistent, so we can explain when and why people do feel obligated, and we can even understand and control to a large extent the conditions under which they do and do not, will and

will not, feel obligated. But we cannot muster a logical argument to prove to the doubtful that they *ought* to feel obligated: we can only put them in situations where as a matter of fact they *will* feel obligated" (p. 195). But the fact of a sense of obligation does not speak to the rectitude of that sense of obligation. Bigotry and terrorism, as I understand them, are often attended by a sense of obligation, and the man who shot President Garfield believed himself obligated to do so in obedience to the command of God. On the other hand, reason to trust our sense of obligation as it is generated out of lived relationships is to be found in Jenkins's organicist metaphysics. For if "the world is throughout an arena of becoming, moving toward a future that is foreshadowed in general outline but indeterminate as to its details," and if this becoming is a progressive realization of the good (as is premised by organicism, though nowhere stated by Jenkins), then there is reason to trust the generated and evolving sense of obligation. The trouble is, organicist metaphysics rather conspicuously commits the fallacy of presupposing the consequent. I wonder if one of Professor Jenkins's deepest intimations may be that presupposing the consequent is not in all cases a fallacy, for it is indispensable to worthy living.

One or two more contentious features of Professor Jenkins's admirably wrought theory can usefully be mentioned. Throughout, he supposes that it is a legitimate function of positive law to effect collective purposes. Indeed, he offers an interesting argument that such fostering is inevitable. "The regime of Possibility," he says, "is provisional and incomplete: it challenges men to make use of it. If these uses are left too much to individual discretion, with inadequate central control, abuses soon appear—might makes right, there is ruthless exploitation, and vast inequalities occur. Where positive law becomes too exclusively prescriptive...energies are left undirected and goals are ill-defined, with the result that men's efforts become erratic and dispersed. The legal apparatus can confine itself to the role of umpire (in the figure of speech that was once popular) only when the rules of the game are fair and the forces at play are evenly balanced. Otherwise, injustice and oppression become widespread. As this occurs, the legal apparatus is called upon to intervene purposively and systematically in the course of events. The main function of law now becomes that of defining and executing policy: its task is to give form and direction to society" (pp. 113-14). I will only mention that there is a forceful theory of law to the effect that it is no part of the business of law to serve collective purposes, the function of positive law being confined to regulating the means by which private purposes (individual and corporate) are pursued. The most eloquent advocate of this thesis is Michael Oakeshott in his *On Human Conduct*. Oakeshott observes that the violation of traditional individual liberties (which Jenkins warns must result from current judicial rights making) inevitably occurs when law undertakes to further collective purposes.

Finally, in a profound study of leadership, Jenkins identifies, describes,

and examines the implications of four successively evolving forms: the dominant male (or female), the paramount chief of a tribal society, the anointed king of a medieval nation, and the elected premier of the modern constitutional state (chap. 11). These forms historically succeed one another in predominance, but by the inviolable principle of conservation in Jenkins's theory of evolution, prior stages must be retained in subsequent ones. An implication is that "the leader of a modern constitutional state must combine in himself the essential qualities and have the status of dominant male, paramount chief, and anointed king, as well as legal official" (p. 172). But is there not reason to rue such a consequence? Are not some features of the past well left behind, and do we not gain by selective forgetting? Of course it would be foolish to rail at a law of conservation that is truly a law. But I believe it can be argued that in history some later features are incommensurable with prior ones and cannot coexist with them but can only come into being by substitution.

Despite its erudition and sophistication, *Social Order and the Limits of Law* welcomes the noninitiate no less than the specialist to its readership and, by its grace, balance, and depth, offers abundant rewards. It is the book I would recommend to overcome either distaste for or disinterest in philosophy of law.

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