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Social Order and the Limits of Law: A Theoretical Essay

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BOOK REVIEW

SOCIAL ORDER AND THE LIMITS OF LAW: A THEORETICAL ESSAY. By Iredell Jenkins. Princeton, New Jersey: Princeton University Press, 1980. Pp. xiv, 390. $25.00.

*Reviewed by Arthur S. Miller**

"If men were angels," James Madison asserted in a famous essay, "no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed, and in the next place oblige it to control itself."[1] Control over the governed is well established in the United States. But how can government be obliged to control itself? This question is based on the assumption, indubitably valid, that those who govern will not limit themselves unless some external force makes them do so. In that sense, the Constitution—American constitutionalism[2]—is a legally concretized command directed toward government officers to act decently toward the citizenry. Throughout American history a gap has always existed between pretense and reality; seeming constitutional absolutes are, in general, mere relative admonitions to act reasonably under the circumstances.[3] In the United States the external force that supposedly controls those who govern is given the label of "law." That view of the social process, however, is far too limited. Other forces constrain human behavior. Politics—political force—for example, can and does help keep power-wielders within bounds. At times, as is obvious, those bounds are over-stepped,

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1. THE FEDERALIST No. 51 (J. Madison) 323 (C. Rossiter ed. 1961).

2. On the necessary distinction between democracy and constitutionalism, see Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 707-08 (1980).

3. *See* A. MILLER, DEMOCRATIC DICTATORSHIP: THE EMERGENT CONSTITUTION OF CONTROL (1981); Miller, *Reason of State and the Emergent Constitution of Control*, 64 MINN. L. REV. 585 (1980).

and opportunities arise for various types of social controls, including law, to come into play.[4]

As Roscoe Pound once maintained,[5] law may indeed be the most important of those devices by which human action is circumscribed. Consequently, it is particularly necessary that all who look to the law to help ameliorate the conditions of an urbanized, industrialized, class society consider what Professor Iredell Jenkins calls "the limits of law" in this well-written, provocative, and important book.

Professor Jenkins maintains that Americans demand that "the law solve all of [their] problems and secure all of [their] purposes."[6] The result is that we "so overload the legal apparatus that it short circuits, creating a spectacular display of fireworks but affecting nothing save its own wreckage."[7] That assertion, even if only partially accurate, merits close and continuing attention. Jenkins' analysis of that hypothesis—that proposition—is at once thought-provoking and illuminating. We are all in his debt for having written such a challenging book, even though I have some fundamental disagreements with how he develops that theme. Jenkins' work is a significant contribution and should be on the reading list of all lawyers—certainly all lawyers in Academia, whether in the professoriate or the student body.

Unfortunately, although this book is essential reading, I do not expect my recommendation to be followed. The study of law is far too vocational, too reductionist, and too concentrated on the nuts-and-bolts of what lawyers do.[8] Law schools annually graduate thousands who have managed to survive the nit-picking boredom of law classes, but those graduates find that they know very little *about* law. They know many rules *of* law, and thus can and do readily pass bar examinations; but they have little conception of the role of law in a polity that trumpets that it has a "government of laws, not of men." Reading Jenkins will not correct all of that sorry state of affairs—far from it. It will, however, help those who read and heed it to "analyze the context from which law derives, the environment within which it exists and acts, the enduring

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4. *See generally* J. ROUCEK, SOCIAL CONTROL 83-90 (2d ed. 1956).

5. R. POUND, SOCIAL CONTROL THROUGH LAW (1942).

6. The quotation comes from the back cover of the book under review. *See* I. JENKINS, SOCIAL ORDER AND THE LIMITS OF LAW: A THEORETICAL ESSAY (1980).

7. *Id.*

8. *See* Miller, *Reductionism in the Law Schools*, 16 SAN DIEGO L. REV. 891 (1979); Miller, *Legal Education as a Form of Brain Damage* (forthcoming).

problems with which it has to deal, and the conditions it must satisfy if it is to succeed."[9]

That task is a large order, but Jenkins, a philosopher who has not had the dubious benefit of a legal education, goes far toward filling it. He at least asks many of the correct questions, without which correct answers will never be forthcoming. One does not have to agree with Jenkins' conclusions to perceive that his tightly argued essay in metaphysics and sociological jurisprudence surely must be carefully considered as Americans enter "the age of frugality."[10]

The major shortcoming that I find in this book is its lack of systematic discussion of politics and economics—of, that is, the political economy of American constitutionalism. In saying that, I realize that the criticism is of a book that Jenkins did not set out to write. Nonetheless, it is vital to perceive that law and the legal system are integral parts of the State and cannot be understood apart from it.[11] Professor Jenkins, of course, knows this fact; he states,

> Law is but one participant in the undertaking of human culture as a whole—the conscious and directed efforts through which man seeks to develop his own powers, to master the resources of the world, and to arrange his multiple affairs successfully. This effort spawns a great many institutions: family, morality, religion, science, technology, economic and industrial organizations, positive law, and others.[12]

Jenkins, however, does not analyze the State,[13] nor does he ask the crucial question: *cui bono*? Who benefits in fact from these institutions, including law? Had Jenkins so asked, he might have con-

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9. I. JENKINS, *supra* note 6, at xii.

10. On the age of frugality, see E. ASHBY, RECONCILING MAN WITH THE ENVIRONMENT (1978); L. BROWN, THE TWENTY-NINTH DAY (1978); W. JOHNSON, MUDDLING TOWARD FRUGALITY (1978); R. MILES, AWAKENING FROM THE AMERICAN DREAM—THE SOCIAL AND POLITICAL LIMITS TO GROWTH (1976); Miller, *Constitutional Law: Crisis Government Becomes the Norm*, 39 OHIO ST. L.J. 736 (1978).

11. It is a commonplace of sociology that the functioning of a state and its legal system are closely intertwined. In settled times this fact may become obscured. The apparent independence of the legal system from current political disputes lends support to the myth that law is something above and apart from the society which it helps to regulate and control . . . . [A] legal system may reflect both the values and the power structure of the state.

K. BOYLE, T. HADDEN & P. HILLYARD, LAW AND STATE: THE CASE OF NORTHERN IRELAND 1 (1975). *See* J. SHKLAR, LEGALISM (1964).

12. I. JENKINS, *supra* note 6, at 313.

13. For a brief preliminary discussion, see Miller, *Reason of State and the Emergent Constitution of Control*, *supra* note 3, at 620-26; Miller & Bowman, *Presidential Attack on the Constitutionality of Federal Statutes*, 40 OHIO ST. L.J. 51, 60-70 (1979).

cluded, as Holmes did more than a century ago, that law is not neutrally derived or applied.[14] Asserting that there is no "identity of interest between the different parts of a community," Holmes maintained that the only unity in law is the answer given by Thrasymachus: law, including decisions of courts, represents the interests of the stronger—the powerful interests in society.[15] American law, particularly as taught in law schools, is based on the assumption that general rules, applied even-handedly and impartially, produce consequences beneficial to all. That belief is the liberal theory of the rule of law; it is a legal counterpart to Adam Smith's invisible hand. Holmes, and others, have seen through that assumption.[16]

What I am suggesting, of course, is that "the limits of law" must be viewed against the background of a theory of society and of the manner in which law actually operates in that society. Again, Professor Jenkins is not unaware of this view. For example, in writing about privileged admissions and other human rights, he states,

> The history of privileged admission stands as a model and a warning of [the] dangerous tendencies that are inherent in human rights. I think that it is beyond dispute that most, though not all, of the pleas that are urged in this guise are reasonable and justified: they are voiced by groups of persons who suffer under conditions that are both insupportable and inexcusable, and they impose upon society the obligation to correct them. The claims advanced as human rights should thus be acknowledged and pursued as social goals. But they should not be recognized as legal rights, for to give them this status threatens to defeat the claims themselves by undermining the social structure on which their realization depends.[17]

How can a "social goal" be realized? Jenkins does not tell us. Since at least Justice Stone's famous footnote in the *Carolene Products* case,[18] it has been widely acknowledged that "discrete and insular minorities" all too often do not benefit from the political process; accordingly, they have no way in which their "reasonable and justified" pleas can be satisfied.[19] Some commentators, such as Justice

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14. Comment, *The Gas-Stoker's Strike*, 7 AM. L. REV. 582 (1873). For discussion of Holmes' comment, see Tushnet, *The Logic of Experience: Oliver Wendell Holmes on the Supreme Judicial Court*, 63 VA. L. REV. 975, 1029-31 (1977). *See also* Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1316 n.71 (1937).

15. *See* PLATO, THE REPUBLIC, Book I, 338-39 (2d rev. ed. D. Lee trans. 1974).

16. *See, e.g.*, Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307 (1979).

17. I. JENKINS, *supra* note 6, at 311.

18. United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).

19. For analysis and discussion of the *Carolene Products* footnote, see J. ELY, DEMOCRACY AND DISTRUST 75-77 (1980).

Felix Frankfurter and votaries in the cult of Frankfurter worship, address that problem by telling people to pull up their own socks and get more political power.[20] Professor John Hart Ely would reach that result by a "representation-reinforcing" theory of judicial review.[21] Still others apparently proceed on the belief that whatever exists is right, and thus provide for no creativity in the development of the Constitution.[22]

The problem of the storied "rule of law" is that adumbrated by Holmes: some benefit more than others. It is neutral in neither origin, application, nor interpretation. Law, particularly that enunciated by courts, with which Professor Jenkins is most concerned, is an extension of politics carried on by other means. Any societal institution, including law and the legal system, has both *manifest* and *latent* functions.[23] The same may be said for the beneficiaries of law; they are *obvious* or they are *hidden*. Sometimes the two categories meet and merge. Historically, law, not excluding the Constitution itself, has benefited the moneyed and propertied.[24] Even in modern times, when the Supreme Court and other courts have outwardly sought to further the cause of human rights in their decisions, it is not inaccurate to maintain that these decisions, too, further the interests of those who have always profited from the system. The obvious beneficiary may, for example, be Black Americans, who in recent decades have persuaded courts and legislatures to throw off the bonds of peonage. Nevertheless, a persuasive argument can be made that the hidden beneficiary is still the "governing class," which benefits from having discontent siphoned off and channeled into relatively innocuous forms. In other words, the *manifest* function of the human rights decisions of government, with which Professor Jenkins is concerned, is to aid those discrete and insular minorities that Justice Stone mentioned, but the *latent* function is that stated by Professor J.A.G. Griffith in his important book, *The Politics of the Judiciary*: "The judici-

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20. *E.g.*, A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970).

21. *See* J. ELY, *supra* note 19, at 77-78.

22. A classic example of this type of scholarly myopia is R. BERGER, GOVERNMENT BY JUDICIARY (1977). Another odd bit of scholarly antiquarianism, pathetic in its attempt to be profound, is Bridwell, *The Scope of Judicial Review: A Dirge for the Theorists of Majority Rule?*, 31 S.C. L. REV. 617 (1980).

23. For discussion of manifest and latent functions, see R. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 115-21 (rev. ed. 1968).

24. *See* A. MILLER, ORACLE IN THE MARBLE PALACE: POLITICS AND THE SUPREME COURT (forthcoming). *See also* Parenti, *The Constitution as an Elitist Document*, in HOW DEMOCRATIC IS THE CONSTITUTION 39 (R. Goldwin & W. Schalbra eds. 1980).

ary in any modern industrial society, however composed, under whatever economic system, is an essential part of the system of government and . . . its function may be described as underpinning the stability of that system and as protecting that system from attack by resisting attempts to change."[25]

As important and interesting as these ideas are, this review is not the place to develop them fully. I have done so in an as yet unpublished book on the Supreme Court.[26] The remainder of this review must necessarily be limited to the suggestion of a few ideas that Jenkins should have taken into consideration, not so much to change his conclusions as to put his analysis into larger context. Consider the following statements, each of which in my opinion is a harsh fact of life (although others may disagree):

A political theorist:

> [t]he free way of life depends, to an extent . . . not yet dreamed of, on the Western nations remedying the inequality of human rights as between ourselves and the poor nations.[27]

An economist:

> As we head into the 1980s, it is well to remember that there is really only one important question in political economy. If elected, whose income do you and your party plan to cut in the process of solving the economic problems facing us?[28]

A biologist stating his "Iron Laws of Ecology":

> You can't win.
> You can't break even.
> Things are going to get worse before they get better.
> They are not going to get better.
> And you can't get out of the game.[29]

A professor of religion:

> We are sadly forced to conclude that we live in a world that is *functionally* godless and that human rights and dignity depend upon the power of one's community to grant or withhold them from its members . . . .
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> . . . .
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> . . . *It is an error to imagine that civilization and savage cruelty are antitheses. On the contrary, in every organic process, the antitheses always*

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25. J. GRIFFITH, THE POLITICS OF THE JUDICIARY 213 (paperback ed. 1977). *See* Miller, *The Politics of the American Judiciary*, 49 POL. Q. 200 (1978).

26. A. MILLER, *supra* note 24.

27. C. MACPHERSON, THE REAL WORLD OF DEMOCRACY 67 (1966).

28. L. THUROW, THE ZERO-SUM SOCIETY: DISTRIBUTION AND THE POSSIBILITIES FOR ECONOMIC CHANGE 214 (1980).

29. Professor Paul Ehrlich, in personal conversation with the present author. *See* P. EHRLICH, A. EHRLICH & J. HOLDREN, ECOSCIENCE: POPULATION, RESOURCES, ENVIRONMENT (2d ed. 1977).

> *reflect a unified totality, and civilization is an organic process* . . . . Mankind moved from one type of civilization involving its distinctive modes of both sanctity and inhumanity to another. In our times the cruelties, like most other aspects of our world, have become far more effectively administered than ever before. They have not and they will not cease to exist.[30]

Balance these views against Professor Jenkins' belief that the task of law is "to assure a stable and fruitful order in which men can plan securely, carry on effective transactions among themselves and with the world, and reap the benefits that are latent in their nature and position."[31] Law to him is a principle "that determines . . . a rule of order, a uniformity and regularity, that would not otherwise exist."[32] Jenkins speaks at one point about "the cruel recognition that the realization of value often entails the sacrifice of value,"[33] which seems to be the precise point that Lester Thurow (the economist quoted above) makes in *The Zero-Sum Society*.[34] Jenkins, however, does not develop the point. Although Jenkins touches on human nature, he concludes that it is "so complex and plastic and the human situation is so volatile that they defy reduction to any simple set of categories."[35] Conclusions about human nature, however, are central to Jenkins' thesis. Surely he should have probed more deeply into the psychology of humankind. What, for example, would Jenkins have to say about the conclusion of Professor Rubenstein (the professor of religion quoted above) that civilization and savage cruelty are not antithetical? One judicial decision that Jenkins discusses at some length, *Wyatt v. Stickney*,[36] dealing with conditions in Alabama's mental hospitals, might well illustrate Rubenstein's views.

Professor Jenkins also speaks of "men" without defining the term or limiting it geographically. Professor C.B. Macpherson (the political theorist quoted above) makes the point that "men"—

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30. R. RUBENSTEIN, THE CUNNING OF HISTORY: MASS DEATH AND THE AMERICAN FUTURE 91, 92 (1975) (emphasis in original).

31. I. JENKINS, *supra* note 6, at 19.

32. *Id.* at 11.

33. *Id.* at 129.

34. L. THUROW, *supra* note 28.

35. I. JENKINS, *supra* note 6, at 314.

36. 325 F. Supp. 781 (M.D. Ala. 1971), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974), *discussed in* I. JENKINS, *supra* note 6, at 135-50, 282-83. In *Wyatt*, Judge Frank Johnson recognized a constitutional "right to treatment" of those involuntarily committed to mental hospitals. *See* 325 F. Supp. at 784. This decision is a classic example of how unrepresented minorities can sometimes (but not often) obtain judicial relief from indecent treatment by government officers. Professor Jenkins' discussion should be compared with Judge Johnson's discourse on *Wyatt*. *See, e.g.*, Johnson, *In Defense of Judicial Activism*, 28 EMORY L.J. 901 (1979).

"humankind"—must, in any theory of law and social order, be defined to include people everywhere.[37] In the main, Jenkins seems to speak of the American situation only; his references are entirely to the American experience. That focus, to be sure, is acceptable, but only if what happens in the United States is not affected by what occurs elsewhere and if other legal systems react in essentially the same manner as ours. If one agrees with Macpherson that the values of American constitutionalism depend in large part upon what happens in other parts of the world, then surely some reference must be made to the world community.

Much the same can be said about Paul Ehrlich's "iron laws of ecology." Ehrlich (the biologist quoted above) is telling us in succinct terms what Thurow said as an economist and what is inferential in Rubenstein's essay: humankind, in sum, is in the midst of one of the great turning points in history—a sea of change in the way that *Homo sapiens* face the environment. We are not in a crisis but a climacteric, a coalescence of crises.[38]

I do not suggest that Professor Jenkins is not aware of these matters. He is. Further, his is an essay rather than an in-depth treatise. Nevertheless, Jenkins' exposition of abstract matters would have been aided had he asked and answered the crucial question, "*cui bono?*," in a larger context. Had he done so, he might have helped answer the question of how government can be obliged to control itself, and thus show some of the shortcomings in Madison's assumptions and in the liberal theory of the rule of law.

Despite this criticism, I should like to conclude by reiterating that this book is an important contribution. The basic point that Professor Jenkins fails to consider—in addition, perhaps, to those listed above—is that law, however created, is the ultimate means by which people can "work within the system" and try to prevail in the endless pursuit of justice in an imperfect society. As faulty as law is—Jenkins shows its faults—no means of social control other than law is as promising. To realize the promise of law means, however, that we will have to know a great deal more about law and its function in the social order. I can think of no better place to start than the volume being reviewed.

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37. This theme is central to the recent massive tome, M. McDOUGAL, H. LASSWELL & L. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY (1980).

38. *See* A. MILLER, *supra* note 3. *See also* Miller, *Reason of State and the Emergent Constitution of Control*, *supra* note 3, at 613-14.