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Social Order and the Limits of Law

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SOCIAL ORDER AND THE LIMITS OF LAW. By *Iredell Jenkins*. Princeton, N.J.: Princeton University Press. 1980. Pp. xiv, 390. Cloth $25; paper $6.95.

The demands of social reformers during the 1960s and early 1970s raised important theoretical and practical questions concerning the ability of the law to effect social change. In *Social Order and the Limits of Law*, Iredell Jenkins attempts to answer such questions by developing a "systematic theory of positive law" (p. ix). Jenkins's thesis is that the law must play a limited role in implementing social change because it necessarily reflects the larger social order. Efforts

to accomplish sweeping social reforms through the law, he argues, detach the law from social reality and render the law ineffectual. Jenkins's argument that social circumstances create and constrain positive law is not new, as the authorities that he cites demonstrate.[1] But because Jenkins grounds this argument in an original and ambitiously abstract theoretical model, *Social Order* should prove of special, if not exclusive, interest to legal philosophers.

Jenkins first assembles his theory of positive law. The law, he argues, can be fruitfully conceptualized as a product of the relationship between "the ultimate dimensions of being or reality" (p. 26) and "regimes of becoming" (p. 42). Four familiar ontological categories are relied upon as the dimensions of order: the Many, the One, Process, and Pattern. In the context of positive law, these categories refer, respectively, to the "many" individuals who constitute a society, the "one" political sovereign that announces the law, the changes that occur in that society, and the societal characteristics that necessarily endure despite change. Against these four dimensions of order, Jenkins arrays three regimes of becoming, categories that describe the future in terms of the present. He labels these regimes "Necessity," "Possibility," and "Purposiveness." Necessity describes the aspect of the future that must be, due to unalterable physical, economic, or political circumstances. Necessity gives way to Possibility where individuals or the state — the many or the one — can influence future events. Purposiveness refers to the realm of events that individuals or the state have deliberately chosen (pp. 32-34).

By placing the "Dimensions of Order" on one axis, and the "Regimes of Becoming" on another, Jenkins constructs his "Matrix of Positive Law." At each interstice, he inserts a word or phrase to describe the outcome that results from the operation of a regime of becoming on a dimension of order (p. 42):

DIMENSIONS OF ORDER	REGIMES OF BECOMING		
	Necessity	Possibility	Purposiveness
Many	Similarity	Differentiation	Cultivation
One	Domination-Subordination	Participation	Authority
Process	Action-Reaction	Self-Determination	Responsibility
Pattern	Rigidity	Flexibility	Continuity

1. *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW, 181-207 (1961); R. UNGER, LAW IN MODERN SOCIETY (1976).

Jenkins maintains that "this system of interrelated elements constitutes the matrix from which law emerges and the field within which legal action takes place" (p. 57). The task of law, he asserts, is "to promote the development of the regime of Purposiveness" — in other words, to aid the cultivation of the individual and enhance the authority of the state (p. 55).

Jenkins foresees two basic uses for his highly abstract theory. First, the matrix helps understand existing legal decisions because, he alleges, jurists implicitly consider the elements of the matrix (p. 60). Second, and more important, Jenkins argues that his model can improve legal analysis. The matrix, carefully applied, does not lead inevitably to a "right" decision but, especially in difficult cases, it clarifies issues, exposes hidden consequences, and guides decisionmakers toward "an outcome that is reasoned and principled" (p. 62).

In the second half of his book, Jenkins applies his theory to concrete legal problems such as regulation of state mental hospitals, forced busing to achieve racial integration, and affirmative action. The trenchant analyses of legal failure that *Social Order* consistently offers effectively advocate the theses that the law is a secondary instrument of social order and that the law cannot successfully withstand the burdens of social change placed on it by reformers. Jenkins's controversial conclusions regarding human rights in general and affirmative action in particular should attract attention. The continued recognition of positive "human rights" that obligate the state to provide social groups with material resources, Jenkins argues, can only result in the sacrifice of civil rights that restrict governmental power over individuals. He effectively questions whether the sacrifice of formal equality inherent in affirmative action programs will really be outweighed by ultimate gains in social equality.

While Jenkins forcefully argues his case for the limits of the law, he fails to demonstrate the usefulness of his conceptual scheme. Inserted among his criticisms of affirmative action, for example, is the almost casual assertion that "these mistakes could have been foreseen and guarded against if these programs had been drafted in the context and with full consciousness of . . . [the] matrix of law" (pp. 283-84). In fact, the explication of Jenkins's familiar arguments that affirmative action both impermissibly disadvantages nonminority groups and undermines "general standards of competence and achievement" (p. 285) does not require his rather confusing matrix. Jenkins's attempt to locate his various arguments in the dimensions of the Many, One, Process, and Pattern seems strained. The extreme abstraction inherent in his all-encompassing, ill-defined categories renders analysis in their terms extraordinarily, perhaps impossibly, difficult. It is not difficult to imagine proponents of affirmative action casting their conclusions in Jenkins's categorical terminology.

But no one is likely to be enlightened or persuaded by the ensuing semantic debate. Resort to abstract ontological conceptions, in short, will likely do more to confuse than to clarify legal issues.

Another of Jenkins's examples, the failure of injunctions to effectuate reforms in mental hospitals, illustrates this fundamental problem. It seems unlikely that a judge unimpressed by the situation-specific argument that an injunction would retard the morale and efficiency of the professional staff and thus undermine effective therapy would be persuaded by the same concerns because they had been expressed as admonitions to remember the "regime of possibility." Unfortunately, Jenkins's matrix does not illuminate the difficult moral and empirical questions involved in the issues that he addresses. One hopes that decision-makers, rather than clothing their thoughts in metaphysical abstraction, will squarely pose and answer these more concrete problems.

Jenkins is at an impressive best when addressing particular instances of the overextension of law, but that is not his purpose. *Social Order* instead seeks a comprehensive theory of positive law that will facilitate the analysis of close questions of law and public policy. But the ambiguous abstraction needed to construct a universal model has resulted in a categorical system so inclusive that it appears at best clumsy, at worst incomprehensible and meaningless.