

## Book Review

### Relativism and Normative Choice in the Legitimation of Transnational Coercion

JUSTIFYING INTERNATIONAL ACTS. By Lea Brilmayer.<sup>1</sup> Ithaca, New York: Cornell University Press. 1989. Pp. vii, 164. \$19.95.

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When a nation reaches a certain stage of maturity — economically, militarily, culturally — its government's actions inexorably begin to produce profound effects outside its borders. Many of these actions will fundamentally reshape the lives of individuals who seemingly have no connection to the actor government beyond planetary coexistence. Some of these effects will be benign, perhaps even salutary. Others will be coercive in nature, forcing those individuals into economic Hobson's choices, or entirely depriving them of liberty or life itself.

With power comes responsibility. There naturally comes a yearning for a principle by which particular exercises of power can be judged legitimate or illegitimate. In surveying their quest for such a principle, there are at least two conceptual axes along which the range of international relations scholars can be plotted.<sup>3</sup> One axis represents a continuum measuring the degree to which the scholar in question believes in the need for, and intellectual plausibility of, some kind of justification for governmental action exogenous to self-

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2. Assistant Professor of Law, Hastings College of the Law; A.B., University of California at Berkeley; J.D., Yale. This review grew out of my participation in a symposium at the University of San Diego on March 10, 1989. I benefited from comments by Larry Alexander, Kevin Cole, and Chris Wonnell.

3. The taxonomy appears in L. BRILMAYER, JUSTIFYING INTERNATIONAL ACTS 28-39 (1989).

interest. The other axis represents a continuum measuring the degree to which the scholar believes that governments, rather than the individuals affected, should be the focal points for our efforts at justification.

The first continuum runs from those who essentially believe that undiluted pursuit of national self-interest is the only principle around which global order can be made to cohere (the realists) to those who believe that transborder governmental action cannot properly be characterized as legitimate unless it conforms to some sort of a universally accepted ethical code (the state moralists and the transnational moralists). The second continuum runs from those who believe that governments are the only relevant players in this justification game (the state centrists, which include both realists and state moralists) through those who believe that both governments *and* affected individuals deserve “standing” (the transnational moralists) to those who think governments are largely or wholly irrelevant to the justification equation (the cosmopolitans). Together, these axes are thought to form a matrix upon which all international relations discourse can be located.

In *Justifying International Acts*, Professor Lea Brilmayer offers a theory of international relations that she says transcends this matrix.<sup>4</sup> Professor Brilmayer readily concedes that her proposed principle for measuring the legitimacy of transborder governmental coercion falls somewhere in the middle of the second axis — namely, that it recognizes, on proper occasions, the relevancy of either foreign governments or affected foreign individuals.<sup>5</sup> But Professor Brilmayer’s proposed principle, which she refers to as the “vertical thesis,” makes recourse to neither national self-interest nor ethics.<sup>6</sup> Rather, it demands a *political* justification for every act of transborder governmental coercion. And not just any political justification will do; to conform to the demands of the vertical thesis, the political justification used to prove the legitimacy of transborder governmental coercion must be identical (save for what is lost in translation) to the political theory that the actor government uses to justify coercion

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4. *See id.*

5. *Id.*

6. The thesis is said to be “vertical” because it focuses the justification inquiry on the relationship between actor government and affected individual, rather than on the relationship between actor government and affected government (“horizontal”). When the justification inquiry is focused on the relationship between actor individual and affected individual, that too is said to be horizontal.

When a government exerts coercive force against one of its own citizens, that is the archetypal form of “vertical” action. When, on the other hand, a government exercises coercion against a noncitizen, the action is said to be “diagonal.” Throughout this essay, I use the terms “diagonal” and “transnational” interchangeably, despite Professor Brilmayer’s cautions about the possible state-centrist connotations to the latter.

of its own citizens.<sup>7</sup> The vertical thesis, then, is a requirement of consistency. It prescribes no particular political theory to which a government must adhere, but insists only that whatever theory is used to legitimate domestic coercion is also used to measure the legitimacy of transborder coercion.<sup>8</sup> So, without relying upon the concepts of national self-interest or ethics, Professor Brilmayer has expanded the parameters of international relations discourse.

The potential benefits flowing from this breakthrough in international relations theory are not to be doubted. In the United States, for example, there still sits a sourness from the discredited human rights theme of President Carter's foreign policy. Nobody questions the nobility of that enterprise, but nobility guarantees neither coherence nor efficacy. In the return to unabashed pursuit of perceived national self-interest, the human rights problems have not gone away. Shots fired by the death squads in Nicaragua still echo in the corridors of Congress and the universities, as do the screams of tortured blacks in South Africa (for Professor Brilmayer, as for many of us, intervention for humanitarian purposes against oppressive regimes may under certain circumstances constitute a claim just as strong as one not to engage in coercive activity). If a transcendent theory of international relations can break us out of our conceptual stagnation, we would be a significant step closer to deciding what we should do about these and like situations.

Even as I pile onto the vertical thesis bandwagon, though, I confess to a vague sense of uncertainty about the degree to which vertical analysis really transcends the current range of thinking on international relations. Professor Brilmayer's instinct is that her advocacy of the vertical thesis places her nearest on the matrix to the transnational moralists;<sup>9</sup> however, she says that the gulf between the verticalists and transnational moralists is still "fairly wide."<sup>10</sup> I am not so sure. My sense is that, at least to the degree that transnational moralists believe that both governments and affected individuals have "standing" to complain about the coercive conduct of other governments,<sup>11</sup> verticalism is logically subsumed within transnational moralism, and vice versa. This certainly does not mean vertical theory has no value. It merely means that the value of vertical theory may

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7. L. BRILMAYER, *supra* note 3, at 28.

8. *Id.* at 22.

9. *Id.* at 36-37.

10. *Id.*

11. Professor Brilmayer so assumes. *Id.* at 36.

differ qualitatively from that which the verticalists expect.

To understand the equivalence of verticalism and transnational moralism, it is necessary to introduce a third conceptual axis. This axis measures the degree to which a person believes that generally applicable moral constraints require all nations to adopt a certain type of political constitutive theory. At one extreme of this axis we find the moral absolutists, who deny that different peoples can rightfully embrace different moral systems. Because at bottom all political constitutive theories are based on some moral system, and because all peoples must adhere to the same moral system, the moral absolutists hold, all nations are required to adopt the same basic set of politically justificatory principles. At the other extreme of this axis are the relativists. The relativists believe in the ontological absence of any morals that can constrain a government from exerting coercion on its citizens, or they hold an epistemological skepticism that we can ever know what these morals are, or both. As a result, the relativists are unwilling to posit any moral requirement that nations adopt any specific type of political constitutive theory.

It is easy to find the transnational moralists on this axis. They are at the front end, arguing that the political justification for coercive action in all nations is constrained by the same set of morals. They are the human rights advocates, commonly urging Rawls's *A Theory of Justice*<sup>12</sup> as the political constitutive theory of every nation.<sup>13</sup> They disdain the idea that morality, or political constitutive theory based thereon, is relative to the values of any particular society.<sup>14</sup> They reject the idea that, as Professor Kadish has said in a different context, "[i]f and when . . . lynching of child sex murderers ceases to offend the conscience of enough of the community, the state's sponsoring of such activity would presumably be consistent with due process of law."<sup>15</sup> The relativists parade the same horrors, marching the other way. In their view, no one has a corner on the truth;<sup>16</sup> moral absolutism ends up being a fine vehicle for the mass rape of societies or even for genocide.

Where does the vertical thesis fall on this axis? The natural temptation is to place it squarely at the relativist end. In its strong version, the vertical thesis claims only to require consistency in justification for domestic and transborder coercion of individuals. It

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12. J. RAWLS, *A THEORY OF JUSTICE* (1971).

13. L. BRILMAYER, *supra* note 3, at 37-38.

14. In her student note, Professor Heidi Hurd provided an excellent, if partisan, guide to the absolutist/relativist debate. Note, *Relativistic Jurisprudence: Skepticism Founded on Confusion*, 61 S. CAL. L. REV. 1417 (1988).

15. Kadish, *Methodology and Criteria in Due Process Adjudication - A Survey and Criticism*, 66 YALE L.J. 319, 345 (1957) (arguing against a due process jurisprudence linked to the "preformed" moral judgments of others).

16. See Note, *supra* note 14, at 1421-22.

professes no preference among competing models of constitutive political theory. Insofar as the thesis aims to legitimate all coercive conduct that meets the consistency requirement, it seems relativistic virtually by definition.

Professor Brilmayer has anticipated this charge:

The vertical thesis seems to suggest that all political theories are equally valid. Nothing could be further from the truth. . . . Far from declaring that all theories are equally good, it invites analysts to criticize or reject particular international actions as politically illegitimate. Such criticism is part of the first-order enterprise, however, and not the second-order enterprise. The second-order enterprise merely imposes formal requirements of theoretical consistency between domestic justification and international coercion, arguing that consistency is theoretically necessary and examining whether other second-order requirements might follow from the formal consistency criterion.<sup>17</sup>

According to Professor Brilmayer, then, the vertical thesis is off the continuum. It is neither morally absolutist nor relativist — it simply makes no normative claim at all about the substance of constitutive political theories. It is only *after* someone else has chosen from among the competing models that the vertical thesis comes into play, requiring even application intranationally and transnationally. Viewing the determination of the legitimacy *vel non* of transnational coercion as a whole, the ascertainment of a particular political theory is the first part of the enterprise, and the requirement of consistent application is the second part.

It is somewhat difficult to assess the plausibility of this claim to make no claim, but for me the issue is settled by the possible consequences. The purpose of the consistency requirement is to allow judgments about the legitimacy of particular coercive action. If a constitutive political theory based on an immoral foundation legitimates transnational coercive conduct by virtue of its consistency with domestic applications, then the vertical thesis has accomplished something quite affirmative and normative. This kind of affirmative legitimation must be distinguished from a purely descriptive enterprise, such as assessing the military success of an attack or invasion. The bottom line is that the vertical thesis, in its strong version, provides immoral political regimes with a new vehicle for legitimating their transnational coercive conduct.

Despite her steadfast refusal to concede that the vertical thesis is relativistic, Professor Brilmayer does seem to have realized that those with absolutist leanings (or at least antirelativists) may not be

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17. L. BRILMAYER, *supra* note 3, at 24.

satisfied with a mere public disavowal of relativism. Against the charge that the vertical thesis gives immoral political regimes a tool for legitimation of their diagonal coercion, she responds:

The difficulty with this objection is that it does not distinguish between a valid political theory and one that is merely held sincerely. It is not enough simply to postulate a political theory; the theory must be convincing. While the formal requirements of the vertical thesis seem to have been met [by an immoral but consistently applied political theory], the dispute over the legitimacy of state acts has merely been shifted to the domestic theory itself. In order for a state to justify its actions, it cannot simply assume a particular political justification. This would not be convincing as a matter of domestic political justification, and it would not be convincing as a matter of justifying international actions.<sup>18</sup>

In other words, the vertical thesis will not operate for just any constitutive political theory. The theory must first surmount some sort of threshold of persuasion or plausibility.

But who decides whether the threshold has been satisfied by any particular theory? Is it the citizens of the actor state? This is an attractive option, but inadmissible. For if the requisite plausibility of any particular constitutive theory were left to the judgment of the actor state's citizens, that allocation of prerogative would violate the "agnosticism" of vertical theory.<sup>19</sup> It would be to confine nations to a certain range of substantive constitutive theories. Nations would be free to select only a constitutive political theory that recognized something akin to the "self-determination of citizens," whether that self-determination was based on democracy, social contract, or something else. It would not permit nations to select a political theory that denied citizens participation in national stewardship, such as the "divine right of kings" or a "dictatorship of the proletariat" that is "temporarily" under the guidance of self-appointed party leaders.<sup>20</sup> Who, then, decides? Is it the collective judgment of domestic political philosophers, over time? This appears to be Professor Brilmayer's choice.<sup>21</sup> But it is still a normative, nonagnostic choice. Unless watered down to mean nothing, the plausibility requirement makes the vertical thesis's imprimatur of legitimacy contingent on staying within a menu that contains significantly less than a full range of choices among political theories.

Verticalists who cling to the claim of agnosticism may insist that

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18. *Id.* at 47 (bracketed material added).

19. I take "agnostic" in this context to mean "nonnormative." *See id.* at 22-25.

20. It might be said that leaving a determination of plausibility to the citizenry, without any further constraint on the choice of a substantive political theory, would violate the agnosticism of the second-order enterprise to a lesser degree than would the universal imposition of, say, a Rawlsian theory. Fair enough. I wonder, though, whether it is really any more possible to be "a little bit agnostic" than it is to be "a little bit pregnant."

21. L. BRILMAYER, *supra* note 3, at 47 ("[o]ver the centuries, domestic political theorists have not simply taken any offered justification at face value").

the plausibility threshold is merely a formal requirement, and that the vertical thesis permits — indeed requires — someone else to elect among constitutive theories. This assertion comes cloaked in the same protective ethos as certain familiar positive law assumptions — for example, that substance can be separated from procedure, or that questions of fact can be separated from questions of law. These assumptions are in turn bottomed on the metatheoretical premise that subjective can always be separated from objective. The problem is that this premise fits better in the realm of positive law, where constitutional and statutory obstacles cannot simply be assumed away, than it does in the realm of first-best political philosophy. Take the example of functional segregation in adjudication. When a judge selects the rule of decision and then charges the jury with the responsibility of finding the facts and applying them to the rule, we may want to say that the judge has still left the jury a free choice among possible results, even though we are well aware that the rule of decision constrains the verdict to a fairly narrow range of outcomes. Thus, in a two-party action at law, the result will be in favor of one and against the other; it will be expressed only in terms of dollars; it will not purport to exercise coercive force against anyone but the plaintiff or defendant; and so on. Although in a deeper sense we know that the judge's selection of the rule of decision has dictated the result in a profound way, the injunction of the seventh amendment (or its state analogue) cannot be ignored, and so to preserve some sense of meaningfulness to the jury requirement, we say that the jury had a free choice.

It is not so with the metatheoretical enterprise of determining what diagonal coercion is worthy of the appellation "legitimate." Because there is no particular compulsion to cede the judgment of what constitutes a "convincing" domestic political theory to anyone else, there is far less willingness to indulge the fiction that the rule-constrained result is in fact the product of free choice. If one hands the choice of a constitutive political theory to a group of political philosophers and instructs them to select only a "convincing" theory, and the selection always turns out to look something like Rawls's *A Theory of Justice*,<sup>22</sup> it would be disingenuous to deny that the "formal requirement" of plausibility has not in a profound way dictated the outcome.

I would not ask the verticalists to refine (i.e., make sneakier) this

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22. J. RAWLS, *supra* note 12.

charade. Instead, I would urge them simply to posit the moral superiority of a particular constitutive political theory. That brings us back to the transnational moralists. They do just that. They assert the universality of morals, which logically requires every nation to found its constitutive political theory on the same moral system. This greatly restricts the range of outcomes; I do not understand the transnational moralists to deny that. It does not seem so bad a thing. If the verticalists' claim of nonnormativism is false, and if relativism is unattractive, then some kind of moral absolutism is what is left.

It may well be that part of Professor Brilmayer's motivation for developing the vertical thesis was concern about objections to the absolutism of transnational moralism. Three of the potential objections may reflect unresolvable differences of opinion between absolutists and relativists: First, as a metaphysical matter, there are no such things as universal morals; second, as an epistemic matter, we could never really be sure we knew what they were; and third, moral absolutism is too dangerous because it might fall into the wrong hands. I will leave the rebuttal of these objections, if it is possible, to more capable minds. But there is another potential objection on consequentialist grounds that deserves mention. It could be argued that moral absolutism cannot function as a foundation for international law because no single set of morals could ever win the acceptance of all nations.

The answer is that this must be worked out within the absolutist framework itself. The absolutist must be willing to retreat to second-best solutions, to tailor the political theory that springs from universal morals so that it fits diverse cultural, religious, and geographical situations, as well as unique political histories and traditions. It is not that what is right for Iranians is not also right for Britons, but rather that these two peoples simply will not accept a universal political theory if it is not tailored to reflect their unique situations. The starting point must still come from within absolutist theory, not from relativistic premises. The absolutist must find a place within Rawlsian theory, or whatever constitutive political theory emerges, for the differences among nations.

It is worth noting that the transnational moralists, being absolutists, must logically believe in the consistency requirement between justificatory schemes for domestic and diagonal coercion. It would be virtually impossible to posit a set of universal morals that could give rise to political theories that would not measure the legitimacy of domestic coercive action in a way essentially equivalent to that of diagonal coercion. Taking the worst case — that the universal moral constraint posited is the racial superiority, say, of Swedes — each nation would be required to adopt a constitutive political theory that measured the legitimacy of coercion on the basis of how favorably it



treats Swedes. All domestic coercive acts by all governments would be judged for their favoring of Swedes over non-Swedes. Though there would be no formal requirement that the government's diagonal coercive acts be measured by the same justificatory scheme, as a practical matter, it would always be the same. As long as the universal moral foundation posits the superiority of Swedes, whatever justificatory measure is developed to apply to diagonal coercion will be intelligible in terms of favoritism for Swedes. Thus, even in the worst case, all transnational moralists are verticalists.

Ultimately, the value of vertical theory is not so much that it provides a nonnormative vehicle for gauging the legitimacy of diagonal coercion, but rather that it forces us to struggle for a better understanding of the ramifications that domestic political theory has on international relations. There is usually great value to pulling something apart, not because the constituent pieces are more valuable standing alone, but because one then sees which parts do not fit together well and are therefore prone to friction and wear. The vertical thesis pulls apart the complex enterprise of legitimating international action, whether it be coercive conduct, affirmative economic assistance, or humanitarian intervention against oppressive regimes. It reveals the subtle interrelationships among political philosophy intended for domestic consumption, international law, and foreign policy. In the process, it is not unreasonable to think that vertical theory might well lead to foreign policy that is more coherent and stable, international law that is more likely to be observed, and perhaps even constitutive political theories that earn greater respect from both the citizens of their own nations and of others.

