

Review Essay

Ethics, Law and Politics

JUSTIFYING INTERNATIONAL ACTS. By Lea Brilmayer.† *Ithaca and London: Cornell University Press, 1989. Pp. x, 164. \$19.95 (hardbound).*

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While walking in the woods, a political theorist came upon a lawyer sitting on a log, contemplating a model ship in a bottle. The lawyer was holding a long stick.

"Why ought that ship be in the bottle?" asked the theorist.

The lawyer made no answer but jumped up and hit the theorist with the stick. As far as the lawyer was concerned, any response to that question would obscure the reality that the ship was in the bottle. The political theorist went away, somewhat the sorer, and wrote a study about the relationship between ships and bottles in general in an effort to discover the oughtness of ship-in-bottleness.

The lawyer, after examining the bottle to make sure that the ship was still there, calmed down and went back to his log, hoping for no further interruptions.

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The rift between political theory and legal practice is at no time more evident nor less justified than when the disciplines of law and political science confront matters related to public international law. Many international lawyers denigrate, both publicly and privately, the teaching of "international law" in political science departments on the grounds that it produces fuzzy thinking and Utopian theorizing. Many political theorists, on the other hand, denounce international lawyers as pragmatic technicians who care more about serving the needs of their clients than about the "oughtness" of international relations. The most effective effort thus far to bridge that chasm by melding the disciplines of law, science and policy has been the seminal work of Professors Myers

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McDougal and Harold Lasswell,¹ beginning shortly after the Second World War and continuing to this day under the intellectual leadership of Professor W. Michael Reisman.²

Professor Lea Brilmayer's book, *Justifying International Acts*,³ represents a related effort, but her theory addresses a different issue: "[t]he relationship between international ethics and domestic political justification."⁴ This book on political ethics is not interdisciplinary in the sense that it attempts to derive specific answers to legal and philosophical issues by merging the techniques of law and philosophy. Rather, it is intended to stimulate additional cross-disciplinary analysis by extending "an invitation to international theorists and political philosophers to have their say about law."⁵ The book, I expect, will succeed in this purpose and, if it does nothing else, should provide yet another stimulus for theorists from either discipline to address these related areas.

In this book, Professor Brilmayer attempts nothing more and nothing less than to open the minds of her readers to an alternative perspective for analyzing issues of international relations. Her principal thesis is that international relations issues may be usefully considered in the context of what she calls "vertical political analysis." She distinguishes this from the "horizontal" approach most often used to justify and explain relationships between nation-states in the world community.

The horizontal approach builds international law on an ethics of the relations between coequal actors, namely, states. The vertical perspective builds international law on the political norms regulating the relationship between the individual and the relevant political institution. From the vertical perspective a state's actions outside its territory, and against noncitizens, must be evaluated in terms of the political justification that grants that state the right to operate domestically.⁶

The author does not suggest that her approach ought to supplant traditional analysis of international political issues. Rather, she offers it as a complement to existing theoretical studies.

The book has a general introduction, seven chapters divided between two parts, each part having its own introduction, and a brief but important conclusion. In the first chapter, the author argues that a state's ju-

1. See, e.g., McDougal, Lasswell and Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188 (1968); Lasswell and McDougal, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362 (1971).

2. See Reisman, *International Lawmaking: A Process of Communication*, 1981 PROC. AM. SOC'Y INT'L L. 101.

3. L. BRILMAYER, *JUSTIFYING INTERNATIONAL ACTS* (1989) [hereinafter cited by page number only].

4. P. 1.

5. P. 5.

6. P. 2.

isdiction depends upon the scope of authority accorded to it by the political theory that justifies its coercive power, and not solely on inferences about legitimacy drawn from the existence and placement of its territorial boundaries. The second chapter describes and raises questions concerning the "horizontal" theories that justify international relations and makes the case for examining these relations under vertical analysis as well. In doing so the author poses a fundamental ethical question:

[I]f humans are entitled to civil and political rights as a matter of political theory, why don't analogous principles regulate the relationship between a state and *all* of the individuals over whom coercive power is exercised? Why are noncitizens not entitled to the benefits of principled limits on sovereign power?⁷

The chapter ends by recognizing some of the difficulties that attend the application of vertical analysis in the international sphere but concludes that the approach would reap significant analytical benefits despite those difficulties.

In the third chapter, Professor Brilmayer says that "[p]olitical theory and boundary questions cannot be viewed in isolation from one another."⁸ She argues that the existing pattern of state-citizen relationships based on territorial boundaries cannot be justified by any normatively defensible distribution because the pattern is more the product of random historical human interaction than of norm-based principled allocation. But her vertical analysis does not require a justification of existing boundaries; it depends only upon an assessment of the role of nation-states in external affairs, in light of their domestic political-ethical theories justifying the exercise of governmental power.

The last four chapters of the book raise and address the question: to what extent are existing general concepts of international law "consistent with, or entailed by, existing plausible reasoning about political justifications?"⁹ The issue areas treated include sovereignty and non-intervention, whether states have affirmative duties to other states or to individuals, and questions raised by the principle of humanitarian intervention.

Those lawyers who feel uncomfortable in dealing with problems of human affairs at too high a level of abstraction might well turn first to the Conclusion. That section puts the entire book in useful context by providing a terse and direct statement of the potential utility and likely limitations of the author's thesis. Reading this later material early on

7. P. 43.

8. P. 53.

9. P. 82.

helps the reader appreciate the role of the more generalized discussion of various ethical theories that appear in the first half of the book. This reviewer, in those earlier sections, found himself constantly asking the question, "so what?"; a question that Professor Brilmayer steadfastly and overtly refuses to answer. The Conclusion makes clear why that answer, in any definitive sense, is not forthcoming and would be out of place, given the author's limited objective of suggesting a useful additional analysis, rather than supplanting erroneous existing ones. All in all, Professor Brilmayer's book contains useful insights about the shortcomings of existing political analysis and makes important suggestions for improvement and progress in the future.

As a reviewer of this book, I find myself somewhere between the political theorist and the lawyer in the parable that opens this review. There is no doubt of the usefulness of examining the "oughts" of government, even when this is done, as it must be, at a high level of abstraction. Most of the authorities that Professor Brilmayer cites are philosophers or political scientists rather than international lawyers. This is understandable since the book is about ethics, not law. The book would have been considerably strengthened, however, by some specific analysis of the legal realist approach and the neo-realist analysis of Lasswell and McDougal.¹⁰ The vertical analysis of international relations issues that Professor Brilmayer urges describes an analytical process very similar to that employed by both of these approaches.

As one who has worked in the Department of State and at least observed and, on occasion, participated in decisions about the limitations imposed by public international law on national affairs, I find that the legal realist approach has much practical appeal. International law, like most other law, is made by human beings who are charged by one political process or another to conduct relations with other groups of people living in other defined geographical areas. The overriding principle that these decision-makers apply as lawyers is that they should advocate those legal positions they believe will best serve the client — the body politic to which they belong that has legitimized their power by recognizing their authority.¹¹ This does not, of course, mean that they deny the importance of compliance with international legal norms, since the security provided by a regularized system of legal decision-making is one of those self-interests that, despite the evidence suggested by some highly publi-

10. See McDougal, Lasswell and Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253 (1967).

11. See generally, M. EDELMAN, *THE SYMBOLIC USES OF POLITICS* (1977).

cized non-paradigm situations, is usually given effect in preference to conflicting short-term national gains.

Three decades ago, Professor McDougal pointed out the truism that, in dealing with international legal issues, government decision-makers are in the unique position of playing the dual role of advocates for a particular point of view and ultimate judges of that view's legal correctness.¹² In that role, these officials are influenced in their decisions about international relations by those same perceptions about how society ought to operate that influence all of us when making decisions with social implications. Such social perceptions include conclusions about the appropriate role of governmental powers; those conclusions must necessarily be influenced by the values reflected in the ethical-political foundation of their respective nation-states.

This truism suggests strong support for Professor Brilmayer's thesis that considerations based on domestic governmental ethical values should become a useful tool in the analysis of international relations. Domestically inspired considerations already implicitly influence practical governmental decisions. They should therefore be relevant when evaluating the results of those decisions in the international arena. Thus, an *ex post facto* analysis of governmental decisions, in light of considerations of domestic political ethics that necessarily exert psychological pressure on decision-makers, makes a great deal of sense. If the practical results of governmental decision-making are implicitly influenced by the domestic political values of the decision-makers, why should we not analyze the "oughts" of international relations in light of those same domestic political and ethical norms, as Professor Brilmayer suggests?

The state is, of course, an abstraction. In real world terms, a nation-state is nothing more than a group of people, located in an artificially bounded piece of territory, whose commonality of interests is largely defined by that common territorial bond and by their acceptance of the proposition that some few of their number may legitimately make, decide and enforce the rules about the relationship between the group and its individuals, and the group and other such groups.

States do not think, do not feel, do not plan. It is the people that govern states who do all these things. When one says, "a state does something," one means that real people do that thing in the name of the state. This is true whether the act in question is external or internal to the state's territory. In each instance the authority to act and the legiti-

12. McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 AM. J. INT'L L. 356, 357 (1955) (editorial comment).

macy of that authority is created by public acceptance. Power can be imposed but legitimacy cannot. Official actors are nothing more than persons whose power the state's populace has clothed with authority by accepting the legitimacy of their exercises of power.¹³ When acting in the exercise of that legitimate power, those officials necessarily (although not always consciously) reflect, in their international dealings or in their domestic activities, attitudes influenced by the legitimizing political forces that authorize them to act. As the late Professor James Brierly once wrote:

There is a subtle interaction between theory and practice in politics, not always easy to trace because the actors themselves may easily be unconscious of theoretical prepossessions which, nevertheless, powerfully influence their whole attitude towards practical affairs ¹⁴

The obvious similarities between the McDougal and Lasswell analysis and that advocated by Professor Brilmayer suggest that at least a few pages, perhaps even an entire chapter, devoted to a discussion and critique of the law-science-policy system, especially the portion that employs the value of human dignity as its touchstone, would have strengthened her argument. Exploration of the intellectual parallels between the author's analysis and the McDougal and Lasswell material, together with an identification of the differences between them, would have linked Professor Brilmayer's work with what may be the single most important jurisprudential effort in modern times to explain the functional relationships between politics and law in the international community, thus lending a jurisprudential referent to her ethical analysis.

Professor Brilmayer's book is worth reading, not only by political ethicists, but by anyone who is concerned about humanity's ongoing struggle to live in peace and to improve the human condition by means of effective interaction among peoples, regardless of their division into separate but interdependent bodies politic. As she intends, the questions she raises are far more important than any solutions the book may suggest. It is a thoughtful piece of work that should help all of us to understand the importance of the question, "Why ought that ship be in the bottle?"

13. See generally, H.L.A. HART, *THE CONCEPT OF LAW* 198 (1961) (accepting the legitimacy of power is not necessarily the same as accepting the moral validity of its exercise).

14. J. BRIERLY, *The Basis of Obligation in International Law*, *THE BASIS OF OBLIGATION IN INTERNATIONAL LAW AND OTHER PAPERS* 2 (Lauterpacht and Waldock ed. 1958).