

Michigan Law Review

Volume 89 | Issue 6

1991

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Recommended Citation

Bernard Yack, *Injustice and the Victim's Voice*, 89 MICH. L. REV. 1334 (1991).
Available at: <https://repository.law.umich.edu/mlr/vol89/iss6/5>

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INJUSTICE AND THE VICTIM'S VOICE

*Bernard Yack**

THE FACES OF INJUSTICE. By *Judith Shklar*. New Haven: Yale University Press. 1990. Pp. vii, 144. \$19.95.

Injustice is the most ordinary of our ordinary vices. It is a rare day indeed in which we do not suffer, experience, or commit some injustice, large or small. And if we do not personally suffer an injustice that day, we can be sure that a friend or acquaintance will tell us about the injustice that he or she suffered. For injustice is our favorite topic of discussion. No subject figures more prominently in the stories that we tell each other.

If asked what we mean by injustice, we have an obvious answer ready to hand: the absence of justice, the failure to receive what we believe to be our due. Most moral, legal, and political philosophers have accepted this obvious definition of injustice. Accordingly, they have devoted almost all of their efforts to identifying the nature and sources of justice, convinced that, in doing so, they will satisfactorily answer our questions about injustice as well.

In *The Faces of Injustice*, Judith Shklar challenges this general belief about the nature and sources of injustice. Her provocative and wonderfully original essay argues that philosophy and common sense alike generally have failed to give injustice its due. Treating injustice as the mere negation of justice, Shklar suggests, obscures "the full, complex, and enduring character of injustice as a social phenomenon" (p. 9). In particular, it encourages the false and arrogant belief that some systematic body of rules and principles can capture the full range of actions that inspire reasonable complaints about injustice. Moreover, treating injustice as a mere negation of justice ignores or silences a large portion of the complaints made by individuals who think themselves victims of injustice. For victims of injustice frequently allege slights that cannot be described as mere departures from recognized standards and principles.

Shklar argues that moral, legal, and political philosophers have much to learn from the victim's perspective on injustice. Her argument is not, however, a mere lament about how jurists and philosophers lose sight of real individuals and their suffering in the pursuit of

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general rules and principles.¹ It is, instead, an attempt to make use of the victim's special insights to push us toward a more satisfactory theory of injustice, a theory that makes no attempt to hide the limits of our cognitive capacities. As such, *The Faces of Injustice* should be most welcome to readers who appreciate the skeptical edge of currently fashionable modes of legal criticism, but are annoyed by the endless and self-congratulatory negativity of those who apply them. As in her earlier book, *Legalism*,² Shklar recognizes here that skepticism about the fabled law/politics distinction is the *beginning*, not the *conclusion*, of a more political understanding of law and injustice.

Presented originally as the Storrs lectures at Yale University Law School, Shklar's essay contains the kind of provocative formulations and vivid examples that we expect of good lectures. Moreover, Shklar's skillful use of art and literature to advance her arguments gives the book a liveliness rarely found in legal and philosophical scholarship. But her essay also has the overly compressed, impatient, and allusive style that often emerges in lectures that attempt to cram a large subject into a relatively short period of time. Hence, *The Faces of Injustice* may seem to some readers to be more a series of provocative and disconnected suggestions than a series of fully developed arguments. I try to show in this essay that this impression is illusory. Shklar's book makes a number of important and highly original arguments about the nature of injustice and the political institutions we construct to deal with it. Readers may have to expend considerable effort to recognize all of these arguments, but such effort will be richly rewarded — if not with all the answers they might like, then with a set of thought-provoking questions they will find nowhere else.

I. PASSIVE INJUSTICE AND THE "NORMAL MODEL" OF JUSTICE

The familiar understanding of injustice as the absence or negation of justice follows directly from what Shklar calls the "normal model" of justice. The normal model presents a picture of justice that is equally at home in common opinion and philosophic scholarship. It portrays justice as a body of rules and basic principles governing the distribution of benefits and burdens within a community, and it demands the establishment of effective and impartial institutions to guarantee the enforcement of these basic rules and principles. Injustice, according to the normal model, occurs whenever we depart from any of these norms (p. 17).

What aspects of injustice do we miss when we treat it as the departure from the basic norms of justice? Most significantly, we ignore or misrepresent our complaints about what Shklar, building upon a dis-

1. Such as we find in E. CAHN, *THE SENSE OF INJUSTICE* (1949), and J. NOONAN, *PERSONS AND MASKS OF THE LAW* (1976).

2. J. SHKLAR, *LEGALISM* (2d ed. 1986).

inction introduced by Cicero in his *Offices*, describes as “passive injustice.”³ “Active injustice” involves acts that depart from or fail to meet the specific requirements of the rules of justice. “Passive injustice,” in contrast, involves failure to “prevent or oppose wrong” when we have the power and occasion to do so.⁴

As citizens, we are passively unjust . . . when we do not report crimes . . . when we silently accept laws that we regard as unjust, unwise, or cruel . . . [w]hen we let the wife beater next door go to it rather than interfere, or when we close our eyes to a colleague who routinely grades randomly and arbitrarily out of sheer laziness [pp. 6, 43]

As public officials, we are guilty of passive injustice when we evade responsibility for the disasters we could have foreseen or prevented and when we do not make full use of our powers and ability to prevent cruelty to those caught up in our systems of justice.

Passive injustice, Shklar notes, is “a civic vice” (p. 42), by which she means that it is a vice that is most widely relevant in a self-governing community, because only in such a community do all citizens share, in however limited a way, in the power and responsibility to create a just order. Ordinary citizens do indeed possess such power, according to Shklar, because even mere proximity to wrongs can give us considerable power to prevent them (pp. 40-41). But the more power we possess, the more liable we become to complaints about passive injustice. Consequently, passive injustice is something that we are especially prone to discover in politicians, judges, bureaucrats, and other public officials who have been armed with the political community’s power to foresee and prevent harm.

Judges who are so lazy that they pay no attention to the witnesses who come before them, immigration officials who are so unpleasant to their clients that they scare them away from their offices, politicians who are so blind and insensitive that they never consider the indirect harm to oppressed minorities caused by the inflammatory rhetoric they use to get elected — all are passively unjust. They all provoke a deep sense of injustice in their victims. We may not be able to do anything to correct their actions until they break some law or fail to follow an established procedure. But we do not wait until we discover some such crime or irregularity before we bristle at the injustice suffered at their hands.

The normal model of justice obscures this passive sense of injustice because it suggests that until a standard of justice has been violated, no injustice has occurred. Victims of what Shklar calls passive injustice can complain about the laziness, irresponsibility, negligence, stupidity, and incivility of the officials who torment them. But, according to the normal model, “[o]nly a victim whose complaints match the rule-gov-

3. CICERO, DE OFFICIIS 24-25 (W. Miller trans. 1956).

4. *Id.*

erned prohibitions has suffered an injustice. If there is no fit, it is only a matter of the victim's subjective reactions, a misfortune, and not *really* unjust" (p. 7).

In this way, the normal model restricts claims of injustice to claims about the violation of the general rules and principles that should guide our behavior. In effect, the normal model tames, rather than defines, our often unruly sense of injustice. As such it may be very useful indeed within the institutions, such as courts, that we establish to tame and order our claims of injustice. But the model is far too narrow to encompass and explain the full range of complaints inspired by our sense of injustice.

In order to gain a more accurate picture of the complexities of injustice, we need, Shklar suggests, to turn from philosophy and jurisprudence to history, social psychology, and especially literature. For although philosophers devote most of their attention to virtues like justice, novelists and playwrights are much more at home with the vices.⁵ Shklar, accordingly, makes many of her most important points through commentary on art and literature; characters from Dickens and Doctorow play as large a role in her discussion of injustice as philosophic propositions and case citations. Indeed, Shklar devotes her most extended and illuminating case commentary to a purely fictional case: "the memorable trial of Bardell against Pickwick" that Dickens presents as the climax of his comic novel *The Pickwick Papers*.⁶

The rights and wrongs of this case, a breach of promise suit brought against Pickwick by his landlady, Mrs. Bardell, seem quite simple. Mrs. Bardell claims that Pickwick has treated her unjustly by breaking a promise to marry her. We readers know, however, that Mrs. Bardell has mistakenly jumped to the conclusion that such a promise was made. A second injustice, this time an actual rather than merely alleged departure from the rules of justice, occurs when Pickwick loses the suit and is thrown into prison when he refuses to pay the damages the court decrees. At first glance, the case seems to be easily accounted for by the normal model of justice and injustice. But when we look at the situation more closely, this simple, orderly picture quickly dissolves. Passive injustices lurk everywhere behind the alleged and actual violations of the explicit standards of justice raised in

5. Shklar complains that because "philosophers refuse to think about injustice as deeply or as subtly as they do about justice . . . while history and fiction deal with little else," we are left with a "gap in our thinking" about political life and institutions. P. 16. She tries to close this gap in *The Faces of Injustice*, as in her earlier book *Ordinary Vices*, by using literary and historical evidence to revise philosophical models of political institutions and moral behavior. See J. SHKLAR, *ORDINARY VICES* (1984).

6. C. DICKENS, *THE PICKWICK PAPERS* chs. 18, 20, 26, 34, 40-42 (Everyman's Library ed. 1954) (1st ed. 1836).

the case. These passive injustices spur its participants to action and complicate our own evaluation of the situation.

It is the arrogant and humiliating way in which Pickwick, certain of his superior power and position in life, dismisses the possibility of marriage to her that inspires Mrs. Bardell's suit, not just the imagined breach of promise. Similarly, the passively unjust behavior of Mrs. Bardell's lawyers — their willingness to let Pickwick be wronged by legal justice — provokes Pickwick's angry refusal to pay the damages imposed on him. Dodson and Fogg, Mrs. Bardell's lawyers, have taken the case "on spec" and pursue it with all their manipulative skills, despite full knowledge of its speciousness. (Pickwick is most upset about their gaining a share of the damages the court demands.) Like most lawyers, they believe that they serve justice by playing an adversarial role in the process that their community has established to determine whether its standards of justice have been violated. Because they play that role very well, neither they nor any participants in the case except Pickwick think them guilty of any injustice. Nevertheless, there can be little doubt that individuals, such as Mrs. Bardell's lawyers, who play this role without any regard to the harm they allow to occur often provoke as deep a sense of indignation as those who directly violate established standards of justice.

If we stick to the normal model of justice, we must settle for a rather impoverished understanding of the sense of injustice that drives the action in the celebrated case of *Bardell v. Pickwick* or, for that matter, in most everyday controversies. For the normal model blinds us to the myriad sources of injustice beside departures from recognized standards of justice. Passive injustice, moreover, has no less serious consequences than active injustice. As Shklar notes, if *The Pickwick Papers* were a Gothic rather than a comic novel, Pickwick's passive injustice would have led Mrs. Bardell to drive a stiletto into his back rather than drag him into court. And were that Gothic novel set in Corsica rather than England, a vicious blood feud would ensue, all as a result of an act of passive injustice.

It may appear, however, that we are dealing here with a mere semantic controversy: whether to use injustice or some other word to deplore the particular set of actions that Shklar insists on describing as passive injustice. After all, the proponents of the normal model of justice are not denying that these actions are reprehensible. Nor is Shklar suggesting that we punish the passively unjust in the same way that we regularly punish the actively unjust. The differences between them might seem to be merely a matter of emphasis and classification, rather than a moral or political disagreement.

But the differences between the two models of injustice are not merely semantic. Indeed, one of the great virtues of Shklar's book is that it highlights the important moral and political consequences that

follow from supposedly inconsequential choices of emphasis and classification. The normal model of justice directs our attention toward the identification and justification of the primary rules and principles of justice and away from the exercise of power and complaints about passive injustice. The normal model recommends that we use terms other than injustice to support these complaints. But because injustice is in most places a word that claims the special concern of community members, such a recommendation considerably diminishes the ability of victims to claim our attention and interest (p. 5). Victims of the neglect, arrogance, and insensitivity of the powerful rarely have much more than their cries of injustice to gain our attention. In effect, the normal model of justice takes away from victims of passive injustice this means of attracting our attention and, in doing so, depoliticizes many of their complaints about their suffering. Its advocates advise those who perceive themselves as victims to focus their complaints on the violation of recognized standards of justice. But, as we have seen, the harm that inspires the indignation of victims does not always take the form of the violation of recognized rules and principles. And, perhaps more important, the powerful always have far greater means to make and control arguments about established standards of justice.

Although the normal models of justice and injustice usually originate in the studies of philosophers and jurists, the relatively powerful groups in any society usually define the way these models are realized in practice. Such groups, not surprisingly, have a strong interest in diminishing the importance of passive injustice, because the greater the attention paid to claims about passive injustice, the greater the demands that can be made on their resources and attention. Once we take this interest into consideration, it becomes clear that the normal model's restricted understanding of injustice not only fails to capture the full range of phenomena surrounding our sense of injustice, but that it also tends to reinforce the authority of the powerful and further disempower the potential victims of their arrogance, insensitivity, and indifference.

II. INJUSTICE AND MISFORTUNE

A defender of the normal model of justice might answer Shklar's critique by developing a new and improved version of the normal model of justice, a version that clearly spells out the nature and extent of social obligations to use power to prevent wrong.⁷ But Shklar insists that every attempt to improve the normal model in this way will be stymied by what she describes as the inherently limited, subjective, and political character of our knowledge of injustice. It is precisely

7. Martha Nussbaum suggests this in her recent review of *The Faces of Injustice* in THE NEW REPUBLIC. Nussbaum, *The Misfortune Teller* (Book Review), NEW REPUBLIC, Nov. 26, 1990, at 30, 32.

the normal model's assumption that we can discover determinate and adequate standards to measure our obligations to avoid injustice that Shklar challenges.

That assumption, Shklar argues, is rooted in "the groundless belief that we can know and draw a stable and rigid distinction between the unjust and the unfortunate" (p. 9). We need to construct such distinctions in order to separate naturally caused and unavoidable suffering from the suffering for which we hold each other accountable. Accordingly, this distinction figures largely in moral philosophers' initial definitions of injustice. An unlucky roll of the dice is a misfortune, they tell us, while the use of loaded dice to produce poor rolling is an injustice.⁸ "Victims" have every right to express outrage at the latter, but not at the former. Unless we believe in an angry and omnipotent deity, it is no more rational to wax indignant about our misfortunes than to smash the trash cans we trip over or blame messengers for the bad news they bring us.

As long as the focus remains on active injustice, we have a fairly simple way of distinguishing injustice from misfortune: look for an ill-intentioned, standard-violating agent. But once the focus turns to what Shklar calls passive injustice, the task becomes much more complex. An earthquake is clearly a natural disaster and a misfortune for those who suffer from it. But it is also an injustice for its victims when much of their suffering could have been prevented or minimized by less complacent public officials — as these victims do not hesitate to say. How much suffering, we have to ask, should public officials be expected to prevent? Without an answer to this question, we cannot clearly distinguish between misfortune and injustice, but this question is far more difficult to answer than questions about the presence of ill-intentioned violations of recognized standards.

The reasons for this difficulty

become clear enough when we recall that what is treated as unavoidable and natural, and what is regarded as controllable and social, is often a matter of technology and of ideology or interpretation. The perceptions of victims and of those who, however remotely, might be victimizers, tend to be quite different. Neither the facts nor their meaning will be experienced in the same way by the afflicted as by mere observers or by those who might have averted or mitigated the suffering. These people are too far apart to see things in the same way. [p. 1]

The distinction between injustice and misfortune, which seems so clear and simple in the books of moral philosophers, is quite uncertain and controversial in actual moral and political experience. If we were omniscient, we could be quite confident about the accuracy of our efforts to distinguish between injustice and misfortune. For we would then be in a position to gather perfect knowledge about the effective

8. See, e.g., J. LUCAS, ON JUSTICE 5-6 (1980).

means to prevent suffering that are available to us at any time and place — knowledge that would be unclouded by our partial perspectives as victims, observers, or public officials. Faced with a natural disaster such as an earthquake or flood, we could then state with confidence exactly what we have a right to expect public officials to do in order to prevent or minimize the human suffering caused by these natural disasters and then, perhaps, we could come up with a rule or standard to which we could hold them. Officials who violate these standards of obligation would then be guilty of injustice.

Lacking such omniscience, we are in no position to declare with any certainty exactly which harms we can prevent or minimize. Thus, we cannot delineate a standard, rule, or principle — the benchmarks of active justice and injustice — to guide our assessments of official action. Because we lack the omniscience needed to distinguish misfortune from injustice, our judgments are always tentative and subject to revision in light of new information and perspectives: yesterday's misfortunes become today's injustices when we discover, for example, that the limited capacities once confidently ascribed to natural distinctions such as race and gender are, in fact, imposed by the powerful on the weak. Yesterday's scientists were no less confident about their knowledge of racial differentiation than we are about similarly controversial issues. In the face of such mistakes it is remarkable that so many theorists continue to express confidence in our ability to distinguish natural misfortune from injustice.

Shklar is not suggesting that we cease trying to identify naturally caused misfortunes and to use our knowledge to inform our judgments about justice and injustice. Her point is, instead, that even in the simplest cases, we rarely have access to more than a very small part of the information needed to discover the actual boundaries between injustice and misfortune: thus we cannot *formulate* rules of duty sufficient to cover the universe of possible events. We are merely fooling ourselves, according to Shklar, when we treat our claims about misfortune and injustice as discoveries of fact. Instead, these claims represent *political* judgments about what we may expect and demand of each other and should be treated as such.⁹

Moreover, political judgments about ability and responsibility to prevent suffering to others inevitably are colored by different perspectives on events and the interests that these perspectives promote. In particular, those who suffer from a particular course of events and circumstances are much more likely to describe it as injustice than are

9. See M. SMILEY, *MORAL RESPONSIBILITY AND THE BOUNDARIES OF COMMUNITY* (1991), for a sustained and persuasive critique of our claims to factual discoveries of moral responsibility. Smiley also identifies the ways in which political considerations, such as ascriptions of communal membership and the distribution of power in society, shape judgments about any individual's responsibility for preventing or minimizing harm to others.

the besieged public officials against whom they often direct their complaints.

Understandably, sufferers seek human or divine agents to blame for their suffering. As Shklar points out, it is intensely degrading to think of ourselves as mere victims of random and meaningless suffering (p. 5). In order to avoid such indignities, we will often even blame ourselves for our suffering rather than treat it as meaningless. As a result, those who suffer from unexpected harms will tend to see themselves as victims of injustice and search for agents who caused or at least could have prevented their suffering.

In contrast, public officials and, in general, the more powerful members of any community have just as clear an interest in maximizing the range of events labeled as misfortune rather than injustice, since they cannot be held accountable for the suffering caused by unavoidable misfortunes. "It could not be helped" is, accordingly, "the favorite evasion of passively unjust citizens" (p. 3). It is heard over and over again in the aftermath of any natural disaster, regardless of whether or not something could have been done to prevent or minimize the suffering experienced by others.

The normal model of justice, based as it is upon the example of adjudication, would suggest that we deal with these competing claims in the same way we deal with all other competing claims about justice and injustice: find an impartial third party to assess their accuracy. A neutral observer or "impartial spectator" would seem to be the best judge of whether a misfortune or injustice occurred or not, because he or she lacks the distorted perspective on events created by the victims' need to find someone to blame for their suffering and public officials' interest in getting themselves off the hook.

Shklar emphatically rejects this suggestion. "[T]he self-understanding of victims must also be taken into account by a full theory of injustice . . . [for] [v]ictimhood has an irreducibly subjective component that the normal model of justice cannot easily absorb" (pp. 36-37). No matter how much we strive to be impartial, no matter how concerned we are about improving the lot of the least advantaged, Shklar argues that a large part of passive injustice always will be apparent only to its victims.

The reasons supporting her argument become clear when we reflect upon the relations between the powerful and the victims of their passive injustice. The significance that others find in our words and deeds tends to increase in proportion to the amount of power we have over their fate. What may seem to be a casual expression or an inconsequential indulgence can, and often does, have tremendous consequences for the less powerful individuals affected by such an action. We can, of course, make an effort to be sensitive to the unintended consequences of seemingly inconsequential actions. But, given our

lack of omniscience, no one can recognize all of these consequences of her actions. Thus a whole range of harmful consequences will be apparent only to those whom they victimize. We will learn about these harmful consequences only if we listen to the voices of the individuals who feel victimized by our words and actions. These individuals may frequently look for victimizers even when none exist; but they also have insights into the harmful consequences of public actions we can get from no other source. Shklar therefore concludes that in attempting to distinguish between injustice and misfortune, "[t]he voices of victims must always be heard first, not only to find out whether officially recognized social expectations have been denied, but also to attend to their interpretations of the situation" (p. 81).

While asking that we privilege the voices of victims in debates about distinguishing misfortune and injustice, Shklar fully recognizes that the public officials' perspective on these matters may also yield special insights that cannot be gained from a more distant perspective. But these insights, unlike those of the victim, are already widely, indeed, overly, represented in public judgments about misfortune and injustice. After all, the public officials' perspective on events dominates legislation, administration, and public debate about allocation of scarce resources. By privileging the victim's perspective Shklar merely seeks to counterbalance the disproportionate weight that already is given to the public official's perspective in deciding what constitutes an injustice.

Privileging the victim's perspective, however, may seem to violate the norms of impartiality that we tend to associate very closely with the idea of justice. But fidelity to established standards and impartiality in applying them — virtues that serve legal justice very well — remain virtues only so long as we possess relatively clear, determinate, and widely accepted standards to apply to particular situations.¹⁰ Whenever we lack access to such standards, as we almost always do in our judgments about passive injustice and the justice of legislation, an emphasis upon the faithful and impartial application of whatever standards we do come up with tends to blind us to the political character

10. Judges have access to such standards in the "easy cases" that comprise the great majority of the cases that come before them for decision. It is therefore appropriate to treat fidelity and impartiality as the principle virtues we ordinarily demand from judges. "Hard cases" — the cases that typically require higher levels of appellate court review — are those in which standards are absent, unclear, or controversial. The harder the case, the less valuable are the virtues of fidelity and impartiality. See Schauer, *Judging in a Corner of the Law*, 61 S. CAL. L. REV. 1717 (1988). In the hard cases that occupy the attention of judges at the highest appellate courts, a reputation for fidelity and impartiality merely acts as a source of legitimation for a judge's exercise of a partial and political judgment about the justice of different legislative standards. (I am not suggesting, however, that deciding easy cases does not represent an exercise of political power. But, unlike deciding hard cases, deciding easy cases involves an exercise of political power — the determination of the established interpretation of fairly clear, determinate and widely accepted standards — in which fidelity and impartiality are the most valued and relevant virtues.)

of the judgments we have made. Such an emphasis blinds us, in particular, to the ways in which we both privilege some voices and stifle others when making these judgments.

Even well-intentioned efforts — such as Rawls' — to bring the position of the least advantaged into our thinking about justice tend to silence the “irreducibly subjective” voices of victims (p. 37). Rawls, as is well-known, insists that we derive our principles of justice by asking ourselves what standards would be chosen by genuinely fair and impartial individuals, individuals whose impartiality is guaranteed by a “veil of ignorance” that obscures their knowledge of their own particular situation.¹¹ In doing so, however, he unintentionally privileges the subjective perspective of relatively powerful individuals. For Rawls asks us to make our choice of principles of justice from a particular perspective, a perspective that fits much better with the partial experience of public officials and other powerful individuals in society than with that of those who perceive themselves victims of injustice: the perspective of individuals legislating for their entire community. These individuals are allowed in their deliberation to imagine how they might react were they to become the victims of society's standards of justice, but not to draw upon their own partial and subjective experiences of victimization (if they have such experiences to draw upon). As a result, the perspective that defines Rawls' principles of justice, principles that, among other things, aim at improving the condition of the least advantaged groups in society, necessarily excludes the subjective, but otherwise unattainable insights of victimized groups into the injustice of laws and social institutions.¹²

The normal model's effort to bring all of injustice into a model of determinate standards of justice reflects what Shklar characterized in an earlier book as a “legalist” understanding of political morality.¹³ Legalism, according to Shklar, is a set of ideas and general attitudes that leads us to believe that moral and political judgments are best made when, like legal judgments, they represent the application of general rules and principles to particular cases.¹⁴ In this broad sense, the normal model's understanding of justice and injustice is legalistic. Just individuals, according to this model, have the virtues of good adjudicators: they faithfully and impartially apply the normal model's rules and principles to particular situations. Unjust individuals, in contrast, break faith with the primary standards of justice.¹⁵ In order

11. See J. RAWLS, A THEORY OF JUSTICE 136-42 (1971).

12. I make a similar argument in Yack, *The Problem with Kantian Liberalism*, in KANT'S POLITICS (R. Beiner & W. Booth eds.) (forthcoming).

13. See generally J. SHKLAR, *supra* note 2.

14. *Id.* at vii-x, 1-28.

15. Even utilitarian and other consequentialist versions of the normal model are often legalistic in this sense, even though they insist that rules of justice should bend according to the requirements of the greatest good. For they still model political judgment on adjudication, suggesting

to maintain this legalist approach to political morality, one has to assume, as do all proponents of normal models of justice, that we can identify the determinate rules and principles that allow us to recognize an injustice when it occurs.

As we have seen, Shklar complains about both the unrealistic pretensions to knowledge packed into this assumption and the disempowering effect that this assumption has upon the victims of injustice. When we turn, like Michael Walzer, to the supposedly shared social meanings of goods as a guide to the basic rules and principles of justice,¹⁶ we are bound, Shklar argues, to exaggerate the degree of social agreement about goods and to place disproportionate emphasis on the viewpoints of the more powerful groups in any community.¹⁷ When we turn, like John Rawls, to hypothetical constructions of fair and impartial reasoning for our basic principles of justice, we blind ourselves to the important insights that can come only from partial perspectives on injustice.¹⁸ As long as we continue to take a legalist approach to the identification of extralegal standards of justice, we will continue to disempower victims of injustice and to pretend to cognitive capacities we do not possess.

In the end, Shklar offers a much more modest and political model of justice and injustice in place of the legalism of the normal model. She suggests that questions about the justice and injustice of laws and official actions can only have political answers, answers that reflect a range of partial and competing perspectives on disputed questions. The search for extralegal standards of justice against which to adjudicate these competing claims reflects a vain and self-deluding effort to remake political judgment in the image of legal judgment. If, like social democrats such as Rawls and Walzer, we believe in the equal moral worth of individuals, then, Shklar concludes, our task is to find ways of empowering the voices of previously silent victims, rather than to search in vain for some body of rules and principles that will fully capture our sense of human dignity.

that the best political judgments are those that represent the application of a preceding, shared, and well-established principle — such as “seek the greatest good of the greatest number” — to particular situations.

16. See M. WALZER, *SPHERES OF JUSTICE* 3-30 (1983).

17. Commenting on Walzer's argument about the shared social meaning against which we measure our judgments about justice, Shklar complains that

[t]hese intimations of shared meaning, as divined by prophetic or traditionalist avatars of the spirit of the people, are never checked against actual opinions, least of all those of the most disadvantaged and frightened people. . . . In the absence of a clear and free account of their feelings, we should assume that the least advantaged members of a society resent their situation, even though — like many a black slave — they smile and sing in a show of contentment.

P. 115.

18. Shklar does not explicitly criticize Rawls in this way, but, as we have seen, her arguments do seem to have direct critical implications for his theory of “justice as fairness.”

III. REVISING THE NORMAL MODEL OF JUSTICE

The arguments discussed in the preceding Parts notwithstanding, Shklar explicitly disclaims any interest or intention in challenging the normal model's conception of justice, as opposed to its "complacent view of injustice" (p. 18). "I do not wish," she adds, "to suggest that there is something absurd about the normal model's construction of justice. . . . I do not propose to challenge it or to reject the legal values that it promotes" (p. 18).

Given the severity of Shklar's critique of the normal model's construction of injustice, these disclaimers may seem a little disingenuous. Surely, her critique of legalism in thinking about injustice has numerous implications for the way we think about justice. I already have explored one important implication of her arguments for theories of justice: the inadequacy of the legalist virtues of fidelity and impartiality as guides to extralegal standards of justice.¹⁹ Shklar's analysis of injustice suggests that the normal model goes wrong because it inappropriately applies a legalist or adjudicatory model of judgment to decisions about how to distinguish an act of passive injustice from a misfortune. If we need to go beyond the normal model to identify and avoid passive injustice, then we clearly need to go beyond it in order to figure out how to act justly.

Shklar's reluctance to challenge the normal model's construction of justice seems to stem from her fear that doing so will impugn "the legal values" associated with court-centered justice and the rule of law. "Without juridical institutions and the beliefs that support them, there can be no decent, just, or stable social relations, but only anxiety, mutual mistrust, and insecurity" (p. 18). Shklar in no way seeks to supplant the application of established general rules and principles to particular cases as the dominant model for the discovery of legal obligation in courts. She is merely trying to alert us to what this model omits, as a guide to the entire subject of justice and injustice. In this way, she seeks to undermine the normal model's "confidence in the ability of the institutions that it underwrites really to cope with iniquity" (p. 18). As noted earlier, the normal model and the rule of law provide a means of taming injustice, of diminishing "the anxiety, mutual mistrust, and insecurity" (p. 18) expressed and contributed to by our sense of injustice. Shklar merely wants to remind us that no system of legal institutions can ever completely satisfy our sense of injustice, and that legal judgment inevitably provokes someone's sense of injustice, even as it tames many others'. We may choose a legalist approach as the best way of exercising coercive power, she tells us, as long as we do not delude ourselves into thinking that by doing so we will ever identify and eliminate more than a small part of injustice.

19. See *supra* note 10 and accompanying text.

Shklar seems to think that challenging the normal model's understanding of justice endangers rule of law values in a way that challenging its understanding of injustice does not. I disagree with her on this point. The critique of the normal model of justice implied by Shklar's analysis of injustice merely brings into question the kind of dogmatic legalistic defenses of the rule of law that she has already severely criticized in *Legalism*.²⁰ In any case, I do not believe that she can challenge the normal model's understanding of injustice without implicitly challenging its understanding of justice.

Shklar implicitly relies on two different concepts of justice in *The Faces of Injustice*. These two concepts of justice correspond directly to the two concepts of injustice, passive and active, upon which she explicitly relies. Corresponding to active injustice, that is, to the injustice that comprises all departures from established standards, is the normal model's familiar concept of justice as fidelity to these standards and impartiality in applying them. I shall call this familiar "normal" concept of justice *passive justice*, because it merely requires that we coordinate our actions with established standards of justice. Corresponding to passive injustice, however, is a much less familiar concept of justice that I shall call *active justice*. Since passive injustice refers to our failure to prevent the wrongs we are in a position to prevent, *active justice* refers to the actions of individuals who properly use their power and ability to prevent wrongs to their fellow citizens.

Active injustice is nothing but the violation of the rules and principles of what I have called passive justice. But passive injustice cannot similarly be defined as a mere departure from what I have called active justice. For no clear, determinate, and widely accepted standards, such as those that define passive justice, define active justice. As we have seen in the preceding Part, there can be no simple factual answer to questions about what constitutes the just use of power to prevent the suffering of others. Answers to these questions are always political rather than factual judgments. These judgments inevitably reflect the strength and intensity of the claims and counterclaims made by those who seek to blame someone for their suffering and those who seek to evade responsibility. Unlike the passive justice of the normal model, active justice does not simply lay out standards against which to measure claims about injustice. It is and should be defined, to a great extent, with reference to competing claims about injustice.

Justice, Shklar and other theorists have suggested, is a rather impersonal virtue that rarely inspires any enthusiasm. As Shklar points out in her subtle and insightful commentaries on Giotto's depictions of justice and injustice in the Cappella degli Scrovegni in Padua, typical

20. J. SHKLAR, *supra* note 2, at 111-209; see also Shklar, *Political Theory and the Rule of Law*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY* 1-10 (A. Hutchinson & P. Monahan eds. 1987).

representations of justice show her steadfast and impassive, but hardly lovable (pp. 46-49, 102-04). “[J]ustice,” J.R. Lucas notes, “is a cold virtue which can be manifested without feeling [I]t is when *injustice* is in danger of being done that we become agitated.”²¹

Shklar and Lucas, however, come to this conclusion only because they focus exclusively on what I have called passive justice, which, as we have seen, consists of the virtues of fidelity to standards and impartiality in applying them. These are cold virtues, indeed. But active justice, which encompasses a much broader range of virtues, certainly inspires our imagination and enthusiasm. The justice that we expect from great legislators, judges, administrators, or anyone else who makes good use of her power, is neither blind nor impassive. It is a justice that looks straight into the faces of those who suffer, rather than staring steadfastly at a distant body of impersonal rules. It is something we look for in anyone who has the power to affect the course of our lives. Because it requires the exercise of much greater abilities and sensitivity than passive justice, we are inclined to celebrate it when we find it.

Active justice, accordingly, excites our warmest admiration.²² This kind of justice, the disposition to prevent harm to one’s fellow citizens, and not, as Rawls would have it, a disposition to fairness, represents “the first virtue of social institutions.”²³ We are, contrary to Rawls, quite willing to sacrifice the fairness of social institutions to a whole variety of competing ends, from security and individual freedom to civil peace and mental tranquility, and it is values such as these that active justice preserves and promotes. If any form of justice is to represent the *sine qua non* of social institutions, then, it could only be something like what I have described as active justice, the disposition to protect fellow citizens from harm. Shklar’s complaints about the limitations of the normal model of justice encourage us to begin to think about this other, more political concept of justice, even if she does not explicitly explore it.²⁴

It is appropriate that I end this review essay by discussing implica-

21. J. LUCAS, *supra* note 8, at 4.

22. Active justice, however, has a counterfeit image that has inspired equal enthusiasm in this century: a charismatic leader’s claim to embody the spirit of a community and to possess a special, instinctive understanding of what is best for its members. The fanatical devotion that such claims have inspired may be one reason for Shklar’s reluctance to discuss the nature and implications of active justice.

23. J. RAWLS, *supra* note 11, at 3.

24. In the fifth chapter of my forthcoming book on Aristotelian political philosophy, *The Problems of a Political Animal*, I argue that Aristotle’s concept of “universal justice” corresponds to what I have described as “active justice.” Aristotle contrasts universal justice with “particular justice” or fairness, which, like what I have described as “passive justice,” focuses on fidelity to determinate standards. Universal justice, rather than fairness, inspires the poets to sing of justice that “neither evening nor morning star is such a wonder.” ARISTOTLE, *NICOMACHEAN ETHICS* 1129-b (quoting Euripides).

tions of Shklar's ideas that go well beyond her explicit arguments. For *The Faces of Injustice* is just as valuable for the new questions it forces us to ask ourselves as for the insightful arguments it explicitly presents. Other analyses of justice and injustice may present much more systematic arguments, but very few of them give us as much to think about as does *The Faces of Injustice*.