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COMMENTARIES

## A World of Struggle Meets the Faces of Injustice (Judith Shklar and Current Affairs)

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This is a difficult task to perform. It is most often a good deal easier to offer a reflection on a paper with which one would beg to differ, than with one to which one's own thinking is aligned. This is doubly so if the article in question is phrased as eloquently and insightfully as Professor Kennedy's was. I might be well advised to merely state, "I concur", and he said, "it is better than I will ever be able to" and leave it at that.

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Professor Kennedy's Montesquieu lecture reminded me of what my own hero Judith Shklar had to say about the liberalism of fear, legalism and the faces of injustice.<sup>1</sup> Shklar warned us that liberalism and the legal structures built upon its foundation are in danger of getting convinced of their own narrative of rational progress.<sup>2</sup> In doing so, it will develop a blind spot to the possibility of regress, of a reversion to darker times, while framing political opposition and dissent against its approach to social life as backward, malign, misguided and/or pathological.<sup>3</sup> But as Shklar argued this paves over the political decisions necessary to any system of justice, the fact that justice is neither the opposite of injustice nor intends to be full-fledged answer to injustice, while each system of justice creates new injustices in its wake.<sup>4</sup>

Shklar made this analysis at the end of the 1980s, beginning of the 1990s, when liberalism seemed on the brink of reaching of an all-out victory: a *Zeitgeist* well summarized in Francis Fukuyama's *The End of History*.<sup>5</sup> The past thirty years have instead shown the depth of her insight. The signs of imminent reversion and regress are ubiquitous, while liberalism's defenders steadfastly remain offering a version of "but we're right, and we just need to communicate it better and/or silence the false and manipulative sirens of populism". This goes hand in hand with a view of the defeat of the losers of our era as inevitable misfortune, rather than the injustice they perceive themselves.

This fails to understand the reality of liberalism itself, but it also sets up an outright challenge from the truly regressive forces of which Shklar was so fully aware. If the forces of reason and expertise are always marshalled against your own experience and your interests, does it not make sense to ditch them wholesale? In this light, different commentators have suggested the link between poststructuralist thinkers, like Derrida and Foucault, with the manner in which President Trump and other would-be autocrats across the world dismiss science, established knowledge and indeed facts themselves.<sup>6</sup> That Trump undoubtedly never read *On Grammatology* or *Discipline and Punish* and that this in any case would amount to a perversion of

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<sup>1</sup> See Judith Nisse Shklar, *Legalism, Law, Morals and Political Trials* (Harvard University Press 1964/1986), Judith Nisse Shklar, 'The Liberalism of fear' in Nancy Rosenblum (ed) *Liberalism and the moral life* (Harvard University Press 1989); Judith Nisse Shklar, *The Faces of Injustice* (Yale University Press 1990).

<sup>2</sup> Shklar, 'The Liberalism of Fear' (n 1).

<sup>3</sup> A key issue in Shklar, 'Legalism, Law, Morals and Political Trials' (n 1).

<sup>4</sup> This was the main thrust of Shklar, 'The Faces of Injustice' (n 1), which has inspired much of my own recent writings, for instance A Pemberton, *Victimology with a hammer: the challenge of victimology*, (Tilburg University Prismaprint 2015).

<sup>5</sup> Francis Fukuyama, 'The End of History?' (1989) 16 *The National Interest* 3.

<sup>6</sup> See for instance Jeet Heer, 'America's first post-modern president?' (*The New Republic*, July 8 2017) <<https://newrepublic.com/article/143730/americas-first-postmodern-president>> accessed July 25 2018.

what this perspective actually entails is not the issue here. More important is the upshot that this erodes the common factual ground upon which peaceful settlement of disagreement within our democracies is built. As the title of an excellent recent analysis of our current era suggests, without such a common ground this is a part of *How Democracies Die*.<sup>7</sup> I understand Professor Kennedy's rallying cry to "get started", with which I could not agree more, at least partially in this light.

### Political choice and the position of victims of crime

I am not particularly well suited to offer a full-scale analysis of the causes and offer advice on remedies to our current predicament. However, some of the issues in my own work concerning victims of crime and their relationship with and involvement in legal proceedings can nevertheless – I hope – offer some partial additional insights into these issues. In both the position of victims of crime in criminal justice and my attempts as an academic to study this issue the role of expertise is key.

A key phenomenon in victimology is so-called secondary victimisation.<sup>8</sup> It is the experience of damage and harm as a consequence of the societal reaction to victimisation. A primary site –but necessarily the only one – for such secondary victimisation is the criminal justice system. In particular victims of sexual violence in adversarial systems of criminal justice felt that their treatment was so demeaning and disrespectful, that they coined the term "the second rape" for it. Much of the movement towards provisions and rights for victims of crime within justice processes therefore is an effort to reduce the risk of secondary victimisation.

This has been an uphill battle for the past four decades in the small number of jurisdictions, which have made an earnest attempt to improve the lot of victims of crime. A recurrent feature of the academic debate surrounding this debate is what I would like to call *tertiary* victimisation. It concerns the attempts of those sceptical of victims' rights and worried about their impact on the rights of the suspect or the offender and due process to frame their own position as aligned with "a universal voice of reason", while framing victims pleas as wrong.<sup>9</sup> Now, there is no doubt that protecting the rights of suspects and offenders, as well as due process, are vitally important to any system of criminal justice and that running roughshod over these issues should be resisted.

But that does not mean that any attempt to strengthen the position of victims can be dismissed out of hand, as emotional narratives that have no place in the rationales of judicial decision making in criminal justice. Instead this argument itself, against victims' emotions and narratives in law turns out, on closer inspection, to be a manner of privileging particular narratives and particular emotions over others, to which the cover of speaking in "a universal voice of reason" is used as a cudgel to silence other perspectives.<sup>10</sup> It is a particular instance of the potentially *hegemonic character* of narratives.<sup>11</sup> This hegemony applies not only to the content of the story, but also concerning the kind of story that is appropriate, the question of who is entitled to tell stories, the settings in which stories are appropriate and the way stories are perceived. Hegemonic narratives pre-empt other narratives, in which their quality of appearing self-evident is an important factor. As legal scholar Susan Bandes noted, 'Often, one story (usually the dominant story) drowns out or pre-empts another (usually the alternative story). Because it is the dominant story, its character as narrative is invisible. The tale appears to tell itself.'<sup>12</sup>

It obscures the fact that rather than a clear-cut issue of following a set of principles to their logical conclusion, balancing the interests of victims with suspects and/or offenders and due process involves (political) choices: another lesson to be learned from Shklar's work.<sup>13</sup> Acknowledging this opens up a space for debate in which opposing interests remain legitimate, instead of compounding a negative outcome with the added sting of it being wrong or misguided. As philosopher Bernard Williams argued in more general terms:

[W]e should not think that what we have to do is simply to argue with those who disagree: treating them as opponents can show more respect for them as political actors than simply as arguers – whether as arguers who are simply mistaken, or as fellow seekers after the truth (...) A very important reason for thinking in terms of the political is that a political decision –the conclusion

<sup>7</sup> Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (Crown Publishing 2018).

<sup>8</sup> Joyce E Williams, 'Secondary Victimisation: Confronting Public Attitudes about Rape' (1984) 9 *Victimology* 66.

<sup>9</sup> Susan Bandes, 'Empathy, Narrative and Victim Impact Statements' (1996) 63 *University of Chicago Law Review* 361.

<sup>10</sup> Bandes (n 9) 387.

<sup>11</sup> Francesca Polletta, *It Was Like a Fever: Storytelling in Protest and Politics* (University of Chicago Press 2006); Francesca Polletta, Pang Ching Bobby Chen, Beth Gharrity Gardner and Alice Motes, 'The Sociology of Storytelling' (2011) 37 *Annual Review of Sociology* 109.

<sup>12</sup> Bandes (n 9) 386.

<sup>13</sup> Shklar, 'The Faces of Injustice' (n 1).

of a political deliberation which brings all sorts of considerations, considerations of principle along with others, to one focus of decision – is that such a decision does not in itself announce that the other party was morally wrong or, indeed wrong at all. What it immediately announces is that *they have lost*.

We cannot avoid the primary victimisation caused by the actions of the offender, may not be able to do so concerning secondary victimisation, given the other interests in play, but can do so for the tertiary victimisation of subsequently calling the victims' position wrong.

### Epistemic injustice and phronesis

This issue can be connected –with a twist – to a concept coined by Miranda Fricker in her eponymous book: *Epistemic Injustice*.<sup>14</sup> This concerns the situations in which someone is wronged in his or her capacity as a knower. It can apply both to the weight given to a person's evidence, to 'certain speakers', as a type of *testimonial* epistemic injustice, as well as to the situation in which a societal institution or society *tout court* lacks the interpretative resources to make sense of the meaning a person of a particular social group or in a particular situation gives to his or her predicament, or *hermeneutical* epistemic injustice. In a number of publications, I have pointed to the difficulty in this regard of justice processes in adequately making sense of victimological experience.<sup>15</sup> As Shklar argued victims experience of their injustice is embodied, emotional, narrative, context-bound and idiosyncratic, which makes this at odds with the manner in which the justice processes frame their experience. In her words:

[T]he normal model of justice continues to have severe problems in coming to terms with victims. It limits itself to matching their situation against the rules, which is an inadequate way of recognizing them as victims (...) Indeed we often negotiate settlements (...) simply to move on with our various projects and the victims have to learn to live with them.<sup>16</sup>

The twist is then that the experience of injustice itself sets the scene for a particular form of hermeneutical epistemic injustice, in which the requirements of systems of justice crowd out the lived experience of injustice. At bottom it concerns the (criminal) law's concern with broken rules, over broken bodies and ruined lives.<sup>17</sup>

However, we should be weary of believing we can devise systems that do not compound the experience of injustice with such hermeneutical epistemic injustice. As David Graeber helpfully, revealed crystallization into fixed form of such institutions will by necessity involve its structuring into rule-based games, which do not sit easily with an experience which is profoundly idiosyncratic and identity-based.<sup>18</sup> Shklar also found that the limitations of justice in the face of injustice were not arguments against the law, which still may be "the best thing we can do".

However, two lines of thought can assist us making the best of such a difficult situation. The first considers the virtue underpinning our understanding of knowledge and expertise in social life. In the past twenty years professor of management and philosopher of science Bent Flyvbjerg has been calling on social scientists to return to refrain from building this on the virtue of *episteme*: the kind of context-independent and universal knowledge to which the natural science aspires.<sup>19</sup> Instead Flyvbjerg marshals Aristotle in his plea for social science that is based upon the virtue of *phronesis*, practical wisdom in particular social and political contexts. The crucial importance of the varied meaning people themselves give to their experiences in social life underlines the necessity of taking this thick social context into account and understanding that knowledge and expertise is contingent on and not abstracted from this context. Given the law's reliance on context-independent rules it is difficult to achieve within legal situations, but as the success of more context-focused processes of mediation and conferencing reveal pockets and spaces can emerge that can draw on phronesis as the key value.<sup>20</sup> Here solutions following crime and wrongdoing can draw on the expertise

<sup>14</sup> See Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford, Clarendon Press 2007).

<sup>15</sup> Pemberton (n 3).

<sup>16</sup> Shklar 'The Faces of Injustice' (n 1) 37.

<sup>17</sup> A point powerfully made by Elizabeth Anscombe. See G E M Anscombe, 'Modern moral philosophy' (1958) 33 *Philosophy* 1.

<sup>18</sup> David Graeber, *The Utopia of Rules: On Technology, Stupidity and the Secret Joys of Bureaucracy* (Melville House 2015).

<sup>19</sup> Bent Flyvbjerg, *Making Social Science Matter: Why Social Inquiry Fails and How It Can Succeed Again* (Cambridge University Press 2001).

<sup>20</sup> On the connection between such practices of restorative justice and the work of Shklar see Antony Pemberton and Pauline G M Aarten, 'A Radical in Disguise: Judith Shklar's Victimology and Restorative Justice' in Ivo Aertsen and Brunilda Pali (eds) *Critical Restorative Justice* (Hart Publishing 2017).

and understanding of those people bearing the brunt of social strife, while the mediators often show a good grasp of the practical expertise involved in understanding when rules should be followed or instead only stand in the way of the best solution.

The second point concerns the audience to which the case is made for our systems of justice. Rather than making them to a detached and reflective audience, to whom the experience of injustice is hypothetical and distant, Shklar would have wanted us to go out and make our case for legalist approaches to the constituencies experiencing their inadequacy, while fully acknowledging the possible validity of their grievances. She would have thought that the case for law and legalism is strongest once we acknowledge that it is a particular social outlook on social life, one that can specifically bolster its case by always remaining vigilant to the accuracy of the experience of those bearing the brunt of its shortcomings and injustices.

All of this suggests that we are at least not lacking in conceptual resources to “get started”. However, I am not convinced of our chances to make much headway in doing so: Flyvbjerg’s call for a *Perestrojka* in social and political sciences has met a decidedly lukewarm response, while the reaction to the recent crises and malpractice in social science research seems to be a heavier emphasis on the value of episteme. “Enlightenment now” as Steven Pinker, one of the cheerleaders of such an approach, would have it.<sup>21</sup>

That makes that in conclusion I would like to ask Professor Kennedy two questions, to which I very much hope he has an answer: What signs does he see in our current day and age that offer much optimism that we will emerge from our current nefarious situation between the rock of our liberal brethren and the hard place of the populist surge? And how do we slowly drill through the hard boards of our institutional arrangements, when other forces are making a load, almost deafening case, for chucking these hard boards in their entirety on a bonfire in tribute of xenophobic strong men?

### Competing Interests

The author has no competing interests to declare.

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<sup>21</sup> Steven Pinker, *Enlightenment Now: The Case for Reason, Science, Humanism and Progress* (Viking 2018).

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