Amartya Sen's *The Idea of Justice*– Some Kantian Rejoinders

Helga Varden

In an American Philosophical Association (APA) session in her honor, Barbara Herman responded to those praising her by saying that she didn't quite recognize herself in some of the very favorable descriptions of her work given that she had been walking among true giants.[1] Eveen if Herman does not feel like a true giant, she certainly is one. But more importantly here, one of the giants Herman was referring to was, I believe, Amartya Sen. Sen's influence in the world—and not only in the academic world or the world of philosophy—has been and continues to be tremendous. And like other true giants, some of his impressiveness resides in his ability to engage difficult and charged questions in a way that helps the world move in a better direction. As a woman living in a world dominated by men, I am very glad and deeply grateful that I have not only Herman as my friend and advocate, but also Amartya Sen. Sen's commitment to the advancement of women's conditions everywhere is unwavering. Another, often overlapping, group that Sen consistently fights for is the poor. Since I won one of the largest lotteries in the world, that is, I was lucky enough to be born in a wealthy country genuinely committed to the rights of its citizens, I have no firsthand knowledge of what it is like to be truly poor. Yet I believe it is reasonable to think that those who do know would join me in thanking Sen for going to bat for them time and time again, and now once more in his new book—*The Idea of Justice*. Moral, political, and social evolution is a slow and non-necessary process, and it requires, among other things, that those with power exercise it wisely. Fortunately, Sen is one of those wise people.

In philosophy, one great sign of respect is serious engagement with your colleagues' arguments. One of the most important colleagues in Sen's life has been John Rawls, another true giant and *The Idea of Justice* reflects this; not only is it dedicated to Rawls, but throughout the book Sen's admiration and affection for Rawls are impossible to miss. Which is not to say that Sen agrees with Rawls. Quite the contrary. Sen believes that the kind of contractarian position Rawls defends, which Sen calls "transcendental institutionalism" (5), has some serious problems—problems that

can best be overcome by adopting Sen's "comparative" or "realization-focused," capabilities approach. According to Sen, Rawls's theory shares two main features with other contractarian theories. On the one hand, Rawls's theory "concentrates its attention on what it identifies as perfect justice, rather than on relative comparisons between justice and injustice" (5ff.). On the other hand, "in searching for perfection, transcendental institutionalism concentrates primarily on getting the institutions right, and it is not directly focused on the actual societies that would ultimately emerge" (6). Sen argues that a major reason why these transcendental theories have problems when it comes to actual societies is that when reflecting on whether or not the theory is realizable, they engage only arguments concerning persons' ideal behavior. He also proposes that because contractarian theories—whether Rawlsian, Kantian, Hobbesian, Rousseauan, or Lockean—focus on institutions and ideal behavior, we can describe them by referring to a corresponding concept, "niti," utilized in Sanskrit writings on ethics and jurisprudence (20). I will return to the concept of *niti* as well as its contrary, *niyaya*, shortly.

The two main problems with contractarian theories with respect to actual societies, Sen continues, are that they are not "feasible" and that they are "redundant" (9ff.). The first problem, that contractarian theories are not feasible, is seen as issuing from their commitment to transcendental institutionalism. This commitment requires that they demonstrate the possibility of "reasoned agreement"—or what is often referred to as 'hypothetical consent'—regarding "the nature of the 'just society'" (9). And demonstrating "reasoned agreement" requires these theories to determine the institutional structure of the just society as well as the associated ideal behavior of persons. In these ways, Sen argues, contractarian theories "seem determined to take us straightaway to some fairly detailed formula for social justice and to firm identification, with no indeterminacy, of the nature of just social institutions" (89). Sen reflects that the problem, however, is that there is no such determinacy in detailing the ideal structure of society. He maintains that there is indeterminacy regarding both what the fundamental principles of justice are and how to apply "otherwise significant concept[s]," or principles, in particular circumstances, such as those that determine exactly which tax rate should regulate economic redistribution in a society (374). Also, in relation to Rawls's principles of justice as fairness (or, alternatively, his lexical ordering of principles of liberty and equality), Sen proposes that there is too much "decisiveness" (ibid.). Even though liberty is essential and most of the time should override concerns of equality, sometimes concerns of equality should override liberty. Sen thinks that Rawls is starting to realize these problems of indeterminacy in his later philosophy, as evidenced by his introduction of the notion of a family of liberal, political conceptions of justice, of which justice as fairness with the original position is but one. The problem however is that Rawls never clarifies the implications of this concession. Indeed, Sen concludes, "Once the claim to uniqueness of the Rawlsian principles of justice is dropped (the case for which is

outlined in Rawls's later works), the institutional programme would clearly have serious indeterminacy, and Rawls does not tell us much about how a particular set of institutions would be chosen on the basis of a set of competing principles of justice that would demand different institutional combinations for the basic structure of the society" (12). One option "forcefully raised" by Rawls's later philosophy, Sen suggests, is to abandon transcendental institutionalism altogether, but, Sen says "I am afraid I am not able to claim that this was the direction in which Rawls himself was definitely heading" (ibid.).

Regardless of the possible complexities Rawls's later philosophy raises in relation to the issues of indeterminacy, Sen proposes that Rawls's decisiveness at least in earlier work regarding the institutional structure of the just society entails that Rawls excludes considerations he ought not to exclude. These unfortunate exclusions include considerations such as investigating "comparative questions about justice;" incorporating "broader perspectives of social realizations;" integrating "adverse effects on people beyond the borders of each country;" developing a "systematic procedure for correcting the influence of parochial values;" ignoring "the possibility that even in the original position different persons could continue to take, even after much public discussion, some very different principles as appropriate for justice;" and, finally, "giving no room to the possibility that some people may not always behave 'reasonably' despite the hypothetical social contract, and this could affect the appropriateness of all social arrangements" (90). These deficiencies of analysis, or derivatives thereof, are those that Rawls is seen as sharing with most contractarian theories, and they are deficiencies that make these theories unfeasible. They are unfortunate results of assuming determinacy where there is none to be found, and of assuming ideal behavior that does not exist in the real world. Indeed, the problem of indeterminacy is seen as intensified by the somewhat "tyrannical" commitment of so many of these theories to states "as being, in some way, fundamental, and in seeing them not only as practical constraints to be addressed, but as divisions of basic significance in ethics and political philosophy," including for dealing with issues of poverty (143). And since the global state is likely to be a practical impossibility in the foreseeable future, this entails, Sen thinks, that most of these theories are much too toothless regarding the gross injustices in the distribution of the world's material resources.

The only way to avoid these problems, Sen argues throughout *The Idea of Justice*, involves accepting that "the identification and pursuit of the demands of justice may have to take a much broader and more contingent form" (91). And this connects up with the second main problem Sen sees as associated with contractarian problems, namely the "redundancy of the search for a transcendental solution" (9). Not only are contractarian theories not "feasible," Sen maintains, but they are also redundant or unnecessary. In fact, all we need for a theory of justice in the actual world is "a framework for comparison of justice for choosing among the feasible alternatives and not an identification of a possibly unavailable perfect situation that could not be

transcended" (9). The alternative to unfeasible and redundant contractarian theories is, Sen continues, the "comparative," "realization-focused," or "*nyaya*" (Sanskrit) theories of justice, which share a commitment to "social choice" theory. In the Western tradition, social choice theory is taken to include thinkers from Jean-Charles de Borda and Marquis de Condorcet to Adam Smith, Mary Wollstonecraft, J. S. Mill, and Karl Marx. In the Indian ethical and jurisprudential tradition, *nyaya* is a prevalent idea throughout, but captured most famously in Krishna's position against Arjuna (who is defending *niti*) in the *Bhagavadgita* (22–23). The common thread among the Indian thinkers is that they were "all involved in comparisons of societies that already existed or could feasibly emerge, rather than confining their analyses to transcendental searches for a perfectly just society. Those focusing on realization-focused comparisons were often interested primarily in the removal of manifest injustice from the world that they saw" (7). In like fashion, Sen proposes that justice requires us to look not at how various social choices and institutions affect average utilities or happiness—or for that matter, Rawls's 'primary goods'—but instead at capabilities understood as "the substantial freedoms that people enjoy" (19) or "the *actual opportunities* for living" (233). In addition to avoiding some of the problems haunting much utilitarian and happiness-based accounts (including those of prominent economic theories), this perspective, Sen maintains, has a particular advantage in its ability to give proper voice to the freedoms of the vulnerable—whether as victims of historical oppression, such as women and the poor, or of some misfortune, such as the disabled and the sick. He argues that by insisting on a focus that pays attention to what persons actually can do, one avoids building theories that fail to pay proper attention to the actual hindrances to freedom with which real people struggle. These hindrances—whether natural or human-made—are front and center in Sen's own conception of freedom, given that its focus on capabilities requires one explicitly to identify and deal with them.

At the heart of Sen's approach lies a commitment to fighting "blatant injustices," such as eradicating starvation and providing basic medicines for vast populations of the world. To do this, as noted already, Sen argues that we do not need the comparison case of the perfectly just society. Assuming that the Mona Lisa is the perfect painting, we do not, he suggests, need Mona Lisa to determine whether a painting by Van Gogh is better than a paining by Rembrandt (16). Similarly, to identify starvation in the world as a crisis of injustice and to search for ways to alleviate it we do not also need the standard provided by a perfectly just society. That is, finding ways to alleviate the blatant starvation and thereby make the world a more just place doesn't require such a grand standard. In addition, an extension of Sen's indeterminacy argument concludes that it is not possible to say in the abstract what weight should be given to which important concerns of justice when it comes to developing and implementing solutions. For example, when comparing which of three children should be given the flute that one of them has made, Sen argues, along with much libertarian theory, that the child who made it

presumably has a stronger claim on it than either the child who can actually play it or the child who has no toys. But he also argues, against libertarian theories, that some considerations may override all other concerns (297ff.). For example, if the flute is the only way to provide a poor child with a means of survival, perhaps by busking, that child's claim could override the others', including the claim from the child who made the flute.

Sen's emphasis on the importance of freedom as capability in a just world does not, however, entail that he thinks everything in the world can be coercively redistributed so as to secure equality for all in respect to capabilities (231ff.). Several other considerations, including liberty and labor, are also seen as important. More generally, Sen emphasizes that the *process* by which a person's capability is enabled and secured cannot be ignored when determining which capabilities a person can be seen as having a right to. And although Sen doesn't think there are exact, determinate answers regarding the appropriate balance between "opportunity aspects" and "process aspects" of freedom-as-capability in the absence of actual cases (228), he does make two further, important clarifications regarding freedom. First, he argues that even if one's actual choices coincide with the coercive restrictions imposed on one's choices, this does not entail that the choice is unrestrained. For example, if there is a law preventing me from going outside in the evening, then my choices are coercively restrained even if it happens to be the case that I prefer to stay inside in the evenings (225ff.).

Second, Sen takes issue with Philip Pettit's republican conception of freedom, according to which "a person's liberty may be compromised even in the absence of any interference, simply by the existence of the arbitrary power of another which *could* hinder the freedom of the person to act as they like, even if that intervening power is not actually exercised" (305). Sen responds to this view by saying that

> Certainly being free to do something independently of others (so that it does not matter what they want) gives one's substantive freedom a robustness that is absent when the freedom to do that thing is conditional either on the help—or on the tolerance—of others, or dependent on a coincidence ('it so happens') between what the person wants to do and what the other people who could have stopped it happen to want. (305)

To illustrate this point, Sen reflects upon three different cases involving a disabled person. In the first case, "Person A is not helped by others, and she is thus unable to go out of her house;" in the second case, "Person A is always helped by helpers arranged either by a social security system in operation in her locality (or, alternatively, by volunteers with goodwill), and she is, as a result, fully able to go out of her house whenever she wants and to move around freely"; and in the final, third case, "Person A has well-remunerated servants who obey—and have to obey—her command, and she is fully able to go out of her house whenever she wants and to move around freely" (306). Sen then maintains that in terms of capability, both the second case (disabled person supported by a social security system or by volunteers)

and third case (disabled person with servants) are equal. The main contrast in terms of capability concerns only the contrast between these two cases and the first case, where the disabled person is not helped to go out of the house. Sen argues that Pettit, however, wrongly concludes that only the person in the third case (disabled + servants) is free. Sen reasons that although the republican approach has a "discriminating power that the capability approach lacks," which is the ability to focus in on a person's dependence on others or on a system (as exemplified by the person in the second scenario), it lacks a discriminating power of the capability approach, namely to identify whether or not a person has "the capability and freedom to go out of her house whenever she wants" (307). Hence, the main problem with the republican approach, Sen maintains, is that "Placing Cases 1 and 2 in the same box of non-freedom, without further distinction, would steer us towards the view that instituting social security provisions, or having a supportive society, cannot make any difference to anyone's freedom, when dealing with disabilities or handicaps. For a theory of justice that would be a huge lacuna" (307). On the basis of these reflections, Sen concludes that although the republican concept of freedom as independence can complement or "add to" the idea of freedom as capability (308), it cannot "*replace* the perspective of freedom as capability" (306, 308). Then again, he points out, the view that seeing freedom as capability and freedom as independence are necessarily in tension "arises if and only if we have room for 'at most one idea.' It arises when looking for a single-focus understanding of freedom, despite the fact that freedom as an idea has irreducibly multiple elements" (308).

One final point concerning the complexity of the idea of freedom as it relates to justice should be mentioned. For Sen, human rights are not limited to what can be enforced. Human rights also require the efforts of, and can be established by, at least to some degree, the voluntary activities of non-governmental organizations, activists, global agencies (including the news media), and heroic visionaries. To what extent states—including a world state—and their institutions are necessary for justice on our planet is a contingent question. These public institutions are not in principle necessary for justice; it is a contingent issue to what extent they are useful or not for bringing justice about. Sometimes they further global justice, sometimes not. Moreover, Sen emphasizes democracy and, in particular, free speech and a free responsible media as essential to the possibility of justice. Without the free flow of information that free speech and a reliable media enables, good decisions concerning any specific issues in any actual society are simply impossible. Indeed, though Sen thinks the global state as a prudent solution to issues of global justice is far off in the future, he thinks that a well functioning media in combination with other organizations that can provide conditions of global democracy in the context of information is a first step in the right direction (408ff.).

Naturally, the above summary of Sen's 400 plus page book does not do justice to all of its insights. Still, I trust it is sufficient to provide a basis against which I can

raise some, I hope, fruitful questions concerning Sen's view that liberal theories' typical focus on states and institutions is misplaced. Contrary to Sen, I will argue that justice requires enforceable rights, including for the disabled, and that states have an in principle necessary role to play here. Second, I will try to boost my argument for the necessity of states by arguing that rightful resolutions of many of the indeterminacies Sen points to require the establishment of public authorities, including states. Third, I will argue with Kant that close attention should be paid to the distinction between private and public right, and that such a distinction may equip a republican theory with the framework within which indeterminacies, capabilities, and public reason get the importance Sen wants them to have. Hence, Kant's republicanism, one of a few important philosophical theories of justice Sen barely engages, and one that Pettit doesn't engage at all in his book on republicanism, may turn out to be a significant defense of much of what Sen wants to argue for. Therefore, Kant's suggestion that justice—for ideal, rather than merely prudential reasons—requires the establishment of public authorities constituted by a certain set of institutions is not, I propose, a drawback for a theory of justice. Quite the contrary, it is a significant strength. Fourth, I will argue that Sen's employment of the concept 'transcendental' does not agree with Kant's own, as it seems closer to Kant's use of 'transcendent.' Moreover, when we understand how Kant uses these two concepts, some of the worries Sen raises may be quieted. In the final section, I will argue that although I find Sen's proposal that ideal theories should spend more time taking people's bad or non-ideal behavior into account a compelling one, questions concerning non-ideal behavior are primarily important for the institutional design for a theory of justice. In an attempt to be space-efficient, I will utilize an example employing Thomas Pogge's recent suggestion for a "Health Impact Fund" to help address these issues.

I believe Sen would agree that one prominent current example of academic initiative and engagement that furthers the cause of justice is the Incentives for Global Health's (IGH) "Health Impact Fund" (HIF), a non-governmental organization (NGO) led by Thomas Pogge.[2] The idea behind the HIF is, in brief, that the IGH will raise money—mainly from governments—to finance rewards to pharmaceutical companies for innovations in medicines having great health impact for the world's poor. The pharmaceutical companies must agree to sell the medicines to the poor at cost, but in return they will be rewarded for the actual positive impact the medicines have on the health of the poor. This, the hope is, will give the pharmaceutical industry an apparently much needed incentive to focus research where the impact on health is likely to be the greatest, and from where the biggest threat to human survival is likely to come, and so should be addressed first.[3] I believe that Sen will say that for each penny that is thereby transferred from the powerful to the powerless, and thereby increases the powerless persons' capabilities, the world becomes a more just place.

I have no doubt that if successful, such a system will make the world a better place, and I also believe that if successful, it will create pragmatic preconditions for a more just world. Indeed, it may be one of the more prudent and effective means of bringing about such preconditions for a more just world, given the horrible state the world is in. I'm not so sure, however, that private initiatives (such as the HIF) falling under the umbrella of an NGO are constitutive of a just world, or can make the world just. The reason for my skepticism is that the 'rights' of the poor to medicines in this system are still dependent upon the choices of the rich, since such a privately constituted system does not, by itself, secure poor persons' rights to healthcare. Securing poor persons' rights to healthcare requires, I believe, creating public institutions in relation to which the poor have in principle enforceable health care claims.

To illustrate this point, let me draw on Lucy Allais's powerful Kantian analysis of whether or not to give money to beggars.[4] Allais argues that giving money to beggars should not fill us with moral feelings of satisfaction, but conflicted feelings. The reason for the conflict is twofold. On the one hand, we recognize that it's the best we can do under current conditions. On the other hand, we recognize that having such private power over other human beings is unjustifiable, and that private responses are not a proper solution to a rights issue. The source of the problem is that giving to beggars amounts to trying to solve a public, systemic problem by individual private means. Yet private responses are in principle inadequate, since they are irreconcilable with persons' rights to freedom or to independence from being so subject to other private persons' power or choices. Hence, finding ourselves in a situation where some have to beg for money in order to legally access means is not only to find ourselves in a relation of unjustifiable power over other human beings that no person has a right to be in, but also to recognize that the only response within our own means is one that is insufficient to solve the problem. Consequently, moral feelings of gratitude (on the part of the poor) and of beneficence (on the part of the rich) are inappropriate moral feelings. Instead, the appropriate feelings on behalf of the rich are those of inadequacy and inner conflict, as one recognizes that one is not rightfully interacting with others. Rightful interaction on the part of all parties requires independence from the type of private dependency relation begging involves. Therefore, even a world in which the rich continuously give money to beggars so that none of them starve still is not a just world. It is likely that generously donating to the poor may be the only available means of empowerment, and hence a first step towards enabling rightful or just relations in the future. But charity in itself does not establish justice or rightful relations among persons.

Applying this reasoning both to Pogge's example and to Sen's conception of justice creates the same worry. To start, it is true that if the Health Impact Fund is a wonderful success and hence increases the capabilities of all the poor persons in the world, then the world will be a much better place. It is also true that the poor will now be situated in conditions where advancing the establishment of their rights

has become a much more feasible project. I do not, however, think it is true that it is now a more just world. The reason is that the possibility of capability for the vulnerable is still fundamentally dependent upon the powerful persons' choices. A just world requires that the poor are not so dependent upon the actual choices of the rich (private persons and countries) to continue to give money to the Health Impact Fund, and of the pharmaceutical companies to continue to support the IGF's efforts. So-called welfare rights require that persons are able to exercise joint control in relation to the total system of freedom-determining economic, financial, and technological systems upon which they are dependent for legal access to means. Welfare rights are systemic measures to secure all citizens' rights to independence from each other's arbitrary choices and their dependence on public law alone, which guarantees legal access to means for those who have none. Welfare rights are therefore not rights individuals have in relation to one another as private persons. Rather, they are rights citizens have in relation to their public institutions.[5]

At this point, one may object on behalf of Pogge and Sen that the HIF could assume sufficient coercive control in the world to ensure that everyone complies with its requirements concerning medicines. That is, one could argue that the only reason why the HIF is merely a voluntary adventure is pragmatic; it could, in principle, have coercive powers. But this response will not solve the underlying problem, since the poor are still subject to some private persons' arbitrary choices; it just so happens that the powerful private persons in charge (Pogge and the IGF) choose to act in the interest of the poor. But they could choose otherwise. Therefore, poor persons' rights to be independent of other persons' arbitrary choices are not secured by the adoption of coercive power by private institutions. The only way to overcome this problem of private dependence in a way consistent with persons' rights to be independent of the arbitrary choices of others, I suggest with Kant, is through the establishment of public institutions. A public institution represents all and yet no one in particular, and it is the means through which we choose together, as a unified, representative body. Public institutions, including states, are therefore ideal preconditions for justice—and not merely possible, instrumental means for securing justice.

This same point applies also to fiduciary relations. As we noted above, in his discussion of Pettit's conception of republicanism—or freedom as independence—Sen is quite sympathetic to the emphasis on independence, but Sen argues that republicanism fails to pay sufficient attention to the moral improvement of the world that comes with increased capability. The three earlier mentioned cases of a disabled person's ability to leave her house is paralleled by Sen's discussion of the distinction between "direct control" and "indirect control" as enabled by "effective power" (301ff.). Sen's examples of indirect control are the kind of effective power a patient has when a physician acts on his behalf and when civic authorities fight local epidemics on behalf of the affected people. In the physician-patient example, Sen argues that "there is no violation of the patient's freedom—indeed, there is an

affirmation of that freedom in the sense of 'effective power' if the physician's choice is guided by what the patient would have wanted" if unconscious, and regardless of whether the patient is conscious or unconscious, if the physician's choice is guided by "how the patient would actually choose, given enough knowledge and understanding" (302). The important thing to note here—for the purposes of discussing the ideal role of public institutions—is that Sen is defending a fundamentally prudential view of public institutions. As long as the person who is in effective control acts in line with what the person incapable of acting would want (given consciousness, sufficient knowledge etc.) or would reasonably want, the resulting relation is just. Sen sees no ideal problem of freedom related to acting on another person's behalf, or, for that matter, to being dependent on another in order to exercise agency at all. Even though Sen is sympathetic to the view that it's better if the vulnerable are not dependent upon others' voluntary help and charity, justice as capability does not require such independence. Moreover, justice as capability also does not require anything but virtuous private persons acting on our behalf when our agency is for some reason impaired. For Sen, there is no principled need to establish public institutions to secure freedom also in this regard.

I am skeptical of this view of what we may call rightful fiduciary relations. As I argue elsewhere, I believe that the reason why we have laws governing professionals acting on our behalf—whether physicians, lawyers or social workers—is not merely in response to the harmful effects of vicious, incompetent, or unqualified professionals.[6] The ideal reason, I believe, is to make sure that the relationship itself is governed by public law rather than by the powerful person's arbitrary choices, that is, by right rather than might. This is so regardless of whether or not the professional action taken is beneficial for the patient. On the one hand, legal regulation of fiduciary relations is the way in which we give proper voice also to the vulnerable, namely to those who do not have the knowledge or expertise required to evaluate the wisdom of those acting on their behalf. On the other hand, legal regulation is the way in which we ensure that indeterminacies regarding how even sound principles of care are applied to particular cases are not merely solved by someone's (the powerful persons') arbitrary choices. That is to say, by establishing public, rule-governed institutions, we establish an artificial person through which we seek to exercise common agency, rather than relying on fiduciary relations in which only one of the persons in reality has agency. The public authority represents all interacting parties, and yet no one in particular—and in so doing it is able to give proper voice to those who do not have one. In addition, it enables us to solve indeterminacies concerning the application of sound principles to particular cases in a way that yields rightful relations. The establishment of public authorities—or the liberal state—is therefore not only a prudential response to the inconveniences involved in trying to establish justice without it, but more importantly it is the ideal way in which we go about establishing justice.

Making an ideal—or non-prudential—case for the necessity of public institutions, including the state, can be done also with respect to relations other than fiduciary ones. We can, still with Kant and in support of much of what Sen is arguing for in *The Idea of Justice*, show that the indeterminacies in the application of the principles of private property and contracts lead to the necessity of public institutions.[7] Similar to Sen's discussion under the heading of "Positional Perspectives" (155ff.), Kant argues that there are reasonable disagreements regarding the specifications of the application of principles of private right concerning property and contracts. The possible disagreements concerning, say, where your property ends and mine starts, and regarding what we actually agreed to when we signed the contract, are not all unreasonable. Because what we are disagreeing about is how normative principles apply to empirical circumstances, and because both sides in the disagreement can be reasonable, there is no single correct answer to many questions of justice. Moreover, Sen rightly, in my view, makes an analogous point in his discussion of Rawls. Sen notes that in Rawls's later writings, he admits that there can be a family of liberal political conceptions of justice, which raises the question of how to select the specific principles that will govern any actual interaction. Sen, it seems, falls on the side of saying that we must select the 'right' principle through informed, public reasoning, where by 'public' Sen means individuals reflecting together on the choices in public forums. Although Rawls and Sen, in my view, correctly identify the problem, I'm suggesting (with Kant) that appealing only to public reason so understood is an insufficient response, since we do not thereby solve the problem. For even when we have reasoned as well as Sen wants us to, still we end up with an informed private choice, not a public one. Or to put the point in Sen's language, the problem of the 'tyranny of the majority' is not thereby eliminated, since if we enforce one reasonable choice rather than some other reasonable choice, what we are enforcing is still an arbitrary reasonable choice.[8] That is to say, we are still enforcing a form of power that is inconsistent with each person's right to independence from being so subject to other persons' might. Thus there may be an alternative reason why Rawls (in his later philosophy) is increasingly concerned to show the role of public institutions as necessary for providing solutions to justice. And Kant can give Rawls what he needs to overcome Sen's worries. Kant, in his account of private right, explains what the principles of private right are and why a solution to the problems of indeterminacy regarding the application of principles of private right involves the establishment of a 'we' proper, namely a will the represents everyone's general or common will, or the establishment of common agency with the right impartial form. That is, the solution requires a public authority that acts on behalf of each of us and yet on behalf of no one in particular.

On the Kantian position I have outlined above, there are three different types of private right principles, understood as principles regulating relations between private persons. They are principles governing (1) private property appropriation,

(2) contract relations, and (3) fiduciary relations (or what Kant calls "status relations").[9] Given the empirical fact that each human being occupies a tiny amount of physical space relative to the size of the globe, our first attempts at rightful political interaction will be local. Therefore, we start with liberal states. By establishing liberal states we establish geographically limited monopolies on coercion. The liberal states, in turn, secure all of their citizens' rights to access protection under laws that in addition to securing their physical protection also enable rightful private relations with regard to property appropriation, contracts and fiduciary relations.[10] Naturally, if this were all that the liberal state accomplished, then it would look like a libertarian state. But Kant's insight is that the libertarian state is not enough to ensure justice. Because the state must secure each of its citizens' basic right to freedom as independence, it must also ensure that no one ends up in private dependency relations, in which a person's freedom and legal access to means is subject to some other private person's choice. In this way, Kant justifies the general claim that public right is not reducible to private right—or that the state must go beyond what is required to ensure private right by establishing basic public institutions, which secure everyone unconditional poverty relief as well as economic and financial conditions under which independent interaction is possible. It does this as a matter of public right, not private right.[11]

Although reasons of space hinder me from further detailing these aspects of Kant's conception of justice, notice that it follows from this Kantian position that understanding how the rights of the mentally disabled are secured in relation to their legal guardians, strangers, fellow citizens, and public institutions is not a 'single-lens' analysis of the kind Sen is so worried about. It is an analysis that requires the combination of several perspectives (principles of both private and public right) as well as sensitivity to the actual world in which a particular mentally disabled person lives.[12] Hence, Kant's theory of justice is able to overcome the difficulties associated with the problematic kind of power over others Sen attributes to private persons due to an asymmetry in knowledge, wealth or otherwise, and it is able to capture the important requirement of a multi-perspectival analysis of complex issues such as we find in the rights of the disabled. Moreover, in contrast to what Sen seems to imply, it is not the case that this kind of position defends an 'either-or' conception of the existence of justice with no room for nuance and partial progress. It does put the foot down when it comes to certain kinds of regimes, such as Nazi Germany or apartheid South Africa, and, in my view, this is a strength rather than a weakness of the theory.[13] But it does not maintain that there is no room for improvement within minimally just societies, or that some blatant injustices, such as denying same-sex marriages, must be approached in exactly the same way as others, such as sodomy laws.[14] Being denied the right to marry is to be denied entrance into civil society in relation to one's family, whereas sodomy laws deny citizens' rights to their own bodies and hence to their own persons. Consequently, people have a

right to physically resist sodomy laws, whereas they must keep working towards establishing same-sex couples' right to marry. And, of course, none of this undermines the claim that if justice is not realizable, then perhaps the best we can do is to further conditions making the possibility of justice more likely—whether through private charity or such private initiatives such as the Human Development Fund. Neither does it deny that there are ways in which virtue may be a precondition for justice. Rather, all I have maintained is that it seems possible to argue both that Sen's '*niti*' provides necessary conditions for getting '*nyaya*' right and that justice is restricted to enforceable aspects of freedom without thereby saying that all there is to freedom is niti and enforceability.

Let me also include a brief note on Sen's use of the concept 'transcendental.' Sen views his understanding of this concept as one that captures Kant's philosophy, but Kant's own understanding of this concept is very different from Sen's. In fact, Sen's 'trancendental' is much closer to, even if not the same as, Kant's understanding of the concept 'transcendent.' According to Sen, remember, 'transcendental institutionalism' refers to theories that aim to outline ideal behavior and the ideal just society, and then to use these ideals as the standard against which actual societies are measured. But this understanding of 'transcendental' is quite different from Kant's own. In brief, in the theoretical philosophy, Kant uses the term 'transcendental' to refer to necessary *a priori* conditions for empirical knowledge. If we were to use this term in relation to his political philosophy, it would refer to necessary conditions for justice, or rightful relations. If we stay focused on political philosophy, then, transcendental conditions for right—such as the *a priori* principles of private and public right—are not an attempt to outline an ideal, perfect world beyond our own, but rather to describe the necessary conditions that make rightful interactions with regard to various empirical objects in the world possible. Now, if we move beyond trying to identify the necessary conditions for just private and public relations, to envisioning how the principles of private and public right would be systematically unified in an ideally just state, then we are trying to construct a 'trancendent' ideal. That is, we move beyond our world to imagine a perfect and unattainable world. The purpose of providing an analysis of a transcendent political ideal is to become increasing clear on what we are striving towards, even though we also know that we can never fully realize it. Given this way of reading the distinction between 'transcendental' and 'transcendent,' I see no reason for Sen's skepticism with respect to the project of 'transcendental institutionalism,' nor for his suggestion that we ought only employ 'contingent' distinctions. For all the transcendental institutionalist so understood wants to do is to provide an analysis of various principles necessary for rightful interactions in this world.[15] For example, the transcendental arguments can show why same-sex couples should have the right both to marry and to engage in consensual sexual relations. In contrast, the ideal transcendent society merely becomes a means of making the overall aim more vivid and clear to us.

I would like to finish by supporting Sen's claim that ideal theories of justice must spend more time incorporating the problems associated with bad or non-ideal behavior when they envision reliable paths to justice. Since I'm currently convinced by Kant's argument that public institutions are constitutive of rightful relations, I'd like to rephrase Sen's point slightly. I believe liberal theories, in their aim to envision both what constitutes a minimally just society and what constitutes the necessary institutional structure of the public authority, must take the time to ensure that the structure itself does not recreate arbitrary private power in its worst forms even if very bad people are in charge of public offices. The crises attending private organizations—for example, the Catholic Church and its institution of unchecked trust-based associations between its priests and children as well as other vulnerable persons—have unsurprisingly had their parallels in the history of public institutions. To give one example, the history of abuse in public orphanages around the world is at least as gruesome as the Catholic Church's history of its priests' abuses of children. The problem, it seems fair to say, is that much previous and current thinking—common sense or theoretical—around these institutions has been based, terribly naively, on a false assumption. That assumption is that, because these institutions are supposed to create an environment of trusting and caring relations for persons who have already been abused or who are particularly vulnerable, those entrusted with these jobs or vocations would themselves neither be tempted by, nor have sought jobs in these institutions precisely because of, the opportunity they provide for power over weak and vulnerable others. The assumption is that only virtuous or just people do the work of virtue or justice. Hence, whether religious, private, or public, the institutions set up to protect the weak and vulnerable had no required, enforceable institutional measures to ensure the absence of abuse. That is to say, although these institutions were envisioned to be regulated by rules of law and virtue—say, public or religious law constitutive of institutional authorities created to protect the rights of children and other vulnerable people—in reality the actual persons vested with this authority were unchecked in their exercise of this authority. Because of the way in which the rules permitted these authority figures to associate one-on-one with, and apply and enforce rules against the vulnerable for long periods of time, these institutions became havens for abuse rather than functioning as institutions for preventing it. In other words, the institutional design was disastrously flawed. In fact, although I agree with Sen that a properly functioning media and information system is one necessary safeguard for inhibiting persons from committing such abuses, I suspect that unless there is a sufficient public system for securing the oversight of the rights of each vulnerable person, there is still much too much dependence on the virtue of individuals to do the job.

Helga Varden, University of Illinois at Urbana-Champaign

Notes

Thanks to Lucy Allais, Michel DeMatteis, and Shelley Weinberg for very useful discussions of the ideas and their presentation in this paper.

1. The annual conference of the Pacific Division of the American Philosophical Association, in Vancouver, Canada, April 2009.

2. On page 263, Sen responds to Pogge's earlier criticisms that Sen fails to order the importance of various capabilities, by arguing that, "I would like to wish good luck to the builders of a transcendentally just set of institutions for the whole world, but for those who are ready to concentrate, at least for the moment, on reducing manifest injustices that so severely plague the world, the relevance of a 'merely' partial ranking for a theory of justice can actually be rather momentous." In light of this discussion, it seems fair to believe that Pogge's proposal of the Health Impact Fund is a step in the right, non-ideal direction according to Sen.

3. This outcome is, I believe, also in line with Sen's view of asymmetrical, power obligations. At one point, Sen illustrates his objection to Rawls's mutual cooperation conception by drawing on Gautama Buddha's view of 'obligations of power.' Sen explains that on this view, obligations track asymmetry rather than the contractarian notion of symmetry. In addition to enabling explanation of obligations to animals, Sen argues with Buddha that it also enables us to explain an important aspect of parental obligations. In particular, "The mother's reason for helping the child, in this line of thinking, is not guided by the reward of cooperation, but precisely from her recognition that she can, asymmetrically, do things for the child that will make a huge difference to the child's life and which the child itself cannot do" (205ff.). A little later Sen adds this reflection: "Arguments that do not draw on the perspective of mutual benefit but concentrate instead on unilateral obligations because of asymmetry of power are not only plentifully used in contemporary human rights activism, but they can also be seen in the easy attempts to recognize the implications of valuing the freedoms—and correspondingly human rights—of all." He draws on examples of Tom Paine and Mary Wollstonecraft by arguing that "what Wollstonecraft called 'vindication' of the rights of women and men drew a great deal on this type of motivation, derived from reasoning about the obligation of effective power to help advance the freedoms of all" (206).

4. Lucy Allais, "Should I Give To Beggars?" This paper was presented at the conference "Poverty; Charity; Justice," organized by The Wits Centre for Ethics and the Philosophy Department at the University of Witwatersrand, March 12–14, 2010. It is cited here with approval from the author.

5. I develop this interpretation of Kant on poverty in "Kant and Dependency Relations: Kant on the State's Right to Redistribute Resources to Protect the Rights of Dependents," *Dialogue—Canadian Philosophical Review* 45 (2006): 257–84. In "Kant's Non-Absolutist Conception of Political Legitimacy: How Public Right 'Concludes' Private Right in 'The Doctrine of Right,'" *Kant-Studien* (forthcoming), I show this argument fits into Kant's overall account of public right.

6. My main paper on this issue is "The Priority of Rightful Care to Virtuous Care: A Kantian Critique of the Care Tradition," which is under revision for *Kantian Review*. An outline of some core features of this argument is also found in "Kant's Non-Voluntarist Conception

of Political Obligations: Why Justice is Impossible in the State of Nature," *Kantian Review* 13.2 (2008): 1–45.

7. Sen notes (325) that John Rawls never defends "a general right to property." In line with what I'm arguing in this paper, I believe this is correct. I believe however, that Rawls's lack of a private right account is a drawback for his position, as it deprives him of the possibility of explaining the necessity of a public authority, on which so much of his account relies. It also deprives him of the distinction between private and public right. Indeed, I believe that Rawls's account is best read as a public right account, to which a private right account needs to be added. I defend this reading of Rawls in both "G. A. Cohen's *Rescuing Justice and Equality*—a Critical Engagement," in *Social Philosophy Today* (forthcoming), and in "The Priority of Rightful Care to Virtuous Care." In my view, Arthur Ripstein, in "Private Order and Public Justice: Kant and Rawls" *Virginia Law Review* 92 (2006): 1391–1438, also argues consistently with these claims.

8. See, for example, a related discussion by Sen in chap. 18, "Justice and the World," 388–415.

9. See Immanuel Kant, *The Metaphysics of Morals*, ed. and trans. Mary Gregor (Cambridge: Cambridge University Press, 1996), 37–66.

10. In the global context, corresponding indeterminacies arise in interstate relations as well as in cosmopolitan relations, which again give rise to the need for related public institutions. Given the space constraints of this paper, I cannot go into those issues here. I do, however, deal with some of them in "Diversity and Unity. An Attempt at Drawing a Justifiable Line," *Archiv für Rechts- und Sozialphilosophie/Archives for Philosophy of Law and Social Philosophy* (ARSP) 94 (2008), Heft 1: 1–25; and in "A Kantian Conception of Global Justice," *Review of International Studies* (forthcoming).

11. I have written several papers on this distinction between private and public right as it relates to poverty, the economy and financial systems. For example, see my "Kant's Non-Absolutist Conception of Political Legitimacy," 257–84. In these papers, I also refute Onora O'Neill's take on Kant and poverty, which is the only Kantian approach Sen uses positively in *The Idea of Justice* (see 382ff.). In addition, I justify those statements by Barbara Herman concerning why states are primary loci for poverty relief that Sen finds so puzzling and unconvincing (see 413n). For a somewhat different interpretation of Kant and poverty relief that also emphasizes Kant's distinction between private and public right, see Sarah W. Holtman's "Kantian Justice and Poverty Relief," *Kant-Studien* 95: 86–106.

12. I expand upon these kinds of issues in "The Priority of Rightful Care to Virtuous Care."

13. I engage this issue in "Kant's Non-Absolutist Conception of Political Legitimacy."

14. See my "A Feminist, Kantian Conception of the Right to Bodily Integrity: The Cases of Abortion and Homosexuality," in *Analytical Feminist Contributions to Traditional Philosophy*, ed. Anita M. Superson and Sharon Crasnow (New York: Oxford University Press, forthcoming), and in "A Kantian Conception of Rightful Sexual Relations: Sex, (Gay) Marriage and Prostitution," *Social Philosophy Today* 22 (2007): 199–218.

15. I am very grateful to Lucy Allais for helping me understand this distinction between transcendental and transcendent in Kant's philosophy.