

The Problem of Injustice: Toward Pragmatic Libertarian Answers

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Introduction

Is spontaneous order feasible in the political realm? Can politics be self-organizing in ways comparable to the unplanned order of markets? Although this question is too large to be dealt with in a single paper,¹ it provides the impetus for a more focused examination of the problem of rectifying injustices. This is a crucial question because if there is any hope of bringing about a more decentralized, minimally interventionist political order within which the freedom and autonomy of all individuals is assured, the obstacles created by serious injustices must be removed, and continued attention to the problem of justice must be sustained. Failure to do so would put the legitimacy of said political order in question. Before proceeding any further, I must explain what I mean by political order. Such an order is the result of at least two processes: a regulatory process and a legitimizing process. The former concerns the protection of individual rights (e.g., rights to life and liberty), and the facilitation of cooperation (e.g., lowering transaction costs). The latter consists of formal and informal mechanisms through which the members of a political community participate in the creation of the said order and by means of which they also express, or are provided with reasons for not withdrawing, their consent; these include the electoral process as well as policies aimed at rectifying injustices of the sort that could threaten the stability of the political order if they were not addressed (e.g., access to education in order to compete in a meritocratic society).² Until recently, economists and political philosophers known for their interest in the theory of spontaneous order have paid more attention to (the dysfunctional aspects of) the regulatory function than to the legitimizing function.³ More efforts are made today, however, to balance these two aspects. John Tomasi (2011: 165) credits the “Arizona school of political philosophy,” with which he is linked in some measure, for having undertaken

much of that work.⁴ This paper fits within this trend but I take a few detours through sources that differ from those used by these authors.

Both aspects include practical and ideational aspects—the practical ones being almost by necessity less “spontaneous” and more coercive than the latter. While the state does not have to be a Leviathan, there is inevitably a Hobbesian side to the preservation of a political order. This problem can be addressed in part by limiting the scope of state responsibilities to the administration of justice and, more specifically, to the enforcement of a system of property rights. Such legal order can itself be thought of as the product of an evolutionary process rather than from any sort of rationalist planning, as we know from the writings of David Hume or F.A. Hayek. In other words, if politics could be reduced to that task alone, a Lockean or classical liberal state would implement under strict legislative controls laws that merely reflect the existence of property rights whose origin was unplanned.⁵ But, often as a result of demands for greater “social justice”—demands that themselves typically emerge spontaneously and through democratic deliberation—the state in modern times has taken on responsibilities that go far beyond the scope of the Lockean minimal state.⁶ On both efficiency and on normative grounds, a good case can be made for paring down—and, ultimately, winding down—the modern welfare state whose bureaucratic mode of operation is obviously not spontaneous; it is highly unlikely, however, that a pure and simple return to the Lockean state would be feasible. Such a reversal would give rise to too much discontent; it could not be self-legitimizing. Paradoxically, it could only be achieved through coercive and rationalist means in the face of more or less widespread dissent.⁷ There are always enough injustices in the world to motivate the formation of a democratic consensus around some priorities that must be addressed (e.g., eliminating discrimination against women and girls throughout the world) and while spending on social programs can vary greatly from country to country and from time to time, the principle of equal opportunity is by now so well entrenched that it is unlikely that it could be sacrificed to the libertarian ideal in its purest form (even Tea Party supporters are reluctant to do away with Social Security entirely).

Unfortunately, while demands for “social justice” are for the most part the outcome of complex and unplanned processes of cultural evolution, the means of answering these demands are typically bureaucratic, hierarchical and rationalistic.⁸ Is there a way out of this predicament? As I suggested above, the literature on spontaneous order (from Hume to Hayek) has not been very concerned with this question. Social Choice, by contrast, seems to be a rich source of insight. It needs to be nudged, however, along a path that was not envisioned by its best known protagonist, namely, Kenneth Arrow, nor by Amartya Sen whose creative re-interpretations of the Arrovian framework

provided the catalyst for my own reflections on this question. In the next section, I briefly outline the reasons why neither utilitarian welfarism nor Rawls' theory provide satisfactory answers to the problem of justice: the former ends in an impasse, the latter, among other criticisms, aims at an ideal that is both utopian and redundant. I offer Sen's interpretation of the methodology of Social Choice as a more convincing alternative. In section 3, however, I turn away from the equalitarian implications of his (and Martha Nussbaum's) capabilities approach and sketch out the contours of a more pragmatically progressive libertarian alternative.

From "Social Justice" to the Remediation of Injustice or from Design to Spontaneity

The problem of distributive justice has been a concern to philosophers, political theorists and economists for ages. It is not my intention to provide a comprehensive survey of all the relevant theories. But I want to zero in on what in recent times have probably been the most discussed approaches: welfare economics and John Rawls' theory of justice. The former is firmly rooted in economics and can be described as being both utilitarian and "welfarist"; the other is probably the best known contribution to political philosophy in the second half of the twentieth century and amounts to a "non-welfarist" critique of utilitarianism. While I share both Rawls' non-welfarist premises and his skepticism toward utilitarianism (although I do not wish to reject it entirely, nor did Rawls actually), I consider much of theory to be more consistent with rationalist "constructivism" (in Hayek's sense of the term) than with the paradigm of spontaneous order. This critique rests in large measure on Sen's own and, for that reason, I also elaborate briefly on his original rethinking of the methodology of Social Choice.

The Rise and Fall of Welfare Economics. Normative economics, which until recently coincided to a large extent with welfare economics, has always been centrally concerned with distributive justice. But the impasse that welfare economics seems to have reached has brought about a flourishing of "non-welfarist" research programs.⁹ I deal with the latter issue in the next sections but here I wish to give a brief account of how and why welfare economics has run out of steam, as it were.¹⁰

Welfare economics asks: how can societal welfare be improved? This is not a purely hypothetical question. There are many circumstances where markets seem to fail to allocate resources adequately, such as when "negative externalities" cause some people to unfairly carry part of the costs of activities profitably undertaken by others (e.g., industrial pollution). In the mathematical

language of economists, it can be expressed as follows: maximize the function $W = W(w_1, w_2, \dots, w_n)$, subject to some feasibility constraints, in a society composed of n individuals (the welfare status of representative individual i being represented by w_i). As long as the function remains purely generic, as it is stated here, the problem remains merely hypothetical. However, the pioneers of the discipline, notably, Alfred Marshall (1842-1924), F.Y. Edgeworth (1845-1926) and Arthur Pigou (1877-1959), assumed that welfare could be measured in terms of the utilities assigned by the economic agents to allocations of available resources in the economy. Because they treated utilities as cardinal measures and, therefore, addable, the previous equation then becomes: $W_x = u_1(x) + u_2(x) + \dots + u_n(x)$, where u_i stands for the utility assigned to the allocation x by the representative individual i . To use a familiar metaphor, let x_1 stand for a particular division of the pie which we want to compare to another way of cutting it, say x_2 . If $W_{x_2} > W_{x_1}$, then x_2 should be preferred to x_1 . Thus the hypothetical problem mentioned above now becomes the practical one of finding the particular allocation of resources (let us call it x^*) that maximizes this fully specified function. Pigou (1932) had assumed that a) welfare can be measured in monetary terms; and b) it is possible to estimate a “national dividend” that accounts for the “balance of satisfactions” among individuals; in other words, “the satisfaction or welfare of different individuals can be added to, or subtracted from, one another” (Suzumura 2000: 3). Similarly, but at a more theoretical level, Edgeworth (1881) used the twin assumptions of interpersonal comparability of utilities and decreasing marginal utility to argue in favor of maximizing the sum of utilities by moving toward an equal distribution of income. The philosophical background of this approach is clearly utilitarian. Although Bentham was aware of the methodological difficulties attendant to summing up disparate utilities, the Pigovian welfare function evokes Bentham’s maxim: “the greatest happiness for the greatest number of people.”

This model did not remain dominant for very long. In light of criticisms leveled at it by Lionel Robbins (1932),¹¹ it became accepted that cardinal measures of utility cannot be objectively assessed. (This argument was later revised by positing that the only valid data are “revealed preferences,” i.e., the observed choices made by individuals on the basis of inaccessible, non-comparable psychological dispositions.¹²) The alternative is to use only ordinal ranking; the “New Welfare Economics” was established upon this epistemological foundation. The touchstone of this approach is the concept of Pareto efficiency. An economic outcome A is more efficient in a Paretian sense than an outcome B if at least one agent is better off in A and no one is worse off; a Pareto optimum is a situation in which no one can be made better off without making at least one other agent worse off. Although informationally

poor, this concept owes its success to the fact that it can be shown that the competitive market equilibrium happens to be a Pareto optimum. (This is known as the first “fundamental theorem of welfare economics.”) There is, however, nothing obviously desirable, let alone just, about Paretian efficiency, except perhaps that it can be considered to be a rather robust protection against envy. To allow for transfers that could compensate the “losers” for gains achieved by their more advantaged counterparts, several options were proposed (e.g., the Kaldor-Hicks compensation criteria). These suffer, however, from two drawbacks. One is of an ethical nature: the transfers envisioned by Nicholas Kaldor or John Hicks are purely hypothetical—in other words, welfare economics says nothing about the *actual* achievement of a fair redistribution. The second weakness is methodological; it can be shown that the criteria proposed by Kaldor or Hicks lead to intransitive results—transfers can lead to a vicious circle where one moves from situation *A* to situation *B* then to situation *C*, only to come back to *A*.

A more promising development was proposed in 1938 by Abram Bergson, and later further developed by Paul Samuelson, in the form of the Bergson-Samuelson Social Welfare Function (SWF). *If* policy-makers can assume that some particular end is socially desirable (there are, of course, many such ends, including Benthamite utilitarianism), then it becomes possible to build a social welfare function based only on ordinal rankings. At least in principle, such a function should be instrumental in identifying the optimal allocation of resources given the end chosen, and given a “production-possibility frontier.” But these hopes were dashed by Kenneth Arrow’s general possibility theorem (better known as the “impossibility theorem”). The problem posed by Arrow was: How can individual preferences over a range of alternatives be aggregated into a collective preference? What Arrow demonstrated is that given some apparently reasonable conditions that a democratic procedure should fulfill,¹³ such conditions cannot be met when there are more than two options to choose from.¹⁴ The reason being that with more than two alternatives, cycles of non-transitive preferences emerge. Only a decisive actor can break such cycles. This makes it impossible, therefore, to democratically arrive at a SWF—it can only be imposed “dictatorially.”¹⁵ Implicitly, this means that anytime citizens have to choose among three or more policy alternatives (and achieving social justice would obviously involve choosing among a much wider range of options), they run the risk of not being able to do so democratically. Democracies, from that perspective, are inherently unstable.

The challenge posed by this logically airtight demonstration has had a profound impact on contemporary political economy. It has been answered in many ways. The logic of Arrow’s demonstration has never been proven

defective but it can be retorted (Regenwetter and Grofman 1998) that cycling is rarely an empirical issue. At a more abstract level, several of Arrow's assumptions have been questioned. Some of these demonstrations are rather technical and need not be given much attention in this paper but it is worth noting that the universal domain assumption has been challenged by many authors. For example, it has been shown that when a restriction on the domain of preferences is introduced such as that preferences must be "single peaked" along a single axis (a concept originally proposed by Duncan Black [1948]), cycling ceases to be a problem.¹⁶ Sen (1995: 275) has shown that this departure from the strict definition used by Arrow can be extended even farther by substituting "a less demanding restriction called 'value restriction.'" It is only when individuals share a rather narrow set of values that cycling occurs; through public discussions, preferences and values can be expressed such that decisions can be reached without cycling ever becoming an issue (Sen shares Rawls' faith in "public reason"). Other conditions can be relaxed as well¹⁷ but a more decisive move is to challenge an assumption shared by both Arrow and the new welfare economics he criticized: the idea that interpersonal comparisons of well-being are impossible.

Rawls' Impossible Dream. It is generally agreed, and for good reasons, that Rawls rescued political philosophy from the slow decline in which it was mired in years prior to the publication of *A Theory of Justice (TJ)* in 1971. For the remainder of the twentieth century, political philosophers from many perspectives engaged in critical debates with Rawls who, in attempting to respond to these critiques, moved forward in a direction that can best be characterized as a retreat from the abstract Kantian position he adopted in his earlier works and toward a more situated version of the ideal of a free moral personality (see Rawls 1996; 1999; 2001). Much has been written on the more "political" turn his version of liberalism took in those years. What gradually faded from view, however, was the extent to which *TJ* had also been a contribution to political economy. More specifically, it can be read as a more or less implicit refutation of welfarism, i.e., the idea that "social welfare is a function of personal utility levels, so that any two social states must be ranked entirely on the basis of personal utilities in the respective states (irrespective of the non-utility features of the states)" (Sen 1979, 538). Rawls' rejection of welfarism is, on one level, the straightforward corollary of his critique of utilitarianism. But it is also more original. Rawls threw one of the first parting shots in the "non-welfarist" revolution¹⁸ by advancing the idea that the problem of justice concerns the distribution of heterogeneous "primary goods"; they include both goods that are measurable in utility terms, i.e., income, and goods that are not, such as "basic liberties." (Non welfarism relies on several other criteria than utility information in order to arrive at a more

subtle and complex understanding of well-being.) And yet Rawls' non-welfarism remains ambiguous and ultimately disappointing, as I intend to show.

The move away from exclusive reliance on utility preferences makes it possible to escape from the strictures of the Arrovian theorem because interpersonal comparisons then become meaningful: different people may have very different and incommensurable preferences over the baskets of goods they can afford, but most if not all people in liberal democratic societies value basic liberties such as freedom of expression. As Sen (1995: 8) remarks,¹⁹ “[o]nce interpersonal comparisons are introduced, the impossibility problem, in the appropriately redefined framework, vanishes.” There are, however, several critical issues with Rawls’ theory of justice. In a sense, they all have to do with the problem created by the introduction of a multiplicity of criteria, in other words, the cost of attempting the move away from utility preferences. This is called “the indexing problem.” That problem stems from the many conceptual and technical difficulties that any attempt at defining a single measure of well-being encounters, given that any non-welfarist scheme posits the significance of a multiplicity of dimensions along which well-being ought to be assessed (Arneson 1990; Blair 1988; Fleurbaey 2007; and 2008). Rawls proposes to resolve it with his two lexicographically ordered principles: the priority granted to liberties and the so-called difference principle according to which inequalities in primary goods are permissible only insofar as they work to the benefit of the most disadvantaged members of society. Hereafter I look first at some technical aspects of the indexing problem before turning to the question of the feasibility of the explanation provided by Rawls for the origin of the ranking order.

Utilitarianism is informationally poor and by refusing to talk about rights, it ends up condoning morally repugnant compromises (Sen 1979). Deontology, however, can also be limiting by refusing to pay much attention to “goods.” By combining both and providing a way to rank them (i.e., justice sets constraints), Rawls made a decisive contribution. To wit, Rawls (1996: 173) stated that “the right and the good are complementary; no conception of justice can draw entirely upon one or the other, but must combine both in a definite way.”

At first sight, the lexicographic approach he pioneered promises a way out of the impasse to which Arrow demonstrated preference orderings led (see, *inter alia*, Hammond 1976). It offers a plausible basis upon which judgments concerning states of affairs can be attempted and provides a method for solving the “indexing problem.” Instead of resolving the problem by relying on individual preferences, which would then push back the Rawlsian scheme in the direction of welfarism (Arneson 1990),²⁰ Rawls's lexicographic approach provides a seemingly reasonable method for ranking heterogeneous aspects of

well-being. However, Rawls does not really solve that problem; although we know that basic liberties are prioritized, there still remains some ambiguity as to how other primary goods—“which do not have an a priori well defined measure” (Kolm 1996: 186)—are compared. The basic liberties are clearly ranked first but, for example, where the bases of self-respect fit in the lexicographic ordering is less clear.²¹ More generally, Blair (1988: 250) concludes that

even if [Rawls] designates liberty as the first good in the lexicon, a full specification of the indexation rule requires the procedure's complete linear priority ordering of the set of primary goods. But any account of how the parties in the Original Position chose this priority ordering must either endow the parties with much more information about their actual trans-veil states and opportunities than Rawls has assumed, or permit them to choose in an arbitrary, random way. Each alternative conflicts with Rawls' interpretation of the results of this deliberation as principles of justice.

John Roemer (1997: 181-182) also sees a fundamental contradiction in the way in which Rawls defined primary goods. Rawls posited that agents should be responsible for their life-plans but also wished to maintain that occupation is a primary good that is socially determined by morally arbitrary factors. Otherwise, there would be no point in arguing that they should be equalized. And yet it does not make much sense to talk about life plans if the choice of occupation is not included. Although Rawls himself did not pay sufficient attention to these details, it is conceivable that a technical solution can be found. The overall goal, however, that of laying down the foundations of a “well ordered” society whose institutions would achieve “justice as fairness” is probably both unrealizable and redundant, as Sen forcefully argues.

Sen's (2009: 8-12, 52-74) critique of “transcendental” conceptions of justice unfolds along three axes. First, it seems highly problematic that a “transcendental agreement” concerning the nature of a just society could ever be reached, that is to say, an agreement that would bear on a *unique* set of principles, even if the agreement is meant to take place in a predetermined political and cultural context. It is not feasible because even if convincing arguments can be advanced against some alternatives, such as Rawls' Original Position stratagem for demolishing utilitarianism, it is impossible to demonstrate irrefutably that a just society could not be established on some other ground. In Rawls' case, the problem stems from the fact that the parties behind the “veil of ignorance” have not had a chance to discuss such equally reasonable approaches.²² And if they were to do so, it seems unlikely that they would converge on a single set of principles of justice. (To give credit where credit is due, the extraordinary richness of theories of justice that philosophers

and now, more often than not, economists have produced can be accounted for in large measure by the formidable challenge posed to them by Rawls in the first place.)

Secondly, not much progress toward the realization of just goals can be achieved in the absence of information about the self and the choices that are open to individuals. Practical reason demands comparisons that involve actual choices. Two related arguments can be lined up in this respect. To begin with, as Kolm (1996: 193) argues, “justice is objectivity not uncertainty” and the veil of ignorance produces the latter rather than the former; in the absence of relevant facts which, admittedly must be treated objectively, all that is left to individuals is a retreat into blind egoism out a fear of the unknown. But it can be added that *all* which is needed in any situation where the question of justice is raised are the facts of the matter. The criteria the parties reach by moving onto the plane of abstract principles may turn out to be redundant, that is to say, neither necessary nor sufficient to arrive at an appropriate judgment. Sen (2009: 16) puts it this way:

Would not a theory that identifies a transcendental alternative also, through the same process, tell us what we want to know about... justice? The answer is no—it does not. We may, of course, be tempted by the idea that we can rank alternatives in terms of their respective closeness to the perfect choice, so that a transcendental identification may indirectly yield also a ranking of alternatives. But that approach does not get us very far, partly because there are different dimensions in which objects differ (so that there is the further issue of assessing the relative importance of distances in distinct dimensions), and also because descriptive closeness is not necessarily a guide to valuational proximity (a person who prefers red wine to white may prefer either to a mixture of the two, even though the mixture is... closer to the preferred red wine).

One might add yet another criticism in the same vein. If what we are looking for is a way of legitimizing a self-organizing set of political institutions—a spontaneous political order, for short—by redressing injustices that could threaten the legitimacy of such a system, it seems inconsistent with that goal to promote a *unique* and complete theory of justice. Justice imposed from on high would clash with the decentralized processes that sustain a liberal democratic, open-ended political order rooted in a vibrant civil society and minimally interfering with the functioning of a free market economy.

Social Choice Redux. None of this means that we have to accept injustice. Almost instinctively, and from a very young age, humans react strongly to injustice—something that Charles Dickens perfectly captured in the words of Pip, the central character in *Great Expectations*: “In the little world in

which children have their existence, there is nothing so finely felt, as injustice” (cited in Sen 2009: vii). Normative economists and philosophers might get settled on the task of remedying injustices faster if they do not waste time on the elaboration of a theory of perfect justice or even a theory that would be most appropriate in a given political and historical context. And in fact, that nearly perfect suitability to a particular context may prove to be counter-productive in a global world. (The fact that in *The Law of Peoples* Rawls develops a separate theory for international relations that, although modeled, on his domestic scheme, presents some differences with it suggests that there could be some unnecessary tensions between the two which Rawls never addressed.) For the point is precisely that instances of injustice need to be corrected, wherever and whenever they occur. There is no need of a “realistic utopia” (a phrase that Rawls used to describe his theory of international relations) nor of an “overlapping consensus” to proceed urgently with the task of freeing individuals to achieve their legitimate ends²³ by removing obstacles in their way. (This is not to deny the merit of engaging in a conversation that could lead to a broad consensus about how to entrench or revise the definition of some fundamental rights in a constitutional document; but the task of rectifying injustices should not hinge on that difficult and sometimes quite protracted process.) That pragmatic approach should also prove useful in taking into account what Rawls called “the fact of pluralism.” To elaborate on this point, I offer hereafter a less than comprehensive but telling overview of works that treat injustice as a more pressing problems than the articulation of a full theory of justice.

Smith's moral theory is a version of “virtue ethics”; the virtues he considered were: justice, beneficence, prudence and self-command. All are important but justice has a specific quality:

Society may subsist among different men, as among different merchants, from a sense of its utility, without any mutual love or affection.... Society, however, cannot subsist among those who are at all time ready to hurt and injure one another (Smith [1790] 1984: 86)

In other words, it is not so much justice that holds society together but its intolerance of injustice. This, however, does not tell us how to bring about perfect justice. As in Sen's case, Smith did not have a “transcendental” theory of justice. The fascinating quality of his thought stems from the tension that exists among the virtues upon which he established his moral theory. As is well known, this tension was at one point in the history of ideas used to disqualify Smith as credible thinker; the famous “das Adam Smith Problem” was precisely that his works were marred by irreconcilable contradictions. Modern scholarship has shown that this was an unfair and uninformed critique, but to say that the “Problem” was badly posed is not to say that there is no problem

at all. Smith never explicitly resolved the issue of how justice could harmonize self-interest (or prudence) and other-regarding virtues. Perhaps his unfinished volume on jurisprudence contained the outline of that solution but it went up in flames.... The lesson that can be drawn from his writings is probably that, as the impartial spectator reminds us, we can never escape the burden of judgment. The “burden” here is caused by the plurality of conflicting views in society and in philosophy that have to be accommodated in practice. Sen (2009: 189-93) offers an interesting way out of this conundrum: at some point, we have to *commit* to a course of action, one that helps others to achieve their goals.

Should the instrument of law be used for that purpose? On this point, I turn to the late nineteenth century French philosopher Alfred Fouillée who was also skeptical about the idea that an ideally just society can be designed but sought ways of remedying the effects of what today Ronald Dworkin calls “brute luck.” His theory of “reparative justice” anticipated contemporary non-welfarist discussions of distributive justice by about a century. Fouillée was very well known in his times (he died in 1912) and had some influence on the social policy of his days but has since then plunged into obscurity. It is instructive, however, to sketch out briefly some of the most salient points of his thought because they can buttress Sen's theoretical framework. (Another parallel is that Fouillée was resisting the neo-Kantianism that so profoundly inspired the intellectual founding fathers of the French Third Republic, just as the non-welfarists are reacting to Rawlsian neo-Kantianism.) According to Fouillée (Dobuzinskis 2010), as society becomes more complex, opportunities for both positive and negative externalities (not his own words, of course) multiply. Negative externalities—the unintended consequences of pursuing one's own goals (e.g., pollution)—was not of great concern to him. He was more concerned with positive externalities—the fact that social and economic progress generate what he called “social property,” i.e., collectively produced resources such as a representative democratic political institutions, science and culture, education as well as more tangible resources (e.g., what we today call “infrastructures”) to which people have unequal access, and from which they sometimes derive unearned advantages. Those who are thus advantaged acquire a debt towards their fellow citizens;²⁴ collective action problems (again, *not* Fouillée's own words) can be solved by legislative measures (e.g., taxation) when recourse to private action (e.g., charity) turns out to be insufficient or inefficient. This a posteriori rectification of unfairly gained advantages he called “reparative justice.” In that respect he mostly stressed fair access to education. But he implied that remediation could be necessary in other areas too. He encouraged the state to legislate norms that define the expectations that citizens can form about their well-being, but he was very suspicious about the capacity

of bureaucracies to carry out the policies required to bring everyone closer to these norms. Thus he recommended subsidizing insurance schemes (e.g., health, pensions, unemployment) that would be located outside of the state apparatus and managed by cooperatives and philanthropic organizations. (One way of doing so would be to provide vouchers or a lump-sum payment to all or many individuals, as I argue below.)

In a book that is rarely read any more but is worth revisiting (see Ledevitz [1985]), Edmond Cahn ([1949] 1964: 13) noted that “the sense of injustice” is “clearly and frequently manifested; it is a familiar an observable phenomenon.” He went on to say that he spoke of “injustice” rather than of justice because (and this worth quoting at length in view of the striking parallel with Sen's thesis)

“justice” has been so beclouded by natural-law writings that it almost inevitably brings to mind some ideal relation or static condition or set of perceptual standards, while [I am] concerned, on the contrary, with what is active, vital and experiential in the reactions of human beings. Where justice is thought of in the customary manner as an ideal mode or condition, the human response will be merely contemplative, and contemplation bakes no loaves. But the response to a real or imagined instance of injustice is something quite different; it is alive with movement and warmth in the human organism.

And he concluded that justice ought to be rethought as “the *active process* of remedying or preventing what would arouse the sense of injustice.”²⁵

Turning now to Nozick's (1974) “theory of entitlement,” we find an interesting “principle of rectification” which comes into play if holdings have been either improperly acquired or transferred. This could have been the beginning of a very interesting theory of in/justice but Nozick chose not to say much about this principle which was left almost entirely undeveloped. He spent a little more time on another sort of rectification, but largely to do away with it. In discussing the famous “Lockean proviso,” i.e., to leave “as much and as good” for others to use, Nozick contended that if the original act of appropriation created conditions under which other parties are presented with opportunities to better their lives, the proviso is met.

Although Hayek famously criticized the ill-defined notion of “social justice,” he was not indifferent to the problems posed by unjust action. He insisted that “[i]njustice is really the primary concept and the aim of the rules of just conduct is to prevent unjust action [where] the injustice to be prevented is the infringement of the protected domain of one's fellow men” (Hayek 1967: 166).

While all these parallels serve to anchor Sen's critique of “transcendental theories” of perfect justice in a broader historical context, his contribution

stands out in terms of its coherence and didactic quality. Sen leaves no doubt about the fact that his entire vision is rooted in the paradigm of Social Choice and he acknowledges his debt to Kenneth Arrow, even though at first sight he seems to draw different conclusions from the same body of ideas. The logic is clear: Social Choice is concerned with the dilemmas attendant to the transformation of often divergent individual preferences into collective action; there is no a priori presumption that there is an optimal equilibrium and different principles can be applied. From a Senian perspective, Social Choice is a powerful method for identifying those options that are least unjust by comparing alternatives, examining their feasibility and selecting solutions that, more often than not, are only partial, on the basis of multiple criteria. In deploying that method, Sen applies seven criteria (2009, 106-111): i) a concern with comparative assessments rather than with the search for an absolute criterion; ii) the recognition of the inescapable plurality of competing principles; iii) allowing and facilitating re-examination; iv) permissibility of partial resolutions; v) diversity of interactions and input; vi) emphasis on precise articulation and reasoning; and vii) championing public reason. Although space lacks here to explore all these points in detail, I wish to underline a few salient issues.

As I argued above in my critiques of the Rawlsian scheme, limiting the number and range of items to be indexed, and insulating them, at least in part, from the concept of agency, offers only uncertain advantages in dealing with the indexing problem. Moreover, the more limited that number is, the more justifiable the charge of leaning toward unfair paternalism becomes; why should individuals order their lives only in terms of a pre-determined scale of “primary” goods? Rawls (1996: 181) acknowledges that a few more dimensions could be added, e.g., leisure time, but while seemingly agreeing with Sen about the importance of taking variations among people into account, he argues that his scheme is sufficient insofar as it is designed to provide only “the minimum essential capacities required by a normal cooperating member of society” (183). It is, however, more consistent with the premises of non-welfarism to seek to respond to variations among people, the circumstances they face and the opportunities that are either open or closed to them. This is precisely what Sen (1999: 74-76) does by exploring the nexus of achievements, or “functionings,” and their corresponding capabilities, i.e., the set of feasible functionings an individual can gain access to. The specifics of that theory have been subjected to numerous criticisms, but here I am only concerned with its core principle. While the idea of primary goods gives us some purchase on the complexity of societal relations, Sen's open ended list of “functionings” more accurately suggests that individuals cooperate with each other in unpredictable ways.²⁶ Whether some overall limits to this diversity should be drawn, as Martha

Nussbaum (2003) suggests, or whether the open-ended nature of Sen's approach is precisely one of its strengths, is not a debate I intend to settle here. Suffice to say that because in increasingly complex and multicultural societies it will probably not be possible to firmly agree on any clear set of social policy goals, even if agreement can be reached on basic needs, I lean toward Sen's side.²⁷ The merit of non-welfarism rests on the assumption that instances of injustice can develop along many unpredictable paths, none of which ought to be a priori excluded. However, this approach obviously raises the question of whether diversity is manageable by theorists interested in the problem of justice. After all if the indexing problem plagues Rawls' theory, it should a priori be even worse in the case of Sen's functionings and their corresponding capabilities.

As it turns out, this is not the case because Sen puts a sophisticated consequentialism to the task. For him (Sen 1982), neither utilitarianism nor "constraint-based deontology" are satisfactory: the instrumentalism of welfarism keeps a blind eye on rights, but paradoxically deontology itself shares with welfarism an inability to use rights in the evaluation of state of affairs, treating rights as if they had no consequences. Having stripped consequentialism of its utilitarian dogmatism, Sen proposes to move in the direction of "an approach that is at once consequentialist and non-welfarist" (1982: 12; see also 1987). This approach takes into account either the fulfillment or nonfulfillment of rights when evaluating state of affairs to arrive at, as he puts it, a "comprehensive outcome" (Sen 1997; 2009: 22-23, 217-217). Coming back to what I pointed earlier, the notion of preference can accommodate more than comparisons of welfare-based utilities. For example, in comparing two sets of goods, the chooser can factor in the fact that his or her choice constricts the range of options left to someone else, and may change his/her preference accordingly (i.e., the notion of "menu dependence"). Again, the flip side of this is that it may not be possible to identify the "very best" alternative, something which Sen calls the "incompleteness of judgment." But the important point is that both the process and the outcome of choice can feasibly be assessed. In particular, not only are political liberties and civil rights important in themselves but they can have a positive effect on development. The relationship between different kinds of freedoms and economic growth is quite complex and space lacks here to explore this topic. However, even if these liberties affect economic development in varying degrees depending on circumstances, the process of development will be enhanced by the presence of these liberties. Agency is transformative and the *effects* of rights matter as much as their intrinsic worth. As Sen (1990: 20) notes, the problem is not merely one of remedying income deprivation:

precisely because income deprivations and capability deprivations

often have considerable correlational linkages, it is important to avoid being mesmerized into thinking that taking note of the former would somehow tell us enough about the latter. The connections are not that tight, and the departures are often much more important from a policy point of view than the limited occurrence of the two sets of variables. If our attention is shifted from an exclusive concentration on income poverty to the more inclusive idea of capability deprivation, we can better understand the poverty of human lives and freedoms in terms of a different informational base.... The role of income and wealth...has to be integrated into a broader and fuller picture of success.

To recap, Rawls narrow focus on “primary goods” over which agents have only partial control, and his somewhat vague lexicographic ordering left him unable to solve the indexing dilemma. If we grant Sen's argument that his agent-centered consequence-based methodology—the capabilities approach—yields a feasible tool with which to evaluate the effects of policies and informal norms on well-being, then it seems preferable, and more in keeping with the logic of non-welfarism, to open broadly the scope of agency-related “goods” without specifying any a priori limitation. Much empirical work has already been undertaken in this vein (e.g., the UN Human Development Index; Brandolini 2009; Kuklys 2005). However, from the standpoint of spontaneous order, there also are some serious deficiencies in the capabilities approach, at least if we seek ways of applying to conditions other than those which prevail in the poorest of developing regions or countries.

Toward a Pragmatic Libertarianism?

The premise from which I start is that a spontaneous political order must rest on a plurality of voices freely expressed in a variety of forums. Thus I am not proposing to articulate here *the* correct approach to rectifying injustices. As I explained above, I agree with Sen's critique of Rawls' theory of justice along the line that even in its modified later version is still too one-dimensional and that the problem is less one of building just institutions than addressing instances of injustice whenever and wherever they occur. But Sen himself vacillates between this sort of healthy skepticism and a commitment to egalitarianism that is open to the very same criticisms than those he hurls at Rawls' approach. The goal of this critical assessment is not to promote a “superior” libertarian outlook; on this I agree with Gerald Gaus' (2011b) recent plea for avoiding sectarianism in the discussion of justice. The position I therefore intend to defend is a pragmatic libertarian position that incorporates proposals originating from “left libertarian” theorists and some other

contributions as well, with a view to promote a plausible resolution of the challenge of legitimizing a spontaneous order. "Plausible" here can be read to mean also workable but not perfect; acceptable but not optimum; rational but only according to the precepts of practical reason; and so on. As for pragmatism, I am not using this term in its everyday life, and often derogatory, connotation of being inclined to make unprincipled compromises, but in the more philosophical sense of judging things in the light of experience. Pragmatism in that sense implies a refusal to treat contested issues as settled once and for all.

Remedying injustices ought to be a priority in itself. Feasible alternatives should be compared in terms of their consequences in circumstances that define or bring to light the rights of the parties. To treat this analysis as an aspect of, or a condition for the achievement of egalitarian objectives is a move that is common but there is no obvious logical connection between remedying injustice and seeking equality. In other words, the capabilities approach can and ought to be divorced from egalitarianism. In fact, the very same argument in terms of knowledge constraints that render the pursuit of "transcendental" justice unfeasible can be applied to egalitarianism.

Liberty vs. Equality (or is it Envy?). Beginning with Rawls, most authors cited so far ranked liberty as the highest value, even if Sen (2009: 63-65, 299-317) is somewhat more circumspect in this regard. They go on to advocate measures that would produce more equality but often, and certainly in Sen's case, as a means toward the enhancing the liberty of those who benefit from such measures, as they define it. Even Nozick's principle of rectification would in all likelihood, if applied rigorously and systematically, result in more equality, as Robert Litan (1977) perceptively shows. But if one examines this issue more attentively, rectifying injustices may produce more freedom, and/or more equality. It does *not* follow, however, that bringing about more equal conditions ipso facto makes things more just. In some instances, strict equality amounts to an unfair treatment of individuals with different entitlements. The concept of capabilities has immense merits but it ought not to be derived from an attempt to find the most adequate form of equality. Sen ([1979] 1982) first proposed capabilities as a constitutive element of what he regards as a better conception of equality; better that is than either utilitarian equality, "total utility equality," or Rawlsian equality. Rather surprisingly in view of his starting point, he concludes, however, that "morality is not concerned only with equality" (1982, 369). I would argue that it is only incidentally concerned with equality. Justice/injustice is central to morality; that ought to be the sole focus of the capabilities approach or of similar approaches. Specific, context-dependent inequalities need to be addressed because they are constitutive of the injustices that need to be rectified. But abstract egalitarianism is no more the answer that

pure justice is. Both pure justice and egalitarianism are, in Sen's word, "redundant"; they suggest criteria that are too far removed from the complexity of constantly changing and evolving social and political systems. I want to briefly tackle two examples of these difficulties by discussing the challenges posed by contractual exchanges and by the nagging issue of envy in democratic societies.

Distributive justice and commutative justice are not synonymous. The latter has to do with the just treatment of parties in exchanges or contracts. Distributive justice has to do with the allocation of resources but it can be argued—certainly it was argued by Hayek—that inequalities that result over time from freely entered into contractual relations were not intended and, therefore, need not be corrected. As I have explained above, even if this were true in an abstract sense, it would be futile because a democratic majority, let alone a consensus, could never be formed around this stern admonition. Still it is clear that treating persons equally in distributive terms may disrupt contracts and market exchanges in ways that could be arbitrary or coercive. In such cases, commutative justice will not be achieved. In other words egalitarianism in the distributive sense violates equality in the commutative sense. That is not a problem that can be resolved easily. Rawls sought to escape from that dilemma by not including property rights in the basic freedoms. But even if one can imagine that ghosts behind the veil of ignorance would decide to ignore property rights, real persons are far less likely to agree wholeheartedly to this omission. Some of these conflicts can, admittedly, be resolved through democratic debates and recourse to "public reason." In fact, this is the only possible way of resolving them, provided that the problems in question are posed in concrete terms (e.g., what can be done to provide more access to a better education for those who face socio-economic, cultural or other sorts of barriers). But it is not prudent to approach the problems of injustice from the standpoint of equality as a good in and by itself because envy is often rhetorically expressed as a virtuous demand for more equality.

Envy is a threat to modern societies which, even when they are not as egalitarian as egalitarian theorist would prefer, are nevertheless committed to various forms of equality that did not exist in pre-modern times. J.-P. Dupuy (1997; 2003) has repeatedly argued that modern economics and, by extension, much of moral philosophy in the Anglo-American world, has placed rivalry and competition at the center of its paradigm. But at the same time, it has done away with envy and the potentially catastrophic consequences of mimetic desire by positing that differences are attributable to impersonal mechanisms (e.g., "the invisible hand," prices as anonymous "signals," the "law" of supply and demand, etc.). But while this might be both factual and relatively benign in the economic sphere where we have long gone past the era of localized,

personalized markets, this neglect is far more contestable in the ethical sphere because it amounts to denying the problem of envy. Rawls' theory is a case in point. Even though he tried to bracket out envy in building the foundations of his theory of justice, Rawls himself, as Patrick Tomlin (2008, 106) notes, conceded that "we are all prone to envy—therefore making it a fact of human psychology." But, if so, then there is no excuse for withdrawing it from the information made available to the actors in the original position since they are presumed to be familiar with the fundamental characteristics of human psychology; and since, although it is less clear, he seems to also concede that "under certain circumstances, [we] all succumb to envy," (106), this becomes a fact about human society in general, about which the parties behind the veil of ignorance are also supposed to be informed. Had Rawls provide them with that information, however, the outcome of their deliberations might have been dramatically different. But instead of posing the question of envy at the onset of his reflections on justice, Rawls postponed it until the very end, and he concluded rather optimistically that in a "well ordered society" there would be little cause for envy. That is highly doubtful because the more democratic societies become egalitarian, the more pretexts are found to resent what others have. Where enormous differences exist, they tend to be accepted as the inevitable order of things, but where individuals compete on a more or less equal footing, relative differences are magnified (Schoeck 1970; Epstein 2003). This problem is arguably less severe in Sen's case insofar as his goal is not to bring forth a just society but merely to equalize multidimensional capabilities—a project that presumably would leave room for many justifiable differences of status, income, etc. Nevertheless, I would argue that the best way to address the problem of envy is to pose it explicitly rather than to minimize its significance. Probably the most direct path toward that goal consists in making individuals responsible for their choices. Although more recent non-welfarist perspectives on justice are arguably still rather too irenic, the most promising among them pay a great deal of attention to the notion of responsibility.

Justice and Responsibility. As Fleurbaey (2008: 1) remarks, "[r]esponsibility is a necessary consequence of any substantial amount of freedom and therefore part and parcel of any free society." It is common sense. Indeed this is confirmed by behavioral economics research; Valérie Clément and Daniel Serra (2001) report that the result of an experiment bearing on the financing of health care, "placed in the conditions of an impartial choice, in a proportion of 2/3 the subjects choose a distributive principle that includes an aspect of responsibility rather than an egalitarian principle."

Most contemporary egalitarian liberals (and Fouillée earlier) have argued—and on this point I agree with them—that those who benefited from some sort of socio-economic "rent" (e.g., the social and cultural inheritance

they received through their families, education, access to land or natural resources which cannot be fully appropriated, the facilities that one can only find in cosmopolitan urban centers,²⁸ etc.) owe a debt of sort to those who have been deprived of these resources. The rationale being that inequalities that are due to arbitrary factors must be compensated, be it by applying the capabilities approach or through some simpler scheme such as a Basic Income. But this can be qualified by adding that taking into account the extent to which at least some of these inequalities are due to choices made by the concerned individuals. Rawls (1999: 81) vacillated on this point; he admitted that individuals are responsible for their life plans but the difference principle is a sort of universal insurance against all risks regardless of one's own actions. Similarly, Van Parijs' (1995) version of the Basic Income could be deployed with little or no regard for the responsibilities of the recipients. Curiously, Sen who has a lot to say about the responsibilities of the powerful (more about this below) remains silent about the responsibilities of everyone for their well-being; this probably reflects a concern about “blaming the victims” but it remains that in a democracy it would be difficult to justify and get support for social programs that absolve individuals from any responsibility in the conduct of their lives. It seems preferable to follow Fleurbaey in attempting to work out a “responsibility-sensitive” approach based on the principle of “equal being for equal responsibility”: “two individuals with identical responsibility characteristics should have the same level of well-being” (Fleurbaey 2008: 25). In brief, a concern for agency is one of the attractive features of the capabilities approach but this approach will be all the more convincing that the corollary of agency, individual responsibility, is given its proper place.

If Not Equal Capabilities, then What? Kolm (2005: 452) raises some criticisms about the very notion of capabilities but mostly about the practical effects of trying to achieve *equality* in capabilities:

A number of the means of formation of capabilities are transferable across people and across capabilities. But capabilities themselves are largely non-transferable... Now people have different preferences about what they do, and hence about their capabilities. Therefore, equality in all capabilities a priori implies Pareto-inefficiency. Moreover, the natural endowments...of individuals make them differently gifted for the various capabilities, and equality in capabilities may induce waste for this reason also. In addition, the policy of equality will induce people to make lower efforts in forming these capabilities, which also induces waste. And this equality often goes with public provision, which commonly implies inefficient supply for reasons of information and motivation.

These criticisms boil down to two: the difficulties posed by the informational requirements, i.e., what classical liberals and libertarians will recognize as the Hayekian knowledge problem (Hayek 1945); and the issue of implementation by public provision. I deal with the former first. Actually, as Burczak (2006, 2) very perceptively remarks, there are two aspects to that problem: a “factual knowledge problem” and an “ethical knowledge problem.” The factual knowledge problem can be subsumed under what I describe as the issue of implementation (see below); so let us for the moment address the ethical knowledge problem. Hayek and many liberals (see Kolm above) are very skeptical about the very possibility of reaching “any principled agreement about the substantive characteristics of the good life” (Burczak 2006: 85). In other words, the very same argument that can be levied against Rawls' notion of an index of primary goods—that it calls for more information than is available and makes rather high demands on the democratic process—can be turned against Sen's goal if the goal is not just to make ad hoc comparisons where needed to remedy specific injustices but to promote some sort of overall equality of opportunities. However, while I am less sanguine than Burczak (2006: 85-94) about the way in which Nussbaum goes about doing away with this objection, I concede that it can be overstated. Not only is it plainly obvious that we all share a human nature characterized by basic needs for food, shelter, and so on but within admittedly varying (albeit not infinitely so) cultural contexts, there is also room for agreement on some other more intangible aspects of human flourishing (e.g., achieving a measure of self-respect). In other words, there is an obligation to remedy injustices defined in terms of an inability to meet not only material basic needs but also some non-material needs beyond that limited horizon (e.g., being able to acquire the skills required to compete fairly in a meritocratic society). Consequently, even if one does not subscribe to the ideal of *equalizing* capabilities across the board, whatever corrective measures are adopted, they must be such that they allow for some measure of human flourishing above and beyond the satisfaction of basic material needs.

Now I turn to Kolm's second objection, namely, the issue of the capacity of public authorities to enhance the capabilities of their citizens. In other words, while in principle it can be agreed that injustices exist with respect to the degree to which individuals are able to reach their full potentials, the question of how this problem can be addressed in practice is a very difficult one. Burczak (2006: 96) correctly identifies the problem:

[a]chieving the goal of equality of capability does seem to place a large epistemic burden, at least in some circumstances and in regard to the attainment of some functionings, on government officials to obtain the requisite knowledge.... Hayek's knowledge problem places limits on the extent to which government officials can implement policies to

achieve capabilities equality. Curiously, however, he goes on to state that the factual knowledge problem is not as serious as it seems without offering nearly as many reasons for why this assertion than he does for refuting the ethical knowledge problem. In fact, he provides no empirical arguments to that effect—and this is an empirical question. Although there would probably be enough data on basic capabilities since, as noted above, much empirical work is being carried out in this area, going beyond this relatively simple problem would be difficult. In complex post-industrial societies, the sort of capabilities that would have to be equalized, that is, if one insists on pursuing an egalitarian agenda, are likely to become more and more finely grained. The *practical* challenge of how to enhance multifaceted capabilities would be daunting. Moreover, if the capabilities approach becomes a tool in the hands of social policy decision-makers and the state agencies they control, fiscal and managerial inefficiencies, not to mention capricious paternalistic interventions, would inevitably ensue. There are two ways of dealing with this problem. The first is to let civil society take care of it (see Shapiro 2007: 201-204). A wide range of capabilities can be enhanced by the activities of non-state actors (philanthropic foundations, cooperatives, micro-lending banks, etc.). Sen's (2009, 372-376) original use of the Kantian notion of “imperfect obligation” can provide an added incentive for these activities. The idea is that we have a non-enforceable but real duty to assist those in need. This ought to be the focus of democratic debates leading to proposals for institutional design (e.g., mixed public-private agencies, new forms of public consultation and engagement, etc.) that would give concrete expressions to this obligation.²⁹ Unfortunately, it is a fact that philanthropic institutions do not at present have adequate means for doing all that would be expected of them.

There is something that public authorities can do, however. It is to enable individuals to decide for themselves which capabilities they wish to enhance, and how, by providing them with the financial means of doing so. A guaranteed income of some sort—and there are indeed many variants (see below) —would fit the bill; it is a notion that can still be described as non-welfarist in nature because the idea is not to satisfy a preference for a marginally higher income, and the utility attached to that increment, but to allow individuals to choose from a broader range of life-plans. This is not a new idea but it has received renewed attention. Several classical liberals, including Milton Friedman (1962: 191-194) and Hayek have expressed their support for it in the past. Hayek did in on several occasions; one can find many allusions to the responsibilities of public authorities for the welfare of citizens in *The Constitution of Liberty*.³⁰ He returned to this theme in an even more emphatic way in the second volume of *Law, Legislation and Liberty*:

There is no reason why in a free society government should not assure to all protection against severe deprivation in the form of an assured minimum income, or a floor below which nobody needs to descend. To enter into such an insurance against extreme misfortune may well be in the interest of all; or it may be felt to be a moral duty for all to assist, within the organized community, those who cannot help themselves (87).

I want to add two remarks, however. The first is that what I and the contemporary defenders of measures such as a Negative Income Tax (NIT) or a Basic Income Guarantee (BIG) have in mind something more substantial and more widely accessible than the bare minimum or “floor” that Hayek described in the quoted passage. The second is that, as Tomasi (2011: 22) notes, Hayek’s comments are ad hoc; he offered no solid justification for them. Moreover, as Burczak (2006: 83) claims, they cannot be derived from, and are in fact incoherent with, his understanding of liberal democracy being entirely coterminous with the rule of law.

The way I propose to justify income redistribution in the form of a lump sum payment is that it stands as a necessary condition for allowing individuals to achieve at least some of their most cherished priorities, to achieve the “functionings” they truly aspire to achieve—something that those with more means at their disposal can always do, even with less talents.³¹ Egalitarians wish to continually expand the horizon of these personal choices *ad infinitum*, by either arguing for unfeasible levels of income redistribution or by imagining a host of other capabilities enhancing measures above and beyond income redistribution. I do not propose to follow them down that illusory path but I suggest that refusing to consider the income or asset disparities that stand in the way of the less affluent in their efforts to move beyond the satisfaction of their most basic needs in an affluent society is an injustice that needs to be corrected. The goal does not have to be to equalize capabilities but simply to ensure that everyone can be given the means to achieve at least a few of their most important personal aspirations or social responsibilities (e.g., to obtain a good education, to be able to seize upon entrepreneurial opportunities that require some collaterals, or to be able to care for aging parents, etc.) The point is not that everyone is owed an unlimited access to all the opportunities and resources available in a politically organized community at any given time, but it is rather to establish the principle that one has a claim to be compensated for at least a fraction of the socio-economic rents that accrue to the more advantaged members of society.

A guaranteed income seems to be the best way of implementing this ideal. It would be relatively easy to administer and, since the only way to

fund such a potentially very expensive policy would be to cut or eliminate most social insurance type programs, it would have the added advantage of doing away with the bureaucratic, state-centric welfare state. Replacing means-tested programs with a guaranteed income would also serve to promote a culture of responsibility. There are, however, several alternatives to choose from, including the “stake holder society” (Ackerman and Alstott 1999; but see also Burczak 2006: 130-134); the Basic Income Guarantee (e.g., Van Parijs 1995); and the Negative Income Tax. These paradigmatic models can be interpreted in a variety of ways. Each option has its own strengths and weaknesses. Choosing the most appropriate plan is difficult issue to which the Senian methodology of intersubjective social choice can be applied in general terms but only as way to inform a broad discussion guided by public reason.³²

Obviously, an in-depth analysis of this problem is not feasible within the limits of this paper but a few salient characteristics can be underlined. The stakeholder grant presents some advantages, most notably the fact that it could prove instrumental in encouraging entrepreneurial initiatives by providing the required collateral assets. However, it would not provide the on-going support that individuals and households need to meet all sorts of rather basic needs (child care, health care, etc.) and this stands as a serious disadvantage. Van Parijs's (1995) radical idea of a very substantial, unconditional Basic Income, however, is perhaps not optimal for reasons outlined by Kolm (2005: ch. 15; see also Gamel 2011): a) it would be prohibitively expensive; and b) being unconditional, it would be neutral with respect to the norm of reciprocity (either in the form of seeking gainful employment or volunteering); the violation of the latter norm would probably delegitimize it in the eyes of the public. Kolm's Equal Labor Income Equalization (ELIE) or some variant of it,³³ does not suffer from these disadvantages, or at least not to the same extent (in brief, it is a transfer that is calculated on the basis of the difference between an individual's wage w_i and the average wage rate \bar{w} , calibrated by means of a coefficient k ; individuals with high productive capacities and high incomes would pay into the plan, individuals below the same threshold would receive a lump sum subsidy). That is because ELIE would not be made available to those who deliberately chose to withdraw from the labor market, and it could be easily blended into existing tax systems—its affordability would be determined by the value of k . There is, of course, far more to be said about Basic Income in general³⁴ and ELIE in particular.³⁵ My point is simply that, as far as the role of the state in equalizing opportunities is concerned, these proposals are most realistic ways of putting in practice the principle behind the capabilities approach than directly trying to address each capability separately.

Fleurbaey (2007) also offers interesting recommendations based on carefully argued axiomatic propositions³⁶ which could improve upon the allocative schemes I alluded to previously by rendering them more sensitive to the efforts that individuals make to improve their own welfare. Thus he claims that the working poor should receive a larger subsidy than that received by those with no or little earning ability. A guaranteed income that would not be available to those who opt out of the labor market (as in Van Parijs' [1995] example of individuals who prefer surfing to working) but would benefit the working poor the most might prove to be both politically feasible and efficient in remedying injustices defined in terms of inadequate access to quality education, and/or health care, housing, and so on.

It should be stressed that although some of the proposals outlined above may appear to be idiosyncratic, they all rest on robust logical demonstrations that, unfortunately, I don't have space here to examine in detail. This is not to say, however, that they should not be debated. Preferably such debates should take place in a constitutionally protected institutional setting conducive to the unfolding of a spontaneous democratic order. It must also be underlined that from the non-welfarist perspective which I endorse, income discrepancies ought not be regarded as the only dimensions along which injustices can be identified; indeed the issue of preserving and enhancing basic rights and liberties must remain the first priority (including the right to obtain recognition of one's property rights where the property regime inadequately take these rights into account as argued by Hernando De Soto [2000]).

Conclusion

It is obviously a simplification, but not an abusive one, to identify theories of justice that, beginning with Plato's dialogues and extending to Kant and Rawls, posit that justice exists as such and can be defined a priori, and to contrast those with theories of in/justice that start from the experiential observation that unfairness evokes the strongest possible reactions from both the direct victims and those who sympathize with them. The former typically aim at laying the foundations of a just society; the latter more modestly seek practical ways of remedying such injustices. Both positions can be distinguished from utilitarianism, which many if not most economists tend to take more or less for granted even if this may be less true today; utilitarianism ranks that which is good over that which is right and can be used, at least according to its critics, to justify unjust acts (both Rawls and Sen agree on this). Therefore, in different ways and varying degrees of explicitness, both camps are, in the jargon of economists, non-welfarist, i.e., they do not reduce well-being to a narrow conception of (typically but not necessarily material) welfare and the

satisfaction of preferences for such. But those who belong to the second camp (e.g., Sen or Smith) can be more accommodating toward utilitarian arguments than the proponents of “transcendental theories.” Such a synthesis opens up workable methods for dealing with real and immediate problems that cannot wait for the realization of utopian ideals forged behind a mythical veil of ignorance.

I have further argued that there is no particular reason why the Senian perspective—remediating injustices—ought to be wedded to an egalitarian project. In fact, as I have previously shown (Dobuzinskis 2010) but had little space to reiterate in this paper, we have in Fouillée work an example of a non-welfarist non-egalitarian (albeit mildly “solidarist”) approach to the remediation of injustices or, as he called it, “reparative justice.” I would further like to argue that this approach can advantageously be pushed in the direction of libertarianism—a perspective with which it already shares some crucial points, e.g., the central importance of individual choice and of the freedom to make such choices. (It can be retorted that Lockean libertarianism has a theory of justice—more commutative than distributive—that is “transcendental”; however, I dispose of his argument below.) The problem is that libertarianism comes with some “baggage,” as the phrase goes. On the more conservative side of it, quasi-libertarians such as Hayek (there are some real philosophical differences between Hayek and Lockean libertarians, but I leave them aside because they are not germane to my point about social justice), social justice is a “mirage”; and if some, e.g., Nozick open the door slightly ajar they quickly close it back (see above). On the opposite side, so-called “left-libertarians (e.g., Henry George in a more distant past and today Peter Vallentyne, Hillel Steiner, Michael Otsuka and Van Parijs even if the later does not describe himself as such) are committed to an egalitarian sharing of natural resources that is so radical that it can be described more as egalitarian, period, than as libertarian. What I propose instead is a thoroughly pragmatic approach to both libertarianism and the remediation of (social) injustices.

Pragmatism grants priority to experience.³⁷ One of the most vivid experiences we can have in our lives is the experience of being free—a point eloquently developed by the Fouillée in his massive (and unfortunately little read) *La psychologie des idées forces*. But, as many thinkers from Smith to Fouillée to Sen have also pointed out, so is the experience of unfairness. A libertarian approach that would prioritize individual freedom and be highly skeptical of perfectionist government intervention but which would also seek to remedy or alleviate injustices caused by externalities and, more generally, by arbitrary allocations of social, political, or symbolic advantages, and/or of natural resources and the costs associated therewith, could in my view be described as pragmatic libertarianism. The epistemological preference for experiential

arguments could be put into practice by conducting reasoned democratic debates about issues that, however, would be brought to the attention of the public in ways that could—and probably should—use a large dose of emotions, personal narratives, and other forms of inputs in addition to more traditional measurements of inequality of the sort pioneered by Kolm, Atkinson or Sen. The solution that result from such democratic debates might, of course, not be libertarian at all. But this is the risk inherent in open systems: they are unpredictable. The onus would be on classical liberals and at those libertarians willing to consider pragmatic trade-offs to underline the merits of solutions, such as those outlined above, that are both efficient and minimally intrusive in the people's lives, and to eschew a priori commitments to “transcendental” goals, including the realization of a “just society,” a truly egalitarian welfare state or a stateless libertarian utopia. The alternative is risking to see the foundations of all economic and political spontaneous orders being dismantled by “progressive” constructivists or populist demagogues empowered by socio-political movements fueled by legitimate grievances mixed with resentment and envy.

Notes

¹ I have attempted to examine this question at length in a previous book (Dobuzinskis 1987) although I now consider this attempt to have been too dependent on cybernetics and biological metaphors and not sufficiently informed by economic theory. On the reasons why democracy, as distinguished from the state apparatus, can be regarded as a spontaneous order, see diZerega (2000; 2011).

² Public approval is a necessary condition of legitimacy but certainly not a sufficient one. Consent has to be expressed in relation to morally defensible policy or institutional practices. I argue hereafter that rectifying injustice, at least of the kind that evokes widespread disapproval and for which there is no credible rational defence, is a legitimate function; neglecting to do so would give rise to legitimate public disaffection from the polity. The extent of that disaffection, however, varies according to circumstances, political culture and a host of other factors, including the possible existence of prejudices harboured against individuals or groups who claim to be treated unjustly.

³ Adam Smith, however, observed that the division of labour can render workers “as stupid and ignorant as it is possible for a human creature to become” (Smith 1776: Book V, Article II); he argued that education, which ought to be given to all, was one way of remedying this predicament.

⁴ Tomasi includes in this school philosophers based at the University of Arizona, most notably Gerald Gaus and David Schmidtz, as well as scholars who studied there, e.g. Jason Brennan and himself. One can also find interesting debates and additional sources on the aptly named “Bleeding Heart Libertarians” blog: <http://bleedingheartlibertarians.com/>

⁵ See Hayek (1973)

⁶ Theodore Burczak (2006: chapter 4) has argued that the Common Law is not as neutral toward all interests as Hayek liked to believe; this is one of the factors that must be taken into account in explaining the rise of the welfare state.

⁷ The extent of that dissent would vary depending on the cultural context and the historical circumstances under which such a utopian project would be undertaken.

⁸ The whole discipline of Social Work privileges the deliberate pursuit of goals and standards defined by an epistemic monopoly centred in academia and government agencies staffed by experts holding degrees in Social Work.

⁹ Even though non-welfarism took off in the last quarter of the twentieth century, it is possible to trace its origin back to earlier times (Dobuzinskis 2010).

¹⁰ This statement is admittedly more rhetorical than entirely factual; for a more optimistic appraisal of the still valuable insights provided by, and potential applications of welfare economics, see Ng (2004).

¹¹ See also Hicks (1934) and Allen (1934).

¹² Recently, this firmly established view has been challenged by the new economics of happiness which makes extensive use of subjective, a priori—as opposed to the a posteriori observation of—preferences. See inter alia Powdthavee (2007).

¹³ In addition to the usual implications of instrumental rationality (e.g., transitivity) these conditions are: Universal Domain; Pareto Principle, Independence of Irrelevant Alternatives and Non-Dictatorship; for more detail see, inter alia, Campbell (2002).

¹⁴ One way of avoiding the paradox, then, would be to limit the number of alternatives to two. In smaller setting, such as parliamentary committees, this could open the door to strategic manipulations of the agenda; but in a broader and political context, open deliberations could yield rationally defensible rules for ordering the voting sequence (see Kadish 1983; for a much more technical treatment of why pairwise comparisons are feasible when the intensity of preferences is taken into account, see Saati and Vargas 2011).

¹⁵ Defenders of the “new welfare economics” tried to answer that Arrow was not addressing the same problem that the one they were interested in and that, therefore, he did not really show that the goal of the “new welfare economics” was unachievable (e.g., Bergson 1954); but the literature has since then dismissed this and other arguments intended to deflect the critique launched by Arrow and, in his wake, the whole Social Choice school.

¹⁶ However, as Walter Bossert and John Weymark (2008) show, “economic domain restrictions do not provide a satisfactory way of circumventing Arrow’s social welfare function impossibility theorem when the set of alternatives is not one-dimensional.”

¹⁷ Marc Fleurbaey (2007: 17) makes the interesting point that if the Independence of Irrelevant Alternatives (IIA) condition is relaxed, then it becomes feasible “to aggregate individual ordinal non-comparable preferences and [to] discuss the design of institutions and policies on this basis.” The way in which he reformulates the IIA axiom is to posit that ethically relevant information about how preferences are paired ought to be taken into account. Thus he proposes (2007: 23) a “weak IIA,” namely that, “[s]ocial preferences on a pair of options should only depend on the population’s

preferences on these options and on what options are indifferent to each of these two options for each individual.”

¹⁸ The extent to which the move toward non-welfarism has been revolutionary in a Kuhnian sense is open to debate; there certainly are authors who have opposed it and who are not ready to concede defeat! Nevertheless, I think that even though welfarism is far from dead, it is reasonable to say that the challenges posed by non-welfarism have radically transformed normative economics and related fields

¹⁹ See also List (2004).

²⁰ Indeed, as Sen (1982: n3) remarks, welfarist variants of the difference principle have been proposed by various authors

²¹ At some point, Rawls goes as far as stating that self-respect is “perhaps the most important primary good” (Rawls 1999: 348).

²² In the preface to the revised edition of *TJ*, as well as in *Justice as Fairness*, Rawls took pain to add another comparison, namely one between his two principles “with a modification of themselves formed by substituting for the difference principle the principle of (average) utility constrained by a minimum” (2001, xvii). This, he explained, helps to more convincingly show that his two principles are justified by the ideas of “publicity and reciprocity” but, taking the concept of reciprocity, for example, there are several other alternative theoretical framework that also make extensive use of the notion of reciprocity (e.g., Kolm 2005) which are not revealed to the parties behind the veil.

²³ It is, of course, important to underline that individuals are responsible for the ends they chose and there is no obligation to assist anyone in pursuing ends that are demonstrably unethical.

²⁴ Fouillée's departure from Kantianism had to do with what he saw as the motivation for repaying that debt, namely what he called the *idée force* of solidarity. Certain intuitions, when individual realize that they share them, become powerful motivations and, in a process similar to spontaneous order, become self-actuating. While Fouillée thought that the revolutionary ideal of “fraternity” was a somewhat utopian notion, he argued that it is more difficult to escape the realization that taking advantage of the all the material and cultural wealth that a society has created over time creates bonds of “solidarity.” In other words, he did not assign to this term any communitarian connotation but simply meant by it a web of implicit contractual obligations.

²⁵ This is followed by a long list of not always perfectly apt examples discussed in great detail by Ledevitz (1985).

²⁶ Rawlsians could counter that the two aspects of the second principle (“power and prerogatives of office and positions” and the difference principle) encompass a very wide range of socially relevant patters of interaction; I concede that this is the case but would suggest that more open-ended concepts such as Sen's “functionings” and “capabilities” cover a far broader range of situations beyond the worlds of work and politics. For a similar critique of the limited scope of opportunities associated with Rawls' primary goods, even when considering only the circumstances of a market economy, see Kolm (1996: 184).

²⁷ But Nussbaum (2003: 43) has a point in arguing that implicit in the way Sen defines the very notion of capabilities is a particular ordering that ranks first some non-negotiable capabilities (i.e., health, education, political and civil rights).

²⁸ This is a double-edged factor: large urban centers also include areas where young males in particular are trapped in a culture of poverty, violence and crime (e.g., South Los Angeles or the “*cités*” in suburban Paris).

²⁹ For a contrary point of view, see Kamm (2011). F.M. Kamm argues that the “Senian rights” derived from the imperfect obligation to assist are weak rights—weaker, that is, than existing human rights. That is a plausible characterization, but there is no reason to think that the former would necessarily crowd out the latter, as it were.

³⁰ See pp. 374, 405, 406 and 427 in the “definitive edition” (2011).

³¹ Burczak (2006, 130-134) also establish an explicit linkage between the capabilities approach and income redistribution in the form a lump sum payment, but his scheme comes with some “strings attached” that would restrict the choices open to individuals.

³² On the concept of public reason, see Rawls (1993; 1999) and Gaus (2011)

³³ See, for instance, Gamel (2011).

³⁴ There now exists a journal (*Basic Income Studies*) entirely devoted to this topic.

³⁵ A NIT such as ELIE would need to be supplemented by other transfers if it is designed to replace most social insurance type programs because it would not cover certain categories of individuals (e.g., retired or disabled people); for these individuals, a targeted transfer but with very few conditions (perhaps pegged at something approaching \bar{w}) would have to be put in place. Admittedly, from the standpoint of minimizing administrative costs, a BIG would have a clear advantage.

³⁶ They are: 1) Compensatory transfer: “If two individuals have identical preferences and work the same amount, but have different consumptions, then it is socially at least as good to make a transfer that reduces the consumption inequality between them (leaving labor quantities unchanged). 2) Laissez-faire in equal skills economies: “If all individuals have the same earning abilities, no redistribution is needed.” And 3) Separability: “If an individual has the same labor-income bundle in two allocations, the social ranking should be the same if this individual did not exist.”

³⁷ See Dewey ([1929] 1958).

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