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Fairness to Nonparticipants: A Case for A Practice-Independent Egalitarian Baseline

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Proponents of practice-dependent egalitarianism argue that egalitarian duties and entitlements only apply among participants in morally relevant practices. In this paper I argue that these views are implausible because they allow for objectionable treatment of nonparticipants. I show that it is impossible, on the basis of practice-internal considerations alone, to determine the extent to which the pursuit of practices can permissibly limit the opportunities of nonparticipants. There are opportunities beyond the current holdings of practices to which no one has a privileged claim (such as unowned natural resources), and the distribution of which is a matter of justice. A just distribution of such unowned distributive goods, though, requires a practice-independent distributive baseline. I further show that such a baseline can only be egalitarian, because all alternative baselines face serious objections. From this I conclude that any plausible theory of distributive justice must accept some form of equal practice-independent distributive entitlements.

Keywords: global egalitarianism; practice-dependence; distributive justice

Introduction

This essay is concerned with the scope of distributive equality. I argue that any plausible theory of distributive justice¹ must assume that everyone is entitled to some form of equal distributive shares, regardless of their membership in particular social practices. The essay is thus a case against practice-dependent interpretations of egalitarian justice, which have regained popularity in recent years.² Such interpretations rest on the idea that the existence of certain kinds of social practices is a necessary condition for the application of sound

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principles of egalitarian justice because the very content of justice depends (at least partly) on the participants' interpretation of the purpose of their practice. This is to say that egalitarian justice governs the relations among people depending on whether these people have relations of some special sort (e.g. whether they are co-nationals or cooperating partners in joint social practices). The objection I raise here against practice-dependent egalitarian theories is that these views allow for objectionable and unfair treatment of people who do not participate in the relevant practices. Practice-dependent egalitarianism, in other words, cannot satisfactorily realize our egalitarian notions deriving from the premise of the moral equality of all persons since it leaves nonparticipants with a less-than-justifiable share of what matters from the point of distributive justice.

In the first section of the essay, I explain what is essential to practice-dependent interpretations of egalitarian justice, why these views limit distributive justice to the context of existing practices, and how practice-dependent egalitarians think we should treat those who are not members of practices that generate principles of egalitarian justice. The second section analyses the problems that practice-dependent views encounter when they determine the just extent to which non-interacting practices can influence each other with the help of non-distributive constraints (i.e. basic rights). I argue that we can only determine the extent to which practices can permissibly influence each other when we take into account their relative distributive situation as well as the overall opportunities that are available to them. These problems point to the need to adopt *some practice-independent* distributive baseline. In the third section of the paper, I show by elimination the necessity of adopting a practice-independent *egalitarian* baseline by demonstrating that all non-egalitarian candidates for such a baseline suffer from condemning implications. I conclude with the argument that we have to ensure a 'level playing field' for everyone, and must not use more than an equal share of whatever is available to humanity that can make human lives go well.³

While this essay makes a case for practice-independent egalitarianism, it is not an argument for any particular formulation of this ideal. There are various distinct normative theories that can be described in practice-independent egalitarian terms such as Hillel Steiner's left-libertarianism (Steiner 1999), Thomas Christiano's account of global equality (Christiano 2008b), Thomas Pogge's argument for a 'harm-independent criterion of justice' (Pogge 2004), Simon Caney's humanity-centered cosmopolitanism (Caney 2005), Chris Armstrong's case for global egalitarianism (Armstrong 2010), and Pablo Gilabert's humanist defense of global equality (Gilabert 2012). They all share the idea that an equal claim to some sort of distributive shares does not depend on the existence of particular social practices or membership in such practices and are thus – according to the arguments advanced here – superior to their practice-dependent rivals.⁴

Practice-dependent egalitarianism and its treatment of nonparticipants

The essential claim of practice-dependent egalitarianism is that the content of distributive justice is (partially) relative to the purpose of the practices in question, and that egalitarian duties and entitlements therefore exist only among members of particular social practices. Thus these approaches have far-reaching implications for our thinking about global distributive justice since the existence of such practices across societies is often a matter of debate.

At a fundamental level, the particular importance that practice-dependent egalitarians attribute to existing social practices derives from their understanding of the *very point* of *distributive justice*. Practice-dependent egalitarians reject the idea that distributive justice is in some way directly concerned with the value of states of affairs (such as the establishment of a 'perfectionist ideal' (James 2005b, p. 304) like some form of distributive equality). In their view, distributive justice instead governs the behavior and the interactions among people. However, for this to be possible, there must be interactions that we can analyse and interpret

with a view to their purposes in the first place. Understanding the purposes of practices in their best light is crucial for practice-dependent egalitarians because different purposes generate different duties of justice for the participants: while every citizen has the right to run for public office, not everyone can apply for the post of a physician, or receive social welfare payments. This idea is captured by what Andrea Sangiovanni calls the *practice-dependence thesis*: ‘the content, scope, and justification of a conception of justice depends on the structure and form of the practices that the conception is intended to govern’ (Sangiovanni 2008, p. 138).⁵

Since practice-dependent egalitarians hold that the content of distributive justice (partially) depends on the social meaning of a practice, only some practices require an equal distribution among participants. According to John Rawls (1971, p. 6), for instance, the primary subject of distributive justice is the basic structure of a society whose purpose is ‘to create primary social goods, and to do so as a cooperative scheme among persons for mutual or reciprocal advantage’ (James 2005b, p. 300). From the practice-dependent perspective, the role of principles of distributive justice is to guide the fair distribution of the benefits and burdens of the social practices that have pervasive effects on our lives, and from which we cannot easily disassociate ourselves (see James 2005a, p. 540). Here, distributive equality becomes relevant as a necessary condition for the justification of the pursuit of certain social practices (like those that constitute the basic structure or international trade). As James stresses, ‘the idea is not that equal distribution has value as such, but rather that each participant, as a moral equal, has a presumptively equal claim to the fruit of the joint effort, in light of his or her contribution to that venture’ (James 2005a, p. 543). Since the value of states of affairs can matter (if at all) only derivatively of other purposes (such as ensuring a fair distribution of the benefits and burdens of social practices), equality in the distribution of goods has no inherent importance for practice-dependent egalitarians.⁶ Beyond actual

practices, though, there are no socially-produced benefits and burdens that could require a just distribution or collective purposes that could be interpreted.⁷ That is, according to practice-dependence, considerations of distributive justice only apply *within* practices or *across interacting* practices. Thus, Laura Valentini holds: ‘in a world of independent states, [...], justice would generate no distributive requirements’ (Valentini 2011a, p. 209).

One important consequence of the practice-dependent account of the purpose of distributive justice is that only certain morally arbitrary factors⁸ fall within its purview. Within social practices, arbitrary influences on human well-being (such as natural talents or social starting positions) must *not* generate unequal chances for people to well live. Across non-interacting groups of people, however, morally arbitrary factors (such as the naturally unequal distribution of resources and other environmental factors) *are* allowed to influence how well-off people are, as long as they do not have some form of thick interaction or cooperative practice. Without such common purposes and schemes, natural inequality (no matter what different opportunities it generates) is *not* a concern for principles of distributive justice. For practice-dependent egalitarians like James, there exist no distributive (let alone egalitarian) duties between isolated, non-cooperative societies:

It is only when, given a fair amount of luck and time, meaningful patterns of interaction become established between [...] two societies or their members that we can begin to consider the extent to which the *global* distribution of goods and opportunities is genuinely within their power, and so reflective of or attributable to their social relations as opposed to the mere workings of fate. (James 2011, p. 294)

Thus, a crucial question (which I focus on here) that arises for practice-dependent egalitarians is how to treat those who do not participate in cooperative social schemes. Practice-dependent egalitarianism, we saw, restricts distributive justice and egalitarian entitlements to those who participate in certain practices. Yet, any distributive theory would be implausible if it completely ignored the position of outsiders who are nonetheless affected by a practice. This

becomes clear when we keep in mind that every social practice also has externalities that affect non-participants. If practice-dependent theories were exclusively participant-focused, they would be concerned only with the lives and interests of the participants and allow for the claims of all other people to be completely ignored. In this case, practice-dependent egalitarianism would be implausibly permissive: it would allow for any detrimental consequence of a practice to affect non-participants who are also our moral equals.

It would be incorrect, though, to think that practice-dependent egalitarians (and proponents of other views that make egalitarian justice dependent on membership in certain social practices) do not acknowledge the practice-*independent* equal moral value of all persons. Just as their practice-independent opponents, these theorists hold that, due to their common humanity, everyone is owed certain forms of treatment and that such treatment is a matter of (non-distributive) justice. However, they hold that what is required by everyone's humanity (in the absence of co-membership in practices) is something short of distributive equality. They generally accept practice-independent constraints on practices in the form of the guarantee of everyone's basic needs, a duty of assistance in cases of emergency, and bans on harming nonparticipants (see, for instance, Valentini (2011a, p. 177)). These entitlements derive from everyone's humanity and can be thought of in terms of (practice-independent) 'basic rights justice.' Beyond such general constraints, practice-dependent egalitarians do not tell us much about the extent to which practices can expand and influence the opportunities of nonparticipants.

One exception in this respect is Aaron James's *Principle of Due Care*, which is best understood as a general constraint (as opposed to a duty of distributive justice) that he argues for as a practice-dependent egalitarian.⁹ According to this principle, no one – regardless of whether they are participants in a practice or not – should 'be made [...] worse off than they would have been had the harmful activity not been undertaken' (James 2005a, 543). The

principle comes with an important qualification: ‘compensation when *harm* is done requires only restoration to this level of well-being’ (James 2005a, p. 543; emphasis added). Thus, because James also holds that considerations of distributive justice are exclusive to the context of social practices, he agrees that – seen in its entirety – ‘justice is not participation-based, but it [...] is practice-sensitive’ (James 2005b, p. 312).

The Principle of Due Care certainly takes some of the edge of the participation-centeredness of the central thesis of practice-dependent egalitarianism. However, in the following section, I present some reasons for thinking that the Principle of Due Care (and every other non-distributive, non-egalitarian principle) is not a suitable standard for assessing what is just with respect to nonparticipants. Instead, as I will show in the third section, all plausible accounts of egalitarian justice must endorse some form of *equal* practice-independent distributive entitlements.

The argument for a practice-independent distributive baseline

As we have seen, there are at least two main points of contention between practice-dependent and practice-independent egalitarians: (a) whether the value of states of affairs matters independently for the demands of justice, and (b) whether the scope of distributive justice extends beyond the regulation of practices among their participants. We can answer both questions if we can show that either practice-dependent egalitarianism or its rival suffer from fatal shortcomings. As was explained, much of the plausibility of practice-dependent egalitarianism hinges on whether it can adequately take into account the interests of nonparticipants without accepting some form of *equal* practice-independent *distributive* entitlements.

My aim in the remainder of this essay is to show that practice-dependent egalitarianism is implausible *precisely because* it is too permissive, and thus allows for nonparticipants to be unjustifiably disadvantaged by the practices of others. Let us begin with

the problem that practice-dependent egalitarians lack a method for determining the just extent to which non-interacting practices can have an impact on each other. Indeed, in their view, this question is excluded from the scope of distributive justice.

The relevance of relative levels

For our purposes, James's Principle of Due Care is an exemplar of the (ultimately unsuccessful) attempts of practice-dependent egalitarians to account for the legitimate claims of non-members by employing non-egalitarian constraints that are themselves practice-independent but non-distributive. To recall, the Principle of Due Care demands that practices make nonparticipants no worse-off than they would be if that practice did not exist. It thus takes the current distributive holdings of the parties involved to be morally significant. However, this position becomes problematic once we consider various ways in which practices render nonparticipants 'worse-off'. To demonstrate this, I employ a thought-experiment loosely based on an idea of Charles Beitz (1979). Imagine a world that consists of only two islands each of which is inhabited by a distinct society, R(ich) and P(oor) respectively. While both societies are aware of each other's existence, there is no interaction among them. From this set-up, we can construct several scenarios.

Negative Externalities Case I: Society R dumps its industrial waste into the sea.

The waste is carried by the current to the shores of P's island, killing the local fish and polluting the beaches.

This is obviously problematic and James's Principle of Due Care would rule out R's practice of ocean waste-dumping as unjust. However, the Principle of Due Care is much less plausible in another scenario.

Negative Externalities Case II: Poor society P pollutes the shores of the island of rich society R. Let us posit that the only way for P to survive on the resources of

their island involves dumping its industrial waste into the sea. We further assume that through the pollution of some of its waters and shores, society R would be made only somewhat worse-off but not significantly so. Indeed, R's island might be so large and resource-rich that to them the washed-up waste is merely a nuisance.

It is plausible that in such a situation, P has a stronger distributive claim to make use of the shores, even though R currently enjoys them. By assuming that current holdings are morally relevant, the Principle of Due Care ignores the fact that the same quantitative loss to both parties is worse for those who are worse-off. These two *Negative Externalities Cases* show that James's Principle of Due Care is much more plausible in situations where those harmed by the practices of others are comparably worse-off than those inflicting the damage. On the other hand, if the polluters are in a worse position than those suffering the consequences of the pollution, the appeal of the Principle of Due Care is less apparent. This shows that non-egalitarian constraints like the Principle of Due Care suffer from a problematic status quo bias.

It thus appears that the question of the permissible effects of practices on each other cannot be answered by a rule that prohibits making anyone worse-off than they are right now. In order to determine which distributive entitlements are justifiable, we also need to consider the *relative levels of well-being or wealth* people enjoy across different and separate practices. Clearly, we need *some* baseline against which the relative levels of non-cooperating groups of people can be measured to determine what impact one practice may have on another, and it is difficult to see how that baseline could be determined by the distributive status quo alone. The scenarios thus highlight the fact that (contrary to the claims of practice-dependent egalitarians) there are issues of distributive justice beyond and across the borders of separate practices.

At this point, practice-dependent egalitarians might reply that they can evaluate the permissible extent of interferences among independent practices by looking only at the purposes of the practices in question. This might go as follows: poor society P's level of wealth is 5, rich society R's level of wealth is 13, but society R only needs a level of 10 to sustain its current high level of affluence; the other 3 units are a luxurious surplus that R's practices produce. In this situation, we could say that, with its pollution, poor society P should be allowed to bring down the level of affluence of society R to 10, only by looking at the purposes of the practices involved.

Some practice-dependent egalitarians have proposed that in this way practice-dependent considerations of justice can also apply across practices that affect each other but are not deeply integrated. According to these practice-dependent egalitarians, 'we live in a world of *overlapping* practices, and the specific rules of each practice often have a major impact on the internal functioning of other practices' (Banai et al. 2011, p. 56). Thus, on their view the fact that the pollution of R affects the practices of P is enough to make this impact a matter of practice-dependent distributive justice. To be clear, from this perspective the fact that society P is made worse-off is not an injustice *per se*. Rather, 'the construction of principles of justice for all relevant practices should be undertaken with an eye to their mutual interdependence' (Banai et al. 2011, p. 56). That is, by looking at the purposes of the involved practices, their relative levels of affluence or well-being, and their impact on each other, we could determine the justifiable effects of practices on nonparticipants by merely employing practice-internal considerations. Depending on the purpose of the practices, and the degree to which they affect each other, we might then arrive at egalitarian practice-dependent duties that participants have toward those they affect with their ventures, but with whom they do not cooperate.

Unfortunately for practice-dependent egalitarians, there are cases in which practice-internal considerations alone cannot determine the extent of the impact practices can justly have on the situation of nonparticipants. These are cases in which what is at stake exceeds the current holdings of the non-interacting practices involved.

The importance of overall opportunities

Let us now consider another scenario.

Island Q: this scenario resembles *Negative Externalities Case II* with the addition of uninhabited island Q that lies off the coast of P's island. Here, new questions arise, such as whether it would still be permissible for society P to pollute the shores of rich society R without first making use of the benefits that island Q can offer them.¹⁰ However, using Q's resources might only bring up society P to a level of 8. Another important question is who can legitimately lay claim to island Q in the first place.

It is difficult to see how these questions can be answered by employing exclusively practice-internal considerations. The 'Island Q' scenario shows that the question of the extent to which practices can legitimately have constraining effects on nonparticipants cannot be answered by only considering the relative levels of affluence of the parties involved either. Instead, in order to establish a baseline to measure such influences, we need to take into account the *overall practice-independent opportunities* available to all of the parties. Thus, the existence of island Q will make a difference for our assessment of the justifiability of society P's pollution of R's shores. If making use of island Q would allow P to rise to a level of 15, then it is much harder for P to show that its polluting R's shores is permissible.

It is important to note that the need to take everyone's overall opportunities into account does not depend on accepting the view that all inequalities (i.e. the inequality from

the differences in the islands' natural resources) are unjust as such. In order to acknowledge the problem, one can remain agnostic about this question. What matters is that we must look to the overall opportunities available to everyone when evaluating the extent to which collective practices can justly lead to lost opportunities for others – whether they are participants or nonparticipants. The problem for practice-dependent egalitarians is that they are unable to make such assessments on the basis of purely practice-internal standards. The following scenario clarifies this point:

The Atmospheric Pollution Case: There are two poor societies on two islands that have no contact with each other. One society progresses rapidly, reaching the industrial age much earlier than the other, and in this way escapes poverty. Its industrial production pollutes the atmosphere of the planet until the atmosphere's absorption capacity is almost exhausted. At this point the other society reaches the industrial age and wants to grow to escape poverty. However, given the current level of pollution, this society cannot simply add to the pollution of the advanced society without exceeding the atmospheric absorption limit (leading to climate change, rising tides, and the possible destruction of both islands).

Here, the question arises whether the primitive society now has to accept that – since it just happened to develop later and does not (or cannot) establish practices with the advanced society – it cannot develop any further. Alternatively, the poorer society might be entitled to demand that the advanced society reduces its emissions so it can reach a higher level of affluence even if this means that the more advanced society is going to suffer a reduction of its level of affluence. It is not apparent how we can answer these questions using exclusively practice-internal standards without having to accept some 'first come, first serve' principle of initial acquisition. A non-egalitarian, non-distributive principle like James's Principle of Due Care, on the other hand, does not answer these distributive questions because it simply

assumes that the current holdings of the two societies are morally relevant. James's Principle of Due Care, to recall, only conceives of problematic externalities of practices in terms of harming nonparticipants by diminishing their current holdings, but not in terms of causing unjust distributions. (Notice, again, that this problem exists independently of whether we think that the unequal distribution of natural resources on the two islands is unjust by itself.)

Practice-dependent egalitarians are thus unable to determine the just extent to which the pursuit of a practice is allowed to cause a loss in opportunities for nonparticipants. There are plenty of examples that illustrate this problem. Decisions made in one country often influence the options or the opportunity costs of other societies: using the water from a big river might negatively affect the opportunities of another, independent society living downstream; claims to new or unowned territories or resources affect what other societies can claim (i.e. in Antarctica, below the Arctic, at the bottom of the oceans, or maybe even on the Moon). In this sense, there are countless ways to diminish other's future opportunities in maximally indirect ways that make it implausible to speak of overlapping practices in these cases. Someone using up rare earth metals on the other side of the world certainly robs me of the opportunity to make use of these valuable resources myself.¹¹ But if we do not have relations of any sort, can my lost opportunity be captured by the idea of the effects of overlapping practices? And, more importantly, what is the baseline that tells us to what extent the other person is permitted to diminish my future opportunities? In order to determine such a baseline, it is insufficient to consider only our current holdings. Rather, we need to take into account how much of the rare earth metals (or alternative equally valuable resources) there is available *in total* to both of us to understand whether the other person's claim to some amount of these is distributively just. This shows that our assessment of the justifiable effects of (non-cooperating) practices on each other cannot exclusively refer to practice-internal standards.

Instead, we must also look at the *overall practice-independent opportunities* that are available to everyone.

To be sure: these questions are questions of distributive justice and not of basic rights justice; they regard what distribution of goods among unrelated people is just – and not whether someone violates my basic rights or damages my possessions. Consequently, in order to determine the just distribution across practices and the extent to which practices are permitted to diminish the opportunities of nonparticipants, practice-dependent egalitarians would have to accept that there is a baseline of distributive shares (that is determined by taking into account the relative levels of the involved parties and the overall opportunities available to them) that every person is entitled to *independently* of the existence or purposes of any social practice. However, this is a position that exceeds their practice-dependent thesis.

The impossibility of a practice-dependent egalitarian constraint on practices

A practice-dependent egalitarian might argue that her view can determine the just extent of practices because it is *inherent in the purposes* of certain practices that participants ought to leave equal possibilities and space for nonparticipants to conduct their own practices of the same kind. She might thus hold a practice-dependent version of the ‘pervasive impact theory’ mentioned by Arash Abizadeh, according to which ‘the scope of justice [consists of] those persons whose life chances are pervasively impacted by [a morally relevant practice]’ (Abizadeh 2007, p. 343). Practices are valuable insofar as they are valuable *for* people, and thus it makes sense to think that a practice that I engage in, and which is valuable to me (i.e. using fossil fuels to increase productivity thereby polluting the atmosphere) would be equally valuable for someone else to engage in. One might therefore conclude that it is the purpose and value of this practice itself that generates a duty to ensure that everyone who could engage in their own practice of this kind has the opportunity to do so.

However, this way of specifying the distributive baseline is not available for practice-dependent egalitarians. If there is a requirement to leave *equal* space for unrelated others to create their own practices, this obligation could not be grounded in the purposes or value of the practices, single acts, or whatever else impacts the situation of distant others. This is because such a requirement of equal concern and equal distributive entitlements must be thought of as an *independent constraint* on the purposes and extent of practices.

To put this point differently: if a theory requires us to leave equal opportunities for all those whom our practices have an impact (which encompasses everyone who could make use of the same opportunities as us – such as those deriving from natural resources – regardless of whether we are in contact with them or not), this *distributive* requirement must derive from a feature of those affected that is *logically prior to and independent of* the practices we engage in – a feature such as everyone’s equal moral status. Egalitarian claims of this sort would be truly practice-independent in that they do not depend on anything about practices at all: they would not be fundamentally justified by reference to the purposes of the practices in question; they would not be limited to existing practices; and the point of such egalitarian entitlements would not be to justify the practices. Instead, claims to equal space for one’s practices are justified by reference to everyone’s moral equality; they are held by everyone since everyone’s opportunities are affected by ongoing practices; and the point of such egalitarian entitlements would be to ensure that everyone is guaranteed the opportunities they are entitled to.

Further, it is important to note that the sort of equal concern implied by the ‘pervasive impact theory’ presupposes that justice is not only concerned with the distribution of socially-produced benefits or the just organization of practices, but also with ensuring that certain equal states of affairs obtain (e.g. that there is (non-socially-generated) equal space for people to develop their practices; or that people are entitled to equal shares of the overall available

natural resources). This implies that in order to argue for egalitarian entitlements for everyone, one must accept the idea that there is value in equality as such. However, as we saw earlier (see pp. 3, 4), this amounts to an interpretation of the point of distributive justice and equality that is rejected by practice-dependent egalitarians.

The argument for an *egalitarian* practice-independent baseline

The preceding section has shown that (in order to determine the justifiable effects of practices) we need to assume *some* distributive baseline that cannot be specified by looking at the purposes of existing practices alone. It also became clear that the distributive standard in question also must be *practice-independent*: while practice-dependent views can account for the basic rights of morally equal nonparticipants, they cannot tell us how to regulate the acquisition of unowned distributive goods among social practices that do not interact. But without any distributive baseline, we cannot know (a) the extent to which practices can legitimately develop, and (b) the extent to which the permissible pursuit of practices can lead to the loss of opportunities for nonparticipants. The need for a distributive baseline, it was shown, is thus a matter of distributive justice among non-interacting practices.

This section will demonstrate that the baseline that is required can only be *egalitarian*. I arrive at this conclusion by way of eliminating all the alternatives by showing that they are implausible. While a practice-independent baseline must be conceived of either as egalitarian or non-egalitarian, any non-egalitarian standard has implications that are so unjustifiable and counter-intuitive that the only plausible option is an enforceable egalitarian constraint on the pursuit of social practices.

There are, of course, numerous conceivable non-egalitarian distributive baselines. One candidate is James's Principle of Due Care, which (as a non-distributive constraint) was already shown to be inadequate for determining the extent to which practices can permissibly diminish the opportunities available to others. Taken as a *distributive* baseline, though, the

Principle of Due Care is too restrictive as it requires us to never make anyone outside our cooperative schemes worse-off than they are right now through the pursuit of our practices. But when we act, we cannot help but diminish the opportunities or options of others: the space I occupy cannot be occupied by others, the air that I breathe cannot be breathed by someone else, food I eat cannot nourish others, and so on. Thus, if it is the case (as is hard to dispute) that not every loss of opportunity for others that our actions or practices cause constitutes an injustice, then this first candidate for a non-egalitarian distributive baseline is implausibly restrictive.

A second way of arguing for a non-egalitarian distributive baseline is to appeal to the idea of mutual benefit. According to John Locke, the institution of private property is justified by the increased overall value of what is owned, and thus makes even those who are left with nothing to appropriate better-off (see Locke 1980, chapter 5, §37). However, this idea cannot justify a non-egalitarian distributive baseline in the cases we consider because Locke's claim is meant to justify the acquisition of something as private property to those *within* a social practice. However, our scenario is one in which the two parties do *not* cooperate for mutual gain, and are not even in contact with one another. Thus, the appropriation of some valuable resource by one party cannot benefit the other. Indeed, the opposite is the case: such acquisition makes the other party worse-off by closing off the opportunities that the resources could have offered.¹²

A third category of potential non-egalitarian distributive baselines consists of global sufficientarian views, according to which every person ought to have 'enough.' Such a sub-egalitarian practice-independent baseline can be understood as a requirement of *distributive* justice rather than a protection of basic needs and human rights.¹³ However, as Paula Casal (2007) shows, sufficiency principles are problematic because according to them the distribution of resources is not a matter of distributive justice above the level of sufficiency.

The problem is that (except for particularly dire scenarios in which nothing can be distributed) beyond the point where sufficiency is guaranteed, there remain other resources that could be made use of by both participants and nonparticipants equally. It is simply implausible to claim that the distribution of these ‘surplus goods’ are not important enough to declare it a matter of (enforceable distributive) justice. This point applies to both minimal thresholds (that ensure the means for a decent life), as well as to more demanding thresholds of sufficiency (which would require, e.g., that everyone can make effective use of their freedoms).¹⁴ Beyond such baselines there remain other goods that are beneficial for everyone and that could be distributed in different ways. The burden of proof here lies with those who hold that the claims of morally equal nonparticipants are only strong enough to secure them ‘enough’ (in any sense) while others are free to appropriate everything else. That is to say, it is not clear how such a gap between intra-practice equality and extra-practice sufficiency could be justified.¹⁵

Besides these individual shortcomings that trouble various versions of non-egalitarian baselines, there are two *general* problems that undermine the plausibility of *any* sub-egalitarian distributive standard. First, all these views must claim that the acquisition of unowned resources beyond an equal share of what is overall available is allowed to take place on a ‘*first come, first serve*’ basis. This, though, is a highly problematic rule for anyone who takes seriously the moral equality of nonparticipants. On the one hand, such a position accepts that nonparticipants also have equal moral worth. In addition, we know that both we and nonparticipants could (now or in the future) derive the same benefits from the goods that exceed our equal share. We further have to acknowledge that no party has a privileged claim to the unowned resources. On the other hand, though, we also hold that the claims of nonparticipants to those resources that exceed our equal share are not important enough to leave the resources for them. That is to say, we take the interests of nonparticipants in the

surplus goods to be less important (or to count for less) than our own interest in these goods. What suffices to justify our acquisition of *more* than an equal share of resources is that we happen to get there first. But this seems incompatible with our claim that we genuinely respect the moral equality of these nonparticipants and the legitimacy of their interests. Acquisition on a ‘first come, first serve’ basis is ruled out by practice-dependent egalitarians *within* practices. It is not obvious why membership in social practices (which is a coincidental matter) determines whose opportunities we can foreclose by acquiring unowned resources by getting to them first.

Besides the problem of declaring the appropriation of unowned resources legitimate on a ‘first come, first serve’ basis, all conceivable non-egalitarian practice-independent distributive baselines suffer from a second grave problem: they incentivize participants in the better-off practice to shun worse-off nonparticipants because establishing contact would trigger more demanding and potentially egalitarian (practice-dependent) duties of distributive justice. While this point might initially seem unproblematic to practice-dependent theorists (after all, such self-isolation might be a permissible choice), it is accompanied by the nasty implication that it would also be permissible for participants in better-off practices to use their advantage to prevent worse-off nonparticipants from advancing. The following scenario illustrates this problem.

The *Contact-Attempt*: in a divided world, society P(oor) wants to establish contact with society R(ich) in order to establish practices that would trigger egalitarian duties. However, the island that society P occupies does not supply its inhabitants with sufficiently stable wood for building the seafaring ships necessary to establish contact. Thus, society P has to hope for driftwood to be washed ashore its beaches – an uncommon occurrence.

In this situation, a sub-egalitarian baseline would not prohibit society R to ensure that no

driftwood reaches the shores of P's island by fishing it out of the ocean.¹⁶

A critic might argue that scenarios in which one group keeps another from advancing *without* establishing direct contact with them is rather unrealistic. However, the low probability of such a situation does not address the problem that, in this kind of case, any sub-egalitarian distributive baseline *would allow* the better-off group to prevent the advancement of the worse-off group. This implication constitutes a grave flaw for any sub-egalitarian distributive standard, since it allows for arbitrarily advantaged groups to influence permanently the fate of arbitrarily disadvantaged groups of morally equal people. In such situations, morally arbitrary factors (e.g. the existence of natural resources crucial for the development and progress of a society) would generate very different levels of well-being and opportunities that could be legitimately used to some group's unilateral advantage. The discrimination that a sub-egalitarian baseline permits therefore does not do justice to the distributive interests of morally-equal nonparticipants who are arbitrarily worse-off.

Summing up these points we can now conclude that any conceivable non-egalitarian distributive baseline gives rise to highly problematic consequences and implications. We have seen that a baseline like the Principle of Due Care is too restrictive. Also, the claim that beyond a sufficiency threshold the distribution of unowned resources is not a matter of distributive justice is unconvincing. Further, the 'first come, first serve' basis on which non-egalitarian standards would permit the acquisition of resources (to which no one has a privileged claim) conflicts with respect for the moral equality of nonparticipants. Finally, any sub-egalitarian constraint on appropriation would allow for worse-off practices permanently to become subject to the choices and influence of other practices with whom they do not directly interact. I thus conclude that advocates of *all* non-egalitarian baselines are faced with bullets that are simply too big to bite: any sub-egalitarian baseline cannot adequately respect the legitimate claims of morally equal nonparticipants. It is not a matter of our decent moral

character – but a matter of distributive justice – to leave them an equal share. A ‘first come, first serve’ rule of acquisition is condemnably problematic in light of the absence of any prior privileged claims and the possibilities it would open up for more advantaged practices to hinder the development of the less fortunate. By elimination, then, the only plausible constraint on social practices is an *egalitarian practice-independent baseline* that is a matter of *enforceable distributive justice*.

Conclusion

We have now seen that practice-independent versions of egalitarianism are more plausible than their practice-dependent competitors. Practice-dependent egalitarians hold that distributive equality only applies *within* or *across* certain cooperating practices with purposes the justification of which makes equality a necessary condition. Further, in their view, distributive justice can only demand an equal distribution of socially-produced benefits and burdens among those who contribute to their production. Other considerations, such as the value of states of affairs, can only be just or unjust if they refer to the intended purpose of a practice and the distribution of socially-produced (dis-) advantages among contributors.

In the second section, we saw that practice-dependent accounts of equality encounter problems when determining the just extent to which practices can have effects on nonparticipants and can lead to a loss of opportunities for them. On the one hand, the permissible impact that practices can have on each other depends on the relative levels of affluence or well-being of the participants in the different practices. It is not enough to assume that a practice must never make outsiders worse-off than they would be without the effects of the practice. What is even more problematic for practice-dependent egalitarians is that we cannot determine which externalities of practices are justifiable without looking at the overall opportunities available. However, these necessary additional parameters and factors exceed the scope of practice-dependent egalitarianism because they cannot be determined by looking

at the extent and purpose of existing practices alone. Rather, we need to apply a just practice-independent distributive baseline to determine the extent to which practices can grow and cause a loss of opportunities for nonparticipants. Practice-internal considerations as well as such that regard the guarantee of basic rights are (on their own) inadequate for answering these *distributive* questions.

In the third section, we scrutinized the possible non-egalitarian candidates for a practice-independent global distributive baseline, and concluded that none are plausible. With respect to the Principle of Due Care as a distributive principle, we saw that it is unreasonably restrictive to require our actions or practices to never make others worse-off than they would be otherwise. Sufficiency principles, on the other hand, suffer from problems of their own as they declare everything beyond the sufficiency threshold not to be concerns of distributive justice. Also, appropriation of more than an equal share of unowned resources does not make those left with less than an equal share better off. In addition, we found that all sub-egalitarian baselines generally face a number of problems, including: the inappropriateness of the non-egalitarian ‘first come – first serve’ rules of appropriation; and the permissibility of unilateral influence in cases in which one group prevents another from advancing. These unjustifiable implications leave only one option: the adoption of some *egalitarian* practice-independent distributive baseline. This standard alone allows us to assess the extent to which practices permissibly affect non-participants.¹⁷

It is important to note that this is entirely compatible with the view that practices (and the purposes the participants attribute to their practices) are relevant for the interpretation of the requirements of justice within existing practices. However, I have argued that interpretations of practices cannot determine the room practices can occupy in the world, the way new practices can be set up, and the extent to which existing practices can limit the overall opportunities of practices with which they do not interact. Such requirements and

constraints must be higher-order moral constraints (at least one level above existing practices and their internal rules of justice) and cannot be determined according to practice-internal interpretations themselves. We need to ensure a level playing field within which these practices can emerge and take place – which is to say that the higher-order constraint on practices must be *egalitarian* in nature. This means that *distributive* justice is not only concerned with justifying the organisation of existing practices to their participants, but distributive justice must also ensure that nonparticipants are treated fairly by those who pursue their common goals and purposes with their practices.¹⁸

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Notes

1. By the term ‘justice’ I mean the particularly stringent and forceful moral obligations of social institutions that differ from other moral requirements applicable to institutions (such as, for instance, charity and humanitarian assistance) in two ways. Firstly, we have duties of justice because there are persons who have correlative *enforceable* entitlements that trigger these duties. Secondly, failure to respect these entitlements by not fulfilling duties of justice can have severe consequences for an institution – it might jeopardize its own moral justification for exercising political power. This also means that states can endanger their legitimacy when they treat non-members in unjustifiable ways (see, for instance, Pogge (2005) and Buchanan (2011)).
2. See, for example, the works of Aaron James (2005a, 2005b, 2011, 2012); Ayelet Banai et al. (2011); Laura Valentini (2011a, 2011b); Miriam Ronzoni (2009); and Andrea Sangiovanni (2007, 2008).
3. In this paper, I focus especially on natural resources since these (a) are not socially-produced benefits, (b) are objectively valuable for everyone, and (c) affect all metrics of distributive justice.

4. The question whether practice-independent egalitarianism is *relational* or *non-relational* has important implications, but is not relevant for my argument. The distinction between relational and non-relational views is not consistently applied within the literature. Many authors (see Sangiovanni 2007, pp. 5, 6; Valentini 2011a, p. 6) understand as ‘relational’ views that hold that distributive justice applies among people who engage in direct interactions of some sort with each other (e.g. within states or international trade relations). Others (see Abizadeh 2007, p. 331; and Armstrong 2012, p. 26) hold that relationalism includes all views that claim that distributive justice applies to all persons who have access to the same pool of resources – irrespectively of whether they interact. An interesting question related to this distinction is whether distributive justice applies in situations in which there is no way in which our actions could lead to a loss of opportunities for others because the latter could never access the same distributive goods that we can make use of (e.g. because they lived in the past, or in a different galaxy). For theorists that answer this question affirmatively (who generally qualify as non-relationalists), the fact that some are worse-off (but not *made* worse-off by anything we do) is a case of (cosmic) distributive injustice. While this question is important and regards which states of affairs are relevant for justice (i.e. only those that can bear the mark of human influence, or any state of affairs that exists at all), it does not detract from the main arguments I advance in this paper: that egalitarian claims of justice do not depend upon membership in any particular social practices, and that ensuring that a certain state of affairs obtains (that no one uses more than an equal share of the overall available opportunities to those things that can make a human life go well) is a matter of (distributive) justice.
5. Besides the mentioned practice-dependent egalitarians, there is another large group of authors who restricts egalitarian justice to co-members in social practices (see Rawls (1999); Blake (2002); Nagel (2005); Freeman (2006); Moellendorf (2009), and Tan (2012)). On these views, though, the scope of equality is restricted to practices because equality presupposes some *particular feature* in practices that triggers the egalitarian requirements (e.g. the fact that their members are coerced by a common authority, or that the members are all contributors to the production of some common good). *The problem of the unfair treatment of non-participants raised in this paper presents a condemning problem for both groups of membership-dependent egalitarians.* What they have in common - and what gives rise to their common problem - is the claim that membership in certain social practices is a necessary and sufficient condition for having egalitarian claims and duties. However, the shortcomings of this second group of membership-dependent egalitarianism (that focus on particular features of practices rather than their purposes) have been well rehearsed (see, i.e., Julius (2006); or Cohen and Sabel (2006); and the works of the practice-dependent egalitarians listed in footnote 2). Thus, in this paper I focus

on practice-dependent egalitarians who argue that whether justice requires distributive equality depends on the social meaning of existing practices. I thank a reviewer of CRISPP for pressing me to make this difference clearer.

6. Elsewhere, James argues that ‘the significance of distribution [...] lies not in what distributional patterns come about per se, but in independently valuable relations of recognition’ (James 2011, p. 276). Miriam Ronzoni holds that ‘no state of affairs can be judged just or unjust unless we refer to a specific practice within it’ (Ronzoni 2009, p. 233). Darrel Moellendorf rejects the idea ‘that equality is intrinsically valuable.’ In his view, justice is ‘concerned not with conditions of inequality independent of economic associations, but with whether economic institutions [...] confer advantages simply on the basis of inequalities of social fortune’ (Moellendorf 2009, pp. 5, 63).
7. ‘Social justice assessment is limited to *socially created* advantages and disadvantages’ (James 2005a, p. 554). The idea that socially-produced inequalities are morally more important than those coming about naturally is shared and argued for by Nagel in his article ‘Justice and Nature’ (Nagel 1997).
8. By ‘morally arbitrary’ I mean factors that are not reasons for anything else.
9. James groups the Principle of Due Care with other non-distributive duties he mentions, such as inclusion or assistance (see James 2005a, p. 543).
10. Assuming that utilising the resources of island Q is a feasible alternative for society P to the practice that pollutes society R’s shores.
11. For Immanuel Kant, this issue constitutes the fundamental problem for the justification of private property in his ‘Doctrine of Right’ (see Kant 1996).
12. As is well-known, the second explanation that Locke offers for the permissibility of private property is that such ownership is justifiable when we leave ‘*as much and as good*’ for others (see Locke 1980, chapter 5, §27). This justification, though, presupposes the acceptance of the very baseline that practice-dependent theorists want to reject: an *egalitarian* practice-independent constraint on the pursuit of all practices.
13. John Rawls’s duty of assistance (Rawls 1999, p. 106) that aims at guaranteeing just and decent institutions for everyone is one example of such a global sufficientarian view.
14. For an argument that high thresholds of sufficiency are problematic in this way see Christiano (2008a, p. 29).
15. For this point see also Christiano (2008b).
16. We might accept the claim that keeping people from establishing common practices while coming into direct contact with them (for instance, by building border fences) already constitutes a form of interaction that makes considerations of practice-dependent (and possibly egalitarian)

justice applicable. However, in the scenario I consider here such direct interaction does not take place.

17. This leaves open the possibility that, if prioritarianism is correct, this equal practice-independent concern for people's distributive entitlements has to result in giving priority to the claims of those who are worst-off. The crucial point here is that also such prioritarian concern would have to apply in a practice-independent way to everyone. I thank Andres Moles for pointing this out to me.
18. It should be noted, though, that the argument advanced in this essay does not necessarily lead to a demand for equal shares of natural resources. Instead, it also allows for the possibility to argue for a distribution that requires equal shares of benefits that derive from the entire range of relevant goods as suggested by Simon Caney (2012) and Chris Armstrong (2013).

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