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The regulation of harm in international trade: a critique of James's Collective Due Care principle

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In his important recent book, Aaron James has defended a principle – Collective Due Care – for determining when a form of economic integration is morally objectionable because it causes unjustified harm (including unemployment, wage suppression and diminished working conditions). This essay argues that Collective Due Care would yield implausible judgements about trade practices and would be too indeterminate to play the practical role for which it is intended.

Keywords: fairness; harm; international trade; justice

Aaron James has proposed and defended three principles for the assessment of international economic integration in his rich and ambitious recent book, *Fairness in Practice: A Social Contract for a Global Economy* (James 2012). The first of these principles is called Collective Due Care (hereafter Due Care), and my aim in this short essay is to critically examine it. Due Care regulates the *harms* that can arise from international economic integration (including unemployment, wage suppression and diminished working conditions). That is, it determines when a form of economic integration is morally objectionable because it causes unjustified harm – it grounds harm-based complaints. James joins this principle with two further principles – International Relative Gains and Domestic Relative Gains. The first of these regulates the distribution of the gains from international economic integration between countries, while the second regulates the distribution of gains from international economic integration within each country. Together these express James's conception of 'structural equity'. On his account, when an international social practice of market reliance satisfies these three principles, no one has a reasonable moral complaint against it (135). When such a practice fails to satisfy them, on the other hand, it would be reasonable for some to reject it as illegitimate (131).

The essay is divided into three sections. In the 'Meaning' section, I explain in detail the meaning of Due Care. In the 'Application' section, I argue that Due

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Care is too indeterminate for its intended purpose of assessing forms of economic integration.¹ In the ‘Substance’ section, I will argue that even if the practical difficulties of applying Due Care could be overcome, it would yield implausible results regarding the moral status of different forms of economic integration.

Meaning

According to James, Due Care ‘concerns the socioeconomic harms of trade’ (203). In particular, it concerns the kinds of socioeconomic harm that trade can cause that are morally objectionable. This principle is clearly central to his conception of structural equity. ‘Trade is sufficiently fair’, James writes, ‘so as to not be clearly illegitimate, if national gains are reaped and no one is harmed – especially if the gains are likely to be widely shared’ (199). Of course, the concept of harm is notoriously slippery. Intuitively, people are harmed by economic integration when they are made worse off by it. But made worse off by economic integration relative to what? That is, there are various different baselines that could be used for the comparisons involved in allegations of harm. James is fully aware of this and offers the following characterization of the baseline situation relevant for applying Due Care:

Trading nations are to protect people against the harms of trade (either by temporary trade barriers or ‘safeguards’, or, under free trade, by direct compensation or social insurance schemes). Specifically, no person’s life prospects are to be worse than they would have been had his or her society been a closed society. (17)

To determine whether a person has been harmed by some trade arrangement in the sense relevant to Due Care, then, we would need to assess whether or not the life prospects of any person under it would be worse than they would have been in a counterfactual situation in which their society had been closed. That is, the baseline for determining harm is a state of autarky. James explicitly endorses this reading of Due Care when he discusses the plight of Mexican farmers under the North American Free Trade Area Treaty [NAFTA] (211).

A trade arrangement is objectionable if any individual’s life prospects are worse off under it than they would be if their society were autarkic. But the autarky baseline itself stands in need of further specification, as the idea of a person’s society being closed can be understood in various ways. Aware of this, James makes it clear that he is not imagining a world in which the person’s society had *always* been closed, or a world in which it *suddenly* became closed at some particular time during the person’s life. Instead, he writes, ‘We compare the person’s condition with how well his or her life would have gone had his or her society (perhaps gradually) chosen autarky roughly around his or her birthday’ (211).

Application

The first problem with Due Care relates to the difficulty of applying it. Trying to determine how well off any particular Mexican worker or social class of Mexican

workers would be in a state of autarky seems wildly speculative. Of course, wild speculation has not normally deterred political philosophers in arguing for sweeping changes to prevailing social institutions! But James is himself hostile to wild speculation in political theory, and rejecting it plays a role in his defence of his conception of structural equity. Elsewhere in the book, for instance, he trenchantly criticizes cosmopolitan views on the ground that they engage in just such wildly counterfactual speculation of precisely this sort (116–119).

James sensibly demands that ‘determinacy not trump plausibility’ (141), but he seems to accept that a principle of fairness should not make reference to what would happen in counterfactual situations about which we cannot make judgements with any confidence. He writes, ‘we might clearly and credibly envisage deep reform in the state system. But the situation is quite different when we are considering revolution of the international order itself, even if by a stepwise and gradual route’ (116).

He acknowledges that applying Due Care creates ‘enormous epistemological difficulties’ (213). Nevertheless, he asserts that it can yield evidence-based verdicts about particular cases. But can we really begin to determine how well off an individual (or a social class to which that person belongs) would be under autarky, instituted at the time that a person is born? I do not know any social scientist who believes that such assessments are feasible. James mentions that the phasing in of autarky might be gradual. However, it is unclear how we are supposed to begin to model such gradual transitions. If asked to take a punt, I suspect that most mainstream economists would say that were societies to have closed, however gradually, at the time of birth of any of their current inhabitants, the results would probably have been quite disastrous for nearly all concerned. In that case, it seems that this principle would be satisfied quite easily, but then it does not seem to capture the range of intuitively compelling harm-based complaints that Mexican workers may have against an arrangement like NAFTA, a point to which I return below.

James defends his use of counterfactual comparison by drawing attention to the fact that economists often speak of estimating the gains from various policies of liberalization. I think he is right that formulating such estimates can be meaningful exercises even if it involves a considerable amount of speculation [he notes that they sometimes seem ‘implausibly precise’ (183)]. However difficult such modelling might be in practice, it does not seem outlandish that we could make some rough but fairly reliable estimates of whether and to what extent there could be gains from different policy measures relative to the *status quo ante*, or compared to what will occur if present policies were instead to remain in place. But it does not follow from this that it is a meaningful exercise to consider whether and to what extent there are gains for each individual person or social class against the benchmark of autarky.

A second problem is that James has not stated the autarky baseline with sufficient precision to make the relevant comparisons. That is, autarky does not specify any particular institutional arrangements, aside from the fact that the

society is closed (or becomes closed in stages) to international trade. So, any one of a quite diverse set of institutional arrangements might arise in autarkic Mexico. Consequently, the living standards of Mexicans residing in such a state might be expected to vary quite significantly as a result of the institutional arrangements that were in fact implemented. Given this, it is important to understand the form of autarkic state that is being employed to determine the baseline for comparison with liberalized alternatives. Are we to imagine a Mexico that is closed to trade but has ideally just domestic social arrangements? Or are we to imagine a Mexico that resembles in most respects Mexico at present in the actual world, save that it closed itself to trade at the time of a person's birth? Perhaps, as seems likely, we can imagine that an autarkic Mexico could have had a range of different trajectories, depending on how domestic political contestation would have played out in the absence of continued international economic integration. Which of these trajectories are we to imagine – assuming we could even begin to model them to an adequate degree – in our counterfactual? More importantly, what reasons can be given for specifying the relevant autarkic state in one way rather than in another, given reasonable uncertainty about which trajectory it actually would have taken? And what is being assumed of other countries' policies with respect to the autarkic Mexicans that we are imagining? Are we to assume that they would have taken the same trajectory, were Mexico to have become autarkic, as they have followed given the policies Mexico has actually adopted? Or are we to model how we think things would have (or should have) gone in these other countries once Mexico became closed? What is happening in other countries may have significant non-trade-related effects on it, so specifying these things is important. Were Mexico to have become closed to trade with the USA, for instance, it seems likely that the US posture on immigration from Mexico, and assistance provided to Mexico, would have been quite different.² And of course, as the remuneration available through legal trade between Mexico and the USA would diminish, gains available through illicit trade could be expected to increase. Increased returns to engagement in illicit trade with the USA could well be a factor of no small consequence for Mexicans and Mexican state institutions.

Discussing the autarky baseline, James claims 'it would surely be rash to insist that no one or hardly anyone would have fared better had their country of lifetime residence never exposed them to the vicissitudes of the global economy and instead remained autarkic starting early in their lifetime' (212). Perhaps this would be rash. But it seems that just about any estimate whatsoever would be rash, given the myriad of different paths a society might take in closing itself or opening itself to trade, and the effects such changes might have on different social classes and individuals within it.

Substance

Setting aside questions of determinacy and applicability, does Due Care provide a plausible way of characterizing harm-based objections to economic integration?

Let us assume that we have successfully made the counterfactual comparisons demanded by this principle and consider what they would imply for Mexican farmers. Suppose that the Mexican corn farmer enjoyed a decent standard of living before the implementation of NAFTA, when Mexico had adopted a mixed strategy of engaging in international economic integration but remaining closed in various respects. Now, however, the worker currently struggles to make ends meet. Suppose further that had autarky been phased in at the time of his birth, he would have been much worse off than he otherwise would be under the NAFTA scheme or the pre-NAFTA scheme. In this case, he would not have been harmed against the baseline of autarky by the shift to NAFTA, and would not be owed any compensation on the ground of Due Care. He would, pursuant to James's second and third principles (which govern the distribution of the gains from trade), be owed a fair share of the gains of trade. But there is no guarantee at all that sharing fairly in such gains would be sufficient to offset the overall worsening of his condition, relative to what it was pre-NAFTA, or what his condition would have been were NAFTA not to have been implemented. Given much of the tenor of his arguments in the book, this would seem to be an implication that James would want to reject. Indeed, this Mexican farmer seems precisely the sort of person who would have a cogent harm-based complaint against Mexico for making the shift from the partially open economy (relative to the US market) that was in place prior to NAFTA to the more fully open economy (relative to the US market) that was in place after the adoption of NAFTA.

Suppose instead that the Mexican farmer is made worse off by NAFTA both relative to his living standards under the pre-NAFTA scheme, *and* because he would also have enjoyed a much better life had Mexico entered into autarky at the time of his birth (How? Perhaps we know his family or his town stood to gain much, were it to be protected against foreign competition, even though most Mexicans would be worse off under autarky). In this case, he is harmed quite severely relative to the autarky baseline when NAFTA takes effect, but much less so relative to the pre-NAFTA scheme. In this case, it seems counterintuitive that the autarky baseline should be the one used for determining whether compensation is owed to people like him. This is an implication that cannot be escaped by appealing to uncertainty. James points out that when we are uncertain whether or not a person (or representative individual) is better off relative to autarky, we should not presume that they are indeed better off, but rather err in the direction of assuming that they are not better off, and that they are thus due compensation (212).³ From the fact that we cannot show that a person is better off relative to the autarky baseline, it does not follow that they should be compensated when they suffer setbacks relative to the pre-NAFTA baseline.

Note that in its initial presentation, Due Care demands that *no one* (or no social class) be made worse off relative to the autarky baseline.

The losers from freed trade can reasonably reject any principle weaker than Due Care, which does not demand either market protection or compensation over time. Their complaint against being harmed, we have in effect argued, carries the day.

The potentially advantaged parties could reasonably complain of being asked to forgo the benefits of free trade no one is made worse off. But they cannot reasonably insist on such benefits at the *expense* of those made worse off. (208)

The plain meaning of Due Care seems to warrant complaints against trade policies that, intuitively, seem spurious. Suppose, for example, that one Mexican social class would have enjoyed a *quite* high standard of living under autarky, but would enjoy a high standard of living under an integrated regime too, while a different social class would have enjoyed a very low standard of living under autarky but a much higher standard of living under an integrated regime. It is implausible that the first class could automatically claim that the shift to an integrated regime was illegitimate because it harmed them without compensation. Things are more problematic still if we adopt James's manner of applying his principle under conditions of uncertainty – when in doubt about whether or not some social class has been harmed, relative to the autarky baseline, we should presume that they have been harmed. Consequently, it would seem that insofar as we could not rule out the possibility that any social class was not made worse off, we would have at least *pro tanto* duties to offer each compensation.

James tries to address this concern by claiming that a 'Special Justification Clause is implicit in Due Care':

The privileged will in any case lack a reasonable objection to being disadvantaged if this provides significant benefits to people who are less well-off, especially given the substantial opportunities for adaptation afforded by the greater wealth. (209)

I agree with the substance of his claim here regarding the legitimacy of complaints by the privileged in such a scenario. But it is not clear how these ideas are in any way implicit in Due Care. Rather, it seems a way of incorporating a broader range of concerns for distributive justice that are quite distinct from Due Care or his other principles of structural equity.⁴

While Due Care explicitly incorporates the autarky baseline, there are other passages in James's book that seem implicitly to invoke a different baseline to ground harm-based complaints against economic integration. When explaining his principle, for example, he refers to US workers who are *displaced*, and who suffer various setbacks as a result of some trade policy. And he is clearly not referring to the counterfactual baseline of autarky, but relative to what their life prospects were prior to the process of liberalization, or relative to what they would have been had the process of liberalization not occurred, or had occurred differently in various respects (205). It seems likely that classes of workers will sometimes be made much worse off by increased economic integration in the form in which it occurred than they would have been had the mixed arrangements that preceded them remained in place, or if such integration had taken a different form. Yet they may still be a good deal better off than they would be in a state of autarky. The workers who are displaced may be working in protected industries, but these industries are nevertheless very much engaged with the international economy, and the living standards they previously enjoyed were due in part to

such engagement. There is a significant difference between what someone's living standards would be under some particular mixed regime of isolation, protection and integration, on the one hand, and what they would be in a fully autarkic or fully integrated economy, on the other. Indeed, it would be a mistake to assume that those who are made worse off from a semi-liberalized to a liberalized regime are those who are most likely to have been harmed by a liberalized regime relative to an autarky baseline.

Furthermore, there are other aspects of James's discussion of the rationale for Due Care that would seem unmotivated, given the autarky baseline incorporated in Due Care. In discussing the unfairness of harm to various workers (204–213), for instance, James argues at length for the view that 'special presumptive weight is to be accorded to ways someone's condition is worsened, relative to what it was at some previous time (i.e. by a historical baseline of comparison), or what it would have been had the policy change in question not occurred (by a subjunctive – historical baseline)' (207). Since few (if any) societies are now entirely autarkic, or became so at the point at which any of their present members were born, it is hard to see why this presumption can help to motivate Due Care.

Note that Due Care gives a tremendous amount of weight to the concerns of those particular individuals who are made worse off by some proposed trade arrangement than they would have been relative to the autarky baseline. Much more weight is accorded to their concerns than is typically accorded to particular individuals or social classes when it comes to evaluating other kinds of policy measures, such as investments in education or infrastructure, health or environmental protection. That is, it is almost always the case that policies make some people better off and some people worse off across social classes, relative to historical baselines or to any counterfactual baseline we might formulate. Yet we do not treat each and every individual as having a harm-based complaint against institutional reforms that make them worse off. Typically, a policy that creates large enough overall gains can be justified even if we can predict that it will make some worse off. The concern for the few who are made worse off is not typically treated as carrying the day. As James rightly notes elsewhere, policy-making involves trade-offs. Whether we should make such trade-offs depends on further facts about the parties involved, and the conception of justice that we believe to be best justified. If one affirms a broadly egalitarian view that also gives some priority to the least advantaged, for example, then this will affect the assessments of various trade-offs involved in policy-making. Yet promoting the interests of the least advantaged class may result in cases where some members of this class are made worse off, and this is often accepted as justifiable, albeit regrettable. It is not clear how the special justification clause can help with this worry. Why should decisions concerning the degree of openness to the global economy that a society adopts be informed by considerations that are so radically different from those relevant to assessing the tax system, funding of education and so on?

Despite my reservations about Due Care, I agree with James that harm-based considerations should play an important role in evaluating arrangements for economic integration, actual and proposed. But how should we ground such complaints? Note that the objections to Due Care identified above drew attention to the fact that it would seem to leave out too much information that seems morally relevant to determining whether or not people have plausible harm-based complaints against a form of economic integration. When considering whether some form of economic integration causes unjustified harm, we should examine its effects on the distribution of benefits and burdens within the society, relative to all feasible alternatives.⁵ This suggests an alternative way of conceiving the grounds of harm-based complaints against arrangements for economic integration. What individuals (and social classes) can demand of forms of economic integration is just what they can demand of other institutional arrangements that might be implemented in their society. That is, they can demand that it be *justice preserving*. The envisioned reform should not lead to outcomes that undermine the achievement of distributive justice domestically. What this demand means, of course, will depend on the conception of justice one favours. Domestic egalitarians should thus reject policies that undermine equality, prioritarrians should reject those that undermine the position of the least advantaged, luck-egalitarians should call for policies that minimize the extent to which distributive inequalities result from aspects of people's lives for which they cannot be held responsible and so on. Furthermore, we should consider whether such arrangements will undermine or further the achievement of justice abroad. Just how much weight should be given to this consideration should depend, again, on one's other moral commitments (about, e.g. to what extent it is permissible to promote justice domestically when this enables the undermining of justice elsewhere). There is no guarantee that trade policies will not undermine justice at home and abroad, rather than preserving or promoting it. A harm-based constraint on economic integration should block the adoption of policies that do so. Existing and proposed forms of economic integration should be assessed on the same grounds that we assess other institutional arrangements.

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Notes

1. For brevity, I will refer to this practice simply as economic integration, in what follows.
2. There is some social scientific evidence that economic liberalization promotes human rights protection, democracy and international peace. So autarky might induce or

facilitate brutal authoritarianism or international war. Should we imagine autarkic countries being more authoritarian and belligerent than their integrated counterparts?

3. Just what evidential standard should be employed in determining is left a bit unclear in the text. He mentions a preponderance standard, but it is unclear why this should be the appropriate one (e.g. rather than a more stringent one that would, say, show that the person was better off *beyond a reasonable doubt* than they would have been under autarky).
4. I return to the relevance of this point below.
5. This does not rule out the possibility that we should grant some weight to what people's actual positions are under the *status quo* arrangements.

Notes on contributor

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