

Contractualism, Choice and Inequality:

(Or, on the Strength, Scope and Choice-Sensitivity of Scanlon's Egalitarianism)

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1. Introduction

T. M. Scanlon's richly nuanced and insightful writings on equality and on responsibility can provide the materials to construct a plausible and powerful egalitarian view, interestingly distinct from many recent egalitarian theories (and, in particular, strikingly distinct from many recent 'luck egalitarian' accounts of egalitarian justice). While Scanlon's own work on these topics is of great power and sophistication, it is perhaps somewhat surprising that he has neither fully explored the theoretical implications of some aspects of this foundational work, nor brought some of the disparate insights of different elements of his work into contact with one another. The aim of this article is, therefore, to probe and explore Scanlon's work on equality and responsibility, examining some of its central theoretical elements, as well as considering how it might be best seen as fitting together to form a unified egalitarian view.

The article will divide into two main parts. In the first part (sections 2-4), I explore the *strength* and *scope* of the contractualist conception of egalitarianism that Scanlon develops, as well as looking at the relationship between equality, fraternity, fairness and (in Scanlon's phrase) "*what we owe to each another*". I suggest (in section 3) that Scanlon's contractualist approach to thinking about the theory of equality provides us with the resources to delineate an egalitarian view which has a scope of application interestingly (and plausibly) intermediate between more extreme statist and cosmopolitan views. I go on to argue (section 4) that the basic insights of Scanlon's view can be used to construct an egalitarian theory that is both more expansive in the range of concerns that it takes to be salient, and is correspondingly in an important respect more politically forceful, than many recent egalitarian theories.

In the second part of the article (sections 5-9), I examine Scanlon's account of (what he calls) *substantive* responsibility, and interrogate the implications of that account for the ways in which (and the degree to which) a plausible egalitarian view needs to make distributive outcomes sensitive to the choices made by individuals. I suggest

that Scanlon's outstandingly insightful account of the "value of choice" can be used to arrive at an account of the proper sensitivity of distribution to individual choice that is much more plausible and nuanced (although also, unavoidably, much more complicated) than the account of the proper role of choice that is to be found in recently influential "luck egalitarian" views. I go on to investigate (in section 7) the prospects for "stretching" Scanlon's "value of choice" account to accommodate both instances of the *disvalue* of individual choice, and instances of the value of collective, democratic choices. Lastly, with something of a change of focus from the constructive to the critical, I look (in section 8) at some potential problems with Scanlon's account of the salience of opportunities, and (in section 9) highlight a potential instability in his account of substantive responsibility and the place of luck.

My overall aim here is to show that, while Scanlon's "Contractualist Egalitarianism" does not, as it stands, answer all the questions that it needs to address, it presents us with a promising and fertile way in which to think about the role of equality and responsibility in a plausible account of distributive justice. I therefore conclude (in Section 10) by laying out the main structure of a "Contractualist Egalitarian" view, emphasizing the ways in which it is distinct from many other recent egalitarian views, and stressing especially the ways in which it is different to the "luck egalitarianism" associated with the work of Cohen, Arneson and others. In a short coda (section 11), I consider a case study – the role of labour unions in socioeconomic life – in which a Contractualist Egalitarian view such as Scanlon's will make interesting and specific recommendations as to the content of egalitarian policy, but on which "luck egalitarian" views will have much less to say.

2. Scanlon's Egalitarianism: *Weaker* than Telic Egalitarianism?

One of the most striking features of Scanlon's discussion of the value of equality is his expression of sheer puzzlement with regard to the pure non-relational conception of equality (as one might find in, say, luck egalitarians like Cohen and Arneson). Derek Parfit, in his 'Equality or Priority' uses the name *Telic egalitarianism* to describe purely goal-oriented, non-relational consequentialist accounts of equality of the kind that Scanlon finds odd and under-motivated.

Such views may seem puzzling, from a contractualist perspective, as they posit a source of value that is particularly difficult to capture from within a contractualist framework. The value of equality, under telic egalitarian views, is something that floats free of the experiential character of human relationships. On such telic views, there is something morally objectionable about inequalities, even when they obtain between individuals who are physically or temporally inaccessible to one another. It therefore posits a variety of moral badness that can obtain even when the individuals in question cannot stand in real relations of codeliberation or mutual justification to one another. It is unsurprising, therefore, that the telic egalitarian account of the badness of inequality is itself, so to speak, inaccessible from within the constructivist process of contractualist moral reasoning. Given this inaccessibility of telic egalitarian conclusions from within contractualism, we need, so to speak, an independently plausible account of why the non-relational conception of equality should be seen as having located anything of moral value. Scanlon takes the

(reasonable) view that no such independently plausible account has been suggested, and therefore sets himself the task of exploring the moral value of equality (and the badness of inequality) without recourse to the pure, non-relational conception of equality as a moral value, that sees all (unchosen) inequalities, always and everywhere, as being disvaluable.

Thus, one might initially take the view that Scanlon's egalitarianism is likely to be much *weaker* than the egalitarianism of those who endorse a pure non-relational conception of equality. For if, like Arneson, one thinks that it is in itself "morally bad that some are worse off than others through no fault or choice of their own", then one has a reason to condemn all unchosen inequalities, no matter when, where or how they occur. If the moral badness of (unchosen) inequality is accepted as a basic axiological truth, then there is an omnipresent reason to condemn such inequalities, and therefore one's egalitarian view will seem to be particularly forceful and robust.

One may, therefore, take the view that the rejection of telic or non-relational egalitarian claims (of the kind endorsed by Cohen and Arneson) is likely to be tantamount to the rejection of a forceful and weighty commitment to equality as a political value. However, I want to suggest that this view would be mistaken. Indeed, my suggestion is that, far from leading to a *weaker* or less forceful version of egalitarianism, the rejection of the core axiological commitments of telic or non-relational egalitarian views need be associated with no diminution in the *strength* of one's egalitarian view and, indeed, can be seen as a step towards describing the contours of a forceful egalitarianism that is likely to be more politically persuasive than (more abstract) *telic* views.

The fact that the rejection of the telic conception of equality need not involve the rejection of a robust egalitarian commitment can be seen when we bear in mind that, although Scanlon rejects 'telic' or 'non-relational' egalitarianism, his investigation into the normative significance of equality is an *affirming* rather than a *debunking* project. Scanlon identifies five kinds of reasons why we should be interested in ameliorating inequalities, all of which involve the sort of considerations that can be rendered intelligible from within contractualist moral reasoning (i.e. in terms of the needs and interests of the contracting, codeliberating parties). That is to say, each of Scanlon's five types of reasons can point towards something that we might owe to each other, reflecting the interests that individuals bring to moral codeliberation.

On Scanlon's view, the elimination of inequalities may be required in the following regards:

1. Humanitarian reasons – to relieve suffering or severe deprivation
2. Status – i.e. to prevent stigmatizing or humiliating differences in status
3. Domination – i.e. to avoid unacceptable forms of power and domination, exercised by those who have more over those who have less
4. Procedural fairness – i.e. to preserve the equality of starting places that procedural fairness might require

5. 'Equal benefits' – e.g. "if members of a group have equal claims to a certain benefit, then a distributive procedure that is supposed to be responsive to these claims will be fair only if it yields equal shares." ("When Does Equality Matter?", p. 9)

As is apparent, this is actually a fairly heterogeneous list. They divide into three distinct groups, which I'll label the 'non-egalitarian', the 'non-intrinsic egalitarian' and the 'deontic egalitarian'. Consideration (1) identifies non-egalitarian reasons to be interested in equality. We may think that avoidable suffering is in itself bad, and that we should do what we can to prevent it. In cases of inequality, the simple fact that some have much more than others indicates that there will likely be some possible pattern of redistribution that will allow the worst-off to have more, thereby raising the prospect that their suffering and/or deprivation can be relieved. If some are starving while others feast, then we know that a redistribution of resources that allow access to food will be instrumentally useful in helping those starving individuals who are suffering absolute deprivation. We therefore have reason to favour a more egalitarian distribution, but not because of any preference for equality *per se*. Hence, consideration (1) points to cases that are structurally similar to the instrumental preference for equality that will be shared by the utilitarian, given the assumption of the diminishing marginal utility of goods or resources. It is a purely instrumental reason for favouring equality, itself based on considerations that are not themselves essentially egalitarian in character.

The remaining four considerations, by comparison, are in fact genuinely egalitarian in character. Considerations (4) and (5) are (in Parfit's terms) *deontic* reasons to care about equality. They relate to ideas of *fairness* or *fair treatment*. Consideration (4) concerns cases where, for example, we believe that there is an obligation of fairness to maintain fair equality of opportunity, or fair competition for jobs or positions of influence or power. In such cases, it may be a consequence of this deontic egalitarian commitment to fair equality of opportunity that we need to preserve a certain degree of background material equality, without which the realization of equality of opportunity might well be impossible. (Brian Barry, for one, makes the point powerfully in his book *Why Social Justice Matters* that a commitment to equality of opportunity brings with it a corresponding, consequential commitment to avoiding material inequalities outside of a certain narrow range). Scanlon himself, when introducing his fourth egalitarian consideration, also makes the (plausible) claim that "Great inequality of wealth and income can, for example, undermine equality of opportunity and the fairness of political institutions." ("When Does Equality Matter?", p. 13))

Scanlon's fifth consideration – Equal Benefits – is perhaps more difficult to characterize. It gets its purchase in contexts where there is some distributive agency that falls under an independent obligation to provide some good among the members of a particular population. When these conditions obtain, there is a resultant objectionable unfairness when (other things being equal) that agency does not provide those benefits *equally* to all individuals to whom those benefits are owed. For example, in debates about healthcare in the UK, one often hears complaints about the unfairness of a "postcode lottery", in cases where particular medical treatments are available on the NHS in certain localities, but unavailable in

others. The background thought here seems congruent with what Scanlon has in mind with his fifth category. *Given that* an agency exists (e.g. in this case, the NHS), the role of which is to provide benefits of a particular kind to members of a population, there is an objectionable unfairness when those benefits are not distributed equally. So, this reason for caring about equality is connected with a particular idea of comparative *fairness*, as it obtains given the prior fact of the existence of a particular kind of institutional setting. (Scanlon's own example is this: "Governments have sometimes provided a lower level of basic services, such as paved streets, sanitation, and access to water, in some areas under their jurisdiction than in others (for example, a lower level in areas occupied by members of a particular racial or ethnic group.)" (The case that Scanlon is discussing relates to the differential provision of public infrastructure in Israeli Arab areas, as opposed to Jewish areas within Israel.)

Scanlon's considerations (2) and (3) are, in my terms (see my "What Should Egalitarians Believe?" *Philosophy & Public Affairs*, 2008), various kinds of *non-intrinsic egalitarian* reasons. They are egalitarian in character because the concern to avoid stigmatizing differences in status, and to avoid unacceptable inequalities of political power, are themselves part of a broader background picture of what it is for people to live *as equals* – i.e. with social relations that are themselves fundamentally egalitarian in character. Such considerations are "non-intrinsic" because, unlike Telic egalitarianism, they do not posit an intrinsic moral value to equal distributions; rather, more equal distributions are favoured because they are conducive to creating the conditions under which this background idea of social equality can be realized.

(Scanlon conjectures that "taken together, these reasons (1)-(5) may provide a full account of the role that substantive equality has in our thinking about social justice. One might think that 'Scanlon's Conjecture' somewhat overstates his hand, as there may be both additional non-egalitarian reasons for favouring greater material equality (for example, because of the effect of the distribution of property-rights on the distribution of either (negative) freedom or effective agential autonomy (see my "What Should Egalitarians Believe?", fn. 18), and also additional *non-intrinsic* egalitarian reasons for favouring greater equality, because (for example) of the relationship between material equality and the conditions for fostering (what Nagel calls) "healthy fraternal attitudes, desires and sympathies" (see my *ibid.*, p. 123)). Moreover, one may have want to give weight to distinctively *democratic* considerations, for example, on the view that democratic politics become corrupted when conducted under conditions of broad material inequality (such considerations may in part fall under Scanlon's category of "procedural fairness" (i.e. in the political as opposed to the economic sphere), but they may also run beyond the limits of that category). Nevertheless, in rejecting "Scanlon's Conjecture", we need not thereby be rejecting the general structure of his account of the normative significance of equality – as being (a) heterogeneous in nature, and combining deontic, non-intrinsic and fully instrumental elements, and (b) as being characterizable without any appeal to non-relational, *telic* accounts of the basic value of equality.)

At any rate, it might plausibly seem that, *even if* telic egalitarianism were true, it's hard to deny that *these* (non-telic) considerations capture the most significant

aspects of our concern to reduce or eliminate inequalities. Hence, it's a mistake to think that relational (or, in my terms, *non-intrinsic*) egalitarianism need be less staunchly egalitarian than telic egalitarian views.

Moreover, acknowledging the full range of egalitarian considerations, as Scanlon does, provides one with a richer and potentially more convincing version of egalitarianism, which is easier to render intelligible and attractive to those who do not have an antecedent commitment to socioeconomic equality. The purely non-relational or *telic* conception of equality, by contrast, can seem overly abstract and remote, and hence the telic egalitarian can be left with few resources for communicating the significance of equality as a political value. Scanlon indeed makes the revealing remark that "Opponents of equality seem most convincing when they can portray equality as a peculiarly abstract goal – conformity to a certain pattern – to which special moral value is attached." (*The Difficulty of Tolerance*, 203). To take Scanlon's example, it is in precisely this respect that Robert Nozick portrays equality as an unattractively thin and abstract value in Chapters 7 and 8 of his *Anarchy, State and Utopia*.

A complicated egalitarian view that combines appeals to the (i) non-egalitarian, (ii) non-intrinsic egalitarian, and (iii) deontic egalitarian, considerations in favour of distributive equality may be more cumbersome and apparently inelegant than pure Telic egalitarianism. But such a view, I have suggested, makes for a more plausible and politically intelligible form of egalitarianism, which lacks nothing in terms of the strength that it ascribes to egalitarian considerations, while at the same time greatly enhancing the persuasive power of the claims that can be made in favour of promoting greater material equality.

3. The Scope of Scanlon's Egalitarianism

What, then, is the scope of Scanlon's contractualist egalitarianism? Does it mandate an interest in equality that is restricted to the borders of particular states, or does it instead suggest a global or cosmopolitan concern with the eradication of avoidable inequalities? In answering these questions, I want in particular to contrast Scanlon's view with the influential "strong statist" view that has been elaborated by Thomas Nagel (in "The Problem of Global Justice," *Philosophy & Public Affairs*, 2005), according to which *no* distinctively egalitarian considerations have salience *across* international borders, and only purely *humanitarian* considerations should characterize our approach to questions of global justice.

Let's start with Scanlon's (non-egalitarian) *humanitarian* reasons for caring about inequalities. Taking the case of the inequality in life-expectancy between Malawi (where it is 37.1 years) and the U.S. (where it is 74.2 years), Scanlon plausibly suggests that what really exercises us here are just considerations of type (1). We care about the absolute deprivation of the Malawians, not about their level of life expectancy relative to the U.S. Our concern here is both non-comparative and specific (in that it is dependent on the particular (low) level of life-expectancy to which the Malawians are subject). It is then simply a contingent matter that the redistributive action which would benefit the Malawian's well-being or life-

expectancy is (as it will be likely to involve a transfer from the rich to the poor), also an action that would promote greater equality.

Nevertheless, even if our concern in such cases is itself essentially non-egalitarian in terms of its underlying motivation, it is worth pointing out that reasons of type (1) could bring us a long way towards promoting greater global equality, even though such reasons are only derivatively or instrumentally egalitarian. For comparison, we can consider how Peter Singer's advocacy of massive global redistribution relies on an appeal only to (utilitarian) reasons of type (1) (see, e.g. Peter Singer, *One World*). Accordingly, it should be borne in mind that once one allows that the global context is one in which humanitarian moral concerns should operate, one is driven towards a position, in terms of recommendations for global redistribution that, at least in their practical effects could be quite radical. Consider, for example, Thomas Nagel, who holds that only type (1) humanitarian concerns apply across international borders. (See "The Problem of Global Justice") As Joshua Cohen and Charles Sabel emphasize (in their "Extra Rempublicam Nulla Justitia?", *Philosophy & Public Affairs*, 2006), Nagel is certainly not a Hobbesian 'realist', despite his invocation of Hobbes, given his claim that humanitarian morality does impose obligations across borders. And, accordingly, even someone who defends the (apparently) austere anti-cosmopolitan "strong statism" of Nagel will, insofar as they endorse humanitarian reasons for lessening global inequalities, actually endorse what would, in effect, be radically egalitarian policies for international redistribution.

But Scanlon's commitment to equality, as we have seen, moves well beyond this minimalist concern with humanitarian considerations, and the 'instrumental egalitarianism' that such concerns bring with them. Scanlon's reasons of type (2) and (3) relate to individuals' relative social standing, prestige and power, and to the character of the social relations that exist between them. This is therefore a *relational* idea, which would have no salience in a 'divided world' (e.g. in the scenario described in Parfit, 1991). Rather, these reasons apply in conditions of social interconnection, as exist, one might plausibly assume, among many non-co-citizens living in different states, under contemporary global capitalism (although it is noteworthy that Scanlon does not himself discuss whether such reasons apply globally). *A fortiori*, these reasons for reducing inequality surely apply under the conditions of global cooperation, interdependence and economic interaction described by, e.g., Cohen and Sabel in their "Extra Rempublicam Nulla Justitia?".

So: if we start with Scanlon's approach to elaborating the significance of equality, it seems that we have at least a *prima facie* reason for thinking that, insofar as the global order has the features of interaction and interrelation described by Cohen and Sabel, global inequalities can be normatively objectionable for reasons of type (2) and (3). Taking Scanlon's approach, then, of starting with the idea of *equality* itself, we seem to have an objection to Nagel's "strong statist" conclusion (see "The Problem of Global Justice"), as it is implausible to think that reasons of type (2) and (3) are 'triggered' only given the existence of a (coercive, jointly-authorized) state. (This is not to say that reasons of these types might not be *especially* pressing in situations where there were a shared state of this kind, given (for example) the plausible assumption that salient forms of social interrelation often obtain to a greater degree among co-citizens than they do among non-co-citizens.)

Reasons of kind (2) will hold where “humiliating differences in status” can exist across state borders (as they surely can). Reasons of kind (3) will hold where the powerful can coerce, dominate or exploit the powerless. And it is surely the case that unacceptable forms of power can be exercised globally, across state frontiers. (One would not have to think long or hard to think of examples.)

Reasons (4) and (5), with their concern for *fair procedures*, certainly require something stronger than the basic level of social interaction sufficient to trigger normative reasons of types (2) and (3). They require not just interrelation and interaction, but some kind of *institutional* setting. But, as Cohen and Sabel point out in their discussion of the ILO and WTO, we can have reason to be concerned with the fairness of institutional procedures with regard to institutions *other than* the institutions of the (coercive, jointly-authorized) state.

If the relevant kind of background conditions (regarding the existence of cooperative schemes and institutions of the right sort) hold, then reasons of types (4) and (5) can also be triggered with respect to the existence of global inequalities. This would strike a further blow against (and further distinguish Scanlon’s contractualist egalitarian position from) Nagel’s “strong statism”. So, is the right kind of “triggering” background in place? Let us take each of these two different kinds of deontic egalitarian considerations in order.

(4) *Procedural Fairness*. The two examples given by Scanlon relate to (a) economic competition and (b) political competition. In the absence of political institutions at the global level, it would seem that reasons of type (4)(b) would not apply with regard to the reduction of global inequalities. (More interesting cases arise when we consider, for example, political competition within the EU. It may be the case that procedural fairness within the EU, with regards to political competition, provides us with a consideration that speaks in favour of greater intra-EU equality.)

Regarding (4)(a), socioeconomic competition, we may ask whether there really are any kinds of background institutional norms regarding equality of opportunity with regard to the global economy. This is a contentious issue, but here consideration of institutions such as the ILO and WTO seems relevant. Again, the EU also provides an interesting hybrid case. (At the moment, I’m just offering these cases up for consideration, and making the minimal claim that it is not obvious what one should say about the status of international institutions that have some role in setting the terms for international economic competition.)

(5) *Equal Benefits*. The paradigm case here certainly seems to be the operation of a state or state agency of some kind. In these sorts of cases, there can be a clear obligation on the state to provide equal benefit to its citizens. It is difficult to think of international institutions that have the same kinds of egalitarian obligations.

So here, I think, in case (5), it is plausible to think that there are no salient concerns relating to *global* inequality (at least in the absence of any kind of world state which had these kinds of egalitarian obligations of giving ‘equal benefit’, with respect to some good, to its citizens). The EU, perhaps, may have some such obligations of

'equal benefit', at least in some particular (tightly specified) dimensions. (For example, given the stated aims of EU structural funds, it would evince a conspicuous unfairness if such funds were (arbitrarily) restricted from being spent in particular areas within the EU.) But no global analogue of these sorts of prior obligations seem to exist.

So, perhaps the truth in Nagel's "strong statist" view is simply this – that there exist no reasons of type (5) that count in favour of reducing global inequality. In addition, as has been said, we can agree with Nagel that there *are* such reasons of type (1). Where Nagel's view may go astray is in denying that there are reasons of type (2), (3) or (4), for reducing *global* inequality. If we follow Scanlon's excavation of what it is that we care about when we care about inequality, a "strong statist" view that denies that egalitarian reasons of types (2)-(4) are relevant in the *global* context seems to miss something of the normative significance of equality.

4. Equality beyond Fairness: on Equality, Status, Self-Respect and Fraternity

It is important to note that Scanlon's concern for equality runs beyond a concern with distributive *fairness*, whether one understands *fairness* (as with Temkin (and Cohen?)) as a property that can be displayed by states of affairs (i.e. a *telic* conception), or whether one (more standardly?) understands *fairness* as a deontic property of forms of treatment.

Scanlon's concern with stigmatizing or humiliating losses of status, and securing conditions of non-domination, are connected both to a concern with securing the conditions for individuals' sense of self-worth (in Rawls's terms "the social bases of self-respect") and also to ideas of *fraternity* and mutual recognition that themselves can be seen as standing at the core of the contractualist picture of moral reasoning and deliberation between equals.

As Scanlon puts it:

"The experiential evil [associated with inequality] involved here can be characterized in several different ways – indeed, there are several different kinds of experience that one might have in mind. Let me distinguish two broad categories. The first, more "individualistic," characterization emphasizes what might be called damage to individuals' sense of self-worth: such things as feelings of inferiority and even shame resulting from the belief that one's life, abilities or accomplishments lack worth or are of great inferiority to those of others. The second category damage to the bonds between people: what might be called the loss of fraternity resulting from great differences in people's material circumstances, accomplishments and the social importance attached to them. Unlike the first, this is a loss suffered by the better off and the worse off alike, and perhaps it is the more fully egalitarian of the two." (*The Difficulty of Tolerance*, p. 212)

These sorts of experiential evils can come about in different ways. Perhaps the most important case, when thinking about the implications of this contractualist egalitarian picture for our thinking about socioeconomic equality, is this:

“... the same objection would apply to institutional arrangements that, while they did not have the aim of *expressing* inferiority, nonetheless had the effect of giving rise to feelings of inferiority on the part of most reasonable citizens. This is my third case. The obvious examples are economic institutions which yield such great disparities of wealth and income that some people experience shame and humiliation because they must live in a way that is far below what most people in the society regard as minimally acceptable.” (*The Difficulty of Tolerance*, p. 213)

Scanlon’s focus then broadens out from the case of the erosion of self-respect, to related considerations involving domination and the loss of fraternity, in this later discussion of the harms of inequality:

“The aim of avoiding stigmatizing differences in status appeals to an ideal of fraternity that is fundamentally egalitarian, and has been central to the egalitarian tradition. Objections to concentration of power may sound less purely egalitarian (freedom from domination is not the same thing as equal status), but the idea of domination by others as the main evil of unequal societies is familiar in the republican strain of egalitarian thought. Both of these ideas (the evil of stigmatization and the importance of avoiding domination) are emphasized by Rousseau, for example.” (When Does Equality Matter?, p. 15) (The Rousseauian strand in Scanlon’s political philosophy is illuminatingly discussed by Waheed Hussain in “The Unromantic Rousseauian: Scanlon on Justice, Motivation and Freedom” (also to appear in *The Journal of Moral Philosophy*, 2010-11).)

Scanlon emphasizes that, even if, say, a system of meritocratic competition is scrupulously fair, it can still be objectionable, in terms of its experiential consequences. For example, imagine a society in which economic production was organized in extremely hierarchical firms, with power and social status being concentrated in the hands of a few. Even if there were absolutely pristinely fair meritocratic competition for positions at the apex of this hierarchy (with a complete absence of nepotism or discrimination) we may nevertheless think that such a society is unacceptably inegalitarian because of the experiential consequences of its particular mode of socioeconomic organization.

Crucially, this insight about the inadequacy of mere *fairness* to capture all that needs to be captured in terms of egalitarian concern can be extended beyond the case of meritocratic equality of opportunity to also include “luck egalitarian” equality of opportunity, as in, say, Arneson (1989). Here, we can imagine a hierarchically structured society, as described above, in which the allocation of individuals to places on the ladder of power, prestige and status was determined entirely on the basis of the consequences of choices made by those individuals within the society. We can assume that, in this society, allowance is made for differences in individual talent, and thus it moves beyond the procedures of a merely meritocratic society. Instead, occupational positions (and, by hypothesis, allocations of power, prestige and social standing) are made on the basis of the (genuine) choices made by individuals (for example, in respect of decisions over educational pathways, work-leisure trade-offs, etc.). By hypothesis, this society is, by the lights of luck egalitarian views, pristinely fair, and thus fully satisfies the luck egalitarian conception of the

demands of equality. There are, we are assuming, no unchosen inequalities in that society (or, to be more precise, no inequalities that are not traceable to the effects of choice). And yet it seems outlandish to claim that such a society is, by the lights of a commitment to the value of equality, beyond reproach. Rather, we would surley want to say that such a society is, in a number of important respects, deeply inegalitarian. If so, then, even if some luck egalitarian view provided the correct account of the demands of distributive fairness – e.g. that a society has no relevant unfairness when there there exists no overall (unchosen) inequalities of condition among the members of a population – such an account might nevertheless fail to provide an adequate account of what would be required of socioeconomic arrangements if they were to meet the demands of equality.

A consequence of Scanlon’s egalitarianism stretching beyond considerations of *fairness* is that:

“... people *are owed more than fairness in the distribution of concrete goods*: they are also owed a concern for the maintenance of their self-worth (in [Rawls’s] terms, self-respect) and this is, as I have argued above, importantly a matter of the character of their experience. Whether they reasonably feel a loss of self-worth is a function not only of the inequalities which they know exist but of the way in which those inequalities figure in their lives.”
(*Diversity of Objections to Inequality*, 217)

We could also add, consistent with Scanlon’s remarks elsewhere, that they are further owed freedom from domination (however it comes about), and the preservation of the sort of fraternal social relations that are at the core of the contractualist picture of moral reasoning as codeliberation among equals.

If there is more to egalitarianism than a concern with securing (aggregate) equality of condition, and more to egalitarianism with a concern with distributive *fairness*, then the luck egalitarian account of equality is inadequate. Insofar as we accept Scanlon’s pluralist picture of the sources of our normative concern with avoiding inequality, then we find ourselves committed to developing social institutions that *not only* eradicate (substantial) distributive inequalities, but also retain a *specific* interest in (a) the preservation of conditions under which citizens can maintain a lively sense of their self-worth (in Rawls’s terms, “the social bases of self respect”), (b) eradicating avoidable hierarchies of power, and (c) preserving the conditions under which citizens can regard one another *as equals*, with an eye to the “healthy, fraternal” social relations that can securely ground such attitudes.

So, it seems that Scanlon’s egalitarianism may, in fact, be rather more staunch than certain forms of luck egalitarianism, as Scanlon retains a commitment to the significance of eradicating inequalities, *even when* those inequalities come about through impeccably fair procedures.

In investigating whether this claim stands up, I’ll now turn to examining Scanlon’s account of substantive responsibility, and with it the “choice-sensitivity” of his view. For, if Scanlon’s account of choice-sensitivity ends up being (more or less) extensionally equivalent to the luck egalitarian treatment of choice, then, despite

surface appearances, the two kinds of views may actually end up as little more than notational variants. But if, on the other hand, the contractualist account of choice-sensitivity generates rather different recommendations, then the distinctiveness of the contractualist egalitarian position would be clear to see.

[NB: Sections 5-9 are, at the moment, rather sparse. I hope nevertheless that the argument should be reasonably clear.]

5. Scanlon on Responsibility: Substantive and Attributive

Scanlon distinguishes between two senses of responsibility, *attributive* and *substantive*.

Attributive responsibility relates to “questions about whether some action can be properly attributed to some agent in the way that is required in order for it to be a basis for moral appraisal.” (WWO, 249)

Substantive responsibility are “judgements of responsibility [that] express substantive claims about what people are required (or ... not required) to do for each other”, including questions about the proper distribution of liabilities and the costs of choices. (WWO, *ibid.*)

It is this latter sense, of *substantive* responsibility, that is relevant for our examination of how distributive justice should be sensitive to matters of choice, on Scanlon’s view.

6. Scanlon on Substantive Responsibility and the Value of Choice

In Sec. 4 above, I’ve suggested that Scanlon’s egalitarianism *may* be less choice-sensitive than many influential forms of (luck-)egalitarianism, given that he posits reasons to object to inequalities, on “experiential” grounds, that seem unrelated to questions of how those inequalities came about (e.g. we have type (2) and (3) objections to inequalities, even if they are the result of individual choice.)

I now want to look at Scanlon’s account of the value of choice to see whether this reduced degree of choice-sensitivity really obtains, or whether it is undone by Scanlon’s treatment of substantive responsibility. (This is related to the question, raised by Scheffler (who ascribes the suggestion to Andrew Williams) in *Choice, Circumstance and the Value of Equality*, of whether luck egalitarians could themselves make use of (something like) Scanlon’s “value of choice” to produce a “metaphysically innocent” version of their view.)

Three points to make about the idea of substantive responsibility:

1. Judgements of substantive responsibility are *conclusionary*. They are all-things-considered judgements about where particular duties or the liability for particular costs should fall. (They are *consequences* of the non-rejectability of sets of principles for the allocation of duties and liabilities, not *inputs* into considerations of which principles are non-rejectable.)

2. Judgements of substantive responsibility are *heterogeneous*: “judgements about what a person’s substantive responsibilities are can be used very widely, to express judgements about almost any duty, or at least the duties connected with any role” (WWO, 248-9)
3. Judgements of substantive responsibility involve *both* deciding what the costs and liabilities associated with particular actions should be, and where those costs should fall (see, e.g. Scanlon’s discussion of penalties for contractual breach in *Promises and Contracts*). Accordingly, judgements of substantive responsibility are not “*all-or-nothing*”, not least because the question of what the costs or liabilities associated with a particular action really are is itself a matter for determination in terms of forming judgements of substantive responsibility. (i.e. it is not a simple matter of identifying an agent, x, who is the bearer of “the costs” (seen as independently determinate) associated with some action, Y)

The Value of Choice account: Scanlon raises two questions:

- (Q1) Why is it that principles that no one could reasonably reject often must be ones that make normative outcomes sensitive to individuals’ choices?
- (Q2) How can the provision of an opportunity for choice, whereby one might have avoided some burden *if* one had chosen appropriately, make it the case that one cannot reasonably reject a principle which makes one bear that burden?

His strategy is to answer (Q2) in terms of his answer to (Q1).

Scanlon’s answer to (Q1) involves positing three modes in which choice can be valuable:

- (a) Instrumental – connected with the fact that one’s own interests are often best promoted when what happens to one is in accord with choices which one has made. (e.g. choosing from a menu)
- (b) Representative – related to “the reasons we have for wanting to see features of ourselves manifested in actions and their results” (e.g. choosing a gift for a family member)
- (c) Symbolic – related to the provision of opportunities for choice as a way of avoiding social stigmatization or loss of status (e.g. being able to choose one’s own marriage partner)

Such an account does show why we have reason not to reject principles that make outcomes *to some degree* dependent on individual choices. But such an account does *not* establish the general “special legitimating force of voluntary action” (WWO, 260). i.e. these are considerations that should feed into our judgements

about which principles are reasonably rejectable, *not* “trumps” that immediately forge connections between choices and liabilities in all cases. (cf. the “Forfeiture View” associated with luck egalitarian views)

Moreover, as Scanlon emphasizes, these forms of value may be absent in many cases, and are, at any rate, “conditional and relative”. (see the discussion of wage and hour laws at WWO, 254; and of seat belts and motorcycle helmets at WWO, 255).

The point that there are many cases in which the “value of choice” may be abstract also comes out clearly in the discussion of paternalism in “Promises and Contracts”:

“... given that we are imperfect choosers, we may have good reason to prefer choosing in a situation in which certain alternatives with long-range bad consequences have been made unavailable, or more immediately unattractive. Thus, when paternalism is justified – when it is legitimate to restrict choices “for the agent’s own good” or to treat choices as lacking their usual moral significance – this is so because in these cases unconstrained choices lack their normal value for the agent rather than simply because the value is overridden by other considerations.” (*The Difficulty of Tolerance*, 264)

Thus, we can have both cases of low or non-existent value for the value of choice, and cases where the value of choice is positive, but is nevertheless overridden by some other consideration.

The value of choice account provides (a) at most a selective “conditional and relative” case for choice-sensitivity, rather than providing a case for tying substantive responsibility to choice in all cases; and (b) provides, in any case, *prima facie* rather than conclusionary considerations, that are to be weighed up against individuals’ other interests (e.g. it might be that we could not reject a principle mandating compulsory payments for universal health insurance, *even if* it infringed the value of choice, given the weight of egalitarian considerations (1) to (5)).

7. Stretching the Value of Choice Account

As mentioned above, Scanlon already allows the “conditional and relative” nature of the value of choice, especially with regard to *instrumental* value. But one can also emphasize the “conditional and relative” nature of *representative* and *symbolic* value.

Moreover, the provision of opportunities for choice can be actively *disvaluable* in all three respects. Consider, say, giving someone the choice to sell their vote, or to opt-out from socialized healthcare or social insurance mechanisms. Allowing such choices could be symbolically *disvaluable* (especially in light of egalitarian considerations (2) and (3), and their connection to self-respect, etc.)

With regard to *representative* value, we typically want some choices to be an expression of communal or collective (political) choices, rather than of individual choice. (Consider social policy, tax rates, etc.) This point is especially salient if one considers Scanlon's treatment of toleration, whereby the idea of toleration involves "accepting as equals" those who differ from us", and is connected to a conception of fraternal, democratic social relations: "... all members of society are equally entitled to be taken into account in defining what our society is and equally entitled to participate in determining what it will become in the future" (*The Difficulty of Tolerance*, 190).

Given this, it is consistent with a broader conception of the value of choice that many substantive responsibilities should be allocated by democratic decision making rather than left to individual choices.

To say a bit more about the case of healthcare, there are different ways in which we might want to characterize the situation involved with the collective provision of healthcare from general taxation. On a luck egalitarian view, I assume that there would be no complaint of *equality* if we had a society in which there was a purely voluntary state healthcare system. Those who paid their premiums would have access to medical care in the future event that they needed it, whereas those who chose not to pay such premiums would not. On the contractualist "value of choice" account, however, our conclusions would be different. On the one hand, we might want to say that the relatively small gains in resources associated with being able to opt-out of an NHS-type system are so trivial as to have negligible instrumental or representational value, when compared with the tremendous instrumental value of being automatically enrolled in a state healthcare system. (We might also think, interestingly enough, that there was something symbolically *disvaluable* about the protection of individuals' health being left to individual choice, rather than guaranteed as a matter of paramount importance by the society in which they lived.) On the other hand, we might take the view that allowing individuals to opt-out of collective arrangements with regard to their own health actually involved substantial instrumental and representative value (and perhaps even symbolic value) to the degree that it would allow individuals to pursue their own personal projects with their own money, rather than having to acquiesce in society's collective decisions regarding the relative importance of healthcare provision vs. private consumption.

However, even on this second view, it may still be reasonable, all things considered, to disallow any scope for individual choice in opting-out of collective healthcare provision, to the degree that we have general egalitarian reasons ((i.) concerned with preserving equality of opportunity (as in Daniels's account (see Norman Daniels, *Just Health*)), or (ii.) concerned with avoiding the harms generated by inequalities associated with having uninsured individuals who might face future medical need within our society, or (iii.) for reasons of the value – in terms of promoting fraternal social relations – of seeing the provision of healthcare as a solidaristic, collective political project) to ensure that healthcare provision remains a collective project, under the political control of the society as a whole, rather than a matter of individual choice.

Hence, (i) there are many cases, on Scanlon's view, where choice has no value, and (ii) there are many cases where, although it has some value, its value is low, or, even if fairly high, can be trumped by other considerations. Therefore, on Scanlon's view, as opposed to luck egalitarianism, we can have general reasons for objecting to making certain outcomes choice-sensitive. Among those reasons can be many of the plurality of egalitarian reasons. Therefore, on the Scanlonian account of substantive equality, choice has a much less central role than under luck egalitarian views. We have no obligation to allow choice-sensitivity in terms of the determination of where benefits and burdens fall, and often we can have good reason both to limit the scope for individual choice, and *not* to let the costs fall where they lay in cases where individual outcomes are influenced by prior choices. In a quick slogan, choices are not trumps. And among the things that can, in turn, trump choices are considerations relating to the normative value of avoiding inequality, understood as bringing with it a plurality of concerns relating to self-respect, status and fraternity.

8. Questioning the Move from Generic Choice-Sensitivity to the Imposition of Specific Burdens

Scanlon's move from Q1 to Q2 involves emphasizing the *generic* value of (particular kinds of) opportunities for choice. But many such opportunities are not, as a matter of fact, valuable for particular individuals (see, e.g. the constitutionally reckless person in Scanlon's Hazardous Waste disposal case.)

This raises the question of the justifiability of the *generality* condition, as well as its proper interpretation and degree of fine-grain, and raises problems connected with incompatibilist worries regarding the values of (unutilized) *opportunities*.

[I shall not pursue either problem in detail for now, but suffice to say that pursuing either the problem of *generality* or the *incompatibilist* worry regarding the worthlessness of unutilized opportunities will tend to lead one to a position that further curtails the proper scope that we should give to choice-sensitivity in allocations of (conclusionary) substantive responsibility.]

9. The Curious Instability of Acknowledging Luck: "There but for the grace of God I..."

Scanlon ends his discussion of responsibility (WWO, 294) with a second-order thought about both attributive and substantive responsibility. Perhaps Scanlon underestimates the degree to which such second-order thoughts can be kept separate from our first-order judgements? Does this line of thought actually introduce an instability into Scanlon's account of substantive responsibility?

"The account I have offered ... explains how the choices people have made, and the opportunities they have had to choose, shape what they owe to others and what others owe to them. On this account ... when we follow a policy that leads to some people's being injured because they have ignored

the warnings they were given, we may be correct in feeling that what we do is justified. But we must also recognize that what separates us from such people is not just, as we would like to think, that we behave better and choose more wisely, but also our *luck* in being the kind of people who respond in these ways. In this respect our attitude towards those who suffer or are blamed should not be “You asked for this” but rather “There but for the grace of God go I.” (WWOTEO, 294)

The phrase “There but for the grace of God go I” is first attributed to the 16th century Protestant preacher and martyr John Bradford. (In the form “There but for the grace of God goes John Bradford”, said of a man being hanged for some petty crime as he was taken to the scaffold. (Bradford himself was burned at the stake.))

It was of course consistent with Bradford’s Calvinism to be able to hold this 2nd order judgement as fully separable from 1st order judgements about responsibility. It is the core of Calvinism to think that a man can deserve eternal damnation without, so to speak, deserving to deserve eternal damnation (or, to put it another way, without his deservingness of eternal damnation being a characteristic connected to his choices or (empirical) character).

Non-Calvinists, on the other hand, may find the balancing act more difficult! For, as soon as one acknowledges that it is simply a matter of luck that a given individual, because his choices or character happen to have had certain features, is suffering some unwanted burden, it becomes rather difficult to nevertheless maintain that it is right and proper that such a burden should be the substantive responsibility of that individual. Holding fast to the appropriateness of our 1st order judgements of substantive responsibility becomes more difficult, and the stability of our position rather more precarious, as soon as we acknowledge (as Scanlon does) the underlying contingency – the sheer luckiness – of where it is that the burdens happen to have fallen. What we have here, in effect, is a specific manifestation of the broader phenomenon of moral luck. Insofar as one is unable to keep one’s 1st order judgements of substantive responsibility secure from the regress-threatening admission of luck and contingency – “there but by the grace of God go I” – the more one will be tempted to downplay the weight given to allowing specific features of individuals (such as their choices), as opposed to the general claims and entitlements of people in general (such as those that feed into the concern with preserving conditions of equality), in determining the allocation of substantive responsibility.

10. Contractualist Egalitarianism vs. Luck Egalitarianism

In conclusion I want now to return to the question of the distinctiveness of Scanlon’s contractualist egalitarianism, especially when held up against luck egalitarian views.

If we accept the broad outlines of a *Contractualist Egalitarian* view, with its diversity of (non-intrinsic and deontic) considerations that speak in favour of greater socioeconomic equality, then we allow that at least part of our concern with distributive equality is derivative of a concern with a broader, underlying idea of

social equality. This idea of a “society of equals” is associated with a concern for (among other things) avoiding status harms, and with the importance of securing conditions conducive to individuals’ self-respect.

Now, it would be unreasonable to care about status harms, self-respect and the character or social relations *only* when these considerations worked through mechanisms associated with distributive inequalities. We should be exercised by such considerations regardless of the causal mechanisms through which they impact on individuals’ lives.

Thus, the following general claim would seem to hold: if we accept the analysis of the value of equality associated with the development of *non-intrinsic egalitarianism*, then it should be clear that a concern with equality has to go beyond a concern with distributive equality, *per se*. It also has to encompass a concern with particular kinds of experiential consequences (in terms of individuals’ status and self-respect, and the quality of their social relations) generated by different possible sets of socioeconomic arrangements.

Taking status harms as an example, we can view such harms as having two dimensions: the inner and the outer:

The *outer* dimension of status harms is associated with the *contractualist egalitarian* concern with avoiding unacceptable forms of power and domination.

The *inner* dimension of status harms is associated with the erosion of self-respect, undermining our sense of ourselves as efficacious and undominated agents, enjoying an equal status with others.

The egalitarian concern to avoid both the *outer* and *inner* manifestations of status harms runs beyond, and is not fully satisfied by, a concern for eradicating distributive inequalities in themselves (although the eradication of (large) distributive inequalities will nevertheless be an essential central precondition for eliminating these sorts of *inner* and *outer* manifestations of status harms).

Now, in recent years, analytical political philosophy has come to be highly influenced (perhaps even dominated) by *luck egalitarian* accounts of social justice (e.g. Cohen, Arneson). According to such accounts, justice demands strict distributive equality (in some space: whether resources, capabilities or welfare), with departures from strict equality being licensed when and only when such departures reflect the choices made by individuals, for which those individuals should be held responsible.

Three objections to luck egalitarianism view of justice, from the standpoint of contractualist egalitarianism:

- i. Luck egalitarianism depends upon an implausible account of the relationship between choice and responsibility. (As we have seen in sections 5-9, on the contractualist account of *substantive responsibility*, the relationship between choice and responsibility is (in a sense) weaker, and is certainly more complex than under the luck egalitarian view. Where it would be reasonable for

individuals to reject a general case in which substantive responsibilities are made sensitive to particular (sets of) choices, then choice-sensitivity is inappropriate in such cases.)

- ii. Luck egalitarianism makes a mistake in thinking that a commitment to the value of equality entails that there must be some x (be it resources, welfare, etc.) to which individuals are entitled to equal amounts. The error is seeing equality as being limited to the role of a *purely distributive* ideal. (Rather than seeing a commitment to equality as being a broader social and political ideal, which has a particular distributive component.)
- iii. (Related to (2)) Luck egalitarianism views individuals excessively as *consumers* of the social product, which is itself seen as needing to be distributed in a particular way. Accordingly, it pays insufficient attention to individuals' broader social relations, including their relations as economic *producers*.

Hence, the shift from luck egalitarianism to *contractualist egalitarianism* involves (a) a more complicated account of the relationship between choice and inequality; (b) a conception of the demands of egalitarianism that *runs beyond* distributive equality or equality of condition; and (consequentially from (b)) (c) an increased focus on the organization of economic life, and the social relations that characterize it.

Consequently, the advocate of a *contractualist egalitarian* account of social justice will take an interest in the structure of control and power within the economy, and in issues regarding the democratization of economic life. Such issues will include, for example, hierarchy and authority in the workplace, the distribution of control over productive capital, and the relationship of corporations to their stakeholders.

11. Coda: A Case Study – Egalitarianism and Labour Unions

Fostering and supporting robust intermediate associations in economic life can be one mechanism through which many of the goals of contractualist egalitarianism can be met. (Compare this with views that emphasize equality in private consumption.) Labour unions stand out as being interesting candidates for achieving some of these goals. For example:

- a. An individual with the support of a labour union is likely to find herself in a much stronger bargaining position with regard to her employer, thereby undercutting some of the dangers of the emergence of unacceptable forms of arbitrary power and domination in economic life.
- b. Involvement in a strong secondary association such as a labour union can provide an individual with a sense of her own standing as an undominated agent, and contribute to her self-conception both as both a political and economic actor, thereby providing a sound basis for an important element of individual self-respect. Unions can provide a “parallel” political power structure, with opportunities for quasi-public office (and hence provide conditions for their members' development of a sense of themselves as

political agents) and can also create an associational social network amenable to a positive self-conception for working people

- c. As well as *directly* providing mechanisms to protect the *outer* (i.e. as in a) and *inner* (i.e. as in b) dimensions of social status, the operation of collective bargaining procedures can have *consequential* effects that are welcome on non-intrinsic egalitarian grounds. For example, a workplace with strong collective bargaining by workers is less likely, *ceteris paribus*, to have demeaning employment practices that give *expression* to workers' reduced status, such as rigid spatial segregation of managers from workers, or practices such as timed bathroom breaks.

The crucial point is that effects such as those mentioned in (a)-(c) are conceptually distinct from the effect of union activity on the distribution of income and wealth (e.g. through the "union wage premium", or improved pension rights in unionized workplaces.)

Therefore, there can be egalitarian grounds for supporting particular kinds of intermediate associations, independently of their effects on economic distribution, per se. A convincing conception of the demands of social justice, in taking seriously the egalitarian concern with (for example) status and self-respect, leads to an interest in the structure of the institutions of economic life that has (unfortunately) gone missing from some recent egalitarian theories.