



T. M. Scanlon, *The Difficulty of Tolerance*
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think, in exploring these fundamental issues: "Part of a political philosopher's job," he tells us, "consists in elaborating and vindicating a coherent set of principles that firmly formulates an ideal worth fighting for" (p. 201). This conception of political theorizing may inspire egalitarians in their battles, but it belies the claim of the subtitle of this collection: that political theory has been changed by his work.

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Scanlon, T. M. *The Difficulty of Tolerance*.
Cambridge: Cambridge University Press, 2003. Pp. viii+273. \$55.00 (cloth);
\$20.00 (paper).

Some philosophers collect their work into chains. Each link in these chains interpenetrates those on either side so that the collections form, if not seamless wholes, then at least wholes whose elements are tightly connected. *The Difficulty of Tolerance* is not a chain but a necklace. It strings together thirteen papers published by T. M. Scanlon over the past thirty years. The papers cover a range of topics in moral philosophy, political philosophy, and the philosophy of law, including freedom of expression, the nature of rights, the claim of equality, the theory of punishment, and, as the title indicates, the difficulty of tolerance. All, as Scanlon says, "are concerned with the standards by which political, legal and economic institutions should be assessed" (p. 1). This common concern unites the papers on a common thread which gives the book some thematic unity. Despite this thematic unity, and despite the fact that the papers in the book complement and illuminate one another, each paper is reasonably self-contained—much more like a stone on a necklace than a link in a chain.

This necklace is strung with some real gems. The papers in it are all multifaceted and highly polished. They all have unusual depth and clarity. Many of them no doubt sparkled in settings from which we should now be grateful to have them removed, for many of them originally appeared in places that made them somewhat difficult to find. Perhaps the book would display more continuity if some additional papers had been included. "Promises and Practices," for example, would have been a welcome addition that would have complemented the last essay in the book, "Promises and Contracts." But bringing together a continuous set of writings seems not to have been the primary aim of assembling this collection. Rather, the primary aim was to make available some important papers by one of the leading moral philosophers of our time. Cambridge Press has done a real service by putting it out.

These papers display the virtues readers have come to expect of Scanlon. For one thing, they show just how long and how carefully he thinks through the philosophical problems he takes up. Scanlon shows an intimate familiarity with the positions he opposes, and he is adept at diagnosing their appeal. He also has a gift for explaining why intuitively important distinctions matter and for discerning the principles that underlie our intuitive reactions to cases. He defends his own positions with power and rigor. Sometimes, as on the grounds of freedom of

expression, Scanlon's positions have shifted over time. His willingness to juxtapose essays which betray the shift shows admirable intellectual honesty.

The contractualist approach to morality for which Scanlon is so well known is also on display here. His classic piece "Contractualism and Utilitarianism" is the book's centerpiece. It is there that we see him defend the view that is nascent in some of the earlier papers reprinted in this collection and that is in the background of later ones that are also included. One of the many reasons that this book is of interest is that readers can watch the gestation of the view in papers leading up to that splendid essay.

But this is not the book, nor does it purport to be the book, through which systematically to engage Scanlon's contractualism. Nor is it a book that invites engagement with pervasive or recurrent themes. What the book does invite, because of the diversity of topics and the interest of the essays devoted to each, is sustained and careful attention to the papers taken singly.

One of the most interesting and challenging papers in *The Difficulty of Tolerance* is the title essay. I want to begin my discussion of this book by briefly considering the central claims of that piece.

Social philosophers often suppose that people with diverse values must be tolerant of one another's speech and conduct because speech and conduct animated by values one does not share can give offense. It is the fact that others offend us—or offend against our sense of propriety, morality, or religion—that is often said to make tolerating them so difficult. The interesting and original idea at the heart of Scanlon's paper on tolerance is that tolerance is engaged, not only when we feel offended, but also when we feel threatened. What is the nature of the threat?

Scanlon insists that citizens have a profound interest in the character of the society in which they live: in the values and mores which define acceptable or normal behavior (p. 191). In a free and pluralistic society, we all face the possibility that the expression and activities of others will alter the prevailing values and mores of our society in ways that we find unwelcome. The possibility of such cultural and moral evolution can be a threatening one, one which threatens that the social world in which we feel most comfortable will be profoundly changed.

A tolerant society, Scanlon says, is one in which citizens are willing to live with that threat. Citizens' willingness to live with the threat shows itself, not only in their society's laws and institutions, but also in their own attitudes. For toleration, Scanlon says, requires each of us to acknowledge that everyone else is "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" (p. 190). Such acknowledgment, Scanlon maintains, is "the price of recognizing one's fellow citizens as equal members of society" (p. 3). Recognizing one's fellow citizens as equal members, in turn, establishes a relationship of mutual respect that is supposed to be "deeper than . . . conflicts" about "the nature and direction of society." If mutual respect persists through these conflicts, it can make society something more than a collection of "rival groups contending over the same territory" (p. 193).

In describing a tolerant society by reference to its pervasive attitudes as well as its law and institutions, Scanlon offers a description which is irremediably vague. Scanlon says that in a tolerant society, citizens are not to disparage one

another, though they should be free to disagree with one another's views. The line between disparagement of a person and vigorous disagreement with her views is, however, a difficult one to draw. It may seem to be effaced when there are significant disparities of power between the contending parties. It would be helpful to have been told what, if any, informal expressions of disapproval are compatible with tolerance. Contemporary circumstances may also make us wonder whether engagement in the culture wars is itself intolerant or whether participants in the war fight tolerantly if they fight with a certain amount of chivalry and with respect for their antagonists.

Scanlon insists that such vagueness is ineliminable (p. 190). Perhaps he is correct, for questions about the boundaries of toleration are raised by any account of the matter. What makes Scanlon's treatment of the matter so interesting is that it raises questions which other discussions of tolerance do not. As I suggested earlier, the most original contribution of "The Difficulty of Tolerance" is that it draws attention to an occasion for tolerance—namely, the threat of unwelcome social change—that is not often discussed in philosophical treatments of the subject. To show what novel questions Scanlon's paper opens up, I want briefly to introduce a philosophical problem that "The Difficulty of Tolerance" suggests but that philosophers have largely ignored because they have not noticed the occasion for tolerance to which Scanlon draws our attention.

To see the problem, note first that tolerance is a virtue which demands personal integrity in the face of moral and political disagreement. For so long as I know that others will do the hard work of disagreeing with those who threaten unwelcome change, and so long as I know that they will bear the burden of appearing callous or intolerant, I may consider myself free to take an easier path. I may be content to appear tolerant and open to change, and to give out that I am, knowing that a position for which I have some sympathy will be well enough represented by others whose conviction is deeper or whose temperament is more combative than my own. If I deny my ambivalence to myself and others, I am guilty of deception, including self-deception. If I refuse to stand up and be counted for the side to which I secretly incline when the opportunity presents itself, I may be guilty of something else. In that case, I have engaged in moral free riding. Or—to extend the unfortunate metaphor of the culture wars—I have engaged in a form of moral draft dodging. These failures are also failures of truthfulness to oneself and others. The tolerance that is effected by those who are guilty of these failures in this way is therefore a false tolerance. The question of whether such false tolerance is *intolerance* is a very interesting one with important implications for moral education. It is not a question which Scanlon addresses. But it is a virtue of his treatment of tolerance that he raises it by calling attention to the connection between tolerance and threat.

Clearly the notions of membership in society and of participation in one's society are central to the argument of "The Difficulty of Tolerance." They are even more important to another of the most challenging essays in the book, "The Diversity of Objections to Inequality." I now want to suggest that Scanlon's failure to say more about the central notions of membership and participation threatens the conclusion of this important paper.

Scanlon expresses the thesis of "Diversity of Objections" in the opening paragraph. There he says: "when I ask myself why . . . inequalities should be

eliminated, I find that my reasons for favoring equality are in fact quite diverse, and that most of them can be traced back to fundamental values other than equality itself. The idea that equality is, in itself, a fundamental moral value turns out to play a surprisingly limited role in my reasons for thinking that many of the forms of inequality which we see around us should be eliminated" (p. 202). At the close of the paper, Scanlon suggests an even stronger thesis. There he suggests, not that the idea of equality "play[s] a surprisingly limited role," but that it plays no role at all (cf. p. 218).

When Scanlon says that the idea of equality plays at most a limited role in reasons for thinking that inequality should be eliminated, the idea of equality he has in mind is what he calls the "moral ideal [*sic*] of substantive equality," namely, "the idea that a society in which people are equally well-off (as determined by some appropriate measure) is for that reason a better society" (p. 208). Scanlon's thesis that this ideal plays at most a limited role in our reasons for thinking that inequality should be eliminated is challenging and perhaps radical. For that ideal seems to be a staple of street-level and campaign-level political discourse, at least on the left. But if Scanlon's thesis is correct, then the talk of equality that seems so important in reform politics is, despite its prominence, derivative.

Scanlon maintains that we have five other reasons for thinking that inequality should be eliminated and that it is these reasons which do the work the "moral ideal of substantive equality" is often taken to do. Those reasons derive from the importance of (1) relieving suffering, (2) preventing stigmatizing difference in status, (3) preventing unacceptable forms of power or domination, and (4) preserving "the equality of starting places required by procedural fairness" (p. 207). "In addition," Scanlon adds immediately, "(5) procedural fairness sometimes supports a case for equality of outcomes" (p. 207).

I want to look more closely at what Scanlon says about reasons of kind 5, for he suggests that reasons of this kind do particularly important moral and political work. Scanlon writes:

these reasons come in a variety of forms which vary in strength. What they have in common is not that all men and women are created equal but rather that *if* all the members of a certain group have a prima facie equal claim to benefit in a certain way, then a fair procedure for distributing such benefits must (in the absence of special justification) result in equal benefits. I imagine that everyone would agree to the truth of this conditional statement, but its uncontroversial character is purchased by packing a great deal into its antecedent. The egalitarian thrust of (5) arises from the claim that this antecedent is true in an important range of cases—e.g. that participants in many cooperative ventures do have prima facie equal claims to the benefits produced and, specifically, that this is so in the case of the basic institutions of society. (Pp. 207–8)

Call the conditional stated here "Scanlon's conditional." That conditional certainly seems plausible at first glance. If it really is as uncontroversial as Scanlon claims, then perhaps it—conjoined with the truth of its antecedent—does help account for much of the force that we ordinarily ascribe to ideas of substantive equality.

I do not, however, believe that Scanlon's conditional is uncontroversial. To see that it is not, consider the question of how to accommodate the interests that citizens with physical disabilities have in enjoying national parks, such as Yosemite

National Park. I assume that these parks are socially created goods. I also assume, for purposes of argument, that they are socially created goods to which citizens with and without physical disabilities have *ultima facie* equal claims. Does it follow that those with and without disabilities have claims to equal benefits?

It is tempting to answer that they do, as the truth of Scanlon's conditional would imply. But this answer becomes somewhat less attractive when we ask just what benefit is supposed to be equalized. The most appealing answer—more appealing than enjoyment of Yosemite or the opportunity to enjoy Yosemite—is that the benefit to be equalized is access to Yosemite. The problem with this answer is that differently abled citizens cannot be granted equal access to all of Yosemite. There are some ways of accessing parts of the park, such as climbing the face of El Capitan, that simply are not open to those with certain physical disabilities. So we might ask whether the idea of conferring equal benefits is a coherent one in the case of this benefit. Moreover, even if the notion of equal access is a coherent one, it seems clear that the access it is reasonable to grant to the disabled falls far short of equal access. When the National Park Service decides how many parking spaces to designate for the handicapped and how many wheelchair ramps to build, it does not even begin to try providing equal access to the park. This is not obviously unreasonable. The fact that it is not raises the question of whether we think claims to equal benefit really do follow from *ultima facie* equal claims to benefit, as Scanlon asserts that they do.

One possible reply to this line of argument is to deny the assumption that differently abled citizens have *ultima facie* equal claims to benefit. Instead, it may be replied, they have only *prima facie* equal claims. Thus someone might try to save Scanlon's conditional by pointing out that it holds only absent some special justification for departing from equality. In the presence of special justification, such as could be based on the fact that those with *prima facie* equal claims to benefit are differently abled, we can depart from equal distribution of benefits and make do with a reasonable approximation of equality. What makes an approximation reasonable in this case, it might be said, is that the degree of access provided to all citizens reasonably balances the interests of the disabled in accessing the park against the interests of those whose access and enjoyment would be impeded by the presence of ramps and the exclusive dedication of parking spaces.

Once we have doubts about the coherence of equal access, however, we should also have doubts about whether we can coherently describe the state of affairs that a reasonable balance of interests is said to approximate. If that state of affairs cannot coherently be described, then it is hard to see what sense can be made of the consequent of Scanlon's conditional. This difficulty casts serious doubt on the defensibility of the conditional itself. Furthermore, the defense of the conditional that I have imagined seems to entail an unnecessary shuffle. Instead of saying that we should reasonably approximate equal access and that such an approximation is reached by reasonably balancing the interests of differently abled citizens, why not simply dispense with the idea of an equal distribution of access altogether? Why not say simply that striking such a balance just is the right thing to do when citizens who have *prima facie* equal claims to a socially generated benefit differ in their capacity to enjoy or access it? Why not, that is, simply reformulate Scanlon's conditional to say that if members of a certain group have a *prima facie* equal

claim to benefits, then a fair procedure for distributing the benefit will be one that reasonably balances their interests in that benefit?

Scanlon might regard this as a friendly amendment to his view since it amends his conditional without reintroducing an ideal of substantive equality. I now want to suggest that such an ideal might be needed to explain some of our egalitarian intuitions after all. I want to do so by turning from the consequent of Scanlon's conditional to its antecedent. More specifically, I want to look at Scanlon's claim that the antecedent is "true in an important range of cases."

The antecedent of Scanlon's conditional is true when "members of a certain group have a prima facie equal claim to benefit in a certain way" and when their prima facie equal claims are not defeated by special considerations. His examples of people who have undefeated equal claims to a social benefit are "participants in many cooperative ventures." An especially important case of such participation is the case of participation in the cooperative ventures that together comprise "the basic institutions of society." It is the fact that people in society participate in these cooperative ventures, the fact that their participation gives them prima facie equal claims to benefit, the fact that those claims are undefeated, and Scanlon's conditional that together are supposed to account for some of our egalitarian intuitions.

But consider the alleged fact that people participate in the basic institutions of their society. It is difficult to verify this claim without knowing a good deal more about exactly what participation is. Suppose for the sake of argument that participation is a fairly demanding notion, so that someone does not participate in the basic institutions of his society if he is involuntarily without meaningful work for long periods or if having been raised in social conditions of violence and deprivation has left him permanently alienated from the society in which he lives. If participation has such conditions, then the ability and willingness to participate in one's society are themselves socially created benefits. It seems to me that these are benefits which should be distributed equally. A society which distributes them equally is, for that reason, a better society than one that does not. It also seems to me that a society which excludes some of those who live in it from participation ought to be reformed so that it includes them and so that it gives them, or tries to give them, equal shares. The question that I want to raise is how these egalitarian intuitions are to be explained.

It may be that those who are owed equal shares of the benefits on which I am focusing are owed them because they have ultima facie equal claims to those benefits. But their ultima facie equal claims to benefit cannot stem from their participation in their society's basic institutions. For I have supposed that some people who are owed equal shares are excluded from participation and that this is among the inequalities that need to be remedied. So it seems that the egalitarian intuitions I want to account for cannot be explained by reasons of kind 5.

At this point, it may be tempting to turn from reasons of kind 5 to reasons of kind 2. It may be tempting, that is, to argue that the unequal distribution of the ability and willingness to participate in society, and the exclusion of some people from participation altogether, are objectionable because they result in objectionable differences in status among "members" of society (cf. p. 228). As I have already suggested, the notion of full membership is an important one in Scanlon's political thinking. But reliance at this point in the argument on the

notion about equality raises questions about who members of society are. It also raises questions about why the socially created goods of membership, such as the good of status, should be equally distributed. The notion of membership is no clearer than that of participation.

Perhaps Scanlon would assert that all people in society are members of it simply because they were born into that society (cf. p. 195). Perhaps he would then assert that all have *prima facie* equal claims to participate in their society simply by virtue of their membership in it. And perhaps he would claim that almost all citizens have *ultima facie* equal claims to participate because there are so few special considerations which can defeat *prima facie* equal claims to participate in one's society.

These suggestions are plausible in light of a critical step Scanlon made in "The Difficulty of Tolerance." There, as we saw, Scanlon argued that recognizing others' full membership in society requires acknowledging that they are "equally entitled to participate in determining what [society] will become in the future" (p. 190). If Scanlon would offer the assertions I have suggested, he could then claim that the antecedent of his conditional is satisfied. It would then follow, on Scanlon's view, that almost everyone born into a society has the claim to participate equally in that society. So by making the assertions I have suggested, Scanlon could rely on reasons of kind 5 to explain the egalitarian intuitions I asked about a couple of paragraphs ago.

But if membership is so easily gotten and if the antecedent of Scanlon's conditional is so easily satisfied—and, in particular, if *prima facie* equal claims to participate are so difficult to defeat—we may begin to wonder whether all the moral work is not being done by the consequent of the conditional rather than by the conditional as a whole. Since the consequent taken alone reads like an idea of substantive equality, it may then seem that an idea of substantive equality plays an important role in explaining some of our egalitarian intuitions after all—such as the intuition that ability and willingness to participate are socially created goods which should be distributed equally among members of society. It may then seem, that is, as if the main contention of "The Diversity of Objections to Inequality" is mistaken.

I have focused my discussion on "The Difficulty of Tolerance" and "The Diversity of Objections to Inequality" in part because of the intrinsic interest of these two papers, and in part because many of the other papers that appear in Scanlon's collection have already received a great deal of critical attention. Indeed, some of those papers—"A Theory of Freedom of Expression," "Preference and Urgency," "Human Rights as a Neutral Concern," and "Value, Desire, and Quality of Life"—have attained the status of classics. The reservations I have expressed about the two papers I have discussed in detail are not meant to highlight faults in Scanlon's work. Rather, they are meant to suggest how stimulating readers will find this collection and how much they can learn by thinking carefully about its rich and complicated arguments. Those interested in, or teaching about, a wide range of topics in moral and political philosophy will be very glad to have these fine papers so readily accessible.

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Summers, Robert S. *Essays in Legal Theory*. Boston: Kluwer Academic, 2000. Law and Philosophy Library 46. Pp. xvi+441. \$196.00 (cloth).

Robert Summers is an important figure in twentieth-century jurisprudence and legal theory. The blurb writer for this book seems not to do him any favors—"many of the essays are relatively original," the back cover says. There is, though, a hard truth to such faint praise. Summers's importance does not lie in his having produced a deep and influential theory of law on a par with, say, H. L. A. Hart, Ronald Dworkin, or Joseph Raz. Summers has made his contributions as anthologizer, historian, and "ambassador." In the 1960s, when analytic philosophy dominated the Anglo-American philosophical academy, Summers edited two important anthologies (*Essays in Legal Philosophy* [Oxford: Blackwell, 1970], and *More Essays in Legal Philosophy* [Oxford: Blackwell, 1971]) which unprecedentedly brought together the best theoretical work of both academic lawyers and academic philosophers and did much to help found legal theory as an interdisciplinary enterprise. He has produced two major historical books, *Instrumentalism and American Legal Theory* (Ithaca, N.Y.: Cornell University Press, 1982) and a monograph on Lon Fuller (London: Edward Arnold, 1984). The role of "ambassador" is well represented in this volume, and I will say more shortly.

Essays in Legal Theory is the third volume of Summers's collected papers to appear (the others are *Essays on the Nature of Law and Legal Reasoning* [Berlin: Duncker & Humblot, 1991], and *The Jurisprudence of Law's Form and Substance* [Brookfield, Vt.: Dartmouth, 2000]). It contains sixteen essays, all but two previously published. Summers says that they are revised for the volume, but the revisions appear light. The book exhibits both the virtues (convenience and synergy: most of the essays appear in places out of the mainstream of North American legal research, and they supplement each other in valuable ways) and some of the innate shortcomings of the genre. Some of the essays are slight and occasional—a memoir for H. L. A. Hart (chap. 1); a somewhat whiny reply to a somewhat whiny review of *Instrumentalism and American Legal Theory* (chap. 4); a piece that does not reveal much new, for a volume on Jhering, on Jhering's influence on U.S. legal theory (chap. 2). Other chapters display the risks run by reprinting older material. There are two chapters (15 and 16) on the law and economics movement, from 1986 and 1981, respectively. At the time they were first published, there would have been a place for such basic introductions to, and ruminations about, law and economics. Now, however, that law and economics is a well-understood and well-established domain of legal theory, the essays seem simply quaint (though, granted, they merit a place as useful introductions for undergraduates). Chapter 3 from 1986 interestingly explores the use by instrumentalists of the metaphor of the law as a machine. However, Summers identifies the internal combustion engine as the paradigm machine. This may have been historically true to the instrumentalists but seems an unfortunate choice for the present, with serious attempts being made to deploy artificial intelligence to develop expert systems for law and to show legal reasoning to be computable.

I mentioned Summers's role as "ambassador." I mean by that the following. For most of the last forty years, Summers has played a prominent role in inter-