

## Responsibility and the Value of Choice\*

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Should individuals' obligations – what individuals are substantively responsible or liable for - depend on the choices they make?<sup>1</sup> Many political philosophers now answer this question affirmatively, and discussions of the grounds, scope and implications of choice-sensitive responsibility have occupied pride of place in recent debates about justice. Although Thomas Scanlon develops his Value of Choice account of responsibility as part of his contractualist moral theory, and not specifically in the context of settling questions of distributive justice, that account gives a distinctive answer to the opening question which all theorists of justice should be interested in. According to Scanlon, in a range of cases – those in which choice is valuable – people's obligations may vary depending on whether they have opportunities to make choices. The fact that choice has value accounts both for why people should be provided with certain opportunities and for why it may be permissible, in those cases, to let people bear certain opportunity-accompanying burdens.

What is most distinctive about this account, by Scanlon's own reckoning, is that it settles questions of responsibility by reference to what people have reasons to want (namely, reasons to want outcomes to depend on how they respond when presented with alternatives), rather than by appealing to the independent moral idea of the legitimating force of choice. Scanlon thereby contrasts his account

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<sup>1</sup> From now on, by "responsibility", I refer to "substantive responsibility" (the term is Scanlon's) unless I indicate otherwise. Judgements of substantive responsibility are judgements about people's liability to certain forms of treatment (enforcing an obligation; exacting compensation from them, etc..) and are different, on Scanlon's view, from judgements of moral responsibility, which concern whether an action is attributable to a person as a basis of moral appraisal of that person. See

to the Forfeiture View of responsibility, which holds that a necessary and sufficient condition for responsibility is that individuals make conscious, genuine, or voluntary choices to bring about certain outcomes. On the Value of Choice view, what matters, for responsibility, is the value of having certain opportunities. On the Forfeiture View, what matters is whether people have actually made certain choices or engaged their will.

In this paper I ask whether the value of choice can do the work Scanlon wants it to do in generating judgements of substantive responsibility, and whether it presents a plausible alternative to the Forfeiture View. I argue, first, that the value of choice can plausibly ground judgements of substantive responsibility, but do so only in a relatively narrow range of cases, namely, that in which what I refer to as “integral costs” are at stake. Second, where costs beyond integral ones are concerned, we should treat the Value of Choice account as incomplete and supplement it with further principles in order to generate plausible judgements of responsibility, most importantly a principle of real opportunity and a principle of stakes. Third, I suggest that whether or not individuals have made choices that are “voluntary” in one sense seems to matter for assigning responsibility for non-integral costs, and should be captured by a principle of real opportunity. Fourth, I argue that, contrary to what Scanlon holds, an account of responsibility that makes room for voluntariness in the way I sketch, and which Scanlon himself in fact seems sympathetic to, is not clearly different from a plausible version of the Forfeiture View. Scanlon seems to have exaggerated the contrast between his view and other views of responsibility that he brands as the “Forfeiture View”.

I hope that two general lessons will emerge from this discussion. The first is that any account of responsibility that accords choice some legitimating role must clarify and justify the reasons for giving it that role. Not enough discussions of responsibility do this. Scanlon identifies some such reasons –

those that have to do with the value of choice – and his criticism of the Forfeiture View is in my view best seen as an invitation to the latter to do the same. Second, a complete account of responsibility will need to draw on a number of different principles in order to yield judgements of responsibility that are sufficiently fine-grained. Here Scanlon, like many other writers on responsibility, does not duly acknowledge this point, although his account can in fact accommodate it quite well.

The discussion proceeds as follows. Section 1 outlines the Value of Choice account; section 2 argues that, as an account wholly distinct from the Forfeiture View, it is best seen to apply only to a narrow range of cases of responsibility; section 3 argues that beyond that range, the notion of voluntariness needs to play a role in generating claims of responsibility; and section 4 argues that the expanded account is not as different from a plausible version of the Forfeiture View as Scanlon claims.

## **1. THE VALUE OF CHOICE ACCOUNT**

The central question of responsibility concerns whether, why, and under what conditions people's obligations should depend on the choices they make. One familiar affirmative answer to this question holds that individuals are liable for certain burdens if and only if they make actual, conscious, genuine, or voluntary choices to undertake those burdens or expose themselves to them. By engaging their will and actively passing up alternatives, they acquire liability. This is the Forfeiture View, which I here describe briefly following Scanlon's characterisation of it<sup>2</sup>. Scanlon rejects the Forfeiture View and aims to provide an alternative to it. That alternative, as I have already mentioned, holds that in a certain range of cases people can be made to bear certain burdens, if and only if they have been provided with an opportunity or a choice to avoid those burdens, and regardless of whether or not they made a voluntary or genuine choice to undertake these burdens (once given the opportunity to avoid them).

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<sup>2</sup> In section 4 below I ask whether this characterisation is a helpful one. Here I assume it is, and will refer to the Forfeiture View as holding that voluntary choice is a necessary and sufficient condition for responsibility.

This section outlines the Value of Choice view and its implications. Since Scanlon's formulation of that view is, so I suggest, ambiguous or unclear at a few crucial junctures, in the process of outlining it I also identify those ambiguities.

As Andrew Williams highlights in his discussion of Scanlon's view, the fact that choice has value plays two different but connected roles on that view<sup>3</sup>. First, it accounts for why and when people should be given certain opportunities: when being given those opportunities has value. Second, it accounts for why and when people's obligations should be choice-sensitive: when choice has value, and people value having certain opportunities, then they may legitimately be made to bear certain burdens that accompany those opportunities.

Scanlon identifies three main ways in which choice has value, including instrumental, demonstrative, and symbolic value (he does not say these are exhaustive, but they do seem to cover at least most cases.) Choice has instrumental value when it is more likely to bring about a desired outcome than alternative means of bringing that outcome about, as when my choosing a dish from a restaurant menu makes it more likely that I eat something I like than having someone else decide for me; choice also has demonstrative, or representative, value: I can have reason to have what happens depend on my responses insofar as it matters that those responses be displayed in what happens, as when I choose a gift for someone dear to me. Finally, choice has symbolic value insofar as, where people are generally expected to make certain choices for themselves, my being given the opportunity to choose signals that I, too, have the status normally accorded to other adults deemed competent and able to choose. When choice has value in one or more of these ways, it provides reasons for preferring principles that make what happens to us – including what obligations we have - depend on the ways we respond when presented with alternatives.

It is worth noting at this point that “the value of choice” could refer to either the value of *having* or the value of *exercising* certain freedoms or opportunities. The symbolic value of choice seems to lie in having certain freedoms, regardless of whether or not one avails oneself of them. That value seems compatible with a person’s refusal or failure to exercise the freedom the possession of which is symbolically valuable, as when a child decides to let his parents choose his marriage partner for him. By contrast, what has representative value, first and foremost, is the *act of choosing*, and only derivatively the freedom to choose: it is my actually choosing a gift, not just the fact that I have an opportunity to choose it, that has value; having that opportunity is instrumentally valuable to my doing something – choosing a gift – which has representative value. The same seems to be true of instrumental value: if I have the freedom to choose from restaurant menus but for whatever reason fail to exercise it, then the value of that freedom, although potentially there, is not realised.

Scanlon does not distinguish between the value of having and the value of exercising an opportunity, and he slides from talking of the latter – emphasising that on the Value of Choice account what matter are our reasons to value having outcomes depend on *how we respond when presented with alternatives* – to talking of the former – insisting that people may be held responsible for certain outcomes regardless of whether or not they have made any actual choices, provided they were given certain opportunities. This is surprising, because the key difference between the Value of Choice and the Forfeiture views of responsibility lies, in Scanlon’s view, in the role played, in judgements of responsibility, by the fact that someone actually *makes a choice*. Furthermore, the plausibility of the Value of Choice account is at stake here: if what I have reason to value is to have outcomes depend on *how I choose*, then principles which impose burdens on me independently on whether (and why) I actually choose may not be justified by the value of choice. I will return to these points in sections 4

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<sup>3</sup> See A. Williams, “Liberty, Liability and Contractualism”, in N. Holtung and K. Lippert-Rasmussen (eds.), *Egalitarianism. New Essays on the Nature and Value of Equality* (Oxford University Press, 2007). See also Scanlon, *What We Owe to Each*

and 2 below, respectively. Until then, I follow Scanlon in using the expression “the value of choice” loosely.<sup>4</sup>

A second point of relevant ambiguity in Scanlon’s formulation of his view, which has already been noticed, concerns the role the value of choice plays in forming judgements of responsibility.<sup>5</sup> At times it seems as though it will play a substantial role, determining whether others count as having “done enough” for us and have placed us “in a sufficiently good position”, so that it is a sufficient condition for responsibility. At other times the claim seems to be the more moderate one that the value of choice is one of the various considerations that bear on whether people should be held responsible (and on whether others count as having done enough). As Scanlon notes: “According to the Value of Choice account what matters is the value of the opportunity to choose that the person is presented with. If a person has been placed in a sufficiently good position, *this can make it the case* that he or she has no valid complaint about what results, whether or not it is produced by her active choice.” (p. 258)<sup>6</sup>.

Thirdly, and relatedly, Scanlon slides from talking about the value of choice as something that settles judgements of responsibility in the strong sense of *extinguishing* the complaint that someone might have against being requested to bear certain burdens, to talking of it as something that *diminishes* that complaint. These two things are clearly different. We’d be hard pressed to deny that, when choice has value, being given the opportunity to choose can (or does) make it the case that our complaint against being requested to pay some price for that choice is diminished. But it is another thing to say that that complaint could be (or is) extinguished if only we were given the opportunity that we value having. Here again, Scanlon moves from a less to a more controversial point without seemingly

*Other*, p. 251, and “Promises and Contracts”, in his *The Difficulty of Tolerance*, (Cambridge University Press, 2003), p. 265.

<sup>4</sup> Michael Cholbi and Paul Bou-Habib have also pointed out to me that Scanlon talks interchangeably of the value of the opportunity to choose and the value of the opportunity to avoid a burden. The two are different, however. I do not pursue this point here.

<sup>5</sup> See Williams, “Liberty, Liability, and Contractualism”.

<sup>6</sup> See also Scanlon, “Promises and Contracts”, p. 265, footnote 35.

noticing this, and our assessment of his argument will vary according to which of these positions we take him to hold.

Since I take the complaint-diminishing claim just mentioned to be too uncontroversial for an account of responsibility to aim at its defence only, in what follows I understand the Value of Choice account as aimed at showing that the value of choice can (together with a few other considerations which do not, however, include the fact that a choice has actually been made) *extinguish* a complaint someone might have against having to bear an opportunity-accompanying burden.

To conclude this exposition of the Value of Choice view, it will be helpful to present the example Scanlon uses to illustrate it. Scanlon considers, as a case of a principle permitting people to undertake useful projects that involve risk of harm to others, one where the officials of a city need to remove and dispose of hazardous waste located near a residential area. The digging and removal of the waste, which must be carried out in order to avoid future harm, carries some risks and, even if all precautions are taken by the officials to render the operation as safe as possible, anyone directly exposed to the hazardous material released in the air would risk lung cancer as a result. The officials take all the measures they possibly can to avoid people exposing themselves to such a risk, but some people are nonetheless exposed and, as a result, suffer lung damage.

Scanlon maintains that a principle permitting what the officials have done (while also requiring that they take all possible precautions) is one that no one could reasonably reject, including the people who were, in fact, harmed through exposure to the hazardous material. The Value of Choice account explains this by reference to the fact that all were placed, as he says, in a sufficiently good position to avoid the danger by choosing appropriately. This fact, and not the fact that an actual choice is made by the people who *are* exposed to the risk and are thereby harmed, is what supports the conclusion that those individuals cannot complain about what results.

The implications of the Value of Choice account is that there is no difference, as far as judgements of substantive responsibility, or liability, go, among the following four individuals, all of which are harmed through exposure to the hazardous material. The first individual is simply Ignorant. Despite all the announcements, Ignorant has failed to hear about the danger, and goes out without realising what he is in for. The second person is Imprudent: he has heard about the warnings but failed to appreciate the real danger involved, and goes out because he is curious to witness the event. The third person, Calculating, is fully aware: she has heard the warnings and is indeed aware of the entity of the danger, but, after carefully reflecting on the matter, decides that it is worth less to avoid the risk than it is to go out an important project for which, given the circumstances, the conditions are particularly good. Finally, the fourth person is Absent-minded: she has heard about the risks, but then simply forgets and exposes herself to them.

The difference between these cases, on Scanlon's Value of Choice account, is irrelevant to judgements about substantive responsibility<sup>7</sup>. In all four cases, Scanlon claims, despite the fact that Imprudent and Calculating, unlike Ignorant and Absent-Minded, have actually chosen to expose themselves to the danger, it is true that since we did as much as we could to protect these people, none of them can "complain". That is, none of these people, Scanlon says, can "reasonably reject a principle permitting such a project to go forward with the safeguards it involved... From the fact that a person, under the right conditions, took a certain risk, we may conclude that he alone is responsible for what happens to him as a result" (pp. 259-260).

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<sup>7</sup> Scanlon accounts for the difference between the characters in the waste-removal case in terms of the circumstances in which they were "actually placed" by the protective measures (p. 259). I think that this suggestion is problematic, but do not discuss it here insofar as Scanlon believes that the difference in how individuals are "actually placed" by the protective measures does not affect judgements of substantive responsibility, and the latter contention is what I am concerned with here.

## 2. ASSESSING THE VALUE OF CHOICE ACCOUNT

As the passage just quoted indicates, Scanlon seems to intend his Value of Choice account to settle questions of responsibility about a potentially wide array of costs people could bring upon themselves. Provided that people have an opportunity they value having, including an opportunity to avoid a burden, then whatever costs befall them are their responsibility. This seems intuitively implausible, and is a claim that Scanlon need not make. In this section I suggest that the Value of Choice account, in its most distinctive form (that is, as positing that only opportunity to choose, rather than actual choice, matters for responsibility, so that it is clearly distinguishable from the Forfeiture View), could be defended as settling judgements of responsibility in a much narrower range of cases than Scanlon implies, namely, those cases where what I will refer to as integral costs are involved. In the next section I argue that beyond those cases, the Value of Choice account would be inadequate, by itself, to settle questions of responsibility, and would yield implausible implications if it were treated as complete. Instead, to handle those cases, it should be supplemented by further principles that specify what the stakes or consequences of people's choices should be, and what counts as a real opportunity to make a choice.

It is useful to start this discussion by considering Scanlon's contention that, in the hazardous case scenario, none of the affected individuals 'can complain'. It is striking that in making this contention, Scanlon conflates two different claims. First, we may say that an individual 'can complain' in the sense that she can reasonably reject a principle that allows the project to go ahead with the requisite safeguards, thereby imposing on all the inhabitants certain burdens, such as the burden of having to stay indoors if they are to avoid the risk of harm through exposure, and the burden of such a risk if they do go out. Second, an individual 'can complain' in the sense that she can reasonably reject a principle that requires that she alone bear further consequences or burdens of her choices to stay

indoors or go out and expose herself to the danger – such as the cost, say, of not being able to go to work or go shopping at the time they would like to go. Let me distinguish between these claims by saying that the first is a claim about judgements of responsibility that concern the *integral costs* of people's choices; the latter a claim about the responsibility for the non-integral, or *consequential costs* of people's choices.<sup>8</sup>

Two individually sufficient conditions for a burden or cost to be 'integral' are, first, that the cost *necessarily* accompanies the opportunity to choose (so that the individual cannot be given that opportunity without also being exposed to the cost); second that the cost is integral to the *value* of the opportunity, so that, if the cost were removed, the opportunity would be less valuable. An example of an integral cost of the first kind is the risk of harm through exposure to the hazardous waste, in Scanlon's example. In that example, we imagine that the hazardous waste must be removed (there would be even greater risk of harm if it were left where it is), *and* forcible evacuation, Scanlon assumes, is not an option (p. 257)<sup>9</sup>. Risk of harm is then inescapable in this case. An example of an integral cost of the second kind is the risk of failure in undertaking challenging projects; or the risk of losing money in gambling for the gamble-lover. If those risks were removed (and it may be possible for these costs to be at least reduced by a paternalistic friend or parent who ensures, behind the scenes, success for us in a project we undertake), the value of the opportunity to undertake a project of our own choice would be reduced: we have reasons to want to risk failing rather than being guaranteed success.

With these points in mind, let us return to the hazardous waste removal case. We can now see that the principle permitting what the officials have done is one that no one can reasonably reject, including those individuals who were, in fact, harmed. The principle in question is a principle that

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<sup>8</sup> I draw here on Dworkin's idea of '*consequential* responsibility'. See R. Dworkin, *Sovereign Virtue* (Harvard University Press, 2000).

<sup>9</sup> It is puzzling that Scanlon should make this assumption, as this would seem a natural place to invoke the value of choice, i.e. in order to establish that people should *not* be forcibly evacuated but be given the opportunity to choose whether or not

imposes costs such as that of risking contracting lung cancer as a result of being outdoors while the hazardous waste removal takes place, as well as the risk of involuntary exposure to the danger. The principle whose reasonable rejectability is being tested requires that these risks should be minimised: recall that the officials must take all measures they can, according to Scanlon, to ensure both that everyone is well informed, so that the risk of involuntary exposure to the hazardous waste is minimised, and to reduce the risk of harm for those who are exposed to it (for example, by fencing the affected area, by wetting down and transporting the material in closed trucks, and so on). The principle that allows people the opportunity to choose with the attached costs, while requiring the officials to minimise those costs, is one which no one could reasonable reject, including the people who suffer those costs. None of Ignorant, Absent-Minded, Calculating and Imprudent can complain, in the sense that none of them can reject the principle that allows the project to go ahead, with these risks being imposed while the requisite safeguards are taken.

We could agree with Scanlon on *this* point. But I add that those individuals *may*, as in the case of Ignorant and Absent-minded above, have some grounds of complaint. We cannot declare that they alone are responsible for what has happened to them, in the sense that they alone must bear the non-integral costs of it. Hence Ignorant and Absent-minded (but perhaps not Imprudent and Calculating), may well, because they have not actually chosen to expose themselves to the harm, be entitled to compensation. This is an option which Scanlon, as a result of lumping together the two senses in which we say of individuals that they ‘can complain’, does not even consider, but which seems to me to be entirely justified. Now, I should make clear that, by suggesting that Ignorant may be entitled to compensation, I do not want to imply that ignorance, in all contexts, is a sufficient condition for “excusing” individuals, and for them to be therefore entitled to compensation, broadly conceived. But I

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to expose themselves to the hazard instead. We may also wonder whether choice has any value at all in this case, but I do not press this point here.

do suggest that the question as to whether Ignorant is entitled to some compensation is a further question which is not settled by Scanlon's account, but which must be considered. Most judgements of responsibility are about costs other than the integral ones, and the value of choice cannot settle these judgements by itself.

### 3. THE RELEVANCE OF VOLUNTARINESS

When we move beyond responsibility for integral costs, the Value of Choice account does not seem adequate for settling questions of responsibility, at least not by itself. To see this, imagine the case of a fifth individual, Needy, who has heard the warnings and is aware of the danger, but who, on the day the hazardous waste is being removed, must go to hospital for an emergency dialysis. Like the others, Needy is exposed to the hazardous material and suffers lung damage as a result. What would Scanlon have to say about a case like Needy's, which he does not consider, but about which very pressing questions of responsibility arise?

It seems to me that, on the face of it, Scanlon would have to say that Needy, too, is responsible for what has happened to her: we can still say that the city officials have done all they reasonably could be expected to do by way of taking measures that may inform Needy about the danger so that she may evaluate its relevance and decide accordingly. So, we could say, Needy has been given an opportunity to choose as much as the others have, an opportunity which people have *generic* reasons to value, and cannot complain as a result<sup>10</sup>. True, she was not placed in the circumstances in which she could have wished to be placed, and the opportunity to choose was not, it turns out, valuable in her case: this is

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<sup>10</sup> Generic reasons are "general conclusions about the reasons that individuals in a situation of a certain kind typically have" (p. 255) and Scanlon thinks that we should think of the value of choice in terms of the generic reasons people have to value choice, thus abstracting from individual differences and particularities in order to proceed at the requisite level of generality when justifying moral principles.

something that Scanlon also says about Absent-Minded and Ignorant. But just as Scanlon says about Absent-Minded and Ignorant that their not being placed in circumstances they would wish to be placed does not excuse them from responsibility, so he would, so it seems, declare that about Needy. She is, then, after all, liable to pick up the costs of being exposed to the hazardous waste.

But this seems implausible: Needy's choice to expose herself to the danger, we can justifiably insist, is not a voluntary one in the relevant sense, and for that reason, I think, we would be sympathetic to Needy's claim to compensation in a way in which we would not be to Calculating's or Imprudent's.<sup>11</sup> But notice that, even so, there is a sense in which Needy cannot complain: she cannot reasonably reject a principle that allows the project to go ahead with the requisite safeguards. We can, plausibly, make both claims, which are run together in Scanlon's account, but which should be distinguished. In order to insist that, at least in a certain range of cases, people should be held responsible for some non-integral costs of their choices only if they made voluntary choices (so that Needy would not be held responsible), we needn't state, implausibly, that Needy can complain if the project goes ahead with the requisite safeguards.

The sense of voluntariness I have in mind when characterising Needy's choice as non-voluntary is not that on which the voluntary is roughly equivalent to the intentional, but is the more demanding sense on which a choice to do *x* is voluntary if and only if it is *not* made because there is no acceptable alternative to doing *x*.<sup>12</sup> Conversely, a choice to do *x* is forced if and only if it is made because there is no acceptable alternative to doing *x*. Voluntariness is opposed to force, in the sense that claims of force are claims of vitiated, or undermined, voluntariness. Wanting to avoid an unacceptable alternative is, on this definition, both a necessary and a sufficient condition for force: if I face a choice between an

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<sup>11</sup> Should our sympathy for Needy's claim depend on whether she has the wherewithal to purchase insurance against these sorts of risks? A complete answer to this question will depend on further details about the case, but in my view, and assuming that Needy is not a beneficiary of unjust inequalities, it would be unfair for Needy to have to bear the (in her case higher than average) costs of minimising threats to her health. Thanks to Matthew Kramer for raising this point.

unacceptable and an acceptable option, and choose the latter both because I really like it and so as to avoid the alternative, then it is not the case that I am forced to choose as I do.

As I have suggested elsewhere, the notion of voluntariness should be explicated in these terms so as to account for the fact that claims of voluntariness are explanatory claims, that is, they must in part explain the choices individuals make, and do so by reference to (although not solely) the nature of the options individuals face. If someone lacks an acceptable alternative to what she does but that in no way motivates her, then, on my definition, she acts voluntarily. Moreover, both individuals' mental states (beliefs and desires) and an objective standard of well-being are relevant in affecting the voluntariness of choice. Claims of voluntariness and force, then, being explanatory claims, make reference to how the nature of the options an individual faces affects her will. However, claims of voluntariness and force are not completely subjective or context-dependent, in that the criterion for the acceptability of options is an objective one. It is possible to uphold both the following claims: first, since claims of force and voluntariness are claims about why agents act as they do, it is the agents' beliefs about the nature of the options they face, and their desires - rather than the objective nature of those options, independently of the agents' mental states - that determine whether or not they act voluntarily; and second, an option is unacceptable and acceptable in accordance with an objective standard of well-being. The fact that someone *deems* an option to be unacceptable is neither a necessary nor sufficient condition for that option to be unacceptable.

It is worth emphasising this last point, because we would find suspicious a notion of voluntariness that deemed too many choices as non-voluntary, especially if we see voluntariness as a generally necessary condition of responsibility. This is not a worry we should have with regard to the account at hand. The view I defend does not commit the mistake of rendering judgements of force and

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<sup>12</sup> See my *Liberty, Desert and the Market* (Cambridge University Press, 2004) and "Debate: The Concept of Voluntariness – A Reply", *Journal of Political Philosophy* 16, 1 (2008).

voluntariness completely subjective or completely context-dependent, so that, whenever someone *dislikes* an option, and/or whenever one option is *much better* than the others, the choice is said to be forced. This view of voluntariness would be implausible, and has been (rightly) subjected to criticism.<sup>13</sup>

Let me take stock of my discussion so far. The picture of responsibility that emerges from this discussion and which I am defending as an alternative to Scanlon's own Value of Choice view is the following. Giving people certain opportunities they value having – and regardless of whether and why they actually or consciously or voluntarily choose one such opportunity over the others - justifies giving people those opportunities and holding them responsible for costs which are integral to them. However, with regard to costs beyond the integral ones, we need both an independent principle that determines which costs may be attached to which options – we may call this a principle of stakes – and, furthermore, we need to secure for people circumstances such that they may make voluntary choices among the opportunities they are provided with – we may call this a principle of real opportunity.<sup>14</sup>

Scanlon himself, I think, would agree that we need an independent principle of stakes. When he discusses Hume's discussion of a patient's choice to undergo potentially life-saving surgery, Scanlon points out that we would want to consider the surgeon-patient exchange as perfectly valid, *provided the surgeon is morally entitled to charge the amount he requests*.<sup>15</sup> He does not suggest, there, that *because* that the patient values the opportunity of life-saving surgery, *any price* the surgeon may choose to charge for it would therefore be legitimate. Similarly, we may say, it does not follow, from the fact that the waste-affected area inhabitants value the option of having the waste removed and the option of

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<sup>13</sup> See Robert Nozick, *Anarchy, State and Utopia* (Oxford: Blackwell, 1974) p. 169.

<sup>14</sup> I tease out the idea of a principle of stakes in "Responsibility and the Consequences of Choice", *Proceedings of the Aristotelian Society*, Vol CIX, Part 2, pp. 165-188. Robert Jubb has suggested to me that all Scanlon may need is a principle of stakes to deal with cases like Needy's. Scanlon could say that Needy's options, given the payoffs they involve, are inadequate. Although the principle of stakes and the principle of real opportunity interact, I think both are needed: what payoffs or consequences it is justified to attach to options will partly depend on the conditions under which those options will materialise for people. It may be justified to attach cost C to option O only on the assumption that people choose option O voluntarily.

<sup>15</sup> Scanlon, "Promises and Contracts", p. 267.

being able to not expose themselves to it involuntarily, that they may be held responsible for *any consequences* we may wish to attach to those options. So I assume that Scanlon would allow for the fact that we need an independent principle of stakes to determine what the payoffs or stakes of people's choices should be.

With regard to the second way in which I am suggesting we need to supplement the Value of Choice account, that is, by requiring that, at least in a certain range of cases, people may be held responsible for non-integral costs only if they have voluntarily chosen the options to which those costs are justifiably attached, it seems less straightforward what Scanlon would make of it. On the face of it, and judging by his discussion of substantive responsibility in *What We Owe to Each Other*, Scanlon seems opposed to the view I have sketched, which looks like a version of the Forfeiture View. On closer inspection, however, and taking into account what Scanlon says about voluntariness in his discussion of promises and contracts as well, it is clear neither that my view is a version of the Forfeiture View as Scanlon conceives of it, nor that Scanlon's own view and a plausible version of the Forfeiture View are in fact that different. I discuss these points in the next section. Here let me restate that the Value of Choice account in its most distinctive form, in which it generates judgements of responsibility for any costs and independently of considerations about whether or not people actually make voluntary choices, is at best incomplete and would yield implausible judgements of responsibility if it were treated as complete.

#### **4. THE VALUE OF CHOICE VIEW AND THE FORFEITURE VIEW: REALLY COMPETING ACCOUNTS?**

Scanlon claims that the Value of Choice account explains “the significance that our choices (...) have in determining what we owe to one another” (p. 263). I have argued that the Value of Choice, as an account that is distinct from the Forfeiture View, cannot do this. It does not account for the significance

that our *choices* have in determining our obligations towards others: to account for that, we need to invoke the importance of voluntariness as a condition for responsibility. Now we may accept this suggestion, and claim that it does not push us towards abandoning the Value of Choice account. Instead, that account should be re-thought as stating that what has value, at least in a certain range of cases, is that people *actually make choices* (as opposed to their having the opportunity to make them), and that they make choices that are describable as voluntary. After all, as Scanlon says, the value of choice refers to the “(...) opportunities to choose that he has had *and the decisions that he has made* (...)”, and to the “(...) reasons that people have for wanting to have what happens depend on the way *that they respond* when presented with alternatives (...)” (p. 249 and p. 251; emphases mine). If we are given alternatives but do not choose between them or are forced to choose between them, then the ensuing outcomes do not reflect the way *we respond* in the relevant sense, that is, in the sense that might justify holding us responsible for those outcomes. This suggests that we could countenance the claim made in the previous section within the terms of Scanlon’s own view. The suggested role of voluntariness would not point us to a version of the Forfeiture View but to a revised version of the Value of Choice view.<sup>16</sup>

I am sympathetic to this possibility, but in this last section I conclude with some doubts about the characterisation of the two competing accounts of responsibility Scanlon sketches, in light of which it is not clear that the Value of Choice view, rather than a plausible version of the Forfeiture View, is vindicated if we accept the conclusions of the foregoing discussion.

While he opposes his account to the Forfeiture View, Scanlon makes it quite clear that some of his contentions could be couched in the language of voluntariness (pp. 260-1). Similarly, in the context of his discussion of promises and contracts, he says that the conditions under which promissory and

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<sup>16</sup> I thank Andrew Williams for pressing me on this. Note that in my view, as I said in section 2 above, we should in fact say that with regard to responsibility for integral costs the voluntariness of choice should not matter. So what is at issue here is

contractual obligations arise, on his view, "...amount to what would ordinarily be called a requirement of voluntariness". These include the demand that that obligations "must be entered into intentionally, with adequate understanding, and without objectionable constraint"<sup>17</sup>.

In light of these remarks, we may wonder why Scanlon thinks of his view as different from the Forfeiture View, and, I now suggest, this is because of his unduly restrictive characterisation of the latter. As mentioned earlier, Scanlon talks of the Forfeiture View as positing, variously, that individuals must make "actual", "conscious", "genuine", or "voluntary" choices to bring about certain outcomes in order for them to be held responsible for those outcomes. While there are arguably relevant differences between various versions of the Forfeiture View depending on what sort of choice is supposed to be relevant, it seems as though Scanlon thinks of the Forfeiture View as characterised by the following two features.<sup>18</sup> First, the Forfeiture View is supposed to rely on the moral idea that voluntary choice has legitimating force, where this idea is not derivative of some other moral principle, and is different from a principle of desert.<sup>19</sup> Second, the Forfeiture View Scanlon has in mind is one on which it matters crucially whether someone actually and consciously acted, "*passed up* specific alternatives" or "engaged their will".

In contrast with the Forfeiture View thus characterised, Scanlon holds that on his view, even in those cases where voluntariness does seem like a necessary condition for responsibility, this is to be accounted for in terms of the value of choice itself: "[t]here are solid generic reasons to want the

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only responsibility for non-integral costs.

<sup>17</sup> Scanlon, "Promises and Contracts", p. 262.

<sup>18</sup> This characterisation of the Forfeiture View is in line with taking Carlos Ninos' account as an instance of it, as Scanlon does. See p. 399, endnote 4. See also C.S. Nino, "A Consensual Theory of Punishment", *Philosophy and Public Affairs* 12 (1983), pp 289-306.

<sup>19</sup> At p. 249, TS says: "(...) I need to show how this [that the force of a person's objection to a burden-imposing principle can be diminished by the fact that she could avoid the burden by choosing appropriately] can be explained *without presupposing some prior moral idea about the legitimating force of voluntary choices* (italics mine). At the bottom of p. 265, Scanlon holds that "Forfeiture is a creature of specific institutions (...). It is not a moral feature of choice in general." He then adds: "As I argued above, what figures in the justification of such institutions and principles is not forfeiture, but, rather, the less sharp-edged notion of the value of choice". (265-6). For the distinction between the Forfeiture View and desert, see p. 259.

additional degree of control over one's obligations that a requirement of explicit consent provides, and these constitute reasonable grounds for rejecting principles that do not provide it. So contractualism can explain why various conclusions that look like instances of the Forfeiture View are in fact correct" (p. 260).

But it is questionable whether any plausible version of the Forfeiture View and a plausible version of the Value of Choice view (which, as I have argued above, will make people's liability for non-integral costs depend on whether they have been provided with the conditions for making voluntary choices) are really different, not just with regard to the range of judgements they will support, but also with regard to their rationale for making them. For any defender of the Forfeiture View must offer reasons why choice has normative significance, lest it amount to an unjustified assertion of the mysterious force of choice. Furthermore, the most plausible candidate reasons for thinking that choice has normative significance, other than the principle of desert (which, as I said earlier, Scanlon assumes is not invoked by the Forfeiture View) are the principles of self-ownership and of autonomy. If we believe that people have certain rights of use, control and transfer over themselves, or that there is value in their being authors of their lives, then we have reasons to insist that they – and others - have a certain degree of control over what befalls them, and this may justify positing choice as a condition for responsibility. The emerging picture is that of accounts that look very much like what Scanlon would call the Value of Choice account. So it seems to me that any plausible account of responsibility - including any promising version of the Forfeiture View - will not have the first feature that Scanlon ascribes to the Forfeiture View. Defenders of the moral significance of choice need not, and should not, just assert that choice has normative significance, without grounding it in a further moral principle (although that principle need not be that of desert).

With regard to the second feature of the Forfeiture View as Scanlon describes it, it is not clear that it will distinguish that view from the Value of Choice in the way Scanlon suggests. For even if we

think that the nature of the choices people actually make matters for judgements of responsibility, and consider it important, for that reason, that they be provided with the opportunity to make choices of the requisite kind, offering them that opportunity is all that we are required to do. After all, “[o]ne can bring the horse to the water but one cannot make it drink”.<sup>20</sup> even if voluntariness matters for the ascription of responsibility, we may consider our job done, for the purpose of assigning liability, when we have guaranteed for one another opportunities to make voluntary choices. Here, once again, it seems that a plausible version of the Forfeiture View, one that aims to lay down a workable account of the conditions for holding people responsible, is not that different from the Value of Choice view.

In light of these remarks, it is not clear that the contrast Scanlon draws between the Forfeiture View and the Value of Choice view is an informative one. We may hold that, in a certain range of cases, it is relevant, for people’s responsibility, that they engage their will and make certain choices, that it is so relevant for a reason (such as those given by an interest people have in autonomy, or self-ownership, or well-being), and that its being so relevant requires guaranteeing people options of a certain kind in order to hold them responsible for certain consequences of their having those options. A view of this kind, which I have tried to defend here, straddles the divide between accounts of responsibility Scanlon sets up, but seems to me to be more plausible than the alternatives considered as mutually exclusive and competing accounts of responsibility.

By way of conclusion, I would like to highlight how the account I have sketched does not incur two problems Scanlon detects in voluntariness-based views. First, as should be clear, the account at hand does not rest on a notion of voluntariness that might be threatened by the truth of the Causal Thesis. For a choice to be voluntary in the relevant sense, it is not necessary that an agent should have

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<sup>20</sup> J. Raz, *The Morality of Freedom* (Clarendon Press, 1986), p. 407. Raz makes this point in relation to people’s becoming autonomous, but the same holds in relation to their making voluntary choices.

been able to do otherwise in any problematic sense. All that is required is that people not be motivated by the fact that the alternatives they face are unacceptable.<sup>21</sup>

Second, the view I have sketched does not stumble on Scanlon's Hume-inspired objection, that a voluntariness-based account would have to declare the choice to pay a surgeon for a life-saving operation non-voluntary in a way that undermined ascription of all responsibility. This would have the unappealing implication of undermining the normative significance of the choice, when we intuitively think that someone's making a choice should be of consequence, as is evidenced in the importance we ascribe to patients' consent for rendering medical procedures legitimate.<sup>22</sup> In reply, we can say that the fact that a choice counts as non-voluntary does not render it wholly irrelevant for the purposes of ascribing responsibility. On my view, we could say, with Scanlon, that the patient who makes the choice to have a life-saving operation has reasons to value the opportunity to have the operation, and could be required to bear the integral costs of having it (such as the unavoidable cost of the post-operation discomfort) for that reason. But the fact that the choice is non-voluntary does come into play for determining whether the patient should be held responsible for some non-integral costs. The patient could in this case complain against a very expensive fee requested by the surgeon, whereas he would not seem to have the same grounds of complaint if he were seeking treatment to correct for moderate vision impairment, for example. The voluntariness of choice has a role to play in the ascription of responsibility, but it does not need to play it for settling questions of liability for any and all costs, anymore than the value of choice can settle all such questions. Any plausible account of substantive responsibility will likely be a messy affair, invoking more than one principle, and voluntariness as well as the value of choice can play some role within it.

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<sup>21</sup> See Scanlon, pp. 261-2, for the claim that the Forfeiture View presupposes a more robust notion of freedom than the Value of Choice account.

<sup>22</sup> Scanlon, "Promises and Contracts", p. 226.