Treating Broome Fairly

CHRISTIAN PILLER
University of York

John Broome has developed an elegant and powerful theory of fairness. It is important to lay out his theory afresh because the basic structure of Broome's theory has been generally misunderstood. Once we understand its general structure, we are in a better position to assess what its normative implications are. In discussing objections that have been raised against Broome's theory, I will show that these implications are different from what his critics have commonly assumed.

John Broome has developed an elegant and powerful theory of fairness. Despite these virtues, Broome's theory of fairness has not received the attention it deserves because it has not been absorbed appropriately into the current debate. In many recent discussions, descriptions of Broome's theory contain fundamental misunderstandings. Thus, it is important to lay out Broome's theory afresh. I do this in section I of the article. In section II, I show how commentators have misunderstood the basic structure of Broome's theory and I also explain why this has happened. In section III, I discuss various objections that have been raised against his theory. Once we understand the general structure of Broome's theory, we are in a better position to realize what exactly its normative implications are. My presentation will show that these implications are different from what his critics have commonly assumed.[1]

I. BROOME'S THEORY OF FAIRNESS

For Broome, fairness deals with how to treat people's claims to some good. Broome's theory is best developed by focusing initially on cases in which all claims to some good are of equal strength. For such cases, his theory consists in a single principle: treat equal claims equally. (I will generalize this principle later on.)

On Broome's view, fairness judgements are relational: they participate in the relational nature of equality. Whether one of us has been treated fairly depends on how others have been treated. As with other relational judgements – for example, the claim that two people

[1] The aim of this article is to lay out Broome's theory and to defend it against criticisms and misunderstandings. I don't mean to convey that no doubts about the correctness of Broome's theory remain. Philosophers, me included, will, in time, present their objections. We need to understand a theory fully before we can discuss it. This article aims to prepare for such a discussion.

© Cambridge University Press 2016
Utilitas Vol. 29, No. 2, June 2017
doi:10.1017/S0953820816000303

CrossMark
https://doi.org/10.1017/S0953820816000303 Published online by Cambridge University Press

are equally rich – we cannot find out whether this comparison holds by knowing about one person's riches alone. Similarly, we cannot know whether a person has been treated fairly simply by knowing how this person has been treated. We have to compare one person's treatment with that of others. Only then can we assess whether the treatment was fair.

Suppose you can either satisfy one person's claim to some good or the claims of two other people to the same good; you cannot satisfy all three claims. Suppose all these claims are equally strong. Whatever you do, whether you satisfy the claim of the one or the claims of the two, you will have violated the requirement of fairness: you will not have treated equal claims equally. Only if a third option becomes available, namely the option to satisfy no one's claim, could you treat people fairly. You would treat them fairly by withholding the good and thus by not satisfying anyone's claim. (Equality, we know from other contexts, allows for levelling down.)

The close relationship between fairness and equality is central to Broome's theory. 'Fairness', Broome says, 'is only a relative matter, a matter of how one candidate is treated relative to others'. Considering a case of equal claims, he continues, 'so long as they all get the same amount of good, however large or small the amount may be, they have been treated with perfect fairness'.[2] Fairness requires equal treatment of equal claims. If claims ought to be satisfied, this requirement will have to stand on different grounds. Broome emphasizes this point again – equal treatment does not require satisfaction – in his later paper on this topic: 'if all the candidates get the same quantity of the good, then fairness has been perfectly achieved, even if they each get very little, or indeed none at all'.[3]

Broome's theory of fairness is not (and is not meant to be) a complete moral theory. In considering fairness, it only considers one aspect of how we ought to act. The case in which withholding the good is the only fair option shows that, sometimes, we ought to do what is unfair. Suppose the people in this case have a claim on a good that is based on their benefiting from the good. Suppose, for example, it is the kind of benefit that a doctor is able to provide. The doctor, in this case of the one versus the two, cannot satisfy all claims. However, he or she should certainly satisfy some claim. Thus, fairness, in this case, is overridden by the benefit that satisfying any of the claims provides.[4] Another illustration

[2] J. Broome, 'Selecting People Randomly', *Ethics* 95 (1984), pp. 38–55, at 43.

[3] J. Broome, 'Fairness', *Proceedings of the Aristotelian Society* 91 (1990), pp. 87–101, reprinted in his *Ethics out of Economics* (Cambridge, 1999), pp. 111–22, at 116.

[4] For ease of exposition, I will simply follow Broome in contrasting fairness, which, in some cases, requires withholding the good, with what he calls 'general or utilitarian

https://doi.org/10.1017/S0953820816000303 Published online by Cambridge University Press

of why Broome's theory of fairness is not meant to be a complete moral theory is provided by cases in which we can either satisfy all claims or none at all. If the claims are equally strong, there is nothing to choose between these two options in terms of their fairness. Nevertheless, it is clear that in cases like these, we ought to satisfy all claims. Thus, fairness is not the only consideration which determines what we ought to do.

Broome's theory of fairness, I said, is an incomplete moral theory. It is also an incomplete theory of fairness. The domain of fairness has been given as how to treat people's claims. However, questions arise about the nature of claims. First, what are the sources of claims? Second, how do claims work in moral deliberation? Third, whenever claims are in play how is it settled what the claims are claims to? This kind of incompleteness might not matter. Any theory will have to leave some questions open. What is left open here does not take us into unfamiliar territory, because we understand talk of claims pre-theoretically. Children have a claim to the attention of their parents; in a society like ours, ill people have a claim to be seen by a doctor; students have a claim to being taught properly.

In all these examples the bearer of claims will benefit from the satisfaction of their claims. Benefits, and those benefits we call needs, are sometimes the source of claims. Sometimes, but not always. If, for example, I need an onion to cook my dinner (or to treat my ear infection), I might have a claim on getting one from my neighbour – as I have helped her in the past – but the number of people who owe it to me to give me an onion will be very small. So, not all needs lead to claims. Broome does not offer a complete theory of the sources of claims. He relies on our pre-theoretic understanding. 'In different circumstances claims will have different sources. Sometimes they may arise from the candidates' needs, from their general rights such as property rights or a right to life, from a debt of gratitude, or from something else. Sometimes claims may be the resultant of several influences.'[5]

Our second question about claims was: how do claims work in moral deliberation? This question goes beyond a theory of fairness. Fairness is one part of morality, but in moral deliberation all aspects of morality will play their role. The demand of fairness is to treat equal claims equally. This is a deontological component in Broome's moral theory, in which fairness will be weighed against other goods. We have seen already that fairness can be outweighed; thus, his overall theory is a form of consequentialism in which fairness is seen as one good

goodness' or simply 'goodness', which requires distributing the good. Benefits are the typical example of what belongs to this latter category.

[5] Broome, 'Selecting', p. 44.

https://doi.org/10.1017/S0953820816000303 Published online by Cambridge University Press

amongst others.[6] About claims, Broome says the following: 'Some of these reasons [why a person should receive a good] are duties *owed to the candidate herself*, and others are not. I shall call the former *claims* that the candidate has to the good.'[7] This fits the examples I have mentioned above. Parents *owe it to their children* to attend to them; teachers *owe it to their students* to teach them well, and so on. Claims are like duties and work differently from other moral reasons, e.g. from those that concern some benefit when this benefit is not itself the source of a claim. Broome says that claims are neither weighed against other reasons nor against each other. Doing this would, as he says 'not seem to give proper recognition to the people's separateness'.[8] Are claims like rights? Claims and rights are certainly related but they are not the same, for two reasons. First, if rights are seen as side-constraints, i.e. as determining directly what one is obliged to do (or not to do), they do not fit into Broome's general moral theory. Second, claims fall short of rights in another way as well. Claims belong to a theory of fairness and we have said that fairness is a relational concept. Thus, fairness only demands the equal treatment of claims; it does not demand their satisfaction.

We have learnt that claims do not aggregate; they cannot be weighed against each other, nor can they be weighed against other reasons. These features (as well as the examples of claims we have given above) make claims like rights. However, we have also learnt that fairness does not require that claims be satisfied. Thus, it might seem as if rights violations, on Broome's theory, were fine. How do we reconcile these two aspects of what Broome says about claims? At this point we need to make a point explicit which has been there all along. We need to separate the role of claims in a theory of fairness from other roles claims might play in an overall moral theory. When Broome emphasizes the deontological, non-aggregative aspect of claims, he is talking about the role of claims in his theory of fairness. It is important to note that the way he characterizes claims within fairness is not an extra element of his theory that would need to be justified by further argument. Their non-aggregative aspect is simply a consequence of the core principle of his theory of fairness. The requirement to treat equal claims equally entails that in conflict situations with different numbers of equally strong claims on each side, the only perfectly fair solution would be

[6] In this article, I focus on fairness and will avoid unnecessary engagement with Broome's general moral theory, which he develops in J. Broome, *Weighing Goods: Equality, Uncertainty and Time* (Oxford, 1991) and in J. Broome, *Weighing Lives* (Oxford, 2006). By bringing fairness, the content of which is determined by a deontological principle, into a weighing process, he 'consequentializes' fairness.

[7] Broome, 'Fairness', p. 115.

[8] Broome, 'Fairness', p. 116.

https://doi.org/10.1017/S0953820816000303 Published online by Cambridge University Press

to satisfy no claims. Thus, we should not look for an explanation of why claims do not aggregate in their nature or source; claims do not aggregate for the simple reason that a denial of aggregation is part of Broome's principle of fairness. I said that it looks like his theory would, in this sense, condone rights violations. Actually, this impression is accurate, when we restrict our attention to fairness. But claims, I said, will play another role in an overall moral theory. Their obvious role is to place people under a *prima facie* obligation to satisfy them. Broome condones neither the violation of rights nor the neglect of claims. Claims ought to be satisfied. This requirement belongs to Broome's general moral theory; it is not part of his theory of fairness.

I have not in any way departed from Broome. He is very clear about this dual role of claims. 'Everyone's claim to a good should, *prima facie*, be satisfied . . . . Call this the satisfaction requirement.'[9] This aspect of claims *allows* for weighing and, thus, the more claims we satisfy, the better. When it comes to fairness, however, we focus on the principle of equal treatment for equal claims, which does not itself require that claims be satisfied. 'Claims', Broome says, 'therefore give rise to two separate requirements: they should be satisfied, and they should be satisfied proportionally.'[10] A theory of fairness spells out this second requirement.

After explaining Broome's principle of fairness, I said that a theory of fairness is not and is not meant to be a complete moral theory. I then said that Broome's theory is also incomplete as a theory of fairness. First, it does not provide a full account of the sources of claims. On the second question, what the role of claims in moral deliberation is, Broome has provided an answer. He distinguishes their role in fairness – equal claims demand equal treatment – from their role in a general moral theory – claims demand satisfaction. I mentioned a third area of potential incompleteness. It gets into view when we try to apply Broome's theory. Take the question whether the young should, other things being equal, get preferential treatment over the old when it comes to the distribution of scarce life-saving medical resources. The young would benefit more from these resources than the old would when we consider their effects in terms of life-years saved. Whether this difference in the size of benefits affects the strength of their claims crucially depends on what we understand their claims to be claims to. If people have a claim to a (reasonably) long life, the young will have a stronger claim. If, however, ill people simply have a claim to medical attention and treatment, differences in age will not

[9] Broome, 'Fairness', p. 118.
[10] Broome, 'Fairness', p. 118.

https://doi.org/10.1017/S0953820816000303 Published online by Cambridge University Press

amount to differences in claim strength. Applying Broome's theory of fairness will itself involve ethical judgements concerning what claims are claims to. This is another way in which Broome's theory of fairness is incomplete.[11]

At this point I want to pause in laying out Broome's theory. We have reached a point at which we are able to look at one of Broome's critics. Brad Hooker is concerned with finding the right place for Broome's theory of fairness within a picture of morality in general and of moral reason in particular. Hooker thinks that the following tripartite map of moral reasons comes closest to Broome's view.[12] We have reasons that come from harms and benefits which lend themselves to a consequentialist treatment. We have deontological reasons that spell out side-constraints, like the reasons not to kill or torture; finally we have reasons stemming from needs, desert, agreement and, possibly, other sources, which provide Broome's theory of fairness with its distinctive domain. Hooker tries to cast doubts on Broome's theory on the basis of what he takes to be Broome's tripartite map of moral reasons. In a nutshell, he doubts whether there is a clearly defined domain for which a theory like Broome's would be needed.

If what I have said about Broome's theory so far is correct, we should not expect that Broome's view can be pressed into a picture according to which it deals with one particular set of moral reasons, like reasons stemming from people's needs. Satisfying one's need is usually a benefit to the person. So, needs are a subclass of benefits. Some benefits, whether they are needs or not, are such that some people have a claim to this benefit whilst others have not. Furthermore, claims, we have seen, give rise to two different requirements. One requirement is that they be satisfied, which for Broome falls outside fairness, another is that equal claims are treated equally. Because one and the same

[11] At the beginning I have called Broome's theory of fairness a powerful theory. What I mean by this is that it helps us to structure moral debates. Take the case of preferential medical treatment for the young over the old. Broome's theory allows us to distinguish three different levels of engagement with this question. The first level, which I have described above, concerns the nature of claims. Do people have a claim to live reasonably long and happy lives or not? Once we have established which claims are in play – and there might be several – we need to establish their strength. We need to consider, for example, whether the size of a benefit, in the cases under discussion, affects the strength of one's claim to the benefit. (We don't think that all differences in the size of benefit count. We do not think that a generally happy and contented person has a stronger claim than a less happy and less contented person.) Debates on these two levels will interact in various ways before we reach a considered view. Broome's theory then tells us what fairness requires. It does not tell us what we ought to do. Sometimes it may be allowed or even required to be unfair. This is a third level of debate. Broome's theory helps us to structure a moral debate in its complexity.

[12] See B. Hooker, 'Fairness', *Ethical Theory and Moral Practice* 8 (2005), pp. 329–52, at 334.

https://doi.org/10.1017/S0953820816000303 Published online by Cambridge University Press

thing, a claim, gives rise to two different kinds of moral requirements – one that allows and one that disallows weighing – the project of determining the domain of Broome's theory by giving us a well-defined set of considerations to which the theory applies is bound to fail.

Let me return to Broome's theory of fairness. I have introduced its core principle 'Treat equal claims equally' and I have explained in which ways his theory is incomplete. There are two more things to be done in this section: first, we have to understand Broome's main argument for his theory of fairness and, second, I want to introduce his generalization of the core principle.

Broome says that his theory explains why it might be a good idea to distribute scarce resources by a lottery between all claimants. He writes, 'I know of no alternative theory that explains the value of lotteries as successfully as mine.'[13] This is the main argument for his theory of fairness. It explains best when and why lotteries should be used.

Imagine a situation in which two people have the same claim on some good but there is only enough of the good available to satisfy one of these claims. It is a common view that in such a situation an equal-odds lottery should be used to distribute the good. Using a lottery in such circumstances seems fair.[14] Why, on Broome's account, is it fair?

There is a sense – we have met it before – in which holding a lottery violates the fairness principle. In holding a lottery we ensure that one person gets the good and the other does not. We don't know whose

[13] Broome, 'Fairness', p. 121.

[14] Here is some relevant background to Broome's discussion. The development of utility theory in the wake of J. Neumann and O. Morgenstern, *Theory of Games and Economic Behavior* (Princeton, 1944) has inspired attempts to set utilitarianism on a solid axiomatic basis. A leading proponent of this approach was John Harsanyi (see Harsanyi, 'Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility', *Journal of Political Economy*, 63 (1955), pp. 309–21). Harsanyi derives utilitarianism from the following three axioms. (1) Individual decision-making satisfies the axioms for expected utility maximization. (2) Social welfare can be written as an increasing function of individual expected utilities. (3) Social choice satisfies the axioms for expected utility maximization. Peter Diamond (see Diamond, 'Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparison of Utility: Comment', *Journal of Political Economy* 75 (1967), pp. 765-6) has raised the following objection to the third axiom. It is a general feature of utility theory that if two alternatives have the same utility value any probabilistic mixture between what are indifferent options will share the same value with these options. In a situation of scarcity we can provide one person with the good of another. If both options have the same utility value, a lottery which gives both of the potential recipients an equal chance of getting the good, as well as any other lottery, will have the same value as either of the two options. This consequence of utility theory, Diamond claims, is incompatible with what people feel about justice and fairness. In a social context, where the good of more than one person is at stake, a lottery is preferable because it is fair. Broome's theory of fairness offers an explanation of Diamond's claim.

https://doi.org/10.1017/S0953820816000303 Published online by Cambridge University Press

claim will be satisfied, but we know that one claim will be. Thus, we know that in holding a lottery we will not treat equal claims equally. However, there is a sense in which holding a lottery satisfies the fairness principle. In holding a lottery we treat equal claims equally in the sense that we give both parties the same chance of receiving the good. Consequently, holding a lottery is always second-best in terms of fairness. It satisfies the fairness principle in one way and violates it in another. If we withheld the good and, thereby, gave no one any chance of getting the good, we would have satisfied the fairness requirement completely. Other moral reasons, for example those captured by the Pareto Principle, which asks that we make things better for people when no one is made worse off by our doing so, speak against wasting the good. If these reasons are strong enough, we ought to distribute the good. Holding a lottery, though less fair than withholding the good, will always be fairer than giving the good to someone straight out, because in holding a lottery we satisfy the fairness requirement to an extent.

We should hold a lottery only if the reasons arising from the benefits of the thus distributed good are strong enough to outweigh the loss in fairness that a lottery brings with it. Sometimes this will be the case. The doctor of the example above should satisfy some claim. At other times, the reasons stemming from benefits will not outweigh the departure from complete fairness. We find such cases in highly competitive contexts. In these contexts no departure from perfect fairness will be tolerated. Here is an example. One's children might have incompatible preferences about what we should do as a family on a Sunday afternoon. As a parent you'd put pressure on the children to reach an agreement and use the possible withdrawal of the offer of an outing as a sanction. If no compromise is forthcoming, you might resort to offering a lottery between the options. Children, however, might reject this offer on the ground that they would rather forgo the benefit than see their sibling win the lottery. The latter, they say, would be deeply unfair. (On Broome's theory, they are making a valid point.) Similar examples can be found in other competitive contexts. Two firms might argue that some public resource that could benefit each of them but will go to only one of them should be withheld in order not to fall behind their competitor. Two states, locked in competition, might prefer that some prestigious project goes to neither of them over going to one of them with equal chances.

Let me summarize Broome's case for lotteries. Distributing goods by lotteries offers a fairness gain when compared to one party simply getting the good: there is a sense in which we treat equal claims equally when holding a lottery. Thus, lotteries are strictly preferable to the alternative of simply giving the good to one of the parties. Distributing goods by lotteries results in a fairness loss when compared

https://doi.org/10.1017/S0953820816000303 Published online by Cambridge University Press

to withholding the good: ensuring an unequal distribution means we have not treated equal claims equally. Whether we should use a lottery depends on whether the benefit of the good outweighs this fairness loss. In Broome's view, there is no algorithm that could relieve us of having to judge each situation in this regard on its own merits.

So far I have limited my exposition of Broome's theory to a special case. I have only considered cases in which claims are equally strong. What does fairness demand when claims are of unequal strength?

According to what is certainly the intended interpretation of the core principle – treat equal claims equally – we should make a distinction between cases when claims are equal and those when claims are unequal. Consequently, we should treat unequal claims unequally. What renders claims unequal is their strength. There are two ways to treat claims of differing strength unequally. We could favour the stronger over the weaker claim or we could favour the weaker over the stronger claim. The intended demand is, obviously, to give priority to stronger claims over weaker claims. Thus the two principles mentioned above – to treat equal claims equally and to treat unequal claims unequally – are instances of the more general principle to treat claims in direct proportion to their strength. In Broome's own words: 'What, then, does fairness require? It requires, I suggest, that *claims should be satisfied in proportion to their strength*.'[15]

I have generalized Broome's theory by arguing how best to extend the core idea of fairness to cases of unequal claim strength. This argument, however, is not watertight; it cannot be. Whenever we generalize, there will be more than one general principle which will capture the core idea. Here is one such alternative to Broome's generalization: treat equal claims equally and, when claims are unequal, satisfy the stronger claims. I will come back to this alternative generalization of the core principle in section III.1.

II. HOW BROOME'S THEORY HAS BEEN MISUNDERSTOOD (AND WHY)

Broome claims that his theory of fairness offers the best explanation of why we should use lotteries in some circumstances. Although I will not offer a complete survey of other attempts to justify the use of lotteries, I need to mention one such alternative account. I call it the fair-share account.

Let us start by considering cases of divisible goods. If two people have the same claim on a good because, for example, they have invested equal efforts in its production, each one should receive his or her appropriate

[15] Broome, 'Fairness', p. 117.

https://doi.org/10.1017/S0953820816000303 Published online by Cambridge University Press

share. In this case this amounts to getting half of the good. An equal division respects the equality of claims. Had one contributed more, this person should get a bigger share, thereby ensuring that claims are treated in proportion to their strength.[16]

I have started with divisible goods because what is fair in such cases should guide our treatment of cases in which the good is indivisible (or cases in which it cannot be divided without significant loss in value). According to the fair-share view, instead of dividing the good *physically*, we should divide the good *probabilistically*, so that each claimant receives an equal chance of getting the good. If the good is divisible, each person gets the part of the good he or she is entitled to; if the good is indivisible, each gets the probabilistic part of the good he or she is entitled to. This is the fair-share view. Here is its most prominent expression.

> The claim is in its essence simple: what a social lottery offers is an equal division of a good that is otherwise indivisible. A lottery constitutes a probabilistic division of the good *ex ante*; instead of getting one unit of the good each member of the lottery pool gets a G/P chance at one unit of the good, where G is the number of units of the good available and P is [the] number of persons in the entitlement pool. On this account a social lottery is just because it permits an equal allocation of the good consistent with the equal entitlements of the claimant pool.[17]

Broome's theory of fairness and the share-fair view appeal to the same core principle: treat equal claims equally. The fair-share view claims that by using a lottery everyone gets the same good – an equal probabilistic share. In this way using a lottery satisfies the core principle.

In the quote above, there is a move from the idea of dividing *the good ex ante* to the claim that, thereby, *the good* has been allocated in equal measures to all claimants. The latter claim, however, is obviously problematic. A physical division of the good distributes the good without remainder. A probabilistic division of the good, however, does not halve the good with nothing left. If there are two claimants, probabilistic division gives each an equal chance and, in addition, one of them will get the good. A lottery is an allocation process; a probabilistic division is a division of the good in name only.

[16] If we'd generalize the idea that equal claims should be treated equally in a different way, the person with the stronger claim should get all of the good. If this seems unfair – it does to me – Broome's proportionality principle looks more plausible than the alternative generalization.

[17] L. A. Kornhauser and L. G. Sager, 'Just Lotteries', *Social Science Information* 27 (1988), pp. 483–516, at 495f.

https://doi.org/10.1017/S0953820816000303 Published online by Cambridge University Press

Peter Stone and Tim Henning both aim at offering comprehensive surveys of all the arguments for the use of lotteries.[18] Henning describes his project as follows.

> Here is a question: are you required to give A and B an equal chance to be saved, by holding a lottery? Many authors in ethics, welfare economics, and political science answer: 'Yes.' For further reference, I will say that these authors endorse the Lottery Requirement, that is, the claim that we are morally obliged to let a fair lottery decide between A and B in conflict cases. In this article, I defend a skeptical view. I seriously doubt that the Lottery Requirement is true.[19]

How does Henning object to Broome's theory? As a matter of fact, Henning raises no objection to Broome's view. Henning is simply not aware of Broome's theory of fairness as an independent attempt to justify lotteries. He criticizes the fair-share view and thinks that, thereby, he has criticized Broome. Peter Stone makes the same mistake.[20] Why has Broome's view met such miscomprehension? Taking the following passage in isolation, Broome seems to invite the misunderstanding of confusing his view with the fair-share view.

> [When the good is not withheld] some unfairness is inevitable. But a sort of partial equality in satisfaction can be achieved. Each person can be given a sort of surrogate satisfaction. By holding a lottery, each can be given an equal chance of getting the good. This is not a perfect fairness, but it meets the requirement of fairness to some extent. It does so, of course, only if giving a person a chance of getting the good counts as a surrogate satisfaction of her claim.[21]

What has misled Henning and Stone is the term 'surrogate satisfaction'. They think Broome's idea is the following: lotteries are second-best because there isn't enough good to satisfy both claims. So claimants receive a substitute of the good, namely a chance of getting it. Stone and Henning both take it that surrogate satisfaction of a claim stands in for its real satisfaction. Understood in this way, Broome's view amounts to the same as the fair-share view. Lotteries achieve equality of distribution by thinking about the good as 'good ex ante' or as a 'surrogate good'.

[18] See P. Stone, *The Luck of the Draw: The Role of Lotteries in Decision Making* (Oxford, 2011) and T. Henning, 'From Choice to Chance? Saving People, Fairness, and Lotteries', *Philosophical Review* 124 (2015), pp. 169–206.

[19] Henning, 'From Choice', p. 170. Note that, at the outset, Henning seems to neglect Broome's view, which does not endorse the Lottery Requirement as stated. On Broome's view, we are only obliged to use a lottery *if* the fairness loss of lotteries is compensated by the benefit of distributing the good. I have argued that this condition will not always be fulfilled.

[20] See P. Stone, 'Why Lotteries Are Just', *Journal of Political Philosophy* 15 (2007), pp. 276–95; P. Stone (ed.), *Lotteries in Public Life: A Reader* (Exeter, 2011); Stone, *Luck of the Draw*.

[21] Broome, 'Fairness', p. 119.

https://doi.org/10.1017/S0953820816000303 Published online by Cambridge University Press

I said that the above passage, viewed in isolation, invites this misinterpretation because 'surrogate satisfaction' is used there ambiguously. In its first occurrence, the term refers to the satisfaction of the *demands of fairness*. Lotteries satisfy the demands of fairness in one way but not in another. Lotteries treat equal claims equally in terms of the procedure used, but violate fairness in terms of how, in the end, the good is distributed, namely unequally. The second use of 'surrogate satisfaction' – getting a chance of the good amounts to surrogate satisfaction of the claim to the good – means something different. It says that receiving a chance of getting the good is *relevant* for the satisfaction of one's claim. In other words, it is a relevant way of treating people when we assess whether people with equal claims to a good have been treated equally.

Stone says that Broome carries the logic of 'objective equalization' furthest.[22] By this he means that in cases where a physical division of the good is impossible, a probabilistic division provides each with a fair share of the good. Attempting to present Broome's view, Stone writes: 'The award of an equal expected amount of the good, in lieu of an equal amount of the good, thus constitutes "a sort of surrogate satisfaction" (Broome 1990, 98).'[23] Both Henning and Stone deny that lotteries can be justified by focusing on chances of goods; we need not forget about the good itself. Henning summarizes his criticism as follows. 'I see no relevant sense in which chances of satisfaction are surrogate satisfaction, so that giving people equal chances would constitute a way to treat claims fairly in the distributive sense.'[24]

Broome does not think that giving each claimant the same chance leads to distributional equality. Distributional equality, he rightly emphasizes, can only be achieved by withholding the good. Take the thesis that chances of a good are themselves a good.[25] Stone and Henning argue against this claim. Broome's argument is unaffected by whether this thesis is right or wrong. It does not play any role in his argument for lotteries. He says that giving everyone the same chance is a relevant way of treating people. Of course, who gets the good, and ensuring an unequal final distribution, is another relevant way of treating people. Lotteries satisfy the fairness principle in one way and not another. Whether chances of goods can stand in for the

[22] See Stone, *Lotteries*, p. 9. The term 'objective equalization' comes from T. Eckhoff, 'Lotteries in Allocative Situations', *Social Science Information* 28 (1989), pp. 5–22, reprinted in Stone, *Lotteries*, pp. 161–76, at 163.

[23] Stone, *Luck of the Draw*, p. 61.

[24] Henning, 'From Choice', p. 177.

[25] I discuss this thesis with reference to Broome's overall moral theory in C. Piller, 'Valuing Knowledge: A Deontological Approach', *Ethical Theory and Moral Practice* 12 (2009), pp. 413–28.

https://doi.org/10.1017/S0953820816000303 Published online by Cambridge University Press

goods themselves is irrelevant to Broome's argument. There are clear statements of Broome's view that do not invite the misunderstanding we have found in Henning and Stone. Here is one such passage.

> It turns out that there is a way – random selection – of treating them equally to a degree, even though they do not all equally get the good. The fairness achieved is less than perfect, not because some people do not get the good, but because the treatment is not perfectly equal.[26]

It is wrong to think that chances of getting the good are relevant because they provide surrogate satisfaction (which would be an additional good of questionable status). Chances of getting the good, when equally distributed amongst people with equal claims, are relevant because such treatment is fair in a way: it satisfies the demand of fairness to an extent.

Broome's theory has fallen off the map of positions on lotteries because commentators have misunderstood his view.[27] It is time to bring Broome's theory of fairness back to the table so that it can be properly investigated.

III. OBJECTIONS TO BROOME'S THEORY

III.1. Are proportional lotteries fair?

For Broome, the core principle – treat equal claims equally – and its contrast case – treat unequal claims unequally – are instances of a more general principle, namely to treat claims in proportion to their strength. Broome explains the general principle as follows.

> I do not mean 'proportion' to be taken too precisely. But I do mean that equal claims require equal satisfaction, that stronger claims require more satisfaction than weaker ones, and also – very importantly – that weaker claims require some satisfaction. Weaker claims must not simply be overridden by stronger ones.[28]

[26] Broome, 'Selecting', p. 46.

[27] I have concentrated on commentators who aim to describe the whole domain of how to justify lotteries. I have chosen them because their failure to understand Broome has a negative impact on discussions about fairness. Henning and Stone, however, are not alone in mischaracterizing Broome's theory. Here is another attempt to capture Broome's view: 'The lottery acts as a surrogate which partially satisfies every candidate's claim' (J. Kirkpatrick and N. Eastwood, 'Broome's Theory of Fairness and the Problem of Quantifying the Strengths of Claims', *Utilitas* 27 (2015), pp. 82–91, at 85). It should be clear by now that using a lottery partially satisfies fairness; it does not partially satisfy a person's claim to the good. The same comment applies to the following description. 'According to John Broome, fair lotteries provide surrogate satisfaction of claims by giving all claimants an appropriate chance of benefiting as a surrogate for actually receiving the benefit' (G. Vong, 'Fairness, Benefiting by Lottery and the Chancy Satisfaction of Moral Claims', *Utilitas* 27 (2015), pp. 470–86, at 472).With the obvious exception of Broome himself, there is hardly anyone who is able to describe his theory adequately.

[28] Broome, 'Fairness', p. 117.

https://doi.org/10.1017/S0953820816000303 Published online by Cambridge University Press

How should the idea of proportional satisfaction of claims be implemented? Broome suggests a weighted lottery in which chances correspond to claim strength: the stronger your claim, the bigger your chance ought to be of getting the good.

This idea has met resistance. Hooker says that it strikes him as 'highly implausible'. He continues: 'Suppose your claims to some indivisible good are very much weightier than mine. Is there any unfairness in your getting the indivisible good rather than my getting it?'[29] Broome says that weaker claims demand some satisfaction; they should get some chance of satisfaction in a weighted lottery; Hooker says that there is no unfairness when the person with a much stronger claim receives the good. Who is right?

Hooker illustrates his case with the following example.

> Suppose your claim on the medicine comes from the fact that you need it to save your life, and my claim on it comes from the fact that I need it to save my little finger. Suppose an average life is something like a thousand times more important than a little finger. So should the matter of who gets the medicine be decided by a lottery in which you have a 999/1000 chance of winning and I have a 1/1000 chance? Given that your claim is so much stronger than mine, how could it be right to take any risk that I rather than you might end up with the good? . . . Letting the stronger claim win seems completely fair.[30]

Hooker's example is not ideally suited to illustrate his point. The benefits at stake in this example differ for the two parties. Thus, considerations concerning utilitarian goodness come into play. They might distort our view in favour of satisfying the stronger claim. A better example would be one in which the benefit is the same for both parties. Suppose two people have worked hard to complete some task earlier than expected. One of them needs to stay, but, with the task completed, one of them could go home and take some time off. Who should it be, if one of them has contributed much more than the other?

If the difference in contribution is big, I would feel uneasy if an appropriately weighted lottery were to send the person home who has contributed much less. It seems unfair to the person who has worked much harder. If there is to be a lottery, I'd certainly hope that the person with the stronger claim would win. This hope, it seems to me, rests on a concern for fairness.

In order to explore the normative terrain more fully, consider a variation of the above case. One person has contributed slightly more

[29] B. Hooker, 'Fairness', *Ethical Theory and Moral Practice* 8 (2005), pp. 329–52, at 349.

[30] Hooker, 'Fairness', p. 349. See Stone, 'Why Lotteries', pp. 285f., for a similar view. Stone argues that claim strength should determine who receives the good. Whenever someone has a stronger claim than someone else, he or she should get the food. Stone calls this a demand of impartiality.

https://doi.org/10.1017/S0953820816000303 Published online by Cambridge University Press

than the other to the completion of the task. Does the feeling persist that fairness requires us to send the person home who has done more, even if ever so slightly more? I, for one, would not hold this view. If their contribution was similar enough, a weighted lottery strikes me as a good idea to decide who will receive the benefit. John Broome agrees. His case is different in content but structurally the same as the one I am using. He writes: 'When the people were equally needy, it was fair for them each to have a 50 percent chance of getting the food. Now that one person is slightly – even minutely – less needy, it is implausible that it should it fair for him to have no chance at all.'[31]

When normative intuitions diverge, we can only make progress by finding some underlying rationale which we are better able to assess and which in turn explains some part of the divergence we are facing. In section I, we have seen that Hooker regards a theory of fairness as dealing with a distinct set of moral reasons. In contrast to Hooker, I explained that Broome's theory is better seen as the development of a deontological principle. We accept that equal claims need equal treatment but there is no set of reasons that exclusively falls into the domain that requires equal or, in case of claims of different strength, proportional satisfaction. The requirement of equal or proportional treatment is by itself a fundamental aspect of moral deliberation.

If, like Hooker, we see claims as a distinctive set of reasons within a theory of fairness, it is their feature of being reasons that will drive our normative thinking. First, if claims are reasons, we ought to satisfy claims. It is true on both Hooker's and Broome's conceptions that we ought to satisfy claims but, as I explained earlier, this satisfaction requirement is not and cannot be part of a relational conception of fairness.[32] A relational conception of fairness, like Broome's, will always allow levelling down. Second, cases of unequal claims become cases of unequal reasons. The principle that guides us in such cases is that we always ought to act in accordance with the strength of reasons. If the reasons are stronger on one side, this is what we must do. This principle will not be sensitive to how strongly the weight of reasons favours one side over the other. If one person has worked much harder than the other, we have a strong reason to favour him. If this person had worked only a little bit harder, we still had more reason to favour

[31] Broome, 'Selecting', p. 48.

[32] Hooker regards it as an improvement of Broome's theory if the satisfaction requirement becomes part of a theory of fairness. He writes: 'If the requirement of proportionality is central to fairness, fairness requires the greatest possible proportionate satisfaction of claims' (Hooker, 'Fairness', p. 341). Broome's relational account of fairness needs to keep the fairness principle separate from any satisfaction requirement. This separation is entailed by the relational nature of fairness.

https://doi.org/10.1017/S0953820816000303 Published online by Cambridge University Press

him. A weighted lottery, as demanded by Broome's theory, will never be appropriate.

I have spelled out Hooker's point of view. However, what drives his thinking – fairness deals in claims and claims are reasons – is not compatible with Broome's relational conception of fairness. Broome develops the application of a deontological principle which shares its basis, namely claims, with other aspects of his overall moral theory. Fairness as proportionality is an independent deontological principle. As such it does not violate general principles about reasons which underlie Hooker's conception. In assessing Hooker's point of view, I find that it has an implausible consequence: when claims are almost equal, a lottery at equal or almost equal odds would, according to Hooker and contrary to what I think, be unfair. On the other hand, I agreed with Hooker that in cases of very unequal claims a weighted lottery has the danger of producing substantial unfairness. As I will show in what follows, Broome's theory does not entail what Hooker and I would find objectionable. When claims are strongly unequal, Broome does not recommend holding a weighted lottery. Such a lottery would, on Broome's theory of fairness, be less fair than satisfying the stronger claim.

Let me start this explanation with what Broome says about such cases.

> If the good goes to the people with the strongest claims, the others will not have been fairly treated; their claims will have been overridden. And if it goes to the other people, the unfairness will be worse. So unfairness is once again inevitable. But once again it can, if the circumstances are right, be mitigated by giving everyone a chance of getting the good. Ideally, each person's chance should be in proportion to the strength of her claim: the lottery should be unequally weighted.[33]

In the case of equal claims, we distinguished two relevant ways of treating people equally. One of these ways referred to outcomes. Lotteries, we said, incur a fairness loss, when compared to withholding the good, because of the unequal outcomes they create. The other relevant way of treating people referred to the lottery as a procedure of distribution. In giving everyone the same chance, we respect fairness. The same two relevant ways of treating people need to be brought to bear in cases of unequal claims. Let us first consider the outcome-related way of treating people. If a weighted lottery rewards the person with the stronger claim, there will be some unfairness – the weaker claim has been neglected. The weaker the claim the smaller this unfairness will be. If the weighted lottery rewards the person with

[33] Broome, 'Fairness', p. 120.

https://doi.org/10.1017/S0953820816000303 Published online by Cambridge University Press

the weaker claim, there will again be unfairness – the stronger claim has been neglected. Neglecting the stronger claim involves weightier unfairness than neglecting the weaker claim. The bigger the difference between the stronger and the weaker claim, the bigger the unfairness will be if the weaker claim wins. This is what it looks like when we consider ways of treating people's claims that refer to the distribution that will result from our thus treating them. The second relevant aspect we need to consider is how lotteries treat people's claims in terms of being a procedure of distribution. In this sense, the weighted lottery satisfies the proportionality principle. In this sense – and this is the sense Broome stresses in the quote above – weighted lotteries are fair. He says that the fairness achieved by the weighted lottery might *mitigate* the distributional unfairness. The fairness achieved by the weighted lottery will, however, have to be weighed against the fairness loss a lottery brings, which will vary depending on whether the weaker or the stronger claim wins.

Let us run these ideas that involve comparisons of degrees of unfairness with an example. Let us assume we can measure claim strength precisely and consider a small-difference case in which a 51%–49% distribution of the chances to win matches the strength of the claims involved and a large-difference case in which the claim-matching chances are 90% and 10% respectively. Let me start with the small-difference case. The lottery treats claims in proportion to their strength and is, in this sense, fair. In terms of the distribution achieved, there is a risk of satisfying the weaker claim. As the weaker claim is almost as strong as the stronger claim, this additional threat to fairness is small. Should we, as Hooker's line of reasoning suggests, satisfy the stronger claim? This would create an additional fairness loss in terms of the procedure used because the person who would otherwise get a 49% chance of winning, which matches her claim strength, would get a 0% chance of winning. We need an ethical judgement that compares these two fairness losses. What is worse in terms of fairness: reducing a 49% chance to 0 or having a 49% chance of satisfying a slightly weaker claim? Broome thinks that reducing the 49% chance to 0 would be more unfair. Thus, in small-difference cases it is fair to use an appropriately weighted lottery.

The situation changes in two respects when we look at large-difference cases. First, the fairness loss when reducing a weak claim to 0 becomes ever smaller the weaker the weaker of the two claims becomes. This weakens the case for the weighted lottery. Second, the smaller chance of satisfying the weaker claim, because it gets increasingly less probabilistic weight, is offset by the increasing unfairness that would result if one satisfied an increasingly weaker claim. If the claim represented by a 10% chance actually wins, the benefit of going home

https://doi.org/10.1017/S0953820816000303 Published online by Cambridge University Press

would not go to the person who has worked nine times as hard. This, it seems, would be seriously unfair. In general, the weaker the claim the bigger the unfairness would be if the weaker claim were satisfied. Whether we should hold a weighted lottery or satisfy the stronger claim when the difference in claim strength is large depends again on an ethical judgement by which we compare fairness losses. What is more unfair: reducing a small chance to 0 or risking that a much weaker claim is satisfied? Whatever the answer one gives to this question, for the purpose of assessing Broome's theory, it is important to realize that this answer comes from outside Broome's theory. Broome's theory provides the question that needs to be answered. We need to answer it for ourselves. I, for one, think that reducing a very small chance to 0 is a small fairness sacrifice. The fairness loss it brings is considerably smaller than the risk of satisfying the much weaker claim, as the latter would be very unfair. Thus, Broome's theory is fully compatible with the normative view Hooker and I have endorsed: it would be unfair to use a weighted lottery when the strength of claims differs significantly. More precisely, given the right judgement about how fairness losses compare, it would be *fairer*, on Broome's proportionality theory, to satisfy the stronger claim than to hold a weighted lottery.

I have shown three things. First, Hooker's view of fairness – a view which sees claims as reasons so that the requirement to satisfy claims becomes part of the theory of fairness – encounters a problem: it says, implausibly in my view, that we should not use a lottery when claims differ only slightly.[34] I admit that this will be a problem only for those who share this normative intuition about what to do in small-difference cases. Second, the normative view Hooker endorses, namely not to use a lottery when claims are very unequal, is compatible with Broome's view. Broome's theory tells us that what is fair in such circumstances depends on how we answer a question about the comparison of different fairness losses. His theory needs these further ethical judgements to be applied to such cases; it does not itself answer this question.[35] It

[34] Broome (see 'Selecting', p. 40) provides the following further argument in support of the intuition that we should use a lottery when claims are almost equal. Lotteries bring some fairness to an unfair situation. (The situation is unfair because a lottery will result in an unfair distribution and we might be morally required to distribute the good.) If lotteries were only used in situations in which claims are exactly equal, any change in claim strength would be more important than the fairness that lotteries bring. Fairness, however, is an important good that cannot be outweighed that easily. For me, this is a good argument. In our dialectic, however, I cannot put much weight on this argument as a defender of Hooker's conception would regard it as question-begging. (According to such a defender of Hooker, we cannot appeal to the value of fairness in cases, like our small-difference cases, in which, according to Hooker, it would not be fair to use a lottery.)

[35] This is a third dimension in which Broome's theory of fairness is incomplete.

https://doi.org/10.1017/S0953820816000303 Published online by Cambridge University Press

is, in my view, very plausible to answer it in a way that endorses Hooker's normative view. Third, Hooker's view is incompatible with Broome's purely relational theory of fairness. I conclude that there is no objection to Broome's theory on the grounds that it would have implausible normative implications.

In discussions of Broome's proportionality requirement, the idea that there is more than one relevant way in which, by doing something, we treat people tends to be forgotten. However, it is clear from his justification of using lotteries in equal claims cases that there are (at least) two ways in which the principle to treat equal claims equally is relevant. Broome might not have been as clear as he could have been when he considered the implementation of the proportionality principle. Proportional lotteries are fair in a way. They are unfair in another way. This further unfairness increases as the difference in claim strength increases. Thus, weighted lotteries are overall fair only when people have claims of similar strength.[36]

III.2. Can't one be unfair to everyone?

It is easy to be unfair to everyone: don't treat equal claims equally. For example, satisfy one of two competing claims without satisfying the other. It might seem harder to treat everyone unfairly whilst providing the same satisfaction of all claims, because then one has treated everyone equally. On Broome's conception, it does not only seem hard to do this, it actually is impossible. Examples like the following, thus, try to challenge his conception of fairness.

Suppose I mark student essays by throwing a pair of dice. It is much quicker doing it this way. I've devised a simple system in which '1' means 7, any '2' means the same mark as before and the other numbers are read as what they are. My marking system produces an entirely reasonable distribution of marks. Every student has the same claim and I treat everyone in the same way. Nevertheless, I keep the system

[36] Has Broome really been less clear than he, perhaps, should have been? Considering a case where several people have roughly but not precisely equal claims, he says that it might be fairer to have an equal odds lottery than to give the good to the person with the strongest claim. Whether this is so, 'depends on a complicated judgement. . . . The likelihood of this less fair result [namely not having satisfied the strongest claims] will have to be weighed against the contribution to fairness of the lottery itself' (Broome, 'Fairness', p. 120). Whenever he endorses weighted lotteries, he only considers cases in which the differences in claim strength are very small. Summarizing his view he writes: 'A lottery should be held when, first, it is important to be fair and, secondly, the candidates' claims are equal or roughly equal' (Broome, 'Fairness', p. 120). Let me add that this presentation of Broome's theory will also have answered the worries raised in H. Lazenby, 'Broome on Fairness and Lotteries', *Utilitas* 26 (2014), pp. 331–45, which, for reasons of space, I cannot discuss in any detail.

https://doi.org/10.1017/S0953820816000303 Published online by Cambridge University Press

to myself because if students knew about it they might well question the fairness of my marking. On Broome's account, we know, my fairness is impeccable.[37]

No doubt, students have reason to complain about my marking. For one, I do not mark according to published marking criteria. I fail my students because I don't treat their work and, thus, them with proper respect. There is no question about whether what I am doing can rightly be criticized – it can. The question is whether I am violating a requirement of fairness.

Fairness bears different relations to other moral notions. Fairness, for example, does not seem to require kindness. A superior can be fair without being kind. Fairness and justice, however, are more closely related. How can it be fair to be unjust?

Consider the following Sidney Morgenbesser story.[38] Dr Morgenbesser became something of a Columbia legend at the time of the student uprising in 1968 for being beaten when he joined a human chain against the police. When asked how he felt about this, he allegedly replied that it was unjust to beat innocent protesters but it wasn't unfair as everyone got beaten. This reply has a funny ring because of the unusual contrast between justice and fairness. Nevertheless, we understand what Morgenbesser is saying. There is a familiar moral notion, and, like Morgenbesser, I would call it fairness, for which comparisons are central.[39]

Further support for a purely relational justice-related notion comes from Aristotle. In book V of the *Nicomachean Ethics*, Aristotle outlines his theory of justice. General justice requires lawfulness and as the law extends to all virtues general justice is complete virtue. In addition to general justice, Aristotle describes two special forms of justice: rectificatory justice and justice in distribution. In this last domain, the domain of distributive justice, Aristotle introduces a purely relational concept. 'Hence what is just [since it requires equal shares for equal people] is in some way proportionate' (*NE* 131a, 29). I mention Aristotle to put some authority behind the common-sense view that there is a need for a purely relational concept.

[37] Hooker ('Fairness', p. 340) makes the same point. If I owe two people some money but I don't repay my debt and burn my money instead (or, more plausibly, simply keep it to myself), have I treated them fairly?

[38] I owe my knowledge of this story to Michael Rosen.

[39] Sometimes the story is told the other way round. Beating innocent protesters is marked as unfair whilst justice was done by beating everyone. I find this way of telling the story less appealing, but what alone matters is that an aspect of justice or of something related to justice is captured by a purely relational notion.

https://doi.org/10.1017/S0953820816000303 Published online by Cambridge University Press

Different claims on some good will have different sources. These differences help us to distinguish claims that appeal to kindness from those that appeal to justice. The students' claim to having their work properly marked is an appeal of the latter kind. Suppose I made an exception for one of the students and suppose I marked his work properly. This student, especially if the mark was poor, will have a complaint; why was he not given the chance of a result determined by the roll of the dice? He might have done much better. The lesson I draw is that however we carve up the normative domain, there will be a role for a purely relational moral concept. We can say that I treated my students unjustly but not unfairly; with equal right to represent ordinary usage we could also say that I didn't treat them fairly. If we do use an absolute conception of fairness, one that requires the satisfaction of claims, we need to be aware that we have added a notion of fairness to our moral vocabulary different from the well-established relational concept. Whatever we say, there is a need for a relational moral concept. Broome calls it fairness and has offered a theory that spells out its role in moral thought.

III.3. The calculation objection and the self-defeating argument

The final objection I want to consider comes from Kirkpatrick and Eastwood. After repeating part of Hooker's paper and endorsing his objection to Broome, which we discussed in section III.1, they object to Broome's idea of treating claims in direct proportion to their strength as follows. 'The calculation objection argues that it is almost impossible to calculate the appropriate weights for the lottery and incorrectly calculated lotteries are unfair.'[40]

I have mentioned three ways in which Broome's theory of fairness is incomplete. It does not offer a theory of the sources of claims; when applying the theory, it leaves it open what claims are claims to; fairness comparisons, which are important for deciding whether his theory endorses weighted lotteries in unequal-claims cases, are also left to considered judgement. Should we add a fourth dimension of incompleteness, namely that it does not offer a theory of how to measure claim strength?

Doing this might be premature. Often it will be easy to measure the strength of claims. If one person has worked nine hours towards completing a shared task and the other person only put in one hour, we'd know exactly which weights to set in a weighted lottery, if, that is, Broome recommended one (which he does not). Kirkpatrick and Eastwood do not consider such examples. They think of cases in which

[40] Kirkpatrick and Eastwood, 'Broome's Theory', p. 86.

https://doi.org/10.1017/S0953820816000303 Published online by Cambridge University Press

the size of benefit determines claim strength. How much more weight should be given to a person who is threatened with losing her arm whilst another person is threatened with losing her finger (and only one loss can be prevented)?

This is indeed a difficult question. Some people think that expected utility theory offers an answer. Suppose a person is able to rank all goods. If, in addition, this person's preferences satisfy certain axioms we can have numerical representations (which are unique up to positive linear transformations) of the goods in question (and of preventing their loss). Then we would need to make a case for interpersonal comparisons of utility, in order to get the weights right when different people are affected by such losses. One person who has argued that all this can be done is, coincidentally, John Broome.[41]

Other people will be sceptical about introducing such precision into moral deliberations. They will say that losing an arm is certainly worse than losing a finger, but how much worse it is, they will say, is not a good question. We know from theories of measurement that we should not think of all comparisons as being guided by independently existing quantities. Sometimes, and ordinal utility theory is an obvious case in point, quantities only mirror or represent comparisons without in any way going beyond them.[42] So, according to this second view, there simply is no precise answer to the question how much worse one loss is than another.[43]

How would this second view affect the implementation of Broome's theory (if, that is, Broome recommended weighted lotteries in such cases, which he does not)? We might come up with a range of numbers which is such that any number in this range would represent the idea that one loss is considerably worse than another.[44] We cannot, however, have a lottery in which ranges of probabilities determine winners. We could have a random selection of any number within this range and then have a lottery with the randomly selected number. This would be

[41] See Broome, *Weighing Goods* and Broome, *Weighing Lives*.

[42] See B. Ellis, *Basic Concepts of Measurements* (Cambridge 1966) for a thorough philosophical discussion of these issues.

[43] Even on standard expected utility theory (without interpersonal comparability) the question whether something is twice as bad as something else cannot be answered. Quantities measured on an interval scale allow for comparisons between differences but not for the kind of comparison we are considering. A temperature scale is the most familiar example of an interval scale. It does not make sense to say that one thing is twice as hot as another.

[44] If I'd be pressed to specify this range for the case at hand, I'd say that the range in which the stronger claim falls goes from approximately 75% to about 98%. By this I mean that any number in this range would represent the idea that the loss of an arm is much worse than the loss of a finger.

https://doi.org/10.1017/S0953820816000303 Published online by Cambridge University Press

one way of solving the problem of implementation for those who think that loss comparisons will always be rough and not precise.

Kirkpatrick and Eastwood engage with neither of these alternatives. Their objection sits uncomfortably between the two views outlined. They say that it is almost impossible (at least in some cases) to measure claim strength *accurately*. Thus, they are committed to the existence of a precise measure of claim strength (in opposition to the second alternative), whilst denying that we can find out about this measure (in opposition to Broome's way of using expected utility theory). I see no reason that would favour this in-between position over either of these two alternatives.

If arguments in favour of their view were forthcoming, we might need to add a fourth dimension of incompleteness to our description of Broome's theory. This would not, however, undermine his theory in any way.

Having answered their calculation objection, I will be brief about their 'self-defeating argument'. When Broome sets up his discussion of lotteries, he says that lotteries are fair and contrasts decisions by lotteries with decisions by experts. How can a decision by lottery, he asks, be better than a decision by an expert? His theory answers this question: if the expert understands fairness, he or she would also resort to a lottery. His point is to show that lotteries are not a response to epistemic limitations; they are a way of treating claims proportionally. When he sets up his discussion he mentions the possibility of biased experts. On this basis, Kirkpatrick and Eastwood write: 'Broome argues against the use of authorities and rules in such decision procedures [which could help determine the strength of claims]. However, the use of authorities or rules seems to be required for accurately calculating claims, so Broome undermines his own theory.'[45]

A theory is self-undermining if it demands something that, by its own lights, cannot be provided. Broome neither demands experts for assessing claim strength nor does he deny that there could be such people. So Kirkpatrick and Eastwood's 'self-defeating argument' founders in both dimensions. Think of a case in which the strength of one's claim depends on the size of the benefit one would receive. How much, for example, would your neighbour benefit from, let's say, a week's holiday in Sicily on his or her own? One would need to know a person reasonably well in order to have a reasonably good idea of how much he or she would benefit. Is Broome's comment about the possibility of biased experts incompatible with the idea that one needs

[45] Kirkpatrick and Eastwood, 'Broome's Theory', p. 90.

https://doi.org/10.1017/S0953820816000303 Published online by Cambridge University Press

to know people in order to see how much they would benefit from various things? There is no reason to think that it would be.

IV. CONCLUSION

Kirkpatrick and Eastwood characterize Broome's position in the following way. 'The satisfaction requirement for fairness can be achieved through surrogate satisfaction in a weighted lottery.'[46] This sentence contains three mistakes. Broome has offered a relational conception of fairness.[47] I have argued that, therefore, he must exclude the satisfaction requirement from his theory of fairness (which he does). When he talks about surrogate satisfaction, he does not mean satisfaction of the claims to some benefit; he rather means that lotteries only partially meet the requirements of fairness. And, lastly, he does not think that weighted lotteries are the fairest way to treat claims of different strength proportionally. Weighted lotteries are fair in one way, but become increasingly unfair in another way as claims strengths start to diverge.

Kirkpatrick and Eastwood repeat the mistakes of others and, as described in the previous section, add some of their own. I'd like to mention two more of their mistakes. Imagine an essay the aim of which is to criticize epistemological scepticism which starts as follows. 'Scepticism encounters a problem: do we really know that there is an external world?' Compare this with what they say about Broome's theory. 'The distribution of indivisible goods poses a problem for Broome's theory of fairness.'[48] The contrary is correct. How his theory deals with the distribution of indivisible goods is not a problem but the main argument Brome offers in support of his view. Their last mistake has given me the title for this article. One of their sections is called 'Brushing Broome Aside'. When I read this, I thought 'How unfair!'

On Broome's account, however, I can't make a judgement about whether his commentators have treated him fairly, as this would depend on how they treat other philosophers. Broome's theory of fairness has been misunderstood. Let us hope that other philosophers do not share the same fate at the hands of their commentators. If Broome is right, we are thereby committed to hoping for unfairness to

[46] Kirkpatrick and Eastwood, 'Broome's Theory', p. 87.

[47] Kirkpatrick and Eastwood ('Broome's Theory', n. 7) say that they have been made aware that, according to Broome, withholding the good is fair. We have seen that this is the essential feature of Broome's relational theory of fairness. Kirkpatrick and Eastwood, however, regard it as a 'subtlety' which, they say, they will ignore.

[48] Kirkpatrick and Eastwood, 'Broome's Theory', p. 85.

https://doi.org/10.1017/S0953820816000303 Published online by Cambridge University Press

happen, but John Broome, being the kind man that he is, would, I am sure, be happy with this consequence.[49]

christian.piller@york.ac.uk

[49] I have presented previous versions of this article at a conference on Contractarianism in Rennes in 2012 and at a conference on Social Contract Theories in Lisbon in 2014. On both occasions I have received helpful comments. I am very grateful to Brad Hooker for his detailed comments. Responding to them has substantially improved this article. I thank John Broome for his comments and, more broadly, for his inspiring work. I thank those of my students who found some enjoyment when they understood Broome's theory of fairness.

https://doi.org/10.1017/S0953820816000303 Published online by Cambridge University Press