Fairness as comparative desert

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Abstract

One prominent theory of fairness is John Broome's. This article identifies several problems with Broome's theory but defends Broome's claim that fairness requires the proportionate satisfaction of claims. This article also shows how Broome's conception of fairness is compatible with fairness as comparative desert.

KEYWORDS

desert, equality, fairness, justice, lotteries, rights

John Broome's theory of fairness is an attempt to overcome three main problems facing those theorizing about fairness. While I argue Broome's theory fails to provide a satisfying solution to these problems, I defend Broome's claim that fairness requires the proportionate satisfaction of claims and show that Broome's conception of fairness is compatible with fairness as comparative desert.

"What is fair?" and "what is just?" are notoriously difficult questions. To narrow the scope of inquiry, our primary concern is with fair treatment in the distribution of scarce resources.

1 | THREE CONCEPTIONS OF FAIRNESS

Here is one common view as to what is fair. Suppose there are three passengers who have just survived a shipwreck, two in their late seventies, and a third, a child aged ten. But, sadly, between them is only one life-preserver. To whom should the life-preserver go? Intuitively, the life-preserver ought to go to the child: the child has a higher chance of having many more good years of life, than if the life-preserver were to be given to either of the other two. One might call this the utilitarian conception of fairness. Each person's interest is taken into account, but

anyone's interest might be outweighed by the interest of others. The thought is: "we ought to maximize overall welfare" and that "everyone's interests count for one and no more than one".[1]

But, as many have observed, while classical utilitarianism might capture adequately our intuitions in this case, it does not do so well in others. While we might be willing to undergo surgery for, say, an additional five years of a life worth living, many of us would *not* be willing undergo surgery if this would bring *someone else* five years and two months of a life worth living. While making such a sacrifice would certainly be admirable, it seems not only implausible to claim that morality can require such sacrifices, but also that such interpersonal trade-offs are *unfair* to the person who has to make the sacrifice, especially when the additional benefit to be gained is so slight. For this reason, many believe utilitarianism not only does not capture what we mean by "fair" in a narrower sense, but also too easily allows for interpersonal trade-offs. Arguably, insofar as utilitarianism requires such trade-offs, utilitarianism fails to make room for justice or fairness.

Here, again in broad strokes, is another theory of fairness. Roughly, on this view, fairness requires non-interference with freely made transactions between individuals. To illustrate, imagine an egalitarian society where each member gets an equal share of the benefits produced through collaboration. Now suppose one of the members, let us call her Amy, also happens to be a magnificent flute player. Her talents are so great she constantly gets invited to perform in neighbouring towns. But the members of her town are just as appreciative of her art as the others, and each member is quite happy to pay her a bit extra, say, an additional £1 at admissions, so that she performs in town.[2] Suppose around a hundred people populate Amy's town. Every time Amy performs in town, everyone goes. After ten performances in town, Amy has around £1,000 more than the rest of the inhabitants. But recall Amy's society is committed to strict equality, so this sum must be redistributed. Yet, a redistribution of Amy's additional earnings seems not only counterintuitive, but also unfair. On this view, so long as the initial distribution of goods and benefits are fair and just, any transaction which follows fair acquisition must also be fair and just.[3] If interfering with Amy's additional earning is unfair, we might say Amy is entitled to, or has a right to, her additional earnings, or there is a side-constraint against redistributing the sum for whatever reason.[4] Let us call this the entitlement theory of fairness.

But the problem is the entitlement theory of fairness also leads to counterintuitive results. Suppose you are a doctor with two patients who both need a kidney-transplant, but only one kidney is available. You can treat either Larry, who is in his late eighties, or Mary, who is in her early twenties but otherwise in good health. While both patients are entitled to treatment, intuitively it would not be unfair for you to treat Mary rather than Larry. Larry has already had many good years, and it is highly likely more years for Mary would be at a much higher level of welfare than for Larry. Since a side-constraint applies to both, the entitlement theory lacks the resources to explain why treating Mary would not be unfair.[5] In short, while the utilitarian conception of fairness is too permissive, on this view, restrictions against trade-offs are too strict for the entitlement theory to be at all plausible.

This last example, however, suggests yet another theory of fairness. Suppose again you are a doctor who has to choose between two patients, but this time your patients are alike in all morally relevant respects (i.e., age, life-expectancy, potential quality of life, & co.). You can either flip a coin and let a lottery decide which patient to treat

[1]There are various interpretations of Bentham's phrase, "everybody to count for one, nobody for more than one". Here is what it would mean for someone's interest to count for more than one. The lives of both A and B are threatened by disease, and you have a drug, but unfortunately only one dose, that will give either A or B an additional ten years of life. Since A is the president, you believe her interests ought to count for more than one, i.e. each year counts for two. You give the drug to A.

[2]This example is based on Nozick's famous Chamberlain example. See Nozick (1974, pp. 161–163).

[3]For illustration, I have assumed fair acquisition consists in the distribution of equal shares; but one might dispute this. For present purposes, it will suffice to say, on this theory of fairness, any interference with holdings that were fairly acquired would be unfair. My sketch provides only an incomplete theory of fairness.

[4]By "side-constraint", I mean a reason which determines directly what ought or ought not to be done.

[5]In other words, if the reason to save both Larry and Mary are side-constraints, that is, determines directly what ought to be done, then we have arrived at an impasse.

or treat one patient outright. Notice, since the benefits to be gained in either outcome is the same, the utilitarian conception of fairness is silent as to whether you should flip a coin or not. But on this theory, we ought to flip a coin since giving each patient an equal *chance* to be saved is a gain in fairness.[6]

The problem is: why think equal chances apply *only* in cases where the overall benefit in either outcome is the same? Should not fairness always be a consideration?[6] Since equal chances are given only when the overall expected benefits in outcomes are the same, this theory seems to treat lotteries merely as a tiebreaker, a means to get the decision made, rather than as a matter of fairness. And even if we think lotteries are fair, this theory fails to explain why lotteries are fair.

I have canvased three theories of fairness and have found each unsatisfactory in a certain respect. My aim was not to suggest these theories are indefensible, but merely to highlight the problems these different approaches to fairness encounter which might then guide us towards a more satisfying theory of fairness.

2 | BROOME'S THEORY OF FAIRNESS

One theory of fairness which we have yet to consider, one which is perhaps more promising than those so far considered, is John Broome's theory. According to Broome, fairness requires the proportionate satisfaction of claims.[7] Broome claims his theory has two advantages over its competitors: it explains why lotteries are fair, and it offers an alternative to entitlement theory.

As we have seen, philosophers theorizing about fairness face three main problems: (A) the utilitarian conception of fairness calls for interpersonal trade-offs even for *slight* gains in overall benefits, which seems unfair especially to the one(s) making the sacrifice; (B) on the entitlement theory, trade-offs are impermissible, or unfair, even when *very substantial* benefits are at stake; (C) when the outcomes of options are of equal value, fairness seems to require we give potential beneficiaries an equal *chance* at gaining the benefit by means of a lottery, but we lack a rationale for thinking in some cases but not others potential beneficiaries have a claim *based on fairness* to a chance at receiving the benefit or good. What makes Broome's proposal especially promising is that his theory of fairness seems to have the resources to overcome each of these difficulties.

Broome takes as his point of departure cases where there are several candidates for receiving a good, but there is not enough of this good to go around, e.g., there are not enough kidneys for all those who need a kidney and those who do not receive a replacement kidney will die of kidney failure.[8] Why choose this as his starting point? Such cases raise most poignantly, the problem of fairness. Let me explain.

Consider again a case like the following:

> **Transplant 1**. There is only one kidney, and you can provide a kidney-transplant to either Larry, who is in his late eighties, or to Mary, who is in her early twenties but otherwise in good health. What should you to do?

We might be tempted to think you ought to decide such cases based on some fixed rule, e.g., "pick the youngest". But what justifies accepting such a rule is that more years of life at a younger age predictably brings greater benefits, so the accepted principle is really "maximize welfare". Our intuitions are further confirmed, if we suppose Mary stands to gain an additional nineteen years of life at high level of welfare, but Larry only one month.

[6]See Griffin (1986, ch. 10).

[7]See Broome (1990, p. 95); also see Kamm (2007, p. 39).

[8]See Broome (1990, p. 87).

However, when we consider more cases, our confidence in *always* deciding hard cases by some fixed rule might be shaken.

> **Transplant 2**. Suppose both Karl and Carla need a kidney-transplant, but there is only one kidney available. Both are the same age, but if you treat Carla, Carla will gain three additional days of life than if you treat Karl. What should you do?

Intuitively, you ought *not* to give Carla the transplant outright based on some fixed rule. Why? A *slight* gain of three extra days seems irrelevant, morally speaking.[9] It is also tempting to think running a lottery, which would give both Karl and Carla an equal chance at treatment, meets the requirements of fairness *better* than decision by some fixed rule. If you share this intuition, then a presumptive case is established for thinking lotteries are fair. If so, then we need an explanation of what makes lotteries fair.

But if it is fair to run a lottery in Transplant 2, why not in Transplant 1? One reason might be that the benefit to Mary is substantial, so substantial in fact that it would be unfair to run a lottery just in case Mary loses. If so, then we need not only an explanation of what makes lotteries fair, but also a principled way of identifying cases where fairness requires running a lottery rather than following a fixed rule.

As Broome observes, when some good is up for distribution there are often different kinds of reasons why any candidate ought to get the good. Broome thinks we can classify these different kinds of reasons into three different classes: utilitarian reasons, side-constraints, and claims. Let us consider each in turn.

Suppose I win a new laptop in a raffle. I can gift the laptop either to my son, who will get great delight from gaming on the device, or to my daughter, who is studying to be a computer programmer and can design a gaming app from which my son would also benefit. If I give the laptop to my daughter, it would be for utilitarian reasons.

But utilitarian reasons are not the only reasons why someone ought to get something. Suppose we are lost in a desert and there is only one bottle of water left, the very bottle I purchased yesterday in anticipation of us finding ourselves in such an unlucky predicament. Plausibly, I have a right to this last bottle, and it ought to be left up to me to decide whether and how much I want to share. In this scenario, there is a decisive, or conclusive, reason which determines directly what ought to be done. If you snatched the bottle from me intending to keep the water all for yourself, that would be wrong, wrong since there is a side-constraint against you taking my water.

But clearly side-constraints and utilitarian reasons do not exhaust the reasons why someone ought to get some good. Suppose two survivors of a shipwreck, one aged seven and the other eighteen, find themselves with only one life-preserver. Most would agree the fair thing to do is for the teen to let the child use the preserver first—or until something else is discovered—because the child is in greater need. If so, then need is also a reason why someone ought to get something. We might call a reason of need a claim. There may be other reasons that are claims, like desert, but, following Broome, I shall set aside for now the difficult task of determining which reasons are claims.

What is the difference between claims and side-constraints? Broome suggests one distinct feature of claims is that, unlike side-constraints, claims do *not* determine directly what ought or ought not to be done. How are claims different from utilitarian reasons? Unlike utilitarian reasons, claims are duties *owed to* individuals themselves.[10] But why think a reason of need, say, is a claim, rather than a utilitarian reason or a side-constraint? After all, is not having one's need met a benefit?

[9]Also see Kamm (2007, p. 34).

[10]See Broome (1990, p. 92).

When Transplant 2 was introduced, I suggested it would be unfair to Karl to treat Carla outright. But why think treating Carla outright is unfair? One explanation is treating Carla outright is unfair since it overlooks Karl's claim of need. But suppose need is not a claim, but instead a utilitarian reason. If so, then, then Karl's reason is easily overridden by Carla's.

But could not Karl's reason of need be a side-constraint? If Karl's reason is a side-constraint, then it would determine directly what ought to be done, i.e., we ought to treat Karl. But surely that cannot be right, since there is no more reason to think Karl has an overriding right to treatment than Carla does. Moreover, suppose Carla stands to gain not just three extra days, but twenty years of a life worth living. Even if Karl was a major donor to the hospital, a prohibition against giving Carla the treatment seems too restrictive.

In short, there are several good reasons for thinking that Karl's reason of need is a claim, as opposed to a utilitarian reason or a side-constraint. And if Broome's taxonomy of reasons passes muster, and his theory of fairness can explain both when and why lotteries are fair, then Broome's theory makes a significant advance in resolving the main problems (i.e., (A)-(C)) encountered in theorizing about fairness. But before turning to why I think Broome's classification does not succeed, let us first examine Broome's answer to the questions when and why lotteries are fair.

Lotteries are sometimes used merely to arrive at a decision that has nothing to do with fairness. Here is Broome's example. Suppose I cannot decide between going to either of two restaurants. I might flip a coin, but I certainly do not do so to be fair to each restaurant; rather, a coin is tossed simply to get the decision made.[11] Furthermore, lotteries do not always make one's treatment of others fair. Obviously, we would not use a lottery to determine the winner of any athletic competitions. Or suppose I have £25 and want to keep £5 for myself but owe Abe £10 and Bea £15. I can either let a coin toss determine who gets £5 less or pay each in full. A coin toss obviously does not make the first course of action fair. Or suppose I have £20 and can either gift £10 to both or flip a coin to decide who gets all £20. It is not at all clear fairness would require that I flip a coin; and it is very tempting to think, even though I am not required to give either any amount of money, giving each £10 would not only be fair, but also giving neither any would also be fair. (We will return to this point later.) What these examples suggest is that lotteries are fair and appropriate only when the good up for distribution is an indivisible good and only when the good to be distributed is in some sense owed to the candidates. But even when the good to be distributed is indivisible and in some sense owed to the candidates, lotteries are not always fair. Is there is a principled way of identifying cases where fairness requires running a lottery?

One approach suggests itself when we recall that in Transplant 1, when the benefits to be gained are very substantial, it would be unfair to run a lottery, whereas in Transplant 2, when the additional benefit to be gained is slight, fairness requires a lottery. Broome develops this approach with the suggestion that claims give rise to two requirements: a satisfaction requirement and a fairness requirement. According to the satisfaction requirement, "if there is any reason, whether a claim or not, for a person to have some of a good, she should have some." The satisfaction requirement requires a maximum satisfaction of claims and reasons. On the other hand, fairness requires that "claims be satisfied in proportion to their strengths." But, as Broome observes, normally it is impossible to fulfil both requirements. If so, then Broome suggests "the demands of fairness should be weighed against the demands of overall satisfaction."[12]

To illustrate, recall that in Transplant 1 Mary needs the kidney-transplant which would give her an additional nineteen years of a life worth living. On the other hand, Larry needs a kidney transplant because it will bring him another month of life; but let us assume instead the transplant will bring him one additional year of life. And suppose we run a weighted lottery, giving Larry a 1/20 chance of winning and Mary a 19/20 chance. As it happens, Larry has the winning ticket. It is tempting to think such an outcome is not only greatly unfair, but also in cases where the benefit one candidate stands to lose is so great, expediency simply outweighs fairness. In other words,

[11]See Broome (1990, p. 89).

[12]See Broome (1990, pp. 95, 96).

the benefit Mary stands to lose simply outweighs any gain in fairness by running a lottery. If so, then in deciding to treat Mary outright we are primarily guided by the satisfaction requirement.

Now suppose instead Karl would gain nine years of a life worth living, but Carla eleven. Suppose again we run a weighted lottery giving Karl a 9/20 chance and Carla 11/20 chance to gain the good. As it happens, Karl has the winning ticket. Here there appears to be much less pressure to think such an outcome unfair. True, Carla had more to lose than Karl, but the gain in surrogate satisfaction through the use of weighed lottery outweighs any consideration of expediency. If so, then in deciding to run a weighted lottery we are primarily guided by the fairness requirement.

The idea that it is not unfair even if Carla loses the lottery in this second scenario gains support from the fact that the alternative is to treat either Karl or Carla outright, a course of action that, as we have established, would lead to an intuitively unfair outcome whomever we choose. What explains this intuitive judgement is perhaps that what each candidate stands to lose is roughly equal. And it is clear in such cases lotteries are not being used just as a mere tiebreaker, since in such cases what makes lotteries appropriate is that we believe there is a gain in fairness when we run a lottery rather than follow a fixed rule.

In sum, when the strength of claims are close, fairness requires a weighted lottery. That we think lotteries are fair in such cases suggests that fairness requires the proportionate satisfaction of claims. This in turn explains why lotteries are fair. Lotteries are fair because they enable the proportionate satisfaction of claims. Neither utilitarian fairness nor fairness on the entitlement theory explains why lotteries are fair. And since Broome's theory provides a principled way of identifying cases where fairness requires running a lottery rather than following some fixed rule, we have one more reason to prefer Broome's theory.

3 | DIFFICULTIES WITH BROOME'S THEORY

In support of his intuition that lotteries are fair, Broome provides an example which I will call the Dangerous Mission. Broome returns to this example several times to demonstrate the various advantages of his view. I have resisted introducing this example earlier since I find the example problematic. Nonetheless, scrutiny will not only prove instructive, but also allow me to address the question whether Broome's taxonomy of reasons passes muster.

> **Dangerous Mission**. Someone has to be sent on a mission that is so dangerous she will probably be killed. The people available are similar in all respects, except one has special talents that make her more likely than others to carry out the mission well (but no more likely to survive). This fact is recognized by her and everyone else. Who should be sent? Who should receive the good of being left behind?[13]

Broome acknowledges that if it was vital to the mission that there is no slip in execution, then expediency outweighs fairness. But if the mission will be successfully carried out no matter who we send, then, Broome contends, intuitively it *would be* unfair to send the talented one.[14] For Broome, fairness requires holding a lottery in this case. The thought is: since the mission does not require flawless execution, the talented one, no less than the others, has an equal *claim* to the good of being left behind. Since they all have an equal claim to this good, according to Broome, a lottery is required.

Dangerous Mission serves several aims. Firstly, Dangerous Mission supports Broome's claim that lotteries are fair. One's intuition here is supposed to establish a presumptive case for the fairness of lotteries—one might of course not share this intuitive judgement.

[13]See Broome (1990, p. 90).

[14]Compare Transplant 2. The soldier's talent seems an irrelevant good. See n. 9.

Secondly, Dangerous Mission suggests perhaps what is driving our intuition here is not only an implicit assumption that each soldier has a reason of need—or as Broome puts it, each soldier has to a claim to the good of being left behind—but also the impression that a flawless execution is an unnecessary benefit.[15]

Thirdly, Dangerous Mission suggests yet another way in which a weighing model cannot fully capture what fairness requires. One might think the problem is not that a flawless execution is unnecessary, rather that it is merely a trivial benefit and needs are more important. But as Broome observes, even if we attach greater weight to claims of need, this solution will not work since each soldier has as good a claim to the good of being left behind as any other. Thus, Dangerous Mission shows not only that a weighing model is in some cases inadequate, but also lends support to the idea that when claims are equal, or roughly equal, fairness requires a lottery.

But here is why Broome's example is problematic. While I have suggested each soldier's claim to the good of being left behind is grounded in a reason of need, there are other possibilities. One alternative is their claim to the good of being left behind is grounded in a claim to fair treatment. But if so, what would a claim to fair treatment entail? How does one come have this claim? What grounds this claim? (I will return to this shortly.)

Here is another problem: it is not obvious what Broome has in mind when he says these soldiers have a claim to the good of being left behind. Broome has told us neither what grounds these soldiers' claims nor what these soldiers actually have a claim to, and these ambiguities are crucial. Let me elaborate.

As we have seen, a defining feature of claims is that claims are duties owed to individuals. But it is not clear what "owed to" entails.[16] What we want to know is not only what treatment is owed to individuals, but also how these individuals come to have these claims. One might think—and this is not incompatible with anything Broome says—having a claim entails not only a duty on the others to provide what one has a claim to,[17] but also entails a claim to fair treatment. But what does it mean to have a claim to fair treatment? And how does this claim differ from a claim to the good?

One possibility is that a claim to fair treatment entails a claim to a *chance* at gaining the good. But then the question arises, do the soldiers have a claim to a chance at gaining the good, or a claim to the good of being left behind, or both? Well, it cannot be that Broome thinks these soldiers have a claim to the good of being left behind, if having a claim entails there is a side-constraint, for then his theory would not be an alternative to entitlement theory; so perhaps the soldiers only have a claim to a chance at gaining the good. And here is the rub. If others do not owe those with claims a duty of fair treatment, then the soldiers have no claim to a chance at gaining the good. But if this is correct, then the soldiers would have neither a claim to the good of being left behind, nor a claim to a chance at gaining the good. In what sense then, one might wonder, do these soldiers have claims? Without satisfying answers to these questions, we should not hastily endorse Broome's theory. Let me explain.

Compare Dangerous Mission to Transplant 2. Earlier when Transplant 2 was introduced, I suggested that Karl had a claim of need, and that if his reason of need was a utilitarian reason, it would be easily overridden, and one reason why one might think treating Carla outright would be unfair is that treating Carla outright overlooks Karl's claim of need. But in Transplant 2, we implicitly assumed that our relation to Karl and Carla is that of doctors to patients; likewise, in Dangerous Mission it seems natural to assume our relation to these soldiers is that of a commander to subordinates.[18] But while it is often assumed doctors have a duty not to overlook any claim of needs (the Hippocratic Oath),[19] it is not obvious commanders have a similar duty to their subordinates. And while we

[15]Since claims, but not all reasons, are mediated by fairness, Broome argues reasons of need are claims.

[16]If "owed to" is a side-constraint, then Broome has not solved problem B.

[17]When a candidate has a claim, others have a duty owed to the candidate. Broome assumes the content of the duty is to provide the owed treatment.

[18]Perhaps if there were no commander, they might draw straws to avoid personal responsibility.

[19]The classic version of the Hippocratic oath reads: "I will apply dietetic measure for the benefit of the sick according to my ability and judgment; I will keep them from harm and injustice." See "Hippocratic Oath: Classical Version," *Nova Online*, available at https://www.pbs.org/wgbh/nova/doctors/oath_classical.html.

normally think of doctors as having a duty to treat every patient fairly, do commanders owe a similar duty to their subordinates? I am unsure.

Consider the following:

> **Charity.** Suppose I have two lottery tickets, each a chance to gain a substantial sum, both of which I have decided to donate to charity. My options are either to give one ticket to Oxfam and the other to Care or give both tickets to Oxfam.[20]

Suppose I decide to give both to Oxfam. It seems implausible to claim Care has a complaint against me for treating them unfairly. Why? Care had no claim to a ticket. Perhaps the soldiers find themselves in a similar situation.[21] Perhaps the soldiers cannot complain since they have no claim against their commander.

By contrast:

> **Cure.** Imagine you are a doctor with two patients who suffer from the same disease to the same degree and are similar in all morally relevant respects. You have only one pill which would cure completely the patient who gets it. Your options are either to flip a coin, or to give the pill to one of the patients outright.

Suppose you give the pill outright to one of your patients. That seems unfair. Intuitively, it seems either patient would have a complaint against you to treat them fairly.

What best explains why your patients have a claim while Care does not is that doctors stand in a different relation to their patients than benefactors to beneficiaries. Whereas it is plausible to claim that doctors have a duty owed to their patients, it is much less plausible to claim that benefactors owe a duty to their beneficiaries. A duty to treat patients fairly is part of a doctor's role-responsibility, i.e., doctors are role-responsible for treating their patients fairly.[22]

Notice that in Cure one might think the patients have two separate claims: one to an equal chance at treatment grounded in the doctor's duty to treat patients fairly, and another claim to the treatment based on needs. To disambiguate, one might recognize only the patients' claim to an equal chance as a claim. Perhaps this is one reason why Broome wants to restrict the term "claims" to reasons within the domain of fairness.[23] But then do patients who have needs have a claim? In this respect, Broome's terminological proposal is slightly misleading.[24] For if confronted with Transplant 1 above, Broome surely wants to say that Mary has a claim to treatment based on need and that in such cases expediency outweighs fairness, i.e., we ought to be guided by the satisfaction requirement in such cases and tolerate some unfairness. Perhaps for this reason, Broome says that *some* claims are outside the domain of fairness.[23] But this obscures the ground of these claims.[25]

[20]This example is Baier's. See Griffin (1986, p. 219).

[21]One might think while Care has no right to a ticket, Care has a claim, in Broome's sense, to a ticket. But in what sense is a claim a duty owed to the individuals, if a claim is not a side-constraint? Some argue a duty of beneficence is owed to others. Godwin thought benefits are owed to individuals such that beneficiaries have a right to the good, i.e. a side-constraint, but others, like Narveson, claim our duty to promote good applies only to existing people, or people who will exist. Broome distinguishes between utilitarian reasons and claims and argues that reason of needs are claims and that all claims are mediated by fairness. See Broome (1990, pp. 92, 93).

[22]See Baier (1985); cf. Griffin (1986, pp. 219–223).

[23]See Broome (1990, p.94).

[24]If reasons of need are utilitarian reasons, then Broome has not solved problem A.

[25]If one does not have a reason of need, then a claim to fair treatment would not apply. Perhaps for this reason, Broome is unbothered by the talk of claims.

But in fact, Broome wants to not only identify certain kind of reasons as claims, but also wants to single out a special subclass of claims, which he calls fairness-claims. What are fairness-claims? Fairness-claims are just claims to a chance to gain some good. For example, in Cure, both patients have fairness-claims. What is their strength? On Broome's view, the strength of claims is determined by the strength of the person's reason, say, of need. And if we were to run a weighted lottery, a proportionate chance is given according to the strength of the reason why the person should have the good. However, Broome overlooks the fact that that the strength of claims depends on the strength of one's reasons for having the good suggests the ground of claims is in the reasons why one should have the good. Yet, as we have just seen, there is some reason to think the reason why one should get the good is not what grounds fairness-claims. Perhaps fairness-claims have their ground in the role-responsible duty of others to treat candidates fairly. If so, then, again, talk of claims can be misleading.

Nonetheless, here is why Broome wants to draw this further distinction between claims and fairness-claims. Suppose the Stark foundation is giving out grants to fund graduate student projects.[26] If so, then the foundation ought to consider all qualified candidates who apply. However, if no grants are up for distribution, then no candidate has a claim. And if no grants are given, it cannot be unfair to the candidates. If so, this lends support to Broome's claim that fairness requires only the proportionate satisfaction of claims. Broome's theory of fairness is that fairness is concerned only with relative satisfaction, not absolute satisfaction. Since all candidates have received the same treatment, the requirement of fairness is satisfied. (I will return to this point shortly.) But importantly, claims stop short of rights—a difficulty, recall, encountered by entitlement theorists. While all candidates have a claim to a chance at gaining the grant, if grants are up for distribution, no candidate has a right to the grant. Candidates who apply only have a claim, a fairness-claim, only when grants are up for distribution.

Broome's core insight is that this line of reasoning applies also to cases where the good up for distribution is scarce and indivisible, namely, to cases like the ones we have been considering involving life-saving kidney-transplants.

However, when Broome's terminological proposal is applied to these cases, we encounter several difficulties. Firstly, as we have seen, Broome's proposal misleadingly suggests that in such cases patients have no real claim of need, but only a fairness-claim if a kidney is available. Secondly, some might find mysterious the idea that fairness-claims come in only when there is a good to be distributed. But the main difficulty is that Broome's theory is unable not only to distinguish between cases like Charity and that of the Stark foundation, but also between Charity and Cure. Let me explain.

On Broome's view, Care would have a complaint against me, but that seems counterintuitive. What best explains the difference between cases like Charity and cases like the Stark Foundation is that, whereas the Stark foundation has a duty to treat all applicants fairly, or is role-responsible much like doctors, I, as donor, do not. And when we compare Charity and Cure, we surely want to say that the patients in Cure have a claim, while Care and Oxfam do not; however, on Broome's theory, if there are no claims outside the domain of fairness and one patient stands to gain a substantial benefit, then Broome would have to claim that, though these patients have no claims, i.e., there is no duty owed to them, the patient who stands to gain most ought to be cured. While it is clear that I do not owe Oxfam or Care anything, surely there is a sense in which doctors have a duty to treat their patients, a duty owed to the patient.

And here is a reason to think Broome has not offered a satisfactory solution to the problem of side-constraints or rights, i.e. problem B. Broome's solution is when a good up for distribution is scarce and indivisible, candidates for the good have a fairness-claim to a chance at receiving the good. But a plausible alternative is to claim that one has a derivative right to a chance at receiving the good, a right derived from one's right to treatment, and that having neither right is a matter of fairness. Suppose I promise Abe on Monday that I would pay him £10 by Wednesday, and on Tuesday I promise Bea I would pay her £10 the next day, but come Wednesday, I have only £5.

[26] See Broome (1990, p. 97).

As it happens, I run into Bea first and pay her £5. But luckily, later in the day I win £5 at the tracks. Surely it is not a matter of fairness that I ought to pay Abe £5 when I meet him.

4 | FAIRNESS AS COMPARATIVE DESERT

We turn now to a different line of criticism against Broome's theory. Broome claims fairness requires the proportionate satisfaction of claims, and that what makes lotteries fair is that they enable the proportionate satisfaction of claims. But perhaps even if lotteries are fair, fairness does not only require the proportionate satisfaction of claims. If so, then Broome has not offered a satisfying theory of fairness. Brad Hooker has taken up this line of criticism against Broome.

According to Broome, "fairness is concerned only with how well each person's claim is satisfied *compared with* how well other people's are satisfied. It is concerned only with relative satisfaction, not absolute satisfaction."[27] To illustrate, suppose I owe both Gertrude and Harold £10 each, and though I have £10, I decide not to pay either or burn my money. On Broome's view, even if neither gets repaid, I have satisfied the requirements of fairness. While paying neither maybe *unjust*, not paying is not unfair.

Hooker disagrees. Hooker thinks *fairness* requires I pay both £5. In other words, not paying either is non-comparatively unfair. Hooker's point is, while I have treated them *equally*, I have treated them *unfairly*. He adds: "if individual or absolute fairness towards anyone is a matter of whether I give him or her the response owed to him or her, never mind how others have been treated, then I have not treated either fairly."[28] In support of this claim, Hooker asks us to consider a case like the following. Suppose I owe Gertrude £10 and Harold £20, and though I can pay both back in full, I pay Gertrude £5 and Harold £10. While on Broome's view, I would have met his fairness requirement, Hooker thinks I have not done all that fairness requires.[29]

But it is not obvious it is a matter of fairness either. Intuitively, Gertrude's and Harold's complaint against me is that I still owe them the other half of what was promised. Gertrude's complaint has nothing to do with Harold's, nor Harold's with Gertrude's. They both have a right to be paid back in full, and this is a non-comparative matter. What grounds the claim upon which their complaint is based is the promise made to each. But if I were to decide to pay Gertrude another £5 and simply ignore Harold, then Harold *might* have a fairness-claim against me.

Here is why I am not convinced ignoring Harold's claim is a comparative matter. Perhaps what is wrong with ignoring Harold and paying Gertrude an additional £5 is that I would not be treating Harold as he deserves.[30] When I ignore Harold, Harold has been done down, which is a non-comparative matter.[31] To illustrate, suppose I am giving away free lunches. At the end of the line is Abe and Bea but there is only one box left. I see that Abe is hungrier than Bea, so I decide to give Abe the remaining box. On the following day, I discover Abe and Bea again at the end line and myself with only one box. I see that Abe is hungrier than Bea, so I give Abe the last box.[32] Now perhaps what is wrong here is *not* that giving the last lunchbox to Abe is unfair; rather, what is wrong with giving Abe another box is that Bea has been done down. Abe no more than Bea deserves free lunches, but since Abe has already been given a lunch, that Bea did not get a lunch the day prior generates a

[27]See Broome (1990, p. 95).

[28]See Hooker (2005, p. 340).

[29]Perhaps Hooker makes an implicit appeal to an equal baseline of respect, but an equal baseline establishes only a *presumption*. See Feinberg (1973, p. 102); also see Griffin (2015, ch. 8).

[30]See Feinberg (1970, ch. 4).

[31]Perhaps Broome entertained a similar idea: "a person's good consists partly in how fairly she is treated; unfairness is bad for a person, whatever she may feel about it." See Broome (1991, p. 182); cf. Hooker (2005, pp. 335, 336).

[32]This example is based on Feldman's. See Feldman (1997, p. 158).

claim of desert since she has been done down. I have ignored her interest for no good reason, and she suffers a disadvantage as a result. Bea ought to get the last lunch on day two because she deserves it. If this is correct, then Bea's claim to a free lunch is a non-comparative matter. I am not here endorsing this view, but merely offer it as an alternative.

Often, desert claims are non-comparative. Suppose the penalty for pickpocketing is three months in jail and three years for grand theft auto. If Alex is caught pickpocketing and Beth stealing a car, then Alex deserves three months of jailtime and Beth three years. It is not unfair that Beth got a longer sentence than Alex. That Alex got three months is irrelevant to Beth's sentence.

However, that desert can also be comparative is often overlooked.[33] Suppose both Alex and Beth are caught pickpocketing, but Alex gets three months while Beth three years. That *would be* unfair. Since the same crime was committed, Beth could claim she ought to have her sentence reduced since Alex only got three months. Beth's claim here is based on a feature of Alex, namely, Alex only got three months, and therefore her complaint is comparative. But notice, Beth could also insist by law the penalty for pickpocketing is only three months, in which case her complaint would be non-comparative. Here comparative and non-comparative desert point in the same direction.[34]

But comparative and non-comparative desert do not always point in the same direction. Suppose the minimum sentence for pickpocketing is three months, but Alex is sentenced to one month while Beth two. Although Beth has a comparative desert claim, Beth is already getting more leniency than she deserves. Thus, Beth has no non-comparative desert claim.[35] Ceteris paribus, Beth—and Alex—ought to be sentenced to three months.

Notice, with these last two examples, Beth could have also put her complaint in terms of fairness, i.e., "it is unfair that Alex got a shorter sentence". In other words, we might identify fairness with comparative desert.

This desert-based approach to justice lends support to Broome's claim that fairness requires only relative satisfaction, but not absolute satisfaction. While relative satisfaction is a matter of comparative desert, absolute satisfaction is a matter of non-comparative desert.[36] When comparative desert is satisfied, non-comparative desert need not be. Suppose Abe and Bea both belong to a small island farming community. Both are basket weavers and weave equally good baskets. Every several months both bring their baskets into town to trade for grain which sustains them and their families for the next couple of months. However, due to a tropical storm, harvest was poor this year and Abe and Bea are only able to gain half the amount of grain they normally get in exchange for their baskets. While both Abe and Bea are getting less than they deserve, intuitively there is no unfairness.

In this paper, I have defended Broome's claim that fairness requires the proportionate satisfaction of claims and shown that Broome's conception of fairness is compatible with fairness as comparative desert. I also argued that Broome's terminological proposal can easily mislead since it suggests that in cases where lotteries are inappropriate candidates have no claims, and that Broome's theory is insufficiently discriminating between several different kinds of cases. I also suggested that Broome's theory does not provide a satisfactory solution to the problem of side-constraints. The best theory of fairness remains elusive.

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[33]See Hurka (2011, ch. 9); Kagan (2012).

[34]Since comparative and non-comparative desert can sometimes point in the same direction, where someone has a comparative desert claim, one might easily to slip into thinking that person also has a non-comparative desert claim when they do not. Hence getting clear on what "owed to" means is crucial.

[35] See Feinberg (1980, pp. 281–282).

[36]Kagan's view is that comparative desert depends on non-comparative desert. See Kagan (2012); cf. Hurka (2011, ch. 9).

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