

BRAD HOOKER

## FAIRNESS

Accepted: 1 April 2005

**ABSTRACT.** The main body of this paper assesses a leading recent theory of fairness, a theory put forward by John Broome. I discuss Broome's theory partly because of its prominence and partly because I think it points us in the right direction, even if it takes some missteps. In the course of discussing Broome's theory, I aim to cast light on the relation of fairness to consistency, equality, impartiality, desert, rights, and agreements. Indeed, before I start assessing Broome's theory, I discuss two very popular conceptions of fairness that contrast with his. One of these very popular conceptions identifies fairness with the equal and impartial application of rules. The other identifies fairness with all-things-considered moral rightness.

**KEY WORDS:** claims, desert, equality, fairness, impartiality, rights, utility

### 1. FAIRNESS AS APPLYING RULES CONSISTENTLY AND IMPARTIALLY

It is often thought that there is a kind of minimal fairness that involves interpreting and applying rules consistently – i.e., applying the same rules impartially and equally to each agent. Call this *formal* fairness.

Like so many things, formal fairness is especially noticeable when absent. Suppose a rule says that any competitor caught betting against his or her own team will be banned from the sport. Pete, Betty, and Carla are caught betting against their teams and so get banned. Then Joe is caught, but he is so popular that he isn't banned. There is obviously a kind of unfairness here.

We usually think of formal fairness as a good thing, but it is hardly the only good thing. For there can be perfectly impartial application of *bad* rules. Suppose some group has a rule that no Jews are allowed into a business club. This is a bad rule, but it can be impartially applied. Clearly, that a rule is impartially applied neither qualifies it as a impartial rule nor qualifies it as a justified rule. (For an early expression of this point, see Sidgwick (1907, pp. 267, 380).)

Someone might reply to this that the problem with bad rules, even where impartially applied, is that such rules make morally irrelevant distinctions. There is no morally relevant distinction between Jews and non-Jews. So the

content of any moral rule making such a distinction is flawed. Presumably, the motivation for such a rule is also flawed. Presumably, the motivation for such a rule is partiality.

Distinguishing between rules motivated by partiality and rules grounded in impartial motivation, we are confronted with the question, what exactly is impartial motivation? There is the further question, should we take rules grounded in impartiality to constitute substantive fairness? In later sections, I will consider substantive fairness in detail. Before I do that, I want to make a few more points about the relation of formal fairness to substantive fairness.

First, I want to draw the lesson of the example of the rule banning Jews. This lesson is that, even if we are unsure what substantive fairness is constituted by, we must distinguish between formal and substantive fairness. For, even if we cannot say what substantive unfairness is constituted by, we can tell that certain rules are substantively unfair. This is true, for example, of rules discriminating against people because of their religious, ethnic, or racial group.<sup>1</sup>

Second, what we might call diachronic formal fairness gets compromised every time there is a change in rules. Think about a time when in some countries, from the date of their marriage, a husband would normally become the legal owner of all his wife's wealth. Imagine a grandson complaining to his grandfather, 'When you married Granny, all her wealth, and any that she would inherit, became yours. So it isn't fair that, when I married 50 years later, the law did not transfer my wife's property to me.' The grandson in this example is complaining that the rule applied to his grandparents (that husbands get their wives' property) isn't being applied to him. But obviously this is less important than improving synchronic fairness between husbands and wives.

Now consider the rule 'Be substantively *unfair*'. Perhaps there would be formal fairness in the consistent application of that rule. But the importance of formal fairness vanishes to nothing in the face of such substantive unfairness.

Or consider the rule 'Don't let people get what they deserve'. If substantive fairness is tied exclusively to desert, then substantive fairness always and only requires that people get what they deserve. If substantive fairness is tied to desert but not exclusively, then desert is only one of the factors determining what is fair. Suppose for the sake of illustration that, in addition to desert, there is one other factor, namely needs. In that case, substantive fairness requires that people get what they deserve or need.

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<sup>1</sup>Of course, the unfairness of rules distinguishing between people on such grounds is reflected in modern interpretations of the 'equal protection clause' in the Fourteenth Amendment of the U.S. Constitution.

A *general* explanation about why the consistent application of a rule might involve only fairness of no significant importance is that the rule itself might directly or indirectly forbid substantive fairness. Obviously, the rule ‘Be substantively unfair’ *directly* forbids substantive fairness. If the only consideration determining substantive fairness is desert, then the rule ‘Don’t let people get what they deserve’ will *indirectly* (yet necessarily) preclude substantive fairness. Again, if the only factors determining what substantive fairness requires are desert and need, then the rule ‘Don’t let people get what they deserve or need’ will *indirectly* (yet necessarily) preclude substantive fairness. More generally, if the only factors determining what substantive fairness requires are *a*, *b*, and *c*, then the rule ‘Do the opposite of what accords with *a*, *b*, and *c*’ will necessarily preclude substantive fairness.

## 2. SUBSTANTIVE FAIRNESS AS SENSITIVITY TO ALL APPLICABLE MORAL REASONS

Near the end of the previous section, I made some assumptions about which considerations determine substantive fairness. I made those assumptions only in order to illustrate certain points about formal fairness. Let us now begin to consider various theories about which considerations determine substantive fairness.

If we are trying to excavate what people mean by ‘fair’, I think we have to acknowledge that ‘fair’ is often used with a very broad meaning. A ‘fair decision’, in this very broad sense of ‘fair’, means a decision that appropriately accommodates all applicable moral distinctions and reasons.<sup>2</sup> I will illustrate this broad meaning with some examples.

Suppose you would benefit more from getting a medicine than I would. *That one person would benefit more than another* is a moral distinction applicable in the case at hand. So, if there are no other moral distinctions applicable in this case, your getting the medicine is fair, in this broad sense of ‘fair’.

But suppose the medicine is mine, because my mother, who legitimately owned it, gave it to me. Now another moral distinction is applicable – the *distinction between the owner and non-owners*. If no other moral distinction is applicable to this case and if the distinction between the owner and non-owners trumps the distinction between greater and lesser benefits, then my getting the medicine would be fair.

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<sup>2</sup>Gert, 1998, p. 195; Kagan, 1998, p. 54; Carr, 2000, pp. 7–9. For a similar understanding of *justice*, see Aristotle, *Nicomachean Ethics*, 1130b18–20; Sidgwick, 1907, pp. 386–387.

Similar things can be said about other possible reasons. Suppose the reason you need the medicine is that *I negligently injured* you. Or suppose *I promised* to protect your welfare before my own. In these or various other circumstances, applicable moral distinctions might come down on the side of my letting you have the medicine. Where that is what applicable moral distinctions on balance favour, the very broad sense of fairness would require that you get the medicine.

Note that this broad sense of fairness might conflict with any *defeated* moral reason, but it cannot conflict with an *undefeated* moral reason. Whatever moral distinction turns out to be most important or reason turns out to be undefeated, fairness in this broad sense calls for compliance with it. We might imagine people defending their action by saying, ‘We had a moral reason to do what we did. We did not have as good moral reason not to do it. Thus, our action was fair.’

I believe ‘fair’ is often used in this broad sense. But the broad usage seems to me unfortunate. We already have terms signifying the verdicts of all-things-considered moral reasoning. Terms signifying the verdicts of all-things-considered moral reasoning include ‘morally justified’, ‘morally legitimate’, ‘morally right’, and ‘morally best’. Don’t we want ‘fair’ to have a distinctive and thus narrower meaning?

### 3. MAPS OF MORAL REASONS

Broome’s theory of fairness is that *fairness consists in proportional satisfaction of a certain type of moral reason*. Broome’s theory starts from the thesis that there are, or have been held to be, three types of moral reasons, defined in terms of “how they work” (Broome, 1990, p. 91). Here is a map of Broome’s account of moral reasons:

#### 3.1. Map One

- (1) Reasons constituted by duties that are *not owed to people* and are *to be weighed against each another* such that the right action or arrangement is the one with the greatest weight of reasons on its side
- (2) Reasons constituted by duties that *are owed to people* and are *side-constraints* (i.e., necessarily prevail over any opposed reasons)
- (3) Reasons constituted by duties that are *owed to people* but are *not side-constraints* (i.e., do not necessarily prevail)

According to Map One, the three general types of moral reasons are not defined in terms of their content. (1)–(3) are agnostic about the content of moral reasons. Instead, according to Map One, the three general types

of moral reasons are instead distinguished from one another in terms of whether they are owed to people and how they operate. Type-1 and type-3 reasons are *not* side-constraints. Type-2 and type-3 reasons *are* owed to people.

Familiar to everyone who has read Kant's or Mill's ethics will be the distinction between duties that are owed to people and duties to do things where what is to be done is not owed to anyone.<sup>3</sup> One common way of drawing the distinction is to say that it consists in the distinction between an agent's duties that are mirrored by correlative rights that others have to the performance of that duty by the agent, and duties that are not reflected in correlative rights had by others. To take the standard example, you have a duty to be generally helpful to strangers, but no stranger has a right that you be helpful to him or her in particular.<sup>4</sup>

Now Broome takes the content of type-1 reasons to concern net benefit. Type-1 reasons are utilitarian. As Broome acknowledges, some utilitarians have thought that type-1 reasons come from duties owed to individuals. Broome (1990, p. 92) quotes Godwin, "Every man has a right to that, the exclusive possession of which being awarded to him, a greater sum of benefit or pleasure will result than could have arisen from its being otherwise appropriated."

The problem this creates is that, if Broome ought to leave open whether the general duty to benefit people is owed to them, then what differentiates reasons of Broome's type-3 from his type-1 reasons? Neither type-1 reasons nor type-3 reasons are side-constraints. And, if Godwin is right, type-1 reasons are constituted by duties owed to people. Hence, there would be no difference between type-1 and type-3 reasons on that dimension either.

Though that might not be a devastating objection to Broome's Map One, let us try to improve on Broome's account. Thus here is a different map, one that omits reference to whether duties are owed to people:

### 3.2. *Map Two*

- (1') Reasons constituted by duties that are to be *weighed against each another* such that the right action or arrangement is the one with the greatest weight of reasons on its side
- (2') Reasons constituted by duties that are *side-constraints* (i.e. that necessarily prevail over any opposed reasons)

<sup>3</sup> According to Schneewind, 1990, p. 49 this distinction was prominent as far back as Grotius and Pufendorf.

<sup>4</sup> One view in opposition to this illustrative example is that the correlative right is held by the *collective* of strangers, though not by any individual stranger. I will not pause here to discuss this view.

- (3') Reasons constituted by duties that, rather than being weighed against each another or operating as side-constraints, are to be fulfilled *proportionally*

Map Two does introduce a fairly clear distinction between type-1' and type-3' reasons. Nevertheless, Map Two won't do, for two reasons.

First, many act-utilitarians hold that there is at least one side-constraint, i.e., one necessarily prevailing duty. For act-utilitarians, this is the duty to maximize net benefit. So the contrast between type-1' and type-2' reasons is lost for the act-utilitarian.

Second, since type-3' reasons are defined merely as reasons requiring a proportional response, it is a tautology to say that type-3' reasons require a proportional response. By a proportional response, I mean that, if the one and only reason for you to get some good is  $n$  times stronger than the one and only reason for me to get it, then you should get  $n$  times as much of the good as I get. Now the problem is that sometimes Broome's account of fairness seems to be the thesis that fairness requires proportional satisfaction of reasons that are to be satisfied proportionally. (I think Broome (1990, p. 96; 1994, p. 38) virtually admits this.)

There are many ways of mapping moral reasons. Map One distinguished different kinds of moral reasons both in terms of whether the moral reasons come from duties owed to people or not, and in terms of how the moral reasons deal with other moral reasons (i.e., override or not). Map Two differentiated among different kinds of moral reasons in terms of how they deal with other moral reasons (i.e., weigh against in utilitarian fashion, override, or call for proportional satisfaction). Now let us consider a map that differentiates among reasons solely in terms of content.

I do not claim that the map I am about to present is the best possible way of distinguishing among moral reasons in terms of content. But, of the possible maps that distinguish among moral reasons in terms of content, the following one seems to me closest to Broome's picture:

### 3.3. *Map Three*

- (1'') Reasons deriving from the possibility of benefits or harms  
 (2'') Reasons never to kill or torture (or . . .) and never to order such acts  
 (3'') Reasons deriving from needs, desert, agreements, or . . .

Once we divide moral reasons into different kinds on the basis of content, we can then ask how reasons of the different kinds work.

It is certainly plausible, indeed nearly irresistible, to think that reasons focused simply on benefits and harms have a teleological nature – i.e., that these reasons work to require the maximization of net benefit. Here is a

simple example of Broome's type-1'' reason. On a hike, you come across two strangers, Jack and Jill, each of whom has a headache. You have in your pocket one aspirin. Suppose each of Jack and Jill is too large to benefit from anything significantly less than the whole aspirin. There is a reason to give the aspirin to Jack and a similar reason to give it to Jill. Suppose Jill has the worse headache. In that case, type-1'' reasons tell you to give the aspirin to Jill.

Here is a more complicated example of Broome's type-1'' reason. Suppose we are sailing round the bay for our enjoyment. On our one-way radio we hear a weather report saying that a hurricane is on its way toward the bay. We see two islands at some distance from us. One island has three people on it. The other has six people on it. As far as we can tell, each of these people is a stranger to us, and these people all apparently have the same age, health, and popularity as those on the first island. We see that we cannot safely try to save the people on both islands, but we can safely save one or the other. In this case, weighing the type-1'' reasons in favour of saving the three people on one island against the type-1'' reasons in favour of saving the six people on the other island comes out in favour of saving the six. Some philosophers dispute this, but I pass over that controversy here.

There is a different controversy that I will consider. This is the controversy about whether someone's being treated unfairly constitutes a harm to that individual.

To clarify this issue, let me start by acknowledging that, of course, the *misery* that can result from someone's being treated unfairly can constitute a harm to her. A common way for this to happen is that someone's being treated unfairly causes her to believe she is being treated unfairly, and this belief then causes her unpleasant feelings such as resentment and distress. In these and many other cases, unfairness causes hedonic harms.

But suppose that a person's good is a matter of more than just her hedonic states. Suppose, for example, that a person's good is constituted not only by how much pleasure she gets but also by whether her life contains knowledge of important matters, achievement, friendship, and autonomy.<sup>5</sup> If this non-hedonistic view of a person's good is correct, then someone's being treated unfairly can cause her harms other than misery. Her being treated unfairly might, for instance, ruin one of her friendships, or prevent her from achieving something important, or restrict her autonomy.

Yet there is a further question: independently of whether someone's being treated unfairly causes any of those harms to that person, is her

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<sup>5</sup>For discussions of such a view, see Parfit, 1984, Appendix I; Brink, 1989, pp. 221–236; Scanlon, 1993, pp. 185–200; Griffin, 1996, ch. 2; Crisp, 1997, ch. 3; Gert, 1998, pp. 92–94; Arneson, 1999.

being treated unfairly *in itself* a harm to her? Broome's answer is yes: "a person's good consists partly in how fairly she is treated; unfairness is bad for a person, whatever she may feel about it."<sup>6</sup>

If being treated unfairly constitutes a harm to the person unfairly treated, then obviously an injunction to maximize net benefit (benefit minus harm) is not independent of fairness. Calculating benefits and harms must take into consideration the harms constituted by unfair treatment. So fairness can invade the content of Broome's type-1" reasons.

Construing unfairness as constituting a harm to individuals creates serious difficulties in moral theory construction. As I have hinted, in the case of Broome's own theory, construing unfairness as constituting a harm to individuals torpedoes the exclusivity of the distinction between type-1" and type-3" reasons. In the case of other moral theories, construing unfairness as constituting a harm to individuals would create even larger difficulties.

In any case, construing unfairness as constituting a harm to individuals seems to me implausible. To show why, I will borrow (and slightly modify) an example of David McCarthy's ('Prospects for Prioritarianism I', unpublished). Suppose you had to make *an entirely self-interested choice* between the following two possible lives for yourself. In one, you would have various pleasures and friendships, you would achieve some of your worthwhile aims, you would have knowledge of important matters, and you would have a certain degree of autonomy. In the other possible life, you would have slightly more of all those good things (maybe because your life would be somewhat longer), but you would be treated unfairly in some fairly small way. So we are imagining that your choice is between two very similar possible lives. The difference between them is that in one you would not only get a bit more of the good things but also be the recipient of some unfairness, and in the other you would get a bit less of the good things but not be the recipient of unfairness. It seems to me clear that you would be better off with the life containing a bit more of the good things but a little unfairness.

I recognize that there are various possible objections to the example. Perhaps the main one would be about the example's assumption that, whatever different kinds of self-interested benefits and harms there are, they are commensurable. The objection might be that, even if being treated unfairly never by itself amounted to enough of a harm to outweigh other benefits to that individual, being treated unfairly might nevertheless count as an individual harm. On this view, someone's being treated unfairly constitutes a harm to that individual, albeit a harm lexically dominated by every other kind of benefit or harm to that individual.

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<sup>6</sup>Broome, 1991, p. 182. See also pp. 180–181, 192, 198–199, and Broome, 1984a.



This way of defending the doctrine that being treated unfairly constitutes an individual harm restricts the doctrine's scope so far as to minimize the doctrine's importance. In any case, I will not say more here about the issue of whether being treated unfairly constitutes an individual harm. Instead, I will simply assume that it does not.

Let me now turn to illustrating Broome's type-2'' reasons, i.e., supposed side-constraints (Nozick, 1974, p. 29). Suppose all of the following. You are younger than I am. You are more disposed to be happy than I am. You have better relationships with your friends and family than I have with mine. And you have better prospects of significant achievement than I do. But, though no fault of your own, you need a new liver. I have a good one, and I happen to be in the same hospital as you. For the sake of argument, let us stipulate that circumstances are such that, if while I am asleep and without my consent the hospital takes my liver and gives it to you, a greater overall benefit will result than if the hospital leaves me alone and lets you die. Those who believe in side-constraints say that the benefit to you of my liver could not possibly outweigh the right I have to my own body parts. My right to my body parts is, on this view, a necessarily conclusive reason for letting me keep my liver. Such rights operate as side-constraints on what can be done to the right-holder.

If side-constraints are defined as 'necessarily prevailing over any opposed reasons', then in a sense they mark out moral absolutes. Necessarily prevailing constraints tell us what not to do *period*, what not to do *no matter what*. If side-constraints are like this, then a side-constraint on taking people's body parts without their consent trumps *any* consideration, indeed *any* combination of considerations, in conflict with it.

But suppose that somehow the fate of the whole world turns on the hospital's giving my liver to someone else. Counter-examples like this cast doubt on side-constraints, defined as necessarily prevailing reasons.

One way of dealing with counter-examples like the one just mentioned is to leave the force of side-constraints intact but limit their scope. Side-constraints would remain necessarily prevailing within a perhaps very large but nevertheless bounded range of cases. Side-constraints' range would not extend to cases where opposing considerations become *too* weighty (Nozick, 1974, p. 30n; Donagan, 1977, pp. 206–207; Fried, 1978, p. 10.).

What counts as too weighty is presumably *variable*, depending upon the side-constraint in play. Where the side-constraint on harming runs out can be expected to differ from where the side-constraint on lying runs out. (In other words, it takes weightier considerations to justify harming someone than it does to justify lying.) In addition, I assume that what counts as too weighty will be *vague*.

In the present context, an even more important point than the variability and vagueness of side-constraints is the fact that we could redescribe the

limit on their scope as a limit on their force. We could say that their force is such that they *normally* prevail but *in extreme cases* can be overridden. To take this line is to accept that even duties often said to be side-constraints are in fact only pro tanto duties, albeit ones that prevail in all but the most unlikely circumstances (Ross, 1930, ch. 2; McNaughton, 1996). Taking this line, we cannot define side-constraints as necessarily prevailing.

Why have I been saying so much about side-constraints? Broome contrasts reasons of fairness (type-3" reasons) not only with reasons of benefit (type-1" reasons) but also with side-constraints (type-2" reasons). Broome seems to need a clear distinction between side-constraints and the reasons associated with fairness (that is, a clear distinction between type-2" and type-3" reasons). On careful reflection, however, the distinction is not so clear.

#### 4. FAIRNESS AND SIDE-CONSTRAINTS

Broome's 1984b did not explicitly disassociate fairness from side-constraints. (See the top of p. 44, where Broome says that rights to life might be part of fairness.) But his later work does explicitly disassociate fairness from side-constraints (Broome, 1990, pp. 91, 94, 96; 1994, p. 38). Having defined 'claims' as the corollaries of duties owed to people and 'fairness-claims' as claims that do not work like side-constraints, Broome (1990, p. 96) writes, "It may be a convenient piece of terminology to say that fairness is a subdivision of *justice*, and that justice is concerned with all claims, but fairness only with fairness-claims."

Is Broome right that compliance with side-constraints is no part of fairness? If a doctor takes your liver against your will and gives it to me, we might think that a side-constraint has been violated. We might also think the doctor committed an act of injustice against you. And we might think you have been treated *unfairly* in being deprived of your liver. In thinking this, we would have accepted that fairness is at least partly a matter of complying with side-constraints.

Just as your owning your liver imposes side-constraints on others not to take it from you against your will, your after-tax ownership of (e.g.) land or money in a just state imposes side-constraints on how others are allowed by morality to treat you. For other people to take your after-tax money in order to satisfy Smith's needs would be unfair. You were the one with the moral right to decide how your own money would be used. This right of yours is correlated with a duty that others have not to decide for you. That duty on them is a side-constraint. Violating it is unfair to you.

Nevertheless, circumstances can occur in which your right to your money should be violated. As I indicated earlier, side-constraints must be restricted so as to abate in extreme circumstances. Either we can conceive of them

as not applying in extreme circumstances. Or we can conceive of them as applying universally, i.e. even in extreme circumstances, but being overridden in such circumstances. If we take this second route, we might say that the duties often said to be side-constraints are in fact only pro tanto duties, albeit especially strong ones.

In whatever way we construe side-constraints, I think that, if side-constraints obtain, then violating them is a violation of fairness. In other words, I think honouring side-constraints, if there are any, is part of fairness. So here Broome and I disagree.

In any case, the main focus of my criticism of Broome does not concern his treatment of side-constraints. It instead concerns his treatment of type-3" reasons.

##### 5. FAIRNESS AS THE *PROPORTIONAL* SATISFACTION OF A CERTAIN TYPE OF MORAL REASON

Of course there is a hugely important issue about what generates non-side-constraint claims. As candidates, Broome mentions three things. One is *desert* (Broome, 1990, p. 93; 1991, pp. 191–192). The second is *contracts* (1991, p. 197). The third is *needs* (1990, p. 93; 1991, p. 197; 1994, p. 38).<sup>7</sup>

He also mentions the idea that “everyone has an equal claim to good” (1991, p. 197). If everyone has an equal claim to good, then “fairness will require the distribution across people to be equal” (1991, p. 197). However, Broome expresses doubt about whether “people have claims to good rather than, say, to the satisfaction of their needs, or to the resources they require to build a life for themselves, or to what Amartya Sen calls ‘capabilities’” (1991, p. 197).

Admittedly, Broome normally remains neutral about which of these or other things ground or generate claims. I will return in a moment to the matter of *what generates claims*.

First, I want to focus on Broome’s central thesis, which is about *the right way to respond to conflicting claims*. The centrepiece of his theory of fairness is that non-side-constraint claims “should be satisfied in proportion to their strength” (Broome, 1991, p. 95).<sup>8</sup> He explains,

In this formula, I do not mean “proportion” to be taken too precisely. The essential point is that fairness prescribes how far each person’s claim should be satisfied *relative* to the

<sup>7</sup>Here I am reporting the views Broome sketches. I am not taking sides on, e.g., whether needs are a basis of desert.

<sup>8</sup>See also Rescher, 2002, pp. 10–11, 25–28; Coons, 1979, pp. 201–202; and discussions of ‘horizontal equity’ in the economics literature. For Aristotle’s conception of justice as proportionality, see *Nicomachean Ethics*, 1131a30–1131b24.

satisfaction of other people's claims. Stronger claims require more satisfaction and equal claims require equal satisfaction. Also, weaker claims cannot simply be overridden by stronger ones: if a stronger claim is satisfied to some extent, then so should a weaker one be to a lesser extent (Broom, 1991, p. 196).

I have already argued that, if there are any side-constraints, fairness does not ignore them. If we include side-constraints in the set of reasons to which fairness responds, we will have to deny that fairness always involves proportionality. For we will have to deny that fairness involves proportionality in the cases where side-constraints come into play. Side-constraints are antithetical to proportionality. The point of side-constraints is that they are not violated *period*, not that they are violated to the same degree with respect to each relevant claim holder.

Equally clear, I think, is that Broome's theory needs revision in another way. He writes,

The essential point of my account of fairness is that it makes fairness a relative matter. It is not at all concerned with the absolute level of satisfaction of claims. If several people have equal claims to some commodity, they are all treated perfectly fairly so long as they each get the same amount of it, even if the amount is small or none at all. Of course, the more they get the better. There is at least one reason for each of them to have the commodity, namely the reason that constitutes a claim. It is therefore better if they each get more rather than less. But it is no fairer. It is not fairness that makes it better (Broome, 1991, pp. 196, 198; 1984b, p. 43, and 1990, p. 95).

Suppose that I promised to pay Jack £50 today and to pay Jill £50 today. I have with me some money with which I could pay everything I owe to them. Suppose, however, I instead literally burn all my money. Have I treated them *equally*? Obviously, I have treated them equally. Have I treated them *fairly*? Broome's theory says that I have. His theory holds that fairness requires merely equal proportionate satisfaction of claims, and this is what I have given to Jack and Jill. I have given each equally nothing of the £50 I owe him or her.

We might say that what Broome's theory demands is that I treat each of Jack and Jill fairly in comparison with how treat the other of them. This is comparative fairness. But if individual or absolute fairness towards anyone is a matter of whether I give him or her the response owed him or her, never mind how others have been treated, then I have not treated either fairly.

Now consider a different case. Suppose that I owe Jack £50 and Jill £100, and that I repay Jack £25 and Jill £50. Again, I have given Jack and Jill equal proportionate satisfaction of their claims. So, on Broome's view, I have treated them fairly. But suppose that I could have paid both of them all I owed them. If I repay each only half of what I owe him or her when I was in fact able to pay all my debts in full, then I have not done all fairness

requires. Again, if the requirement of proportionality is central to fairness, fairness requires the greatest possible proportionate satisfaction of claims.

As we saw in the quoted passage above, Broome accepts that there is a moral reason to satisfy people's claims maximally. It is just that he thinks that this moral reason isn't part of *fairness*. I've argued above that this moral reason is part of fairness. Fairness requires the greatest possible proportionate satisfaction of claims (whether or not it also requires compliance with other moral reasons).

Let us move on to the question of whether *proportional* satisfaction is the morally required response to a certain type of moral reason. Remember this question makes no sense if these reasons are *defined as ones requiring proportional satisfaction*. The question does make sense if the reasons in question are *defined by their content*. So let us take these reasons to be defined by their content. In particular, let us assume that type-3" reasons focus on needs, desert, and agreements.

To illustrate his general theory of fairness, Broome asks us to imagine that there is some good the benefit of which will be maximized if *all* the good goes to one person, but there are two people with equal claims to it (Broome, 1990, p. 95). Since there are two people with equal claims to the good, fairness requires that it should be divided equally between them. Here fairness conflicts with what would maximize overall benefit.

Let me make some initial points about need-satisfaction as a focus of fairness. If you need something and I don't, then very probably your getting it would benefit you more than my getting it would benefit me. So to say that fairness calls for (among other things) the satisfaction of claims of need might be a way of saying that one of the things fairness requires is that smaller benefits for some not be chosen over larger benefits for others.

But now focus on a case where your getting some indivisible good would *satisfy your need* but my getting it instead would *benefit me more* than you would benefit from getting it. We might nevertheless think that fairness favours your getting the good rather than my getting it. What explains why we might think this? We naturally assume that those who are neediest are worst off. So in the case at hand, we might be assuming that, if you are needy and I am not, you are worse off than I am. If we make this assumption, then the fact that we favour your getting the good rather than my getting it might be explained by our thinking that there is always some reason of fairness for giving a benefit to the worse off rather than to the better off.

In other words, in order to reflect on whether satisfying needs is in itself morally important, we need to neutralize the following two facts. One is the fact that satisfying needs will normally bring significant gains in utility. The other is that satisfying the greatest needs will normally benefit the worst off, since normally the worst off are the neediest. What we need for

a good test case is one with the following features:

- (a) There is an indivisible good to be distributed either to you or to me.
- (b) I need the good and you don't need it or anything else as much as I need this good.
- (c) You are worse off than I.
- (d) Your getting the good would benefit you exactly the same amount as my getting it would benefit me.

In this case, (d) is obviously neutral and so does not complicate matters. Our case poses an uncomplicated choice between satisfying a need and benefiting the worse off. Reflecting on this case leads me to think that benefiting the worse off is more important than satisfying needs.

Alternatively, it may be said that the test case I describe above is impossible. The objection might be that, if I need the good and you don't need it or anything else as much as I need this good, then you couldn't be worse off than I am. In other words, the objection is that (b) and (c) cannot be true together. If that is right, however, then the injunction to satisfy the greatest needs really is nothing but the injunction to benefit the worst off.

Let us use the term *prioritarianism* to refer to the view that, other things being equal, the worse off have a greater claim on a good than the better off do. Following Parfit, I think that prioritarianism is the best account of what matters in substantive equality (Parfit, 1997, pp. 213–217). I also agree with Parfit (1997, p. 216) that, “Distribution according to need is better regarded as a form of the Priority View.”<sup>9</sup> As I would put it, the importance of satisfying needs is that it serves as a proxy for benefiting the worse off.

I admit that most people who champion distribution according to need have in mind is not prioritarianism. They instead have in mind the view that benefiting individuals matters more the worse off they are *up to some threshold of sufficiency* and then ceases to matter more after that level has been reached.<sup>10</sup>

I confess, however, that I can't believe that there is any principled line to be drawn between needs and non-needs, or between sufficiency and more than enough. To take just one example, what is 'enough' when it comes to years of good health? So I think prioritarianism more defensible, albeit less popular, than the sufficiency view.

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<sup>9</sup>I worry, however, that giving priority to the worse off conflicts with crucially important impartiality; see Hooker, 2000, pp. 26–27, 55–65.

<sup>10</sup>I am grateful to Andrew Mason for reminding me of the point in this paragraph. For a classic discussion of needs, see Wiggins (1987). For recent discussions, see Crisp, 2003; Temkin, 2003; Reader and Brock, 2004.

Now consider desert. Note how often we justifiably don't deal with it proportionally. We hope the most deserving candidate gets the job; the job isn't divided proportionally in line with candidates' relative deserts. The first company to develop and patent the medicine gets the spoils, though another company developed the medicine only a few months later. When should desert be rewarded in a 'winner-takes-all' fashion and when in a proportional fashion? The answer presumably depends on what prior agreements have been made.

Admittedly, where an agreement is silent on how to treat competing claims arising from it, perhaps there is a presumption in favour of proportionality (Sidgwick, 1907, p. 279). Suppose Joe agreed with Jack to pay him £400 and agreed with Jill to pay her £800. Now suppose that Joe has only £600. If neither of Joe's agreements subordinates the other, Joe should pay each of his creditors half of what he agreed to pay. So he should pay Jack £200 and Jill £400.

And we can offer a principled defence of a rule requiring proportional payment of debts where full payment is impossible. There is general social value in potential lenders' being able to assume that they will get at least an equal portion of their loans back if the debtor has some resources.

Let us now move from cases involving promises and creditors to cases involving wills. Suppose Joe writes a will leaving Jack £400 and Jill £800, but he dies with only £600 in his estate. Suppose that the will does not make either bequest subordinate or residual to the other. Then fairness requires that Jack get £200 and Jill £400 from Joe's estate.

Again, we can offer a principled defence. A rule requiring proportionality in such cases seems designed to respect the *presumed* will of the benefactor. If Joe didn't subordinate either bequest to the other, then presumably he meant for Jill to get twice as much as Jack of whatever amount below £1200 his estate contained.

## 6. THE ARGUMENT FROM LOTTERIES TO PROPORTIONAL SATISFACTION

Broome argues from the fairness of lotteries to his theory of fairness as the proportional satisfaction of type-3'' claims. He does not present his argument quite as explicitly as I shall. Nevertheless, I think the following a reasonable reconstruction:

- Premise 1 If lotteries are sometimes fair, a theory of fairness ought to explain when and why they are.
- Premise 2 Lotteries are sometimes fair.
- Conclusion 1 A theory of fairness ought to explain when and why lotteries are fair.

Let us rephrase that conclusion and use it as the first premise in a new argument:

- Conclusion 1\* If a theory of fairness both (a) provides a better explanation than its rivals of when and why lotteries are fair and (b) is at least as plausible as its rivals in other respects, then this theory of fairness is better than its rivals.
- Premise 3 The theory that fairness is the proportional satisfaction of a certain type of moral reasons provides a better explanation of why and when lotteries are fair than is provided by any other theory of fairness.
- Premise 4 The theory that fairness is the proportional satisfaction of a certain type of moral reasons is, in other respects, at least as plausible as any rival theory of fairness.
- Conclusion 2 The theory that fairness is the proportional satisfaction of a certain type of reasons is better than its rivals.

What, if anything, is mistaken in this argument? The conclusions do follow from the premises. Premises 1 and 2 are correct. So, if the argument has weaknesses, they must occur in the Premise 3, or in Premise 4, or in both. Those two premises make assertions about the attractions of the theory that fairness is the proportional satisfaction of a certain type of moral reasons. Does the theory that fairness is the proportional satisfaction of such moral reasons really have these attractions?

A number of the points made in this paper address that question. First, it is very hard to assess a thesis about how some set of reasons work without knowing what the content of these reasons are. In particular, the plausibility of the theory that fairness is the proportional satisfaction of certain reasons seems to turn, at least in significant part, on the question of what these reasons are. For example, if the reasons come from benefit and harm or from the duty not to kill, they are not to be dealt with proportionally.

Second, I have argued that sub-maximal proportional satisfaction is inferior, from the point of view of fairness, to maximal proportional satisfaction.

Third, I have argued that a theory that incorporates into fairness whatever side-constraints exist is superior to one, such as Broome's, which does not. Likewise, if the duties often said to be side-constraints are instead especially strong pro tanto duties, fairness will have to accommodate them.

But, for the time being, each of those three objections can be set aside. For, first, Broome's suggestions about the *content* of type-3'' reasons are not silly. Second, his theory can easily be amended so that fairness itself favours *maximal* proportional satisfaction of claims. And, third, his examples of cases where lotteries seem appropriate are ones in which *nothing like side-constraints intrudes*. So let us consider his examples.



The first is that games often start by tossing a coin to decide which player starts in the favourable position (Broome, 1990, p. 89). Suppose that player B's winning would cause more good than player A's winning, perhaps because B is more popular than A. Be that as it may, fairness requires that any external advantage in the match be arrived at by a coin toss or some other even chance. To dictate that the more popular player gets the more favourable starting position would be manifestly unfair.

In Broome's second example, there are two candidates for a medical treatment that will provide an extra twenty years of life (Broome, 1994, p. 37). The situation is such that the medical treatment can be given to no more than one of these candidates. One of these candidates is irreversibly disabled, and so, if saved, would only have an additional twenty years of disabled life. The other is healthy, and so, if saved, would have an additional twenty years of able-bodied life. Suppose that twenty years of able-bodied life is likely to be a greater benefit than the same number of years of disabled life. Then, presumably, a policy of giving the medical treatment to able-bodied people in such cases is more likely to produce greater benefits. Nevertheless, Broome suggests, such a policy would be unfair to the disabled.

Broome's third example is as follows. "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 that one has special talents that make her more likely than others to carry out the mission well (but no more likely to survive)." (Broome, 1990, p. 90; see also 1991, pp. 194–195) Broome (1990, p. 94) suggests that, in the case as described, each person has an equal non-side-constraint claim to the good of being left behind. Since, on his theory, fairness requires the equal satisfaction of equal claims, he thinks fairness requires that each person get an equal chance of being left behind. An unweighted lottery would give each person such an equal chance.

Of course there is also a reason to maximize the chances of success in the dangerous mission. And this reason of course favours sending the most talented person on the mission. Broome admits that this reason may be more important in this context than fairness. Still, what fairness requires is that each person gets an equal chance of being left behind.

Broome thinks that it is obviously fair to hold a lottery in each of these three cases. He also thinks that this is best explained by the theory that fairness is proportional satisfaction of type-3" reasons. But is he right?

The example of tossing a coin at the beginning of a game seems to me quite unlike the other two examples, and particularly unpersuasive. The point of games, or series of games, is to test ability or luck. Some games or tournaments cannot avoid giving one player or team an advantage. Some sports decide which team or player to give the advantage by some randomising mechanism – in other words, luck. Other games or tournaments

decide the matter by prior tests of skill. For example, the pro-basketball team with the best regular-season record gets home-court advantage during the playoffs. At the start of a tennis tournament, the best-ranked tennis player (for that kind of court) is given the easiest draw. These procedures are not less fair than a coin toss. If the point of a season of games or tournaments is to test players' or teams' relative skill, then distributing unavoidable advantages on the basis of prior performance is fair.<sup>11</sup>

Turn now to Broome's example about allocating scarce medical resources. Again, whether fairness requires a lottery in this case seems quite unclear. In the example, substantive equality and priority for the worse off favour helping the disabled person, since that person is likely to have had a worse life so far than the able-bodied person. To the extent that we identify fairness with such egalitarian or prioritarian considerations, we will think fairness requires giving the medical treatment to the disabled person.

Suppose we agree that, because fairness requires that priority be given to the worse off, fairness requires that the scarce medical resource be given to the disabled patient. Suppose also that purely utilitarian considerations favour giving the scarce medical resource to the able-bodied person, since that person would derive greater benefit from it than the disabled would. In this case, we have a conflict between utilitarian reasons for giving it to the able-bodied person and reasons of fairness for giving it to the disabled person.

But neither of these sets of opposed reasons favours holding a lottery. Utilitarian considerations are against holding a lottery because the lottery might select the disabled person and thus produce less utility. Substantive equality and priority for the worse off (and thus, we are supposing, fairness) are against the lottery because the lottery might select the better off person and thus increase inequality and do nothing to benefit the worse off.

In the face of a conflict between reasons of utility and reasons of fairness, we *might* eschew trying to decide which set of reasons is stronger and instead simply toss a coin. But if this is what we do, it won't be because *fairness* as such demanded the lottery. Rather, the lottery (coin toss) will be merely a device for adjudicating a conflict between fairness and utility (cf. Broome, 1990, pp. 89–90). Thus, Broome's scarce medical resource

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<sup>11</sup>I contrast the awarding of a good draw in a tennis tournament or a home-court advantage in a basketball game with handicaps in horse races. Giving the horse with the best record extra weight to carry in a race is clearly unfair insofar as the race is purely a test of the horses' abilities. Racehorses are handicapped in order to make people think the race will be closer, the winner harder to predict, and the race thus more interesting. If all the owners of horses in the race *agree* to the handicapping, then that agreement on their part makes the handicapping fair to the owners. More generally, handicapping seems fair only when the relevant parties consent. Many people who dislike handicapping in horse races feel that the relevant parties are the contestants, which of course are the horses, not the owners.

example does not conclusively show that fairness requires proportional satisfaction of type-3'' reasons.

Finally, consider Broome's dangerous mission case. Presumably, equality favours sending either everyone or no one on the dangerous mission. Sending everyone is likely to be terribly counter-productive (because everyone's going on the mission would make detection by the enemy highly probable). By hypothesis, sending no one on the mission is also out of the question. So one (as opposed to either all or none) should be sent.

Even if sending one is on balance the right thing to do, this is opposed by equality. Broome's view is that each person in the squad has an equal claim to the good of not being sent on the dangerous mission. So sending one is unfair to that person.

Now using a lottery to select which one to send would not of course give everyone an equal outcome. It would, however, give everyone an equal chance of getting the benefit of not having to go on the mission. Broome (1990, pp. 97–81; 991, p. 196; 1994, pp. 38–40) suggests that the unfairness to the person of being sent can be somewhat mitigated if a lottery is used to select which person to send.

I am not entirely persuaded by Broome's analysis of the dangerous mission case. As I see things, the commander, in deciding whom to send, has two main considerations to weigh up.

First, as Broome mentions, sending the best soldier on the mission maximizes the probability of the mission's success. So there is a 'success of this mission' reason for sending the best soldier on the mission. The more important the mission, the stronger this reason is.

A second reason pulls in the opposite direction. It is desirable not to risk losing one's best soldiers on missions that less good soldiers could accomplish. Thus, there is an efficiency consideration in favour of sending a soldier who will get the job done but whose loss would be less than that of any other in the group. This consideration favours sending the soldier who is the least talented of those with enough talent to get the job done.

If the commander's decision accords with a completely impartial assessment of these considerations, can the decision he or she makes be unfair? Note how tempting it is in such cases to fall into using fairness in the broad sense outlined in Section 2 above. On this usage, if the greater weight of moral reasons favours sending a particular candidate, then doing that must be fair.

Consider the case where the combination of the importance of the mission and the increase in the probability of success if the best soldier is sent favours sending the best soldier. Then, in the broad sense of fairness, sending the best soldier would not be unfair to anyone. Now consider the case where the probability of success in the mission is the same no matter

which soldier is sent. And assume this group of soldiers will have further missions to accomplish or battles to fight. In this case, there is good reason for sending the worst soldier on the mission. Again, that would not be unfair to anyone, in the broad sense of fairness.

As suggested earlier, however, we may want to keep 'fair' from being used so broadly that it becomes synonymous with 'morally required, all-things-considered'. If so, then the question facing us is whether a defensible narrower usage of 'fair' favours a lottery in the dangerous mission case.

Where the good is divisible, then of course the fair thing to do is to divide the good equally among those with equal claims on it.<sup>12</sup> Where a good really is indivisible and a number of people have equal claims on it, those people should at least have an equal chance of getting that good. The good of staying behind while someone else is sent on the dangerous mission is not something that can be divided with the person sent. Thus there is a rationale for the lottery in this case.

What this shows, however, is merely that, where people have equal claims on an indivisible good, fairness requires that the good be distributed by lottery. What is the best explanation of this requirement? Broome's explanation is that fairness is the proportional satisfaction of claims. An alternative and simpler explanation is that, where equality in the distribution of a good is impossible or would come at too great a loss, giving people with equally strong claims equal chances for the good is the best possible substitute.<sup>13</sup>

The best objection to Broome's explanation highlights its implications for cases where different people's claims are not of equal strength. Suppose

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<sup>12</sup>Sometimes, goods might not appear to be divisible but in some relevant sense actually are divisible. As Rescher notes, if you and I have equal claim on some good that cannot be divided, we could agree to share it simultaneously, or share it diachronically. Even if sharing simultaneously or diachronically is out of the question, we might be able to sell the good and split the money. Or one of us could buy out the other. In all such circumstances, the good, or at least the benefit to be obtained from it, is for our purposes divisible. Only when all such alternatives are impossible is a lottery appropriate (Rescher, 2000, pp. 34–35).

<sup>13</sup>An especially powerful discussion of the moral pressure to provide equal chances appears in Griffin, 1996, pp. 208–213. Griffin thinks of his principle of equal chances as flowing from a principle of equal respect: 'each person's *chance* at welfare matters and matters equally, because . . . each person's *welfare* matters and matters equally, and because of the causal connection between chance at welfare and welfare itself'. (p. 211). Griffin's argument for equal chances thus derives from the kind of equality at the foundation of utilitarianism – the welfare of each person counts the same. I do think that argument is powerful. But the argument I suggest in the text goes further, since it is grounded not in equality of concern but in the pressure (where it exists) for equality of outcome.

each of us needs or deserves some indivisible good, but some of us need or deserve it more than others. Broome wrote,

[I]f 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. (Broome, 1990, p. 98. See also 1994, p. 48.)

So Broome admits that, on his theory of fairness, where different people have unequal claims on an indivisible good, fairness calls for a weighted lottery where each person's chance of winning is proportional to the relative strength of her claims.

That suggestion seems highly implausible. 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?

For example, suppose that there is available some limited quantity of medicine and that this medicine cannot be divided without rendering it ineffective. 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?

Or suppose your claim on some indivisible good comes from desert, and so does mine, but you are four times more deserving than I am. Should a lottery be run where you have an 80% chance of winning and I have a 20% chance? Again, your claim clearly outweighs mine. Letting the stronger claim win seems completely fair.

Such examples strongly suggest that, when people have unequal claims on some indivisible good, weighted lotteries are not required by fairness – indeed are contrary to fairness.

Let me slot that point into an argument against Broome's theory of fairness. Broome contends that the best explanation of when and why lotteries are fair is that fairness is the proportional satisfaction of claims. However, if fairness is the proportional satisfaction of claims, then, when the good is indivisible and claims are unequal, fairness requires weighted lotteries. In fact, fairness does not require weighted lotteries in such cases. So the theory that fairness is the proportional satisfaction of claims is false.

To reject Broome's argument from the fairness of lotteries does not entail denying that sometimes fairness does require proportional satisfaction of claims. As I accepted near the end of the previous section, in cases of *divisible* goods fairness can require proportional satisfaction of claims. And, earlier in the present section, I accepted that lotteries are fair when a good is indivisible and people have equally strong claims to it.

## 7. THE CONTENT AND PLACE OF FAIRNESS

Still, I go along with Broome in thinking that fairness depends on a wide range of considerations. He points to considerations deriving from desert, agreements, and needs. I would add side-constraints (if there are any). And I have argued that the goal of benefiting the worse off is more defensible than that of satisfying needs.

The theory that fairness depends on the previous paragraph's list of considerations has impressive explanatory power. First, the *breadth of considerations* on which fairness depends explains why fairness is so frequently invoked. Second, the frequent contestability of assertions that this or that is fair is explained by *difficulties with the grounding considerations*. Here are some examples. There are philosophical problems with the concepts of desert and need. There is uncertainty about what would be best for the worse off in the long run. There may be uncertainty about whether fairness requires or even allows a fundamental bias towards the worse off. And very often the content of agreements is vague.

On the view of fairness we have arrived at, fairness is more than merely equal and impartial application of rules but narrower than all-things-considered moral rightness. Fairness is narrower than all-things-considered moral rightness because, whereas all-things-considered moral rightness of course depends on all applicable moral reasons, fairness depends on only a subset of applicable moral reasons. It depends on desert, agreements, needs (or priority for the worst off) and whatever side-constraints (or especially strong pro tanto duties) there are. But fairness does not depend directly upon, and so can conflict with, type-1'' reasons, that is, reasons of utility.<sup>14</sup>

<sup>14</sup> By having fairness depend directly on side-constraints (if there are any) as well as depend directly on type-3'' reasons but *not* depend *directly* on reasons of utility, my view of fairness resembles the view expounded in Kaplow and Shavell (2001). But I am more reluctant than Kaplow and Shavell are to let utility trump fairness in particular cases. On the other hand, I do think a kind of rule-consequentialism can underwrite both (restricted-scope) side-constraints and rules honouring desert, agreements, and needs. See Hooker, 2000, pp. 45–65, 135–136.

## ACKNOWLEDGEMENTS

This paper improved as a result of outings at Oxford, Bristol, Lampeter, Reading, Princeton, Southampton, and the British Society for Ethical Theory. For helpful comments on those or other occasions, I am grateful to Maria Alvarez, Jeppe Anderson, Elizabeth Ashford, Andrea Ashworth, Paul Audi, Robert Audi, Christopher Bertram, Alexander Bird, Joseph Biehl, John Broome, Jessica Brown, Byne Browne, Alan Carter, Kerah Gordon-Solmon, Oswald Hanfling, Gilbert Harman, Alison Hills, Iwao Hirose, Henry Hooker II, Victoria Kamsler, James Ladyman, Gerald Lang, Arto Laitinen, Lawrence Lengbeyer, Stephanie Lewis, Matthew Liao, David McCarthy, Jeff McMahan, Dennis McManus, David McNaughton, Tristan McPherson, Andrew Moore, Richard Norman, Philip Pettit, Dawn Phillips, Aaron Ridley, David Robjant, Michael Rosen, Julian Savulescu, Bob Sharpe, John Skorupski, Mark Schroeder, David Sobel, Nick Southwood, Michael Smith, Marc Stears, Philip Stratton-Lake, Bart Streumer, Jeremy Watkins, Ralph Wedgwood, and Carolyn Wilde. I am especially grateful to Fred Feldman, Mark Greenberg, Rob Lawlor, Andrew Mason, Jussi Suikkanen, and Andrew Williams for extremely helpful written comments.

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*Department of Philosophy*  
*University of Reading*  
*Reading RG6 6AA*  
*UK*  
*E-mail: b.w.hooker@rdg.ac.uk*