Can a compromise be fair?

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Abstract
This paper examines the relationship between compromise and fairness and considers in particular why, if a fair outcome to a conflict is available, the conflict should still be subject to compromise. It sets out the defining features of compromise and explains how fair compromise differs from both principled and pragmatic compromise. The fairness relating to compromise can be of two types – procedural and end-state; it is the coherence of end-state fairness with compromise that proves the more puzzling case. We offer reasons why people should be allowed to resolve conflicting or competing claims through compromise, even if compromise comes at the expense of end-state fairness, but we resist the suggestion that the primary rationale for compromise is to be found in non-ideal circumstances.

Keywords
compromise, bargain, fairness, obligation, ideal and non-ideal theory

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The question that provides the title of this paper may seem decidedly odd, since it is commonplace to describe compromises as fair, or unfair. Indeed, amongst all the values that we might bring to the assessment of compromises, fairness seems pre-eminent. Mimicking Rawls, we might say that fairness is the first virtue of compromises. There is good reason why it should be. The parties to a compromise begin from an initial position of conflict and each makes concessions. Their making concessions means that a kind of apportionment or distribution is taking place and, if we evaluate that apportionment, the obvious question we should ask is: is it fair? If, for example, we find that one party has made much larger sacrifices than another in return for much smaller gains, we may deem the compromise unfair.

Some writers go even further in relating fairness to compromise. Theodore Benditt (1979: 29), for example, makes fairness intrinsic to the very idea of compromise. Like many writers on compromise, he seeks to distinguish a

compromise from a bargain and he finds the critical difference in the attitudes of the parties to their conflict: in a bargain, each party seeks simply to get the best deal for itself, whereas in a compromise the parties give due consideration to one another's interests and try to find a fair accommodation.

Several writers argue that fairness or justice can itself demand compromise. If people possess legitimate but conflicting interests or convictions, the right course for them is to agree upon a compromise in which each person's interest or conviction receives its due. To do otherwise is to fail to treat others with the equal concern and respect to which they are entitled. So it is not only possible for a compromise to be fair; sometimes fairness itself would seem to demand compromise.[1]

Why, then, should there be anything puzzling in the idea of fair compromise? Suppose that *A* and *B* register claims that conflict or compete in a way that requires resolution. *A* and *B* might, for example, be competing claimants to a good and might have different views on how the good should be divided between them. Suppose too that the objectively fair resolution of their competing claims is an equal division of the good between them. Suppose finally that *A* and *B*, through deliberation and reflection, come to appreciate that dividing the good equally between them would indeed be fair and they therefore settle upon that equal division. Have they arrived at a fair compromise? There is reason deny that they have, since *A* and *B* no longer disagree. They began with conflicting views on how the resource should be divided between them but have come to adopt the same view, so that the conflict that generated the need for compromise has disappeared.

Agreement on what the fair outcome would be does not, however, remove every form of conflict that creates a need, prima facie, for compromise. Suppose that *A* and *B*, rather than having different views on how a good ought to be divided between them, simply have different and conflicting preferences in relation to a good. They might, for example, have different and conflicting preferences about the evening's television programmes they wish to see on their jointly owned television set. Assume that the fair resolution of their conflict is that each should be able to view his or her preferred programmes for half of the evening and that *A* and *B* themselves embrace that arrangement. Here a fair resolution has not removed conflict. *A*'s and *B*'s television preferences remain different and conflicting: the fair arrangement has dealt with their conflict without erasing it.

Here we run into a different objection to the idea of fair compromise. If a fair outcome to a conflict is available, should we conceive it as properly a matter of compromise at all? In reaching a compromise, the compromising parties have discretion over the agreement they reach; but can it be morally acceptable that they should be at liberty to agree on any but a fair outcome, supposing that one is available? People should be fair to others and they should not treat that 'should' as a matter of choice. That is not to say, of course, that the availability of a fair resolution will remove the need for compromise in reality. People do not always do what they ought to do and they may need to be induced to compromise on matters that ought not to require their compromise. But, from a moral point of view, the availability of a fair resolution would seem to make compromise redundant. So even when a fair arrangement does not erase conflict, it may still seem to pre-empt compromise.

Consider too the attitudes appropriate to fairness and compromise. In a compromise, each party makes concessions that he would prefer not to make. Each would prefer that his initial claims could be met in full, but each makes concessions to the other as the price he has to pay to secure a resolution of the conflict. The parties to a compromise must have something to gain from it, if only peaceful coexistence, since otherwise they would not be induced to compromise. It is the prospect of that gain that induces them to compromise; but, in compromising, each still pays a price for the gain that he would prefer not pay. In that respect, compromising entails regret. But suppose now that a fair resolution to the conflict is available. If that outcome really is fair, it seems quite inappropriate that each party should view it with regret. It seems equally inappropriate that each party should regard the fair outcome as a matter of concession. If a fair outcome is available, we should rush to embrace it rather than accept it with grudging reluctance.

Consider, for example, how Rawls's citizens stand in relation to justice as fairness (Rawls, 1993, 2001). The citizens of his liberal society have different and conflicting conceptions of the good stemming from their different and conflicting, but reasonable, comprehensive doctrines. Rawls presents us with a political conception of justice that is appropriate for the basic structure of a society marked by that pluralism. A major feature of that political conception is that, as far as possible, citizens should not use political power to favour their own conception of the good or to disadvantage the reasonable conceptions of others. Such partisan use of political power would be unfair.

How would Rawls's citizens view the requirements of justice? They might conceive them as the product of a grand compromise. Each would like to use political power to advance his own conception of the good to the maximum possible extent and to suppress conceptions of which he disapproves. The trouble is that every other citizen would like to do the same. So the best deal they can secure amongst themselves is one that allows none of them to use political power for that purpose. That is certainly the way in which the parties in the original position would think, since they seek to gain the maximum advantage for those they represent, even though they are constrained in their endeavours by the veil of ignorance. But the fictional parties in the original position are not Rawlsian citizens. The original position is merely a 'device of representation' for working out what justice requires. Good Rawlsian citizens will not conceive the principles of justice as the outcome of a bargain, nor will they comply with them in a spirit of compromise. They will want to be just, simply because just is what they ought to be. Even if they could depart from the constraints of justice with impunity, they would not do so, since they are committed to the principles of justice as principles of right conduct. Thus, Rawlsian citizens will not see the justice of their just society as a manifestation of compromise.[2]

The question of how fairness relates to compromise is also part of a much larger question concerning the relation between compromise and morality in general. Why are compromises necessary? A possible answer is: because morality is often not up to the job. There are some conflicts for which morality does not provide and for which, in the absence of a 'right answer', compromise is our best option.

Alternatively, the problem may be that morality, rather than providing us with no answer, yields too many. People may believe there is a right answer, but may have quite different views of what the right answer is; in that case the 'right answer' will simply compound the problem rather than solve it. Compromise may therefore be a response to moral disagreement, reasonable or unreasonable, rather than a way of filling a moral 'hole'. Either way, the project of subjecting compromises to moral scrutiny will seem misplaced. In one case, there is no moral norm we can use for scrutiny, and, in the other, it is the very absence of an agreed norm that makes compromise necessary. The more sceptical we are about the capacity of morality to yield agreed answers or any answers at all, the more we shall find a role for compromise. Perhaps, then, compromises belong to a morality-free zone, so that

there is a problem about subjecting them not only to a test of fairness, but to any sort of moral test.

In examining these issues, we begin by analysing what a compromise is. We go on to consider Simon May's distinction between pragmatic and principled compromise and indicate that fair compromise is not wholly congruent with either type of compromise. We divide the fairness relevant to compromise into two sorts: procedural fairness and end-state fairness. There is nothing problematic about the conjunction of compromises and pure procedural fairness, but there is something prima facie puzzling about the conjunction of compromises and end-state fairness. We attempt to remove that puzzle by showing how a compromise can be substantively fair and yet still retain the defining features of compromise. We also explain why a legitimate compromise need not be fair, and we identify reasons why the parties to a potential compromise should have the freedom to compromise, even when the competition between the parties' claims is governed by a principle of fairness that indicates the right outcome independently of their compromise. Finally, we consider how the distinction between ideal and non-ideal theory bears on the relationship between compromise and fairness and argue that, while compromises can have a role in non-ideal circumstances, there is no reason to exclude compromises from the domain of ideal theory.

1. What is a compromise?

In tackling the relationship between compromise and fairness, an obvious first step is to examine what a compromise is. What, then, are the essential features of a compromise?

(a) *Two or more parties*

A compromise has to be made between two or more parties. The parties can be individual persons, groups, associations, or institutions. That simple condition is not entirely uncontroversial since we sometimes speak of compromise as if it were intrapersonal. For example, if *X* sacrifices his principles to his ambition, he might be said to have 'compromised' his principles, in which case he will have compromised himself. 'Compromise' might also be used to describe trade-offs of values of the sort that value-pluralists believe inescapable, even though the relevant conflict is amongst

values rather than valuers (cf. Benjamin, 1990). We treat these intrapersonal or impersonal notions of compromise as figurative and parasitic upon the standard notion of compromise as an inter-personal or inter-party matter.

(b) *Conflict*

There has to be conflict of some sort between the parties. If there is no conflict, there can be no occasion for compromise. The conflict can be grounded in different preferences, interests, principles, beliefs or judgements. Those differences in types of conflict do not affect whether something is a compromise, though they may be relevant to our thinking on the appropriateness of compromise.

(c) *Engaged in by the parties themselves or by their representatives*

A compromise is something reached by those who are party to it, or by others who are empowered to act as their representatives. A compromise is not a solution imposed by a third party. When a third party divides the spoils between two conflicting parties and imposes that division upon them, people sometimes describe that as an 'imposed compromise'. But that usage departs from the ordinary idea of compromise.[3] A third party might 'mediate' in a compromise, but their mediation does not replace the need for the compromise to be agreed upon by those who are party to it.

The case of arbitration is slightly more complicated. Arbitration is often included within the scope of compromise and sometimes the reason given is that arbitrators are inclined to split the difference between those amongst whom they arbitrate (e.g. Golding, 1979: 20-1). But that is not reason to treat arbitration as compromise; an arbitrator's decision is unilateral rather than a bilateral or multilateral agreement. However, if the conflicting parties *agree* to arbitration, their agreement can amount to a compromise, just as agreeing to resolve a dispute by the toss of a coin can be a compromise. The agreement of the parties remains crucial here: if arbitration is forced upon the parties, it does not constitute compromise – at least, not for the conflicting parties. And if the arbitrator decides to give all that is at stake to one party and none to other, the parties' prior agreement to accept his arbitration does not cease to be a compromise. Incidentally, the possibility that parties can compromise by agreeing to arbitration, or to decision by a random process, means that compromise solutions are possible even when the good at stake is indivisible (Benjamin, 1990: 6-7).

(d) *All parties make concessions*

A compromise has to be a two-sided or multi-sided deal. It is a compromise only if both, or all, parties give ground. Capitulation can be unilateral but compromise cannot. The concessions made by the parties do not have to be equal and that raises the awkward question of just how asymmetrical a compromise can be and remain a compromise. If a deal is within a smidgen of complete capitulation by one party, should we still deem it a compromise? But, setting aside that marginal case, it is essential to the idea of a compromise that all parties to it make concessions.

(e) *Process*

Compromising normally involves some sort of process. This may take the form of protracted discussion or negotiation, or it may be little short of instantaneous ('You want x; I want y. Why don't we split the difference?' 'OK, it's a deal.'). But some sort of process is implied in a compromise's being reached by the compromisers themselves.

(f) *A compromise is agreed to*

A compromise is something that the parties 'make' or 'agree to' or 'enter into'. To be a party to a compromise is to have entered into, and to have assumed, a commitment. In that respect, compromises are like promises. Indeed, J. Patrick Dobel (1990: 3, 35) describes them as 'co-promises'. Thus, the reason for adhering to a compromise, like the reason for keeping a promise, is not reducible to the reasons for making it. That is important since people are sometimes inclined to think of a compromise as a mere balance of advantage, which each party has reason to adhere to only so long as they continue to find it advantageous. But agreeing to a compromise, like making a promise, involves entering into an undertaking and the obligation to adhere to that undertaking provides an 'exclusionary reason' for adhering to it. That exclusionary reason is not reducible to, nor should it be subordinated to, the sort of on-balance calculation of advantage that might reasonably determine whether someone should enter into a compromise in the first instance.[4]

These, then, we take to be the defining features of compromise. Some analysts agree with Benditt in distinguishing compromises from bargains (e.g. Coons, 1979: 191-2;

Lister, 2007: 17-18), but that distinction is not easy to maintain if we keep faith with ordinary usage. For instance, if an employer and a trade union engage in bargaining over wages and conditions, it would be quite normal to describe the result of their negotiations as a compromise even though it is entirely a product of bargaining. The very idea of 'negotiating' a compromise implies an element of bargaining. In ordinary usage the terms 'bargain' and 'compromise' are overlapping rather than either co-extensive or mutually exclusive. Entering a shop and buying a bar of chocolate for a fixed price involves a bargain between purchaser and seller, but we would not normally describe it as a compromise. Conversely, if the parties to a conflict seek a fair accommodation of their different wishes and deliberate, rather than negotiate, their way to an outcome, we would be more inclined to describe the outcome as a compromise than a bargain. Here we simply bracket the question of how compromises relate to bargains.

2. Pragmatic and principled compromise

When we move from what a compromise is to the different forms it might take, it is useful to follow Simon May's lead in distinguishing between principled and pragmatic compromises (May, 2005). A pragmatic compromise is wholly goal-based in nature. In a pragmatic compromise, people compromise to achieve a goal and in compromising they concede as much as they need, but only as much as they need, to secure the goal. A pragmatic compromise is therefore wholly instrumental and strategic in nature. Compromising involves making sacrifices and the parties will aim to keep their sacrifices to the minimum necessary to secure the compromise that will promote their goal.[5]

A principled compromise, by contrast, is driven by principle. We compromise in a principled way when we act on the belief that we owe it to others to concede something to their position. Suppose, for example, that we are parties to a disagreement with others but our disagreement is 'reasonable'; each has reason to recognise the reasonableness of the claims of others even though he disagrees with them. In that case, it may be incumbent upon us, as a matter of principle, to enter into a compromise with our disputants. Our compromise will be neither instrumental nor goal-based in motivation; rather it will reflect our acceptance that, in the given circumstances, compromising with others is the intrinsically right thing to do. Several

theorists, for example, have suggested that conflicts over abortion can be, and ought to be, resolved by compromises that take this principled form.[6]

The distinction between principled and pragmatic compromise is not a distinction between morally motivated and non-morally motivated compromise. Consider two warring states who are contemplating compromising with one another in order to put an end to their conflict. The representatives of those states may be under a weighty moral imperative to pursue peace, given the bloodshed and human suffering that continued war will entail. Even so, the compromise through which they pursue the goal can remain wholly pragmatic. The goal may be morally urgent, and the state representatives may conceive it as morally urgent, but, in so far as nothing but the goal motivates their compromise, each still has reason to behave in a wholly strategic way: each has reason to concede only as much as he needs to achieve the compromise. Hence, the fact that a compromise is a self-conscious instrument of a morally worthy and important goal does not, on its own, transform it from a pragmatic to a principled compromise.

Our concern is with fair compromise and that sort of compromise may seem to be subsumed by the more general idea of principled compromise. In fact, fair compromise, as we shall use that idea, is not wholly congruent with either sort of compromise. It clearly differs from pragmatic compromise in that the fairness of a compromise is not a function of the goal pursued through the compromise or of the strategic minimum each party has to concede to secure the compromise. But neither is it wholly subsumed by the idea of principled compromise. As May uses that term, it describes the *reason* for compromising – there is a principled reason, rather than a goal-based reason, for entering into a compromise with others. By contrast, logically, principle need play no part in generating a fair compromise. For example, two parties who have roughly equal bargaining strengths and equal interests in a conflict are likely to arrive at a compromise that divides the spoils equally between them. That equal division may be precisely what fairness demands, so that their compromise is fair. But, as this example illustrates, neither party to a fair compromise need have been motivated by considerations of fairness in reaching the compromise; each may have aimed only to maximise his own advantage.

However, while that is a logical possibility, it is one that is likely to occur only under very special conditions, such as those that characterise the example we have given. If the parties approach a compromise as an exercise in pure bargaining, the

outcome will reflect their relative bargaining strengths and, if there is anything fair about the outcome, that will be a matter of pure chance. Generally, only those who seek a fair compromise will actually light upon one. In reality therefore, a fair compromise is more likely to emerge if the parties allow themselves to be guided by a principle of fairness in the compromising process. That brings the idea of fair compromise closer to May's idea of principled compromise since, if a principle such as fairness provides the reason for *entering* a compromise, it will also normally provide reason for aiming for a *particular sort* of compromise – one that is fair. However, the two ideas are still not wholly aligned. May's principled compromise excludes goal-based compromise but fair compromise does not – provided that 'goal-based' describes the parties' reason for seeking a compromise rather than the manner in which they compromise. The parties may set about compromising for entirely goal-based reasons, but still be concerned that their goal-directed compromise should be fair to all who are party to it.

Before moving on from the idea of principled compromise, we might note that principles can provide the subject-matter of compromise. That is, the conflict that creates a potential for compromise may be one that arises from the parties' possessing different and conflicting principles. When a conflict of principles arises, it is possible that there might be another principle, or 'meta-principle', that should govern its resolution (although, as we indicate below, that cannot be taken for granted), in which case there will be scope for principled compromise of principled conflict. But it is also possible that a compromise of principles will be motivated and justified by a goal. When people find reason to compromise on matters of principle, their reason is very commonly that the compromise promotes a goal whose importance justifies the sacrifice of principle.[7]

However, a principled compromise does not have to be a compromise of principles. If two parties have conflicting interests or preferences, there can also be a principled way of resolving that conflict. Indeed, if we take the idea of fair compromise, that idea applies much more readily to conflicts of interest or preference than to conflicts of principle, since promoting interests and satisfying preferences benefit those whose interests and preferences they are, whereas complying with a principle does not, in a similarly straightforward way, benefit the holders of the principle or disadvantage those who reject it.[8]

3. Compromise and two types of fairness

The idea of fair compromise brings with it the issues that we outlined at the start of this paper. If compromising can be a way of securing a fair arrangement, why should that arrangement be contingent upon compromise at all; and, if people merely comply with what fairness requires, should they – and should we – conceive their compliance as an act of compromise?

In tackling those questions, we need first to consider in virtue of what a compromise might be fair or unfair. Compromising yields an outcome – the compromise that the parties settle upon – and we can examine whether that outcome is fair. We can look, for example, at how the sacrifices and gains are distributed amongst the compromising parties and consider whether that distribution is fair. We might describe the relevant fairness here as 'end-state fairness'. But compromising also involves a process – a process of bargaining, negotiation or deliberation – and we might scrutinise the fairness of that process, independently of its outcome. We are then concerned with 'procedural fairness', a fairness that concerns how the compromise was arrived at rather than what the compromise is.

4. Compromise and procedural fairness

Can a compromise be fair in virtue of the procedure by which it is reached, rather than in virtue of its content considered independently of that procedure? If it can, we can make sense of why the fairness secured by a compromise must be secured by way of compromise. Without the parties undertaking the process of compromising, we shall have no way of knowing whether the relevant outcome is or is not fair, since the fairness of an outcome will depend entirely upon the fairness of the process by which it has been generated. We cannot short-circuit things, avoid the process of compromising, and go straight to a fair outcome, since a compromise will be fair only in virtue of its being the outcome of a fair process.

Rawls (1999a: 74-77) describes fairness of this wholly procedural sort as 'pure procedural justice', though we shall use the term 'pure procedural fairness'. A lottery provides a clear example of this sort of fairness. Assume that a lottery is conducted

fairly and Smith wins the prize. There is no way in which we could identify Smith's receiving the prize as the fair outcome independently, or in advance, of the lottery's being conducted. Smith's receiving the prize is fair only because it is the outcome of a procedure that has been conducted fairly.

Analogously, we might imagine ourselves specifying conditions that govern the relative starting points of the parties to the negotiations, the kinds of pressures they can and cannot legitimately bring to bear upon the process, the types of information they should be required to divulge and the types they can legitimately keep to themselves, and so on. We might conceive these as the conditions of pure procedural fairness, such that any compromise that emerges from the procedure can be deemed fair merely in virtue of its emerging from the procedure. If that is what we understand a fair compromise to be, there will be nothing puzzling about its being both 'fair' and a 'compromise'.

But we might also conceive the fairness of a procedure in a quite different way. We might describe a procedure as fair in virtue of its propensity to yield outcomes whose fairness we can identify independently of the procedure. We know what are fair outcomes and we judge a procedure to be fair or unfair in virtue of its record, or its probability, of producing those outcomes. Rawls describes this sort of procedural fairness as 'perfect' or 'imperfect' procedural justice (1999a: 74-75). It is 'perfect' if the procedure is guaranteed to yield just outcomes and 'imperfect' if it is not. If, for example, justice demands that each of a number of people receives an equal share of a cake, requiring the person who cuts the cake to take the last slice is a good candidate for perfect procedural justice. The procedure used in a criminal trial exemplifies imperfect procedural justice. We know independently of the judicial procedure what justice demands – the conviction of the guilty and the acquittal of the innocent – and we design the procedure so that it will be likely to secure those outcomes. But we also know that, however well we design the procedure, it will not always deliver the right outcome; it therefore exemplifies imperfect procedural justice. We shall describe the sort of fairness that Rawls calls perfect or imperfect justice as 'end-state procedural fairness', since it identifies a procedure as fair in virtue of its propensity to produce an end-state that is fair and an end-state whose fairness is identifiable independently of the procedure.

We observed a moment ago that, if by a 'fair compromise' we mean only one that is yielded by pure procedural fairness, there is nothing puzzling about its being

both ‘fair’ and a ‘compromise’. However, the position is not similarly straightforward if the procedural fairness we invoke is end-state procedural fairness. That sort of procedural fairness implies that we can know what a fair end-state would be, and therefore what a substantively fair compromise would be, independently of the procedure that yields it. It also implies that we can assess the procedure as fair or unfair only if and because we know what the fair outcome would be. This sort of procedural fairness therefore returns us to the issue of why, if an outcome can be substantively fair, it should also be the object of a compromise. Moreover, that issue is not fundamentally one of procedural fairness at all; it turns on the idea of end-state fairness. So, to examine it, we need to investigate how an outcome can be appraised as substantively, rather than merely procedurally, fair and yet still be properly subject to compromise. Before turning to that question, two other points concerning procedural fairness are worth noting.

First, end-state procedural fairness can morph into pure procedural fairness. In constructing a procedure, we may be guided by an end-state conception of fairness but, once the procedure is up and running, we may begin to conceive its outcomes as fair simply because they are outcomes of that procedure. In other words, while we begin by conceiving the procedure in terms of end-state fairness, we eventually shift to conceiving it in terms of pure procedural fairness. The way we often speak of a ‘fair trial’ exemplifies that shift. In constructing procedures for a criminal trial, we should be guided by what processes will most effectively detect guilt and innocence. But, once the procedure is in operation, we typically mean by a ‘fair trial’ one that has complied with all the requirements of due process and not necessarily one that has delivered a correct verdict. Someone can receive a ‘fair trial’ and yet still be wrongly convicted. A possible reason for this shift is that, although we know that the accused must be, as a matter of fact, guilty or innocent, we normally have no way of determining that matter of fact separately from the trial process itself. In a fashion similar to our thinking on a fair trial, our conception of a fair procedure for making compromises may be geared initially to our thinking about what sorts of outcome (end-state) would be fair. But once we have worked out what the rules should be and have a general procedure in place, we may come to think of particular compromises as fair merely in virtue of their being outcomes of that procedure.

Secondly, a purely procedural approach to fair compromise seems to imply bargaining and negotiation rather than deliberation. People can bargain and negotiate

under fair conditions, so that their eventual compromise can intelligibly count as fair because it has been arrived at under those fair conditions. But if the parties pursue their compromise through deliberation rather than bargaining or negotiation, and if their deliberations are about what would constitute a fair resolution of their differences, they will be deliberating about what would be the fair end-state. So, if the parties deliberate rather than bargain their way to a fair compromise, they cannot suppose that pure procedural fairness is the only sort of fairness at stake in their compromise.

5. Compromise and end-state fairness

In examining the relationship between compromise and end-state fairness, we begin by examining how it is that a legitimate compromise can be fair and yet still a compromise, and also how it can be unfair and yet still a legitimate compromise. In the next section, we consider what it is that might justify this state of affairs.

To say that an issue is properly subject to compromise is to say that, as a matter of fact, it is one on which two or more parties present conflicting claims. It is also to say that, as a matter of right, it is up to the parties themselves, or their representatives, to settle their conflict. That is consistent with the parties' using the services of a mediator, but the outcome will be a compromise only if it proves acceptable to both or all of the parties and only if they agree to it. Once they agree to a compromise, they have an obligation to comply with it for that reason. The legitimacy or validity of a compromise is therefore distinct from its end-state fairness. A compromise is legitimate or valid if and because the parties have consented to it, so that the obligation to adhere to the compromise derives, at least in the first instance, from the way it has come about rather than from its content.

The distinction between procedural and end-state fairness remains significant for the relationship between the legitimacy and the fairness of a compromise. The fairness of the process through which a compromise is reached may well affect its validity, particularly if it has been unfair in a way that calls into question the authenticity of the consent given by one or more of the parties. If, for example, one party has used trickery or deception to fool the other into entering into a compromise that is not the compromise he believed himself to be entering, we may hold that the wronged party is freed from the normal obligation of compliance. The sort of fraught

circumstances in which the need for compromise can arise may give us reason not to be overly demanding in specifying the procedural fairness that is necessary for a compromise to be valid. But, in general terms, it is easy to see how procedural unfairness, especially unfairness that affects the authenticity of the parties' consent, might undermine a compromise's legitimacy.

The same is not true of end-state fairness. As we have emphasised, a compromise is something that the parties enter into and agree to. In so doing, they assume an obligation to one another of the sort they would incur were they to promise or to give some other form of undertaking. The obligation they incur constitutes an exclusionary reason to abide by the compromise, so that the parties' reason to comply with it is not wholly contingent upon their subsequent view of its substantive fairness, even if they judge it, and judge it correctly, to be substantively unfair. The legitimacy of a compromise depends upon the parties' consenting to it; its end-state fairness, or unfairness, concerns its content and provides a test separate from that of consent.

Thus, if we hold that a conflict is properly subject to compromise, so that the agreement of the parties to the conflict is a necessary condition of its being properly resolved, a fair end-state resolution will not suffice. A third party might, for example, impose a substantively fair resolution upon the conflicting parties but, in the absence of the parties' own consent, the fairness of the resolution will not suffice; the consent of the parties themselves remains necessary if the resolution is to obligate them. For the same reason, if the parties strike a deal that is recognisably fair, the fairness of the deal does not make it something other than a compromise; it is still a compromise in that it is the parties' agreement that makes it a binding deal for them. The separateness of consent and end-state fairness also makes it possible for end-state fairness not to be a necessary condition of compromise's legitimacy; a compromise can be substantively unfair and yet still be valid and obligatory as a compromise.

Can the fact that *A* and *B* are in disagreement alter what is substantively fair and make their compromise determinative of what is substantively fair? Suppose, for example, that *A* and *B* are in conflict over how a good should be divided between them. Each believes he should receive 75% and the other 25%. Looked at objectively, the fair outcome is that A should receive 75% and B 25%. That objective assessment might be based, for example, on our assessment of what each has contributed to producing the good and our discovery that A has contributed three times as much as *B*. Can the fact that *B believes* he should receive 75% and enters the

compromising process *demanding* 75% alter the standing of *A*'s and *B*'s claims, so that dividing the good equally between them becomes the substantively fair outcome? Or perhaps, rather than altering the fair outcome, the way in which *A* and *B* disagree creates a different sort of fair outcome that is somehow additional to, rather than a substitute for, the objectively fair outcome. It is very hard to see why we should accept either of these possibilities. Allowing that *B*'s false belief about his fair share might alter what his fair share actually is would be rather like allowing that his false belief might alter what is actually true. Notice however that, even if we were to allow either of these possibilities, the substantive fairness of the outcome would remain logically independent of the outcome agreed upon by the parties. We alter our thinking on what is the fair outcome in light of the fact that *A* and *B* each believes he should receive 75% and we go on to conclude that, in these circumstances, 50% each becomes a fair outcome. We then have a new standard for judging the fairness of the distribution between A and B, but that standard is still grounded independently of whatever A and B themselves actually agree upon. In other words, the end-state fairness of a compromise remains contingently related to its being a compromise, and its being a compromise does not pre-empt the issue of its end-state fairness.

Is end-state fairness, then, of no relevance to the obligation to adhere to a compromise? We need not hold that it can never be relevant. We might think that a point could come at which a compromise was *so* substantively unfair, that it lost obligatory force. In conformity with this thought, British contract law requires the terms of a contract to fall within certain outer limits of fairness relating to the substance of the contract as well as to the circumstances in which it was agreed (Office of Fair Trading 2008). Insofar as a contract fails to meet those standards, a court will not recognise and uphold it. In a similar fashion, the exclusionary reason to adhere to a compromise created by the parties' agreement need not exclude every sort of reason to the contrary. But, even if we allow that extraordinarily that may be so, ordinarily the parties will be bound by their compromise in virtue of having entered into it rather than because of its content.

Can a compromise's end-state fairness *add* to our reason for complying with it? If we always have reason, at least *pro tanto*, to be fair, the answer must be yes. But, given that the obligation to comply with a compromise derives, in the first instance, from the parties' agreement to it, any additional reason supplied by substantive fairness will normally mean only that the obligation to comply is morally

overdetermined. The one case in which the substantive fairness of a compromise could make a critical difference is when a reason arises that argues for defection from the compromise. Then, in calculating whether, all things considered, we should defect, the compromise's substantive fairness (or unfairness) might make a critical difference.

So far we have considered what difference, if any, end-state fairness might make once a compromise is in place. But how should end-state fairness bear on the compromising process? Should it not motivate the compromising parties? We should note to begin with that the obligatoriness of a compromise, like the obligatoriness of a promise, is unaffected by the motivation of the parties to it; their obligation to comply derives from their having agreed to the compromise rather than from their having agreed to it for a particular sort of reason. A major exception to that general truth would arise if their reason somehow affected the authenticity of the parties' consent; if, for example, they were acting under the kind of duress that would invalidate their consent

That gives rise to a second consideration: would anyone genuinely consent to a compromise that was substantively unfair? It is easy to see why they would if the unfairness went in their favour, but suppose it went against them. Even in that case, the pay-off the party expects to gain from the compromise may make the unfairness a price worth paying and therefore a price worthy of their consent. Indeed, it would not be surprising if both parties to a compromise believed that their claim had received less than its due in the compromise; both, even so, might genuinely consent to the compromise because, for both, the anticipated benefit makes the perceived unfairness tolerable.

However, those two points do not entirely dispose of the puzzle with which we began this article. If we always have moral reason to be fair, that would seem to imply that the parties in reaching a compromise should aim for end-state fairness – assuming that there is an end-state fairness for which they can aim. But if they have that obligation to be fair, the idea of 'fair compromise' may once again seem paradoxical: how can the parties have an obligation to treat one another fairly, and yet still have the moral freedom to enter into a compromise that is less than fair to the other party? That apparent paradox is a common enough phenomenon when we extend domains of freedom to people. A right can include a right to do wrong (Jones, 1994: 204-5). If we give people the right to a significant area of freedom, we may

disapprove of the use they make of it yet still accept that they have a right to use it in that way. For instance, others may criticise me for living the life of a couch potato rather than developing my talents, and yet still accept that my life is mine and that I have the right to live it as I choose. That is why someone's having a right does not render them immune from criticism for the use they make of it. Similarly, the parties to a compromise may be entitled to settle on whatever terms they find acceptable, but they may still have moral reason to exercise that entitlement in one way rather than another. We can consistently therefore accept that a particular compromise is legitimate and a source of obligation for those who are party to it, but still judge it to be unfair and criticise it for its unfairness.

Earlier, we noted that it is logically possible for a compromise to be substantively fair even though the compromising parties had arrived at it through pure bargaining and with no eye to fairness. We also noted that, in reality, a substantively fair compromise is much more likely to emerge if the parties aim for one. For that reason, a substantively fair compromise is more likely to arise if the compromising process takes the form of deliberation rather than bargaining. Suppose that the parties do engage in deliberation with the intention of arriving at a fair outcome and, through deliberation, come to settle upon a fair outcome. Have they not then substituted consensus for compromise? The answer depends upon the sort of right outcome they have agreed upon.

If *A* and *B* begin with conflicting claims, deliberate about their claims, and eventually reach a consensus that dissolves their conflict, the occasion for compromise will have disappeared. In the course of the deliberation, *A* and *B* have found reason to revise their claims until they reached a point at which their claims ceased to be conflicting. In that case, what has gone on during the deliberative process should be described as 'correction' rather than compromise; each has corrected his original position to a point at which the two positions cease to be different (May, 2005: 318-319). They might, for example, have been in dispute about the right policy, but their deliberation might have been a process of moral learning in which they eventually came to see the same policy as right.

But suppose now that *A* and *B* start out with conflicting claims, deliberate about the fair resolution of their conflict, and come to agree upon what a fair resolution to their conflicting claims would be. That is a different matter. In that case, they have retained their conflicting claims; all they have agreed upon is the fair

resolution of their conflict; their agreement leaves the conditions for compromise intact. As before, a process of moral learning may have taken place, but this time what *A* and *B* have learned has not dispelled their conflicting claims but only how they might be dealt with fairly. So it is possible for *A* and *B* to deliberate their way to a fair outcome and yet still engage in compromise once they have identified what the fair outcome is.

6. Why compromise?

What justifies the practice of compromise? The answer could be that, on many occasions, fairness fails to indicate a right outcome or is itself in dispute, so that compromise is the only practical option. We consider that possibility in the next section. Here we want to suppose, as in the previous section, that there is a principle of end-state fairness that should govern the parties' conflict, and to argue that there can still be reason to allow the parties themselves to resolve their conflict through compromise. We do not claim that the reasons we give constitute an exhaustive list.

First, compromises are but one form of agreement that people can enter into and their ability to make agreements with others, whether through compromises, promises, contracts, or other sorts of undertaking, is an important element of human freedom. A world in which people were bereft of any opportunity to enter into self-chosen compromise arrangements with others would be one in which their freedom was seriously impoverished. So, even if an impartial spectator could identify, and could correctly identify, a fair outcome to the competing claims of the parties, we would still have reason to allow those parties to settle the issue for themselves. To express the same point in other terms, we may deem some matters to be properly a person's own business, so that the settlement of those matters is not the business of others, no matter how well informed and correct the moral judgement of those others may be.

Secondly, there are some institutions or rights that we value that bring with them the possibility of compromise. If people are to enjoy a significant range of personal freedoms and if those are to include the freedom to enter into arrangements with others, it is hard to see how that freedom could exclude the freedom to enter into compromises. Similarly, if people are to enjoy meaningful property rights of any sort, it is hard to see how those rights could not include the freedom to enter into deals with

others. While this second defence of compromise is close to the first, it has a different logic: the appeal is not directly to the value of compromise as a freedom but to the value of rights and institutions of which opportunities for compromise will be inescapably a part.

Thirdly, we might defend compromises on grounds of efficiency or well-being. A resolution agreed to by the parties to a conflict may serve them better than a resolution imposed by a third party. Of course, we cannot know that that will always be so, but the issue here is close to that of whether people's well-being is better served by subjecting them to the paternalistic rule of others or by leaving them free to determine the course of their own lives. We may believe that we know better than the compromising parties what the best outcome would be and, on occasion, we may be correct in that belief, but we may also have reason to accept that, as a matter of general practice, efficiency and well-being are better served by leaving the parties to make their own arrangements rather than subjecting them to a third-party view. One reason why that might be so is that, for the compromising parties, more than fairness may be at stake; as we indicated previously, the 'losing' party in an unfair compromise may think the unfairness a price worth paying for the good he secures through the compromise.[9]

Fourthly, it will often be the case that more than one fair outcome is available. Consider two people who want to go on a fortnight's holiday together but who have different preferences about where they should go; one prefers France, the other Italy. Assume that the two people are of equal status and their preferences are equally intense. In that case, several possible compromises are open to them, none of which is obviously fairer than the others. They might go to France for one week and to Italy for the next, or they might go to France for one year's holiday and to Italy for the next, or, if they share a second preference for Spain, they might resolve to go there instead, or they might agree to settle on their holiday destination by tossing a coin – heads for Italy, tails for France. Here there is obvious reason, whether it be respect for the autonomy of the parties or concern for their well-being, to allow them to choose their own option.

Finally, there are cases in which the stability of an arrangement is a major consideration. For example, in establishing political arrangements for a divided society, such as Northern Ireland, it matters very much that both sections of the society should regard those arrangements as legitimate. Fair arrangements that

command no allegiance will be useless. What commends a compromise solution may be that the two sides will recognise and adhere to a solution only if it is one that they themselves, or their representatives, have negotiated and agreed to. That reasoning may seem merely prudential, but it need not be so entirely. Given the link between the legitimacy of a compromise and the consent of the parties, it may very well be that the parties have a greater *obligation*, as well as a greater inclination, to comply with a compromise to which they have consented than with a fair arrangement to which they have not (Zartman, 2008).

7. Compromise, the ideal and the non-ideal

Nothing in our analysis of the relationship between compromise and fairness has suggested that compromise should be associated with the non-ideal. On the contrary, we have given reasons to suppose that the practice of compromising can be part of a society's arrangements ideally conceived, even though it is not a practice guaranteed to yield fair outcomes. However, commentators on compromise often associate it with the non-ideal. Compromise is frequently conceived as a practice made necessary by the imperfections of human beings and the untidy and contingent nature of the circumstances in which they live.

The distinction between 'ideal' and 'non-ideal' theory is due to Rawls (1999a: 8, 212-217).[10] His distinction has been differently interpreted and has received much critical attention.[11] Here we use it to comment on the relationship between compromise and fairness, without attempting a definitive interpretation of Rawls's meaning or trying to render the distinction precise for all purposes.

For Rawls, when we engage in ideal theory, we consider what the basic structure of a society would be if it were fully just. In theorising on that question, we assume that all citizens of a just society would be fully compliant with its institutions and arrangements. Thus, one sort of issue Rawls consigns to non-ideal theory is non-compliance and how we should deal with it: 'what is the just way to answer injustice?' (Rawls, 1999a: 215). In domestic political life, non-ideal theory will address issues such as punishment and civil disobedience, and, in international political life, it will include just war theory and issues raised by the existence of unjust regimes.

If we were to apply this notion of the non-ideal to compromise, the thesis might be that compromise is necessary only because people fail to comply with the demands of fairness. However, in the previous section, we identified a number of justifications of the practice of compromise, none of which depended on people's non-compliance with fairness. That is not to deny that non-compliance may generate a need for compromise: coping as best we can with unjust people and unjust regimes may often require painful compromises. But there is no good reason to hold that the principal rationale for compromise lies in non-compliance.

Rawls also identifies a quite different sort of subject that belongs to non-ideal theory: 'how best to cope with the inevitable limitations and contingencies of human life' (1999a: 215). Here his meaning is less easy to discern, especially since ideal theory is supposed to take account of the normal circumstances and limitations of political life, even though under reasonably favourable conditions. The distinction between ideal and non-ideal theory is intended to mark a division of labour in our moral and political thinking; it is not meant to license unrealistic utopianism.

However, compromise is often associated with 'the inevitable limitations and contingencies of human life' and those who make most of the role of compromise in politics are often sceptical of the contribution general ideals and principles can, or should, make to political life (e.g. Bellamy, 1999). How does this looser and less censorious understanding of the non-ideal bear on the relationship between fairness and compromise?

One possibility is that circumstances will arise on which principles of fairness are silent or indeterminate. Indeed, it may be the very silence and indeterminacy of those principles that makes compromise necessary and appropriate. Consider, for example, two states that are in dispute over a piece of territory, such as Britain and Argentina over the Falkland Islands, or India and Pakistan over Kashmir. It may be that no clear principles exist for determining what would be a fair outcome of the dispute, or, it may be that, while states can offer relevant and plausible justifications for their competing claims, those justifications are incommensurable and of no help in determining a fair outcome. In these circumstances, if a compromise solution is reached, it will be substantively neutral with respect to fairness: neither fair nor unfair. It is no part of our purpose to argue that, for every compromise, there must be an identifiably fair outcome; our analysis entails only that some compromises can be tested for end-state fairness, not that all can. However, even when end-state fairness

is nowhere to be found, procedural fairness may have something to contribute to the compromising process.

Another possibility is that the circumstances calling for compromise arise, not because a relevant principle of fairness is unavailable, but because there is disagreement over what it is. If we return to the case of states in dispute over territory, it is very likely that each state will insist that it alone has rightful jurisdiction over the territory, while a mediator might propose a resolution to the dispute that divides the territory between them. If we are presented with those three conflicting views, it is tempting to suppose that fairness favours the mediator's view, since it divides the spoils between the claimants. But we cannot infer that. It may be that one state really is the sole rightful claimant to the territory, while the other has no justified claim in spite of its protests to the contrary. In that case, splitting the difference would treat the rightful claimant unfairly. Moreover, where end-state fairness itself is in dispute, there may be no 'second-order' or 'meta-' principle of end-state fairness to which the parties can retreat to resolve their dispute, nor one that somehow supersedes and makes redundant the first-order fairness that is in dispute.

If no second-level principle of end-state fairness is available to the parties, perhaps they can resort instead to pure procedural fairness. However, it is not at all clear that pure procedural fairness is appropriate to a dispute about end-state fairness, nor can we take for granted that procedural fairness will escape the dispute that afflicts end-state fairness. In the territorial dispute, for example, each state may well hold that its rival has no rightful place at the negotiating table and also that its entitlement to the territory should not even be subject to negotiation and compromise. So dispute about what is substantively fair may translate into dispute about what is procedurally fair and no agreed procedure may get off the ground. Again, it is no part of our purpose to deny that at various points the resources for resolving disputes provided by fairness may run out, so that we are reduced to pure pragmatism. We deny only that compromise either can or should arise only if and because the resources of fairness have been exhausted.

The case of disagreement illustrates the potentially controversial nature of the 'cut' between the ideal and the non-ideal. If we believe that a relevant standard of fairness is plainly apparent to the informed and impartial, and that disagreement arises only because some people fail to recognise it (perhaps because their moral view is distorted by their self interest), it will be appropriate to assign both the disagreement

and the resulting compromise to the non-ideal. If, on the other hand, the relevant standard of fairness is subject to 'reasonable' disagreement (perhaps because, like comprehensive doctrines and conceptions of the good, it is subject to Rawls's 'burdens of judgement'), both the disagreement and its resolution through compromise will be proper subjects for ideal theory.[12]

8. Conclusion

We began by asking whether a compromise can be fair. That may have seemed a strange question, since common sense would answer, 'of course'. We have not sought to depart from common sense. Indeed, we have indicated that there is more than one way in which a compromise can be fair. Rather the point of our opening question was to ask, if there is available an objective and discernibly fair outcome to competing claims, how can the actual outcome be rightfully contingent upon a compromise reached by the competing claimants. How can there be moral room for both the fairness we use to assess compromises and the discretionary freedom that is essential to the practice of compromising?

It is tempting to deal with this conundrum by separating the ideal from the non-ideal: ideally a personal or social arrangement would be fair but, because human beings and their circumstances are non-ideal, we have to settle for something less – a compromise arrangement. We have acknowledged that non-ideal circumstances can indeed create a need for compromise and that, either because there is no principle of fairness that covers those circumstances or because fairness is itself subject to dispute, it can be misplaced or beside the point to ask, is the compromise fair? However, we have resisted the claim that that need be the answer, or even the standard answer, to our question.

We have indicated that there is nothing puzzling about subjecting a compromise to a test of pure procedural fairness; compliance with pure procedural fairness, especially when it affects the authenticity of the compromisers' consent, may well be a condition of a compromise's being legitimate or valid. The real puzzle is how a conception of, and a commitment to, substantive or end-state fairness can be consistent with allowing a conflict covered by that conception to be resolved through compromise, assuming that a compromise entitles the parties to agree to any of a range of possible outcomes rather than only to an outcome that is fair. We have indicated how a compromise can be fair, and deliberately fair, and still be a

compromise. We have also indicated how a compromise can be unfair and yet be a legitimate, as well as a de facto, compromise – a compromise with which the parties are obligated to comply. Finally, we have suggested reasons why, even in ideal theory, we should find it acceptable that people should be able to compromise rather than simply bend to the demands of fairness.

Our analysis has therefore steered a middle course between the view that treats compromise as either bereft of, or a pragmatic substitute for, fairness, and the view that insists that a compromise worthy of the name must be characterised by end-state fairness. However, our analysis is not intended to be itself an exercise in compromise. Rather we have aimed for an analysis that provides the most coherent account of our ordinary thinking on compromise and fairness.

Notes

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1. For argument that fairness or justice requires compromise, see Bellamy, 1999: 93-114; Benjamin, 1990; Dobel 1990: 79-100; Kuflik, 1979; Lister, 2007; O'Flynn, 2006: 88-94; Resnick, 1979.

2. For argument that Rawls is mistaken in taking this view and that his notion of public reason should be conceived as a form of moral compromise, see Lister, 2007. See also Kuflik, 1979: 56-62.

3. For a different view, see Benjamin, 1990: 5; and Kuflik, 1979: 40.

4. On exclusionary reasons, see Raz, 1975. Raz has also described these as 'protected', 'peremptory' and 'pre-emptive' reasons (1979: 118; 1986: 37, 42). Exclusionary reasons need not be exclusionary without limit. For example, having promised to do x, I have an exclusionary reason to do x, which is qualitatively different from the on-balance reasons that would otherwise determine whether I should do x. But there can be a limit to the reasons that the exclusionary reason excludes, which is why there may be circumstances in which I could justifiably break the promise.

5. The goals sought by the parties to a compromise need not be the same. For example, two warring states may compromise to secure peace; one may do so in pursuit of an enduring peace and the benefits that an enduring peace will bring; but the other may do so only as a temporary expedient that will enable it to remarshal its troops, build up its weaponry, and go back to war with a better chance of victory.

6. See, for example, Bellamy, 1999: 112-3; Benjamin, 1990: 151-71; Gutmann and Thompson, 1996: 52-94; Sher, 1981. For the opposing view, see May, 2005. While May distinguishes between pragmatic and principled compromise, he repudiates the very idea of principled compromise and argues that moral compromise in political life is only ever justified for pragmatic reasons. Cohen-Almagor (2006) makes a similar, though not identical, distinction between 'principled' and 'tactical' compromise and, unlike May, is strongly supportive of principled compromise.

7. On this issue, see especially Benjamin 1990 and Margalit 2010.

8. Lister (2007: 18) holds that, for a compromise to be moral, both the conflict and its resolution have to be moral. But, if the point of describing a compromise as 'moral' is to say that it is morally justified or that it has been constructed on the basis of moral reasons, there is no reason why the conflict it addresses must be a conflict over what is morally right.

9. For a defence of the efficacy of the 'compromising mindset' in democratic government, especially as a counter to the 'uncompromising mindset' that tends to be promoted by democratic campaigning, see Gutmann and Thompson (2010).

10. See also Rawls, 1999a: 308-309; 1999b: *passim*; 2001: 13, 55-57, 65-66.

11. For critical discussions of the ideal/non-ideal distinction, see Farrelly, 2007; Mason, 2004; Simmons, 2010; Stemplowska, 2008; Swift, 2008; Ypi, 2010.

12. Rawls himself allows that indeterminacy and its resolution can figure in ideal theory. In relation to the legislative stage of his theory of justice, he observes, 'the question whether legislation is just or unjust, especially in connection with economic and social policies, is commonly subject to reasonable differences of opinion. In these cases judgement frequently depends upon speculative political and economic doctrines and upon social theory generally. Often the best that we can say of a law or policy is that it is at least not clearly unjust' (1999a, p. 174). We are grateful to one of *PPE*'s referees for drawing this passage to our attention.

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