

Compromise as Precise Justice*

John E. Coons†

My responsibility is to assist the principal paper¹ in defining compromise; I will confine myself to one major area—civil litigation. This is not my maiden voyage in these waters, and I will avoid needless repetition. Briefly summarized, the earlier work proposed fifty-fifty apportionments by courts in certain cases of indeterminacy of fact or value. The even split was said to follow from the common assumption of equality before the law. Given a balance of conflicting proof or of conflicting policies, an all-or-nothing judgment would seem to violate the equality principle.

That earlier work left the underlying conception of equality unexamined. Most of this paper will be devoted to filling that gap. At least a start can be made toward a new meaning for equality, a contribution which seems sorely needed. The final sections will briefly outline how viewing equality as here defined might help to clarify the notion of compromise as embodied in a system of apportioned civil justice.

I

LIMITING THE SCOPE

No definition of compromise would be “true,” but one could be more useful to our purpose than another. Ambiguous definitions can be functional; law, for example, employs paradox and riddle when they suit the goal of doing justice. Here, however, the aim is not to do justice but to understand a certain aspect of it in order that others may do it better; hence clarity is a principal objective.

For clarity's sake, then, let us limit the scope without sacrificing the essence. Two brief examples will help. First, a robber demands my hundred dollars; I tell him my troubles, and he settles for fifty. Second, Jones offers me a thousand dollars for my car, and I counter-offer to sell for two thousand; eventually we agree on a price between. These

* Reprinted from *Compromise in Ethics, Law, and Politics: Nomos XXI* edited by J. Roland Pennock and John W. Chapman, © 1979 by New York University, by permission of the publisher.

† Professor of Law, Boalt Hall School of Law, University of California, Berkeley. B.A. 1950, University of Minnesota; J.D. 1953, Northwestern University School of Law.

1. The principal paper referred to here is Golding, *The Nature of Compromise: A Preliminary Inquiry*, in *COMPROMISE IN ETHICS, LAW, AND POLITICS* 3 (J. Pennock & J. Chapman eds. 1979).

could be thought examples of compromise, but I exclude both. Each involves what is common to all possible definitions of compromise—the apportionment of some good or burden between persons. But such a concept is too broad. We must whittle the domain of apportionment to suit our purposes. Our primary interest is the relationship of compromise to justice; hence we eliminate the halfhearted robber whose “sharing” is scarcely an example of a just outcome. By contrast, the transaction with Jones achieves a just apportionment, but it too drops out, though for a different reason. It is but a common higgler, the maximizing of utilities under conditions of relative freedom. It is the everyday experience of markets, politics, statecraft, and personal relations. If compromise were to include every trade-off of one good for another, it would incorporate most of life and forfeit the power to distinguish. For the sake of parsimony we will limit the term to cases of conflict, and conflict of a certain variety—namely, those which involve incompatible claims of right.

The scope can be further narrowed. Suppose this variation of the previous example: Jones and I each claim to be the sole owner of the car. However, we reach a settlement; I keep the car and pay him half the value. Here are clashing claims of right, and common usage would view the outcome as a compromise. Once again, I exclude it. Though in itself a just outcome, the example teaches little about compromise as a form of justice. A free accord between adversaries yields but their private view of justice in the particular case; more, it is contingent upon their peculiar preference, circumstance, and necessity. Social science may someday derive a behavioral definition of compromise from such private settlements, but it will learn what phenomena to count only when noneempirical sources have provided a standard of relevance. The hope here is to move toward such a standard.² Bargained settlements thus are excluded not as irrelevant to a schema of compromise but as premature.

What is left are apportioned outcomes of conflict such as would be imposed by an authoritative third party—a judge or arbitrator. This is the world of jurisprudence, and its traditions place us under a healthy discipline. To simulate the role of judge not only sustains our concern for justice but also forces us to articulate reasons for chosen outcomes. It commits us to seek a view of compromise that is principled in the sense of being drawn from identifiable values. Here this will mean ar-

2. A splendid step in that direction is Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976). See also Coons, *Approaches to Court Imposed Compromise—The Uses of Doubt and Reason*, 58 NW. U.L. REV. 750 (1964). Aside from these efforts the idea of compromise has been largely neglected by Anglo-American jurisprudence.

guing for a certain view of human equality and inferring from it a system of decision.

Let us, then, begin with the following framework, which we will explain and defend. In private dispute resolution, compromise is a species of ordered justice inferable from the fact of human equality. Absent a relevant factor peculiar to one disputant, justice is governed by a presumption of equal desert, and an even apportionment is required. Likewise, where relevant distinctions exist, the degree of departure from an even apportionment must be justified by the distinctions; for example, a bare preponderance of evidence for A does not by itself justify an unapportioned award to A.

II

COMPROMISE AND EQUALITY

Mere equality cannot serve as a basis for deserving anything. Two stones may be indistinguishable, but a difference in their treatment triggers no presumption of injustice. To be important as a consideration of justice, equality must hold for some quality that is distinctly human and ethically relevant. In identifying that quality here there is no need to reinvent human ontology. It is sufficient to enlist the traditional Western view that at its core our identity is moral; if there be a distinctly human equality, it is one associated with the making of ethical choices. Borrowing from Jaspers, "The essential equality of all men resides solely in that depth where to each one freedom opens a way to approach God through his moral life"³ (Nor need it concern us here whether the object of the moral life is defined as God.)

One consequence of locating human equality in moral worth or dignity is that we part company with the determinist, for to deal in morality is to deal in liberty. I regret the separation, but if equality does not lie in effective moral parity—if it does not consist somehow in human freedom—I fear it will not be found at all.

The essential quality proposed as the ground of the presumption of apportionment is, then, equal moral desert. It is a feature of the experienced person—deep, subjective, essential, identifying—the real me, not the one you see. It is a quality not given but achieved—the formed character, not mere moral capacity. It is to be distinguished from what one "deserves" superficially in the external order such as reward or punishment for particular choices or acts; desert in such cases is the judgment of an exterior event in an exterior forum. To

3. K. JASPERS, *DER PHILOSOPHISCHE GLAUBE* 56 (1948), as translated in Spiegelberg, *Equality in Existentialism*, *NOMOS* IX 193, 194 (1967).

borrow from the language of the law, such a forum lacks jurisdiction of the person. The world does not judge character; it judges acts.

This claim of the moral parity of all persons, like every egalitarian assertion, must confront the contradictions of experience. It may be that (like stones and bees) we human beings share certain qualities, but we also differ from one another in such a multitude of important ways as to make any claim of fundamental equality seem on its face fatuous. In fact, some human beings more resemble stones and bees than the norm of their own species. *Prima facie* there seems no reason of justice to forbid our treating such creatures as members of an inferior order of nature.

This is a primary hurdle for any theory of justice (at least any based in equality), and the problem is not limited to cases of extreme difference among human beings. Within the range of "normality" there are many differences that may justly be considered in distributing benefits and burdens. John and Mary are equally intelligent, but Mary can run faster, excels in mathematics, and has a prison record, while John speaks better French, is ten years older, and has a low income. Equality seems to fail as a description of our experience of one another; in turn, it fails as a basis for equal treatment. This has been the besetting weakness of egalitarian theories; equality exists only as aspiration, and then only among particular human beings. There is no equality even of the aspiration of equality.

Is equality of moral desert also but a yearning peculiar to a certain culture or personality type? At first it would appear so. No voluntarist holds that people are in fact equally "good"; how could such a view consist with liberty? Our philosophies, culture, and history emphasize that virtue and depravity are alternate possibilities for Everyman. Societies, past and present, have passed judgment upon individual character, drawing inferences from behavior, genealogy, caste, and religion. Character, like blindness and age, has been a common juridical classification for rewards and penalties. It thus seems as flimsy a basis for equality as any other.

Rawls would solve this problem by locating equality in the mere *capacity* for moral choice, ignoring the manner of its exercise: "The capacity for moral personality is a sufficient condition for being entitled to equal justice."⁴ This view, which is an appealing assumption for a philosophy concerned essentially with distributive justice, is problematic if applied to conflicts between individuals. We can agree with Jaspers, as with Rawls, that moral capacity is "an essential equality of men"; the trouble is that capacity seems no basis for one's deserving

4. J. RAWLS, *A THEORY OF JUSTICE* 19, 505-12 (1972).

anything beyond the *opportunity* to make ethical choices. It does not clarify dyadic conflict; there the issue is not the general opportunity to choose among options but special rights to be enjoyed exclusively by one person. In conflict situations one party does not become more deserving than the other to enjoy a particular good, say an automobile, simply by *having* the potential for moral activity, but only by its exercise. If moral personality counts toward entitlement, one deserves by freely *becoming* a certain kind of person through choices actually made. To base human desert in the mere capacity for morality would be to admire the philanthropist for being rich and punish the strangler for being strong. The relevant quality for a theory of commutative justice is not an unexercised moral liberty bestowed by nature but the actual character forged by the individual in deliberate response to the challenge of his experience.⁵ That character is anything but equal from person to person, and that reality of moral inequality seems to put our presumption of equal treatment in deep trouble.

Fortunately, we are rescued by our own weakness. Once we surrender the impossible claim that the moral desert of individuals is equal, we uncover the plausible claim that it is immeasurable. Inscrutability—if that is the fact—will distinguish individual moral desert from age, race, income, intelligence, criminality, and the multitude of other factors by which human beings discernibly differ and that are employed by the state to justify distinction of treatment in the civil order.

Is moral desert inscrutable? The question could be put at several levels. First, as a root problem in epistemology, is reliable knowledge ever possible on this issue, or is moral identity so disconnected from behavior as radically to elude inference? Is the moral condition even of a Judas or a Hitler knowable? That enduring issue is beyond this brief comment and beyond me. I will, therefore, assume what I doubt—that there is no absolute barrier to assessment of individual moral worth. I will further assume that under certain conditions this possibility of knowledge may be actualized—that, for example, it is possible to perceive moral worth through intimate and prolonged private relationship, and I will even grant that gifted individuals sometimes are able to read character in transient encounters. (This is in spite of my own experi-

5. Rawls' work is principally concerned with fairness in the manner in which the world's goods and powers are to be shared—what is traditionally called distributive justice. Here we are concerned with justice between two parties in conflict. An equality of capacity is more effective to Rawls' purpose than ours and in any case was dictated by his form of analysis. Once the strategy of an "original position" is adopted, there is no choice but to rely upon potentiality; since by hypothesis no one has yet acted, no one has yet acquired desert except by his postulated qualities. Once we come to issues of individual conflict, however, it would be an unwarranted leap to pass from sheer power to desert without an intervening choice having been exercised by the individual.

ence, which is that of mystery and implacable complexity; the injunction to "judge not" seems to me a caution of epistemology as much as of charity.)

The issue for us, however, is not the possibility of insight by individuals under ideal conditions but the capacity of a decisionmaking bureaucracy to achieve systematic penetration of individual character in the course of dispute resolution. Judges and arbitrators must decide between strangers who appear before them briefly in stereotyped adversary roles; in this setting the mediating links of intimacy and rapport—of confidence given and received—are not only unavailable but also forbidden to the decider. All disclosure is guarded. No one is expected or even entitled to appear as himself but only as the reporter of an external historical reality that is his "case." Under such conditions individual moral worth is radically inaccessible. Its perception by a Solomon might be imaginable in a polity based upon family or even extended family; but, once society has passed beyond tribalism, the moral worth of persons becomes inscrutable to government.

Objection may be made that in certain cases—for example, in passing criminal sentence—even modern society purports to judge factors that are virtually indistinguishable from moral desert; for example, the convict's personal history of misbehavior is considered in sentencing. One response is that these occasions for considering moral status are more theater than legal process. They help maintain both the system's function as moral educator and the judges' preferred view of their own roles. It is important that the system be observed to judge character; therefore, it purports to do so. This is not, however, because it penetrates the criminal's heart. The decision is all surface. It is a quasi- or ascriptive judgment that involves judicial anguish precisely because real worth remains a mystery. This indeterminacy is central to the current criticism of inequality in sentencing practices; the law relies upon social sciences that are incapable of distinguishing sheep from goats. Professor Caleb Foote finds the tools so weak that the only fair resolution is flat equality of sentences for the same objective act.⁶

Nevertheless, for purposes of argument I will make still another

6. Foote, *Sentencing Through the Looking Glass* (unpublished manuscript on file with the Center for Law and Society, University of California, Berkeley). For other examples of official character analysis, see *Repouille v. United States*, 165 F.2d 152 (2d Cir. 1947) (as a basis for naturalization, applicant "must have been a person of 'good moral character' for the five years which preceded the application"); *Curran v. Curran*, 125 Cal. App. 2d 644, 271 P.2d 61 (2d Dist. 1954) (immoral character inferred from adultery bars child custody); *Orlando Daily Newspapers Inc.*, 11 F.C.C. 760, 3 R.R. 624 (1946) (broadcast license application denied for vituperation, vilification, and intemperance in expression). The *Repouille* case exemplifies the external or "objective" character of the judgment. Repouille had committed a "mercy killing" under pitiable circumstances and from tenderest motives. Otherwise he had led a blameless life. The one act was taken as proxy for his character, barring his naturalization.

concession and assume that, where there is a history of flagrant and egregious misbehavior, the finder of fact may draw the inference of relative moral depravity; I will likewise assume that a life of objective blamelessness and self-sacrifice would justify a contrary inference. There would remain the mass of human conflicts in which the character of the parties—even if put in issue—would be utterly impenetrable. As a further tactic of economy, I will exclude the criminal process and speak only of conflict resolution in civil matters between private parties.

Assuming that the decisionmaker in such cases remains invincibly ignorant of moral desert, what follows? A great deal follows, at least if it be moral desert alone that can raise the issue of justice. If it is only in the exercise of our moral freedom that we forge a distinct character and thus come to deserve something more or less than merely an opportunity, it is in the inscrutability of that character that we deserve equality. Ironically it is the very absence of a yardstick for individual moral worth that permits us to accord each an equal dignity; for, if we could know that of two disputants only one was virtuous, we would be entitled to reward him just as the tax code rewards philanthropy. It is society's ignorance of our character that liberates it from yet another distinction among human beings and thereby provides the basis for a descriptive equality.⁷

Thus, the epistemological barrier is crucial to the argument. Only when individual desert is accepted as important and real but inscrutable to public process does it cease to be a ground of discrimination and become transmuted into a basis for a civil order purged of arbitrary distinctions. But note both how much and how little this claim of effective moral parity represents. It is on the one hand the only descriptive basis for the presumption of equal treatment of conflicting parties—the crucial starting point for any theory of commutative justice. On the other hand, it is something most everyone would have admitted on faith without hearing the argument from indeterminacy; human equality and the presumption of equal treatment may be a surprise to jurists, but everyone else—including the law—already knew about them. The practical question has been, rather, what weight to give the equality presumption when it stands against particular values, proofs, and conflicting presumptions argued by each of the parties to offset the original equilibrium.

The law has a traditional answer to this question. It has been developed in its most refined form in the exegesis of the "equal protec-

7. "Perhaps the equal impossibility of certain knowledge in all these cases is one of the best reasons for the equal treatment of those whose inequality cannot be accurately assessed," Spiegelberg, *supra* note 3, at 209.

tion" clause, but it is implicit in all civil litigation as well.⁸ It is a minimalist position favoring no particular objectives for the system. The decisive fact, value, or presumption that overcomes the presumption of equality need only meet a test of rationality; it must plausibly serve *some* legitimate objective of the decisionmaking system. This need not always be the objective of justice between the parties. Thus, in a factual dispute over ownership of a chattel, a rule favoring the party with possession would be justified if credibly linked to the end of discouraging false claims by others; the opposite rule might be justified on the ground that it discourages self-help. Whether the rational relation criterion is in any case a trivial or significant hurdle is not revealed by this formal description but can be discerned only in practice; from its use by the courts, it is plain that one man's rational connection is another's non sequitur. Furthermore, it is crucial to know what objectives the decisionmaker is permitted to pursue that conflict with the objective of justice between the conflicting parties.⁹ Is it proper that his wish to deter a certain kind of conduct become the ground for judgment against an equally deserving party?

At least the presumption of equal treatment puts the decisionmaker to the task of discovering and articulating reasons, whether of justice or policy, for imposing unequal treatment; if that responsibility is taken seriously, even a weak presumption of equality may have important consequences. It has not been wholly without fruit in our constitutional law, and signally so in the area of race discrimination. It has a potential application to the problems of compromise that could be equally dramatic and, over time, could be broadly influential in our systems of dispute resolution.

III

THINGS BEING EQUAL

So far, then, we have identified our subject as the authoritative resolution of civil conflict in which the process of decision employs an initial presumption of equal entitlement and in which the deciding authority is empowered to apportion. Given such a presumption, and other things being equal between the parties, justice lies in an equal apportionment. Now we wish to consider contrasting applications of this rule. Our first task will be to clarify what we mean by "other things being equal" in potential cases of apportionment. Thereafter we

8. For an entry to the vast literature on the constitutional significance of "rationality," see Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976).

9. The interplay of the rationality test and the importance of the substantive matter at stake in the dispute is well considered in the dissent of Justice Marshall in *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 70 (1973).

must inquire what follows in those cases where things are found to be unequal between the parties and, finally, in those cases where external concerns of policy are considered. Are apportionments other than fifty-fifty and winner take all possible? By what rationale would they be governed? What evidence is relevant?

What counts as relevant to be set against the presumption depends, as we have noted, upon the purposes of the decisionmaking system. There are reasons, good and bad, to resist apportioned outcomes. Some have to do with the parties themselves; there is no commutative basis for apportionment if one party's claim is based wholly upon perjury. Other concerns are external to the parties; the court may object to a fifty-fifty split in cases of disputed ownership if the outcome will be an incentive to theft. For the moment we will continue to assume that our sole purpose is to define justice between two parties in conflict, eliminating temporarily and artificially all external concerns of policy in order that we may concentrate upon the commutative relation.

Let us suppose that justice between the parties turns upon an issue of fact. A and B each claims to own a particular pig. At the trial the evidence leaves the issue in equilibrium. The decider has two ways of looking at such a factual standoff. If the important consideration is that one of these parties is a "real owner," the two available forms of decision—winner take all and equal apportionment—present a dilemma between random selection and deliberate error. Either the judge must be 100% wrong half the time or half wrong all the time. But if we cease to ask the unanswerable question of who the "real owner" is and inquire, rather, given this evidence what is the just resolution by an authoritative decider, the dilemma disappears. The presumption of equal treatment would entitle each to demand half the value of the animal. Of course, if the parties agree, a random selection of a sole winner would also be just. However, the imposition of a random choice against the will of either would be problematic, for a one-sided result would not express the factual equilibrium perceived by the decider; it would be unjust from the point of view of the *system of decision*.¹⁰ This conclusion would hold even for that half of the cases in which the "real owner" prevailed by chance.

The law is filled with "pig cases."¹¹ There is no experience more common to judges and juries than the factual standoff; most easy cases

10. On the other hand, if one stresses the process rather than the substantive outcome, the 50-50 chance seems perfect justice; my own sense of justice drives me to emphasize the outcome, but this feeling is purely intuitive and not very strong. The recent article by Greely, *The Equality of Allocation by Lot*, 12 HARV. C.R.-C.L. L. REV. 113 (1977), though interesting, does not make much progress toward ordering this difficult relation between chance and justice.

11. Here is a set of them from my earlier article, Coons, *supra* note 2, at 753-54. Some are examples of factual, some of policy, equilibrium:

do not get litigated. If justice between the parties were the only object of our legal system, the historic dominance of winner-take-all outcomes would appear to constitute systematic unfairness. But in addition to justice there are many considerations of policy. One general fear is that the practice of apportionment would tend to corrupt potential litigants and deciders alike. Human affairs would be planned in the light of the apportionment system and, once in conflict, litigants would conduct settlement negotiations with an eye to the possibility of an imposed compromise. Whether this would increase litigation or stimulate dubious claims is doubtful but this would at least be a legitimate concern of the system. Likewise, finders of fact might be tempted to lean toward an equilibrium in order to avoid the duty of imposing the harsher outcome of winner take all even where it represented the just solution between the parties. No doubt there are also cultural and psychological explanations for winner take all.¹²

Consider, now, a second form of equilibrium or standoff. In this example my brother Fred borrows my car, removes the hi-fi, and sells it to you, representing himself to be the owner. Fred is insolvent; you or I—or you and I—must suffer. The facts are clear; what we face here is not a balance of proof but an equilibrium of values at two levels. First, as between the parties there is no reason to prefer one to the other. Each is innocent; each was as careless or careful as the other. Justice seems to require an even split. Second, at the level of policy, there is an equilibrium of conflicting concerns—the security of ownership versus the security of transfers. (If the reader disagrees about the balance as the case is put, let him alter the facts to produce his own view of equilibrium.)

The law has found such cases difficult, and properly so. It is a pity

1. *A* and *B* are unsecured creditors of *X*, whose assets are insufficient to satisfy both *A* and *B*.

2. An Act of God destroys part of the grain stored in Jones' grain elevator by *A*, *B*, *C*, and Jones.

3. The good ship Marylyn survives a tempest by throwing overboard cargo belonging to *A*. Cargo of *B* and *C* is thereby saved.

4. *A* and *B* collide at an intersection with resulting damage and injuries. Both were negligent, but *B* was more negligent.

5. A check, of which *A* is the holder, bears what is apparently *B*'s signature. *B* denies signing such a check. Handwriting experts disagree with each other. There is no other evidence.

6. *A* swears he is the owner of an unbranded cow in *B*'s possession. *B* swears the cow is his. There is no other evidence.

7. *A* and *B* both enjoyed the favors of *C*, a young lady, on a given evening. *C* has in due course and at the appropriate time given birth to a child. *A*, *B*, and the child have similar blood types.

8. *A* purchases a hi-fi set at a reputable store. The set was sold to the store by *X*, who had borrowed it from *B*. *B* demands its return. The store is insolvent. *X* is gone.

9. *T* leaves an ambiguous will. It is impossible to tell whether he intended *X* or *Y* as his devisee of Blackacre.

12. *Id.* at 787-93.

that it has not seen fit to apportion the loss equally. Someday it may move in that direction. Note that in the hi-fi example the just result is not impeded by systemic needs for deterrence. Neither party would be tempted deliberately to create the conflict, since each stands to lose. Further, from the point of view of the system an apportionment is preferable, because it permits *both* of the conflicting policy values to be recognized in the outcome.

Thus, where the crucial issues of fact are in equilibrium, or where the facts are determinate but conflicting policies are in equilibrium, the basic presumption of equality of treatment would favor an even split. For convenience this may be summarized as the principle of insufficient reason; lacking adequate grounds to depart from the original equilibrium position, an even split represents both justice and wise policy.

IV

THINGS BEING UNEQUAL

Justice Brandeis is said to have remarked once that "To be effective in this world you have to decide which side is probably right; and, once you decide, you must act as if it were one hundred per cent right."¹³ Brandeis (who may have been speaking only of politics) thus identified one of the two principled solutions that are possible for cases in which the decisionmaker finds the parties not in equilibrium; one is an uneven apportionment, and the other is winner take all. It is, of course, the latter approach that has generally been preferred by the law.

The competing solution of an uneven apportionment would be based upon either of two rationales, depending upon the particular facts. Either it would express the probabilities of a factual unknown or the relative weights assigned by society to conflicting values. In the pig case, for example, if the factual question of ownership came out as a sixty-forty probability in the mind of the finder of fact, the value of the pig would be so apportioned. By contrast, in cases of value conflict

13. As remembered by Professor Nathaniel Nathanson, having received it (probably) from Thomas ("The Cork") Corcoran. Cardozo is essentially in agreement: "[S]ince a controversy has arisen and must be determined somehow, there is nothing to do, in default of a rule already made, but to constitute some authority which will make it after the event. Someone must be the loser; it is part of the game of life." B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 143 (1965).

Obviously, it would be a serious logical lapse to apply the Brandeis approach separately to multiple issues in a single case. That is, where the relevant rule of law requires a party to prove each of two facts and each is found to be 51% probable, it would be incorrect to infer a probability that both were true. No doubt what Brandeis meant (as applied to our problem) is that, viewing each dispute as a whole, reaching a decisive conclusion has positive systematic values. His conception of a decisive conclusion was total victory by one party.

such as the hi-fi example, if the policy of security of buyers weighed sixty-forty in importance relative to that of security of owners, the value would be so apportioned.

Before we reject these quantified outcomes as an exaggerated nicety of judgment, we should note that a number of our states do just this in automobile accident cases involving mutual fault. This is the solution of "comparative negligence."¹⁴ As a tool of judicial administration it seems to be no worse than the alternative doctrines. I concede that the quantification of factual probability and of the relative weight of policy values is artificial; the question remains: Artificial compared with what? If one party has established but a bare preponderance in the decider's mind, which is the more factitious outcome—a sixty-forty apportionment or winner-take-all? The difficulty of being precise cannot by itself justify abandonment of whatever precision is possible. Justification must come, if at all, in terms of extrinsic considerations such as deterrence and similar policies unrelated to the particular parties—in other words, through considerations other than commutative justice.

The rationale for uneven apportionments should be seen as a principle of sufficient reason. Once a decision system accepts the presumption of equal treatment, departures from a fifty-fifty apportionment require justification for each increment of departure. To infer directly from a nonequilibrium of fact or value that one party should be the exclusive victor is a non sequitur.

V

A NONEGALITARIAN APPROACH

How would this system of apportionments be affected by a conclusion that human beings are unequal in their characters, hence in desert? For example, suppose that relative desert of parties to a conflict were initially quantified by age, children being worth sixty and a middle-aged man forty. In principle the form of analysis just given would still apply but with different effect. An equilibrium of proof, other things being equal, would result in a sixty-forty judgment favoring the child.

Seeing this emphasizes that the equality presumption is but one of many that could lend themselves to apportioned outcomes. It is, however, the only one that can be given a plausible intellectual base. It is also the only starting position consistent with modern political theory. Nevertheless, it would be intelligible if one were to label all systems of apportionment "compromise," even those proceeding from a premise

14. See Fleming, *Foreword, Comparative Negligence at Last—By Judicial Choice*, 64 CALIF. L. REV. 239 (1976).

of inequality. The necessary feature is not the parties' equality but their being assigned their relative desert of whatever weight. Any judgment between them other than winner take all would represent an apportionment—hence a compromise—under the analysis here.

CONCLUSION

Perhaps in this finite area of civil disputes we have moved somewhat closer to a definition of compromise. For these cases it seems fair and useful to describe compromise as conflict resolution based upon some original presumption of relative entitlement of the parties (preferably equality); other things being equal, that presumption requires the proportional division of a disputed good. Any departures from the original proportionality of entitlement would be grounded either in relevant facts peculiar to the parties' relation or in the impact of relevant conflicting policies.

Where no public policy affects the outcome, compromise in this sense of precise apportionment becomes indistinguishable from commutative justice. Apportionment seeks recognition as the *normal* solution to private conflict, the beginning point for social intervention. The claim, in short, is not trivial. It implies that our present system of civil jurisprudence with its commitment to winner take all begins at the wrong end. Perhaps the existing mode of decision could be justified in the mass of cases by a demonstration of policy objectives inconsistent with apportionment. That justification has never been seriously attempted, perhaps because winner take all has never been challenged. It would be a worthy employment of jurists and law reformers to criticize the rationale for polarized outcomes in particular cases and, where the challenge is unmet, to develop rules for a more precise commutative justice.