COMMENTS ON APPROACHES TO COURT IMPOSED COMPROMISE—THE USES OF DOUBT AND REASON


The following comments are taken from the transcript of proceedings of the conference on “Compromise and Decision Making in the Resolution of Controversies”. After an oral presentation by Professor John E. Coons of summarized parts of his paper, “Approaches to Court Imposed Compromise—The Uses of Doubt and Reason”, the conference participants freely discussed the issues and theories raised therein. The full transcript ran to nearly three hundred pages. The following highly-edited excerpts are typical of the comments and exchanges made during the proceedings.

FACT INDETERMINACY

PROFESSOR JONES:† Suppose we begin as I think lawyers should begin, that is, with the conviction that abstract speculations concerning justice are less significant than the impressions of justice or injustice that come through to ordinary litigants. This, I take it, is the idea symbolized by the old common law statement that it is even more important that justice be seen to be done than that it be done in fact.

I find Professor Coons’ “splitting” proposal1 a very attractive idea, one that we may have given up on a bit too soon. Let us take, for illustration, the Jones v. Smith pig case, which is the case Professor Coons used in his oral explanation.2 What we want, above all, is to have the case handled

* Each participant represented in this excerpt from the transcript of proceedings will be more fully identified following his initial comment.
† Harry W. Jones, Cardozo Professor of Jurisprudence, Columbia University.
2 Professor Coons posed a simple hypothetical case in which Jones and Smith ap-
so that Jones and Smith will have no feeling of estrangement from the legal order. We want to avoid any impression on the part of the litigant that he has not been fairly treated. When adjudication produces that kind of estrangement from the legal order, the task of justice becomes almost impossible.

Assume for the moment that "splittable" cases like the pig case reach the courts often enough to make the proposal one worth talking about. Let us say, further, that the pig is really mine; it is a Jones pig, and Smith’s claim to it is false. It seems to me a quite absurd suggestion that I, the true owner, would be more oppressed by a feeling of injustice if the court awarded me half a pig than I would be if I were awarded no pig at all. If the splitting approach were taken, my feeling as the winner of half a pig would, I think, be something like this: “Well, it was my pig, but I really couldn’t quite prove it, so the legal order did the best it could for me by giving me half.” But if I received nothing, and Smith were awarded the pig I knew to be mine, even though I could not prove it was mine, I think I would feel very keenly about the injustice of it all.

If I am right in this belief that even the litigant whose version of the facts is the true one will regard a half-pig award as more just, or at least less unjust, than an award that goes wholly against him, Professor Coons’ “splitting” device has possibilities as a means of reducing feelings of estrangement from the legal order. In actual adjudication, the split award might be quite acceptable to litigants because of a certain disposition I have encountered now and then in parties to disputes for which I have been arbitrator. People who go to law or arbitration, and particularly business men at the head of large concerns, have a strong and observable tendency to interpret a compromise verdict as an out-and-out victory for their side. “I won; they awarded me half my pig, and the other side was trying to deprive me of all of it.” In short, even a party who has received only fifty per cent justice is more likely than not to interpret this as a pretty good brand of justice and therefore to feel quite reconciled to the functioning of the legal order in his case.

PROFESSOR FREUND:* I am wondering whether one ought not to make a distinction between claims that involve, if true, some moral stigma on the part of the defendants and those that do not. If you have the problem of two innocent people—and here we are running a little ahead, because that involves rules of law—then one might say society should spread the loss; this is one of the inevitable casualties of life. On the other

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* Paul A. Freund, Carl M. Loeb University Professor, Harvard University.
hand, if the claim is one to which we normally attach a moral stigma, and the doubt is over the fact—as, for example, whether the defendant’s defamatory statement was true, or whether the defendant acted in good faith on reliance on what he regarded as good evidence—then it seems to me that to split the difference is rather a serious moral issue, because it places the stamp of opprobrium, to an extent, on the defendant in the name of an economic solution.

I am sure that to people who have a Brandeisian strain in their background this question of whether in our society we ought to strive to get away from moral judgment, or ought to strive in an increasingly mass and anonymous society to revive and strengthen moral judgment, will seem to be a rather basic issue.

PROFESSOR SOWLE:∗ Professor Jones has said that a litigant may feel, “I really haven’t been able to prove my case here by a preponderance of the evidence; therefore, I am willing to settle for half even though I know really I am entitled to all.” Now, perhaps his attitude might be that way if he were unfettered in his presentation of the facts as he saw them. I suspect, however, that his attitude might be quite a different one if, through a claim of privilege by the opposing party or a fairly narrow interpretation of the rules of relevancy, he were precluded from developing fully the facts which he, not as a lawyer but rather as a litigant, felt were relevant to the controversy.

So, I wonder, if your system were adopted and made to work, would not a considerable relaxation in the rules of evidence be desirable?

PROFESSOR COONS:† I think that the logic of the rules of evidence and the goals that these rules seek to promote under the present all-or-nothing system would remain. I don’t think there is any difference in the logic. However, there might be an additional impetus to open up the rules, as you suggest. The possibility of compromise may deceptively seem to imply a relaxation of formalities in the suggested interests of justice, but this is not necessarily true. If people can be made to appreciate the difficulty the law has in arriving at a decision respecting equilibrium, they ought to be sufficiently sophisticated to recognize the reason for preserving rules of evidence. The rules of evidence ought to be as explainable as the abolition of a burden of proof.

PROFESSOR FULLER:‡‡ I just want to say something that is directly relevant here, and that is, that the rule excluding an offer of settlement would fit very unhappily into this kind of a thing. If the jury is going to split the difference, and there has already been an offer out of court to

∗ Claude R. Sowle, Professor of Law and Associate Dean of the School of Law, Northwestern University.
† John E. Coons, Professor of Law, Northwestern University.
‡‡ Lon L. Fuller, Carter Professor of Jurisprudence, Harvard University Law School.
split the difference, and you rule that out, and the splitting isn't as much as what the defendant offered, you are going to be in trouble.

PROFESSOR ALLEN:* It does occur to me that some of the examples which have been posed to illustrate dilemmas of fact indeterminacy identify problems, not so much of failure of the fact-finding process, as a failure of the principle to which the fact-finding process is directed. I am thinking particularly of the bastardy case, in which you have two suspected fathers of the same blood type as the illegitimate child. And I think anyone would react with the feeling that it is a violation of all instincts of public policy and of justice to say that the two men shall escape their responsibility for the care of the child because it is impossible to say which of the two was the father.

Now, it might well be that here factual indeterminacy is a problem because the wrong question has been put to the fact-finder. Perhaps the problem arises from the fact that the bastardy action is predicated on a search for a father, and maybe that is not the right question to ask. Maybe you should ask, "Who engaged in illegitimate or illicit activity which was within the scope of the risk, of which this little bundle now is the concrete manifestation? All I am suggesting here is that there are many kinds of factual indeterminacy problems, and being an optimistic sort it appeals to me that maybe by a range of attacks one can avoid some of the hard problems that Professor Coons identifies by the process of elimination.

PROFESSOR FREUND: I suppose if the question were whether one defendant did or did not have intercourse, and in the mind of the trier the probabilities were in equilibrium, one wouldn't suggest he ought to pay for half the upbringing of the child. But I was really going to say—and this is a frivolous or profound note, as you take it—the pig case has an analogue, I believe, in either Chinese law or Chinese legend.

A and B both claimed to be owner of a chicken. They brought the chicken before the judge, and he couldn't make up his mind. He asked each of them what the last meal of the chicken had been, and A said beans, and B said rice; thereupon the judge slaughtered the chicken, examined its stomach; whereupon B, who had spoken of rice, was thrashed. And you ended up with a dead chicken and one humiliated litigant.

Now, this solution would not be due process of law because it converted the issue in a surprising way. Nevertheless, I think there may be a moral here with respect to the economic and moral aspects of a litigation.

PROFESSOR FULLER: Since perjury may well be a problem in the simple case of factual indeterminacy, I have been putting myself in the

* Francis A. Allen, Professor of Law, University of Chicago.

*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." Coons, supra note 1, at 754.
position of the perjurer to see which of these rules I would like the best. And it is very clear to me, I would like this split-the-difference rule, because all I have to do is get in there and obfuscate the issue in a way that would make it very hard to prove later that I lied. If I put it over dearly, I’ve got to lie in a way that I can be convicted for it or else I will succeed in winning one-half of something to which I am not entitled merely by muddying the issue. It seems to me, as I have reflected on it, that this is quite an important aspect of the matter.

PROFESSOR JONES: Lon Fuller’s last comment suggests to me a general factual problem—how are “facts” remembered and testified to?—on which I must confess to some indeterminacy of my own.

My guess concerning the many cases that fall within the category of fact indeterminacy is that by far the greater number of these cases arise not from conscious perjury on either side but from good faith but mistaken recollection, on one or both sides, as to what actually took place long before the trial. What we have most often, I think, is not a factual dispute between a crooked and perjured Smith and an honest and upright Jones but a collision of interest and recollection between two people, each of whom has a good faith factual belief that what he testifies to is true.

My recollection is that Jerome Frank made this point in several of his discussions of the terribly difficult problems that fact-finders have in legal proceedings. Fewer problems of indeterminacy are created for fact-finders by deliberate falsification than by the imperfection of partisan and biased memories after a long period of time. This quantitative guess as to how problems of fact indeterminacy come about most often is, I think, of considerable significance in relation to Professor Coons’ “splitting” thesis.

How often do cases of true fact indeterminacy arise in actual litigation? The cases I think of offhand are, of course, in areas related to my own work. Take the field of Contracts. If I were a sensitive fact-finder, charged with the adjudication of contract disputes, I believe that I would very, very often be in the situation, or state of mind, of true fact indeterminacy. This is not to concede that I would be a lazy fact-finder; indeed, the harder one works to get at the true version of disputed facts, the more likely he is to arrive at the unhappy conclusion that the facts are truly “indeterminate”, in the sense in which we have been using that term. And I have a very strong impression, at least as concerns contract litigation, that such factual disputes as these are less often the result of conscious perjury on either side than of confused and interest-influenced recollections of what happened a long time ago.

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PROFESSOR RUDER:* One of the things that has been disturbing

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* David S. Ruder, Associate Professor of Law, Northwestern University.
me about this conversation is that the hypothesis set forth in Professor Coons' paper assumes that the only middle ground would be to split the difference exactly. I wonder if it helps to advance the discussion at all to suggest that it might be possible to have other types of compromise, say a seventy-thirty or a sixty-forty compromise.

PROFESSOR COONS: It would, but only on some other hypothesis. I have assumed throughout that a factual preponderance destroys the relation of "equality" between the parties that my form of compromise would require.

PROFESSOR FULLER: It wouldn't be terribly hard in a negligence case to say, "I think this fellow is about seventy per cent negligent, and the plaintiff suffered a lot of things, some of them kind of conjectural; we will take off the conjectural ones—loss of earnings, damage to beauty, things like that." I wouldn't think that is an impossible intellectual operation.

PROFESSOR KAUFMAN: There are two different things here. One is that in a negligence case, you can perhaps determine the degree of negligence. But where it is a matter of the probability of the truth of a statement, that's quite a different situation. If you have a sixty-forty in the latter case, what you are saying is the preponderance of the evidence says A is right and B is wrong. And where the preponderance of evidence indicates that A is right and B is wrong, then there is a reasonable case of throwing the case to A. Because, in balance, the evidence points in that direction.

PROFESSOR FULLER: Except that I think, characteristically, truth questions are closer to the negligence question than we imply. That is to say something happened; neither one of them is telling the exact truth; neither one may be lying. Each is putting his best foot forward; each has improved on the story in remembering it. So you are asking yourself, well, let's see, which of these stories is the closest—and perhaps neither is very close—but you are ready to accept. You are dealing with probabilities.

**Rule Indeterminacy**

PROFESSOR NOONAN: Perhaps you can take particular areas where the problem of rule indeterminacy is more acute than others. I would suggest that one such area is the construction of wills and trusts.

Now, in my experience, takings wills and trusts with problems arising anywhere from twenty to eighty years after the instruments have been executed, you are dealing with questions of meaning, where there is no assurance at all that the testator or creator of the trust had any meaning in mind. You are dealing with the meaning of words like heirs and issue.

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* Arnold Kaufman, Associate Professor of Philosophy, University of Michigan.
† John T. Noonan, Editor, Natural Law Forum, Notre Dame Law School.
Approaches To Court Imposed Compromise

applied to people who are very remote collaterals of the testator. You are not dealing with anybody's expectations, because you are dealing with people remotely connected with the testator. When you talk about the expectations in this context, what you are talking about are the expectations of people's lawyers. All of the people involved in the trust have had their lawyers read it, and the lawyers have given them some kind of estimate of what they think would be the chances of their winning the case.

In this kind of situation, you do have the body of past decisions of the court saying heirs means this in this situation, and it means that in another situation. You try to construct some kind of argument to show that it means what your client wants in this context. But I think any lawyer who does this will agree that there was say, a sixty per cent chance, applying the earlier decisions, that it meant this, and a forty per cent chance that it meant that.

Now, in that kind of context, where everyone is innocent and there are no real expectations, why isn't the most sensible solution to say, with a sixty per cent probability this way, let's give sixty per cent to party A and forty per cent to party B. The only objection I can see to this is that it will create some kind of problem of precedent for the future. But I am not sure that this couldn't be solved. Perhaps there are other objections.

PROFESSOR FREUND: I think the fact that we are talking about monetary claims leads us into a fifty-fifty solution perhaps more readily than it should. In the case of school desegregation, let us say we had a rule that was ambiguous. Let us say that judges were quite unclear on whether equal protection of the laws meant desegregation or simply equal facilities. I think no one would suggest that the equitable resolution would have been to say that either half of the Negro students shall be admitted, or Negro students shall be admitted through half the grades. That would strike one as not sensible or just. When we deal with money, however, we seem to be led into a fifty-fifty solution as the most naturally just one.

I am always troubled by the collision of rules. If one starts with that as the problem, I am a little afraid that judges will be tempted to keep rules, or to create rules, that are overly broad. I think one thing that philosophy can learn from law, or at least be reminded of from law, is that the meaning of the rule is its application, that this is a dialectical process, and that our appreciation of both the rule and the fact is sharpened by that process. So I would be sorry if the introduction of a middle category had the effect of encouraging judges to work with rather broader rules than they would otherwise because of the existence of a third area in between. There are opportunities for the refinement of rules to take account of facts that ought to be exploited.

Now, having said that much, I would have to confess that there comes a point where the distinction between a trust and a debt is made, and where the practical difference in result seems wholly disproportionate. The
amount of money involved seems wholly disproportionate to the difference between the rules in application. But it seems to me that the conditional decree is at least as promising a solution as a fifty-fifty split—that a judge might say, “I think, on the whole, this was a constructive trust refined to the limit. But I can also see that the defendant might have thought otherwise and acted in good faith. The difference between his ruination and his affluence is altogether disproportionate to that fine difference.”

Now, how do we solve it? Well, possibly giving the plaintiffs the decree on condition that they pay the defendant what a trustee’s commission would be; or if the defendant gave up his livelihood, or part of it, in order to manage these funds, a decree on condition that they pay him the income that he would have had, had he not spent his time and energy in the investment of these funds. It seems to me there are nice adjustments that can be made quite apart from a fifty-fifty split.

PROFESSOR NATHANSON:* Professor Freund, aren’t you really analyzing what the court did in the desegregation cases? You said we would have been shocked if the court said candidly, “Well, we think desegregation is properly required only in three grades, but not in the rest.” But we weren’t shocked by the solution, in effect, that over a number of years it might only be in one grade and two grades, and so on. So that here the rule is kept pure but the application is, in effect, qualified.

PROFESSOR SCHUYLER:† I am troubled with the thought of establishing a rule for the future in terms of compromise. And I think I feel this because, in the construction of wills and contracts, formulae have been developed, obviously for the purpose of trying to achieve justice, as we feel it, in particular cases.

Now, this is true in the attachment of legal consequences to acts of businessmen too. You have numerous formulae which tend to support both sides of a case. If you accept a compromise as a rule for the future, and if you accept the idea that you can compromise the will construction cases, aren’t you going to leave parties in the same dilemma and courts in the same dilemma, and future litigants in the same dilemma as they are now if you do use a compromise as a rule for the future? This troubles me greatly.

I think you can do as has been suggested here: you can say that in this particular case we will compromise for various reasons, but this is a very rare and special instance where we will allow such a result.

PROFESSOR COONS: I am not suggesting this would be an across the board proposition. You have to be very careful about the areas which you select. And I would think that in the area which you describe, there would be a serious doubt as to whether it would be wise to develop a very

* Nathaniel L. Nathanson, Professor of Law, Northwestern University.
† Daniel M. Schuyler, Professor of Law, Northwestern University.
broad rule which would apply across the board. I do suggest that in certain kinds of will construction problems there may be an appropriate area for it, even at the same time recognizing that this is closer to factual indeterminacy than to rule indeterminacy.

PROFESSOR NOONAN: It is a mixed question.

PROFESSOR COONS: Right. That troubled me a lot, and I am not sure that I was right. But I do think at least it is worth exploring. I think the courts ought to feel free to think of this as a viable technique which they might use if they can carefully define their categories.

I have trouble with anything but a fifty-fifty split, simply because I think at some point you have to take into account the weakness of people, and the play upon sympathy and empathy that is involved if you developed a purely sliding scale. The only stop-gap I have is simply to stop short some place. Fifty-fifty is the best I have.

PROFESSOR NOONAN: I think a much more rigorous effort is demanded of the judge if he is going to say that it is sixty-forty, than if it is fifty-fifty.

PROFESSOR COONS: Logically, yes.

PROFESSOR NOONAN: I have never seen a will that, after twenty years, didn't have ambiguities in it. And it doesn't matter who drafted the will. The course of events changes the meaning of words. No one foresees all of the probabilities. So that I would say this was intrinsic to the situation of wills and trusts being interpreted after a period of time. There is always a doubt. And the reason I suggest very tentatively why this comes up in this kind of situation is that in it you move very far from any real human needs. You are dealing with a dead testator who never thought about the problem. You are dealing with other people who really have little expectation. So it is a very artificial kind of a problem. That is why some kind of a calculus that results in a quantitative compromise seems desirable.

PROFESSOR FULLER: You could almost reach the opposite conclusion, though. You could say you are dealing with a dead testator; you are dealing with people that had no expectations at all; therefore, for the sake of the development of the law, you go ahead and make a black and white decision. Nobody is hurt; nobody is disappointed.

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PROFESSOR SNYDER:* It seems clear from our discussion that in certain kinds of cases, the "all or nothing" judicial outcome can leave litigants, lawyers, teachers, philosophers, and legal theorists with a sense of injustice—the solutions generated seem "unfair." However, Professor Coons' provocative proposal of the more refined fifty-fifty apportionment of consequences raises different and also unwelcome possibilities: (1) too

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* Richard G. Snyder, Professor of Political Science, Northwestern University.
much discretion for judges; (2) translating essentially moral questions into economic terms—the “partitioning” of morality; (3) relaxation of legal norms such as rules of evidence; (4) adding to, rather than reducing the number of dilemmas already faced by judges and juries; and (5) the unfairness of a fifty-fifty apportionment of blame or proceeds of settlement when this outcome is not felt to be refined enough. I'd like to suggest that a carefully constructed typology of decision problems or cases derived in large part from a systematic mapping of prescribed and ad hoc non-adversary proceedings in all sectors of the legal system, plus a specification of the conditions under which the “costs” of imperfections in the functioning of the judicial process (that is, human fallibility, fact indeterminacy, and so forth) ought to fall equally on the parties because defects are social rather than legal, might be held to sharpen and limit the effects of the proposed new rule. In Professor Coons' paper and in our responses to it, there is a wide range of examples which could be used inductively for these purposes. Examples cited embody significant distinctions which, if more precisely defined, could become the basis of conditional instructions, thus giving judges new rules, but not necessarily more discretion. Turning "justice" and "fairness" into concepts having clear situational referents—always a basic need in the social sciences, by the way—might pave the way for separating acceptable from unacceptable compromises, both of which have been highlighted in our conversation. We might try typologizing critical situations using the factors which cause ambiguity and which short-circuit the connection between judicial process and desired results. Some of these potential type-bases appear to be located in characteristics of the litigants, others in the various stakes the community has in enforcement of standards, and still others in the unequal distribution of adverse consequences of an absence or nonapplicability of strictly legal procedures. Once these properties are sorted out and combined, we could search our experience and professional literature for techniques of conflict resolution which could be tried on for size. This endeavor surely invites collaboration between the lawyer and the social scientist and might indicate whether another step toward a contextually operational realization of a generalized notion of justice is feasible.

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PROFESSOR FREUND: Professor Coons' comparison of scientific thinking and legal thinking is something that seems to me ought to be explored more directly. He spoke of the esthetic goal of simplicity, and economy, and neatness in rule formulation in science, and also, in law.4 And I think there is an interesting parallelism there. But, of course, the movement does not always run in that direction. It is always a question to

4 Coons, supra note 1, at 791-93.
what extent the goal of the esthetic or the economical is more important than the goal of fruitfulness or satisfyingness.

In law, for example—and perhaps philosophy can derive something from law here—isn’t it the case that there are movements toward simplification, toward larger categories by way of, perhaps, metaphor, and simile, and concept, and yet which are not satisfying? So that after gaining the insights of synthesis, the necessity is felt to break a concept down again—although when you break it down, you have already achieved more insight than you had before synthesis occurred. One can think of a law of associations, let’s say, that would subsume corporations, and churches, and trade unions, and which would have something valuable to contribute to the rationalization of those subjects. And yet, one wouldn’t want to solve all problems on the basis of that economical and unifying concept. One would want to take account of the differences and then begin to break down again. Of course, this goes on in science. The unit of celestial and atomic mechanics, I dare say, yielded something, but it had to gave way again. And now, atomic physics, I gather, is in a mess because we have fast neutrons and slow neutrons, and the law seems to be different for the two. And scientists seem to think this can’t be the end, but rather than adhere to a unity that is relatively less satisfying, productive, predictive, and explanatory, they have to live at least for the time being with a more particularistic mess, though they have gained insight by tentative syntheses.

It seems to me the same thing happens in law. We properly rebel against particularism, and yet we come back to it in a kind of spiral after we have made intermediate generalizations.