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# JUSTICE AND NO-FAULT INSURANCE

BY

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In his *Anarchy, State, and Utopia* Robert Nozick sets forth in outline what he calls the entitlement theory of justice; he argues that justice in holdings is historical, that "whether a distribution is just depends upon how it came about."[1] Insofar as theories of distributive justice ignore this historical aspect, as they commonly do, turning instead upon 'end-state' principles of distribution (or, if historical, upon 'patterned' principles), the problem of justice in holdings is thereby significantly distorted. This observation regarding typical theories of distributive justice finds an interesting example in much of the discussion surrounding the no-fault insurance issue; one supposes, in fact, that the primary concern of many of the advocates of no-fault is how best (often, most efficiently) to distribute the costs (or negative holdings) of automobile accidents. The historical perspective—how those costs arose, what rights and obligations (historically) surround the accident—so nicely captured by our traditional system of distributing costs according to the law of torts tends to be diminished (if not altogether ignored), and as in the case of typical discussions of the larger question of distributive justice, distortion ensues. In considering some of these distortions I will not be undertaking anything like a thorough examination of the many and complex issues involved in the no-fault question;[2] I will, however, be concerned with certain of the moral implications of no-fault, and in particular with just this problem of distributive justice as it applies to automobile accidents: it is less than intuitive, after all, that the losses from an accident should be borne by an innocent victim and his insurance company, this while the party causing the accident and his insurance company may suffer no losses at all.[3]

Ideally, perhaps, questions of justice should be treated by philosophers; unfortunately philosophers have been notably absent from discussions of no-fault. There recently appeared in *The Journal of Philosophy*, however, an article on the subject by Jules L. Coleman[4] in which arguments earlier adumbrated by Joel Feinberg[5] are substantially expanded upon. Coleman's article is especially interesting because, while advocating a no-fault system, it is concerned primarily with moral issues, and it does treat in considerable detail the historical perspective. In making these issues explicit, however, Coleman has served to bring out just those arguments underpinning the distributive aspects of no-fault proposals that many find disturbing. The attention of the present paper will therefore center largely on Coleman's arguments: in particular, I will be interested to show that retributivism is not, contrary to Coleman, the theory of justice ordinarily invoked in support of the fault system; that at least part of the reason he argues that it is lies in his failure to adequately distinguish (and use) the different senses of 'penalty' that apply in criminal and in civil contexts (a confusion found in Feinberg as well); and that there is no theory of justice (or at least Coleman has provided none) which will adequately support the distributive system he advocates: on

the contrary, there is one—Nozick's entitlement theory—which argues against that system. Finally, I will conclude by speculating briefly upon some of the broader practical and political implications of the no-fault question. It may be best to begin, however, with a quick review of the moral theory underpinning the traditional tortious remedy to automobile accident losses and then look briefly at some of the implications of no-fault for this theory.

## I

It is unfortunate that no-fault has been posed largely as an *insurance* issue; the state of affairs for which the no-fault remedy is suggested has nothing really to do with insurance. Nor do the moral and legal foundations of tort law have anything in particular to do with the automobile. On the contrary, under the common law, whenever an individual's action results in harm to another (or damage to his property), the injured party may initiate civil proceedings against the agent to recover his losses.[6] At bottom is the moral principle that a man is under a standing obligation to not harm his fellow man. The notion of individual responsibility implicit in this obligation emerges at such time as there may be a failure in meeting the obligation; the agent then may be held responsible or liable for the consequences of his action, i.e., his failure in meeting his standing obligation may result in an occurrent obligation to compensate those he has injured.[7] Thus if *A* is injured by *B*, *B* may be held responsible for the damages, responsible for making *A* whole again: under the common law *A* has the right to sue *B* for recovery of his losses. *A* of course has no *obligation* to sue *B;* this is a matter of private not public law. But *A* does have the common law *right* to sue for recovery, which he may choose to exercise; and this right is derived from *B's* failure to meet his standing obligation.[8] This is simple rectificatory justice, stemming at least from Aristotle.[9]

Now the coming of the automobile made no significant change in this moral and legal theory; it afforded only another area for injurious human interaction. It did, however, together with advances in medicine, give rise to more frequent losses of considerably larger amounts than had theretofore usually been occasioned, and so automobile liability insurance was devised so that a driver might protect himself against the losses he could suffer as a result of his causing losses to someone else. Automobile liability insurance was never intended, in short, to protect *directly* the victims of someone else's action; it did so only *indirectly* by enabling the agent to meet his moral and legal obligations. This is a point frequently misunderstood (or misemphasized) by supporters of no-fault; their concern for the needs of the accident victim (and in particular, the victim who for some reason hasn't been compensated) all too often results in half the picture being presented.[10]

Not the least of the effects of no-fault on this state of affairs has been a radical alteration of these common law rights and obligations. The various no-fault proposals (as well as statutes pending or already passed by some states) vary considerably, but they all share certain fundamental principles and objectives. In order that more accident victims be compensated more quickly (note that these are 'end-state' concerns),[11] no-fault proposals essentially eliminate liability insurance (often below certain monetary thresholds, or except with regard to certain kinds of losses[12]), thereby making automobile insurance a kind of compulsory *self*-insurance (i.e., insurance designed to compensate the victim for his *direct* losses, not the *indirect* losses one may suffer from his having caused losses to someone else).[13] Thus an accident victim, regardless of fault, is compensated by his *own* insurance company; but he is typically reimbursed for only a percentage of his 'out-of-pocket' losses, and then for only those

losses *not* covered by any other forms of insurance he may have (e.g., hospitalization, sick leave, vacation pay). Moreoever, any pain and suffering he may have endured—perhaps, again, through no fault of his own—frequently does not figure into the equation. Thus the victim is not made whole again, and he is not because no-fault has eliminated his common law right to sue for recovery (most often by the defendant's having been provided by statute with immunity from tort liability arising out of an automobile accident), replacing this right with a compulsory insurance policy.[14] In effect, the obligation of a driver to not harm his fellow man (assuming there remains such an obligation) has been severed from any responsibility or liability for harming! In a very real sense, actors are no longer responsible for the upshots of their actions: victims are responsible for those upshots, through their own insurance companies. The historical question—"How did this damage arise?"—is no longer asked.

## II

The brief outline in the previous section of both the fault and the no-fault systems should provide an adequate background against which to look at Coleman's arguments in support of no-fault.[15] In the next section we will consider Coleman's treatment of the crucial distributive question—"Who should bear the costs of automobile accidents?" It will be necessary first, however, to untangle a number of confusions which lie in the way of that issue, confusions which generate unwarranted support for the no-fault conclusion. In general, Coleman is anxious, in his examination of what he takes to be the moral argument for the fault system, to show that "certain principles of so-called 'retributive justice' do not support the claim that civil liability for automobile-accident costs ought to be determined on a case-by-case basis, according to the contributory fault requirement." (473)[16] If he is able to show this, then he believes that "one sort of stubborn and philosophically interesting impediment to implementing non-fault accident law will have been overcome." (474) This will allow Coleman to conclude, as he does, by advocating a system which distinguishes between retributivism and recompense, the costs of the latter being distributed on a no-fault basis. (488)

Unfortunately, Coleman is from the beginning up against a straw man: no one to my knowledge supports the fault system by reference alone or even primarily to the principles of retributive justice. (Coleman in fact gives no indication who he has in mind here.) Retributivism is essentially a theory of *punishment*, not compensation; indeed, Coleman himself characterizes it as "a theory about the moral propriety of penalties." (474)[17] But the tortious remedy, as was shown above,[18] has as its purpose the compensation of victims, not the punishment of wrongdoers. It operates in the realm of private, not public law; in the civil, not the criminal courts. And it is rectificatory, not retributive justice, that serves as its theoretical foundation.

Before inquiring into why Coleman sets retributivism up as the theory underlying the fault system, however, it should perhaps be argued somewhat further that retributivism and the fault system are not so related; for if the civil court compensates victims *by* punishing wrongdoers, then retributivism would indeed seem to underlie the fault system. The issue comes down to whether a judicial requirement to compensate the victim of one's wrongdoing is to be construed as a punishment. While there may be room for disagreement here (if not from a legal then from a philosophical perspective), the weight appears rather convincingly to be against such a construal. If *A* has been injured by *B*, the civil court merely transfers the *cost* of that injury from *A* (where it has fallen) to *B*. Is this to punish or penalize *B*? If *B* had injured himself, i.e., had borne the cost of his action *directly*, would we say he had *punished* himself? Perhaps; but we are approaching (if not already at) a metaphorical usage. As a necessary condition, *social* punishment (i.e., punishment being administered by

another) involves a loss above and beyond the loss occasioned by the action for which punishment is being administered (this punishment proper will be discussed below). Yet there is no such additional loss to emerge from the civil proceeding.[19] The loss to be borne by *B* is merely the loss occasioned by his original action, as if he had injured himself, or as if all of the losses had fallen initially upon him.[20] (None of this is to argue, of course, that the tortfeasor will most likely not *see* himself as being punished by the civil court; but this psychological phenomenon is to be distinguished from the philosophical issue.)

There often is, however, an element (and theory) of punishment *associated with* the loss which may be redistributed under the civil proceeding, and hence associated with the fault system. It is frequently the case that the same act will subject the agent to both civil and criminal proceedings, the former supported by principles of rectificatory justice, the latter by principles of retributive justice; and among the most frequent of such cases involve actions which give rise to automobile accidents. If a driver fails to obey a stop sign, for example, thereby causing an accident which injures others, he may be required by a civil court to compensate the injured; but he may *in addition* be required by a *criminal* court to pay a penal fine (or to undergo some other kind of punishment, say the loss of his driver's license) for having violated a provision of the traffic law.[21] It is important that the distinction between these two kinds of 'penalty' be kept clear, however, as well as the proceedings through which and the principles according to which they are determined. It will be helpful in what follows, in fact, if we speak of the 'criminal penalty' and the 'reparation penalty,' keeping in mind that the latter is not, properly speaking, a penalty, but a mere transfer of costs.

Now from the beginning Coleman runs these two penalties together by assuming a society in which

> . . . there is only one institution available within the system of accident law from which we must both exact reparation from moral wrongdoers and compensate the wronged. Thus, we shall assume that if this institution did not provide a structure for exacting reparation from the moral wrongdoer, he would go scot free; his record would remain clean. Likewise, we shall assume that, if this institution did not provide a structure for compensating the faultless victim, he would go without formal compensation. Under this newly defined institution, the wronged are compensated for by the same structures that are employed to exact reparation from wrongdoers. This assumption is crucial, since if we allowed the possibility of designing separate institutions for penalizing wrongdoers and compensating victims, most if not all of the initial plausibility of the fault system as an accident law which guarantees that wrongdoers get their comeuppance would dissipate (474-5).

It is to be noticed first that the final part of this passage, the argument for initial plausibility, is correct only insofar as it assumes that the function of the fault system *is* to guarantee that wrongdoers get their comeuppance, and this has already been shown to be a mistaken assumption. Again, Coleman is plainly construing reparation as punishment in this passage (as well as elsewhere[22]); reparation is taken here as the means by which wrongdoers get their comeuppance, which is understandable, given that retributivism and the fault system are being tied together. The reference to the wrongdoer's 'record,' however, (a driver's license record perhaps?) only further confuses the matter, suggesting a criminal penalty, which is altogether distinct from compensation (even when compensation is construed as *the* penalty). But it should be noted finally, and most importantly, that this overall institutional assumption—against which Coleman argues for the better part of his article—is wholly gratuitous not only because the assumption concerning the relation between retributivism and the fault system upon which it is founded is itself incorrect, but because it is altogether unnecessary to speak in terms of allowing "the possibility of designing separate

institutions for penalizing wrongdoers and compensating victims''—we already *have* such separate institutions under our traditional legal arrangements! Our criminal courts penalize wrongdoers, and our civil courts compensate victims.

Why then does Coleman construct this elaborate assumption? The best case I am able to make for him (other than the obvious one, that he thinks that it is commonly believed—or at least that some believe—that retributivism does indeed underlie the fault system) is roughly the following: he wants to argue that ''the 'ideal' legislator may design a system of accident law that provides effective structures for compensating traffic victims on a non-fault basis, while providing alternative means for rendering faulty parties their due.'' (474) This amounts to separating the compensatory from the criminal aspects of the issue, the latter depending upon fault, the former not. Hence, he needs to show that retributivism (and therefore fault) does not underlie the compensatory aspect, but that it can be preserved with regard to the criminal aspect. By arguing against this assumption—*viz.*, ''that the fault system is required by the traditional retributivist principle'' (474)—Coleman can make more plausible the separation of the two aspects that he envisions.

In truth, however, Coleman has carried the separation too far (as do all supporters of no-fault). To show that the fault system is not required by the traditional retributivist principle is not to show that there is no connection whatever between the criminal and reparation penalties. For while the two kinds of penalty are exacted for different reasons, through different procedures, and under different justifying principles, under the traditional tortious remedy they both arise from and depend upon the same historical event—the original action of the agent (quite apart from any contingency in their actual assignment). This is not to say, however, that being a tortfeasor need be either a necessary or a sufficient condition for being assigned either of these penalties. It is not a *sufficient* condition for a criminal penalty because the action may violate no provisision of the criminal law; and it is not a sufficient condition for a reparation penalty because the victim may, for whatever reason, release the tortfeasor from his liability, or perhaps a third party will assume the obligation. Again, being a tortfeasor is not a *necessary* condition for being assigned a criminal penalty since criminal penalties are often assigned for wrongful acts which produce no harmful consequences (e.g., ordinary traffic violations). But the problem of justice in distribution arises when being a tortfeasor is not a necessary condition for being assigned a *reparation* penalty; for then there will be no apparent connection between the penalty (or obligation) holder and any antecedent action of his—the payment of compensation will be required with no apparent historical justification. Yet this is precisely what Coleman is advocating and precisely what no-fault accomplishes.

## III

Assuming an automobile accident in which *B* is at fault in injuring *A*, Coleman would have the following:

> According to the sort of non-fault schemes I want to defend, the insurance company reimburses *A*, thereby 'protecting' his innocence, while the appropriate penal institution exacts some penalty, itself suggested by the stronger retributivist principles, from *B*, thereby ensuring that his wrongdoing get its comeuppance (490).

Again, the only change here from our present legal arrangements involves the reparation of the injured party. But notice the language in this regard: *the* insurance company reimburses *A*. Which insurance company? *B*'s (as at present)? *A*'s? A 'social' insurance company? This point is crucial, for it brings out clearly the direction of Coleman's thesis. Somewhat before this he speaks of structures for ''distributing automobile

accident costs on a non-fault basis." (488) But among whom? Drivers? Automobile owners? Society at large? He discusses briefly (following Feinberg) an 'at-fault' pool scheme according to which *all* blameworthy action, regardless of consequences, would be assigned a penalty, the proceeds of which would be pooled to compensate victims; but he then dismisses it. (484 ff.) (It should be pointed out, though, that this pooling scheme again confuses the two kinds of penalty: criminal penalties—which alone are appropriate for *all* wrongdoing, independently of whether such wrongdoing results in harmful consequences—are being used for compensatory purposes.)[23]

A clue to Coleman's answer is to be found in his argument that there is no injustice if *C* steps in to reimburse *A* (487 ff.): "At the institutional level, in non-fault plans, the insurance system assumes *C*'s role. . . ." (490) But again, *what* insurance system? Clearly there is no *injustice* in *C*'s stepping in (as was pointed out above); but this does not imply either that there is an *obligation* for *C* to do so, and it is the obligation to compensate that we are after. Before turning directly to the crucial question of *who* ought to pay the reparation and *why*, it will be well to pursue in greater detail this relationship between *C* and 'the' insurance company, since there is considerable misunderstanding concerning it in Coleman's essay.

Coleman seems to think that if *B*'s insurance company reimburses *A* it is somehow equivalent to *C* stepping into the picture.

> I suppose one might argue that, since principles of compensatory justice establish the right of faultless victims to compensation, their claim to reimbursement must be against those at fault. . . . (This argument, it should be noted, ignores complications presented by a system in which persons enter into contracts with insurance companies to protect themselves either against liability for accidents that are their fault or against the possibility of being a victim of another's wrongdoing. In virtue of the contractual relationship, there are circumstances under which one's claim to compensation is against one's insurance company, not against the wrongdoer.) (487)[24]

What are the 'complications' that are at all relevant here? If *A* sues *B* for damages, he sues *B* and/or (depending upon the jurisdiction) *B*'s insurance company (assuming there is one). That *B*'s insurance company pays *B*'s reparation penalty, however, does not mean that *B* does *not* pay it! *B*, after all, pays insurance premiums. And these premiums, together with the contractual provisions they entail, are simply a mechanism, an arrangement voluntarily undertaken by both *B* and his insurance company to distribute over time and among members of the actuarial class to which *B* belongs the costs of any harmful actions *B* and others in his class might perform in the future. Moreover, as further evidence that it is *B* who is in fact (albeit indirectly) paying the reparation penalty, if *B*'s insurance company does reimburse *A* for the costs of *B*'s actions, *B* will likely be paying higher premiums for a time in the future: by his actions, especially if repeated, he may have put himself into a different actuarial class. Thus, the presence of an insurance company in the (traditional) transaction by no means implies the presence of a distinct unrelated individual *C*, as Coleman seems to believe. In particular, this presence does not changee the obligatory status of *B* to *A*, as is evidenced by the fact that claims in excess of the limits of *B*'s liability policy redound to *B* directly.[25]

If it is not a matter of indifference, then, whether *A*'s or *B*'s insurance company will be obligated to compensate *A*, if neither insurance company can properly be seen as a charitable *C*, what sense can possibly be made in the present context of '*the* insurance company (or system)?' Unfortunately, Coleman gives no specific answer here; we are left on our own to speculate about who will be obligated to bear these costs, which we can do from our knowledge of various no-fault proposals. Perhaps it is society (i.e., 'the government'), or the victim, or, as in the case of most no-fault proposals, the

victim (through reduced compensation payments) and *his* insurance company. But in any event, the question of *why* these costs are to be so distributed remains.

We come then to the heart of the matter: given that the costs of accidents are not, on Coleman's view of things, to be distributed on the basis of fault,[26] the (moral) question why they are to be distributed otherwise comes down to the question "What principle of justice will support this distribution?" The closest Coleman comes to addressing this matter is in the following:

> Though there may indeed by a principle of justice endorsing penaltiesfor wrongdoers (retributive) and another requiring compensation for faultless victims (compensatory) [what I have called rectificatory], there is no principle of justice requiring that faultless victims be compensated by precisely those persons who have been at fault in causing them harm. (487)

It is in support of this last contention that Coleman introduces his charitable *C* example. But in the absence of any such *C* ('society' is surely no such institution!) these remarks are of little help. Coleman has, in fact, simply evaded the main issue: he seems to believe that the anomalous situation in which the victim is compensated by a charitable *C* argues for there being no principle of justice requiring that faultless victims be compensated by *precisely* those persons who have been at fault in causing them harm. The fact that this gratuitous 'compensation' must be tendered in exchange for a release—otherwise there is no connection between 'gift' and 'compensation,' and the victim is still free to sue the wrongdoer—would alone refute this inference. But *a fortiori,* the observation that there are charitable *C*s could not possibly serve as the ground for there being a principle of justice *obligating* third parties to compensate victims.[27] On the contrary, there is a theory of justice—Nozick's entitlement theory—which argues against there being such an obligation: in particular, the principle of justice in transfer (at least as it is outlined by Nozick) precludes the taking of another's holdings against his will, except as this may be justified for historical reasons (such as for reparation for *that individual's* commission of a tort).[28] Yet this is precisely what Coleman would have done, though he does not say so in so many words. If victims are not to be compensated by the relevant tortfeasor, how else (other than by gift) could they be compensated but by themselves (through their own insurance companies) or by unrelated third parties? There are no others.

There remains, however, the justification of the obligation that I have claimed falls properly on the tortfeasor. (Immediately above I simply asserted it under the rubric 'for historical reasons.') When Coleman (and Feinberg) must justify *this* arrangement, as in a "state of nature," (488 ff.) he defers, with reluctance, to so-called "weak retributivism:"[29] When there are no social institutions,

> . . . if *B* did not have to bear *A*'s costs, *A* (presumably) would. The result is that *A*'s innocence would be penalized. This constitutes a clear injustice to *A*. The principle of justice which requires that innocence not be penalized rather than that wrongdoing get its comeuppance, is a principle of "weak retributivism." (489)[30]

The sense in which Coleman is here speaking of 'retributivism' at all is by no means clear. There is no punitive element in this arrangement, nothing that could properly be called punishment. It is, in fact, the traditional tort remedy. This 'weak retributivism' appears, then, to be merely a roundabout (and quite unsatisfactory, because incomplete) way of stating the rights and obligations of the respective parties as set out in Part I of this paper.[31]

## IV

Since no satisfactory justification for this redistribution of costs has been forthcom-

ing, it may be well to reflect very briefly upon some of the broader practical and political implications of Coleman's thesis (and of no-fault in general). It has already been pointed out that no-fault (a) eliminates or limits certain basic common law rights of recovery, (b) imposes obligations to self-insure (or, if through social mechanisms, to insure the actions of others), and (c) separates agents from the costs of their actions.[32] While the first two of these changes are striking enough, it is this last aspect which is perhaps the most salient feature of no-fault. Separating agents from the costs they produce does not, of course, make those costs go away; they are simply borne elsewhere—by innocent victims, or by unrelated third parties. There is nothing intuitive in this solution; indeed, the burden of justifying their being so borne would seem to rest squarely with the supporters of no-fault. For a society with a decent respect for the integrity and autonomy of its individual members will attempt to keep actors and the upshots of their actions (both good and bad) as close as possible.

It is perhaps not too cynical to remark that what follows from not doing so begins to emerge once we recognize the all too human penchant for avoidng the costs (while seeking the benefits) of our actions—thus the common attempt to avoid the reparation costs we have been discussing, and the inclination to view their assessment as a penalty. On a case-by-case basis, however, the actual costs—for all kinds of practical reasons, not least of which is their being determined by a judicial proceeding—are rather more difficult to escape than when these costs are considered *en masse* or when their determination is the result of some other procedure. Indeed, when a case-by-case assessment is eliminated and the reparation obligations are both widely distributed and determined by statute (as in the case of 'social insurance') an entirely new element is introduced. Now we no longer have the tortfeasor facing the injured; we have the injured facing the unrelated obligation holders. Clearly, the interests of the latter, in the absence of a pervasive magnanimity, are to minimize their losses. And just as clearly the obligation holders (or insurance "system" payers, or taxpayers, if funded through taxes) are always more numerous than the injured. If the 'social insurance' is operating through political (as distinct from judicial) channels, then this majority, in a democracy, will likely prevail. The interest of the (uninjured) majority, again, is to keep premiums down: indeed, this is one of the factors that led to no-fault considerations in the first place. One way to keep premiums down is to keep costs (i.e., reparations to the injured minority) down.[33] And of course this is precisely what experience has shown. Those states which have passed no-fault statutes have invariably been influenced by this majority interest, with the result noted above, that rights of recovery recognized in the common law have been limited or eliminated altogether. In particular, rights to recovery of general damages (e.g., pain and suffering) have come under severe curtailment and in some proposals have been eliminated completely. All this will keep costs down for the many, to be sure: it is most utilitarian. But the larger problem with the no-fault proposal, as with so many schemes which would replace common law rights with legislative statute, is that it brings us face to face with the tyranny of the majority, the dangers of which the classical theorists so clearly recognized.

## NOTES

[1]Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 153.

[2]For an excellent discussion of these issues and the legal theory underlying them (as well as an extensive bibliography) see Walter J. Blum and Harry Kalven, Jr., *Public Law Perspectives on a Private Law Problem* (Boston: Little, Brown, and Co., 1965).

[3]With regard to the foregoing remarks, Blum and Kalven comment: "The question frequently now heard is: 'By what arrangement can we most expeditiously maximize the shifting of losses?'

There is a profound difference between this and the old-fashioned question: 'What losses should be shifted and what losses should the victim bear?' Under the logic of the common law, there is no meaningful way of answering the first question unless the second question has already been answered." *op. cit.*, p. 15.

[4]"On the Moral Argument for the Fault System," LXXI (Aug. 15, 1974), pp. 473-490.

[5]In "Sua Culpa," in *Doing and Deserving* (Princeton, N.J.: University Press, 1971), pp. 212-221.

[6]I say 'action' rather than (in another mode) 'wrongful action' because I am (and will be) assuming a strict and not a negligence standard of liability. This is in keeping with what I take to be the direction of contemporary legal thinking (with which I agree), though I recognize that the negligence standard has, for reasons not altogether clear, dominated in automobile cases. For a defense of the negligence standard see Blum and Kalven, *op. cit.*, pp. 15-17; also Richard A. Posner, "A Theory of Negligence," 1 *The Journal of Legal Studies* 29 (1972); but for cogent discussions of strict liability see Richard A. Epstein, "A Theory of Strict Liability," 2 *The Journal of Legal Studies* 151 (1973), and "Defenses and Subsequent Pleas in a System of Strict Liability," 3 *The Journal of Legal Studies* 165 (1974).

The use of 'harm' here (and throughout) is not meant to suggest that *any* harm caused under *any* circumstances is a proper candidate (other than *prima facie*) for tort remedy. The standard texts on tort law should be consulted in this regard.

[7]This sense of 'responsiblity' is as opposed to the more primitive (because logically prior) sense which is used in contexts in which *authorship* is at issue: "I'm not responsible (for that consequence)" may mean simply "I'm not the author of the action which brought about that consequence." Causality is prior to liability, though "responsible" may be used for both.

[8]It may be helpful to draw somewhat more precisely the logical correlations between the rights and obligations in the above example: *A*'s right to sue *B* for recovery may be (loosely speaking) *derived* from *B*'s failure in meeting his standing obligation, but it is not *correlative* to that obligation; rather, *A*'s legal (and procedural) right to sue has correlative to it the obligation of the state (assuming we are not in a "state of nature" situation) to provide the machinery necessary to the realization of that right; but *A*'s right to sue is *in service of* his (moral and legal) right to be compensated for the harm caused him by another, and it is this latter right which has correlative to it the obligation of *B* to compensate those he has harmed. *B*'s standing obligation to not harm others, on the other hand, is correlative to *A*'s general right to be free from harm caused by others. The central notion here is that the correlativity of a right and an obligation turns upon the object of the right-claim.

[9]The *locus classicus* for rectificatory justice is the *Nichomachean Ethics* V, 4, 1132a 4-7: "[In private transactions] . . . the law looks only to the distinctive character of the injury, and treats the parties as equal, if one is in the wrong and the other is being wronged, and if one inflicted injury and the other has received it. Therefore, this kind of injustice being an inequality, the judge tries to equalize it . . ." (The bracketed phrase comes from V, 2.)

Commenting on this passage, Ross remarks: "The problem of 'rectificatory justice' has nothing to do with punishment proper but is only that of rectifying a wrong that has been done, by awarding damages; i.e., rectificatory justice is that of the civil, not that of the criminal courts. The parties are treated by the court as equal (since a law court is not a court of morals), and the wrongful act is reckoned as having brought equal gain to the wrongdoer and loss to his victim. . . ." W. D. Ross, *Ethica Nicomachea* (Oxford, 1925), no pagination. The reference to "gain" and "loss" here is owing to Aristotle's discussion in this section of transactions in general and not just of those involving what we would call a tort.

It has been brought to my attention by Dr. Gary North that the concept of responsibility entailed by this rectificatory justice is to be found as early as Exodus, Ch. 21, verses 18, 19.

[10]A good example of this is to be found in Jeffrey O'Connell, *The Injury Industry* (Urbana, Ill.: University of Illinois Press, 1971).

[11]It is to be noted as well that these commonly lauded objectives of no-fault were never intended to be objectives under the common law. It was intended that some victims not be compensated, e.g., drivers in single car accidents (or, under a negligence standard, negligent drivers and victims of accidents in which no negligence is involved), and that justice be thorough (e.g., that victims be *wholly* compensated), which often takes time. See Blum and Kalven, *op. cit.*, pp. 30-31 and 71 ff.

[12]These complications can be quite detailed. See, e.g., James D. Ghiardi and John J. Kircher, "Automobile Insurance: An Analysis of the Massachusetts Plan," *Syracuse Law Review*, vol. 21

(Summer 1970), pp. 1144-1147. For incisive comments on the controversial Massachusetts Supreme Court ruling on that state's no-fault statute (*Pinnick v. Cleary* (1971)) see, e.g., Robert M. Cove, "Case Comments," *Suffolk University Law Review*, Vol. VI (Fall 1971), pp. 123-139; also Raymond J. Kenney, Jr., "No-Fault in Massachusetts—an Epilogue," *Massachusetts Law Quarterly*, Vol. 56 (1971), pp. 441-452.

These threshold and specified loss provisions of many no-fault proposals—necessary for the system to have any semblance of justice—tend to diminish one of the most common practical arguments in support of the scheme, that it lowers premiums. Insofar as the tortious remedy is reintroduced (through the back door, as it were), the increased reparations will result in increased premiums.

[13]Needless to say, the complications this scheme raises for pedestrians, guest passengers, and motorists from non-no-fault states (all of whom would not normally buy such self-insurance limited to automobile accidents)—not to mention the subject of property damage—are manifold. The tort remedy is, by comparison, simplicity itself.

[14]In theory the victim could be made whole by being allowed to collect *all* of his losses from his own insurance company. But this would go counter to all prudent (and most legal) principles of self-insurance. We are ordinarily allowed (by the insurer, or by law) to insure only a part of the value being insured, this to discourage fraud. Moreover, given the uncertain value of various general damages (e.g., pain and suffering), the elimination of the adversary relationship between plaintiff and defendant leaves the context for determining these values (plaintiff vs. *his* insurance company) a little artificial: it wasn't *his insurance company*, after all, who injured the plaintiff! In any event, under the tort remedy innocent victims are not normally expected to bear a part of their losses as though they were self-insuring. This is but another of the moral anomalies of no-fault.

[15]All references to Coleman's article (above, note 4) will be included in the text in parentheses.

Coleman's use of "fault system" is unfortunate, though understandable. To the extent that the standard of simple negligence is used, 'fault' is perhaps less than appropriate; but to the extent that a theory of strict liability is adequate for the tortious remedy, as I would argue (see note 6, above), "fault" is altogether misleading. Nevertheless, to avoid confusion I will follow Coleman and refer to the traditional system (even where strict liability applies) as the "fault system."

[16]Coleman is arguing against a system in which contributory fault is a bar to recovery. Supporters of the fault system, even those who defend the negligence standard, need not be committed to this principle, however. In many states, in fact, this much maligned doctrine has been replaced by 'comparative negligence;' and where this has not occurred the so-called doctrine of 'last clear chance,' stemming from *Davies v. Mann* (1842), has served to modify the contributory bar to recovery.

[17]Feinberg remarks that " 'Retributivism' has served as the name of a large number of distinct theories of the grounds for justifiable punishment . . ."; *op. cit.*, p. 216, n. 20.

[18]Especially note 9; see also Blum and Kalven, *op. cit.*, pp. 13 and 63.

[19]"Loss" is being taken here to denote the total losses brought about by the original action—those which may be assigned to the tortfeasor by the court as well as those which may have initially fallen *directly* upon him.

[20]See Epstein, "A Theory of Strict Liability," *op. cit.*, p. 158.

[21]It is with this criminal penalty that we find the "expressive aspect" which apparently lies at the base of Coleman's attempt to distinguish " 'genuine' punishments" from "mere penalties." (489)

[22]E.g., "There seems to me to be no reason why non-fault accident laws could not provide us with alternative *penal* structures for exacting some form of *reparation* from wrongdoers in ways suggested by the retributive principle, e.g., *penal fines* . . ." (488) (emphasis added).

But as was mentioned earlier, this confusion of the two kinds of penalty is to be found in Feinberg as well (Coleman, it should be pointed out, expresses special indebtedness to Feinberg, and in particular to "Sua Culpa;" above, note 5): Distinguishing 'strong retributivism,' according to which "*all* fault deserves its comeuppance," from 'weak retributivism,' according to which, "if someone must suffer, it is better, *ceteris paribus*, that it be the faulty than the meritorious," Feinberg argues that "What is called the 'fault principle' (or, better, the 'his fault' principle) . . . is not even compatible with the strong version of general retributivism. As we have seen, the causal component of 'his fault' ascriptions introduces a fortuitous element, repugnant to pure retributivism. People who are very much at fault may luckily avoid causing proportionate harm,

and unlucky persons may cause harm in excess of their minor faults" (*op. cit.*, p. 219). The reparation penalty, in other words, may be out of proportion with the fault, and so the faulty actor would not get his proper comeuppance. But this depends upon construing the reparation penalty as *the* comeuppance.

[23]Feinberg's argument here is interesting: roughly, if we are "all more or less equally sinners," and if the occurrence and extent of the consequences of our sins is a matter of mere contingency (i.e., some are lucky, some not), then why not sever the causal connection (of "his fault" judgments) altogether and penalize people (for purposes of compensation) for their faulty actions alone and not for their consequences. The truth of these antecedent conditions remains to be established, however.

[24]The last part of this passage confuses the uninsured motorist provision of many liability policies—which is a form of self-insurance—with the liability features proper.

[25]On the role of insurance in the traditional picture, Blum and Kalven remark: "From the beginning the common law has had the simple view that when a loss was shifted it could only be shifted from one individual to another; and when liability insurance came along it was seen officially only as a device for guaranteeing the solvency of parties onto whom a loss might be shifted." *op. cit.*, p. 32.

[26]Or, under strict liability, on the basis of their origin (see notes 6 and 15 above).

[27]I ignore here the principles put forward in this connection by Feinberg: e.g., "the deep pocket principle (of distributive justice) that the burden of accidental losses should be borne by those most able to pay in direct proportion to that ability." *op. cit.*, p. 221, n. 21. While I think such principles (as Feinberg lists) can all be convincingly met (and are most certainly outside the traditional law of tort), to do so is quite beyond the present scope. On this 'deep pocket' principle, however, see Blum and Kalven, *op. cit.*, p. 55 ff.

[28]*Anarchy, State, and Utopia*, p. 150.

[29]See note 22 above.

[30]Feinberg argues that weak retributivism "is the principle that *fault forfeits first*, if forfeit there must be" (*op. cit.*, p. 218). But it is clear that neither he nor Coleman (490) are happy with the state of affairs resulting from the application of this principle; Feinberg continues: "If someone has got to be hurt in this affair, let it be the wrongdoer (other things being equal). But where there is no necessity that the burden of payment be restricted to the two parties involved, weak retributivism has no application and, indeed, is quite compatible with a whole range of nonfault principles" (p. 220). But surely the point is not *if* someone has got to be hurt; rather it is that someone has *already* been hurt (by the accident)! The problem now is one of determining what obligations were not met and what obligations are thus now owing. (Notice that Feinberg too has no qualms about shifting the burden to third parties.)

[31]A further justification of the rights and obligations there set forth is of course required if the arrangements I am defending are to be "completely" justified; but that is a large undertaking, quite outside the present scope.

[32]This last point is of course in keeping with much contemporary political philosophy. For a justification of the separation of actors from the costs (and benefits) of their actions on a much grander scale see John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard Univ. Press, 1971), especially pp. 104 ff. and 311-2; for a cogent criticism of Rawls on this point see Nozick, *op. cit.*, pp. 213-4.

[33]It is sometimes implicitly assumed by political philosophers that the terms "majority" and "minority" denote in some sense "fixed" groups (e.g., an ethnic minority, or a working class majority). The present analysis, however, points up that majority/minority membership (and therefore 'class interests') may be transitory indeed: a member of today's premium- (or tax-) paying majority may tomorrow be a member of the injured minority. Hence the democratic political realm (as distinct from the judicial realm) may be less than propitious for rendering the requisite equitable solutions.