

Nozick, prohibition, and no-fault motor insurance¹

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ABSTRACT: No-fault insurance schemes involve prohibiting exercise of the natural rights of individuals to recover damages from those whose negligence causes them harm. Public debate about no-fault emphasises consequentialist benefits, and takes little account of the putative rights of individuals to recovery. I argue, however, that even on a relatively extreme rights-based conception of justice, such as Robert Nozick's, it may be possible to justify a no-fault scheme. The argument proceeds by: (1) elucidating what compensation the Nozickian must offer in return for prohibiting an activity such as the private recovery of damages; and consequently (2) arguing that there is no prima facie reason to think that the compensation afforded by participation in a no-fault scheme would be any less adequate than that afforded by participation in a system of tort law.

No-fault insurance comes in a variety of flavours. I call a scheme *compulsory* no-fault insurance if and only if it denies all the participants in the relevant activity the right to recover damages for harm they suffer as a result of the negligent behaviour of others. In turn, it requires the participants to insure themselves against the cost of any harm negligently done to them by others. Evidently, there could be different schemes that involve abjuring the right to recover other varieties of damage. I focus on a relatively mild version, whereby it is only damage arising through negligence that is covered.

The areas of human activity where no-fault insurance has been proposed include motor accidents, workers' compensation, and medical negligence.² I focus on motor accidents, and given that there are some important practical differences in the application of no-fault schemes between this and other areas, it is unclear how readily the arguments will generalise.³

¹ This paper is forthcoming in *Journal of Applied Philosophy*.

² A particularly well known example of a very general no-fault scheme is that instituted in New Zealand under the *Accidents Compensation Act* (1982).

³ Thanks to an anonymous referee for counselling caution here.

Not all no-fault schemes are compulsory. In the legal sphere, Jeffrey O’Connell has been a notable advocate of *elective* no-fault schemes.⁴ In these cases, individuals may elect to be exempt from being sued for negligent damage, but must then (1) give up the right to sue others for negligent damage, and (2) take up a no-fault insurance policy, whereby they are covered for damages done to their vehicle, regardless of who is at fault.

What, if anything, is wrong with such a scheme, be it elective or compulsory? In the current public debate, prominent issues include the efficiency of cost distribution, the possibility that no-fault schemes will fail to deter drivers from driving dangerously, and other such consequentialist criteria.⁵ Occasionally, opponents of no-fault schemes appeal to the rights of drivers.⁶ If a driver has a right to recover negligent damages, how can it be that the state can remove that right, and require that one insure *oneself* for the damages one suffers? Or, in the case of an optional scheme, how may an individual justly exempt herself from the possibility of being sued for damage caused through her own negligence? Critics of no-fault argue that this severs the negligent actor from responsibility for her action, and amounts to placing the burden of suffering upon the innocent victim and the victim’s insurance provider.⁷

I wish to argue, however, that even on relatively extreme rights-based views, such as that of Robert Nozick,⁸ it may be possible to justify the institution of a no-fault insurance scheme.

⁴ See O’Connell, J. et al. (1996) The Comparative Costs of Allowing Consumer Choice for Auto Insurance in All Fifty States, *Maryland Law Review*, 55, 160–81, and references therein.

⁵ The discussion in economics and law journals is abundant. See Studdert, D. M. et al. (1997) Can the United States Afford a ‘No-Fault’ System of Compensation for Medical Injury? *Law and Contemporary Problems*, 60, 1–34; and Cummins, J. D. et al. (2001) The Incentive Effects of No-Fault Automobile Insurance, *The Journal of Law and Economics*, 44, 427–66, for some recent examples.

⁶ This variety of objection is made, drawing explicitly upon Nozick’s theory in places, by Pilon, R. (1976) Justice and No-fault Insurance, *The Personalist*, 57, 82–92, at 83–84.

⁷ Pilon, at 84.

⁸ Nozick, R. (1974) *Anarchy, State, and Utopia*, Oxford, Blackwell. Subsequent references to this work will be made in parentheses in the text.

§ Nozick's account of prohibition

Nozick thinks, of course, that we may prohibit exercise of the natural right to enforce justice privately, and that something like the institution of tort law is an adequate mechanism with which to replace the part of that natural right which pertains to recovering damages for injury arising through negligence (ASU, chap. 5).

Grant, then, what Nozick's argument requires, that paying for a tort-based system of law for recovery of damages puts one at no disadvantage relative to being free to enforce one's claims of justice privately. The question then becomes: Is a no-fault insurance scheme a similarly adequate replacement for the opportunity to enforce one's claims privately?

The consequentialist considerations of efficiency, etc., – often touted as advantages of no-fault schemes – would not be persuasive to an avowedly deontological philosopher such as Nozick. On what basis, then, may we prohibit an activity, and what is the appropriate amount of compensation owed to the prohibited party? Having answered these very general questions about prohibition, we may hazard an answer as to whether or not participation in a no-fault scheme would be, like a tort scheme, an adequate form of compensation, such that no disadvantage was suffered.

Nozick has two different accounts of legitimate prohibition: one for prohibiting rights-violations themselves, and the other for prohibiting activities that merely risk causing a rights-violation. Prohibiting the private enforcement of justice is an instance of the latter type of prohibition. With respect to activities that merely risk causing the violation of the rights of another, Nozick has one overarching principle:

The Principle of Compensation: those who are *disadvantaged* by being forbidden to do actions that only *might* harm others must be compensated for these disadvantages foisted upon them in order to provide security for the others.

(Pp. 82–3, emphasis in original)

He then distinguishes three distinct cases which call for different types of compensation (pp. 84–7). If X wishes to prohibit Y from exercise of an activity alpha, then we may ask what would it be like for X to *purchase* from Y her abstinence from exercising her right to alpha? The three cases are:

- a. X is better off in virtue of Y being around to engage in such trades.

- b. X is not better off in virtue of Y being around to engage in such trades, but Y has a motive for proposing to alpha other than merely profiting by sale of her abstinence.
- c. X is not better off in virtue of Y being around to engage in such trades, and Y has no motive for proposing to alpha other than merely profiting by sale of her abstinence.

In cases of type (a), Nozick notes that this is a type of productive exchange, whereby both X and Y benefit from the possibility of trade. In that case, for X simply to prohibit the practice of alpha is analogous to walking into a shop, seizing a good which was for sale, and then offering compensation after the fact. That may be just, so long as the amount of compensation is equal to the amount that would have been arrived at by normal bargaining. Call this amount *market* compensation. Market compensation will normally be *greater* than ‘full compensation’ – the minimum amount sufficient to make Y indifferent about having lost the right to engage in alpha. This is because in the process of bargaining, if Y is successful, she will be able to obtain a price greater than full compensation, which is still, less than the maximum that X is willing to pay. X may not, therefore, pay merely full compensation, for that would unfairly return all the benefits of exchange to the prohibitor (pp. 63–5). It would be akin to insisting that one always succeed in driving the hardest possible bargain.

Given that it is a practical impossibility to determine market compensation without actually engaging in the process of bargaining, there is a strong presumption against the permissibility of prohibition in cases of type (a). There may, however, be cases where the compensation offered is so magnanimous as to make it reasonably certain that no complaint is warranted.

The paradigm case of type (c) is the cynical Russian roulette player. Someone who threatens to play Russian roulette upon me with no motive other than obtaining some money in exchange for her abstinence is engaged in a paradigmatically unproductive exchange. Therefore, suggests Nozick, we have no duty to offer any compensation at all for prohibiting this sort of activity.⁹

In between, in cases of type (b), Nozick is harder to pin down. He says that we may prohibit only if we compensate for the *disadvantage* suffered by the prohibited party. He admits, however, to having no ‘theory of disadvantage’ (pp. 82, 87).

⁹ Although it is hard to find one passage which Nozick states this decisively, it is certainly consistent with comments on pp. 82, 83, and 86.

Despite that rather serious shortcoming, Nozick relies heavily upon this concept in his justification of the minimal state. The central idea appears to be that we are supposed to suffer no disadvantage in being deprived of 'unimportant' or 'socially undesirable' activities. So the sincere Russian roulette player, although she is genuinely worse off by being prohibited from her activity, is thought to suffer no disadvantage.

While I cannot myself offer any complete theory of disadvantage, I can hazard a few remarks on what sort of concept Nozick requires for his subsequent justification of the state to work, and that those few remarks may be sufficient to permit extrapolation to an argument which justifies a no-fault scheme. I need first, then, to review Nozick's justification of the state.

§ The prohibition of private enforcement of justice

Nozick's account of the minimal state requires that it is possible justly to prohibit the private enforcement of justice. This is – at least in the standard case – a type (*b*) prohibition, in that the members of the dominant protective agency would be better off if they did not have to deal with independents at all, but the independents are not threatening to enforce justice privately solely in order that they may profit by selling their abstinence from that activity. In order justly to prohibit the independents, then, the dominant protective agency must offer sufficient compensation such that the independents suffer no disadvantage.

In most cases, sufficient compensation will be achieved by offering the agency's protective services at a cost (discounted if necessary) equal to or less than the monetary cost to the independent of providing protective services for themselves (pp. 110–3).

From this Nozickian justification of the state, we may make some tentative observations about the concept of disadvantage. Consider the independent who ardently loves the thrill of hunting down those who have violated her rights in order to obtain compensation or enact punishment, as the case merits. By being deprived of this activity, this individual's psychology is being overlooked, and she is being compensated in terms that will fall well short of full compensation. She is worse off. Nonetheless, Nozick holds that she is not 'disadvantaged'.

The concepts of market compensation and full compensation are defined relative to an individual purchase of a specific right. To purchase A's car justly, one must offer an amount that compensates A for forgoing property rights in *that car*. Call such compensation amounts 'subjective' compensation. One might appeal to

a different idea of compensation, such as ‘market price’ – this being the cheapest amount for which one could purchase that *type* of right from someone in the market. Market price and related amounts I shall call ‘objective compensation’. It appears that Nozick’s *disadvantage* is an objective species of compensation. Whether or not market price is the very same objective concept as disadvantage is a matter for further consideration, but it is reasonably certain that the independent who misses out on the particular thrills of vigilantism is not being compensated on a *subjective* basis.

§ Application to no-fault

The preceding sections have established that a Nozickian is likely to endorse an objective amount of compensation for being deprived of the right to recover damages. If the justification of a no-fault scheme instead of a tort-based system of law is to go through, then we need to show that the objective compensation received through being offered membership of a no-fault insurance scheme is no less than that afforded by tort law.

Benefits of vengeance

A benefit of vengeance of sorts might be thought to accrue to both the practitioner of enforcement in the state of nature, and to the plaintiff suing under a tort law scheme. No such benefit seems to be available under a no-fault scheme, for the party who is at fault not only is not required to pay damages for the injury they caused, but even evades the public embarrassment of being brought to court, etc. So this looks like a benefit of which we are deprived by instituting a no-fault scheme.

Even if we grant that there is such a thing as a benefit of vengeance under a tort scheme, it is implausible to think that this is an essential feature of a just scheme of compensation for injury caused in motor accidents.¹⁰ The type of harm with which I am concerned is that incurred through negligence. At law, however, negligence is defined by an objective standard, which arguably has very little correlation with moral fault. Suppose that that argument succeeds. Then to suppose that one deserves the opportunity to exact vengeance upon one who has

¹⁰ The following argument owes a great deal to Coleman, J. L. (1974) On the Moral Argument for the Fault System, *The Journal of Philosophy*, 71, 473-90.

committed a deed – admittedly careless – but one for which we cannot say that they are at fault, seems absurd.

Suppose, on the other hand, that legal standards of negligence do correlate with moral fault. We may then ask why it is that it is only *negligence that causes harm* that ought to be revenged? Surely every instance of failure to drive responsibly is equally an instance of moral shortcoming, regardless of whether or not it is the cause of any injury? That may establish that there is a right to exact retribution, then, but not solely upon those who cause negligent damage. Rather the right is held against those who are guilty of driving in faulty fashion, regardless of whether or not it leads to any damage. Jules Coleman has argued that this right to retributivism may be accommodated within a no-fault scheme. What it will require is that faulty driving be penalised by greater contributions to the insurance pool.¹¹

Other benefits of right to recover

Apart from the alleged benefit of vengeance (a sort of ‘moral’ benefit), the principal benefit one derives from a right to recover damages is a financial one. One receives money in return for the damage suffered. Under a typical no-fault scheme, the amount of compensation one receives for any given injury will differ from what one would have received under a tort scheme. No-fault schemes will typically take less account of the individual circumstances of the plaintiff. They will perhaps put statutory limitations on the amount that may be received in damages. While there could be no-fault schemes which much more closely resembled a tort-based system of assessing damages, it is unlikely that one which did so would be sufficiently efficient to be attractive. In general, then, plaintiffs can expect to receive fewer damages for negligent harms under a no-fault scheme than they would if successful in their suit under a system of tort.¹²

Against that, however, is the benefit that one need not prove who was at fault under a no-fault scheme. In return for the loss of the ability to recover what we might call full compensation for a negligently inflicted harm, we gain near certainty that we shall recover *something*.

Is this trade-off acceptable? One reason to think so is that a no-fault insurance scheme might mean a lower expected cost to the participants in the scheme. That is, less money might be spent on lawyers’ fees, judges’ salaries, private

¹¹ Coleman, at 484–5

¹² This point is emphasised by Pilon, at 84.

investigators, and other costs incurred in the process of determining negligence and extent of damages, as occurs in a tort-based system. Whether that is the case – i.e. whether there is a sufficiently large reduction in cost that the average individual is better off – is an empirical question which I do not attempt to answer. But *if* this were so, would it be sufficient to show that a no-fault scheme is at least as good as a tort scheme for the purposes of compensating individuals for the loss of their right to recover damages privately?

Given the earlier discussion of the concept of disadvantage, we see that there is no possible Nozickian complaint on the grounds that not every participant will receive *full* compensation for loss of the right to recover privately. Moreover, there is reason to expect that consideration of the impact of a no-fault scheme on the *average* individual will indeed be relevant to determining whether or not everyone is compensated for his or her *disadvantage*, since that appears to be an objective concept of compensation.

A further, speculative argument

I believe the above considerations are sufficient to establish that there is no *prima facie* Nozickian objection to adoption of a no-fault scheme instead of a tort scheme. It is tempting, however, to offer further justification for the adequacy of a no-fault scheme along the following lines.

Call a right, the exercise of which confers benefits which are predominantly fungible, an *exchangeable right*. Call those rights which confer predominantly non-fungible benefits, *non-exchangeable rights*. Evidently there will be no hard and fast division here, but a spectrum of rights along the dimension of exchangeability.

The property right I have in a banknote, for instance, is one which confers predominantly fungible benefits. I could get equivalent benefits from having a property right in any banknote of the same denomination. At the other extreme, the benefits I derive from the right to freedom of movement are far less fungible. There are very few other rights which might be granted to me which would provide equivalent benefits.

Consider a debtor X, who owes \$100,000 to her creditor Y. Other things being equal, it is no injustice to compel X to give \$100,000 worth of banknotes to Y. Most would hold, however, that it would be grossly unjust to compel X to become Y's slave for a period of time in order to repay the debt. Plausibly, this moral difference between forced monetary repayment of debt versus forced enslavement

to repay debt is at least in part explained by the difference in *exchangeability* of X's right to the banknotes and X's right to freedom of movement.

This observation makes the following sort of principle tempting:

- (P) If a right is highly exchangeable then it is, other things being equal, just to compensate for violations (including prohibitions) of that right by offering an *objective* amount of compensation rather than a subjective amount.

If this principle were accepted, the argument would run: The principal benefit which we derive from the right to recover damages is a monetary benefit. As discussed above, monetary benefits are very high in fungibility. Therefore, the right to recover damages is highly exchangeable. By *P* then, other things being equal, it is acceptable to prohibit exercise of this right and to offer some species of objective compensation. Hence the complaints of individuals with respect to the loss of benefits afforded by private justice enforcement or by tort law which they particularly value may be justly ignored.

The apparent advantage of the argument is that it does not go via the relatively opaque concept of disadvantage, but appeals explicitly to a principle that has at least superficial plausibility.

This sort of argument, however, seems to beg the question against the individual who feels under-compensated by a no-fault scheme. When we talk of a benefit being fungible, the lover of private justice enforcement may complain: 'True, for most people the relevant benefits are highly fungible. But for me, I either derive *different* benefits from the same right, or I simply do not find those benefits to be as fungible as most folk. It is for precisely that reason that subjective compensation differs so dramatically from objective compensation in my case.'

I have no answer to this objection which is entirely satisfactory. The best I can offer is the thought that, in the example of X and Y above, we would not be particularly impressed if X claimed that her attachment to her banknotes was highly sentimentalised, and that therefore the benefits she derived from ownership of them were not at all fungible. X would still be obliged to relinquish the money. Indeed, even if X protested that she would *prefer* temporary enslavement than loss of her cash, some would still insist that X yield her banknotes. (Although Nozick, of course, would be happy to permit such consensual enslavement (p. 331).) This suggests that, to the extent that a principle along the lines of *P* is relevant in this case, it is not a principle which refers solely to the exchangeability of a right *to the idiosyncratic right-holder*, but rather to some sort of non-subjective idea of

exchangeability.¹³ One might attempt to cast this standard in terms of intersubjective consensus; or in terms of what we must value most if we are to be intelligible to other moral agents; or some other terms entirely. I have not worked out theory on this point. I merely offer the above argument as an initially promising avenue by which to explicate the rationale behind the murky Nozickian concept of disadvantage, and to lend further support to the thesis that no-fault insurance is compatible with Nozick's theory of justice.

§ Compulsory participation

The central argument of the paper is complete. A word is warranted, however, on the topic of compulsory versus elective no-fault schemes.

I have already had occasion to discuss Nozick's justification for forcing individuals to forgo private enforcement of justice. Note, however, that strictly speaking Nozick does not require that the prohibited independents become paid-up members of the protective agency. He allows that they may request monetary compensation for being prohibited from private justice enforcement, and yet abstain from availing themselves of the services of the agency (p. 113). Similarly, one would not expect him to endorse the conclusion that it is just to compel everyone to pay for membership of the no-fault scheme, even though it may be legitimate to prohibit the exercise of the natural right to recover damages privately.

This suggests that a compulsory scheme would not be legitimate. However, as in the case of Nozick's justification of the state, the point of market equilibrium will most likely lie very near universal participation. An individual who, having been prohibited from the private recovery of damages, collects her monetary compensation for that prohibition, but then does not pay for insurance services, will stand in a state of nature with respect to the insurance agency, which has invested in it the recovery rights of every member. Given the relative might of the dominant agency, the outsider would be at a very great disadvantage if ever the agency believed her to be responsible for an injury to one of its members. Participation in the scheme is therefore likely to be of great benefit to the overwhelming majority of individuals.¹⁴

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¹³ I am indebted to Patrick Emerton for this suggestion.

¹⁴ Thanks to Patrick Emerton, Chet Pager, and an anonymous referee of this journal for very helpful comments on an earlier version.