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A TORTS Festschrift IN MEMORY OF PROFESSOR OSCAR S. GRAY

DONALD G. GIFFORD*

To both his colleagues in the national scholarly torts community and at the University of Maryland Francis King Carey School of Law, Oscar S. Gray, the late Jacob A. France Professor Emeritus of Torts, defined what it meant to be a scholar.¹ For nearly four decades, he constantly updated the definitive five-volume treatise in the field, *Harper, James and Gray on Torts*² by authoring the second and third editions and issuing semiannual (and more recently, quarterly) supplements. Along with me, he edited multiple new editions of his torts casebook.³ He chaired the AALS Section on Tort and Compensation Systems and later received the Section's Award for a lifetime of outstanding scholarship, teaching, and service. He was extremely active in making sure the Reporters of the various components of the *Restatement (Third) of Torts* accurately understood the state of the law. Finally, and most important to Oscar, he was extremely generous in mentoring younger scholars—both nationally—as reflected in the comments in each of the articles that follow, and at the University of Maryland.⁴

It was therefore not surprising that when the editors of the *Maryland Law Review* decided to publish a Festschrift in memory of Professor Gray, several of the nation's leading torts scholars volunteered to participate.⁵ Reflecting Professor Gray's broad interests in tort law, the articles contained

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*Jacob A. France Professor of Torts, University of Maryland Carey School of Law. I thank Professor Christopher J. Robinette of the Widener University Commonwealth Law School and Kyle Keraga, law clerk for U.S. District Court Judge Richard Bennett of the District of Maryland, for reviewing and offering suggestions on this Foreword.

1. As one example, at the 1993 meeting of the AALS Torts and Compensation System, the late Jeffrey O'Connell, another of the giants of tort law of the time, while speaking on a panel that Oscar had organized, remarked, "In the world today, no one better epitomizes that 'ancient and hallowed term "scholar"' than Oscar Gray." An expanded version of Professor O'Connell's remarks later appeared in the *Maryland Law Review*. See Jeffrey O'Connell et al., *Consumer Choice in the Auto Insurance Market*, 52 MD. L. REV. 1016 (1993). Regrettably, the written version omits Professor O'Connell's remark about Professor Gray that I quote here.

2. FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, HARPER, JAMES AND GRAY ON TORTS (3d ed. 2006).

3. HARRY SHULMAN, FLEMING JAMES, JR., OSCAR S. GRAY & DONALD G. GIFFORD, LAW OF TORTS: CASES AND MATERIALS 1 (6th ed. 2015).

4. See Jana B. Singer, *Tribute to Professor Oscar S. Gray*, 79 MD. L. REV. 1158, 1158 (2020) (describing her colleague as "a source of wisdom, support, and intellectual inspiration" and recounting similar comments from many other Maryland colleagues).

5. The articles are presented alphabetically using the surname of the author or, when there are co-authors, the surname of the first co-author.

in this volume range from abstract to practical and from historical to contemporary. Many address issues that were not even blips on the radar screen⁶ when Professor Gray first began his scholarly career.

There is perhaps no greater praise for a contribution to a memorial Festschrift than that the article caused the reader to envision a colloquy between the deceased scholar and the authors. In “*Conceptualizing Tort Law: The Continuous (and Continuing) Struggle*,”⁷ by Kenneth S. Abraham and G. Edward White, both David and Mary Harrison Distinguished Professors at the University of Virginia School of Law and preeminent historians of American tort law, the authors ask two sets of questions at the heart of this thing known as “tort law”:

(1) What is tort law? What are its boundaries? Is it a conceptually coherent body of law? and

(2) How can it be logically organized? How can individual torts be classified?

As I read this article, and contemplated these questions, I found myself frequently envisioning the probing questions that Professor Gray would have asked the authors in response.

In addressing these questions, Professors Abraham and White provide us with an extraordinarily well-researched history of the formally articulated doctrines governing tort law. The authors chronicle how treatise authors,⁸ casebook editors,⁹ and Restatement reporters have “embark[ed] on an epistemological search for order, seeking to organize and classify fields of knowledge on the basis of common, foundational principles.”¹⁰ These scholars almost inevitably begin their explanations of tort law with the intentional torts protecting the general right of personality:¹¹ battery, assault, and false imprisonment. This sequencing has usually been explained historically, by the fact that these torts were derived from the writ of trespass.¹² It has also been a matter of pedagogical convenience, allowing educators to prioritize the more doctrinal and rule-like intentional torts over the “messier” policy battles inherent in the rise of negligence, and, during the late-nineteenth century, to highlight the “rule-to-application ‘scientific’

6. I do not choose this metaphor randomly. Oscar Gray once served in the United States Navy and was assigned to teach electronics to other Navy personnel.

7. Kenneth S. Abraham & G. Edward White, *Conceptualizing Tort Law: The Continuous (and Continuing) Struggle*, 80 MD. L. REV. 293 (2021).

8. *Id.* at 304–06, 308–12.

9. *Id.* at 313–17.

10. *Id.* at 303.

11. *Id.* at 317, 320–23.

12. *Id.* at 340–41.

method in order to justify professional education for lawyers within the university context.”¹³

This focus on intentional torts to persons as a logical place to begin organizing tort liability is a classic case of “the tail wagging the dog.” Even though the three ancient intentional torts governing bodily security still comprise an overly large share of first semester students’ study of tort law,¹⁴ they are of comparatively trivial importance in contemporary tort adjudication.¹⁵ Instead, today’s tort cases generally address liability for what Professor Gray described as “accidental injuries”—that is, injuries that are a “more or less incidental (and usually undesired) by-product of carrying on legitimate activities of one sort or another.”¹⁶ It is telling that whenever scholars have sought to extend the organizational scheme first developed in the context of intentional torts affecting bodily security to the remainder of tort law, they have invariably failed.¹⁷

Professors Abraham and White attribute this failure to the idea that tort law lacks an “organizing concept” that would make the subject “coherent in any obvious way.”¹⁸ They contrast the lack of coherence of the subject matter of tort law with the field of contracts, where they argue that the organizing principle is “promising,” and with property, where the organizing concept is “the nature of rights to or in a thing.”¹⁹ They observe that “generations of law students have simply learned that a tort is ‘[a] civil wrong not arising out of contract,’”²⁰ and ultimately conclude that this is “the only fully accurate

13. Donald G. Gifford, Joseph L. Kroart III, Brian Jones & Cheryl Cortemeglia, *What’s on First? Organizing the Casebook and Molding the Mind*, 45 ARIZ. ST. L.J. 97, 110 (2013).

14. *See id.* at 106–08, 111–12 (describing the disproportionate amount of time spent studying intentional torts during the first semester of law school).

15. As of 2005, intentional torts represented less than three percent of all tort trials in state courts and a similarly small percentage in federal courts. Lynn Langton & Thomas H. Cohen, *Civil Bench and Jury Trials in State Courts, 2005*, U.S. DEP’T OF JUSTICE 2 (2008), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cbjtsc05.pdf>; Thomas H. Cohen, *Federal Tort Trials and Verdicts, 2002-03*, U.S. DEP’T OF JUSTICE (2005), <http://bjs.ojp.usdoj.gov/content/pub/pdf/fttv03.pdf>. It seems likely that a majority of these cases involved misrepresentation, interference with contractual and other business relationships, and other business torts that are rarely considered during first-semester Torts.

16. SHULMAN, JAMES, GRAY & GIFFORD, *supra* note 3, at 1 (6th ed. 2015).

17. *See, e.g.*, Abraham & White, *supra* note 7, at 323, 329, 341 (“What may have happened, we think, is that the Reporter and his advisors recognized, as the project proceeded, that interest analysis was not as promising a method of organizing or conceptualizing all of tort law, and particularly of grouping torts together, as they had originally hoped, and that subdividing everything that involved protection of a particular kind of interest by reference to the tripartite standards of conduct would not be sensible either.”)

18. *Id.* at 319.

19. *Id.* at 318–19.

20. *Id.* at 319 (quoting KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 1 (5th ed. 2017)).

characterization of tort law.”²¹ This is reflected in the fact that Professors Abraham and White describe the *Restatement (Third) of Torts* as “a series of separate projects . . . because it simply was not necessary for Reporters to have a view of the entire subject while restating its parts.”²²

As the authors note, and as Professor Gray recognized, tort law is always messy.²³ It is precisely the open-ended and ill-defined nature of tort law and its doctrines that enable it to respond, in an inductive manner, to the wide variety of constantly evolving harms experienced in our society. Could, for example, any meaningful definition of tort law drafted in the 1870s encompass contemporary invasion of privacy torts? Professor Gray’s casebook,²⁴ and even his treatise,²⁵ by definition a compilation of doctrines, reflect that constant struggle and interplay among competing policies.²⁶ His former students frequently, at least initially, found his disdain for black-letter rules to be frustrating. For Professor Gray, though, it was the lack of rigid boundaries and classifying structures in tort law that provided the richness at the core of his life’s work. It is impossible to imagine Oscar Gray as a scholar in a discipline with well-defined boundaries or a rigid set of rules. He, like most practicing lawyers, was more fascinated by how tort law operated in the real world than the theoretical architecture of its doctrines.²⁷

In the second article in the Festschrift, “*Proximate Cause Untangled*,”²⁸ Mark Geistfeld, the Sheila Lubetsky Birnbaum Professor of Civil Litigation at the New York University School of Law, provides a coherent dissection and explanation of proximate cause, which he acknowledges is “commonly thought to be a ‘hopeless riddle,’”²⁹ by disentangling it from the other elements of a negligence claim.

In Professor Geistfeld’s analysis, the confusion surrounding “proximate cause” occurs because “it is entwined with all elements of the tort claim,

21. *Id.* at 341.

22. *Id.* at 335.

23. *Id.* at 296–97, 338–39 (acknowledging that “there is no consensus on any comprehensive underlying purpose of tort law,” characterizing the “organization of tort law” as “puzzling and fragmented,” and stating that “the different torts do not hang together very much”).

24. See SHULMAN ET AL., *supra* note 3, at iii (explaining, in the preface, “we have tried to present the material in such a fashion as to emphasize social consequences”).

25. HARPER ET AL., *supra* note 2.

26. See, e.g., *id.*, at § 11.5 (“Thus the possible objectives of tort law in accident cases may be classified as the moral objective, the compensation objective, the admonitory or deterrent objective, and the objectives of avoiding discouragement of desirable activity, economic waste, and a disproportionate burden on any members or groups in society.”).

27. See Abraham & White, *supra* note 7, at 337 (observing that “the organization of tort law simply does not matter much to the practicing lawyer.”).

28. Mark A. Geistfeld, *Proximate Cause Untangled*, 80 MD. L. REV. 420 (2021).

29. *Id.* at 460 (quoting Patrick J. Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 WASH. U. L.Q. 49, 50 (1991)).

ranging from duty to the determination of damages.”³⁰ By breaking the determination of liability for negligence into its component parts, Professor Geistfeld clarifies the critical role foreseeability plays in each aspect of a negligence claim.

Professor Geistfeld begins with the issue of duty. He justifiably criticizes courts that “rely[] on the element of duty to make case-specific findings of foreseeability as a matter of law, . . . conflat[ing] the categorical role of foreseeability with its case-specific application, thereby usurping the role of the jury.”³¹ Among other courts, the Court of Appeals of Maryland more than occasionally has held that there is no duty on case-specific findings of no foreseeability³² or other aspects of the case more appropriately left to the jury.³³

Professor Geistfeld distinguishes the liability-determining phase of the tort case, where foreseeability is involved in the determination of both duty and breach of duty, from the determination of damages for which the plaintiff can recover.³⁴ At the damages phase, he argues that a directness test “more fairly determines the extent of damages.”³⁵ Drawing upon an observation in Professor Gray’s treatise,³⁶ he conflates the universally adopted eggshell-skull rule with opinions such as *In re Polemis*.³⁷ In *Polemis*, the defendant’s employee dropped a plank into the hold of a ship, creating a spark and setting the ship ablaze because of the presence of petroleum vapors.³⁸ The

30. *Id.* at 460.

31. *Id.* at 436.

32. *See, e.g.,* Warr v. JMGM Group, LLC, 433 Md. 170, 175, 181, 70 A.3d 347, 350, 353 (2013) (holding that tavern that continued to serve alcoholic beverages to a visibly intoxicated patrons who was a known drunk was not liable for injuries and death the patron subsequently caused members of a family in a traffic accident a short distance from the tavern; “Vital to sustaining a cause of action in negligence is the existence of a legally recognized duty owed by the defendant *to the particular plaintiff*.” (emphasis added)).

33. *See, e.g.,* Georgia Pac., LLC v. Farrar, 432 Md. 523, 540–41, 69 A.3d 1028, 1039 (2013) (holding that there is “no duty” to warn members of household exposed to asbestos dust brought into home on clothes of family member who works in close proximity to asbestos products supplied by defendant; “Determining the existence of a duty requires the weighing of . . . whether . . . there is a feasible way of carrying out that duty”). The issue of whether the jury acted unreasonably in failing to fulfill a duty is more properly considered by the jury as part of its analysis of breach of duty.

34. *See* Geistfeld, *supra* note 28, at 451–56.

35. *Id.* at 453.

36. *Id.* at 454 n.147 (observing that while “there is no reason to distinguish between a direct cause and an intervening cause,” it may be “unfair to limit a defendant’s liability when the plaintiff had a preexisting vulnerability to suffering unforeseeably large harm” (citing HARPER, JAMES & GRAY ON TORTS, *supra* note 2, § 20.5)).

37. *Id.* at 454–55 (citing *In re an Arbitration Between Polemis and Another and Furnis, Withy & Co., Ltd.*, 3 K.B. 560 (1921)).

38. *Id.* at 455.

conflagration clearly was unforeseeable, yet the plaintiff prevailed on his claims for harm directly caused.³⁹

Polemis is generally treated as an issue of proximate cause, which would place it within Geistfeld's category of issues relating to the plaintiff's prima facie liability case, but Geistfeld argues "that the *Polemis* court was applying the eggshell-plaintiff rule, even though [the court] did not expressly describe the inquiry in this manner."⁴⁰ He argues that interpreting *Polemis* "to mean that the directness test can establish proximate cause in the prima facie case, regardless of foreseeability," resulted in "an overly expansive formulation of proximate cause that the court in *Wagon Mound I* subsequently rejected in favor of the foreseeability test."⁴¹ In other words, this portion of Geistfeld's analysis rests on the premise that the many courts that interpreted *Polemis* to establish a directness test for proximate cause, a foundational, if not universally accepted, principle of traditional proximate cause analysis, were in error. In his analysis, "[t]he foreseeability and directness tests are each valid within their appropriate domains, which is why the long-running debate about the single best test has been inconclusive."⁴² The foreseeability test governs the liability issues in any case, and the directness tests applies only in the context of the extent of damages, one manifestation of which is the thin-skull rule.⁴³

Professor Geistfeld's analysis should prove to be invaluable to courts, scholars, and students as they continue to "untangle" the "hopeless riddle" of proximate causation.

The third article, "*Rescuing Avoidable Consequences from the Clutches of Remedies and Placing it in Apportionment of Liability, Where it Belongs*,"⁴⁴ is by Professor Michael Green, the Bess and Walter Williams Professor of Law at Wake Forest Law, who served as Co-Reporter for the *Restatement (Third) of Torts: Apportionment of Liability*, and *Restatement (Third) of Torts: Concluding Provisions*, and the *Restatement covering Liability for Physical and Emotional Harm*, and Mr. James Sprague. They tackle the issue of how the doctrine of avoidable consequences should be

39. *Id.*

40. *Id.*

41. *Id.*; see also *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound No. 1)* [1961] A.C. 388 (Privy Council).

42. Geistfeld, *supra* note 28, at 424.

43. *Id.* at 451–53.

44. Michael D. Green & James Sprague, *Rescuing Avoidable Consequences from the Clutches of Remedies and Placing it in Apportionment of Liability, Where it Belongs*, 80 MD. L. REV. 380 (2021).

handled by courts in the forty-six civilized jurisdictions that have replaced contributory negligence as a total bar to recovery with comparative fault.⁴⁵

As the authors explain, the doctrine of avoidable consequences “is nominally a remedial doctrine that bars plaintiffs from recovering for enhanced or aggravated harms that the plaintiff could reasonably have avoided.”⁴⁶ An example would be a plaintiff whose leg was broken in an auto accident failing to seek medical treatment, leading to the amputation of the leg after gangrene occurs. The authors make the overwhelmingly persuasive argument that the doctrine of avoidable consequences, which totally bars recovery for the enhanced injuries, cannot survive the adoption of comparative fault and instead that liability for the enhanced injuries should “be apportioned among all of those whose tortious conduct caused that harm.”⁴⁷

Professor Green and Mr. Sprague credit Oscar Gray for both “champion[ing] comparative fault . . . and recogniz[ing] the incompatibility of avoidable consequences with modern apportionment schemes.”⁴⁸ As they observe, “Professor Gray had a shrewd mind and could not abide weak, flabby, and incoherent arguments.”⁴⁹ Professor Green and Mr. Sprague convincingly argue that the same principles of comparative fault that apply to apportion fault for the harm resulting from the original accident should be applied a second time to the discrete set of *enhanced* harms causally resulting from both the initial tortfeasor’s conduct and the plaintiff’s failure to prevent avoidable consequences.⁵⁰ They acknowledge that despite the seeming persuasiveness of their argument, a majority of courts continue to apply the doctrine to bar recovery totally for avoidable consequences, without acknowledging the tension created with comparative fault.⁵¹ Their

45. I am confident that I can accurately state that my strong characterization of states still employing contributory negligence as a total bar to recovery reflects the views of Professor Gray as well as my own. Perhaps ironically, two of the five jurisdictions that retain contributory negligence as a total bar to recovery are Maryland, obviously the home of this law review, and North Carolina, where Professor Green teaches and Mr. Sprague serves as his research assistant. See *Coleman v. Soccer Ass’n of Columbia*, 432 Md. 679, 695–96, 69 A.3d 1149, 1158 (2013) (Harrell, J., dissenting). The authors approvingly quote Judge Harrell’s blistering dissenting opinion in *Coleman* where the Court of Appeals of Maryland retained contributory negligence as a total bar to recovery. See Green & Sprague, *supra* note 44, at 381 n.2 (quoting *Coleman*, 432 Md. at 696, 69 A.3d at 1158–59).

46. Green & Sprague, *supra* note 44, at 384. The authors distinguish avoidable consequences from the doctrine of mitigation of damages, where the “injury-enhancing plaintiff misconduct . . . precedes or coincides with the initial tort,” such as the plaintiff’s failure to wear a seat belt. *Id.* at 388.

47. *Id.* at 387.

48. *Id.*

49. *Id.* at 419.

50. *Id.* at 398–99.

51. *Id.* at 416–17.

explanation for this inconsistent resolution is that many courts regard the doctrine as one with origins in the law of remedy, not the law of tort liability.⁵² The logic of the argument the authors make is so compelling that the authors are not presumptuous in asking themselves: “Why, authors, have you spent so much effort beating a dead horse?”⁵³ They then reveal the answer by noting, that, unbelievable as it may be in view of the logic of their argument, that “the Reporters for the *Restatement (Third) of Torts: Remedies* have circulated a Preliminary Draft that seeks to perpetuate avoidable consequences as a remedial doctrine that bars plaintiffs from enhanced-harm recovery.”⁵⁴

Professor Christopher Robinette, the author of the last article contained in this Festschrift, “*Harmonizing Wrongs and Compensation*,”⁵⁵ continues to carry on Oscar Gray’s scholarly life’s work by collaborating with me in the preparation of the quarterly supplements to the definitive six-volume treatise, *Harper, James and Gray on Torts*. In his article, Professor Robinette’s thesis is that the American accident-compensation system should include “a compensatory bypass in tort law”⁵⁶ for what he convincingly argues are the substantial portion of tort claims that are primarily concerned with compensation rather than vindication.⁵⁷ Using Professor Ted White’s characterization, Professor Robinette finds that the primary focus in modern tort law is admonitory, based on the wrongful nature of the defendant’s conduct and not on the victim’s compensation needs.⁵⁸ He further observes that we may be in a “moment of flux in tort theory”⁵⁹ between the predominantly instrumental conceptions of the last fifty years, and a growing contemporary conception of tort law based on moral wrongdoing.⁶⁰ Nevertheless, Professor Robinette argues that both approaches center on the defendant’s wrongful conduct and not on the compensatory needs of victims.⁶¹

Rather than advocating for a change in the tort system itself, Professor Robinette suggests that compensation-oriented victims should have access to

52. *Id.* at 397.

53. *Id.* at 418.

54. *Id.*

55. Christopher J. Robinette, *Harmonizing Wrongs and Compensation*, 80 MD. L. REV. 343 (2021).

56. *Id.* at 344.

57. *Id.* at 355.

58. *Id.* at 343; *see also* G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 244–48, 291 (Expanded ed. 2003).

59. *See* Robinette, *supra* note 55, at 343.

60. *Id.* at 343–44; *see also, e.g.*, JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS (2020).

61. Robinette, *supra* note 55, at 344.

a swifter, more certain, and less costly alternative for awarding compensation, even if such compensation is awarded in smaller amounts.⁶² He notes that Professor Gray often acknowledged the benefits of accident compensation systems that provided routinization of the claims process and smaller awards of damages to claimants on a no-fault or reduced fault basis.⁶³

Professor Robinette chronicles the waves of accident surges that have characterized the history of American compensation law: workplace accidents at the turn of the twentieth century,⁶⁴ automobile accidents, particularly during the mid-twentieth century,⁶⁵ and cycles of mass disasters, including the September 11 terrorist attacks,⁶⁶ the BP Gulf Coast oil spill,⁶⁷ and the proliferation of claims resulting from defective ignition switches in General Motors vehicles.⁶⁸ In each instance, the surges of claims resulted in structures for bypassing formal tort adjudications and relaxing requirements for compensation in exchange for lower compensatory awards. Professor Robinette calls for such a compensatory “bypass,” not just episodically, but as an ongoing feature of accident compensation.⁶⁹

Professor Robinette’s article honors the memory of two of his mentors: obviously Oscar Gray, but also Jeffrey O’Connell. Professor Gray’s case book, which I also continue to edit, begins with the totally misguided but uniquely rich case of *Ives v. South Buffalo Railway Co.*,⁷⁰ in which the New York Court of Appeals declared a workers’ compensation system, somewhat similar to the no-fault bypass system that Professor Robinette recommends, unconstitutional under the Due Process Clause.⁷¹ It exposes first-semester law students to no-fault compensation systems in their first weeks of law school and enables them to explore the advantages and disadvantages of such a system. At the same time, Professor Robinette honors the late Professor Jeffrey O’Connell, the most persistent and influential scholarly advocate of no-fault liability systems during the last half of the twentieth century,⁷² with

62. *Id.* at 378–79.

63. See Oscar S. Gray, *Future Prospects for Compensation Systems Introduction*, 52 MD. L. REV. 893, 894 (1993).

64. See Robinette, *supra* note 55, at 355–60.

65. *Id.* at 360–68.

66. *Id.* at 368–70.

67. *Id.* at 370–74.

68. *Id.* at 374–77.

69. *Id.* at 378–79.

70. 201 N.Y. 271, 94 N.E. 431 (1911), reprinted in SHULMAN, ET AL., *supra* note 3, at 3–15.

71. 201 N.Y. at 316–17.

72. See Douglas Martin, *Jeffrey O’Connell, Legal Scholar of No-Fault Coverage, Dies at 84*, N.Y. TIMES (Jan 10, 2013), <https://www.nytimes.com/2013/01/11/business/jeffrey-oconnell-legal-scholar-of-no-fault-coverage-dies-at-84.html>.

whom Professor Robinette partnered as both a research assistant and later as a co-author.⁷³

As I reviewed these four superb articles for this Festschrift in memory of my colleague and mentor Professor Gray, I found myself speculating as to how he would have reacted. I am convinced that with each piece, he would have posed penetrating questions. However, at the end of the colloquy, as was his style with younger scholars with whom he worked, he would have been an enthusiastic supporter of each of these contributions and probably would have added them to the annotations in the *Harper, James and Gray on Torts* treatise. Most important, he would have been so honored that such an impressive group of scholars had written such rich and thought-provoking articles in his memory.

73. See generally JEFFREY O'CONNELL & CHRISTOPHER J. ROBINETTE, A RECIPE FOR BALANCED TORT REFORM (2008); Jeffrey O'Connell & Christopher J. Robinette, *Tort Law's Flaws*, in MATERIALS ON TORT REFORM (Andrew Popper, ed., 2010); Jeffrey O'Connell & Christopher J. Robinette, *The Role of Compensation in Personal Injury Tort Law: A Response to the Opposite Concerns of Gary Schwartz and Patrick Atiyah*, 32 CONN. L. REV. 137 (1999); Jeffrey O'Connell & Christopher J. Robinette, "Choice Auto Insurance": *Do Theories of Justice Require Linkage Between Injurers and the Injured?*, 1997 U. ILL. L. REV. 1109 (1997).