

As an example, internationally recognized rules should be formulated for mining non-replaceable resources. In Guatemala, the peasants and the clergy are presently demanding that a gold-mining concern either not be allowed to function or at least be required to share its profits with the country from which they are derived. There should exist accepted norms to resolve problems such as this rather than letting them fluctuate with the political whims of individual politicians.

This reviewer heartily recognizes the wealth of material created by authors such as Gwartney, Vargas Llosa, Stringham, Powell, Collier, and so many of their colleagues. Let us create a manual that synthesizes their findings, that will serve as the basis for later and better studies that will further our attempts to eradicate the poverty nightmare from the entire world—a challenge to the Independent Institute to advance this sorely needed objective.

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## A Recipe for *Balanced* Tort Reform:

### Early Offers with Swift Settlements

**Jeffrey O'Connell and Christopher Robinette**

Durham, North Carolina: Carolina Academic Press, 2008 (222 pages)

He's at it again.

Jeffrey O'Connell, co-author with Christopher Robinette of the 2008 book *A Recipe for Balanced Tort Reform: Early Offers with Swift Settlements*, has long been a proponent of no-fault schemes. Professors O'Connell and Keeton provided the impetus for motor-vehicle no-fault laws with their 1965 book *Basic Protection for the Accident Victim: A Blueprint for Reforming Automobile Insurance*. Professor O'Connell has long championed broad no-fault schemes for all injuries and, more recently, no-fault-choice schemes for motor-vehicle accidents.

In his current *Recipe* book, Professor O'Connell is again the inveterate reformer but this time not to replace fault with no-fault measures. Rather, his idea is to force tort claimants into swift settlements by making them prove gross negligence beyond a reasonable doubt (the usual standard is negligence by a preponderance of the evidence) if they reject early defense offers of compensation for solely economic losses. To the tort claimant, Professor O'Connell offers a Hobson's choice (he calls it a "jujitsu maneuver") of foregoing compensation for pain and other noneconomic loss (out of which attorney's fees are also paid) or run the huge risk of no recovery at all under insurmountable proof burdens.

Professor O'Connell illustrates the asserted value of his proposed reform with double-amputee Steven Sharp's protracted products-liability litigation against Case Corporation. He writes that the case "highlight[s] the huge problems and shortcomings inherent in the current tort system—specifically agonizing uncertainty, delay and transaction costs—that

combine to create counterproductive results even when it may (finally) result in victory for an injured claimant.”

To poet-scholar William Mishler, who studied and wrote about the same case in *A Measure of Endurance: The Unlikely Triumph of Steven Sharp*, it seemed much more like patient vindication. Indeed, where Professor O’Connell sees delay in the time Sharp’s case took, others might charitably see Sharp’s healing. Where Professor O’Connell sees uncertainty, others might credibly see fairness to and redemption for accused defendants. Where he sees attorney’s fees as transactions costs, others might see the enormous effort Sharp’s lawyer risked to stand beside a horrifically injured young man who appreciated that relationship as much as the compensation. Where he sees tort cases as “tiresome, tireless arguments” draining judicial and social resources, others might see them as a primary reason why judicial and social systems exist—that we treat one another compassionately and justly. Professor O’Connell construes as “tragic shortcomings” and “waste and want” what the poet and others see as courage, perseverance, healing, and redemption.

With an assertion that he admits may sound callous, Professor O’Connell also writes that a young man who recovers \$6.5 million in a tort claim after losing both of his arms due to a manufacturer’s negligence has been *over*-compensated. His callousness simply highlights his amoral approach when it is the right kind of moral blaming that justifies the tort system. Professor O’Connell and other instrumentalists who would eliminate or reshape tort law fail to fully appreciate its morality. Professor T. M. Scanlon explains in the 2008 Harvard University Press book *Moral Dimensions: Permissibility, Meaning, Blame* that properly conceived moral judgments simply adjust parties’ attitudes based on the significance that the parties’ actions have had for continuing their relationship. Parties account for prior actions when determining how to shape their future relationship. Anyone not adjusting attitudes to fit actions is foolhardy.

Such morality is critical to balanced relationships. If one does not assign to another’s actions the meanings that they carry, then one denies sentience to that other, like a parent over a young child. Equally, rejecting one’s own right to account for another’s actions places one in an inferior position, and rejecting the right of another to complain shows an indifference to that other. What is required is making judgments that fit actions in the relational context in which they occur, like rational actors in a moral economy.

Professor O’Connell asserts that there is no such market for pain. Perhaps that is so but only in the most limited sense of markets. To the contrary, we constantly make adjustments in activities and relationships to reduce and account for pain. Professor O’Connell labels as “melodrama” the trial lawyer’s skill at illustrating pain but that skill only resonates with jurors because we are all expert in suffering it. American law wisely allows juries to account for common sense, tradition, history, and folk wisdom, producing what Neal Feigenson calls in the 2000 book, *Legal Blame: How Jurors Think and Talk about Accidents*, a “global responsibility judgment.”

Professor O’Connell also incorrectly assumes that under-utilization of the tort system is a problem due to its inefficiencies, but tort victims choose to sue or not sue for a variety of good reasons by admirably balancing their personal need, their tormentors’ need for

deterrence and redemption, and the public's need for justice against public liberty and private forgiveness. We all spend lifetimes making small and large adjustments of private rights and interests. To ask or not ask for help is something with which most of us are intimately familiar. Why should policymakers urge upon us any different decision? The traditional tort system represents an optimum degree of choice. Policymakers should be cautious in substituting their judgment for those who ought to make it.

Professor O'Connell's proposal is not fair. The writing and thought of it are not particularly balanced. He and his co-author gather empirical and other sources to support their argument, but the recipe is a curious proposal promoted in querulous form, perhaps better read by those who are already predisposed to that side of the tort-reform argument.

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