

Book Review

THE MYTH OF A VALUE-FREE INJURY LAW: CONSTITUTIVE INJURY LAW AS A CULTURAL BATTLEGROUND[†]

AN INJURY LAW CONSTITUTION. By Marshall S. Shapo. New York, N.Y.:
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INTRODUCTION

As they age, most academics do not wear out, but rust out or suffer from a hardening of the conceptual categories. Not so with Marshall Shapo, the Frederic P. Vose Professor at Northwestern University School of Law, whose *An Injury Law Constitution* is the culmination of a lifetime quest for justice through tort regimes.¹ In this book, Shapo demonstrates by clear and convincing evidence that so-called tort reform is not just about torts, but is a sociocultural debate over the parameters of a broader constitutive injury law that is functionally equivalent to constitutional law. His singular contribution is the insight that constitutive injury law is a cultural mirror

[†] I draw my title in part from Alvin W. Gouldner, *Anti-Minotaur: The Myth of a Value-Free Sociology*, 9 SOC. PROBS. 199 (1962), criticizing sociologists of his day for their detached value neutrality and setting the stage for value-engaged research. I appreciate the editorial suggestions of Tom Galligan, Tom Koenig, Chryss Knowles, and Gabe Teinenbaum. Finally, I would like to thank my editors at the *Northwestern University Law Review* for their editorial suggestions, particularly Thomas Kayes, Laura Kolesar Gura, Elizabeth Uzelac, and Jeff VanDam.

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¹ Professor Shapo has praised the extraordinary career of Page Keeton and how his four decades of scholarship reflected a concern for justice as well as practical administration. Marshall S. Shapo, *Page Keeton and the Revolution in Products Law: Toward Stability, a Quest for Fairness*, 52 TEX. L. REV. 1065, 1065 (1974). As with Keeton, it would take a novelist to capture the full measure of Marshall Shapo the man, his mind, and his contribution to torts scholarship.

that reflects the continual societal struggle over the degree to which safety should be subordinated to the autonomy of the injurer.

When Marshall Shapo was a novice law professor teaching torts at the University of Texas Law School nearly a half century ago, no one would have imagined that U.S. presidential campaigns would feature tort law. Today, Republican leaders know that tort reform can always raise money from corporations and energize the conservative base—as effective as pitching lamb chops towards a pack of wolves. President George H.W. Bush charged that then-Governor Bill Clinton’s campaign was “backed by practically every trial lawyer who ever wore a tasseled loafer.”² His son, President George W. Bush, aggressively called for curbing frivolous lawsuits against medical providers in his 2007 State of the Union Address. Bush highlighted tort reform in several of his other State of the Union Addresses as well.³ Mitt Romney, too, campaigned on tort reform:

Another burden on our economic future is our out-of-control tort system. Last year, U.S. corporations spent more money on tort claims than they did on R&D. If innovation is the key to our long term leadership, then some tort lawyers are cashing out our country’s future. . . . No thanks, America needs national tort reform.⁴

Apart from its fundraising effectiveness, a phony crisis is like nothing else when it comes to camouflaging the real agenda in erecting new defenses and immunities to shield the corporate injuring lobby.⁵ If, as Shapo argues, tort law is a cultural mirror,⁶ what do caps on justice say about the way American society treats its mothers and grandmothers?⁷

² Lynn Van Matre, *Bush Wrongly Hassles the Tassel*, CHI. TRIB., Aug. 28, 1992, § 5, at 1 (mentioning “sharp lawyers” and “crazy lawsuits” in his 1992 acceptance speech at the Republican National Convention).

³ George W. Bush, State of the Union Address (Jan. 23, 2007), in WASH. POST, Jan. 24, 2007, at A16; see also George W. Bush, State of the Union Address (Jan. 31, 2006), in N.Y. TIMES, Feb. 1, 2006, at A18; George W. Bush, State of the Union Address (Feb. 2, 2005), in N.Y. TIMES, Feb. 3, 2005, at A22; George W. Bush, State of the Union Address (Jan. 28, 2003), in N.Y. TIMES, Jan. 29, 2003, at A12.

⁴ Justin Hart, *Excerpts from Governor Mitt Romney’s Remarks at the Detroit Economic Club*, MITT ROMNEY CENT. (Feb. 7, 2007, 11:22 AM), <http://mittromneycentral.com/2007/02/07/excerpts-from-governor-mitt-romneys-remarks-at-the-detroit-economic-club/>.

⁵ See, e.g., Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 WIS. L. REV. 15 (reviewing all empirical studies on punitive damages); see generally THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW (2001) (summarizing research on tort reform that demonstrates that it is based upon a foundation of anecdote and urban tort myths rather than systematic empirical data).

⁶ See, e.g., MARSHALL S. SHAPO, TORT LAW AND CULTURE (2003).

⁷ “Proposals to cap noneconomic damages in nursing home cases are aimed at reducing insurance premiums. Tort reformers argue that nursing home lawsuits are ‘forcing many doctors to quit serving patients in nursing homes and draining resources that should be used to provide quality patient care to nursing home residents.’ Nursing home lawsuits are also blamed for doctors having difficulties ‘obtaining or renewing their medical liability insurance.’” Michael L. Rustad, *Heart of Stone: What Is*

What does it say about our society's family values when judges cap the noneconomic damages awarded to a child born deformed because of a prenatal injury inflicted by a negligent doctor? What does it say about the inner life of our Republic that we cap noneconomic damages at \$250,000 for elderly nursing home patients who have suffered excruciating pain from neglected pressure sores or who have been sexually assaulted by minimum wage caretakers?⁸

Shapo's *An Injury Law Constitution* introduces the concept of an "injury law constitution" to describe the distinctive values embodied by American tort law, with its emphasis on responsibility and prevention of injuries. Constitutive injury law can be described as our civil religion that levels abuses of power, whether it is the haughty power of the oil industry responsible for the gusher in the Gulf or feral governmental officials that spy on or even torture U.S. citizens.

I. AN INJURY LAW CONSTITUTION IN A NUTSHELL

Shapo's thesis is that distinctive and virile bodies of law have evolved for determining responsibility for injuries and the prevention of injuries. These legal institutions have some of the qualities of a constitution—a fundamental set of legal and moral principles that govern relations between human persons, corporations, and governments.⁹ His work counters the simplistic arguments of corporate-funded tort reformers who claim that America's civil justice system is driving our economy into a death spiral through jackpot justice awards to greedy plaintiffs and their amoral trial attorneys. Drawing upon forty-six years of torts scholarship and teaching, Shapo demonstrates how injury law reflects our most important cultural values in curbing corporate, governmental, and individual bullies, or reckless companies that play roulette by trading safety for profits.¹⁰

Chapter One is a treasure trove of constitutional history that is critical to Shapo's thesis that injury law is fundamental enough to be the functional equivalent of constitutional law. As my former professor, Tom Lambert, reminds us, "History is not archeology: it is not digging in dust pits; it is 'relighting the towers of Troy to watch them burn.' History has an office. It

Revealed About the Attitude of Compassionate Conservatives Toward Nursing Home Practices, Tort Reform, and Noneconomic Damages, 35 N.M. L. REV. 337, 369 (2005) (alterations and footnotes omitted) (quoting *Medical Liability in Long Term Care: Is Escalating Litigation a Threat to Quality and Access?: Hearing Before the Spec. S. Comm. on Aging*, 108th Cong. 1–2 (2004) (statement of Sen. Larry Craig)).

⁸ *Id.* at 345, 371 & n.237.

⁹ See MARSHALL S. SHAPO, *AN INJURY LAW CONSTITUTION* 1 (2012).

¹⁰ See, e.g., SHAPO, *supra* note 6; see also ABA SPECIAL COMM. ON THE TORT LIAB. SYS., *TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW* (Marshall S. Shapo, Reporter, 1984).

is to turn on the lights—to help us understand where we are and how we got there”¹¹

Shapo specifically illuminates the lengthy path of injury law through his account of how the Athenian leader Solon (sixth century B.C.) abolished the use of human beings as collateral to secure loans, a business practice recognized as legitimate under the primitive constitutionalism of Draco.¹² Constitutionalism in Aristotle’s day contained consumer protections such as specific rules against adulterating commodities.¹³ Shapo next traces how the natural rights idea took root at Runnymede and was later exported into the American colonies. Originally, the principal concern was how to constrain governmental abuses of power, but civil law gradually expanded its scope to cover private oppressions.¹⁴ Many of the American colonies, for example, later enacted state constitutions embodying what today would be tort rights such as the right to file suit for libel or to be free of “unreasonable searches and seizures,” which prefigured § 1983 governmental torts.¹⁵

Shapo acknowledges that injury laws do not have “the binding status of the U.S. Constitution, nor do they provide an authoritative basis for courts to invalidate common law rules or statutes.”¹⁶ The constitutive tort law, he argues, “provides a normative framework, and a set of moral standards, by which we measure existing and proposed rules for society’s response to injuries.”¹⁷ Shapo contends that countries in the European Union are just in the formative stage of evolving their own injury constitution, “developed in the rulings of the European Court of Human Rights.”¹⁸

In Chapter Two, Shapo argues that “our modern law of injuries manifests an effort on the part of judges and legislators to check the use, including misuse and abuse, of power.”¹⁹ Shapo provides many effective examples of judicial decisions infused with morality, thus creating a constitutional dimension. In general, the 1960s and 1970s was a period of torts expansionism when courts recognized innovative rights and remedies that were closely akin to establishing new constitutional rights.²⁰ Courts

¹¹ Thomas F. Lambert, Jr., Editorial, *Principles, Persuasions, and Primrose Propaganda*, 19 NACCA L.J. 25, 26 (1957).

¹² SHAPO, *supra* note 9, at 2–3.

¹³ *Id.* at 4.

¹⁴ *See id.* at 5.

¹⁵ *Id.* at 9.

¹⁶ *Id.* at 1.

¹⁷ *Id.*

¹⁸ *Id.* at 15 (internal quotation mark omitted).

¹⁹ *Id.* at 25.

²⁰ In 1968 the California Supreme Court abolished the harsh landowner categories of the trespasser, licensee, and invitee in favor of a standard of reasonable care in *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968). The first appellate case to uphold a punitive damages award in a products liability case was decided in 1967. *See Toole v. Richardson-Merrell Inc.*, 60 Cal. Rptr. 398 (Ct. App. 1967) (affirming an

often served as a shield against overbearing abuses of power such as in *Fisher v. Carrousel Motor Hotel, Inc.*,²¹ where the Texas Supreme Court upheld a tort remedy in favor of an African-American mathematician denied restaurant service solely because of his race.

By the time Shapo began his teaching career at Texas, torts was at its tipping point as court after court ruled that the quest for substantive justice should trump long-established “pro-defendant tort defenses and immunities.”²² By the 1970s, many states had tempered the harsh effects of statutes of limitations by developing discovery rules that allowed tolling where the injury did not manifest for decades.²³ The tort tide turned against anti-plaintiff familial, charitable, and governmental immunities and other regressive defenses such as assumption of risk and contributory negligence that had long prevented tort victims from obtaining redress.²⁴

Shapo’s formative years as a torts professor also began at the height of a progressive era of liberalized safety regulations, another leg of Shapo’s constitutive injury law.²⁵ During the 1960s and 1970s, new federal statutes, in alliance with the reinterpretations of the common law of torts, aggressively curbed abuses of power. Shapo notes: “The number of statutes with leveling tendencies is legion. In the injury law field, a very short list includes not only the Occupational Safety and Health Act, but the Americans with Disabilities Act and various sections of the Civil Rights Act of 1964.”²⁶

Congress passed the Federal Tort Claims Act in 1946, but governmental liability for abuses of power did not reach its takeoff point until a series of expansive court decisions in the late 1960s and early 1970s.²⁷ Congress enacted the Consumer Product Safety Act in 1972, which invested the Consumer Product Safety Commission with the power to establish product safety standards to protect consumers from

award of punitive damages against a pharmaceutical company for the fraudulent marketing of the anti-cholesterol drug MER/29). A year later, the Eighth Circuit upheld the concept of crashworthiness in *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968). In 1967, the California Supreme Court ruled for the first time that an insured has a right to sue an insurance company for its bad faith refusal to settle a claim. *Crisci v. Sec. Ins. Co.*, 426 P.2d 173 (Cal. 1967). The tort of bad faith failure to settle insurance cases was developed further in *Fletcher v. Western National Life Insurance Co.*, 89 Cal. Rptr. 78 (Ct. App. 1970).

²¹ 424 S.W.2d 627 (Tex. 1967).

²² KOENIG & RUSTAD, *supra* note 5, at 52 (explaining how the law of comparative negligence was displacing the harsh and discredited doctrine of contributory negligence).

²³ *Id.* at 53.

²⁴ *Id.* at 53–55.

²⁵ SHAPO, *supra* note 9, at 33.

²⁶ *Id.* at 35.

²⁷ *See id.* at 32–33.

unreasonably dangerous products.²⁸ This was also the heyday for constitutional torts to redress police misconduct.²⁹

In Chapter Three, Shapo demonstrates that injury law, meaning rules for the responsibility for injuries and prevention of injuries, is the chief guardian for protecting rights. The seeds for this chapter were planted more than four decades ago in an essay Shapo wrote about the role of torts in countering abuses of power.³⁰ His prediction was that “[t]he Torts of the future will stress to an even greater degree, in Dean Green’s felicitous phrase, that tort law is very much public law.”³¹ Shapo’s 1970 article called for “public policy-based torts that would check the private party much like constitutional law cases of that era checked abuses of government power.”³² Fast forward forty-two years, and Shapo has published a torts tour de force that demonstrates with convincing clarity that injury law has begun to take on the qualities of a constitution—a powerful mechanism to check individual, governmental, and corporate bullies.³³

Shapo explains how the early common law vindicated personal security and the right to enjoy real property, remedies that remain part of the bricks and mortar of intentional torts. Torts were largely a closed system that denied recovery if an injury could not fit comfortably within an “existing and recognized writ.”³⁴ By the mid-eighteenth century, Anglo-American torts vindicated reputational interests (defamation), enjoined harmful land uses (nuisance), and made sellers accountable for knowingly selling unmerchantable wares (misrepresentation).³⁵

Injury law evolved when it shed the shackles of the writ period to address emergent forms of oppression.³⁶ Shapo illustrates evolving injury rights by the development of the doctrine of informed consent in medical liability cases. Benjamin Cardozo prefigured the doctrine of informed consent in a 1914 case in which he wrote about, in Shapo’s words, “self-

²⁸ “The Consumer Product Safety Commission (CPSC) was created in 1972 when Congress passed the Consumer Product Safety Act to protect the public ‘against unreasonable risks of injuries associated with consumer products.’” Michele Boyer, *Consumer Product Safety Commission CPSC History*, US RECALL NEWS (May 30, 2008), <http://www.usrecallnews.com/2008/05/us-consumer-product-safety-commission-cpsc.html> (quoting *Contact Information*, U.S. CONSUMER PRODUCT SAFETY COMMISSION, <http://www.cpsc.gov/en/About-CPSC/Contact-Information/> (last visited May 24, 2013)).

²⁹ See, e.g., *Monroe v. Pape*, 365 U.S. 167, 187 (1961) (allowing cause of action against police officials under 42 U.S.C. § 1983).

³⁰ Marshall S. Shapo, *Changing Frontiers in Torts: Vistas for the 70’s*, 22 STAN. L. REV. 330, 334 (1970).

³¹ *Id.* at 334–35.

³² Michael L. Rustad, *Torts as Public Wrongs*, 38 PEPP. L. REV. 433, 541–42 (2011).

³³ See SHAPO, *supra* note 9.

³⁴ PROSSER AND KEETON ON THE LAW OF TORTS § 6, at 28 (W. Page Keeton ed., 5th ed. 1984).

³⁵ *Id.* § 3, at 19.

³⁶ See SHAPO, *supra* note 9, at 38.

determination concerning one's own body."³⁷ Courts began to recognize that patients had a right of informed consent in medical malpractice beginning with the 1957 case of *Salgo v. Leland Stanford Jr. University Board of Trustees*.³⁸

Tom Lambert often stated, "Harm is the tort signature."³⁹ Another major theme in this chapter is how American culture influences what is regarded as legally cognizable harm. Shapo describes how American individualism runs through injury law in at least three aspects: "[1] individualization of justice, [(2)] the question of how much to allow for individual aspects of injurers' ability and competence, and [(3)] the question of how the law should deal with particular elements of the physical and mental makeup of injury victims."⁴⁰ As a result, "plaintiffs in mass torts litigation have enjoyed little success in convincing courts to recognize collective liability theories such as market share, enterprise liability, civil conspiracy and concert of action."⁴¹ Courts continue to struggle with mass torts and disasters that do not mesh well with tort's traditional model of individuated justice.⁴² Tort reformers have successfully deployed the rhetoric of individual responsibility to justify limitations on tort damages.⁴³ Shapo observes that courts are especially hesitant to recognize emotional harms under the tort system. The negligent infliction of emotional distress, for example, is a tort that is often deployed but rarely successful because of high legal thresholds.⁴⁴

Chapter Four examines how courts determine the radius of the risk and the sources of risk, the role of statistical analysis, the behavioral causes of injuries, harms not recognized as injuries, and problems of calculating loss.⁴⁵ Torts are individualized, while alternative compensation systems such as Social Security disability payments and workers' compensation injuries are scheduled with one-size-fits-all solutions.⁴⁶ Shapo contrasts the common law of torts with income maintenance under workers' compensation, which he describes as "a kind of halfway house between tort

³⁷ *Id.* at 37 (discussing *Schloendorff v. Soc'y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914)).

³⁸ 317 P.2d 170, 181 (Cal. Ct. App. 1957) (holding that jury instructions were improper on the issue of whether the patient was properly informed of the risks of a procedure).

³⁹ Thomas F. Lambert, Jr., *Suing for Safety*, TRIAL, Nov. 1983, at 48, 48.

⁴⁰ See SHAPO, *supra* note 9, at 56.

⁴¹ Michael L. Rustad & Thomas H. Koenig, *Reforming Public Interest Tort Law to Redress Public Health Epidemics*, 14 J. HEALTH CARE L. & POL'Y 331, 353 (2011).

⁴² Courts have refused to extend market share or enterprise liability to products lacking fungibility. See, e.g., *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1068 (N.Y. 2001) (refusing to extend market share to the distribution of handguns); *In re N.Y. State Silicone Breast Implant Litig.*, 631 N.Y.S.2d 491 (Sup. Ct. 1995) (refusing to expand market share to silicone breast implants).

⁴³ See SHAPO, *supra* note 9, at 54.

⁴⁴ See *id.* at 77.

⁴⁵ *Id.* at 70–84.

⁴⁶ See *id.*

law, which before workers' compensation became law often denied recovery to injured workers because of their own risky conduct, and full-dress social legislation."⁴⁷ He places torts along an injury law spectrum that also includes federal safety statutes such as the Food Drug and Cosmetic Act, the Occupational Safety and Health Act, and the National Traffic and Motor Vehicle Safety Act.

Chapter Four is also a fascinating and important study of legally recognized injuries, which are the building blocks for the creation of rights. This chapter identifies the sources of risk that lead to various kinds of harm by presenting empirical studies of American injury rates.⁴⁸ Preventable injuries are responsible for billions of dollars in lost productivity as well as countless deaths.

Chapter Five examines the structural aspects of the legal system that make American injury law conflict-habituated terrain. Constitutive tort law is a jagged terrain reflecting an often-conflicting relationship between the federal structure of government, common law courts, and state legislatures. Courts use "no duty" or "limited duty" rules to keep the lid on expansive tort rights. For example, Shapo notes that airline defendants argue that the lawsuits filed by survivors of September 11th are "stretching their duty too far to hold them responsible for the dastardly acts of the terrorists."⁴⁹ This chapter also compares the roles of courts and legislatures and addresses the problem of preemption.⁵⁰ Finally, Shapo addresses the problem of how legal mechanisms cope with modern issues such as scientific uncertainty.⁵¹ Courts continue to have difficulties with latent injury cases, such as where the inhalation and ingestion of asbestos cause an immediate subclinical injury to lung tissue but the symptoms do not become manifest until decades later.⁵²

Shapo begins Chapter Six with a doctrinal analysis of the three paradigmatic branches of tort law—intentionality, negligence, and strict liability for both activities and defective products. Strict liability was once the esoteric and delimited province of ultrahazardous activities or injuries caused by harboring wild animals. But this branch of tort law took off in 1965 when the American Law Institute (ALI) published Section 519 of the *Restatement (Second) of Torts*, which adopted strict liability for abnormally dangerous activities. In 1965, the ALI also published Section 402A, strict

⁴⁷ *Id.* at 67.

⁴⁸ *See id.* at 73–74.

⁴⁹ *Id.* at 89–90.

⁵⁰ *Id.* at 94.

⁵¹ *Id.* at 94–95.

⁵² *See, e.g., Allstate Ins. Co. v. J.H. France Refractories Co.*, 626 A.2d 502, 507 (Pa. 1993) (approving a "multiple-trigger theory of liability" for such injuries).

product liability, which swept the torts landscape like a prairie fire.⁵³ Only two years earlier, the California Supreme Court had handed down *Greenman v. Yuba Power Products, Inc.*,⁵⁴ the first appellate case to recognize strict product liability.⁵⁵ In this chapter, Shapo traces the story of products liability from *Greenman* to the failed products liability cases against big tobacco.⁵⁶

Chapter Six places the body of injury law in proper perspective by noting that in “overall monetary terms,” workers’ compensation far outweighs tort compensation.⁵⁷ Over the past century plus, Congress and the states have displaced the scope of tort law by enacting workers’ compensation statutes as well as the Federal Employers’ Liability Act (FELA). FELA’s core assumption is that “the employer is the most appropriate party to shoulder the responsibility for workplace injuries.”⁵⁸ Shapo views alternative compensation statutes in constitutive injury law as attempts to balance “social justice with cost control.”⁵⁹ Courts will sometimes load their “own moral judgment upon the moral foundations embedded in the workers’ compensation statute itself.”⁶⁰ In my view, these courts are pragmatically recognizing that the paltry recovery under workers’ compensation fails to do justice where the employer has recklessly endangered its employees.

Much of this chapter enters into the thorny subject of the indeterminate relationship between the common law of torts and federal safety regulation. The language of the Consumer Product Safety Act, for example, employs a technocratic rhetoric rather than a moralistic one.⁶¹ Safety regulations play an important role by serving as a proxy for the

⁵³ The rise of strict products liability is emblematic of the modern expansion of plaintiffs’ rights in tort law. Justice Roger Traynor’s concurring opinion in *Escola v. Coca-Cola Bottling Co.*, 150 P.2d 436, 440 (Cal. 1944), was the first judicial recognition of strict products liability. A shift from negligence to strict liability in products liability has swept the nation since the mid-1960s. See RESTATEMENT (SECOND) OF TORTS § 402A (1965); FRANK J. VANDALL, STRICT LIABILITY: LEGAL AND ECONOMIC ANALYSIS 9 (1989).

⁵⁴ 377 P.2d 897 (Cal. 1963).

⁵⁵ The Supreme Court of New Jersey also helped to jump start the field of products liability in its 1960 opinion in *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960). In *Henningsen*, decided prior to New Jersey’s enactment of UCC Article 2, the court refused to enforce an automobile manufacturer’s attempt to assert the doctrine of contractual privity and no notice under New Jersey’s Uniform Sales Act. Justice John Francis, who authored the opinion, reasoned that the dealer and manufacturer were liable without a showing of negligence, notice, or privity, ruling that “[a]bsence of agency between the manufacturer and the dealer who makes the ultimate sale is immaterial.” *Id.* at 84 (upholding liability against both Chrysler and Bloomfield Motors).

⁵⁶ SHAPO, *supra* note 9, at 108–11.

⁵⁷ *Id.* at 114.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 115.

⁶¹ See *id.* at 118.

standard of care in private tort litigation.⁶² The social mechanisms for Shapo's injury constitution are often overlapping, and one of the difficult issues is to establish "boundaries for amounts being left to a choice among social mechanisms."⁶³ The uncertain relationship between tort law and alternative compensation systems could be the subject of a separate treatise.

Chapter Seven returns to a discussion of the mechanics of workers' compensation and how plaintiffs' attorneys creatively bypass its exclusivity bar.⁶⁴ Workers' compensation statutes enacted by the states expanded the number of compensable claims, but the quid pro quo is the exclusivity bar: the claimants' surrender of their right to pursue tort claims. One way that plaintiffs' attorneys sidestep the exclusivity bar is to allege that an employee's injuries were the result of an intentional tort as opposed to negligence.

Courts and legislatures attempt to strike a fair balance between social and individual goods; this is the subject of Chapter Eight.⁶⁵ Here, Shapo employs cases often used in first-year torts casebooks to illustrate civil law's concern with balancing the defendant's freedom of movement against the plaintiff's dignitary interests.⁶⁶ He uses the spring gun in the Iowa farmhouse case⁶⁷ to illustrate the long-standing social norm that landowners cannot set a trap for trespassers under the privilege of defending property.⁶⁸

Shapo shares common ground with civil recourse theorists who contend that tort law has a constitutional status.⁶⁹ Nevertheless, he departs from this microlevel perspective in emphasizing tort law's multiple and sometimes conflicting objectives. He is also critical of microlevel theorists whose myopic view of the bilateral relationship between individual plaintiff and defendant blinds them to the public functions that torts play for "we the people."⁷⁰

Chapter Nine is a roadmap to the "rationales, goals and purposes" of American injury law. In this chapter, Shapo discusses core principles of injury law such as vindication, punishment, social justice, uniformity, and

⁶² See *id.* at 120.

⁶³ *Id.* at 121.

⁶⁴ *Id.* at 123.

⁶⁵ *Id.* at 179.

⁶⁶ *Id.*

⁶⁷ *Id.* at 180 (discussing *Katko v. Briney*, 183 N.W.2d 657 (Iowa 1971)).

⁶⁸ See Roscoe Pound, Lecture, *The Economic Interpretation and the Law of Torts*, 53 HARV. L. REV. 365, 371 (1940) (citing nineteenth-century cases stating that landowners cannot expose trespassers to serious injury and finding this norm rooted in Coke's Second Institute and the fifteenth-century Year Books of Henry VI and Edward IV).

⁶⁹ See, e.g., John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 559–611 (2005) (developing a historically based argument for tort law's constitutional status); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 754 (2003).

⁷⁰ SHAPO, *supra* note 9, at xvi–xvii.

rationality. He contends that federal safety regulations, whose primary goal is injury prevention, clash with law and economics concepts such as efficiency, risk–utility and cost–benefit analysis, and clash with the conceptions of corrective justice prefigured by Aristotle.⁷¹

Injury law is a multiparadigmatic field. There are different ways to interpret the subject.⁷² It contains an internal contradiction when simultaneously attempting to advance both the maximization of safety and cost–benefit analysis. Shapo favors a pluralistic approach—“a selection process for ideas that recognizes the complexity of the human universe.”⁷³

In Chapter Ten, “Remedies and Sanctions,” Shapo discusses how the Supreme Court has developed constitutional torts to redress governmental abuses.⁷⁴ The Court’s landmark case of *Monroe v. Pape*⁷⁵ created “a major channel into the great bundle of rights provided by the Constitution.”⁷⁶ But Shapo also tells the tragic tort story of *DeShaney v. Winnebago County Department of Social Services*,⁷⁷ where the Court closed the courtroom door to plaintiffs seeking to hold a governmental agency accountable for the death of a child even though state officials had extensive evidence of prior circumstances when he was abused by his father.⁷⁸ The Court ruled in another case that the police department had no duty to enforce a restraining order that might have prevented a father from slaying his three daughters.⁷⁹ These cases reflect the shrinking and waning of governmental tort, which cuts against the principle that responsible government is answerable government.

II. DEMYSTIFYING THE SUPREME COURT’S TORT REFORM AGENDA

Throughout his book, Shapo describes the methods by which injury law institutions evaluate and construct remedies. He observes that “[t]hese different methods . . . exhibit the brokering that constitution provides among elements of causal impact, moral responsibility, dispassionate accounting related to control of risk, and humanitarian concerns.”⁸⁰ In the twenty-first century, our injury constitution is, to use Prosser’s memorable phrase, “a battleground of social theory,”⁸¹ featuring attacks on tort law by much of corporate America and the leadership of the Republican Party.

⁷¹ *Id.* at 213–16.

⁷² *See id.* at 227.

⁷³ *Id.* at 233 (internal quotation mark omitted).

⁷⁴ *Id.* at 125–28 (discussing cases interpreting 42 U.S.C. § 1983 (2006)).

⁷⁵ 365 U.S. 167 (1961).

⁷⁶ SHAPO, *supra* note 9, at 248.

⁷⁷ 489 U.S. 189 (1989).

⁷⁸ SHAPO, *supra* note 9, at 250–52.

⁷⁹ *Id.* at 252 (discussing *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005)).

⁸⁰ *Id.* at 242.

⁸¹ PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 34, § 3, at 15.

A year before Shapo started teaching torts at Texas, the Supreme Court ruled, in *New York Times Co. v. Sullivan*,⁸² that the constitutional protection given to speech and the press limits state defamation law. Shapo dispassionately chronicles the ways that the Supreme Court has placed “constitutional limitations on defamation suits” since that landmark decision.⁸³ In 1967, the Court continued its constitutionalization of tort law in its *Time, Inc. v. Hill* decision, holding that privacy is subject to the First Amendment.⁸⁴ The Court also delimited tort remedies in its interpretation of maritime law. In *East River Steamship Corp. v. Transamerica Delaval Inc.*,⁸⁵ the Court held that a tort claimant could recover for products liability in admiralty even though it could not recover for the physical damage a defective product causes to itself. The Court recognized strict liability and drew upon the common law in incorporating negligence into general maritime law.⁸⁶ The Court’s distinction between injury to “the product itself” and “other property” is part of a continuing struggle to define the parameters of injury law.⁸⁷

The Supreme Court is now engaged in a concerted project to downsize constitutive injury law. Through a review of a variety of decisions, Shapo illustrates the Court’s attempts to hold the lid on injury rights by closing the door to claims or limiting remedies. For example, in Chapter Four, he discusses how the Supreme Court denied recovery to construction workers whose employer recklessly exposed them to asbestos fibers without protection over an extended period.⁸⁸ He tells the story of Michael Buckley, who worked for Metro-North Railroad as a pipe fitter, repairing pipes in the steam tunnels beneath Grand Central Station. For a three-year period, Buckley and his coworkers were exposed to asbestos dust for approximately an hour a day. During that time, the workers would be covered with asbestos dust from working with insulation. It was not until 1987 that the workers received “asbestos awareness” training.⁸⁹ Michael and his coworkers were dubbed the “[S]nowmen of Grand Central”

⁸² 376 U.S. 254 (1964).

⁸³ SHAPO, *supra* note 9, at 247.

⁸⁴ 385 U.S. 374, 387–88 (1967) (holding that the constitutional protections for speech and press preclude the application of the New York right-to-privacy statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth); *see also* *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (concluding that public figures and public officials may not recover for the tort of the intentional infliction of emotional distress absent proof that the publication contains a false statement of fact made with actual malice).

⁸⁵ 476 U.S. 858, 865 (1986).

⁸⁶ *Id.* at 868.

⁸⁷ *Id.* at 868–70.

⁸⁸ *Metro-N. Commuter R.R. v. Buckley*, 521 U.S. 424 (1997).

⁸⁹ *Id.* at 427.

because they would come out of the railroad tunnels each day “covered head to toe with white powder.”⁹⁰

The Supreme Court held that that the massive, unprotected exposure to asbestos that these workers endured did not constitute compensable harm under the Federal Employers’ Liability Act. Shapo believes that the Court denied recovery because a negligent infliction claim in this latent injury case would have created the “potential for a flood” of litigation.⁹¹ He takes no stand as to whether the Snowmen of Grand Central case, which denied even the rudimentary remedy of medical monitoring, was antithetical to a humane injury constitution. Courts deciding recent toxic torts cases have been influenced by the Court’s disapproval of medical monitoring damages in *Metro-North*.⁹²

Shapo misses an opportunity to evaluate the Court’s new institutional role as judicial tort reformer and what this signals for the future of constitutive injury law.⁹³ It is difficult to understand why the Court should systematically undermine punitive damages, which has been a purely state law remedy for more than two hundred years.⁹⁴ Shapo adopts a value-neutral stance as to whether the Supreme Court’s federal takeover of this state law remedy threatens constitutive injury law. He never connects the dots between the Court’s newly minted role as “injury law guardian”⁹⁵ and corporate America’s campaign to downsize tort law’s remedies in products liability, medical malpractice, and employee’s rights.

Another shortcoming of the book is that it is U.S. centric, assuming that our legal system is used by all advanced industrial societies.⁹⁶ Shapo’s passing observation is that a constitutive tort law has parallels in the United Kingdom and Italy.⁹⁷ In fact, the European Union’s harmonized system of consumer protection and product safety is a far more developed injury

⁹⁰ Buckley v. Metro-N. Commuter R.R., 79 F.3d 1337, 1340 (2d Cir. 1996).

⁹¹ SHAPO, *supra* note 9, at 77.

⁹² See, e.g., Rhodes v. E.I. Du Pont de Nemours & Co., 657 F. Supp. 2d 751, 774 (S.D. W. Va. 2009) (expressing doubts that an increased risk of harm is a cognizable injury).

⁹³ Tom Galligan comprehensively critiques Supreme Court tort reform developments such as the Court’s Supremacy Clause-based incursions on state tort law in preemption cases and Fourteenth Amendment limitations on punitive damages recovery. Thomas C. Galligan, Jr., *U.S. Supreme Court Tort Reform: Limiting State Power to Articulate and Develop Tort Law—Defamation, Preemption, and Punitive Damages*, 74 U. CIN. L. REV. 1189 (2006).

⁹⁴ Shapo thoroughly discusses how the Court has gradually turned the screws on punitive damages in a series of cases beginning with *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994). See SHAPO, *supra* note 9, at 256–62.

⁹⁵ Here, I am comparing the Court’s jurisprudence to Plato’s antidemocratic work, *The Republic*, which conceives of philosopher-king overseers who apprehend truth and justice through a study of forms. See Michael L. Rustad, *Happy No More: Federalism Derailed by the Court that Would Be King of Punitive Damages*, 64 MD. L. REV. 461, 465 (2005).

⁹⁶ To his credit, Shapo discusses British constitutionalism as well a recent case from the European Court of Human Rights. SHAPO, *supra* note 9, at 15–18.

⁹⁷ *Id.* at 12–22.

constitution than America's.⁹⁸ The Data Protection Directive adopted by the European Commission in 1995 grants all European citizens a fundamental right to control the collection, transmission, or use of personal information.⁹⁹ On January 1, 2012, the EU's Proposed General Data Protection Regulation displaced the Data Protection Directive.¹⁰⁰ The twenty-seven member states of the European Union are signatories of the European Convention on Human Rights,¹⁰¹ which guarantees respect for one's "private and family life, his home, and his correspondence," subject to certain restrictions.¹⁰² The European Court of Human Rights has given this article a very broad interpretation, making it functionally equivalent to a fundamental Europe-wide constitutional right.¹⁰³

⁹⁸ "After the Second World War, the countries of Europe banded together to develop community-wide legislation to protect individual human rights. The Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (ECHR) reflects a Europe-wide movement to guarantee individual rights. The ECHR is a legal norm incorporated by reference into the national legislation of each member state. Since the vast majority of European countries are civil code jurisdictions, the ECHR is self-executing. . . . All final judgments of the European Court of Human Rights are binding on the respondent states, and the Committee of Ministers of the Council of Europe supervises the execution of the judgments." Michael L. Rustad & Sandra R. Paulsson, *Monitoring Employee E-Mail and Internet Usage: Avoiding the Omniscient Electronic Sweatshop: Insights from Europe*, 7 U. PA. J. LAB. & EMP. L. 829, 871–72 (2005) (footnotes omitted).

⁹⁹ Council Directive 95/46/EC, 1995 O.J. (L 281) 31 (EC) (protecting individuals with regard to the processing of personal data and on the free movement of such data).

¹⁰⁰ See *Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation)*, COM (2012) 11 final (Jan. 25, 2012), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0011:FIN:EN:PDF>; see also Tanguy Van Overstraeten & Alana Van Caenegem, *EU—Update on the Proposed General Data Protection Regulation*, LINKLATERS (Nov. 26, 2012), <http://www.linklaters.com/Publications/Publication1403Newsletter/TMT-News-November-2012/Pages/EU%E2%80%93Update-proposed-General-Data-Protection-Regulation.aspx> (describing the timetable for adoption of proposed regulation).

¹⁰¹ "After the Second World War, the countries of Europe banded together to develop community-wide legislation to protect individual human rights. The Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (ECHR) reflects a Europe-wide movement to guarantee individual rights." Rustad & Paulsson, *supra* note 98, at 871.

¹⁰² *Id.* at 872. "The Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, which is enforced by the European Court of Human Rights, is one of the most important documents underlying the right to privacy. Individuals can file a complaint to this Court provided all national remedies have been exhausted. During the last few decades European policymaker[s] have discussed what comprises the private sphere." *Id.* at 870–71 (footnote omitted) (discussing Article 8 of the ECHR). "It is important to understand how the European Court of Human Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms work" in tandem to protect privacy as a fundamental right. *Id.* at 871. "Most privacy-based legislation in Europe, including statutes governing personal data, privacy, and protection of e-mails, has its genesis in the Council of Europe's Convention." *Id.*

¹⁰³ "Article 8 of the ECHR articulates a basic fundamental right to privacy embodied in the constitutions of European countries, and grants all Europeans the fundamental right to have their privacy respected." *Id.* at 872 (footnote omitted).

At a time when U.S. courts and legislatures are beating a hasty retreat from expansive tort remedies,¹⁰⁴ the European Union has adopted the Product Liability Directive, which requires member states to adopt national legislation. This Directive comes close to a constitutional right for all European consumers.¹⁰⁵ Shapo's omission of a discussion of the Product Liability Directive is surprising given that he was the first U.S. scholar to compare U.S. law with the then-newly minted EU Directive.¹⁰⁶ Many of the chapters of Shapo's book point to U.S. injury law as curbing abuses of power, but it is the Europeans who have elevated consumer rights such as product safety, privacy, and consumer protection to a quasi-constitutional level.¹⁰⁷

CONCLUSION

An Injury Law Constitution is a rich, textured, and nuanced study of the connections between common law decisions, statutes, and alternative compensation systems. If law schools were to adopt Shapo's argument for teaching these complex connections, they would have to increase the credit hours, not reduce them.¹⁰⁸ In his book, Shapo seeks a pathway between law, economics, and philosophically oriented civil recourse theorists who are so prominently featured in twenty-first century tort theory.¹⁰⁹ Studying tort law divorced from its relationship with safety regulations and alternative compensation systems is like Hamlet without the Prince of Denmark.¹¹⁰ *An*

¹⁰⁴ The American Law Institute's RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998) proposes a products liability analysis that retreats from strict liability to negligence.

¹⁰⁵ See Council Directive 85/374/EEC, on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, 1985 O.J. (L 210) 29 (EC).

¹⁰⁶ See Marshall S. Shapo, *Comparing Products Liability: Concepts in European and American Law*, 26 CORNELL INT'L L.J. 279 (1993).

¹⁰⁷ See, e.g., Council Directive 93/13/EEC, 1993 O.J. (L 95) 29 (EC).

¹⁰⁸ The trend in American law schools is to reduce credits for torts. Yale Law School, for example, teaches torts in a one-semester, four-credit course. *Torts I: Group I*, YALE L. SCH., <http://ylsinfo.law.yale.edu/wsw/prereg/CourseDetails.asp?cClschedid=110924> (last visited May 24, 2013). Northwestern Law, where Shapo teaches, allocates only three credits to the basic torts course. *Torts*, NW. L., <http://www.law.northwestern.edu/curriculum/coursecatalog/details.cfm?CourseID=1118> (last visited May 24, 2013) (describing introductory torts course as a three-credit course); see also Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 503 n.153 (1998) (noting that "many law schools have reduced torts from a six-credit, full-year course to a three- or four-credit, one-semester course"); Lynn M. Daggett, *Teaching Torts by Integrating Ethical, Skills, Policy and Real-World Issues, and Using Varied Pedagogical Techniques: Reflections on Using the Henderson, Pearson and Siliciano Casebook*, 25 SEATTLE U. L. REV. 63, 63 (2001) (indicating that torts credits were reduced from six to five for first-year students); John M. Griesbach, *Teaching Torts: Introduction*, 45 ST. LOUIS U. L.J. 709, 713 (2001) (discussing "losses that have been suffered as credit hours for the basic torts course have been reduced from six to five to four or fewer over the past decades").

¹⁰⁹ See SHAPO, *supra* note 9, at 214–22.

¹¹⁰ See Rustad, *supra* note 32, at 498.

Injury Law Constitution is a distinctively American theory with its evocative analysis of the empowerment of ordinary citizens to redress wrongs. Further research should investigate how the injury law constitution of modern Europe, drawing from a very different cultural, philosophical, and historical context, addresses emergent social problems.