

**Marshall S. Shapo, Prosser Award Recipient
AALS Torts & Compensation Section**

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I am delighted to introduce this year's William Lloyd Prosser Award recipient, Marshall S. Shapo, the Frederic P. Vose Professor at Northwestern University School of Law. Many academics peak at a young age. They do not wear out, but rust out as they age or become dated due to a hardening of their conceptual categories. Not so with this year's Prosser Award recipient whose work reflects a lifetime quest for humanistic decency through torts jurisprudence. His singular contribution to tort law is the insight that injury law is a cultural mirror that reflects the continual societal struggle over the proper balance between public safety, economic efficiency and the freedom to act autonomously.

Shapo as a Grand Theorist

Prosser updated his magisterial torts hornbook when Marshall Shapo was a new law professor. By the time Shapo began his teaching career, as a torts professor at the University of Texas, Prosser had helped torts fulfill its potential as a key protector of human decency as court after court ruled that the quest for substantive justice should trump long established "pro-defendant tort defenses and immunities." Inspired by Prosser, many states tempered the harsh effects of statutes of limitations by developing discovery rules that allowed delayed tolling where the injury does not manifest for decades. The reformist tort tide turned the legal system against anti-plaintiff familial, charitable, governmental immunities and other regressive defenses such as the assumption of risk and contributory negligence that had long prevented tort victims from obtaining redress. Marshall played an important role in furthering these progressive "tort reforms" in an era when that phrase referred to advancing humanistic public policies.

Torts as a Cultural Mirror

Shapo's formative years as a torts teacher also began at the height of a progressive era of liberalized safety regulation. During the 1960s and 1970s, new federal statutes, in alliance with the reinterpretations of the common law of torts, aggressively curbed abuses of corporate, individual and governmental power. Marshall views torts jurisprudence as a mirror, accurately reflecting America's basic values, aspirations, and future trajectory. Shapo's conceptualization of torts as a cultural mirror helps us to understand the human consequences of tort rights.

If, as Shapo argues, tort law is a cultural mirror, what do caps on tort damages say about the way American society treats its mothers and grandmothers? What does it say about our society's family values when judges cap the non-economic 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 caps non-economic 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 care takers?

Shapo's Grand Treatises

Marshall Shapo is a grand theorist of tort law in the tradition of William Lloyd Prosser. Shapo's life-long work demonstrates that injury law reflects our cultural values in curbing bullies that threaten the public's safety and well-being. His foundational premise is that "the body of law Americans have developed concerning responsibility for injuries and prevention of injuries has some of the qualities of a constitution."

Professor Shapo's treatise, now in its seventh edition, chronicles the path of products liability law in four volumes developed over a half century in nearly 4,000 pages. Like all grand theorists, Shapo has contributed concepts and methods of analysis in wide currency. He was the first to coin the term "constitutional tort" in his classic article in the *Virginia Law Review*. In his *Duty to Act* book, he provided a new twist on cases revolving around a failure to render aid. He was the first to

examine how duties arose out of relations of power and dependence. William Power writes of Shapo's insight:

Whereas Posner uses economic efficiency, Fletcher uses fairness (reciprocity), and Epstein uses causation to build their respective models, Shapo uses power and dependency (which include considerations of efficiency and humanitarianism). Shapo embraces the neonatural law approach of his predecessors without adopting the specific, overarching features they distill from the cases.

Torts scholarship has recently been dominated by theories based upon a single concept or insight whether it be efficiency, reciprocity, or more recently civil recourse. Marshall, in contrast, posits a tort law that is multivariate in recognizing the complexity of the human universe. Shapo chides the law and economics crowd for their elegant theory that steadfastly resists testing its domain assumptions through empirical data, whose antiseptic formulas avoid tort's moral role as a cultural mirror, and that ignores the law-in-action's "smell of the streets."

Marshall's pluralistic doctrinal scholarship acknowledges that economics plays an important role in shaping torts, but also argues that human decency is integral to a just torts jurisprudence.

Another Shapo contribution is his ability to see the interrelationship between torts, regulation and compensation systems. His theory of products liability demonstrates how the common law and regulation are knitted together. Studying tort law divorced from its relationship with safety regulations and alternative compensation systems is like Hamlet without the Prince of Denmark. Marshall's 1,000-page report, "Towards a Jurisprudence of Injury," was the subject of a national conference as was his Oxford University Press book, *An Injury Constitution*.

Torts to Check Power Abuses

Marshall combines insights drawn from jurisprudence, law and society, law and politics, law and behavior, law and science, in his many

books and articles. His monographs *Tort Law and Culture*, *Compensation for Victims of Terrorism*, and *The Duty to Act* demonstrate how tort law is grounded in societal realities. His prescient prediction in a 1970 Stanford Law Review article was that torts of the future will embody public law was inspired by Leon Green. Shapo 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.” Fast-forward nearly a half century, tort law has become a public law subject, serving as a powerful mechanism to check individual, governmental, and corporate oppression.

Shapo’s Contributions to the Torts & Compensation Section

Finally, I would like to say a few words about Marshall’s key role in building and maintaining the high quality of this section. He has served as section chair twice and as secretary and chair-elect in organizing torts section meetings. In addition, he has been a panelist or speaker at section meetings at least half a dozen times. Generations of lawyers, whether they studied under Marshall at Texas, Virginia, or Northwestern view him as an inspiring teacher who ignited their imagination and instilled a love of tort law. I present you Marshall Shapo, this year’s recipient of the William Lloyd Prosser Award.