In their introduction to this fascinating volume of essays on 12 leading scholars of tort law, the editors observe that the history of tort law is typically told as a procession of leading cases that are seen as having in some way contributed to making the law (p 1). In recent years, that model of legal development has been challenged by work that has sought to uncover the contribution made to tort law by statutes, a project to which both editors of the volume under review have contributed. But statutes, like cases, are primary legal sources, and this volume takes a refreshingly different approach to studying the making of tort law. Its goal is to shed new light on the development of tort law as an intellectual domain and not simply a body of rules, and to demonstrate that legal scholars played a decisive role in that development. It succeeds admirably on both fronts.

Rather than examining cases, statutes, and the judges and legislators who produced them, the essays in this volume focus on the men who wrote treatises and commentaries on tort law (and a consequence of the editors’ decision to focus exclusively on people who were influential in their day but no longer active is that the book only covers men). Eleven essays examine a wide range of writers on tort law, starting with Thomas McIntyre Cooley in the mid-nineteenth century and ending with Tony Weir in the twenty-first. These are supplemented by an introduction by the editors and a concluding chapter by Peter Cane which offers broader reflections on common law tort scholarship.

Every chapter is richly researched and offers much food for thought. However, this is also a book that is greater than the sum of its parts. Its value lies not just in the information it presents about individual scholars and their contribution to the intellectual development of tort, but also in the broader themes that emerge when the chapters are read together. It is on these broader themes that this review will focus.

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The first theme relates to the influence exerted over law by jurists. SFC Milsom memorably defined a jurist as a person who looks at law from a distance to make general statements about its development or postulate properties for it. All 12 scholars discussed in this book were jurists in Milsom’s sense, and all exerted a non-trivial influence over the development of tort law. A central goal of the volume is to document, analyse, and evaluate this influence, and a central finding is the sheer range and diversity of forms that that influence could take.

A first type of diversity relates to the form of the work through which jurists influence the law. As the essays in this volume show, a surprisingly broad range of types of scholarly work turns out to have been influential, including not just articles, monographs, and case notes, but also book reviews (Fleming), textbooks (Salmond, Winfield), quasi-legislative restatements (Bohlen, Prosser), and even work done as a translator (Weir), editor (Pollock), or public service.
intellectual (Holmes). It is not just that all of these are possible ways of influencing the law. It is, rather, that all of them appear to be necessary. An important lesson that emerges from this volume is that scholars are most effective in shaping the law when they are willing to engage with it through as broad a range of formats as possible, and not merely through more traditional academic formats.

A second, and deeper, type of diversity relates to the nature of the influence jurists wield over the law. The introductory chapter categorises tort scholars into three broad types: ‘pioneers’ (Cooley, Holmes, and Pollock), ‘consolidators’ (John Salmond, Francis Bohlen, Percy Winfield, William Prosser, and John Fleming), and ‘iconoclasts’ (Leon Green, Fleming James, Patrick Atiyah, and Tony Weir). The pioneers’ contribution was creation: the fashioning of a body of tort law from out of the detritus left by the demise of the forms of action. The consolidators’ contribution was preservation and perpetuation: ensuring the survival of the pioneers’ work by putting it in a form that was accessible, intelligible, and useful to practitioners, judges, and students.

The work of the pioneers and consolidators went well beyond substance. The process of systematisation in which they engaged also required a high degree of innovation in relation to the juristic method they used to derive legal propositions, and the form which their published work took. Mark Lunney’s essay on Salmond (Chapter 4) discusses how Salmond’s textbook on tort represented a new type of legal writing; and the legal treatise, similarly, was transformed by Pollock into a thing radically different from what it had been before. An even clearer example is presented by the rise of the restatement tradition in the US – which, as Michael Green and Christopher Robinette point out in their respective chapters on Francis Bohlen (Chapter 5) and William Prosser (Chapter 8), had foundational importance to the consolidator project, and which involved very significant innovations of form and methodology, particularly in relation to how rules were derived from judicial decisions. John Fleming’s cross-jurisdictional writings on tort, discussed by Paul Mitchell in Chapter 10, represent a similar type of methodological innovation, and present an approach and attitude to case law that is strikingly different from that seen in the work of Salmond, Winfield, or Pollock.

In contrast, the iconoclasts’ contribution to the development of tort law was very different. The influence they sought to have was closer to Schumpeter’s ‘gale of creative destruction’ than it was to the pioneers’ and consolidators’ careful systematisation. Much like Schumpeter’s gale, the iconoclasts sought to revolutionise tort law’s structures from within, incessantly destroying old ones and incessantly creating new ones. Atiyah’s critical views on tort law’s inadequacy as a system of accident compensation (discussed by James Goudkamp in Chapter 11) and his successive advocacy of alternative mechanisms – public compensation systems in his early work and market mechanisms in his later work – represent precisely such a process of attempted creative destruction. So, too, does James’ somewhat more successful work to turn US tort law into a more effective loss-spreading system, discussed by Guido Calabresi in Chapter 10. Importantly, they fought not just against the orthodoxies bequeathed to tort law by the pioneers and consolidators, but also new orthodoxies they saw emerging in their time. Weir’s resolute...
The idea of ‘the radicalism of tradition’ is taken from the work of Craig Calhoun on nineteenth-century radical movements in England. See C Calhoun, The Roots of Radicalism: Tradition, the Public Sphere, and Early Nineteenth Century Social Movements (Chicago, University of Chicago Press 2012) 82–120.

A second theme emerging from the volume relates to the nature of legal orthodoxies, which turn out to be more contested, contingent, and evanescent than many modern theorists allow. As this volume demonstrates, the distinction between orthodoxy and heresy is not set in stone, and positions that today appear impeccably orthodox may have appeared quite heretical when first articulated. In his essay on Winfield (Chapter 6), Donal Nolan reminds us of just how controversial some of the positions taken in Province of the Law of Tort were when first articulated. As Nolan discusses, statements and approaches in the book that appear wholly unobjectionable to a modern eye were seen by some of Winfield’s contemporaries as so heterodox, if not heretical, that they triggered a storm of reviews, responses, and rebuttals drawing in some of the leading figures of the day. Equally, the inclusion of a relatively marginal view or position in a scholarly work may lead to it being discovered or accepted as orthodoxy. Green’s discussion of Bohlen’s inclusion of a risk-benefit standard for negligence in the US Restatement provides an excellent example. As Green shows, the standard itself was taken from the work of Henry Terry, but it was Bohlen’s inclusion of the standard in the Restatement that ultimately laid the ground for its acceptance as an explicit standard in negligence.

Similarly, what appears to be a uniform received orthodoxy may in fact turn out to conceal a wide range of conflicting opinions and positions. The pioneers are perhaps the clearest examples of this. The pioneers were in many ways the iconoclasts of their time, rebelling against the rigidities of a way of thinking that was still grounded in procedure and in categories rooted in factual patterns rather than in substantive law. The actual intellectual structure of tort law that emerged from their work, however, contained a number of unresolved
importance, if it mattered at all. To Cooley, in contrast, tort law was primarily about redress for wrongs and for the injury caused to the plaintiff’s interests as a result of the wrong. As such, where Holmes’ thinking about tort law was organised around different standards of conduct and fault, and around justifying shifting loss from where it naturally fell, Cooley’s thinking about tort law revolved around different types of interests. Although Holmes’ account was theoretically influential, neither the actual development of legal doctrine nor the work of the consolidators was ever wholly Holmesian.

The position of the third pioneer, Frederick Pollock, is somewhat harder to deduce from this volume, in part because the chief objective of Stevens’ essay on Pollock (Chapter 3) is to demonstrate that Pollock’s influence on tort law was ‘a malign one’ which continues to cause confusion within the law. There are many interesting points in Stevens’ analysis, not least his account of what Pollock’s career tells us about how to be a jurist (pp 91–94) and the mistakes to avoid (pp 94–98), but the essay’s criticism is relentless and unsparing, condemning Pollock’s style (‘truly terrible’, ‘sickly’, ‘pretentious’), his normative presuppositions (‘largely wrong’), his juristic ability (‘not very good’), and his understanding of positive law (‘wrong … both in his day and now’). One cannot help but feel that all this is a tad unfair to Pollock, and even more so to his contemporaries: given that Pollock was undeniably influential, were all his contemporaries really so utterly devoid of discernment as to be unable to see just how bad his work was?

Pollock’s most obvious contribution was methodological. Pollock believed in an organic, bottom-up approach to deriving principles of tort law and, as Michael Lobban suggested in his review of Duxbury’s intellectual biography of Pollock, this lack of scepticism towards the judicial enterprise
may well have contributed to the continued dominance of analytical jurisprudence in English law, unlike in the US.\footnote{M Lobban ‘Book Review’ (2010) 68 MLR 873, 875–876.} Duxbury himself argued that Pollock’s work as editor of the Law Reports and the LQR also exercised a shaping influence on the law including in relation to tort.\footnote{Duxbury, supra n 2 at 289.} When it comes to substance, Pollock’s focus, unlike both Cooley and Holmes, appears to have been the moral obligations arising out of social relations, and his approach to tort involved analysing the manner in which the law was coming to answer the questions of whether, when, and how those moral obligations ought to be translated into legal obligations. This led him not only to favour an organic approach to the law, but also to accept that being reasonable was not the same thing as being coherent, and that the law could be reasonable without being fully coherent or consistent. These accounts of tort law – as being about conduct, wrongs, and social relations – continue to be the subject of debate in the present day, and that they reflect the unresolved legacy of the pioneers is therefore a finding that is of genuine interest.

A second dimension of divergence on which this collection sheds light is the issue of the extent to which tort law reflects matters that are the subject of disagreement rather than agreement. It is common to see accounts of tort in the present day which represent it as reflecting our moral intuitions – matters on which we can, with some reflection, agree. As this volume shows, however, there is also a long tradition of viewing tort law as concerned at least as much with disagreement as with agreement. Theories rooted in disagreement view individuals in terms not dissimilar to Schopenhauer’s porcupines: seeking the warmth of others’ presence, but constantly being poked by their quills.\footnote{A Schopenhauer, Parerga and Paralipomena: Short Philosophical Essays (E F J Payne (trans), Oxford, Clarendon Press 1974), Vol 2, 651–652.} In this conception, the very most tort law can do is to provide some of the underpinnings on which civil and solidary existence depends, and its justificatory basis lies in its status as a practice rather than in the specifics of its doctrines. Holmes, in his late life, arguably adopted precisely such a position, sceptical about the ability of the judiciary (and, thus, the law) to articulate effective community standards. In contrast, theorists who see tort law as relating to domains characterised by substantial agreement are likely to be willing to articulate a far more ambitious normative and justificatory basis for tort theory. Because tort in this vision builds on a strong set of shared moral intuitions, the law of tort can create a hierarchy of things it protects or needs to which it is more responsive, and leave out matters that are ‘eccentric or indifferent’ to the state’s purpose. As this volume shows, these differences were particularly strong in the work of the consolidators. That such divergences exist in tort theory is not new, but by highlighting the preconceptions that undergird and explain these differences, this volume makes a significant contribution to understanding the nature of the fault lines that characterise modern tort theory.

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A third and final theme emerging from this volume concerns tort law’s relationship to the broader legal system. Many of the authors represented in this volume also wrote about other areas of law, including contract, legal theory, comparative law, and constitutional law. Most of the essays in this volume acknowledge these broader
Like Salmond, Josserand’s most influential work was contained in textbooks rather than treatises, and in particular his textbook on the French civil code. See L Josserand, *Cours de droit civil Positif Français* (3rd edn, 3 Vols, Paris, Sirey 1938–1939).

The essays in this volume are focused exclusively on common law theorists from the US, Britain, and (to some extent) the ‘Old Dominions’. There is no coverage of the civil law world apart from a few comparative remarks in Cane’s chapter. In some ways, this is a missed opportunity. The exclusive focus on the common law world makes it hard to distinguish the extent to which the theoretical developments discussed in the volume reflect factors specific to the common law, as distinct from broader Western intellectual trends, or parallel responses to similar factors and circumstances in other jurisdictions. A chapter on a figure such as Louis Josserand, an influential French jurist of the inter-war period who developed a risk-based theory of liability in delict and was an early proponent of replacing quasi-contract with a law of unjustified enrichment,9 would have provided an interesting counterpoint to the picture that emerges from the volume’s study of common law jurists. Equally, the criteria for inclusion mean that there is necessarily no discussion of the development of distinctive bodies of jurisprudence in the ‘New Commonwealth’.

But it would be churlish to make too much of these points. The editors’ goal was to bring back into our consciousness the views on tort of people who exercised considerable influence over tort law across the common law world, and who largely operated in a time when it was common to speak of the common law in India or Australia, rather than (as one would now do) the common law of India or Australia. In that aim, the volume succeeds admirably. A peculiar feature of recent theoretical work in tort law has been that in our

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quest to find a usable theoretical core for tort law, the tendency has been to look primarily outside the world of common law thought, with more attention paid to the thought of figures from classical Athens or imperial Prussia than to those from the common law’s own recent past. By drawing our attention to the richness and variety of juristic thought within the common law, and their successes as well as their failures, this volume points both to the potential and the salutary lessons the world of common law jurists holds for modern tort scholarship.

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