James Goudkamp and Donal Nolan (eds), *Scholars of Tort Law* (Hart Publishing, Oxford, 2019)

In their introduction to this fascinating volume of essays on twelve 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law (and a consequence of the editors' decision to focus exclusively on people who were influential in their day but no longer active is that the book only covers men).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-19th century and ending with Tony Weir in the 21st. 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.[1] All twelve 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

[1] S F C Milsom, *A Natural History of the Common Law* (New York, Columbia University Press, 2003) at xiii.

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 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.[2] 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.[3] Much like Schumpeter's gale, the iconoclasts sought to revolutionise

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[2] Neil Duxbury, *Frederick Pollock and the English Juristic Tradition* (Oxford, Oxford University Press, 2004) at pp 281-282.

[3] Joseph Schumpeter, *Capitalism, Socialism and Democracy* (New York, Harper, 1942) at p 84.

tort law's structures from within, incessantly destroying old ones and incessantly creating new ones.[4] 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 hostility to the growing drive of harmonising private law in Europe and the creeping growth of rights-based approaches to private law, discussed by Giliker in Chapter 12, is a case in point.

Yet the volume also shows that the impulse to unleash a gale of creative destruction was largely driven by the iconoclasts' dissatisfaction with the results of the application of the orthodoxies they challenged. As Calabresi discusses, James had been a defence lawyer for the New Haven Railroad, and saw first-hand how crucial tort remedies were for the victims of railway accidents (p 262). Weir, similarly, had a deep understanding of continental legal systems – as Giliker discusses (pp 347-349), he was responsible for producing English translations of many key texts – and was concerned that inadequate attention was being paid to methodological differences between the systems. Leon Green, as Jenny Steele demonstrates in chapter 7, saw himself as 'correcting relatively new misunderstandings' in the law, rather than 'suggesting a break in its traditions', and was fundamentally optimistic about the capacity of tort law to respond to new challenges as long as care was taken to make sure it did not lose its inherent flexibility (pp 226-228). If the iconoclasts sought to overthrow positions that orthodoxy held to be entrenched in the canon of case law and juristic writings, they only did so in defence of what they saw as a deeper core to which they believed tort law was and should remain committed. Their radicalism was the radicalism of tradition.[5]

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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

[4] The phrasing is adapted from Schumpeter's description of how creative destruction operates within the economy. See ibid at p 83.

[5] 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.

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 contradictions. There were many different ways in which tort law could have been conceived as a substantive area of law, and the pioneers did not necessarily agree on a single way of doing so. But nor did the consolidators, with the result that the multiplicity of positions passed unsystematised into tort doctrine, and continue to co-exist within tort law in the present day. Two aspects of this difference which have received considerable attention in present-day tort theory are the question of whether tort law should be monist or pluralist—that is, whether it should be seen as being grounded in a single overarching principle or in a multiplicity of principles—and the methodological issue of the role of organic, bottom-up reasoning as opposed to top-down reasoning based on a priori assumptions about tort law derived from principles external to the law. In what is one of the most interesting contributions of this volume, the essays highlight other dimensions of divergence within tort law which have been with us from the beginning.

One of these dimensions relates to the question of what tort law is concerned with, or what (to borrow Winfield's phrase) its 'province' is. In the era of the forms of action, this question was irrelevant: the province of a form of action was fact patterns of the type covered by that form of action. A more substantively organised body of tort law, however, required a more substantive answer. In their chapter on Cooley and Holmes (Chapter 2), John Goldberg and Benjamin Zipursky discuss how these two pioneers of tort law in America took very different positions on this question. Holmes' conception of tort law was wholly focused on defendants. To Holmes, tort law was about the defendant's conduct and its conformity to the standards of the community. The nature of the plaintiff's interest was at best of secondary 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.[6] 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.[7] 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

[6] Michael Lobban, 'Book Review', (2010) Vol 68, No 5, *Modern L Rev*, 873, at pp 875-6.
[7] Duxbury, *supra* n 2, at p 289.

being poked by their quills.[8] 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 writings, but do not analyse them in any depth. The three exceptions are the essays on Leon Greene by Jenny Steele (Chapter 7), on John Fleming by Paul Mitchell (Chapter 10), and on Tony Weir by Paula Giliker (Chapter 12), all of whom discuss the relationship between their subject's views on tort and their broader views on law. Giliker shows how a closer study of Weir's work as a legal translator, and of his later opposition to European harmonisation, permits us to form a more rounded and nuanced view of Weir's scholarship than engaging solely with his tort text would. Steele's chapter on Green demonstrates that Green's thought assumes a rather different – and entirely more interesting – colour when his views on tort are placed alongside his broader views on the power of the judge and the role of the jury. Mitchell's chapter uses a close analysis of Fleming's writings on tort to extract his broader views on other aspects of the operation of the legal system, including the role of categories, precedent, and the trajectory of legal change. Peter Cane's contribution (chapter 13) makes a similar point about the relationship between tort scholarship and the broader legal system. By setting the (relatively recent) development of tort law in broader historical context of the development of legal method, and the role of the jurist, in common law and civil law, Cane sketches an interesting and insightful picture of the manner in which a shifting context has shaped and continues to reshape the role of the jurist in relation to the common law of tort, and of the challenges that are likely to face different approaches to tort theory in the coming years. These essays

[8] A Schopenhauer, *Parerga and Paraliponema: Short Philosophical Essays* (E F J Payne (trans), Oxford, Clarendon Press, 1974), Vol 2, at pp 651-652.

make a powerful case that we miss a trick when we study tort law in isolation from other aspects of law, as scholars increasingly tend to do in our more specialised age.

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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 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.

[9] 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 Louis Josserand, *Cours de droit civil Positif Français* (3rd edn, 3 vols, Paris, Sirey, 1938-1939).