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Moral Foundations

This book is inspired by Immanuel Kant's *Rechtslehre*. Its thesis is a reflection of the legal theory developed in that work. But the book is not a presentation of Kant's theory of tort law. It could not be. As Kant had nothing to say about tort law, there is no such theory.¹ What, then, is the nature of this inspiration? The answer is that the *Rechtslehre* presents a framework for thinking about legal issues that can be applied to any legal subject. This scaffolding is erected in this chapter and utilised throughout the book. It is particularly useful in this context because the framework contrasts strongly with the dominant model from which tort law is today understood. It will be well to examine that now.

I. The Conventional View

One way to approach this model is to notice the manner in which the third *Restatement of the Law of Tort* is progressing. Note particularly the following titles of what we already have: *Liability for Physical and Emotional Harm* and *Liability for Economic Harm (Tentative Drafts)*. Consider also the following from the former of these, the first passages to deal with liability. 'An actor who intentionally causes physical harm is subject to liability for that harm.'² 'An actor whose negligence is a factual cause of physical harm is subject to liability for any such harm.'³ Impossible to miss here is the notion that tort law is fundamentally about responding to harm. Harm in this theory is never clearly defined, but the basic idea is plain. Tort law is the common law's mechanism for dealing with loss.

In the Commonwealth, this view has been usefully summarised by Robert Stevens:

On this conception 'the overall object of tort law is to define cases in which the law may justly hold one party liable to compensate another.'⁴ Within liability for negligence

¹ This is because, as Jacob Weinrib has reminded me, Kant's focus is on primary and fundamental rights rather than on wrongs or remedies.

² *Restatement (Third) of Torts: Physical and Emotional Harm* (St Paul, MN, American Law Institute Publishers, 2010) §5.

³ *ibid* §6.

⁴ *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32 [9].

‘damage is the gist’,⁵ and where there is no recovery for negligently inflicted loss it needs justification. Under this model, the role of the ‘duty of care’ in liability for negligence is as a ‘control device,’ primarily concerned with the diverse reasons why a particular defendant has an immunity from being liable for carelessly causing loss. This conception of the law of torts I shall call the ‘loss model’.⁶

The debate over the loss model and its alternatives is alight in theoretical discussion of the law. It has raged over a natural battleground: whether the loss model provides a satisfactory understanding of the law. Unsurprisingly, the argument against the loss model is that it does not. In fact, the argument goes, the model provides so poor an analysis that it must routinely appeal to policy arguments in order to keep liability within sensible limits. The reason for this is clear. There is simply too much loss in the world for it always to attract liability. Thus, ‘control mechanisms’ must be introduced to keep liability in check.

As Stevens notes, this feature of the loss model is most obvious in the law of negligence. Thus, speaking from the perspective of the conventional view, Stephen Todd has noted that:

The duty requirement exists because the potential scope of negligence as a basis for legal liability is virtually unlimited. On its face ‘negligence’ looks only to the quality of the defendant’s conduct and not to factors such as the likely or possible number of plaintiffs, the likelihood that loss would be caused, the nature and extent of particular loss and the circumstances in which the loss came to be inflicted. Thus the courts have had to devise principles to delimit the boundaries of liability. To this end they have instituted a requirement in every case of foreseeability of damage to the person bringing the action, and have also taken account of these other factors in deciding whether, for reasons of policy, liability ought to be especially restricted or denied altogether. The language of duty provides the formula for expressing these conclusions of policy. It operates as a ‘control device’ or filter through which any particular claim must pass. It is apparent, then, that the function of the duty of care is not so much to identify cases where liability is imposed as to identify those where it is not.⁷

The upshot of this is that the law tends to be analysed in the following way. First, one or more principles are identified. In the law of negligence, the fundamental principle is said to be that individuals are responsible for the losses caused by their negligent behaviour—the view witnessed in the third *Restatement* above. Second, an enormous raft of exceptions are listed to the principle, exceptions that are said to be justified on policy grounds—ie, grounds other than, and often inconsistent

⁵ *Gregg v Scott* [2005] UKHL 2, [2005] 2 AC 176 [99].

⁶ R Stevens, *Torts and Rights* (Oxford, Oxford University Press, 2007) 2 (some citations omitted).

⁷ S Todd, ‘Negligence: The Duty of Care’ in S Todd (ed), *The Law of Torts in New Zealand*, 6th edn (Wellington, Thompson Reuters, 2013) 147 (citation omitted), quotation from *Smith v Littlewoods Organisation Ltd* [1987] 1 AC 241 (HL), 280. See also, eg, P Cane, *The Anatomy of Tort Law* (Oxford, Hart Publishing, 1997) 10; J Fleming, *The Law of Torts*, 9th edn (Sydney, LBC Information Services, 1998) 115; WP Keeton et al, *Prosser and Keeton on the Law of Torts*, 5th edn (St Paul, MN, West Group, 1984) 358; WE Peel and J Goudkamp, *Winfield and Jolowicz on Tort*, 19th edn (London, Sweet & Maxwell, 2013) 81.

with, the general principle. This too is neatly captured by the summary of negligence in the *Restatement*: 'An actor whose negligence is a factual cause of physical harm is subject to liability for any such harm within the scope of liability, *unless the court determines that the ordinary duty of reasonable care is inapplicable*.'⁸ The unless clause is of considerable practical importance.

As a descriptive matter, the conventional view is of course impeccable.⁹ It is, after all, the conventional view, the view utilised by the vast majority of lawyers. But our focus is theoretical. And at that level, it is clear that the model is inadequate. An understanding that presents a principle with exceptions is faulty. An understanding that presents a principle with so vast a list of exceptions is no understanding at all. Imagine a chemist who maintained that all elements were metals, but then catalogued the 26 non-metals as exceptions.¹⁰ We would be right to conclude that this chemist did not understand what an element was. For just the same reason, we must conclude that the loss model cannot comprehend the law of tort. In fact, it is worse than this, because at least in many areas of the law, the exceptions are both more important and the potential cases that fit them far more numerous than the rule. That is more like a zoologist stating that all felidae are lions and then listing tigers, jaguars, leopards, cougars, cheetahs, lynxes, ocelots, domestic cats etc as exceptions. Here, we would rightly conclude that this zoologist did not know what felidae were and did not seem concerned to find out. If our conception of the law of negligence leads to the conclusion that 'the potential scope of negligence as a basis for legal liability is virtually unlimited'¹¹ and we are thus forced to introduce a host of control mechanisms, then we need a new conception.

In the end, then, history itself is sufficient to reveal that the loss model is a failure. That model was invented in the belief that it would provide a utile starting point for developing a conceptually adequate understanding of the law of tort.¹² No objective observer could resist the conclusion that it has failed. The lists of exceptions to its general principles have grown well beyond breaking point. In fact, it is arguable that the reason it is not more widely appreciated that the conventional view has broken down is that lawyers have simply got used to dealing with the near-chaos that the view has created. That says a great deal for their resourcefulness, but not much for the law itself. And that is not the end of the matter. These are only the general problems with the conventional view. The case against the conventional view has really only begun. Other, more specific, problems are examined throughout this book. But these problems too manifest themselves in the same general way: they show that the conventional view cannot comfortably

⁸ *Restatement (Third) of Torts* (n 2) §6 (emphasis added).

⁹ However, though this is not the place to discuss this matter, it is highly unlikely that the loss model was the conventional view throughout the law's history. On the contrary, it is, I think, a creature of the twentieth century.

¹⁰ Here, I am including in the set of non-metals the nonmetals and the metalloids.

¹¹ Todd, 'Negligence: The Duty of Care' (n 7) 147.

¹² It reaches its zenith in great works such as J Fleming, *The Law of Torts*, 9th edn (Sydney, LBC Information Services, 1998).

explain the working of the law in practice and so must continually have resort to policy-based exceptions. The unfortunate result is increasingly obscure and arbitrary legal decision making.

In the US, matters have taken a somewhat different turn. There, theorists have not been content with principles and lists of exceptions. On the contrary, a powerful theory has been developed that attempts to explain the principles and the apparent exceptions in a unified and theoretically satisfactory fashion. I refer, of course, to the school of thought known as law and economics.

This is certainly a view worthy of respect—a genuine theory that provides genuine analysis. The problem is that if it intends directly to explain the practice of the law of tort,¹³ then it fails because it is structurally inconsistent with structural features of that law. This argument has been pursued by others and so need not be examined here in detail.¹⁴ I give only the flavour of the argument by examining two examples.

Some torts demand that a defendant can be liable to a plaintiff only if he caused injury to that person. This is known as factual causation or cause-in-fact. On the face of it, this has nothing to do with economics. Thus, it has been claimed by law and economics scholars that ‘the idea of causation can largely be dispensed with in an economic analysis of torts’.¹⁵ This reveals the gulf between economic and legal analysis and the fact that, despite the claim that economics reveals the implicit logic of the common law, the logic of economics and the logic of law are very different.¹⁶

Similarly, some torts require the defendant to have intended harm to the plaintiff. Economic explanations can be attempted of this feature of the law, but they too seem to depart from the law itself. For instance, it might be claimed that the law is particularly concerned with intention because a defendant who intends to cause harm is more likely to bring that harm about than one acting merely carelessly. The problem is that it is easy to invent examples in which this is not the case. Imagine a man who wants to kill another who is in a hall of mirrors, where having the intention to shoot the desired victim virtually guarantees that he will miss. Here, the intention makes the man less likely to cause harm, but if he nevertheless shoots the plaintiff, the legal rules concerning intention will apply. Again, this suggests that the concerns of the law are not economic.

¹³ It is important to recognise that much law and economics does not have this aim and so is not subject to this criticism. Nevertheless, this type of analysis is not a rival for the one presented here, however useful it is in other contexts.

¹⁴ eg, EJ Weinrib, *The Idea of Private Law* (Cambridge, MA, Harvard University Press, 1995) 1–21, 36–38, 46–50; J Coleman, *The Practice of Principle* (Oxford, Oxford University Press, 2001) 1–64.

¹⁵ W Landes and R Posner, *The Economic Structure of Tort Law* (Cambridge, MA, Harvard University Press, 1987) 229.

¹⁶ Curiously, this is often admitted by law and economics scholars. See, for instance, the claim in W Landes and RA Posner, ‘Causation in Tort Law: An Economic Approach’ (1983) 12 *Journal of Legal Studies* 109, 134 that: ‘In so analyzing the causation cases we are admittedly far from the language and concepts with which the courts analyze these cases.’

The point is not that the law is economically inefficient. It may be that it is highly efficient. Indeed, the law may mirror the outcomes called for by economics closely. If that is so, then economics will usefully describe the incentive structures produced by the law etc. The claim is not that economics cannot fruitfully be used to analyse the law. The point is that the *reasons* given in the law and by economics differ. Thus, even when economics and law argue for the same outcomes—as *arguendo* they may always do—the content of their arguments are very different. Hence, economics cannot explain or justify the law in the sense that it cannot support the reasons given in law for legal decisions.

It is important to stress that I do not mean to reject economics *tout court*, even in the quite narrow sphere in which I question it at all. Some years ago, I attended a seminar given by a prestigious American academic in Hamburg considering the economic analysis of the law. One of the German economists in the room asked the presenter why he had considered only economics that focused on material social cost and ignored the kind of economics that begins with the Kantian notion that the fundamental human entitlement is not to welfare, but to equal freedom. The presenter's response was that this form of economics was not influential in the US. I do not doubt that the response was right, but these thoughts nevertheless raise the possibility that contemporary examples of law and economics scholarship fail directly to latch onto law, not because economics and law are analytically forever distinct, but because these examples of law and economics involve bad economics and the study of law is one of the ways in which this can be brought home.

Whatever the truth of that, it seems clear that US-style law and economics also takes its cue from the loss model. It holds that it is with loss or harm that tort law is most deeply concerned. Hence, we have the idea that the aim of the law of negligence is to find the lowest cost avoider and that it is deeply concerned with loss spreading. And most fundamentally, it is the commitment to the loss model that cannot be accepted, whatever particular form that commitment takes.

What could the relationship between tort law and loss be? One answer—the one suggested by law and economics—is that tort law is designed to minimise loss. The problem with that answer is that it is flatly inconsistent with the law as it presents itself. As we have said, tort law is a law of wrongs. A defendant who batters, falsely imprisons or negligently injures another is conceptualised as a wrongdoer. It is not in the nature of the law to regard this person as a mere loss non-minimiser, as an agent acting merely inefficiently. This does not prove that loss minimisation is not what tort law is really all about, but the law does not seem to be about this. It seems to be about wrongdoing of some kind, and it is with this notion that the theory of tort law ought to begin.¹⁷

¹⁷ In the end, everything is up for grabs, so it is possible that the best theory of tort law will leave the notion of wrongdoing behind. But wherever it ends up, legal theory must begin with the law's most salient features, and the notion of wrongdoing is one of them.

This leads the loss model to the notion that the causing of loss is wrongful, at least *prima facie*, and that is how the model operates in the Commonwealth. Recall that the model maintains that tort law is most fundamentally concerned with loss. The model therefore sees loss as the basic evil to be alleviated. Of course, however, practicalities demand that not all losses can be compensated. Thus, control mechanisms must be introduced to constrain liability.¹⁸

There is a deep problem with this view, far deeper than its inability to provide an adequate account of the law, which inability is a mere symptom of this problem. The problem is that the loss model is based on notions inconsistent with the reality of the human condition.

Given human nature and the world in which we find ourselves, causing loss to others is a fact of life. To take just a miniscule set of examples, I obtained a place at university that would have profited other potential students, a scholarship that others could have used, acquired a job that others want, live in a house that others prefer, am married to a woman who could make others happy, have friends who could devote themselves to other people and so on. I cause loss to people when I enter a queue ahead of them or press the button at traffic lights to cross the road. I say things that people would prefer me not to say, think things that people would prefer me not to think, and so on and on. I cause people loss all the time. We all do. It is part of life. How, then, could it be appropriate to regard causing loss as even *prima facie* wrongful?¹⁹

I do not mean to deny that this feature of the human condition is a source of sadness and regret. On the contrary, naturally, it would be better were things otherwise. But building into one's understanding of law the notion that things are even *prima facie* unjust unless they are otherwise is, frankly, otherworldly. It is reality denyingly utopian; the result of failing to look the human condition in the eye. It is an understanding fit only for the law of the kingdom of heaven.

If loss is an evil, then life itself is evil and living a life with one's eyes open to the consequences is an act of intentional evil. I cannot believe any of this. The loss model is not merely wrong, it is pathology. It is interesting to consider what it is about the modern world that makes it seem attractive to so many. It is impossible to imagine it thriving in, say, ancient Greece or the medieval Europe in which our law grew up. But I will not pursue that issue here. Our focus is on providing an alternative understanding of the law.

¹⁸ Note that if loss was not seen as *prima facie* wrongful, then it would be odd to refer to these features of the law as 'control mechanisms'. They are seen to be control mechanisms because they prevent liability from falling where it would otherwise fall.

¹⁹ Note that it is no reply to say that modern lawyers all accept that these losses are not actionable. Of course, that is true. The point is that, on the loss model, that is because of some policy concern favouring an exception to a general principle. And that is entirely implausible.

II. A Kantian Understanding

If tort law is not most fundamentally concerned with loss, then what is it concerned with? The Kantian answer is that it is concerned with freedom. Thus, we have Kant's fundamental principle of law:

Any action is *lawful* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law.²⁰

For our purposes, the most important feature of this principle is its commitment to equal maximum freedom. Individuals are entitled to the maximum amount of freedom possible consistent with the recognition of the same freedom in others.

Kant maintains that this principle generates a single innate right:

Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity.²¹

So, freedom is defined as independence from constraint imposed by others' choices. We must pause to examine this important idea.

The innate right generates an entitlement to be free of constraint imposed by the choices of others. A direct consequence of this principle is that constraint not imposed by others does not violate the innate right. We are constrained to walk on the earth, unable to flap our arms and take to the sky. But that is no encroachment on our freedom. The inability to fly is not imposed on us by others. Importantly, the same is true when we are constrained in ways that are not the result of others' choices. The fact that I was born means that there are fewer resources available for you, but that cannot be regarded as a violation of your freedom by me as it did not result from any choice of mine. In general, one is responsible only for one's actions, and actions are behaviours that can be imputed to an agent.²²

We might make this point by distinguishing between moral and merely factual constraint. An individual is factually constrained if there is some impediment to her will. Moral constraint, on the other hand, is factual constraint that is the result of the action of another. In the following, 'constraint' is used only in this latter sense. For us, then, a constraint is an interference with freedom in terms of another's choice.

Moreover, both of the principles examined above demonstrate Kant's commitment to the protection of what is often referred to as external freedom,²³ here

²⁰ I Kant, *The Metaphysics of Morals*, M Gregor (trans) (Cambridge, Cambridge University Press, 1996) 6:230. For reasons that cannot be elucidated here, I generally translate 'Das Recht' as 'law', not as 'right', and the cognates of 'Recht' accordingly.

²¹ *ibid* 6:237.

²² *ibid* 6:223.

²³ The term 'external freedom' is designed clearly to distinguish the notion to which it refers from that denoted by 'autonomy' examined in the *Groundwork*, which is a more positive account of freedom

specifically conceptualised as the ability to live independently of the choices of others. This too must be stressed. The formulation of the innate right not only elucidates the content of that right, it also defines the operative conception of freedom. According to this understanding, freedom *is* independence from the constraint of others' choices.

Kant's position is not that human life should be lived in splendid isolation from others or that the law should encourage this. It is that respect for individual freedom entails that individuals must be able to insist on independence if and when they choose. So, while one can accept that individuals must form associations if they are to live well, the point is that they must also be free to make their own decision to associate and leave entered associations if they choose to do so. On the Kantian understanding, the job of legal theory is not to paint a picture of the good life and the job of law is not to push people towards it. Rather, the task is to elucidate and insist on the freedom that makes human flourishing even a possibility.

It is important to elucidate one further implication of the innate right: one is free to do anything that does not violate a right in another. Kant identifies this with a specific principle, that of being beyond reproach.²⁴ I label it the *principle of innocence*.²⁵ This can be illustrated by imagining that you and I are alone in the state of nature. In this condition, I am entitled to do as I will unless my action will violate the same entitlement in you. This entitlement is a product of my innate right. The restriction on my entitlement is a product of your innate right. Thus, if I perform an action that violates your freedom, that must *ipso facto* be a violation of your innate right. To put this negatively, if I do not violate your innate right in these circumstances, then I cannot have violated your freedom and thus cannot have wronged you.

Kant also accepts that human beings can acquire rights, eg, proprietary and contractual rights. Though we will not examine these aspects of his theory here, suffice it to say that I also violate your freedom if I violate your acquired rights. The central point at the moment is the negative one: if I do not violate your rights, I cannot have violated your freedom. The crucial upshot of this is that this legal theory is—at least at this point²⁶—unconcerned with human needs and desires.²⁷ Consequently, the theory of tort law based on this account is also indifferent to need and desire.

If that sounds unacceptably harsh, the following comments are in order. First, the position is not that the law as a whole, still less politics in general, should

in Isaiah Berlin's sense. I Kant, *Groundwork of the Metaphysics of Morals*, M Gregor (trans) (Cambridge, Cambridge University Press, 1996) 4:440; I Berlin, *Two Concepts of Liberty* (Oxford, Oxford University Press, 1958).

²⁴ I Kant, *The Metaphysics of Morals*, M Gregor (trans) (Cambridge, Cambridge University Press, 1996) 6:237–38.

²⁵ In passing, one might note that the loss model is inconsistent with the principle of innocence. It holds that liability is based on a principle, where one cannot live a life without breaking that principle.

²⁶ cf Kant (n 24) 6:325–28.

²⁷ The innate right is an entitlement to be free based on the fact that human beings possess rationality. It does not receive justification from the fact, to the extent that it is a fact, that human beings need or want to be free.

ignore need and desire. The claim is only that these are not appropriate subjects for tort law. Second, the theory holds this view not out of a callous disregard for human need and desire, but out of respect for human freedom. Its thesis is that justice requires areas of law—of which tort law is one—focused on human freedom. Its thesis is not that human need and want ought everywhere to be ignored.

This is only the briefest outline of Kant's legal theory, but it will suffice. It is not intended to provide a list of the rights we find in tort law. Nor is it proposed as a set of first principles from which tort law is to be derived. Rather, its chief importance is to reorient our thinking about tort law. For decades, we have been attempting to understand that law as society's response to loss. That attempt has failed. This book adopts a different perspective and seeks to show that it provides a considerably more powerful picture of the law of tort.

III. The Scope of Analysis and the Criticism of Tort Law

This book is an analysis of the principles of tort *liability*. It maintains that those principles are better understood as protecting freedom than as responding to loss. This book is not an examination of tort law *tout court*. Thus, it does not argue (though it does not deny) that tort law actually succeeds in protecting freedom. Whether it does so depends not only on the shape of its liability rules but also on the adequacy of its remedies. In that regard, there is a great deal of evidence to suggest that tort law is (or at least parts of tort law are) a disaster in this regard.²⁸ Though this book does not focus on these issues, some brief comments are in order.

At heart, this criticism of tort law is concerned to show that the law fails to provide an adequate social response to what we might call the problem of incapacity.²⁹ It must be understood that the argument of this book is entirely consistent with this criticism. In particular, the following points should be made.

The criticism under consideration holds that tort law provides the most important social response to incapacity, but that this response is inadequate. Though some have thought that positions of the kind advanced here are in tension with this view,³⁰ on the face of it, the reverse is the case.³¹ To put this into the language

²⁸ In the English context, see, eg, D Harris, *Compensation and Support for Illness and Injury* (Oxford, Clarendon Press, 1984); H Genn, *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (Oxford, Clarendon Press, 1987); T Baker, 'Blood Money, New Money, and the Moral Economy of Tort Law in Action' (2001) 35 *Law and Society Review* 275.

²⁹ D Campbell, 'The Damages System in Practice' in D Harris, D Campbell and R Halson (eds), *Remedies in Tort and Contract* (Cambridge, Cambridge University Press, 2002).

³⁰ See, eg, *ibid* 440.

³¹ At this point, the differences between positions such as those advanced in A Burrows, 'In Defence of Tort' in *Understanding the Law of Obligations* (Oxford, Oxford University Press, 1998) and R Stevens, *Torts and Rights* (Oxford, Oxford University Press, 2007) ch 15 from the position advanced here must

adopted here, tort law is a poor vehicle for responding to incapacity not only because of problems with the law's remedial facility, but most fundamentally because it is not an attempt to deal with incapacity at all. On this view, then, the criticism of the status quo is in fact deepened as a result of the thesis advanced here, though that criticism is not now directed at tort law per se.

David Campbell has argued that perhaps the most objectionable feature of tort law is that it 'prevents general reform [of social response to incapacity], and it is highly arguable that tort should be abolished for just that reason.'³² This, I think, is wrong. But it is important to see just why that is so.

Currently, tort law prevents reform. It does so because it is regarded as providing a more or less comprehensive response to incapacity and, despite widespread acknowledgement of tort law's failures in this regard, alternative responses seem to many to be undesirable or impractical.³³ In these circumstances, despite the fact that tort law is the worst solution to the problem of incapacity of all the alternatives, that it does not fail entirely to compensate for incapacity can appear to justify delaying necessary but controversial and difficult reform. Yet what is the fundamental problem here? For Campbell, it is tort law itself. According to the position advanced here, however, it is the false belief that tort law is properly regarded as a response to incapacity.

If the view advanced in this book were to be accepted, one consequence would be that tort law would no longer be viewed as society's inadequate response to incapacity. That is not because the law would be viewed as an adequate response to incapacity; it is because it would be viewed as no response to incapacity whatsoever. Consequently, we would not view society as possessing a more or less comprehensive though poorly functioning mechanism for dealing with incapacity; we would view society as possessing no such (general) mechanism at all. This would achieve precisely what Campbell wishes the abolition of tort law to achieve.

That might appear to raise the following question: what, then, is the point of tort law? This book, of course, is an answer to that question. It should also be noted that moving away from the loss model and the idea that tort is to be viewed as society's response to incapacity is likely dramatically to reduce the burdens placed on tort law in general, including on its remedies. This may be another area, then, in which the best way to save a phenomena is to shrink it³⁴ (here, though, the necessary shrinking is mainly conceptual). Ironically, then, the general reluctance of these critics of tort law to entertain views of the kind advanced here is an

be stressed. I have explained some of these differences in A Beever, 'Corrective Justice and Personal Responsibility in Tort Law' (2008) 28 *Oxford Journal of Legal Studies* 475.

³² D Campbell, 'The Damages System in Practice' in D Harris, D Campbell and R Halson (eds), *Remedies in Tort and Contract* (Cambridge, Cambridge University Press, 2002) 457.

³³ *ibid* 453–61.

³⁴ *cf* D Campbell, 'Gathering the Water: Abuse of Rights after the Recognition of Government Failure' (2010) 6 *Journal of Jurisprudence* 487, 533.

obstacle to the reform they ultimately seek.³⁵ Because they insist that tort law must be understood as a response to loss, closing their ears to legal theory that suggests the contrary, they perpetuate the damaging myth that society has such a response, albeit a poor one, when in fact it has none.³⁶

In short, these critics insist on interpreting tort law as an arm of the welfare state. This book argues that this is the wrong analysis. That argument says nothing itself about the welfare state. Naturally, there is far more to say on this issue, but that is not the subject matter of this book. It is time to begin our examination of tort liability.

IV. Three Foundational Principles

This chapter has presented three central principles. As noted, their chief importance is to reorient our thought regarding tort law. Because they will make appearances in the chapters that follow, it will help to present them formally here:

Equal maximum freedom: individuals are entitled to the maximum amount of freedom possible consistent with the recognition of the same freedom in others.

Innate right: individuals are entitled to independence from others, specifically not to be subject to constraint.

Innocence: individuals commit wrongs—ie, act illegally—only if they violate the rights of others.

These are the building blocks of the theory of tort law that follows.

³⁵ Here I wish explicitly to exclude David Campbell from these comments, whose work and advice has been extremely important in the formation of my own views.

³⁶ I hope that this brief discussion will have done something to undercut the unfortunate assumption that positions of the kind advanced in this book are necessarily wedded to a particular political ideology, let alone the claim that they are essentially covert attempts to implement such ideologies. The world and, thankfully, my mind are more complicated places than these criticisms suggest.