# Book Reviews

## Nicholas J McBride, The Humanity of Private Law Parts I and II

Nicholas J McBride, *The Humanity of Private Law: Part I: Explanation* (Hart Publishing, 2018) 296 pp, ISBN 9781509911950.

Nicholas J McBride, *The Humanity of Private Law: Part II: Evaluation* (Hart Publishing, 2020) 224 pp, ISBN 9781509911998.

GK Chesterton famously invoked the metaphor of a fence to defend a cautious approach to law reform. He said:

> In the matter of reforming things, as distinct from deforming them, there is one plain and simple principle; a principle which will probably be called a paradox. There exists in such a case a certain institution or law; let us say for the sake of simplicity, a fence or gate erected across a road. The more modern type of reformer goes gaily up to it and says, 'I don't see the use of this; let us clear it away.' To which the more intelligent type of reformer will do well to answer: 'If you don't see the use of it, I certainly won't let you clear it away. Go away and think. Then, when you can come back and tell me that you do see the use of it, I may allow you to destroy it.'[1]

If we are to continue with the fence metaphor, then the 'stand in' for Chesterton's Fence in Nicholas J McBride's ambitious two part work *The Humanity of Private Law* is the entire corpus of English private law. Part I of McBride's work addresses the question of *why* English private law exists in the first place. The answer provided by McBride is that the English private law is, at least at present, concerned with ensuring that its subjects possess '14 or so'[2] goods which aim to help those subjects flourish. McBride calls this the 'possessions model' of human flourishing on the basis that this model depends on subjects *possessing* certain goods.[3] Those goods are listed as ensuring that subjects have:[4] (1) good health; (2) freedom from being muddled or confused; (3) a sufficient degree of practical reasonableness to make sense of the world and from which to make personal judgements; (4) a sufficient degree of self-awareness as to how one's life is going; (5) friends and a life partner; (6) whom they care about; (7) a sufficient degree of concern for one's future and wellbeing; (8) a desire to pursue at least one meaningful project or cause; (9) a sufficient degree of mastery in at least one trade or game that requires some degree of skill; (10) a sufficient degree of creativity and opportunities to be creative; (11) a requisite degree of stability in one's personal, cultural, political and environmental affairs; (12) flourishing for those individuals whom subjects care about; (13)

[1] GK Chesterton, *The Thing* (Sheed & Ward, 1939) 29.

[2] Nicholas J McBride, *The Humanity of Private Law: Part II: Evaluation* (Hart Publishing, 2020) 1 ('*Part II*').

[3] Nicholas J McBride, *The Humanity of Private Law: Part I: Explanation* (Hart Publishing, 2018) 82–7, 107 ('*Part I*'). This is built on John Finnis' account of human flourishing in John Finnis, *Natural Law & Natural Rights* (Oxford University Press, 2nd ed, 2011) 448.

[4] McBride, *Part I* (n 3) 107.

freedom from undue anxiety about future flourishing; and (14) membership in a society in which the basic flourishing of everyone is promoted.

Where is this list of the possessions of human flourishing derived from? McBride arrives at this account by considering what would be widely accepted by reflective people in a modern Western liberal society as constituting flourishing and has, as such, been received in those societies. This creates something of a chicken and egg problem — are these possessions received because they have been reflected on or reflected on because they are the *status quo ante*. The possessions model is then cross-checked by noting the extent to which it can fit with the case law and the messy and diffuse way in which case law develops incrementally across time. McBride provides the necessary and reasonable caveat that a perfect fit between theory and practice is impossible, and that judge made law is bound to contain 'historical excrescences [and] carbuncles … that can be scraped off without loss'.[5] From this point it should be appreciated that given McBride's list of flourishing requires the weighing up of incommensurate factors it may be too imprecise to solve the narrow issues that are often before a judge.

The difficulty with transitioning any virtue ethics project, and I would consider McBride's project to be a form of neo-Aristotelian virtue ethics, into directly applicable legal rules is the high level of indeterminacy created in weighing up the various virtues. The consequence being that those scholars and lawyers who dislike the incommensurate nature of such balancing exercises will remain unconvinced by McBride's thesis. However, McBride does attempt to provide some guidance as to how the possessions of human flourishing are to be balanced. Like CS Lewis' famous observation that courage is a prerequisite to the other virtues,[6] McBride notes John Finnis' observation that practical reasonableness is a pre-condition to enjoying the other possessions of flourishing.[7] Further, McBride notes both that: (i) subjects require conventions and stability[8] if they are to flourish such that judicial discretion is circumscribed by decided cases; and (ii) when balancing interests certain primary possessions or goods[9] from his list ought to take preference to what he terms 'secondary goods'[10] because the latter merely *facilitate* the enjoyment of the former.

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[5] Ibid 264–5.

[6] CS Lewis, *The Screwtape Letters* (Geoffrey Bles, 1942) 148.

[7] McBride, *Part I* (n 3) 84.

[8] Ibid 98, 119.

[9] Ibid 124:

> he primary goods are: (1) life and health; (2) not being muddled or confused; (3) being practically reasonable; (4) identifying with the way one's life is going; (5) having, and caring about, friends and a life partner, and those friends and life partner are themselves flourishing; (6) having at least one 'desire of the heart' to pursue some - meaningful cause or project and being allowed to pursue that project; (7) caring about oneself; (8) mastery of at least one trade and game involving some degree of skill; (9) being creative; (10) living in a caring society that attempts to promote the flourishing of all of its members; and (11) being able to enjoy goods (1)–(10) without one's doing so being dependent on anyone else's non-flourishing.

[10] Ibid:

> in order to enjoy these primary goods, it is very likely that someone will also have to enjoy on a stable basis the following secondary goods, the enjoyment of which will help someone – if they wish – to enjoy the primary goods: (a) a home; (b) private property; (c) a reasonable level of income; (d) an occupation affording opportunities for

A famous example of McBride's thesis in action can be taken from the law of torts. Indeed, given the background of the author[11] many of the key examples in the text are taken from the law of torts, but contract law, other voluntary transactions and restitution receive detailed attention too. Assume that A purchases a house situated on the boundary of a charming cricket ground of which the local cricket club (B) is the long-term leasee. From time-to-time cricket balls land in A's rear garden when they were hit out of B's ground for 'six' runs. The occurrence of a cricket ball landing in A's garden is rare and is made, rarer still, by the construction of a 15-foot fence on the boarder of the ground. Nonetheless, A brings a claim against B asserting that B owes A a duty not to use its land to effect an unreasonable interference with A's land. In doing so, A seeks the remedy of enjoining B from playing cricket on the ground. The outcome of this example, being the famous case of *Miller v Jackson*,[12] was that B had infringed A's right to quiet enjoyment of his property but that damages of £400 (around £2,500 in today's money) were issued in lieu of an injunction for B's past and future infringement of A's right. However, the way in which McBride describes the case makes clear the indeterminacy issues noted above. He writes that:

> Lord Denning MR [presents the case as] a conflict between [B] enjoying the primary good of being able to acquire mastery of a trade and game that involves some degree of skill, and [A] enjoying the secondary good of being able to make full use of their home. Given this – and unsurprisingly – Lord Denning MR was in favour of prioritising the primary good over the secondary good, and allowing [B] to continue playing cricket on their ground. For the other two judges – Geoffrey Lane and Cumming Bruce LJJ – the case was much more difficult. For them, the case presented a conflict between primary goods: [B] enjoying the primary good of skilful mastery of a trade and game, and [A] enjoying the primary good of life and good health. On this view of the case … how do you choose between different people's enjoyment of the primary goods if you are concerned to promote everyone's … flourishing? The answer is that you don't: you attempt to find a compromise that will promote everyone's interests. Geoffrey Lane LJ's compromise involved issuing an injunction against B, forcing them to stop playing on their ground, but suspending it for a year in order to allow B to carry on playing while looking for another ground to play on. Cumming Bruce LJ's compromise (which Lord Denning acquiesced in, in order to produce a clear majority decision in the case) was to allow B to continue playing cricket on the ground but to require [B] to pay [damages to A].[13]

Reflecting on this example, the concern is that McBride's thesis becomes somewhat unfalsifiable at this point. The three different outcomes posited by each judge 'fits' the possessions model of human flourishing. True that McBride notes the judgments share a

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skilful mastery and creativity; (e) a decent environment (physical, cultural and political); (f) the ability to mix with other people without - shame and without being misled as to the character of those other people; (g) the space and freedom to decide for yourself how you will lead your life; (h) freedom from anxiety over whether you will be deprived in the future of any of goods (a)–(g). Because the enjoyment of these goods is helpful for RP-flourishing, we will also care that the people in group G enjoy these secondary goods. However, the instrumental character of these goods means that we will care less about this than that the people in group G enjoy the primary goods. We will see no virtue in someone's enjoying goods (a)–(h) unless that enjoyment results in their enjoying one or more of goods (1)–(11); and we will regard as extremely irrational anyone who sacrifices their enjoyment of one of goods (1)–(11) in order to enjoy some or more of goods (a)–(h).

[11] As one of the authors of Nicholas J McBride and Roderick Bagshaw, *Tort Law* (Pearson, 6th ed, 2018).

[12] [1977] QB 966.

[13] McBride, *Part I* (n 3) 129.

commonality in that each judge was weighing the possessions of flourishing,[14] but such a concession concedes that each potential outcome reflects a reasonable attempt to transition a series of high-level and abstract ideas into a concrete outcome at general law.

It is thus unclear when reading *Miller v Jackson* through the lens of the possessions model of human flourishing who is right and who is wrong. Further still, the purported 'balancing of interests' by Lord Denning MR was active at the primary level of rights: to determine whether B had breached a duty which it owed A in the first place. This is fundamentally different in kind from the purported 'balancing of interests' by Geoffrey Lane and Cumming-Bruce LJJ which operated more narrowly at the secondary or remedial stage in order to decide whether A received an injunction or its money equivalent given that B had committed a nuisance. The former approach is quite controversial as it makes the primary rights that the law of torts confers on each of us at birth highly contingent on the flourishing of others (eg, the right to bodily integrity, reputation or quiet enjoyment of one's property can be directly overridden by a balancing test). The second approach is different from the first in that it acknowledges the existence of the primary right of quiet enjoyment of one's property but accepts that there are sufficient reasons[15] for the general law to provide damages as the remedy for the infringement of that primary right rather than granting a more coercive remedy such as an injunction or specific relief.

A significant constraint which McBride places on the direct application of the possessions model of human flourishing is the overarching need for the private law to maintain legitimacy. That is, if the private law lost legitimacy in the eyes of subjects any attempt for the private law to promote human flourishing would ring hollow. Thus, McBride argues that in order to maintain legitimacy the private law ought to:[16] (1) provide a response or remedy to wrongdoing; (2) provide an appropriate sanction for *deliberate* wrongdoing; (3) limit opportunities for subjects to disrespect the law; (4) prevent the distribution of private law rights coming down to chance; and (5) ensure that the private law does not benefit one class of subjects over another.

When considering the importance of integrity, one puzzle that McBride seeks to solve is the objective standard of care applicable in the tort of negligence. Is the objective standard of care unfair to those who, through no fault of their own, struggle to meet it? The answer McBride provides is that the objective standard is readily justifiable on the basis that it preserves the legitimacy of the private law. This is because an objective standard ensures that the private law does not discriminate in favour of those who *cannot* meet this standard as regards the rest of the community.[17] Naturally, the same outcome can be reached by rights-based theorists by noting that my rights (eg, my right to bodily integrity) ought not be contingent on the vicissitudes of others.

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[14] Ibid 117.

[15] Such as: (i) the preservation of personal liberty by awarding damages over specific performance or an injunction; or (ii) where third-party interests will be unduly impacted by specific relief.

[16] McBride, *Part I* (n 3) 202.

[17] Ibid 241.

Part II of McBride's work then addresses the subsequent question of what, if anything, the possessions model of English private law should be replaced with. Ought Chesterton's Fence be replaced with something else? The answer provided is that English private law *ought* to move away from promoting the possessions model of human flourishing and be concerned with ensuring that subjects are able to lead a quest towards a truthful life. This is termed the 'journey model' of human flourishing on the basis that what matters is the direction in which one's life is heading. Additionally, McBride briefly evaluates a third conception of human flourishing which concerns individuals pursuing worthwhile causes or projects. This third conception of human flourishing is termed the 'service model' on the basis that what matters is the work one undertakes. Why then ought English private law reject both the possessions and service models of human flourishing? While there is not space to do justice to the sophistication of McBride's fully formed arguments some key points are set out below. It is, however, worthy of observation that McBride never expressly sets out why English private law must choose categorically a single conception of human flourishing, as opposed to say a messy compromise between these three different conceptions.

In McBride's rejection of the service model of flourishing two arguments stand out.[18] The first is that the service model creates an infinite regression in that if *everyone* in a society is dedicated to helping others than there is no one in that society with an 'independent desire that does *not* involve helping the other to do what they want to do'[19] and thus there is nothing any member of society can do due to the contingent nature of flourishing. One can imagine a society in which two individuals both refuse to walk through a door due to an infinite series of courteous statements of 'please, after you' 'no, please I insist', etc. Second, the service model creates the danger that *if* a goal or cause is close to being 'achieved' then there is a tendency for individuals who are pursuing that goal to embellish the *de minimis* issues that remain in order to preserve a sense of meaning. If one has dedicated one's life to X, the idea that X might be soon solved can deprive an individual of a significant part of one's identity.

McBride also finds the possessions model of human flourishing which was built up in Part I of his work wanting. [20] First, he observes that the possessions model of human flourishing is not *feasibly* within the reach of a large portion of the population due to the relative scarcity of the goods that make up the model. McBride notes that this is particularly evident in the fact that many of the public goods in Western liberal democracies are only capable of being supplied through deficit financing (although at this stage McBride is well beyond a mere critique of the private law). Second, there is a tendency for those employed in industries that supply the goods which underlie the possessions model of human flourishing to, over time, be 'required to give up more and more of their time and creativity in the interests of [more efficient] production, so that the abilities of all but the most privileged workers to … [f]lourish will be fundamentally impaired'.[21] Third, the possessions model of flourishing is difficult to apply universally as those with significant disabilities who may have limited prospects of ever possessing the

[18] McBride, *Part II* (n 2) 3–6.

[19] Ibid 4.

[20] Ibid 17–23.

[21] Ibid 18.

‘goods’ which constitute this model. Finally, the possessions model of human flourishing struggles to be self-sustaining across time. This is for the principal reason that persons with ‘possessions’ suffer from a form of loss aversion pursuant to which they will not act to defend either their political community or assist with the flourishing of other persons (eg, by raising a child) for fear of losing the ‘possessions’ which they have already acquired.

Finally, given that the possessions model of human flourishing is out of reach of so many, McBride considers the journey model preferable. According to the journey model of human flourishing, the private law ought to foster a series of 16 elements as what it is to be engaged on a ‘quest to lead a truthful life’. These elements are:[22] (1) life and good health; (2) a sense of reality; (3) the ability to focus on reality; (4) a clear mind which is free from distorting prejudices; (5) openness to new realisations; (6) a requisite degree of humility; (7) enjoyment of peace of mind; (8) a love for the truth; (9) a love of activities which develop truth-seeking virtues; (10) work that emphasises developing a sense of reality; (11) a realistic view of the world; (12) sincerity when dealing with others; (13) being true to oneself when deciding what to do; (14) living in a community in which truth-seeking is fostered; (15) maintaining a reasonable level of income; (16) leisure activities that enable one to reflect on reality.

Having set out the content of the journey model of human flourishing, McBride then provides some key examples of how private law would be *different* should this model be adopted. This part of the work will be of significance to torts lawyers who are interested in the development of the law to meet contemporary challenges. McBride’s suggestions involve placing private law’s subjects under a wide range of new legal relations, including: (1) more extensive duties not to act fraudulently toward others (most notably where such conduct will disturb a truthful journey and imposing an obligation not to so act will, on balance, do ‘more good than harm’);[23] (2) expansion of the extent to which the private law imposes duties to protect privacy;[24] (3) the creation of new private law immunities from adverse consequences in order to protect whistleblowing[25] and managers who fail to meet performance targets (in order to indirectly protect workers from being squeezed);[26] (4) the widespread expansion of the limited duties currently only applicable to those with a ‘common calling’ (eg, inn keepers) to provide potential customers with a ‘right to access’ in order to secure for individuals widespread access to communal spaces (both physically and digitally); (5) placing duties on manufacturers against the creation of products that are intended to harvest user attention (so called ‘attention wells’, such as smart phones or platforms such as Facebook and YouTube); (6) placing a duty on the state not to deceive intentionally or betray members of the public (eg, McBride provides some concerning examples of potential claimants who were tricked into maintaining long term romantic relationships with undercover police officers).

[22] Ibid 53.

[23] Ibid 117.

[24] Ibid 125.

[25] Ibid 128.

[26] Ibid 144.

As much as one may have sympathy with the raft of potential new legal developments proposed, it ought to be clear that the 'journey model' of human flourishing gives the private law a large amount of work to do. The extent to which imposing, for example, a 'duty of access' to the labour and services of another or 'duty not to harvest attention' infringes on the liberty of *all* individuals will be of concern to many readers. Further, on McBride's account the private law takes a *central* role in society for fostering human flourishing, but the question is never asked whether this is to expect too much of the private law and the curial process. It is, of course, possible that there are non-legal solutions to the challenges and problems considered by McBride in Part II of this work. The tendency by which lawyers see all cultural and societal problems as legal problems means that this obvious truth is all too often overlooked. I do not wish to be taken as saying that individuals ought not choose to act virtuously, or to seek meaning or self-improvement on a day-to-day basis. I am simply making the point that personal vows, internal goal setting, meaningful pursuits and subjective thoughts need not be the domain of the externally binding rights and obligations of which the private law is concerned. Additionally, McBride appears to place a reduced emphasis on the stoic virtue of prudence when considering how easy it is, on his account, for an individual to be denied a 'truthful journey' (eg, by becoming addicted to an 'attention well') and then, in turn, setting a generous level of protection that the private law ought to afford such individuals. When viewed in light of these critiques, *The Humanity of Private Law* is arguably more relevant and useful to readers as a general work on the ethical and moral questions of what it is to live a meaningful or virtuous life rather than as a legal text.

Finally, McBride considers the conditions under which it is permissible for unelected judges to develop the private law in a manner that will promote the journey model of human flourishing rather than maintain what he considers to be the *status quo ante* of the possessions model. At this point there is a detailed account of when it is permissible for judges to develop the general law which will be of interest to a wide range of readers.[27] McBride ultimately argues that judges ought to develop the law in the manner they think would be best. This conclusion is subject to a conservative caveat, given that subjects are entitled to stable expectations there is a risk that a radical change in the law would cause feelings of alienation and dispossession in society. As such, McBride argues that the law ought not to develop unless there 'first exist a super-majority of the subjects of private law (around 75%?) who identify their flourishing with' the journey model'.[28] This conclusion raises the following question: if the journey model of human flourishing became so widespread as a matter of culture to satisfy McBride's test would it *need* to become law? Would there be much left to gain? Would this development not be akin to Louis XIV mandating that all Frenchmen attend Sunday mass — something that all good Catholics were already morally bound and willing to do in order to flourish?[29]

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[27] Ibid 168–89.

[28] Ibid 189.

[29] This is an inversion of Albert Venn Dicey's famous observation in AV Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund, 8th ed, 1982) 32, where he notes that even a despot:

> Exercises [his legal] powers in accordance with his character, which is itself moulded by the circumstances under which he lives, including under that head the moral feelings of the time and the society to which he belongs … Louis the Fourteenth could not in all [political] probability have established Protestantism as the national religion in France ...

When read as a whole, as it ought to be, Parts I and II of *The Humanity of Private Law* marries private law, economics, politics, cognitive science, moral philosophy, theology, and literature into a potent thesis. Whilst marshalling a wide range of material, McBride is also fair-minded and is willing to make concessions as to the strengths of his arguments. A work of such breadth and ambition ought to be celebrated. While many readers will have disagreements with McBride's central claims, when assessed on the basis that McBride's central thesis is to advocate truth-seeking, any inquisitive lawyer will find the work as providing great intellectual nourishment on their own intellectual journey.

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