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## *Review Essay*

# The Temptation of Cosmic Private Law Theory

Nathan B. Oman\*

Nicholas J. McBride, *The Humanity of Private Law, Part I: Explanation* Oxford: Hart Publishing, 2019

Nicholas J. McBride, *The Humanity of Private Law, Part II: Evaluation* Oxford: Hart Publishing, 2020

It's a heady time to be a theorist of private law. After decades of vague post-Realist functionalism or reductive economic theories, the latest generation of private law theorists have provided a proliferation of new philosophies of tort, contract, and property. The result has been a tremendous burst of intellectual creativity. While Kant and Hegel have been dragooned into debates over torts and contracts and even such supposedly woolly headed thinkers as Coke and Blackstone have been rehabilitated, there have been fewer efforts to generate natural law accounts of private law than one might expect, particularly in light of the revival of natural law theory in the wake of John Finnis's publication of *Natural Law and Natural Rights*.<sup>1</sup> To be sure, natural law theorists have turned their attention to private law topics, but until recently there have been few efforts to provide natural law synthesis of private law theory.<sup>2</sup> Nicholas McBride's ambitious two-volume work *The Humanity of Private Law* offers such a synthesis. These books are a tour de force of scholarship. *The Humanity of Private Law* combines a deep understanding of legal doctrine, a broad engagement with contemporary private law theory, moments of trenchant social criticism, and a subtle set of philosophical arguments that range well beyond the normal scope of jurisprudence. They are the sort of books that repay close reading and from which one can learn much. They also, however, offer a cautionary tale of the limits of legal theory. The very fecundity and depth of contemporary debates over private law creates a temptation toward what we might call cosmic private law theory. The dangers of this temptation are also on display in *The Humanity of Private Law*.

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<sup>1</sup> See generally John Finnis, *Natural Law and Natural Rights* (New York: Oxford University Press, 1980).

<sup>2</sup> One possible exception to might be James Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (New York: Oxford University Press, 2007).

## I. The Humanity of Private Law

Nicholas McBride's magnum opus is divided into two volumes.<sup>3</sup> The first volume makes an interpretive argument about the nature of English private law, while the second volume makes a normative argument about what McBride believes English private law should become in the best of all possible worlds. Of the two volumes, the first volume is the most plausible, while the second volume is the most interesting.

McBride begins his interpretive argument by suggesting that English private law presents a series of hard cases in which courts reach normatively unattractive outcomes. The task of the interpretive theorist, he suggests, is to explain why the law might reach such conclusions. For example, in *Nettleship v. Weston*,<sup>4</sup> a student driver caused a car accident and injured her friend. Ultimately, the Court of Appeal held that the defendant had breached the duty of care that she owed to her passenger. That is the duty, according to Lord Denning, "to drive in as good a manner as a driver of skill, experience and care who is sound in wind and limb, who makes no errors of judgment, has good eyesight and hearing, and is free from any infirmity."<sup>5</sup> The problem in the case, according to McBride, is that the defendant, as an inexperienced driver, lacked the capacity to drive in a manner that would comply with this duty. Nevertheless, the law imposed on her liability, liability that, given her understandable level of skill, it was impossible for her to avoid. McBride gives other examples of such unattractive outcomes.<sup>6</sup> Courts have held that the police do not have a duty to come to the assistance of victims of crimes;<sup>7</sup> have refused to enforce promises in the absence of consideration, even in some cases where those promises have been relied upon;<sup>8</sup> allowed insurance companies to sue those to whom the companies, through their own negligence, have made mistaken payments;<sup>9</sup> and, held that the victim of a negligently constructed home is only able to sue the builder when the negligent construction actually results in harm to the occupier of the building.<sup>10</sup> The doctrinal reasons for the outcomes in these cases should be clear to anybody with a passing understanding of the law of torts, contracts, and unjust enrichment. But according to McBride, they go against ordinary moral intuitions, the morality of the mythical "man in the Clapham Omnibus."<sup>11</sup>

McBride next canvases contemporary private law theory, arguing that none of the approaches to private law that are currently popular among legal theorists

<sup>3</sup> See Nicholas J. McBride, *The Humanity of Private Law, Part I: Explanation* (Oxford; New York: Hart Publishing, 2019); Nicholas J. McBride, *The Humanity of Private Law, Part II: Evaluation* (Oxford; New York: Hart Publishing, 2020).

<sup>4</sup> [1971] 2 QB 691.

<sup>5</sup> Quoted in McBride, *The Humanity of Private Law (Pt. I)*, 2.

<sup>6</sup> *Ibid.*, 3-7.

<sup>7</sup> *Michael v. Chief Constable of South Wales Police*, [2015] AC 1732.

<sup>8</sup> *Combe v. Combe*, [1951] 2 KB 215.

<sup>9</sup> *Kelby v. Solari*, (1841) 9 M & W 54.

<sup>10</sup> *D&F Estates v. Church Commissioners*, [1991] 1 AC 398.

<sup>11</sup> See Patrick Devlin, *The Enforcement of Morals* (New York: Oxford University Press, 1965), 15 (arguing that the law should reflect the morality of the "man in the Clapham omnibus").

can adequately explain the outcomes in these cases. According to McBride, contemporary private law theory can, broadly speaking, be divided into three categories. First, there are law and economics theorists who believe that private law rules can be explained primarily in terms of the incentives that they create and the need to generate efficient incentives for behavior. Next, there are Kantian theorists who believe that the rules of private law reflect a particular form of deontological political morality. He places such corrective justice theorists as Ernest Weinrib as well as explicitly Kantian writers such as Arthur Ripstein in this category.<sup>12</sup> Third are what McBride calls legal moralists, who argue that private law rules reflect some set of particular moral obligations. To this group McBride assigns the civil recourse theory of John Goldberg and Benjamin Zipursky.<sup>13</sup> McBride finds all of these theories inadequate for one reason or another and offers his own alternative explanation for the structure of English private law rules.

This is where McBride shines as both a subtle theorist and a deep student of English private law doctrine. His novel theoretical move is to shift from looking at the question particular rights or duties to the broader issue of the structure of a good life. His basic claim is that private law doctrine can best be explained as an effort to provide a particular vision of the good life, what McBride calls RP flourishing.<sup>14</sup> This is “the picture of human flourishing that is widely accepted by reflective people in modern western liberal societies and is received in that it is promoted by the culture of those societies.”<sup>15</sup> His argument here builds on the conception of human flourishing offered by John Finnis in his reconstruction of natural law theory, but McBride diverges from Finnis in terms of the basic goods that he sees incarnated in RP flourishing.<sup>16</sup> McBride’s discussion is far more subtle than can be adequately summarized in this essay, but suffice it say that he sees RP flourishing as resting on 15 basic goods:

1. Life and good health
2. Not being muddled or confused
3. Being capable of practical reasonableness
4. Identifying with the way in which one’s life is going
5. Caring for friends and a life partner
6. Loving oneself
7. Having one “desire of the heart”—a meaningful cause or project—to pursue
8. Mastery of a trade or game involving some skill
9. Having the ability and opportunity to exercise creativity

<sup>12</sup> See generally Ernest J. Weinrib, *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1995); Arthur Ripstein, *Private Wrongs* (Cambridge, MA: Harvard University Press, 2016).

<sup>13</sup> See generally John C. P. Goldberg and Benjamin C. Zipursky, *Recognizing Wrongs* (Cambridge, MA: Harvard University Press, 2020).

<sup>14</sup> McBride shares the common mania for acronyms in English and Anglo-influenced philosophy. RP stands for “received picture.”

<sup>15</sup> McBride, *The Humanity of Private Law (Pt. I)*, xix.

<sup>16</sup> Compare Finnis, *Natural Law and Natural Rights*, 85-90.

10. Enjoying on a stable basis the external goods needed for an RP life—home, private property, income, a decent environment, etc.
11. Having friends and a life partner
12. Those that one cares about are able to pursue their “desire of the heart”
13. Being free of anxiety that future flourishing will be impaired
14. Living in a caring society that seeks to promote RP flourishing for all its members
15. The enjoyment of these goods is not dependent on the suffering of others<sup>17</sup>

This is a list of goods that describes the kind of life to which affluent and successful professionals in advanced liberal democracies aspire, a life that those who are economically and socially successful achieve. Notice, that McBride’s account here doesn’t rest on a particular conception of political or legal morality. Rather, it flows from what John Gardner has called “personal life,” by which he means not our romantic or sexual lives but rather “what people do (as well as what they think, believe, want, etc.), quite apart from the law.”<sup>18</sup>

McBride then proceeds to argue that the effort to achieve RP flourishing can explain much of the structure of English private law. His approach is essentially Dworkinian.<sup>19</sup> He wishes to show that RP flourishing both fits the basic structure of English private law and provides a plausible justification for it. He does not, however, insist that his theory can explain every rule or court decision contained in the corpus of the common law of contracts, torts, property, unjust enrichment, and the like. Legal doctrine must necessarily deal with a level of granularity at which theory runs out and judgement must take over. Nevertheless, McBride sees English private law’s primary purpose as supporting RP flourishing.

For example, in his explanation for contract law McBride nests his interpretation of legal doctrine in this broader conception of a good life. Thus, for example, rather than seeing contract law as reflecting distinct moral obligations to keep promises, he sees the purpose of contract law instead primarily in terms of generating what he calls, “artificial trust.”<sup>20</sup> This is the ability of market participants to behave as though they trust one another. As he put it, “contract law is geared toward enabling people to make RP-flourishing-enhancing exchanges with each other by generating artificial trust between parties to an exchange.”<sup>21</sup> He goes on to claim that a number of different aspects of contract doctrine can best be explained by this principle. Thus, the doctrine of consideration serves to enforce informal promises only when those promises are part of a bargain. There are exceptions to the doctrine of consideration in the case of informal promises,

<sup>17</sup> See McBride, *The Humanity of Private Law (Pt. I)*, 82–114.

<sup>18</sup> John Gardner, *From Personal Life to Private Law* (New York: Oxford University Press, 2019), 8.

<sup>19</sup> See generally Ronald Dworkin, *Law’s Empire* (Cambridge, MA: Harvard University Press, 1986).

<sup>20</sup> McBride, *The Humanity of Private Law (Pt. I)*, 163.

<sup>21</sup> *Ibid.*, 164.

but, he points out, such exceptions have gained traction in English law only in situations involving commercial promises. In other words, only in situations where the enforcement of the promise would serve to encourage “RP-flourishing-enhancing exchanges” is the doctrine of consideration relaxed. This somewhat functionalist explanation of contract law, seeing it as a law designed to facilitate exchange, also explains other features of the law that seemed to diverge from ordinary moral conceptions around promising. McBride writes:

Contract law would fail in its mission to facilitate the orderly working of the market-place, were it not to give effect to the objective principle. If you reasonably thought that you had made a deal with me on terms x, y, and z, you would still be unable to act as though you trusted me to adhere to those terms, if it were the case that I could at any time say that I was not bound by any of those terms because I had not intended to agree to the term as part of my contract with you.<sup>22</sup>

Thus, the law of contracts is largely uninterested in subjective intentions, even if those subjective intentions might be an important part of our moral evaluation of the promise keeping behavior of any individual.

He makes similar arguments tying the idea of RP flourishing to other areas of private law. It is a mark of both McBride’s erudition and the maturing of the field, that he does not confine his discussion to the traditional heartland of private law theory, the law of torts and the law of contracts. Rather, he branches out to include not just the law of unjust enrichment—a thriving cottage industry among English and commonwealth scholars that has failed to achieve the same popularity among American law professors—but also such often theoretically neglected fields as trust and estates.<sup>23</sup>

If his discussion of the field ended with volume 1 of *The Humanity of Private Law*, one might conclude that McBride is a jurisprudential optimist. The supposedly unattractive features of the common law with which he began have been shown to flow from an attractive vision of human flourishing. The theoretical dragons have been slain, and all is well with the world. In volume 2, however, McBride launches a full-scale normative assault on the theory of RP flourishing that he develops in volume 1. First, he insists that RP flourishing is ultimately self-contradictory. It rests on the idea that achieving a flourishing life consists of having a bundle of possessions, widely construed.<sup>24</sup> I say widely construed, because some of these possessions consist not of rights to the use or enjoyment of particular things or claims against others but also of certain personal characteristics such as health and practical reasonableness. The problem is that while our society can deliver such goods to some of its members, it cannot deliver them to all of its members. RP flourishing, on McBride’s view, is available to the relatively affluent and the professionally successful. However, it is permanently out of the reach of large swathes of society. In this, McBride is very much writing in the shadow of Brexit and Donald Trump, both which he sees as expressions of political frustration by those to whom the promise of RP flourishing has been

<sup>22</sup> *Ibid.*, 165.

<sup>23</sup> *Ibid.*, 173–82.

<sup>24</sup> See McBride, *The Humanity of Private Law (Pt. II)*, 1–3.

held out even as the conditions necessary for its achievement are confined to a fortunate class at the top of society.<sup>25</sup> For McBride, the exclusion of certain members of society from RP flourishing isn't simply a social challenge to be attacked with better policies. Rather, he believes that the RP flourishing of those who have achieved the requisite social success requires the RP flourishing failure of those "lower down" in society.

Even if one doesn't subscribe to McBride's pessimistic assessment of the modern economy—and at least some of his pessimism is questionable, resting on sweeping empirical generalizations often supported by little more than citations to at-best polemical scholarship<sup>26</sup>—RP flourishing suffers a deeper difficulty. Again, McBride's turn away from the traditional marriage between jurisprudence and liberal political philosophy is fruitful. RP flourishing is an account of what it means to succeed as a human being. Within the taxonomy of accounts of human flourishing it is what McBride calls a "possession theory."<sup>27</sup> He points out, however, that one might believe that human flourishing arises not from possessions, widely construed, but rather from a particular kind of activity. He offers service-centered accounts of human flourishing as an alternative. Hence, rather than adopting a view in which a good human life consists of having certain things—including certain characteristics of the self—human flourishing consists of serving some higher social purpose. He presents Martin Luther King, Jr. and Mother Theresa as attractive examples of this kind of human flourishing. McBride, however, sees the service model as deeply problematic, particularly when it is devoted to the eradication of some evil that it is possible only at best to ameliorate. He writes:

Dedicating our lives to addressing an evil that can never be completely eliminated is terribly dangerous. We would more than likely end up in Charles Taylor's phrase "in a perpetual flaming rage," adopting more and more extreme measures to "hammer the really bad guys for making the world worse, and who need to be conquered or eliminated. We make a feast of our righteous anger." . . . The only way to [avoid this] . . . is to love human beings unconditionally. This unconditional love for humanity will prevent you from despising human beings who do not live up to your noble goals for them, seeking more and more intrusive ways of controlling them and destroying those who cannot be controlled. However, the need to cultivate this remarkable, God-like love for humanity as a whole, which mirrors the love of a good parent feels for his or her children, will be beyond virtually everyone. The result is that someone who seeks to live up to the Service Model of human flourishing by pursuing a noble cause—like alleviating the suffering in the world—that can never be fully achieved will almost certainly end up, at best, bitter and frustrated, and at worst a moral monster. Given this, it is hard to see how anyone

<sup>25</sup> *Ibid.*, 189–93.

<sup>26</sup> E.g., *ibid.*, 126, 141, 142 (citing the work of David Graeber). For an empirical argument against McBride's pessimism consider Benjamin M. Friedman, *The Moral Consequences of Economic Growth* (New York: Knopf, 2005). For a well-written, if at times polemical, work making a similar case for long-term economic optimism see Deirdre N. McCloskey, *The Bourgeois Virtues: Ethics for an Age of Commerce* (Chicago: University Of Chicago Press, 2007); Deirdre N. McCloskey, *Bourgeois Dignity: Why Economics Can't Explain the Modern World* (Chicago: University of Chicago Press, 2010).

<sup>27</sup> See McBride, *The Humanity of Private Law (Pt. II)*, 1–2.

could recommend the Service Model to someone seeking to understand what human flourishing involves.<sup>28</sup>

McBride's point here is not, of course, that working toward the elimination of human suffering or some other impossible-to-achieve goal is bad. The actions of those pursuing such goals are often heroic and deserving of praise. Rather, his point is that the pursuit of such goals cannot provide an adequate vision of human flourishing, and it is dangerous to imagine that it could be sufficient.

This is where McBride offers his own theory of human flourishing. He begins with the idea that rather than focusing on serving humanity through the elimination of some evil, we should instead regard our lives as a journey, a journey in which we are seeking a particular destination.<sup>29</sup> The advantage of this notion of a journey is that it does not suggest that human flourishing depends decisively on some set of possessions. Indeed, where RP flourishing, according to McBride, requires in practice that certain members of society be incapable of flourishing, a Journey Model, because it does not necessarily depend on a bundle of possessions, can be available to everyone. Likewise, because a Journey Model does not necessarily consist, as the Service Model does, in the eradication of some evil, it does not present the dangers of centering one's identity on a relentless and eternal battle against the forces of evil. So what is the journey on which we should embark? According to McBride, it is the journey of the search for truth, and true human flourishing consists of trying to apprehend truth.<sup>30</sup> From this somewhat modest beginning McBride offers a very metaphysically ambitious account of what such a quest for truth entails, what he calls QTL flourishing.<sup>31</sup> Ultimately, he argues that a quest for truth requires that all people grapple with the question of Being. By the question of Being he means an inquiry into the nature and sources of existence.

At least since Parmenides, the question of Being has been central to the Western philosophical and one might add theological tradition. One of the hallmarks of modern thought, however, has been a turning away from the question of Being. The assumption has been that the quest to find some metaphysical ultimate that lies behind or beyond ordinary experience is fruitless. According to one popular narrative of modernity, the success of modern science is both a result of a turn away from the question of Being and powerful evidence that the question ought to be abandoned. McBride celebrates modern science as an instance of QTL flourishing because it represents a journey directed toward the truth, but he believes that the quest for truth cannot abandon the question of Being without the risk of intellectual and moral distortion. Here McBride draws on the work of Martin Heidegger, who saw the forgetfulness of Being as one of the great failings of the modern world. According to Heidegger, it is the peculiar task of humanity to act as "the shepherds of being." It is a title that McBride adopts for those on the

<sup>28</sup> *Ibid.*, 4 (internal citations omitted).

<sup>29</sup> *Ibid.*, 23–30.

<sup>30</sup> *Ibid.*, 31–33.

<sup>31</sup> QTL is an abbreviation of "quest to lead a truthful life."



journey of QTL flourishing.<sup>32</sup> However, MacBride rejects Heidegger's broader approach to the question of Being. Heidegger drew a distinction between beings and Being. The latter is the totality that makes the former possible. Heidegger thus rejected the traditional position within Western metaphysics, which saw Being not in terms of the totality of beings but rather as some ultimate entity that sits independently behind all other beings and accounts for their existence. This is the vision of Being that McBride adopts. He argues that the question of Being consists of the effort, ultimately, to understand, apprehend, and grasp the ultimate Being that stands behind reality. Hence, despite the Heideggarian language, the metaphysical structure invoked by McBride is closer to classical theism than Continental phenomenology.

McBride suggests that QTL flourishing might provide an alternative vision of private law. If a journey in quest of truth was made the vision of human flourishing on which that law depended much of its structure would change. For example, he argues that as it currently stands English private law places a relatively low priority on the quest for truth. Thus, free speech is not a good with which English private law is especially concerned.<sup>33</sup> The English law of libel is quite aggressive about policing speech, which has a dampening effect on the quest for understanding. Private law based on QTL flourishing would be more attentive to the need for legal rules that foster the free exchange of ideas. Here McBride gestures approvingly toward the more deferential stance toward free speech taken by American tort law, albeit under the powerful influence of the First Amendment to the U.S. Constitution.<sup>34</sup> McBride points to other places where English private law would be modified if its focus was not on the protection of the series of possessions necessary for RP flourishing but instead focused on fostering the conditions necessary for a journey in the pursuit of truth.<sup>35</sup>

In the final portion of volume two McBride engages the question of whether or not English private law should be remade on the basis of QTL flourishing. The question for McBride is not whether or not QTL flourishing is a superior to RP flourishing. He decides that question decisively in favor QTL flourishing. This conclusion, however, does not dispose of the issue of how English private law should change. Here McBride engages in a subtle discussion of the various questions that often arise, particularly in the common law, with regard to legal change. In particular, what is the competence of judges to generate new legal rules based on their individual normative judgments.<sup>36</sup> Interestingly, McBride argues that judges should take a relatively cautious and deferential approach to legal change but does not do so on the basis of traditional arguments about the democratic deficits faced by judicially created law.<sup>37</sup> Rather, MacBride argues that law is unlikely to be legitimate and effective if the normative vision

<sup>32</sup> See McBride, *The Humanity of Private Law (Pt. II)*, 94–95.

<sup>33</sup> *Ibid.*, 120–21.

<sup>34</sup> *Ibid.*, 123–24.

<sup>35</sup> *Ibid.*, 124–30.

<sup>36</sup> *Ibid.*, 168.

<sup>37</sup> *Ibid.*, 185–86.

instantiated by legal rules differs markedly from the dominant moral vision of the society over which those legal rules exercise authority. Because modern English society remains committed to RP flourishing and because a theory of QTL flourishing remains exotic at best to most members of English society, it would be inappropriate for English private law to shift toward a full-throated commitment to QTL flourishing. Any such shift must wait upon a social recognition of the superiority of the vision of human life offered by QTL flourishing. Hence, volume two of *The Humanity of Private Law* is ultimately a treatise on the nature of the good life, to which are appended a series of legal arguments whose ultimate conclusion is that the theory of QTL flourishing should, at least for the time being, be treated as legally irrelevant.

## II. Cosmic Private Law Theory

This is the point where the conventions of the book review essay require that I say something critical about McBride's project. There is much in these books to admire, and I agree with much of what they say. Nevertheless, I shall try to do my duty by the genre and offer some criticisms of *The Humanity of Private Law*. Those criticisms, however, only make sense (if they make sense at all) against the background of the recent intellectual history of private law theory. It is safe to say that in the second half of the twentieth century that private law theory, particularly in the United States, was dominated by the rise of the law and economics movement. Prior to its arrival on the intellectual scene, private law scholarship was dominated by doctrinal scholarship motivated by the kind of vague functionalism spawned by Legal Realism and its more well-behaved (and less interesting) child, the Legal Process School. With pioneering works such as Guido Calabresi's *The Cost of Accidents*, however, theorists of private law were given a new set of theoretical puzzles with which to grapple.<sup>38</sup> Vague functionalism gave way to more precise claims about costs and incentives and economics provided a set of concepts that sharpened debates around the rational actor model as a tool for prediction and Kaldor-Hicks efficiency as a tool of normative analysis.

To trace even in this irresponsibly broad-brushed manner the arc from Legal Realism to law and economics is to tell the story of private law theory with a distinctly American accent, and one might object that this story has little to do with English scholarship, which has always been more formalistic and less enamored of functionalism or economics. Fair enough. Within private law scholarship, however, the Atlantic narrowed in the final decades of the 20<sup>th</sup> century. In particular, law and economics called forth a skeptical reaction first with corrective justice theorists in tort and the promissory theory in contract, and then with a flowering of follow-on theoretical work that

<sup>38</sup> See Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (New Haven: Yale University Press, 1970).

either rejected law and economics tout court or else sought to limit its reach.<sup>39</sup> This reaction to law and economics produced a body of American legal thought that, while admittedly somewhat heterodox within the United States, could appreciate the work produced by more formalistic and philosophically informed legal scholarship in the United Kingdom and the broader common law world. These are the intellectual currents that render McBride's work intelligible to an American audience in a way that would have been difficult to imagine a generation ago.

McBride is thus writing at a moment of great intellectual creativity and ferment within private law theory. Within that context, he is making some important intellectual contributions. Since the 1980s waves of alternatives to law and economics have washed over the law schools, as each new generation of theorists has built on previous criticisms and interpretations. Aristotle has been wedded to Kant, who has been a perennial favorite with legal theorists since the publication of Rawls's *A Theory of Justice* turned so many political and legal theorists against utilitarianism.<sup>40</sup> Hegel has enjoyed a renaissance among lawyers.<sup>41</sup> New approaches to justice have proliferated.<sup>42</sup> Within this polyphonic private law revival, one of the notable absences has been natural law theory. To be sure, McBride isn't alone in offering such a theory. One thinks of the revival of interest in equality in exchange among contract law theorists.<sup>43</sup> Still, despite the rise of the new natural law theory sparked by the publication of John Finnis's *Natural Law and Natural Rights*, there have been few sustained efforts to offer a detailed natural law theory of private law.<sup>44</sup> With *The Humanity of Private Law*, we have such a theory, one that shares a basic structure with Finnis's work but offers its own take on natural law. However, McBride is seeking to do far more than this, and in offering QTL flourishing as a theory of private law he illustrates a tendency in contemporary private law theory about which we should be skeptical.

The revolt against functionalism and law and economics has opened a broad field for private law theorists. There is a certain intellectual exhilaration that

<sup>39</sup> See, e.g., Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge, MA: Harvard University Press, 1981); Weinrib, *The Idea of Private Law*; Jules Coleman, "The Structure of Tort Law," *Yale Law Journal* 97 (1988): 1233–53; Benjamin Zipursky, "Civil Recourse, Not Corrective Justice," *Georgetown Law Journal* 91 (2003): 695–756; Jody S. Kraus, "Legal Theory and Contract Law: Groundwork for the Reconciliation of Autonomy and Efficiency," *Social, Political and Legal Philosophy* 1 (2002): 385–446.

<sup>40</sup> See, e.g., Ripstein, *Private Wrongs*.

<sup>41</sup> See, e.g., Peter Benson, "Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory," *Cardozo Law Review* 10 (1988): 1077–1198.

<sup>42</sup> See e.g., Andrew Gold, *The Right of Redress* (Oxford; New York: Oxford University Press, 2020).

<sup>43</sup> See James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (New York: Oxford University Press, 1993); James Gordley, "Equality in Exchange," *California Law Review* 69 (1981): 1587–1656.

<sup>44</sup> See Finnis, *Natural Law and Natural Rights*; John Finnis, "Natural Law: The Classical Tradition," in *The Oxford Handbook of Jurisprudence & Philosophy of Law*, ed. Jules Coleman and Scott Shapiro (New York: Oxford University Press, 2002), 1; Robert P. George, *In Defense of Natural Law* (Oxford: Clarendon Press, 1993). Exceptions to my generalization might include J. W. Harris, *Property and Justice* (Oxford: Oxford University Press, 1996) and Adam J. MacLeod, *Property and Practical Reason* (Cambridge: Cambridge University Press, 2015).

comes from connecting the humdrum world of automobile accidents and breached supply contracts to deep questions of moral and political theory. Furthermore, it is important to recognize that in many ways private law provides the most basic structures of our society. To take an American example, most people will live their entire lives without ever encountering such high constitutional questions as the separation of powers or executive immunity. While the constitutional status of the War Powers Act<sup>45</sup> does not impinge very much on our lives, however, we will all be victims of breach of contract and most of us will become tortfeasors at some point. The basic structure of interpersonal obligations and the distinction between mine and yours has more to do with the organization of society than do voting procedures or the relationship between the legislature and the judiciary. The United Kingdom and the United States have very different basic assumptions about constitutional law and very different constitutional institutions. Yet an American in England will find that, for the most part, English society is familiar and navigable. In large part this is because, notwithstanding divergences between public law, private law in the United States and other common law jurisdictions is very similar. This broadening of the horizons of private law theory rests on the recognition of important shared social and moral realities.

Nevertheless, we should be cautious of overly ambitious theories of private law. In constitutional law, Judge J. Harvie Wilkinson has warned against what he calls “cosmic constitutional theory.”<sup>46</sup> Thinking about private law can fall prey to a similar temptation. There is a tendency to offer what John Gardner has called “metaphysically inflationary”<sup>47</sup> accounts of private law. Such metaphysical inflation consists in arguing that rules in torts, contracts, and the like should be derived from a series of controversial conclusions based on esoteric metaphysical entities. For example, one might be skeptical about the existence of such creatures as the autonomously choosing self of some contract law theory.<sup>48</sup> Less metaphysically ambitious theories might seek to ground private law in widely shared moral experiences or the usefulness—moral and otherwise—of the social practices that private law underwrites. In seeking to ground a theory of private law in the question of Being, it would be difficult to imagine a more metaphysically inflationary account of private law than that put forward by McBride as QTL flourishing.

There are two problems that such vaunting theories face. The first is the problem that McBride, to his credit, articulates: social acceptance. It is not a necessary condition for the legitimacy of the law that it be accepted by all of those over whom it claims authority. However, at the very least its reasons must be cognizable and acceptable to some large segment of the population subject to its dominion. Particularly when we are speaking of such ubiquitous institutions as

<sup>45</sup> See 50 U.S.C. §§ 1541–1548.

<sup>46</sup> See J. Harvie Wilkinson, III, *Cosmic Constitutional Theory: Why Americans Are Losing Their Inalienable Right to Self-Governance* (New York: Oxford University Press, 2012).

<sup>47</sup> Gardner, *From Personal Life to Private Law*, 15.

<sup>48</sup> See generally Nathan B. Oman, “Contract Law and the Liberalism of Fear,” *Theoretical Inquiries in Law* 20 (2019): 381–410.

property or contract, we ought to be able to explain the law in terms that most citizens can understand and accept. In a world where—fortunately!—most people are not metaphysicians, metaphysically inflationary theories may simply be inexplicable to most people. This, it seems to me, is more likely a vice of theories that seek to explain the law to those whom the law controls rather than a vice of the ordinary people to whom the law is addressed. Furthermore, were we to live in a city inhabited only by philosophers and law professors, our situation might not be much better. Indeed, I suspect that the more philosophically sophisticated a reader becomes the more controversial McBride's theory of QTL flourishing becomes. It's not simply that he wishes to ground private law in the search for truth, a controversial enough claim. Rather, it is that he suggests that it can be grounded in a particularly controversial account of the nature of Being itself. Heideggerians cannot accept McBride's theory, nor, it would seem, can thoroughgoing philosophical naturalists. This doesn't, of course, mean that McBride's account of Being is false. However, legal theory is both more than and less than metaphysics. It is more than metaphysics because the links between law, its explanation, and the requirements of political legitimacy place persuasive demands on a legal theory that mere metaphysics does not face. Widespread rejection of Heidegger's theory of Being does not present the immediate problems of social and political legitimacy that a widespread rejection of the law of property would create. It may be, of course, that our laws are fundamentally mistaken or that they are morally inexplicable to those without sufficient philosophical acumen. Either possibility, however, should be troubling to legal theorists. Legal theory is less than metaphysics because an adequate account of the law may well leave unanswered important questions about the nature of humanity, existence, and the ultimate meaning of life. That's fine. We shouldn't come to law in search of solutions to spiritual, existential, or intellectual crises.

The second problem with metaphysically inflationary theories is that they often simply don't give us very much guidance about precisely the kinds of legal issues that they purport to illuminate. For example, McBride argues that the theory of QTL flourishing implies that employees within corporate structures should never be held accountable for failure to meet objectives set by managers.<sup>49</sup> This conclusion has the academic virtue of being novel and interesting but would likely strike most people as implausible. McBride's journey from the question of Being to this particular rule of corporate governance requires a number of conceptual leaps most of which have very little to do with his theory of QTL flourishing. First, he argues that the current corporate culture undermines QTL flourishing because it subjects low-wage workers to rude and domineering managers and subjects salaried workers to a regime of "bullshit jobs" that are "completely pointless, unnecessary or pernicious."<sup>50</sup> He diagnoses the source of this situation in the radical ignorance of corporate managers. His argument is that managers simply lack the information and intellectual capacity to match means to ends in a coherent way

<sup>49</sup> See McBride, *The Humanity of Private Law (Pt. II)*, 144.

<sup>50</sup> *Ibid.*, 141 (quoting David Graeber, *Bullshit Jobs: A Theory* [New York: Simon & Schuster, 2018]).

and thus goals set by management will inevitably be irrelevant at best and pernicious at worse. Notice first that one needn't subscribe to QTL flourishing to believe that the particular corporate culture that McBride describes is pernicious. The desirability of ameliorating such a situation can be justified by any number of different normative approaches. One simply doesn't need anything as ambitious as QTL flourishing to condemn such a concrete situation. Notice also that McBride's suggested rule of corporate governance does not flow from his theory of QTL flourishing but rather from a set of controversial assumptions about the information at the disposal of corporate managers and their competence. It is surely true that executives face information problems and are often incompetent, but McBride's rule requires that we believe that they are radically incompetent. Furthermore, it requires that this insight into radical managerial incompetence has gone unnoticed by investors and others whose livelihoods depend on scrutinizing and assessing managerial effectiveness. Again, QTL flourishing provides us with no particular insight about such questions, which are largely a matter of complex empirical judgments.

### III. Conclusion

While McBride's theory is not overtly religious, it is Christian, or at the very least, written in the shadow of Christianity. It's easy to see that the Being who accounts for all beings is a polite way of discussing God. Throughout *The Humanity of Private Law*, McBride drops hints of his frustration that the secularism of modern legal scholars has caused them to miss the echoes of Christianity to be found in English private law, and his style of drawing illustrations and ideas from a vast swath of philosophy, literature and popular culture, allows him to include references to the New Testament.<sup>51</sup> At a deeper level, his idea of QTL flourishing draws on a particular notion of Christian theology, one that centers salvation on coming to know God. It is important to note here that the theological echoes in McBride's theory are particularly salient in the Christian intellectual tradition. To be sure within Islam and Judaism, there are mystical traditions that see religious life primarily as an ascent along the chain of being back to the ultimate being that accounts for the existence of the universe.<sup>52</sup> Likewise, there are Islamic and Jewish writers that have engaged in the kind of abstract theologizing that has dominated the Christian tradition, many of whom, such as Avicenna or Averroes, had a tremendous influence on the history of Christian theology. However, Islamic and Jewish spirituality have emphasized revealed law, the need to understand the precise practical significance of revealed texts and conform one's life to their demands, in a way that Christianity has not. Thus, in the Orthodox

<sup>51</sup> See, e.g., McBride, *The Humanity of Private Law (Pt. I)*, 264; McBride, *The Humanity of Private Law (Pt. II)*, 47, 51, 60, 158.

<sup>52</sup> See Mircea Eliade, *A History of Religious Ideas*, vol. 3, *From Muhammad to the Age of Reforms*, trans. Alf Hiltebeitel and Diane Apostolos-Cappadona (Chicago: University of Chicago Press, 1985), 113–80 (discussing the history of Islamic and Jewish theology and mysticism).

Jewish tradition the primary emphasis is not on the knowledge of God's being but rather on the explication of halakhah.<sup>53</sup> To be sure the rabbis understand the study of the Torah as a means of worshipping and drawing closer to God, but their primary intellectual project has often been legal rather than theological or philosophical.<sup>54</sup> Likewise, in the Islamic tradition the *usul al-fiqh* and the imperative to understand and follow the Sharia have often had greater religious prestige than metaphysical speculations.<sup>55</sup> Thus, when McBride says that QTL flourishing consists of the effort to understand the Being that accounts for all other beings, the theoretical and intellectual inflection of this quest finds its origins in a Christian emphasis on theology rather than other forms of religiosity. However, high theological speculation is hardly the only form that a Christian life can take. It seems uncontroversial to claim that one can live a deeply Christian life without centering it on the question of Being. Indeed, one suspects that many Christians without philosophical training would be unable to understand the question. Likewise, if one studies the New Testament, there is precious little discussion of being in the text at all.<sup>56</sup> Rather than understanding, the Jesus of the Gospels tends emphasize the forgiveness of sins and the love of one's neighbor. There is no suggestion in the New Testament that a failure to seek after an understanding of such metaphysical abstractions as ultimate Being constitutes a failure to live a flourishing life. Rather the Sermon on the Mount operates at a much lower level of metaphysical abstraction, focusing on the status of the human heart in the context of practical relations with other people. This does not mean that that the rich tradition of philosophical and theological speculation about the relationship between the God of Christianity and the question of Being should be rejected as valueless. However, a more metaphysically modest approach to Christianity might provide a better starting place for thinking about private law than the question of Being.

<sup>53</sup> See generally Rabbi Joseph B. Soloveitchik, *Halakhic Man* (Philadelphia: The Jewish Publication Society, 1984).

<sup>54</sup> See generally Chaim Saiman, *Halakhah: The Rabbinic Idea of Law* (Princeton, NJ: Princeton University Press, 2018).

<sup>55</sup> For a summary of the Islamic approach to law, see Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh* (Cambridge: Cambridge University Press, 1997).

<sup>56</sup> One obvious and notable exception would be the opening of the Gospel of John in which Jesus is associated with the divine *logos*. See John 1:1.