Author's Response to the Commentators

RICK BIGWOOD

I repeat my expression of gratitude to the commentators for their remarks, and not least for taking the work seriously enough to warrant the rigorous attention that each has afforded it.

Reply to Alan Cameron

As the title to his reply suggests, Alan wants to 'challenge' the foundations of my 'liberal conception' of exploitative contracts. In his words, he wants to

> propose an alternative methodological basis that points to a different ontological-legal perspective to the liberalist ('liberal') conception of contract and contract law on which ... [my] account of the exploitation doctrines rests'.[1]

In doing so he aims, partially at least, to challenge my view of the relationship of legal doctrines to non-legal disciplines such as philosophy. My 'legalist' account of contractual exploitation turns out to be insufficiently 'pluralist'[2] for Alan's liking: the work identifies only with a certain positivistic view of 'state law' that ignores types of non-state jural order that, in Alan's view, are no less 'law' than state law.

I address none of Alan's 'what is law'-type questions in the book, and won't do so on this occasion either. My response to Alan is simply this: if he can provide a more plausible methodological basis (or 'ontological-legal perspective'[3]) for my project without changing its essential conclusions, then great! As Alan fairly acknowledges in his commentary, nowhere in *Exploitative Contracts*[4] do I provide a well-developed conception of the law's connection to other sources or disciplines, and I

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1 Alan Cameron, 'Foundations of a Liberal Conception of Exploitative Contracts – a Challenge' (2007) 32 *Australian Journal of Legal Philosophy* 127, 127.

2 Ibid 131.

3 Ibid 127.

4 (2003) ('*Exploitative Contracts*').

accept that my use of philosophical sources is somewhat selective for its purposes. Besides resort to the general philosophies offered by well-known giants like Rawls, Nozick, Aristotle, and Kant, much of the philosophical writing I use in the work is limited to dedicated philosophical treatments of the exploitation concept in particular. Also, although I claim that the book is not a work of philosophy (or economics, or history, or whatever), nowhere do I claim that it is not a work of *jurisprudence*, as Alan understands that term in its theoretical sense. Having said that, though, I do not self-consciously identify with any particular jurisprudential leaning (such as 'positivism', hard, soft, or middling), although I am happy for others, like Alan, to label me appropriately. In my Prospectus (Chapter 1), I expressly acknowledge the possibility of alternative accounts, while accepting that the theory I present might only be as strong as the weaknesses of the liberal conception of contract that it assumes and upon which the project rests. Clearly, the book is *not* a full-blown defence of the liberal conception of contract as such. Alan's alternative, if I understand him correctly, is to return to a 'Christian-biblical world view', which he says is rooted in a 'divine law' or 'cosmonomic' theory of law.[5] This, says Alan, would allow us to return to the wellsprings of the sorts of principles, concepts, commitments, etc (eg 'neighbourhood') that feature and are developed in *Exploitative Contracts*. But to my mind, this sort of alternative to my (in Alan's words) 'liberalist, autonomy-based, positive theory'[6] of contract and contractual justice is likely to be highly contested in a secular legal order, the full history of which might well explain the emergence of important features in our positive law (such as legal neighbourhood) but it cannot *justify* those features now and for the future.[7] That is why I think Tim Dare's sort of defence of the liberal conception,[8] as serving as a type of *modus vivendi* for the here-and-now, but not necessarily for always, is a more plausible strategy than recourse to the 'normative power'[9] of any particular heritage that is not concerned with striking tolerable compromises between reasonable, but sometimes inconsistent, substantive views about the institutions or practices that govern, or ought to govern, people's lives, interactions, and claims in modern constitutional democracies. No disrespect intended, but the 'normative power of [a] ... Christian heritage'[10] is unlikely to persuade many non-Christians, living in an increasingly

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5 Ibid 139, note 31.

6 Ibid 139.

7 'Tradition' is clearly one value or virtue that might be factored into the ultimate justificatory mix, though.

8 See Tim Dare, 'Kronman on Contract: A Study in the Relation Between Substance and Procedure in Normative and Legal Theory' (1994) 7 *Canadian Journal of Law and Jurisprudence* 331.

9 Cameron, above n 1, 138.

10 Ibid.

pluralist society, that 'divine law'[11] is the best directive (or 'ontological-legal perspective'[12]) that ought to govern their interpersonal transactions, especially contracts. Any account of contractual unfairness or injustice that purports ultimately to be referable to such a directive is thus unlikely to command general, or even bare-majority, acceptance today.

As to Alan's comments regarding my conception of bargaining ethics, I must confess, possibly owing to my own limitations, to not understanding fully the burden of his remarks in this connection. Again, they have something to do with my positivist, non-pluralist perspective on law as it is presented in the book — he says, for example, that '[w]here the boundary between the ethical and jural dimensions is to be drawn is undoubtedly the key to the difference between our two conceptions'[13] — but I feel unable to defend myself without a clearer account of what exactly Alan has in mind here (beyond simply wanting to accommodate a plurality of jural orders beyond the 'state-type' that I assume and describe in the book). I do in fact think of contracts exclusively as state-sanctioned agreements that satisfy the transformative criteria of 'contract law' for the time being in force. To enter into a contract is to exercise a governing 'legal power',[14] and thereby intentionally to achieve a formal legal status, in a similar way that 'getting married' is also to exercise a governing legal power intentionally to achieve a recognized formal jural status, even though we can meaningfully define and understand the background institutions or practices of 'agreement' or 'spousal partnership' quite independently of their formal legal sanctioning *qua* contract or marriage, respectively. Alan hints in a footnote that, following Dooyeweerd, his pluralist theory of legal sources would assist to resolve such 'conceptual conundrums' as the distinction between 'intention to be bound' and 'intention to create legal relations'.[15] Without knowing more about what exactly is the conceptual conundrum here — in my experience these are interchangeable notions in contract law and practice — or how Alan's account would purport to resolve them, I am unable to comment on what the upshot of his alternative methodological approach is for my own account, or indeed whether and to what extent it is superior. Alan is right about my positivistic leanings, though. Legal 'reality' is important to me, and my 'legalist' account is thus built upon my perception of it.

Reply to John Gava

11 Ibid 139, note 31.
12 Ibid 127.
13 Ibid 136.
14 See generally Jim Evans, 'The Concept of a Legal Power' (1984) 11 *New Zealand Universities Law Review* 149 (contract being discussed at 163).
15 Cameron, above n 1, 137, note 27.

John's commentary is full of very interesting observations, and I agree with virtually all of them, except as they apply to my book. John usefully considers whether and how judges could use *Exploitative Contracts*, and what implications would flow from such use. Ultimately he argues that

> the theory underpinning [my] ... argument suggests a role for judges that is incompatible with historical and functional understandings of what it means to be a judge and which would amount to a revolutionary change in the relationship between legal scholars and common law judges.[16]

This is all very well, but I'm rather surprised as to why John thinks I even come close in my book to advocating a style of *judging*. He says in the conclusion to his commentary that I am 'quite explicit in demanding that judges adopt what [John sees] ... to be a philosophical approach to judging',[17] and this is despite the fact that I say very early on in the book that 'judges, and counsel that assist them, do not have the same metaphysical luxuries that philosophers (and the like) typically enjoy: "it is a lawyer's plain duty to be pedestrian, to keep his feet on the ground".'[18] In fact, nowhere in the work do I say, or hopefully even imply, that I *expect* — John's word — judges to be philosophers,[19] although doubtless many of them are, resources and workload constraints permitting, capable of abstract conceptual reasoning appropriate to what is their pragmatic as well as creative role. Hoping that judges will read my book (or bits of it), presenting a 'legalist' account of exploitative contracts (ie an account that takes the existing substantive state law on unjust contracts as its critical starting point), and asking judges to pay 'closer attention' than they currently do when applying essentially contested concepts like 'exploitation', is not the same thing as appealing to them to write judgments in the same way as I have written my book, or expecting them to be, or even to set out to satisfy the standards of, philosophers in search of abstract truth or pure intellectual coherence. As Tim Dare rightly points out in his commentary, I am occupying a very different office from that of the judge, and accordingly I do not shoulder the same constraints.[20] If John were to

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16 John Gava, 'The Audience for Rick Bigwood's *Exploitative Contracts*' (2007) 32 *Australian Journal of Legal Philosophy* 140, 140.

17 Ibid 151.

18 Bigwood, above n 4, 8, quoting Cyril John Radcliffe, *The Law and Its Compass* (1960) vii.

19 This would be especially rich given that I claim not to be one myself!

20 Tim Dare, 'Two Distinctions in Bigwood's *Exploitative Contracts*' (2007) 32 *Australian Journal of Legal Philosophy* 153, 160.

read my published views on judicial methodology,[21] he would probably find them to be not too dissimilar from his own.

Exploitative Contracts divides into two distinct parts. The first (Chapters 1–5) is the 'theory-building' part, and I agree with John that that is probably 'at least as much a work of philosophical analysis [meaning jurisprudence?] as it is one of legal analysis'.[22] Realistically, I don't expect judges to pay much, if any, attention to that part of the work, at least in their routine judicial activities.[23] Much of the first half of the book is merely reasoned confirmation of structures, distinctions, and detail that one already finds immanent in the private law that has resulted from orthodox judicial reasoning over time. The second part of the book, however, and Chapters 6–8 especially, deal with particular legal/equitable doctrines that seem, at least at first blush, to exhibit a common law precept against interpersonal exploitation. Although those chapters are referable to the first half of the book for continuity of argument and certain justificatory moves, they are quite capable of being read as stand-alone treatises on their respective subject matters. I would hope — 'expect',[24] which is John's word, is putting it much too strongly — that judges would read and be influenced by those chapters to the extent that they might assist courts to 'tidy ... up'[25] criterial and linguistic irregularities that I perceive to infect the doctrines under discussion, which irregularities have emerged largely because of the more 'free and easy'[26] ways of the common law that John describes in his commentary. Obviously, that common law reasoning is, in John's words, 'not designed to convince philosophers', but rather 'is a craft tradition driven by the very real need to make authoritative decisions within very severe time constraints',[27] is hardly a reason for judges to avoid achieving whatever improvement toward internal consistency and coherence is possible according to legitimate judicial methodology. Granted, judges don't have to resort to philosophy to see doctrinal (etc) irregularities or to fix them — there is a lot 'regular' legal methodology in my doctrinal chapters too. But when the sort of irregularities that one, in one's academic capacity, perceives in the law make little difference to the resolution of

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21 See Richard Sutton and Rick Bigwood, 'Taking Stock: Legal Method in New Zealand Today (and for the Future?)' in Rick Bigwood (ed), *Legal Method in New Zealand: Essays and Commentaries* (2001) 305–38.

22 Gava, above n 16, 143.

23 Still, the first part of the book has proved to be of interest to at least one judge who has recently expounded, albeit extra-judicially, his judicial philosophy; see E W Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (2005) 371–92 especially.

24 Gava, above n 16, 144.

25 Ibid 141.

26 Ibid 143.

27 Ibid.

particular disputes, or risk injustices in particular cases, or hinder private actors' ability to order their affairs as to the future, judges are unlikely to be incentivized to effect change just for the sake of satisfying the scholar's desire for 'neat ... [and] tidy'[28] laws. Many of the irregularities that I identify in *Exploitative Contracts* probably fall within that genre, and so John may get his wish and judges, if they do choose to read the work, won't be influenced by it at all.

Needless to say, though, I don't regret writing *Exploitative Contracts*,[29] even if judges won't, because in John's view they shouldn't, use it. A mere *omnium gatherum* on the subject, while perhaps serviceable to busy judges for whatever period the garnered law remained current, would have been completely unsatisfying to write, would have added nothing to what was already available, and certainly would not have seen my work being discussed in the pages of a reputable journal of legal philosophy! Still, one reviewer of the book did kindly opine that the doctrinal chapters on unconscionable dealing, duress, and undue influence 'represent one of the most detailed, clearly analysed, presentations of these equitable [sic, for duress developed largely at common law] doctrines', and as such 'they are likely to be of most interest to practitioners'.[30] If it is true that those chapters might be of interest to practitioners, judges might find utility in them too,[31] quite independently of the more theoretical half of the work that precedes them.

Yet for all of John's concerns about how judges might use *Exploitative Contracts*, or what its methodology might imply for their craft, nowhere in the work do I ask judges to abandon being judges in the traditional sense. If a judge ever did use the book to pass herself or himself off as a philosopher, or even to adopt what John sees to be 'a philosophical approach to judging',[32] self-evidently that would be wrong.

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28 Ibid 141.

29 I'm not suggesting here that John implies that I should have regrets.

30 Hugh Collins, 'Bigwood: *Exploitative Contracts*' [2005] *Lloyd's Maritime and Commercial Law Quarterly* 415, 416. I should be careful here, though, since John has levelled similar concerns at Hugh Collins' writing in contract as he has toward mine on this occasion! See John Gava and Janey Greene, 'The Limits of Modern Contract Theory: Hugh Collins on *Regulating Contracts*' (2001) 22 *Adelaide Law Review* 301; John Gava and Janey Greene, 'Do We Need a Hybrid Law of Contract? Why Hugh Collins is Wrong and Why it Matters' (2004) 63 *Cambridge Law Journal* 605.

31 My chapter on unconscionable dealing (Chapter 6) was recently cited with approval in *Australian Competition & Consumer Commission v Radio Rentals Ltd* (2005) 146 FCR 292, 296–8 (Finn J).

32 Gava, above n 16, 151.

Reply to Tim Dare

Tim is troubled by some of the distinctions I draw in the early part of *Exploitative Contracts* — in particular, those between 'corrective' justice and 'distributive' justice, and 'constitutive' rules and 'practice' rules — even though I suspect we do not disagree greatly in our respective views on substantive contract law. My main concern with Tim's commentary, and this goes to the *weight* of his criticisms rather than their validity, is that we seem to be at cross-purposes as to what my overall project is in *Exploitative Contracts*. Also, some of the apparent disagreement or possible misunderstanding (by me) in respect of some of the detail, or *à propos* the use of the distinctions that Tim mentions, seems to have resulted simply through careless expression on my part.[33] I welcome, therefore, this opportunity to clarify my position.

Most of Tim's commentary focuses on Chapter 3 of the book. There I attempt to give an account of contractual justice that is plausible within the confines of the classical liberal conception of contract, given the intellectual and institutional forms of order that that conception presupposes. This is all with a view to advancing an account of legal contractual exploitation, which *ex hypothesi* involves injustice, that in turn takes much of its shape and content from my conception of contractual justice. Important distinctions necessary to understanding contractual justice on the ordinary liberal conception of contract,[34] I maintain, are those existing between 'distributive' and 'corrective' justice, and between two different 'subjects' of justice — the 'basic structure', including the social-cum-legal institution of contract on the one hand, and 'individual transactions' occurring within that institution on the other. In connection with the different subjects of justice, I also invoke another Rawlsian distinction: in Tim's language, the distinction between 'constitutive' rules and 'practice' rules.[35] In re-reading

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33 One example of this can be found in Dare, above n 20, 155, note 12, where he declines what he perceives to be an 'amendment' by me to his work. However, when I say in Chapter 3 of *Exploitative Contracts* that '[w]e might bolster Dare's call for a procedural or conventional rights-based theory as mere *modus vivendi* by introducing here considerations of relative institutional competence' (at 110), I was never intending to suggest an *amendment* to Tim's theory, but rather to add quite *independent* reasons for not wanting regular contract law to do the sort of distributional work that Kronman's theory required. Clearly, relative institutional competence is not part of Tim's argument against Kronman, and Tim's theory stands unaltered and sufficient by way of response to Kronman without reference to my additional considerations.

34 By which I mean here the unalloyed *common law* of contract, unaltered by necessary statutory glosses.

35 Dare, above n 20, 154.

my chapter in the light of Tim's comments, it is regretted that on occasion I do seem to suggest or imply that the distinction between the two different subjects of justice and the two different kinds of rules are essentially one and the same distinction merely restated, such that I effectively elide them. They are of course different distinctions, yet they overlap and are complementary for my purposes. They are complementary because, from the standpoint of 'contractual justice', we can get two very different answers to two very different questions: 'why do we enforce contracts?' and 'why should X's contract be enforced/not enforced in this particular case?'. John Rawls's 'Two Concepts of Rules'[36] helps us to understand how this can be so and why it is important. Nowhere in *Exploitative Contracts* do I deny that there can be conversation between these two levels of question, appropriate to office-holder. Rawls's distinction, in a later paper,[37] between 'institutions' and 'individual transactions' (or 'practices') *qua* 'subject' is not *necessitated* by the distinction he draws in his 'Two Concepts of Rules', or a mere restatement of it, but it is certainly complementary to his earlier work. This is because asking why society enforces contracts is a question to be answered at the 'institutional' level (and hence be settled by considerations that define and constrain the institution), whereas asking why a particular individual, X, must perform her promise with another individual, Y, must be settled by reference to considerations that define and constrain the practices falling under the institution. I believe that by drawing a 'division of labour', as Rawls puts it, between the rules relating to the basic structure (including the institution of contract) and those 'applying directly to individuals and associations and to be followed by them in particular transactions' (the specific ceremonies of contracting),[38] Rawls in his later paper allows one distinction to be mapped onto the other, at least to create overlap if not elision. Rawls's intention in that paper was to point out to his readers that his 'difference principle', which is a principle of *distributive* justice, was never intended to apply *directly* to individual transactions (although no doubt it might be the sort of principle that might define the boundaries of contract at the institutional level and hence apply to the question, 'why, and if so to what extent, do we enforce contracts?'). This comports with the sort of strategy that I want to adopt in connection with contractual justice: that is, to leave issues of 'distributive justice' *pure* to the basic structure, while controlling the operation of the contract rules — the matter of whether X's contract should be enforced/not enforced in the particular case — to criteria more applicable to individual transactions, such as (non-distributive) corrective

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36 (1955) 64 *Philosophical Review* 3.

37 John Rawls, 'The Basic Structure as Subject' in Alvin Goldman and Jaegwon Kim (eds), *Values and Morals: Essays in Honour of William Frankena, Charles Stevenson, and Richard Brandt* (1978) 47–71.

38 Ibid 54–5, 65.

justice. This does not preclude reformers from ever arguing that the practice rules have lost sight of the constitutive rules and so must be adjusted to seek better alignment; but neither does it preclude us from maintaining, potentially indefinitely, *independent* justifications for our institution of contract (the constitutive rules), on the one hand, and, on the other, the rules falling under that institution that tell judges and contracting parties which individual contracts they must honour and which they can renounce.

Tim might object (because he does in fact) that this is just to assert the distinctions I draw without adequately justifying them with argument. He complains that I move too quickly between describing the models and making conclusions that I like. He quotes this isolated passage from my third chapter:

> [O]nce society commits itself to $Contract_1$, $Contract_2$ *must* [although this word is not italicized in the original text, the effect of which is to now imply that I was making the point rather more strongly than I think is the case] be allowed to operate in a largely unqualified and *non*-distributive manner, free from excessive governmental interference and collective conceptions of the good. Although this account is unlikely to satisfy those who think that $Contract_2$ should incorporate or defer to 'distributive' or other teleological considerations ... the expedience and pragmatism of Rawls's institutional division of labour ... cannot lightly be ignored.[39]

Let us assume that Tim is right here (although I think I do give arguments, such as relative institutional competence, for treating $Contract_1$ and $Contract_2$ differentially for legal purposes; 'regulation' (appropriate to $Contract_1$) is not the same thing as 'private law' (appropriate to $Contract_2$)). Tim's main worry seems to concern how I view the relationship between the constitutive rules (relating to $Contract_1$) and the practice rules (relating to $Contract_2$). In truth, though, I have very little to say about that relationship in the book. Tim omits from the quoted passage above, at his second ellipsis, the words 'in the name of justice'.[40] The discussion in my third chapter is *limited* to questions about contractual justice, and not all the rules about the free market ($Contract_1$) and relating to the bindingness of individual contracts ($Contract_2$). So while it is true that the distinctions I draw are neutral as to the content of the rules at either level, I am only concerned with the rules as they relate to contractual justice, distributive or corrective, but mostly just corrective. And I *do* give arguments as to why the content of the constitutive rules might be distributional in the way that

39 Bigwood, above n 4, 78.

40 Dare, above n 20, 158.

the rules of the practice should never be (eg distributive justice is *conceptually* distinct from corrective justice, and judges will never be well placed constitutionally to administer distributive justice anyway, so they should leave the regulation of the free market to other, better-equipped, branches of government and just focus on achieving corrective justice *inter se*). Now these may not be *convincing* arguments in favour of drawing the sorts of distinctions I want to draw in the book, but they are arguments nonetheless.[41]

At this point especially I feel that Tim and I are somewhat at cross-purposes as to what my project is in *Exploitative Contracts*. Given my sympathy for the Rawlsian model, he comments, Tim would have expected me (*qua* commentator, interpreter, institutional designer) to pursue a more aspirational approach, and Rawls's 'Two Concepts of Rules' certainly leaves me free to do that. So he is puzzled when, in my second chapter, I question why Norton, in her work on bargaining ethics, remarks that '[o]bjective functionalist criteria [of bargaining] lack a deep moral dimension'[42] and that '[t]he ethics of bargaining ... must be reconciled with the ethics of the real world'.[43] The implication here on Tim's part is that, instead of endorsing Norton's project and approach, I somehow fail to see how the relationship between constitutive rules and practice rules works, and hence I am wrong to suggest that Norton forgets her own observation that the ethics of bargaining do not have fully fledged aspirational ambitions. The truth, though, is that when I was writing my chapter on bargaining ethics (Chapter 2, discussed in Alan's commentary), I did not have the Rawlsian distinction squarely in mind (and nor, I suspect, did Norton, at least not as a self-conscious strategy or endeavour). I used Norton's work in my chapter because I liked her argument that *any* regulation of bargaining activity — and, granted, this might occur at either the institutional or the practice level — must reflect the nature of the activity being regulated. As Karl Llewellyn once asked: 'Why should [we] expect the ethics of the game to be different from the game itself?'[44] This need not refer ethics to the *purpose* we think a particular game is serving,

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41 Concerning my claim that interference with exploitative contracts at common law should be viewed as argument about 'corrective' rather than 'distributive' justice, one reviewer of the book observed that, 'for once in recent legal theory, there is some concrete meaning to this claim': David Campbell, '*Exploitative Contracts* by Rick Bigwood' (2005) 64 *Cambridge Law Journal* 243, 244. Unfortunately, the same reviewer concluded that the work would 'ultimately be judged a failure' (at 245) because it was not a book about Pareto optimality.

42 Eleanor Holmes Norton, 'Bargaining and the Ethic of Process' (1989) *New York University Law Review* 493, 540.

43 Ibid 575.

44 Karl Llewellyn, *The Bramble Bush: On Our Law and Its Study* (1930) 150.

but rather simply to the way in which the game is customarily played, apart from its purposes. For we may disagree on what those purposes are, while nevertheless agreeing that the game is not immoral as it is currently played and thus may be permitted to continue.

Anyway, if my questioning of Norton's aspirational project is curious, it's not for the reason that Tim assumes. Tim ascribes to Norton a compromise or *modus vivendi*-type strategy that I don't think she is pursuing at all, at least not explicitly. Norton does not overtly argue that the process ethic of bargaining exists because we can't agree on some substantive purpose that the institution or practice of bargaining is meant to be serving. Although Norton thinks that bargaining is indeed an institution worth preserving because of its social utility, she believes that the fundamental purpose of bargaining is to achieve a 'valid' agreement, 'valid' meaning that the parties are meant to honour the agreement and that society and its institutions will recognize it.[45] (This is hardly a good steer on what the practice rules should look like across the board, and as a fundamental assumption of her functionalist model it rather begs the question, at least for the purpose of having some sort of meaningful conversation between the constitutive rules and the practice rules.) Tim seems to have assumed that Norton is using functionalism in the way that philosophers typically use it; namely, to analyze and explain social institutions or practices according to the function they perform in the relevant society. He says in his commentary: 'In short, Norton argues the ethics of bargaining are derived from its function.'[46] But that is not quite what I perceive her to be arguing (and how I rely on her work). She actually argues that the ethics of bargaining are derived not from the *function* (meaning purpose) of bargaining as such, but rather from *the way in which* bargaining works or 'functions' toward a consensus or outcome. In her words: 'This model is called functionalism because it draws its assumptions about ethics from the way the process operates or functions.'[47] Bargaining sorts out ethical dilemmas relating to truthfulness and fairness *inter se*, even in the absence of external regulation, Norton argues, because of the way it works *in practice* and the internal assumptions it makes. Norton's account claims, therefore, to be an 'objective and analytical', rather than 'value specific', basis for assessing bargaining ethics.[48] I like her project (to a point) because I believe that an institutionally sensitive account of contractual bargaining norms or rules (including those against interpersonal exploitation in contract formation) must presuppose and accommodate the assumptions and operational imperatives of bargaining itself. Thus, abstract ethical

45 Norton, above n 42, 535 (and see ibid note 156).
46 Dare, above n 20, 158.
47 Norton, above n 42, 575.
48 Ibid 501.

theories won't necessarily suffice to explain and justify such norms or rules. What Norton doesn't like is the ethical minimalism of what results from her notion of functionalism, and this impels her to begin searching for a higher, more aspirational ethic applicable to bargaining. This is a bargaining ethic that remains referable to a functional understanding of the negotiation process, but which is answerable to external influences and 'aspirational' ethics, whatever those suitably are.

In questioning Norton's inquiry in the way that Tim mentions, I never meant to imply that Norton ever loses sight of her own observation about the ethics of process. Because Norton's functionalist criteria purport to be merely *descriptive* ('objective and analytical' rather than 'value specific',[49] as she says), naturally they will lack 'moral depth' for that reason and to that extent. What I was wanting to say, and do say, in Chapter 2 of *Exploitative Contracts*, though, is that the ethics outside of bargaining, 'in the real world'[50] as Norton puts it, may not, after analysis, produce any higher bargaining ethic at all, at least for the generality of cases. The minimalist ethic that Norton describes might still be considered 'ideal' for legal operational purposes, which is what I argue, given the nature of pre-contractual bargaining and the limitations of adjudication (say). Truth to tell, Norton simply doesn't like the fact that external regulation over bargaining activity in certain areas, eg US labour law and divorce law, has been overly deferential to the minimalist process ethics that her functionalist account describes. But there may be quite morally complex reasons (presented in the latter part of Chapter 2 in *Exploitative Contracts*) for thinking that such ethical minimalism is about right, at least for the generality of contract negotiations governed by judge-made private law. (I say nothing in *Exploitative Contracts* about legislative regulation of bargaining, generally or in specialized areas, such as collective bargaining. It may well be that Norton's appeal for higher bargaining ethics can be justified in particular areas of law and practice, which ethics are not suited to contract negotiations universally.[51]) Certainly, the *assumptions* upon which Norton's 'objective functionalist criteria' rest do not lack 'a deep moral dimension',[52] and so I remain, despite Tim's comments, uneasy about Norton's remarks, especially the second one about the imperative to reconcile process bargaining ethics with real-world ethics. In my view, Norton's 'objective functionalist criteria', although they purport to be merely descriptive, are nevertheless capable of being justified in a so-called

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49 Ibid.

50 Ibid 575.

51 This is in fact why I eventually depart from Norton's functionalism and elect for a more instance-specific ethic based on the concept of 'reasonable expectations', as elaborated toward the end of my second chapter.

52 Norton, above n 42, 540.

'morally deep' way, and I dedicate space in the book to explaining how that might be so. At no point, though, do I deny the possibility of the type of project that Tim ascribes to Norton via Rawls, and which he seems to want to ascribe to me. But *Exploitative Contracts* is more about my wanting to create better justificatory and taxonomic order in the current general common law relating to certain ill-gotten contracts than about making the bargaining process subject to greater external regulation and higher standards than the law currently knows, which is Norton's desire.

In addition to the foregoing, Tim worries as well about my distinction between 'distributive' and 'corrective' justice. Space does not permit a full defence of this distinction, assuming I could even offer one. In truth, the extent to which corrective justice is 'autonomous' from distributive justice is hotly contested,[53] and *Exploitative Contracts* certainly doesn't resolve that debate. I do, however, believe that corrective justice is significantly (if not entirely) distinct from distributive justice, and thus must be 'non-distributive' in form and content: the goal of corrective justice is not simply to reverse unjust 'distributions', even though certain moves within corrective justice, such as stipulating the governing rights and duties *inter se*, will doubtless have distributional consequences. But this really has nothing to do whether corrective justice can be concerned for 'groups' rather than individuals only. It is a matter of how the parties to the respective claim-types are being 'linked' or 'compared',[54] rather than how many people are actually involved in the particular claim. Tim's point that the concept of corrective justice does not itself rule out a concern for groups rather than individuals is easily resolved, but only if one buys into the initial argument that distributive justice and corrective justice are independent and mutually irreducible forms of justice, and not everyone does. On that view, the example that Tim gives of reparation to indigenous peoples for past wrongs as being within the realm of corrective justice is true because the Crown and the relevant group are being linked according to a ruling norm that governs, or ought to have governed, 'takings' or 'appropriations' in the particular society, which norms were violated in the particular case or series of takings, and which violation might, other things being equal, justify reversal or reparation in the name of corrective justice. Provided there is an entity or individual that has legal standing to represent the group in the particular legal claim, there is no logical problem in treating a 'community

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53 See, eg, Hanoch Dagan, 'The Distributive Foundation of Corrective Justice' (1999) 98 *Michigan Law Review* 138; Peter Cane, 'Distributive Justice and Tort Law' [2002] *New Zealand Law Review* 401; Dennis Klimchuk, 'On the Autonomy of Corrective Justice' (2003) 23 *Oxford Journal of Legal Studies* 49.

54 Cf Ernest Weinrib, 'Corrective Justice in a Nutshell' (2002) 52 *University of Toronto Law Journal* 349, 351–2.

of people' as an 'individual' for corrective justice purposes.[55] If, however, the Crown and a group were being 'compared' simply according to some distributive criterion that governs, or ought to have governed, the allocation of resources among eligible participants in the particular community, and the reversal were being made for *that* reason (ie, to realize the prior conception of just holdings in particular resources), it would be 'distributive justice' that was doing the reversing, or making the reparation, rather than corrective justice. Very little in *Exploitative Contracts* turns on the number of people involved in the claim, although much does turn on my conception of distributive and corrective justice as autonomous forms of justice. Tim is right, though, that the mere distinction between corrective justice and distributive justice is not itself a response to those who object to the limited ability of the liberal conception of contract to respond to concerns about the significance of antecedent inequality between bargainers. Indeed, I acknowledge as much in the book.[56] But I want to give contract law as administered by non-political state servants (judges) an appropriate but limited role in so responding. Clearly, more can be done, but it is not necessarily the judges' role or legitimate mandate to do it. Tim and others might disagree, but it is not clear to me how much more judges can or should do in the name of contractual justice without threatening the traditional constitutional role of judges administering 'private law' in particular. *Exploitative Contracts* is not an invitation for courts to do more in that regard; it is merely a call for them to do what they have long been doing, just in a more consistent and coherent fashion.

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55 See generally Jeremy Waldron, 'Taking Group Rights Carefully' in Grant Huscroft and Paul Rishworth (eds), *Litigating Rights: Perspectives from Domestic and International Law* (2002) chapter 11.

56 Bigwood, above n 4, 78–9.