

Foundations of a Liberal Conception of Exploitative Contracts – a Challenge

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Introduction

For contract scholars the appearance of Rick Bigwood's *Exploitative Contracts*¹ is a significant event. It is not his intention to present a work of pure jurisprudence or legal philosophy. Undoubtedly, however, a strength of this study of unfairness in contract formation lies in the interdisciplinary nature of the work, which allows Bigwood to construct a uniquely rounded theoretical foundation for the area of contract law chosen for examination.

I have been asked to focus my commentary on the theoretical basis of the doctrinal analysis contained in the first two chapters ('Prospectus' and 'Operational Bargaining Norms: Contracting Beyond Utopia'). These chapters do not on their own form a complete theoretical framework for Bigwood's exposition of the doctrines examined in the book. However, they provide enough of the basic components of that framework (method and ontology of the legal-ethical subject matter) to gain a view of key elements in the work's theoretical foundations. While acknowledging important insights in Bigwood's account of his legal method, I will propose an alternative methodological basis that points to a different ontological-legal perspective on the liberalist ('liberal') conception of contract and contract law on which Bigwood's account of the exploitation doctrines rests. The implications of this theoretical alternative perspective will mostly be confined to the account of bargaining ethics in the second chapter.

Legal Method and Legal Theory

As a legal-doctrinal theorist rather than a general legal philosopher (jurisprudent) Bigwood makes no attempt to 'rigorously defend' his liberal conception of contract. His aim is to provide a 'credible', minimally serviceable ('satisficing') conception adapted for the technical purposes of

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¹ (2003).

analysis in the ‘peculiarly legal contractual domain, accepting the principles, practices, and discriminations already immanent in that domain’.² But why does the author consider that the liberal conception rather than any other is the best fit for doctrinal purposes? According to Bigwood, despite many years of critical assault, it has at least survived challenges to its hegemony. Whatever may be its theoretical shortcomings, the main reason for its survival, according to Bigwood, is its serviceability for the institution of contract as it is practised within the prevailing state of society.³

According to the author, insofar as it is the court’s role to determine the justice of a contract *inter partes* when applying exploitation-based law to the contract, the (liberal) conception that is best suited to explaining this area of judicially administered contract law necessitates taking a ‘content-independent’ stance.⁴

Because the law’s concern for exploitation in the formation of contracts speaks directly to that dimension of the inquiry that is concerned with interpersonal justice of a contract ... consistency requires that our theory of legal contractual exploitation likewise embody a content-independent (and, in particular, autonomy-focused) conception of contractual justice.⁵

² Ibid 4. ‘By ‘credible’ I mean that the theory must be descriptively accurate and normatively acceptable ... but ultimately it must embody a *satisficing* conception of exploitation rather than a “comprehensive” or “aspirational” one’: at 4 (emphasis in original). Compare Neil MacCormick’s view of his own work on legal reasoning as both descriptive and normative: Neil MacCormick, *Legal Reasoning and Legal Theory* (1978) 13.

³ Bigwood, above n 1, note 17. The particular liberal conception of contract Bigwood adopts is based on the approach in 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* 331–48.

⁴ ‘Whereas most accounts of exploitation are ... “end-state” or “transfer-value” theories of exploitation – they express the unfairness or unjustness of exploitation as residing at least in the *material (typically welfare) consequences* of the relationship or transaction alleged to be exploitative – a theory of exploitation best adapted for application within contemporary contract law would conceive of exploitation as ... a “purely processual” concept. ...[S]ubstantive unfairness is not part of the *definition* of exploitation in this context; it has no independent analytical significance or explanatory power apart from the distinctive “process” features of the transaction adjudged to be exploitative’: Bigwood, above n 1, 5–6 (emphasis in original).

⁵ Ibid 6.

In other words, because the practical legal concern of the courts in this area of contract law is with the justice of the ‘process’ rather than the substance (content) of the contract, the liberal conception of contract, which requires a content-independent approach, is best suited to account theoretically for the law and its doctrines.

Bigwood describes the method of his study as comprising a conceptual approach suited to the specific purpose of analysing the relevant area of contractual common law. In the course of describing the appropriate legal method he makes some important observations on its methodological basis. Amongst these is the emphasis he gives to the ‘legalist’ nature of the work characterized by the fact that his theory of contractual exploitation is ‘rooted, first and foremost, in formulations of positive law on the subject, which by hypothesis are more likely to be contextual, temporal, and deterministic in ways that abstract non-legal theories of exploitation are not’.⁶ But as already indicated, a strength of the book is its interdisciplinary approach, even if the disciplines he delves into are for the purpose of elucidating legal doctrine rather than for pure theoretical consistency.

Bigwood is fully conscious that his analysis is not epistemologically value-neutral and he makes no claim to authorial ‘correctness’ and objectivity for the findings of such a study even at the purely descriptive level.⁷ But, in any case, as an interpretative⁸ legal theory the author recognizes that the theory can never be wholly ‘value-free’.⁹

The inductive-deductive method of lawyer and judge is the legalist method of black-letter law analysis said to be implicit in Bigwood’s account of the exploitation doctrines. However it was his study of the non-legal literature that furnished him with a critical perspective on the selected legal subject matter and provided the basis for questioning both the inter-doctrinal coherence of the existing doctrines and the intra-doctrinal consistency of the criteria within specific doctrines.¹⁰

Legal Method and Methodology: Ontological and Epistemological Assumptions

⁶ Ibid 9.

⁷ Ibid 9–12.

⁸ What theory is not interpretative?

⁹ See his characterization of the legalist nature of a theory of contractual exploitation and its limitations expressed as ‘disclaimers’, including the final disclaiming of value-neutrality: Bigwood, above n 1, 9–12.

¹⁰ Ibid 14–5.

In his general observations on the role and interrelation of the academic disciplines, Bigwood possibly overlooks the methodological differences between the legalist type of study he has undertaken and other disciplines including philosophy, economics, etc. This is probably a reflection of a tendency in the past to regard legal philosophy or jurisprudence (in its restricted *theoretical* sense) as an area of study within the legal curriculum that is viewed as 'speculative' and essentially external to the enterprise of legal study and doctrine itself. That is to say, it is viewed as a sub-branch of philosophy which is a discipline possessing its own distinctive concepts and distinctions fully independent of and external to other disciplines in the academy but which is applied in an external fashion to different disciplines, including law, in order to furnish speculatively abstract insights. There may well be something of this notion underlying Bigwood's wariness in his comments on the relationship of legal doctrine to philosophy and other disciplines in their theoretical analyses.¹¹ It is a view of the disciplines and their interrelationships which, at least in part, I wish to challenge.

In the first place a distinction must be made between the method of analysis adopted for the study and the legal method which is embedded in the (mostly) judicial process that produces the law and legal doctrines being examined.¹² Bigwood is no doubt correct to emphasise that the method for his conceptual analysis must be fitted for the 'legalist' purpose of expounding and reforming the conceptual foundation of the legal subject matter contained in the judicial-legal formations constituting the law of contract.

Undoubtedly, the abstractive method of theoretical legal analysis must take account of the judicial method of legal analysis embedded in the concrete product comprising judge-made law. But the method of legal scholarship, which gives a critical, theoretical account of legal doctrines, is not identical to that judicial legal reasoning embedded in the concrete law, though it assumes an understanding of that method which is deepened through being itself subject to theoretical analysis.¹³ Before this discussion on the distinction between the method of *theoretical* legal analysis and the

¹¹ See, eg, *ibid* 7: 'there are likely to be limitations to the insights that philosophical (or any other non-legal) analyses of exploitation can offer the law. This is not least because *philosophy serves different functions than law*' (emphasis added).

¹² A discussion of the judicial legal method in the New Zealand context is found in Rick Bigwood (ed), *Legal Method in New Zealand* (2001), including contributions from Bigwood himself at 3–12 and (jointly with Richard Sutton) 305–38.

¹³ See, eg, Neil MacCormick, *Legal Reasoning and Legal Theory* (1994).

legal method is further developed, I want to say something about the meaning of ‘legal’ in this context.

An assumption embedded in this description of the method is that ‘legal’ and ‘legalist’ refer exclusively to, respectively, state law, in this case the law of contract, and to the method of analysis appropriate for examining that state-legal¹⁴ product. This positivist assumption is deeply embedded in our legal culture. The tendency to identify law with state law is not entirely surprising given the dominant and all-pervasive role of state law in Western societies.

Once we recognize, for example, that indigenous cultures also have their own law, it is appreciated that state law is a law quite different from other historical legal orders. But only until we recognize that, *within* highly (‘developed’) societies possessing clearly differentiated state and non-state organizations and institutions, there is a plurality of different *types* of jural orders functioning, can it be clearly appreciated that state law is but one amongst different *types* of jural orders which are law *to no lesser degree than state law*. This legal pluralist observation (claim) has important implications not only for Bigwood’s account of his method of analysis but for the entire theoretical analysis of contract, contract law and their socio-ethical basis in an ‘operational’ account of the ethics of bargaining.¹⁵

Firstly, it can be seen that the main focus of Bigwood’s analysis is upon one type of jural order – the state type – that branch of which ‘legalists’ call private law, to which, for the most part,¹⁶ the law of contract belongs. Bigwood is right then to insist that the method of analysis of the area of contract law that is the focus of his study must be suited to its subject matter as state law of a particular judicial-doctrinal form.¹⁷

So our author is also right to be suspicious of applying the analyses of philosophy and other disciplines to this formalized public legal subject

¹⁴ For the present I use a neutral descriptive term. But later I will prefer to speak of ‘public legal’ for reasons that will be explained.

¹⁵ For a critical-postmodern perspective on legal pluralism see Margaret Davies, ‘The Ethos of Pluralism’ (2005) 27 *Sydney Law Review* 87.

¹⁶ ‘For the most part’ because, according to my pluralist conception of private and public law, contract is also regulated by at least one source of state law that is not private-legal in its orientation – the jurisdiction of the courts over contracts contrary to public policy.

¹⁷ In the reformational legal theory the concept of ‘form’ of law plays an important role. Herman Dooyeweerd’s untranslated ‘Sources of Law’ that is part of his *Encyclopedia of the Science of Law* [trans of: *Encyclopaedie der Rechtswetenschap*] contains an extensive account of ‘originating’ and other forms of positive law. See below n 23.

matter without carefully adapting and modifying those extra-legal disciplines specifically for that purpose.

Nonetheless, there is a case for arguing that the method described in Bigwood's book is not necessarily appropriate in all respects for the analyses of non-state types of jural order. The positivist assumption of 'law' and 'legal' as equivalent to state law, however, obscures this insight. Yet it is the case that the public-jural nature of state (private) law *presupposes* these private jural orderings in virtue of the normative integrating function it performs with respect to these other non-state jural orders. Significantly, the latter include the bilateral private 'ordering' of the institution of contract as a 'jural instrument' for private regulation of economic bargaining in which market transactions consist.

I will have more to say about the legal ontology on which the above view of the relation between state law and other types of 'law' rests. But for the moment I want to draw out the epistemic implications of the pluralist point for the method of legal analysis.

Presumably, if there are more legal orders than state law of which the discipline of law is required to give an account, then, just as it is the case with the method for analysing the public formations of state law and its formal doctrines, so too for the frequently less formal orderings of this 'private' (non-state) law:¹⁸ the method of analysis must be fitted to its subject matter according to the inductive-deductive approach advocated by Bigwood for his analysis of contract law.

This point is amply demonstrated in Bigwood's own study. Though the book's major objective is to provide a 'satisficing' conceptual account of the state law (of contract) in the area of unfair dealing pertaining to contractual formation, the function of contract law in general as a form of public-legal regulation of the private ordering of contract as a *jural* instrument of the 'private'¹⁹ parties would require the author to give some

¹⁸ I am grateful to Stephen Revill, Senior Partner, Bell Gully, for pointing out, in the context of information technology regulation, the greater practical importance of private regulatory codes, for example, in IT related transacting and in the management of information that provides security of information and protects privacy interests, as compared with statutory codes such as the *Electronic Transaction Act 2002* (NZ) and other legislative 'requirements' to which that Act refers.

¹⁹ I do not overlook the increasingly common phenomenon of one or both of the parties being public institutions and organizations. Whilst this phenomenon may affect the applicable norms (private and public legal), or if not the type of norms, then public law policy considerations accompanying the application of private legal norms of contract, the 'co-ordinational'

account of this private ordering as a jural (normative) sphere distinct from the (state) law of contract. A descriptive-normative ('ethical' and 'legal') account of bargaining and contract is indeed contained in the chapters on bargaining and contractual justice. However, in part,²⁰ owing to the positivist assumptions within both his explanation of the 'legalist' method and contractual justice, the jural plurality of this state of affairs and its methodological implications are obscured.

Is it possible then to give a *general* account of conceptual-theoretical analysis that encompasses the many types of jural order, not confined to state jural orders, which complex contemporary societies contain? If so, how then, in general terms, would we characterise the method of this analysis of law, allowing for individual articulations of that method adapted to the type of jural order for which the analysis is required? Surely, Bigwood has already gone some way towards articulating that in terms of the inductive-deductive approach and the proper use of philosophy and the various relevant academic specialist disciplines already mentioned. But I would propose that this articulation requires further elaboration in the light of the pluralist point I have been labouring.

The author of this book has nothing explicitly to say about jurisprudence, as such, and its relationship to doctrinal legal scholarship in general or to the area of contractual legal doctrine in which he specializes. This is slightly curious because a distinguishing feature of this book is what can only be described as its jurisprudential foundation provided in the first half of the work. He does provide however, as has already been observed, an account of the manner in which he has drawn upon other disciplines. Philosophy (Goodin, Wertheimer et al) provides the initial conceptual account of exploitation, albeit modified for doctrinal legal purposes, and supplemented by the insights of other specialist disciplines. But is not Bigwood's description of his method employing these non-legal disciplines a particular instance of jurisprudence applied to a specific area of (state) law? Jurisprudence (in its theoretical sense) is the orientation of philosophy towards the 'legal' or jural dimension of human experience.²¹ By naming

character of the contract relationship as a specific type of jural relationship remains the same.

²⁰ 'In part' because the obscuring of this jural plurality is also importantly attributable to Kantian assumptions relating to the nature of morality and its relation to law, most clearly expressed in the chapter on the ethics of bargaining. See below 'The Jural Aspect, Plural Jural Orders and Bigwood's Conception of Bargaining Ethics' for an alternative view of the relationship between law and morals.

²¹ I have provided a more detailed 'reformational' view of jurisprudence in an unpublished paper (Alan Cameron, 'The Encyclopedia of the Science of Law: A Provisional Assessment of the Legal Philosophy of Herman

the field of theoretical inquiry we can adopt a more positive attitude towards the disciplinary role of philosophy than Bigwood conveys. The danger of applying philosophical insights to law does not lie in the inherent highly abstract nature of philosophy itself but in a conception and/or practice of philosophy that is disconnected from the many viewpoints or angles of approach that are represented in the different disciplines.

On the one hand, I am suggesting *good* philosophy is always connected to, and draws upon, a multiplicity of disciplinary insights in order to provide an integrating theoretical account of the relationship between the different disciplines and their distinctive disciplinary concepts that can in turn serve as a basis for further articulation of specific disciplinary concepts, including the disciplinary concepts of law. Good philosophy then is not as inherently distant from disciplinary insights as Bigwood might be taken to imply. On the other hand, specific disciplines, including law, already assume a greater abstractive 'distance' from the concrete subject matter on which they focus than is commonly understood. And it is this abstraction, on which the discipline depends, that points to its necessary connection to philosophy as the (theoretically abstracting) 'discipline of the disciplines'.²²

I can now make the connection between my earlier idea of plural jural orders and the relationship between philosophy and the non-philosophical special disciplines, including the discipline of law. The key idea here is that of ('ontic') aspects of concrete social reality, one of which is the jural (normative) aspect.²³ The notion of plural jural orders I have in

Dooyeweerd' (2004)), comparing it with Neil MacCormick's 'Four Quadrants of Jurisprudence' in Werner Krawietz, Neil MacCormick and Georg Henrick von Wright (eds), *Prescriptive Formality and Normative Rationality in Modern Legal Systems: Festschrift for Robert S Summers* (1994) 53–70.

²² A description taken from the title of a forthcoming book on the nature of philosophy by D F M Strauss (publisher: Peter Lang). The account of the relationship between law and philosophy contained in this paper follows closely that account and the theoretical writings of Herman Dooyeweerd on which Strauss bases his own approach. I am indebted to Professor Strauss for providing me with a draft of his book.

²³ The theory of normative (and non-normative) modal aspects of reality in which the idea of the jural aspect is found, is one of the main theoretical pillars of the late Dutch Christian philosopher and jurisprudent, Herman Dooyeweerd. His mature general philosophical systematics are found in Herman Dooyeweerd, *A New Critique of Theoretical Thought* (1997). The application of the modal theory and other key elements of Dooyeweerd's reformational 'Philosophy of the Cosmonomic Idea' are found in his jurisprudential 'notes' prepared for his students during his tenure as

mind presupposes an irreducible universal (normative) dimension of concrete societal functioning (jural aspect) on the basis of which the special disciplinary enterprise of law adopts its distinctive conceptual focus in respect of a potentially unlimited subject-matter.

Within this jural aspectual orientation, law, as a special academic discipline, is itself incapable of giving an explicit theoretical account of the normative jural aspect and its connection with all non-jural aspects of human experience. The very nature of any scholarly discipline (other than philosophy) is to presuppose some theoretical-philosophical account (conception) of its aspectual orientation that permits it to carry out its specific disciplinary investigations. The question ‘what is law?’ is a general philosophical question. It becomes a question to be answered within the philosophy of law (jurisprudence)²⁴ that accounts for the jural aspect of experience in its coherence with all non-jural dimensions (economic, ethical, aesthetic, social etc) from the specific standpoint of that jural dimension. The task of jurisprudence involves giving an account of a concept of law that embraces an interconnected framework of specific basic jural concepts, which the discipline of law employs, in order to provide an insight into the way human activity functions within that jural aspect (for example, but not only, judicial case law decisions and reasoning). Because the discipline depends upon those concepts, which in turn depend upon a conceptualising abstraction of the jural dimension from a multi-dimensional *concrete* social reality, every disciplinary analysis of jural phenomena, such as the doctrines of unfair dealing, itself presupposes an abstraction of the jural dimension from the subject matter it examines. It is this abstraction or *distinguishing* of the jural from the non-jural that provides the specifically jural orientation towards the subject-matter it investigates and explains.

The Jural Aspect, Plural Jural Orders and Bigwood’s Conception of Bargaining Ethics

The specific conception of the legal dimension that is presupposed in the implicit abstractive nature of the legal discipline becomes directly relevant

Professor of Law in jurisprudence at the Free University of Amsterdam, 1926–65. These are currently being translated into English and published in several volumes as *The Encyclopedia of the Science of Law* [trans of: *Encyclopaedie der Rechtswetenschap*] of which only Volume One, *Introduction* (Robert Knudsen trans, Alan Campbell ed, 2002 ed) has appeared. The systematic volume containing the basic ‘elementary’ and ‘complex’ concepts of law is the next of the volumes to be published.

²⁴ The question ‘what is exploitation?’, I would argue, is also a philosophical question to be answered *within* the philosophy of law under the pluralist conception of law arising from the idea of the universal jural aspect.

to a consideration of Rick Bigwood's study when we turn to his chapter on bargaining ethics. In this first substantive chapter there is already presented to us a view of the relationship between the jural, ethical and economic aspects, with specific reference to the bargaining-contract context. This perspective presupposes a conceptual-theoretical abstracting from the concrete social datum that provides the foundation for a particular conception of contract and contractual justice found in subsequent chapters.

This chapter provides an account of bargaining within its 'market' context that views that activity as *typically economic*, though the focus of the author as legal doctrinalist is on the *ethico-jural* dimensions of the concrete social phenomenon of bargaining. The disciplinary concern of the author is not with the economic aspect that typifies bargaining but with its normative jural and ethical 'regulative' aspects. The pluralist view adopted by this commentator, that these dimensions are universal throughout the diversity of human societal contexts, is fully consistent with Bigwood's requirement for a descriptive-normative account of contract-related bargaining ethics that identifies *typical* normative-regulatory characteristics specific to that economic context.²⁵ Bigwood's account then provides a perspective on the distinctive (*typical*) way these universal aspects display themselves in the particular bargaining-market context. Hence his adoption and adaptation of Norton's 'operational' or 'functionalist' theory of bargaining ethics. The process of bargaining has the object of producing a mutually beneficial economic outcome. The contract as a kind of 'private ordering' is a 'jural instrument' for facilitating that process and its economic outcome. Hence Norton's processual account of bargaining ethics, with some modification, is well suited to support a processual theory of contractual justice articulated in subsequent chapters.

Where the boundary between the ethical and jural dimensions is to be drawn is undoubtedly the key to the difference between our two conceptions. If for the moment we were to accept a radical proposal to completely abandon an identifying of the jural with the 'legal' in the most commonly understood sense of state law, then we might be able to do justice to Bigwood's insight that a contract is a jural instrument, a private ordering of inter-party bargaining, in an economic context. Let us assume here that 'jural' in the first place is to be understood as *not* referring to some state legal sanctioning of the private ordering but to the private ordering of the parties themselves, and then, not even to the subjective ordering itself,

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I concur with his caution towards any one of the dominant ethical theories (deontological and consequentialist) as failing to capture these context-related typical features. My caution arises, not from a suspicion of ethical theories *in toto*, but with the particular theories in question that fail to grasp adequately the distinctive normativity of both the ethical and, by implication also, the jural aspect.

but to a universal normative dimension to which the ordering of the parties is a subjective response. And further, if we were to closely examine the normative structure of this jural dimension as it expresses itself *within* that private ordering, we might find that what Bigwood (and Norton) describe as the *ethical* norms operative in the bargaining context are for the most part the same as, or similar to, *jural* norms operative within the contract that gives them expression.

The kinds of bargaining norms that constitute what might be called processual bargaining justice or fairness are on this conception jural norms that can now be more clearly distinguished from the truly ethical, ‘supererogatory’ or ‘aspirational’ norms which, by general consensus, lie beyond legal or ‘ethical’ justice. The ‘ethics’ of bargaining turns out to be mostly an ‘order’ of ‘jural’ norms *typified* by its economic context. The contract as a jural instrument ‘opens up’ this economic bargaining practice *with respect to its jural aspect* by formalizing that normative jural aspect of the bargaining relationship in the contract. The contract is a jural instrument that captures in a more definitive and durable form the parties’ mutually agreed outcome, embodying the ‘just’ balance they have struck with respect to the respective economic interests that each is ‘legitimately’ pursuing through the bargain and its contractual outcome.

This conception of the jural aspect and its relation to the ethical and economic aspects in the market-bargaining context also gives a clear basis for Bigwood’s insistence on the need for supplementation of the operationalist bargaining ‘ethics’ with societal (culturally contextual) ethico-jural normative requirements specified in the concept of the ‘reasonable expectations of the parties.’²⁶ The private, bilateral (‘co-ordinational’) economic ordering, which expresses itself formally in the contract, arises from an original private jural competence residing in the parties that does not owe its origin to the public state authority.²⁷ However

²⁶ Bigwood, above n 1, 50 and following pages.

²⁷ I follow Herman Dooyeweerd’s theory of sources of law in identifying the contract as a non-state (private) source of law distinct from the state law (of contract) that regulates this private jural ordering. This can be demonstrated from a close examination of the courts’ stance with respect to contract formation doctrines. For example, consider the central place given to the concept of the parties’ *intention to be bound* in the formation of the contractual agreement. My conviction is that only the pluralist theory of legal sources proposed here is able to provide a sound theoretical basis for an account of the jural concept of intention to be bound and, in the process, help to resolve some conceptual conundrums, including providing a clear conceptual distinction between intention to be bound and intention to create legal relations. The so-called paradox of consideration as a distinct jural element in the requirements of formation is another conceptual problem for

it can hardly be denied that the effectiveness of contract as a market instrument to a significant extent²⁸ depends upon external sanctioning and regulation by the state in the form of the law of contract.

What is under-emphasized, owing to positivist prejudices, in the commonly accepted private law–public law categorization, is that *every* ‘positivization’ of a jural norm by the state *including the entirety of the ‘private’ (state) law of contract* bears a public legal character owing to its public-jural source. In order, therefore, to appreciate the typically public-legal function which the state law of contract performs in relation to the economic institution of contract,²⁹ a sharp distinction between two basic types of jural order (law) is required: (i) the truly private bilateral *economic type* of jural order constituted by the parties’ contract; and (ii) the state law of contract comprised largely of the rules, principles and doctrines which regulate that private jural ordering in what is commonly called ‘private law’. Such a distinction precedes the distinguishing of internal sub-types or ‘forms’ of state law as different kinds or forms of ‘public law’. In this perspective, the state law of contract, which regulates the private relationship of contract (hence ‘private law’), is one sub-type or sub-category of state (‘public’ law).

Conclusion

An important reason for both significant similarities *and* differences between a reformational conception of contract, some elements of which I have merely outlined, and Bigwood’s liberal conception of contract arises from a common historical juridical source. Legal liberalism draws heavily on a legal history powerfully influenced by Christian ethical and legal thought which is concretely expressed in the continuing presence of principles and concepts of legal justice associated with the former Equity jurisdiction, and in other ethico-jural principles found within the strictly common law jurisdiction.³⁰ Bigwood’s advocacy of a tort-like pre-formation concept of contractual ‘neighbour’ care is an example of how liberalism continues to draw on the normative power of that Christian heritage whilst cutting itself off from a subjective religious commitment in its theorising.

which this pluralist perspective can provide clarification.

²⁸ But not always and everywhere, if we accept the findings of Hugh Collins in *Regulating Contract* (1999).

²⁹ A comparison with other ideas of a public basis for contract law such as found in Peter Benson, ‘The Idea of a Public Justification for Contract’ (1995) 33 *Osgoode Hall Law Journal* 273 is called for here.

³⁰ The writings of Harold Berman provide ample historical support for this factual assertion in respect of the Western legal traditions.

My criticism of the legal liberalist tradition in favour of an alternative theoretical conception is grounded on a conviction that, by cutting itself off from the religious root of the historical source of many fundamental jural principles, the liberalist conception deprives itself of the living source of these principles. This commentator proposes a radical move back to the religious roots of the historic Christian intellectual sources of law and ethics for a theory of law which can provide an alternative to Bigwood's liberalist, autonomy-based, positivist theory of contract and contractual justice used to sustain his valuable contribution to the development of law and legal doctrine.³¹

³¹ I am not alone in making this call. Andrew Phang has also advocated a return to a Christian theory of law as the basis of legal principles in the form of a reformed natural law theory. See Andrew Phang, 'American Jurisprudence through Christian Eyes – Beyond the Nightmare and the Noble Dream' (2004) 81 *University of Detroit Mercy Law Review* 867. Whilst my approach also rests on a Christian-biblical world view and advocates a 'divine law' ('cosmonomic') theory of law, it rejects the rationalist assumptions of the natural law tradition implicated in the qualifier 'natural'.