Two Distinctions in Bigwood's *Exploitative Contracts*

TIM DARE[+]

Rick Bigwood's *Exploitative Contracts*[1] takes on two challenging tasks, and would be a valuable contribution if it made modest progress on either of them. In fact, Bigwood's excellent book makes more than modest progress on both. The first task is the development and presentation of a complex theoretical account of contract and contractual exploitation. The account draws upon an impressive range of philosophical sources – from Aristotle and Kant to Rawls – to defend a procedural, as opposed to substantive, model of contractual justice. What settles whether a contract is just, and so enforceable, is not how it distributes benefits and burdens (and whether that distribution is just by the lights of a theory of distributive justice), but how the contract came about. More particularly, whether a contract is exploitative depends upon how one party has treated the other in the process of generating the contract: 'legal contractual exploitation consists in an abuse of contracting power in the pre-formation bargaining relationship'.[2] Bigwood's second task is the application of this theory to provide a comprehensive and authoritative treatment of the various legal doctrines under which a contract may be set aside as exploitative, principally unconscionable dealing,[3] economic duress,[4] and undue influence.[5] On Bigwood's account, these doctrines all require the deliberate use of a position of strength to take advantage of a weaker party: all require exploitation as he defines that phenomenon. The mere possession of an advantage will not do. Bigwood's extended treatment of these lines of doctrine – over some 250 pages in the second half of the book – is itself a remarkable job; a valuable contribution in its own right.

These remarks are principally concerned with Bigwood's theory of contract and exploitation, rather than with his analysis of contract doctrine. Bigwood acknowledges that his theoretical account assumes a liberal ideology which gives priority to the protection of the individual as an

---

+ Department of Philosophy, University of Auckland.
1 (2003) ('*Exploitative Contracts*').
2 Ibid 197.
3 Ibid chapter 6.
4 Ibid chapter 7.
5 Ibid chapter 8.

autonomous and independent moral agent.[6] The conception of contract which flows from this ideology accepts as just any distributive outcome which results from voluntary exchange.[7] There is an obvious objection to the conception, which Bigwood notes, and which lies at the heart of much post-Rawlsian political philosophy. A model which accepts as just any distribution arising from voluntary exchanges is forced to tolerate distributions reflecting pre-existing inequalities which have affected the bargaining process. According to the objection the antecedent unequal distribution of natural endowments (intelligence, strength, and the like) and social contingencies (such as wealth and social position) result in 'unfair' bargaining outcomes, no matter how unobjectionable the bargaining processes. 'Given such conscious indifference to … the distribution of society's resources', how, asks Bigwood, 'can the common law of contract ... achieve even minimum moral acceptability?'[8]

Bigwood's treatment of all of this is fairly orthodox, though no less interesting for that (and for Bigwood, I take it, much of the payoff for this sometimes painstaking exposition comes in the latter, doctrinal, part of the book). However, Bigwood offers a curious response to the question raised at the end of the previous paragraph, suggesting that the liberal conception of contract can offer at least an indirect answer by way of two distinctions with a long history: that between corrective and distributive justice and that between constitutive and practice rules. I have two worries about this strategy. First, I am not always satisfied with Bigwood's account of these distinctions, and second, I think Bigwood occasionally gives way to the temptation to offer elaborate theoretical models as though they were *in themselves* an adequate response to substantive disagreement.

Let me try to cash out those worries a little. For the most part Bigwood's account of the distinction between corrective and distributive justice is an admirably clear guide through familiar territory. The latter seeks justice in distributions or outcomes, and requires an antecedent account of what a just distributive pattern would look like. Corrective justice seeks to rectify, or correct, injustices in transactions, reversing wrongful gains and losses arising from particular dealings between particular parties. While distributive justice is concerned with whether overall distributions are just or fair, regardless of how they may have arisen, 'corrective justice is concerned only with the difference that is attributable to harm wrongfully occasioned by another'.[9] So far so good, but Bigwood

---

6 Ibid 63.

7 Or, more accurately, does not reject any distribution merely because the distribution – who has what – is unjust.

8 Bigwood, above n 1, 68.

9 Ibid 71.

adds, or finds in the corrective justice literature, something else which will later play a significant role in his model. Whereas distributive justice claims are multilateral, perhaps involving many or all of the members of a political community, he writes, corrective justice claims are distinctly bilateral. Corrective justice considers persons only as individuals, not as members of 'social wholes'.[10] But I do not think this constraint follows from the concept of corrective justice. Consider the widespread discussions about reparation to indigenous peoples. Such discussions are often carried out firmly within the realm of corrective justice, claims for compensation being grounded in allegations of past wrongs. Obviously, though, those discussions concern groups rather than individuals (albeit groups conceived as parties to the relevant 'interactions').

It might seem that Bigwood should be untroubled by such examples. Perhaps in the contractual context, parties typically are individuals rather than groups or 'social wholes', but the example suggests, first, that the concept of corrective justice does not *itself* rule out concern for groups rather than individuals. A separate argument for that conclusion is required. In addition, the example casts doubt on the force of a subsequent appeal to 'relative institutional competence' as a ground for thinking that while distributive justice should be left to the social welfare system, the liberal conception should be happy to have judges 'focus on unfairness *inter partes*, which they can easily identify'.[11] Again, it may or may not be true in the contractual context that limiting judges to matters of corrective justice ensures that they work within their institutional competence, but that will not be so because of the nature of corrective justice itself.[12]

In my view, then, the distinction between corrective and distributive justice will not itself answer 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. The distinction simply restates one of the features of the conception that gives rise to the worry at the outset.

---

10 Ibid 70.

11 Ibid 111.

12 Bigwood offers the appeal to relative institutional competence as a way of bolstering an argument I made against Anthony Kronman's influential conclusion that liberal contract was inevitably distributive: 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, discussed by Bigwood in ibid 109–11. While I am pleased to have my work discussed, for the reasons set out in the text, I respectfully decline the helpful amendment.

The second distinction that Bigwood suggests will allow an indirect answer to the worry is that between constitutive and practice rules. John Rawls provides the classic statement of the distinction.[13] Rawls points out that the justifications we give for institutions or practices may differ from — and perhaps even conflict with — the justifications we give for conduct within those institutions or practices. Consider promise. The practice of promise is perhaps most plausibly justified on consequentialist grounds: it is very useful to be able to distinguish between statements we can rely on and mere puffs, and promise allows us to do so. Rawls's targets in the 'Two Concepts' paper assumed that if the practice of promise was justified on consequentialist grounds, then whether or not particular promises should be kept was also to be settled by appeal to utility. But, responded Rawls, that was to 'fail to make the distinction between the justification of a practice and the justification of a particular action falling under it'.[14] Before promises were made, promisors were free to weigh up the merits and do whatever seemed best on the balance of reasons. Once a promise was made, however, others had grounds to believe that that sort of deliberation was over. Now, they were entitled to think, promisors had a duty to act as they had promised to act and promisees had a correlative right that they do so. The function of promise, on this account, was precisely to establish rights and duties and so to rule out certain kinds of deliberation. If this model is correct, then the appropriate justifications for conduct within the practice of promising differ dramatically from the justifications of the practice itself. We may be consequentialists when designing the institution, but build into the design a set of hard and fast rules — 'deonotological' constraints — which exclude appeal to utilitarian considerations from within the institution.

I have elsewhere argued that Rawls's distinction is enormously valuable. It allows us to see how institutions might be designed with full recourse to the rich resources of broad-based moral, economic, and political theory, without supposing that the occupants of institutional roles (promisees, promisors, lawyers, judges, doctors, etc) are entitled to appeal directly back to those broad resources when acting as role occupants. In the contractual context, I have suggested, the distinction allows us to see how distributive concerns might be reflected in institutional design, and yet issue in non-distributive criteria of contractual obligation.[15] On this account

---

13 John Rawls, 'Two Concepts of Rules' (1955) 64 *Philosophical Review* 3–32.

14 Ibid 16.

15 See Dare, above n 12, note 3, and, more generally, various papers in the legal ethics literature. Bigwood discusses my use of Rawls's distinction in Bigwood, above n 1, 75–6.

practices typically reflect compromises between reasonable, though perhaps inconsistent, substantive views about just what the practice *ought* to be like.

Broadly, Bigwood uses the distinction to a similar end. Again, so far so good, but now, I think matters begin to get a bit murky. Bigwood supplements this Rawlsian distinction with another, implying that the one is essentially a restatement of the other, between the basic structure of society (the rules of property, tax, and inheritance, for instance) and rules governing individual conduct (such as the law of contract), and goes on to map two conceptions of contract onto this latter distinction. $Contract_1$, which he says is synonymous with the free market, is part of the basic structure of society. $Contract_2$ consists of the detailed rules which individuals use to take on contractual obligation. Though depending on $Contract_1$ for its normative force,[16] $Contract_2$ functions autonomously:

> To the extent that common law judges have primary responsibility for implementing the principles of … 'particularized' interpersonal justice, they must settle any question of justice in this context solely with reference to the criteria of $Contract_2$ (whatever these may happen to be); they cannot resort directly to the justification or explanation given for the criteria in the first instance and at the institutional level ($Contract_1$).[17]

It is not clear to me that these additions and elaborations of the basic division between constitutive and practice rules are very helpful. My principal concern, however, is the same raised in respect of Bigwood's use of the earlier distinction between corrective and distributive justice, namely the directness with which he moves from descriptions of these models to conclusions in favour of his view. According to Bigwood,

> once society commits itself to $Contract_1$, $Contract_2$ *must* be allowed to operate in a largely unqualified and *nondistributive* 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

---

16 '[$Contract_2$] corresponds to the law of contract as the normative device employed to regulate particular actions falling under $Contract_1$, that is, the formation, performance, and enforcement of *particular* contractual transactions. (Of course, such actions only have normative force because they occur within and are recognized by a certain institution or practice – in this case, $Contract_1$.)': Bigwood, above n 1, 77 (emphasis in original).

17 Ibid.

> Rawls's institutional division of labour ... cannot lightly be ignored.[18]

But this seems much too fast. First, the description of the distinctions is not an *argument*. The distinctions themselves are neutral as to the content of rules at either level. Acceptance of them does not commit us to substantive conclusions, such as, for instance, the conclusion that some set of practice rules (the rules of $Contract_2$ in Bigwood's supplemented version) must be non-distributive. Nor, second, can we draw such substantive conclusions directly from observations about the broad nature of the institution or practice (the basic structure or $Contract_1$ in Bigwood's supplemented version). The point of the basic distinction is precisely that this kind of deduction cannot be made directly from the one level of justification to the other. Consider Bigwood's own example, as an illustration of this second point. In our community, on Bigwood's account, the relevant component of the basic structure, $Contract_1$ is essentially the free market. But accepting that the free market is part of the basic structure doesn't tell us very much about the detailed rules of contract ($Contract_2$). The free market is a broad church, which could (and does) tolerate remarkably intrusive rules without ceasing to be a 'free market'. Indeed, the basic Rawlsian distinction allows us to see just how a broad institution such as the market might tolerate 'unfree' practice rules, designed to promote freedom of exchange, albeit at the cost of specific freedoms in particular cases or areas.[19]

Let me give one final illustration of Bigwood's use of the basic Rawlsian distinction which I find problematic. In Chapter 2, Bigwood engages at length with Eleanor Holmes Norton's functional account of the ethics of bargaining. In short, Norton argues the ethics of bargaining are derived from its function. 'The resulting functionalism', she maintains, 'links bargaining ethics to the function they perform without assuming that the ethics that result are sufficiently aspirational in [for instance] sorting out deception and fairness'.[20] The account seems plausible. Put in Rawlsian terms, we suppose that we construct the institution of bargaining with an eye on its function, on what we want bargaining to achieve. There is of course room for argument about what that proper function is (moving goods to efficient distributions, satisfying preferences, protecting the vulnerable,

---

[18] Ibid 78 (emphasis added).

[19] Coase's theorem seems relevant here, reminding us that the freedom of the market is remarkably robust against a range of initial allocations of legal entitlements. See Ronald Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics* 1.

[20] Eleanor Holmes Norton, 'Bargaining and the Ethic of Process' (1989) *New York University Law Review* 493, 501. See Bigwood, above n 1, 37–44.

etc). As institutional designers in pluralist communities we design institutions to promote some compromise between the reasonable but inconsistent substantive views about the proper functioning of bargaining. And, as above, the practice rules so derived govern the practice, not the contested substantive views.

Given Bigwoood's sympathy for the Rawlsian model, one might have expected him to have endorsed, especially, those parts of Norton's analysis which fit nicely with the model. Bigwood questions, however, why Norton remarks that '[o]bjective functionalist criteria lack a deep moral dimension',[21] and that '[t]he ethics of bargaining ... must be reconciled with the ethics of the real world'.[22] These remarks show, Bigwood suggests, that Norton has forgotten her own observation that the ethics of process do not have fully fledged aspirational ambitions, and reveal that Norton thinks such 'process based ethics' ought to be perfectionist. But I wonder whether the apparent disagreement with Norton tells us something about Bigwood's understating of the Rawlsian model (and hence, perhaps, something about the theory of contract he bases on that model). For I think Norton must be exactly right here. It is an implication of the view that institutions and practices are based upon compromises between reasonable but inconsistent moral views, that almost everyone will think almost all of those compromises are second best, falling short of an aspirational ideal. There is nothing in Rawls's model to suggest that we should abandon moral aspirations. We should aim to have our institutions track reasonable substantive views insofar as they are able. Suppose, it became clear, for instance, that the practice of promise had come adrift from the substantive concerns which motivated the design of the practice. In these circumstances it is true both that the rules of the practice govern and define the practice – so tell us what we must do as occupants of the offices of promisor or promisee – *and that*, as occupants of the office of external critic or institutional designer, we have reason (though not necessarily sufficient reason) to change the practice rules. The model of rules sketched above does not portray a clean break between substantive and procedural concerns, only an insistence that we cannot appeal to substantive concerns from within institutions (whether we're lawyers, judges, contracting parties etc). And I think all of that seems to be more or less what Eleanor Holmes Norton thinks too.

By way of conclusion, I think some of these queries about Bigwood's interpretation and use of the Rawlsian model have an interesting implication for his own view of the theoretical part of his book. Both in the

---

21 Norton, above n 20, 450.

22 Ibid 575.

opening pages of *Exploitative Contracts*,[23] and in his contribution to this symposium,[24] Bigwood emphasizes what he modestly calls the limited scope of his book. *Exploitative Contracts*, he tells us, sets out to provide a theory of exploitation 'good enough for practical *legal* (if not perhaps higher moral or ethical) purposes'. 'It is', he writes, 'an exploitation theory ... [which] belongs to the *juridical*'.[25] Of course one can engage in more or less purely jurisprudential theorizing about legal concepts such as exploitation, describing the relevant rules and their requirements, but one cannot move into discussion of what the rules should be, or why the rules are as they are, without moving from practice rules to constitutive rules. Rawls anticipates this sort of meta-discussion: 'if one holds an office defined by a practice', he writes,

> then questions regarding one's actions in this office are settled by the reference to the rules which define the practice. If one seeks to question these rules, then one's office undergoes a fundamental change: one then assumes the office of one empowered to change and criticize the rules, or the office of a reformer[.][26]

Arguably, Bigwood does not see himself as a reformer: he offers a theory of exploitation derived from a sophisticated description of the existing practice rules. However, he is not simply working with the resources of a bit of legal practice: he is giving an account of why that practice is the way it is, how it should be understood and so on. And the resources for *that* discussion must be found beyond the narrow borders to which Bigwood owns. I don't think the project Bigwood describes in his more modest moments is especially plausible. He is occupying an office – commentator, interpreter, institutional designer – which means he neither can nor should eschew appropriate regard to substantive concerns (though of course he might tell judges, lawyers and contracting parties that they shouldn't think *they* can follow suit: they occupy different offices). And that's all to the good: he has no reason to be modest about *Exploitative Contracts*.

23 Bigwood, above n 1, 4.

24 Rick Bigwood, 'Rick Bigwood, *Exploitative Contracts*: Author's Introduction' (2007) 32 *Australian Journal of Legal Philosophy* 114, 115.

25 Bigwood, above n 1, 6 (emphasis in original).

26 Rawls, above n 13, 27.