The Audience for Rick Bigwood's *Exploitative Contracts*

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Introduction

A W B Simpson has suggested that forms of legal literature reflect underlying theories of and about law.[1] In this comment I will explore the theory underpinning Rick Bigwood's *Exploitative Contracts*[2] and then examine some of the implications that flow from his position. In particular, I will consider whether and how judges could use Bigwood's book. I will argue that the theory underpinning Bigwood's 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.

I am neither a philosopher nor philosophically inclined and in this comment I will assume, for argument's sake, that Bigwood's substantive arguments are sound. Such an assumption accords with my own reading of his book but I will leave both praise and criticism of these arguments to those better qualified to make them.

Bigwood's legal theory

In *Exploitative Contracts* Bigwood analyses the notion of exploitation as it is used in contract law. He accepts that locating his theory in the principles, practices, and discriminations of the existing legal domain will have some consequences for the theoretical framework that he establishes:

> the *legalist* nature of my theory of contractual exploitation is depicted by the fact that it is rooted, first and foremost, in formulations of positive law on the

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1 A W B Simpson, 'The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature' (1981) 48 *University of Chicago Law Review* 632.

2 (2003) ('*Exploitative Contracts*').

> subject, which by hypothesis are more likely to be contextual, temporal, and deterministic in ways that abstract non-legal theories of exploitation are not (nor usually purport to be). A legalist account of contractual exploitation thus; (*a*) seeks the criteria of an exploitation claim as they emerge, explicitly or implicitly, from relevant substantive law (taking due account of the fact that substantive judge-made law is itself typically piecemeal, indeterminate, inconsistent, and provisional); (*b*) takes the role of the exploitation concept to be determinable entirely within the framework of existing legal concepts, principles, rules, practices, etc; and (*c*) regards the normative force of a legal contractual exploitation claim ... as justifiable solely on the basis of legal principle and the authority of the state.[3]

Bigwood is at pains to note that his is not a work of economics, politics or philosophy but is, instead, a work of law.[4] He also emphasises both the 'authoritatively normative' dimension of law, a dimension that is entirely lacking in the disciplines listed above,[5] as well as the practical constraints that this imposes on overworked and fallible judges.[6] Because of these constraints the domain of the authoritative legal materials, for his purposes the judicial pronouncements on exploitation,[7] is never going to have the neat, tidy and intellectually coherent framework of, say, a fully worked out philosophical theory.

At this stage it might appear that Bigwood is carrying on the legal treatise tradition of systematising decisions and tidying up the work of busy judges, and he reinforces this impression when he notes that the book is a work of law and not economics, politics or philosophy.[8] Yet one only has to read the book to realise that he is doing something more than this. Bigwood's book is far more philosophical than the standard legal text. It is devoted to a deep analysis of the notion of exploitation, one that does reflect inchoate principles existing in case law but which is also far, far more analytically rigorous than most of the judicial formulations and analyses of the exploitation concept.

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3 Ibid 9 (emphasis in original, citation omitted).

4 Ibid 7.

5 Ibid.

6 Ibid 10.

7 Ibid 15–6.

8 Ibid 7. As Simpson has shown, in the 19th and 20th centuries the legal treatise was the vehicle for such work: Simpson, above n 1. In the second half of the 20th century this has been supplemented by writing in the periodical legal literature.

Indeed, Bigwood admits that the existing legal materials do not adequately reflect his understanding of a refined conception of the underlying notion of exploitation already existing in those materials. He argues that his immersion in the non-legal literature has convinced him that

> judges (and legal scholars) largely assumed the 'deeper logic' of exploitation, rather than elaborated it; and ... that the positive law on the subject did not present a consistent and coherent conception of exploitation across the range of doctrinal vehicles deployed for the assumed or declared purpose of regulating exploitative contracts. In fact, I came to view the regulative doctrines as themselves quite unsynchronized ... and that this was apparent both interdoctrinally (the doctrines did not always fit together well as a family order), and intradoctrinally (internal doctrinal criteria ... did not always match the anti-exploitation purpose said to be served by those criteria at the conceptual justificatory level). A two-way revision and adjustment of our intuitions, convictions, and legal practices was certainly needed, at least if we were to persist with ... exploitation as a justificatory and taxonomic concept in this area of law.[9]

Throughout his book Bigwood refers both to large scale and to particular discrepancies between the refined conception of exploitation that he has derived and developed from the legal materials, and the formulation and application of that conception at the level of particular decisions and larger doctrinal formulations. For example, in his detailed analysis of unconscionability he accepts that

> the pages of the law reports and legal periodicals are littered with accounts of unconscionable dealing that appear to reveal an irreconcilable disjuncture between formal statements of the juridical foundation of the jurisdiction and formal statements of the criteria by which the jurisdiction is to be administered in individual cases.[10]

Bigwood is happy to acknowledge that cases have been 'wrongly decided',[11] or that judges, even the highest-level appellate judges, can engage in theoretically unconvincing analysis,[12] and that the common law's dealing with undue influence has been inadequate because of an inability on

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9 Bigwood, above n 2, 14–5.
10 Ibid 237.
11 Ibid 270.
12 Ibid 297–8.

the part of the judges 'to lay down any general rule as to what will (or will not) constitute "undue influence"'.[13] Indeed, Bigwood suggests that any explication of the law in this area 'is challenged by unsurmountable imprecision and contradiction in the case law on the subject'.[14]

It may be appropriate here to emphasise the difference between Bigwood's notion of rigorous philosophical thought and common law reasoning. Bigwood's own book provides a wonderful illustration of what might be called orthodox philosophical reasoning. In this tradition basic positions are identified and each step in reasoning is carefully analysed to ensure that it follows from the base assumptions and coheres with all other steps taken in the particular matter that is being explored or expounded. In particular, various forms of logic are used to test the validity of each step in the reasoning chain and, until and unless it can be shown that each step 'follows' from the preceding one the reasoning is not accepted as convincing. 'Fudging' is not allowed; either something follows logically from the base assumptions and the preceding argument or it does not. All this takes time, of course, but philosophers are not under any formal or institutional time constraints in developing their ideas – apart, perhaps, from issues of publication for promotion and like matters.

Common law reasoning by contrast is much more free and easy. Judges make liberal use of analogy, logic, and pragmatic and consequentialist considerations in varying mixtures and with varying degrees of rigour. Common law reasoning is not designed to convince philosophers. Rather, it is a craft tradition driven by the very real need to make authoritative decisions within very severe time constraints.

To sum up, Bigwood has presented in *Exploitative Contracts* a rigorous, philosophically informed theory which explains the doctrines of contract law that deal with exploitation. At the same time, by taking cognizance of the contradictions and incoherencies contained in the cases from which the doctrines are derived, he refashions those doctrines in light of his analysis in order to create a philosophically consistent doctrinal structure. Despite his claim that his is a legalist account, his own arguments show that his project is at least as much a work of philosophical analysis as it is one of legal analysis – that is, analysis as it has been performed in the common law tradition.

For whom is the book written?

13 Ibid 378.
14 Ibid 470.

One can, I think, assume that Bigwood expects to be read by legal academics, especially those interested in contract or those who use the concept of exploitation in other areas of law. Does he expect judges to read and be influenced by his work?

I think that he does. For example, Bigwood asks the following of judges:

> my call is for judges and legal academics who apply the exploitation concept in exposition, justification, and analysis to pay greater attention (than they currently do) at the level of *conception* (rather than concept), and that they exercise care in applying, in the area of contract law in particular, any intellection of exploitation that follows upon such concentration.[15]

His description of what he wants to achieve in his analysis provides a standard against which judges can base their reasoning in this area of the law.

> What is a *credible* theory of exploitation to serve in the peculiarly legal contractual domain, accepting the principles, practices, and discriminations already immanent in that domain? By 'credible' I mean that the theory must be descriptively accurate and normatively acceptable (all things considered), but ultimately it must embody a *satisficing* conception of exploitation rather than a 'comprehensive' or 'aspirational' one.[16]

In his treatment of unconscionability Bigwood makes the following claim about the inconsistencies in the legal doctrine in this area.

> It is not always clear why on conceptual or analytical grounds these inconsistencies do or should remain among various legal systems or major British Commonwealth countries.[17]

Another example is provided when Bigwood discusses the knowledge requirement in unconscionability.

> Clearly, some linguistic adjustment is needed to the formulations currently employed by judges and jurists in respect of the knowledge requirement in unconscionable dealing cases so as to reflect the important conceptual distinction between inferred and

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15 Ibid 5 (emphasis in original).

16 Ibid 4 (emphasis in original).

17 Ibid 237 (citation omitted).

> constructive knowledge (that is, if courts want to persist with 'exploitation' as the public reason for interference with transactions in the name of that jurisdiction).[18]

In general terms Bigwood is happy to accept the necessity to explain away '[a]berrations ... [as] mistakes, compromises or exceptions' within the existing body of case law[19] and that the judges' 'formulations and criteria must be enhanced' by an understanding of the deeper and more philosophically rigorous understanding of exploitation that he expounds in his book.[20]

Quite clearly, then, Bigwood is happy with the notion that, if his conceptual apparatus does indeed cohere and does reflect the underlying philosophical notion of exploitation which he believes lies at the heart of the sometimes messy common law, this will require judges to change doctrines and to decide cases in light of his formulation. Indeed, if we consider his understanding of how one can derive a philosophically sound understanding of exploitation from an untidy and sometimes contradictory mass of legal materials, it becomes apparent that he expects a considerable amount of interchange between legal doctrine and a philosophically rigorous notion of exploitation.

> Anyone offering an interpretative legal theory must have employed, consciously or otherwise, normative criteria beyond the doctrinal data that enabled him or her to determine the basic normative ideas with the doctrinal area and to rank those ideas appropriately.[21]

In other words, according to Bigwood, one needs a theory of some sort to make sense of the mass of cases, including the inevitable contradictions and mistakes contained within them, in order to be able to choose, order and reject, if necessary, the precedents that make up the case law.[22] Because of this need for an abstract conception to make sense of the mass of legal materials,

> a process of reasoning inductively from discrete common law doctrines and determinations is unlikely to produce a fully coherent and consistent account of *any*

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18 Ibid 259.

19 Ibid 11.

20 Ibid 22.

21 Ibid 12 (citation omitted).

22 Ibid, citing Melvin Eisenberg, 'The Theory of Contracts' in Peter Benson (ed), *The Theory of Contract Law: New Essays* (2001) 218.

> judicially administered concept let alone of legal contractual exploitation.[23]

This, in turn, means that

> we must treat the principle extracted from the doctrinal data as similarly provisional – as an *approximation* of what a proper, institutionally sensitive conception of legal contractual exploitation would (credibly, at least) look like. By looking backwards, and proceeding inductively from the 'bottom up', all that we would have identified is a working draft of a concept that remains still to be synoptically 'perfected': constructed, adjusted, and revised according to some appropriate technique, the most obvious being 'reflective equilibrium'.[24]

Bigwood describes the process of reflective equilibrium as involving a two way process of comparing ordinary intuitions, convictions and judgments to the principles that can be said to underlie their structure and trying to bring the two into some form of harmony. For Bigwood the large non-legal literature on exploitation is helpful in such a process because it forces us to consider vital questions about the exploitation concept and the formulations of it that are to be found in the cases.

> Once reflective equilibrium is achieved in respect of a theory of legal contractual exploitation, the object is to then work *forwards*, deductively from the 'top down', by using the theory to identify more specific criteria or norms that should be made referable to the theory (its precepts and purposes), and to systematize, improve, and reshape the 'imperfect' legal principles, doctrines, and determinations that were called inductively in aid of the theory's initial identification.[25]

This understanding of what Bigwood expects of legal analysis leads inexorably to standards of intellectual coherence and the adoption of a method to achieve that coherence which are far removed from traditional legal reasoning. In other words, despite Bigwood's insistence that his analysis is legal, when one compares his method and its sophisticated philosophical reasoning to common law judging, it is clear that there is a fundamental difference between his work and that of common law judges. It is a difference that he recognises throughout his book. This means that Bigwood is not just tidying up the untidy reasoning of busy and sometimes

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23 Bigwood, above n 2, 13 (emphasis in original).

24 Ibid (emphasis in original).

25 Ibid 13–4 (emphasis in original).

careless judges. Rather, he is carrying out sophisticated philosophical reasoning at a level which is not to be found in the case law. The intellectual tools that Bigwood uses and the standards that he applies are the intellectual tools and standards of professional philosophers and not those of common law judges.

Bigwood's legal theory and the judges

As shown above, it is clear then that Bigwood wants his intellectual endeavour to influence the development of legal doctrines in areas that are affected by the notion of exploitation. Is this likely to happen and, if it did, what would this mean for the judges and the common law?

First, will it happen? Will judges use Bigwood's ideas in their decision-making? Bigwood has attempted to create a coherent and theoretically sophisticated intellectual structure into which and against which the existing legal doctrines that deal with exploitation in contracts can be integrated and, where necessary, modified. But, can this be done without introducing asymmetry into the law? If we limit ourselves to the law of contract it seems unlikely that the situation could long continue where in one area of contract, that involving exploitation, the judges would develop the law guided by a dense, coherent and philosophically informed framework while continuing in other areas to follow a method that has, in Bigwood's words, created 'piecemeal, indeterminate, inconsistent, and provisional' legal doctrines.[26] So, either the judges will resist the temptation proffered by Bigwood or pressure will build for the construction of similar theoretical reformulations to cover all the other areas of contract law. But, of course, this would potentially create asymmetry in the common law more generally. Just as judges would not want a contract law divided between areas that are informed by frameworks such as that given by Bigwood and those areas that rely on traditional doctrines, one can imagine that the judges will not want a 'two-speed' common law made up of a theoretically informed and influenced law of contract while the rest of the law relies on traditional doctrines and legal reasoning. Pressure will inevitably arise for similar work to be done in all areas of law.[27] If this is the case, *could* the judges take on a style of judging advocated by Bigwood?

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26 Ibid 9.

27 If, for example, and it is a big 'if', Bigwood's project coheres with Weinrib's notion of the immanent rationality of law, it would follow that Bigwood would have to accept that the whole of the private law, at the very least, would have to be conceptually connected in a coherent fashion. Ernest Weinrib, 'Legal Formalism: On the Immanent Rationality of Law' (1988) 97 *Yale Law Journal* 949, 973.

One has to have doubts about this. As a practical matter it is unlikely that busy judges would have the time to master both the law and philosophy. Extraordinary exceptions aside, to ask judges in our crowded dockets to keep up with changes in case law, legislation and the legal literature as well as establishing and maintaining professional philosophical skills and knowledge would seem to be asking too much of even the gifted, hardworking individuals who make up the judiciary. If judges were to adopt a philosophical rigour in their judging this would most likely be done by reflecting the work of philosophically inclined legal academics rather than through their own mastery of philosophical concepts and reasoning.

Secondly, what would it mean for the common law (and the judges) if they were, so to speak, to sub-contract the development of the common law to philosophically literate legal academics (assuming, of course, that there would be enough of this rarity to go around)? It would, of course, amount to a revolution. No longer would the development of the common law be driven by a caste of lawyers expert in the 'artificial reason' of the law. Instead, in ways that would parallel the civil law tradition, legal scholars would take centre stage with the judges having an important decisional but lesser intellectual role than at present. The nature of the common law would change too. It would shift from being a primarily practical, craft-based discipline to a more scholarly and intellectually rigorous one.[28]

However, it is not just a matter of time and ability or the fact that judges may have to take a back seat to professionally trained philosophers. I think that expecting judges to be philosophers confuses the nature of the professional role undertaken by common law judges. One can use the arguments of Stanley Fish on the differences between doing and thinking about doing to understand the fundamental differences between the scholarly discipline of philosophy and the craft-based practice of judging. For example, in his celebrated article, 'Dennis Martinez and the Uses of Theory',[29] Fish makes the following comparison between thinking *within* a practice and thinking *with* a practice – or the difference between doing and thinking about doing:

> To think *within* a practice is to have one's very perception and sense of possible and appropriate action issue 'naturally' – without further reflection – from

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28 See, for example, P S Atiyah, *Pragmatism and Theory in English Law* (1987); Meir Dan-Cohen, 'Listeners and Eavesdroppers: Substantive Legal Theory and its Audience' (1992) 63 *University of Colorado Law Review* 569; Richard Posner, 'Legal Scholarship Today' (1993) 45 *Stanford Law Review* 1647.

29 (1987) 96 *Yale Law Journal* 1773.

> one's position as a deeply situated agent. Someone who looks with practice-informed eyes sees a field already organised in terms of conspicuous obligations, self-evidently authorized procedures, and obviously relevant pieces of evidence. To think *with* a practice – by self-consciously wielding some extrapolated model of its working – is to be ever calculating just what one's obligations are, what procedures are 'really' legitimate, what evidence is in fact evidence, and so on. It is to be a theoretician.[30]

The craft-based tradition of common law judging clearly constitutes such a practice within an interpretative community of deeply situated individuals with a common store of knowledge (the cases in olden days and today a mixture of cases and statutes), a common method (the ramshackle, analogy-based form of reasoning peculiar to the common law), and broadly accepted notions of what is right and acceptable and what isn't. In Fish's terms, theory plays a role within this tradition as the representational means of communicating reasons for decision. Judges give reasons and those reasons 'work' within the accepted notions of the common law. They do not convince when examined from a philosophical or, indeed, from any scholarly perspectives that reject the standards and beliefs of the common law. Thus, for example, Legal Realists, Critical Legal Studies proponents, Feminists, Law and Economics scholars, Postmodernists and the like have berated the common law judges for their unstated assumptions, the contingency of their reasoning and the generally untidy appearance of doctrines. But, as Fish argues, any practice will display such features when evaluated by another interpretative community whose standards are underpinned by a different set of both stated and unstated assumptions.

As we have seen, Bigwood is particularly concerned with the inconsistencies and sometimes garbled reasoning that define the common law's treatment of exploitative contracts. Doesn't this matter? Doesn't it matter that lack of theoretical rigour leaves us with a practice that is ramshackle and inconsistent? Fish denies that this is a problem. He makes this clear in response to Roberto Unger's claim that the lack of theoretical underpinnings in the common law means that the law is simply 'an endless series of ad hoc adjustments' and 'a collection of makeshift apologies'.[31]

> The question I would ask is 'makeshift in relation to what?' Surely not in relation to the pressures and urgencies that make a solution satisfying or an adjustment helpful. The answer, as we have already

30 Ibid 1788 (emphasis in original, citation omitted).

31 Ibid 1799, quoting Roberto Unger, 'The Critical Legal Studies Movement' (1983) 96 *Harvard Law Review* 561, 572–3.

> seen, is makeshift in relation to a description of our several and various actions which would show them to follow from a single set of abstract principles, from a theory. But what that means is that 'makeshift' and 'ad hoc' are accusations not of our practices as they pursue their several goals, but of our practices as if it were their single goal to be available to a philosophical description. But if our practices had that goal, they wouldn't be our practices. They would be philosophy ... It is hard to imagine why agents genuinely committed to a practice would hand over responsibility for judging it to some other practice, especially to a practice that takes place almost exclusively in college classrooms.[32]

It is not surprising then that Fish criticises calls for philosopher kings and philosopher judges.

> Philosophers, after all, are like anyone else; they want people who don't do what they do to believe that what they do is universally enabling. They want us to believe that the only good king is a philosopher-king, and that the only good judge is a philosopher-judge ... I don't know about you, but I hope that my kings, if I should ever have any, are good at being kings, and that my judges are good at being judges[.][33]

Of course, one could add that Fish's position need not be as abstract as he seems to imply. He is too much the postmodernist (or cynic, or both) to attach much importance to history and the lessons it offers. All interpretative communities are not alike; they may differ in utility to society, they may embody values and beliefs that are more or less attractive and they may have differing heritages and trajectories of development. There are historical and constitutional reasons for seeing the interpretative community that makes up the common law as more than just another community with its own particular practice, beliefs, standards, and so on. The common law has a historical heritage of many centuries' duration through its role as the established and accepted mechanism for state resolution of private disputes and vindication of rights. Such an historical justification for being is unusual and gives the traditions, practices and beliefs of the common law a link to the here and now which a purely abstract or theoretical interpretative community can never have. Similarly, the fact that the common law is and has been the state's tool for the resolution of disputes and vindication of legal rights confers constitutional status on the common law and the interpretative community that inhabits its

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32 Fish, above n 29, 1799.

33 Ibid 1800.

world. History and popular acceptance have made the common law part of our constitutional structure.

Fish's analysis of interpretative communities is so abstract he ends up ignoring history and constitutionalism. One can agree with Fish that theory and practice differ and that criticism of a practice of one interpretative community by the theory or practice of another misses the point. But our history is contingent. The common law that we have inherited has attached us to a tradition of western and, particularly, British constitutional and legal thought. This history means that we cannot choose, or discard, the common law as one might a pair of shoes. In trying to understand the role of common law judges the lessons to be learned from Fish are not abstract; rather, they apply to an interpretative community with longstanding historical and constitutional claims to its existence and importance.

To the extent that Bigwood's project threatens the continued existence of this interpretative community and its practices, one has to ask whether the consequences of such a change need to be considered and evaluated and this leads, inevitably, to asking whether the common law is worth preserving.[34]

Conclusion

Bigwood's ambitious book tries to marry the craft of the common law with the scholarly discipline of philosophy. While I will leave it to others to determine whether he succeeds in his purely philosophical investigations, I would be surprised if any reader did not learn an awful lot about contract and the exploitation concept from reading this book. But, since Bigwood is quite explicit in demanding that judges adopt what I see to be a philosophical approach to judging, it is appropriate to consider the implications that flow from this position.

Put bluntly, I do not think that common law judges have the time, inclination or skills to do what Bigwood wants them to do. If their judgments were to reflect the consistency and sophistication demanded by Bigwood this could only be done by, in effect, passing on the role of developing the common law to philosophically equipped legal scholars. The reality is that there are not enough such scholars for this to happen. But even if there were enough of this type of legal scholar available, it is difficult to believe that the common law judges would meekly pass on their historical role of guardians of the common law to others.

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[34] I have discussed this issue in greater detail in John Gava, 'Another Blast from the Past or Why the Left Should Embrace Strict Legalism' (2003) 27 *Melbourne University Law Review* 186.

And nor should they. Until and unless a convincing case is made that the common law tradition has run out of puff, or that there is an incontrovertible case for moving to a scholarly domination of the common law, there is no reason to ignore the historical and constitutional arguments in favour of the craft-based and judge-dominated common law.