Critical Contract Law in Australia

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Introduction[1]

In a recent article Mr Justice Priestley described contract law as a 'burgeoning maelstrom'.[2] The article encapsulated the sense of change and uncertainty that seems to have affected many of those who write about, practice in or adjudicate upon contract disputes today. One can certainly sympathise with the judge when he noted that the literature on contract theory is accumulating beyond the power of an ordinary person to keep up with; a problem that is compounded by the differing uses to which theorists put apparently settled terms.[3] Already in its short history this Journal has published a comprehensive overview of contract theories by Brian Coote[4] and a scan of Professor Coote's footnotes alone demonstrates the diversity of recent writing on the subject.

Professor Coote's proposition is that contracts can be understood as distinctive coherent entities if one realises that their essence is the reciprocal exchange of assumptions of legal contractual obligation.[5] With respect, this hardly smoothes the problems away. The beguiling but circular theory that contract is simply about the assumption of contractual liability tells us nothing about when judges will say that the liability has been assumed,[6] what judges will treat as an assumption[7] nor when 'near-contracts'[8] will be discovered. This formulation of 'the essence of contract' seems to us no more compelling than competing formulations such as will, promise, exchange or reliance theories, although it does have the virtue of elegance.

The purpose of this article is not to put forward a rival 'explanation' of contract law. In fact, we are open to the view (*pace* Professor Coote[9]) that contract doctrine can presently be described as incoherent; as merely a

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1 We owe thanks to various colleagues who have commented on earlier drafts of this article, in particular Stephen Bottomley, Paul Finn and Nick Seddon.

2 Mr Justice Priestley, 'Contract—The Burgeoning Maelstrom', (1988) 4 *Aust Bar Rev* 202.

3 Priestley, above, n 2 at 205.

4 B Coote, 'The Essence of Contract', (1988) 1 *JCL* 91 and 183.

5 Coote, above, n 4 at 193.

6 How, for example, will it explain the way in which the three High Court judges sitting in *MacRobertson Miller Airlines Services v Commissioner of State Taxation (WA)* (1975) 133 CLR 125 gave differing analyses of an everyday airline ticket.

7 The intention to create legal relations cases such as *Todd v Nichol* [1957] SASR 72 suggest that the promisor's assumption of liability is determined in the light of the promisee's actions. In turn this suggests that assumption may simply be a retrospective justification for reliance protection.

8 Coote, above, n 4 at 201.

9 Coote, above, n 4 at 184–5.

collection of responses to particular disputes[10] organised around certain ideals that at any time might subvert one another. Accordingly, the search for an essence, in the sense of a doctrinal constant, cannot be fruitful. This does not mean that theoretical reflection on contract law is doomed to fail, however. It simply means that elements of a theory cannot be found by relying solely on doctrinal categories.

Our present purpose is a cautious one, although this might surprise those readers who regard critical legal studies (hereafter 'CLS') and caution as mutually exclusive. Our aim is to introduce readers to CLS by probing a claim that Australian contract law is at some kind of fundamental turning point. For such a claim to be persuasive, we say, it needs to offer some account, going beyond mere description, of an earlier contract law. In that way we have a benchmark. The claim also needs to offer a theory containing conceptual apparatus that will help us distinguish between radical change and the kind of temporary and random adjustment of doctrine that always occurs in a legal system. If the theory fails to provide such an apparatus then we are left essentially with data in the form of case law but with no real way to interpret its significance. In effect, we need some apparatus in order to make a substantive comparison with what went before.

The structure of the article is as follows. In the next section we describe briefly the alleged crisis in Australian contract law and present a standard, plausible explanation of it. In a search for a more philosophically grounded perspective we turn to an example of CLS writing on contract law which purports to lay bare the core moral issues and to expose the argumentative techniques used by lawyers to deal with them. We identify a problem in the failure of CLS to reconcile these grand claims about the value basis of contract law with its radical position on the indeterminacy of law. It is paradoxical, at the least, to suggest that contract law is simultaneously indeterminate and yet clearly directed by certain values. Accordingly in the fourth section we look briefly at the indeterminacy thesis and suggest modifications which allow it to embrace both regularity and unpredictability. Finally, we look at one major High Court decision, said to form part of the turning point, and apply this modified version of critical theory to it. We conclude that the choices made by the High Court in *Waltons Stores v Maher*[11] were choices available in doctrine for some time. Whilst regular repetition of these choices would signal a real break with classical thought, our theory of legal reasoning suggests that such repetition is not inevitable.

10 Some recognition of growing particularism has been given by judges. Mr Justice Priestley, above, n 2 at 219, refers to the increasing tendency for courts to decide cases on the basis of what particular facts require to produce a 'reasonable outcome'. Sir Anthony Mason in 'The Use and Abuse of Precedent', (1988) *Aust Bar Rev* 93 at 95, refers to 'an increasing emphasis often media inspired on the importance of the courts arriving at fair and just results in particular cases'. The Chief Justice, as co-author, has speculated that the future of contract as a unified body of rules is limited, see Sir Anthony Mason and Stephen Gageler, 'The Contract' in *Essays in Contract*, P D Finn (ed), Butterworths, Sydney, 1987 at p 33.

11 (1988) 164 CLR 387.

The Crisis in Australian Contract Law and the Demise of Legal Formalism

Claims to the effect that Australian contract law is entering a period of crisis, in the literal sense of a turning point or time when a decision is called for, are increasingly being made.[12] To Finn, for example, Australian common law as a whole is in a watershed period and by way of illustration he suggests that consideration is under seige and privity has taken a mortal blow.[13]

The decision of the High Court in *Waltons Stores* in 1988 usually features prominently in any catalogue of recent upheavals.[14] It was held there that words and conduct during negotiations gave rise to liability even though no contract eventuated and no tort was established (s 52 of the Trade Practices Act 1974 apparently going untested). The liability was found in promissory estoppel. By using it as a sword not a shield[15] the primary convention whereby Anglo-Australian law had kept promissory estoppel and contract apart was abrogated and the future role of consideration as the primary sign of liability has been thrown into doubt. Of course, *Waltons Stores* is not the only aspect or illustration of the supposed turning point[16] but it is certainly a highly visible one and we hear that it has caused concern amongst senior commercial practitioners about how they can now predict when morality, the market and the law will be brought together.

It is tempting to attribute this supposed watershed in Australian contract law wholly to changing social and judicial attitudes about business practice. But there may also be a broader backcloth in the development of Australian law and legal reasoning generally. The divergence of Australian and English law has recently become a theme of the Chief Justice, Sir Anthony Mason,[17] and he has noted examples in tort and equity which he suggests illustrates an emerging Australian common law. He has predicted that the 'independence of Australian contract law will become more pronounced as Australian judges shape the common law of contract to accord with Australian circumstances, needs and values'.[18]

The Chief Justice has also been remarking on legal reasoning. This might be due to the need to explain how divergence and the system of precedent can coexist.[19] Sir Anthony, and other judges dealing with this theme,[20] tend to

12 For an interesting discussion see M P Ellinghaus, 'Towards an Australian Contract Law' in *The Emergence of Australian Law*, M P Ellinghaus, A J Bradbrook and A J Duggan (eds), Butterworths, Sydney, 1989.

13 P D Finn, 'Commerce, The Common Law and Morality', (1989) 17 *Melbourne ULR* 87.

14 See, for example, C J Rossiter and M Stone, 'The Chancellor's New Shoe', (1988) 11 *UNSWLJ* 11 at 38.

15 E Clark, 'The Swordbearer Has Arrived: Estoppel and *Waltons Stores Interstate Ltd v Maher*', (1987) 9 *U Tasmania LR* 68.

16 Other examples are *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 (unconscionability); *Trident General Insurance Co Ltd v McNeice Bros Pty Ltd* (1988) 165 CLR 107 (privity) and *Taylor v Johnson* (1983) 151 CLR 422 (mistake).

17 See, for example, his Wilfred Fullagar Memorial Lecture, 'Future Directions in Australian Law', Monash University, 25 August 1987, p 5.

18 Sir Anthony Mason, 'Australian Contract Law', (1988) 1 *JCL* 1.

19 In Mason and Gageler, above, n 10, it is significant that the section entitled 'The Future of Contract' begins with a reference to precedent and an assertion that the law cannot be enslaved to the customs and usages of the past.

20 For an extended discussion of the influence on legal rules of values outside the legal system, Mr Justice McHugh, 'The Law-Making Function of the Judicial Process', (1988) 62

characterise recent years as the demise of formalism. Formalism, as we will see, is variously defined but a fair definition of the kind they refer to embodies claims about a gapless system of general rules from which can logically be deduced the outcome of a particular dispute without resort to justifications external to the system or consideration of the consequences of a decision. Formalism, therefore is rule-oriented and non-consequentialist. It may be contrasted with substantive models of legal reasoning which openly invite consideration of moral, social and economic factors in legal decision-making.[21]

One is naturally led to speculate about a relationship between this divergence of Australian and English contract law and the acknowledgment that formalistic reasoning has declined. Hugh Collins has argued that the classical law of contract 'represents one of the acmes of legal formalist scholarship by virtue of its clear rules and their clusters of logical derivatives'.[22] Could it be that what were previously regarded as clear rules and logical derivatives in contract law are no longer seen that way because the standards of acceptable legal reasoning have increasingly permitted the entry of external considerations? If so, then these external considerations are likely to be indigenous ones rather than imports from the United Kingdom and will lead to different outcomes from those produced by the courts in the Strand.

So much is plausible. To be persuaded that fundamental change is under way, however, one would surely need more. What is the nature of these external considerations? How do they differ from the considerations previously underlying the rules? How do they enter the system? How are they processed once they are there? More central still, what is involved in the activity of theory construction about an area of law which allows us to know that things are different now? These are difficult questions which lawyers have tended to shy away from. In a similar vein, Collins has noted:[23]

> Normally, like planets circling a star, political philosophy and the law of contracts affect each other's path without their orbits ever coinciding.

Waltons Stores v Maher is a good case to try and bring them together because, as Ramsay tells us, arguments concerning the scope of promissory estoppel or pre-contractual reliance are inherently ethical and political in nature.[24] Critical legal studies, given its preoccupations with liberal philosophy, the market order, legal reasoning and contract, seems an obvious body of theory that could develop further these hypotheses and help us know what is going on in Australian contract law.

20 (continued)
ALJ 15 and 116. This is not a purely local phenomenon. Sir Robin Cooke, the President of the New Zealand Court of Appeal, noted in 1987 that for an appellate judge 'hearing cases day by day it seems more than a decade since the pretence of legal formalism was abandoned...': see 'The New Zealand National Identity', (1987) 3 *Canterbury LR* 171.

21 J Adams and R Brownsword, 'The Ideologies of Contract Law', (1987) 7 *Legal Studies* 205 at 215. See also P S Atiyah and R S Summers, *Form and Substance in Anglo-American Law*, 1987, ch 1 for a general discussion of substantive and formal reasoning.

22 H Collins, 'Contract and Legal Theory' in *Legal Theory and Common Law*, W Twining (ed), 1986, p 136.

23 Collins, above, n 22 at 137.

24 I Ramsay, 'Contract Law and Modern Society', (1986) 24 *Osgoode Hall LJ* 449 at 450.

Critical Contract Law

A movement from within the American legal academy, CLS is something of a philosophical hybrid drawing on the theories of different traditions such as Marxism, the Critical Theory of the Frankfurt School[25] and Post-Structuralism.[26] Charting the intellectual history and origins of the CLS movement is outside the scope of this paper[27] but it must be emphasised that the movement is not a Marxist one. In fact it explicitly rejects Marxism as a framework for theorising about law.[28]

We concentrate here on a major article by Clare Dalton entitled 'An Essay in the Deconstruction of Contract Doctrine' published in the *Yale Law Journal* in 1985.[29] To our knowledge hers is one of the most sustained CLS analyses of contract law. Whilst Dalton is more overtly influenced by post-structuralism[30] and the deconstructionist method[31] than other CLS writers such as Unger[32] and Feinman,[33] she shares with them an emphasis on contradiction and indeterminacy. In this section, where we are describing generally the CLS approach to contract law, we concentrate on the idea of contradiction. In the succeeding section, where we indicate some difficulties with the CLS approach, we develop further the question of indeterminacy. Before we begin, it is fair to say that Dalton and others write in an ahistorical way. The liberalism

25 See A Hunt, 'The Theory of Critical Legal Studies', (1986) 6 *Oxford Jo of Legal Studies* 1 at 9.

26 G Peller, 'The Metaphysics of American Law', (1985) 73 *Cal LR* 1151 and D C Hoy, 'Interpreting the Law: Hermeneutical and Post-structuralist Perspectives', (1985) 58 *S Cal LR* 135.

27 See generally, Hunt, above, n 25; M Tushnet, 'Critical Legal Studies: An Introduction to its Origins and Underpinnings', (1986) 36 *J Legal Educ* 505; D Beyleveld and R Brownsword, 'Critical Legal Studies', (1984) 47 *MLR* 359 and D Livingstone, 'Round and Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship', (1982) 96 *Harv LR* 1669.

28 Many CLS writers spend time attacking some aspects of classical or scientific Marxism. See, for example, R M Unger, *Social Theory: Its Situation and Its Task*, 1987; R Gordon, 'Critical Legal Histories', (1984) 36 *Stan LR* 57; M Kelman, *A Guide to Critical Legal Studies*, 1989; D Kairys, 'Introduction' in D Kairys (ed) *The Politics of Law: A Progressive Critique*, Pantheon, New York, 1982.

29 (1984–5) 94 *Yale LJ* 999.

30 The philosophy of post-structuralism is linked primarily with the work of the French philosopher Jacques Derrida. The key idea is that liberation of the individual is intimately bound up with the use and interpretation of language. This idea is translated by post-structuralists into various methods often referred to under the general label of deconstructionism and has been very influential in literary theory. For a clear introduction see D Boyd and I Salusinszki, 'Newer than New', *Australian Society*, Dec 89/Jan 90, p 18.

31 See n 30, above. Very broadly, post-structuralists, following Derrida, would hold that by deconstructing texts one can reach the inner structures of thought. CLS are attracted to this because of the promise it holds for deconstructing legal texts and thereby reaching their value basis. Derrida is a difficult philosopher to read, especially in his later work such as *The Post Card: From Socrates to Freud and Beyond* (A Bass trans), 1987. More accessible are *Speech and Phenomena* (D B Allison trans), 1973 and *Writing and Difference* (A Bass trans), 1978. Amongst commentaries in this area the following are useful: J Culler, *On Deconstruction: Theory and Criticism after Structuralism*, 1983; C Norris, *Deconstruction: Theory and Practice*, 1982, and J Sturrock, *Structuralism*, 1986, ch 5.

32 See, for example, R M Unger, 'The Critical Legal Studies Movement', (1983) 96 *Harv LR* 561 at 616–48.

33 See, for example, Jay M Feinman, 'Critical Approaches to Contract Law', (1983) 30 *UCLA LR* 829.

they describe seems timeless, although one suspects that they are happiest engaging with ideas that pre-date the New Deal. This might be justifiable in the case of American scholars writing during the Reagan years of neo-classical libertarianism but it raises questions about applicability to Australia. We must stress, therefore, that we see Dalton as describing the broad foundations of classical contract law—an ideal type which was reflected with few variations in America, Australia and Britain during the laissez-faire era[34]—and that the value in her work is as litmus paper in identifying change here.

Dalton relies strongly on the notion of a 'fundamental contradiction': the hallmark of much CLS writing.[35] Although formulated differently within CLS, the fundamental contradiction is the idea that, at least in liberal societies, self and other can never be reconciled. One needs others in order to have a sense of self (so otherness helps constitute self) but at the same time others threaten self.[36]

Drawing on the deconstructionist techniques of the French post-structuralist Jacques Derrida, Dalton identifies tendencies within liberalism which impose structures on contract doctrine. Derrida has argued that since the 18th century and the emergence of distinctive liberal philosophy the discourse of philosophers has been marked by conceptual duality.[37] These dualities include poles such as public and private, reason and desire, form and substance or objective and subjective. Furthermore, according to Derrida, liberal discourse tends regularly to favour one of the poles. The disfavoured pole is described as the 'dangerous supplement' because it has a subversive potential. First, the favoured pole can only be fully defined by reference to the other pole (one can only define, say, private by knowing what public would be) so it contaminates attempts to rely exclusively on one pole. Second, because the dangerous supplement can never be pushed out of sight it can always be invoked unexpectedly to corrupt the normative practices that have been established around the favoured pole.

CLS ties this claim in with the fundamental contradiction. The dilemma facing liberalism is that any moral or legal code it might generate for individuals is capable of being subverted because it relies on conceptual dualities that are themselves unstable due to the presence of dangerous supplements. An extract which illustrates Dalton's position is as follows:[38]

> We live with two convictions—that we should take care of ourselves and that we should take care of others—and we lack any conceptual or instrumental scheme

34 For an interesting discussion of the ideological and doctrinal similarities between these countries, despite their differing economic circumstances, see D W Greig and J L R Davis, *The Law of Contract*, Law Book Co, Sydney, 1987, ch 2.

35 See D Kennedy, 'The Structure of Blackstone's Commentaries', (1979) 28 *Buffalo LR* 209. Whilst it is true that Kennedy, one of the leading CLS expositors, purports to have renounced the fundamental contradiction (D Kennedy and P Gabel, 'Roll over Beethoven', (1984) 36 *Stan LR* 1), Hunt, above, n 25 at 24, has argued persuasively that this was only a partial and unnecessary recantation.

36 Within CLS there seems to be a division between those who hold that the fundamental contradiction is specifically a problem of liberalism and those who regard it as part of the human condition; see Hunt, above, n 25 at 22. At the least, liberalism exalts self and individual autonomy to a greater extent than other social philosophies and arguably leads to a heightening of any inevitable contradiction between self-interest and altruism.

37 (1984–85) 94 *Yale LJ* 999 at 1007. Dalton's account is taken from J Derrida, *Of Grammatology* (G Spivak trans), 1976.

38 (1984–85) 94 *Yale LJ* 999 at 1025–6.

sufficiently persuasive in its neutrality or its appeal to consensual values to regulate when one impulse should predominate. How, then, should we determine that some self-interested behaviour is beyond the pale, but some other is not?

Contract law is crucially about voluntary associations of individuals in liberal societies and is, according to CLS, at the centre of the self–other problem. Although liberal societies do not generate a clear code of how individuals should associate, the uncertainty one would expect from moral dissensus appears to be diminished by conceptual duality, by conditioned thought processes that divide experience into dichotomies and regularly favour one side. Contract law is inevitably infected by this. It too is structured by dichotomies and devotes its energies to describing, policing and disguising the divide between self and other.[39] Dalton locates two sets of problems which stem from this divide: problems of power and problems of knowledge. If one comes up with an apparently satisfactory answer in one set, for example to a problem of power, then one runs into a problem in the other set, a problem of knowledge.

The problems of knowledge stem from the combination of liberalism's wish only to enforce actual agreements—choices that individuals have really made—with its inability to know what people intended and the absence of any known way of ensuring that the individuals have communicated their true meanings to each other. So the problems of knowledge are knowing what the parties severally intended and what intention each conveyed to the other. A common response of contract law to problems of knowledge is the objective test—that is, reliance on manifestations of intention—but this runs into one of the power problems, that state power should not be used to intervene into private contracting. The objective test amounts to such intervention, all the more so where a judge becomes convinced of what one party's actual intention had been but reckons that the other side reasonably did not read it that way at the time. To protect the latter, the state declines to enforce the actual intention of the former.

Problems of power are at least two-fold: the power of the state over the market and the power of one individual over another within the market. They stem from liberalism's desire to allow the market (rather than the state) to move wealth to the most prudent and gifted and yet not to return to the kind of power order which dominated traditional society and which liberal theory strove to break away from. In other words, liberalism has the problem that the market based on free-willing choices has the ability to destroy itself by creating a few who can override the free wills of others.

Attempts to preserve the market by restraining power, however, run into problems of knowledge and of power. How does one know when to separate hard bargaining from unfair bargaining and how therefore to place limits on concepts such as duress and unconscionability (which can be seen as state power over the market)? To put duress into operation, for example, one needs to consider individual intentions and wills but that returns us to the problem of knowing what they were. In Dalton's words, 'fleeing before the problem of power, doctrine finds itself trapped once more in the problem of knowledge'.[40]

39 (1984–85) 94 *Yale LJ* 999 at 1000.
40 (1984–85) 94 *Yale LJ* 999 at 1067.

So far, much of this may seem an obscure way of saying something that all of us know, that putting the values of liberalism into practice in a neat and predictable form raises some awkward questions to which classical contract law could not provide all the answers.[41] Dalton becomes more original, yet more difficult, when she purports to dismantle contract structures and show how they are vain attempts to deal with these problems. Contract doctrine attempts to steer between the Scylla of power problems and the Charybdis of knowledge problems by using dualities or dichotomies such as form and substance, public and private or objective and subjective. These dualities are operationalised by a series of techniques which, at the least, mask the dilemma, shunt it somewhere else in the system or postpone it for another day.

We concentrate here on the alleged form/substance duality, partly for reasons of space and partly because the consideration/estoppel conflict that surfaced in *Waltons Stores* is acted out within it. Dalton's premiss is that liberalism requires there to be a valid reason for state intervention into the market. Indeed, it needs some sign that the transaction is in the nature of a market transaction in the first place. On the other hand, liberalism's suspicion of public intervention into the private sphere makes it reluctant to allow the state to evaluate a transaction that has been entered into voluntarily. Accordingly, the doctrine of consideration in its classical version requires attention to the form of exchange rather than a more searching examination of the substance. This is encapsulated in the well-known aphorism that consideration must be sufficient but need not be adequate.

This distinction between form and substance is unstable, however. According to Dalton, to know what amounts to 'form' one must know what the substance would be. In other words, without a notion of substance one still is left asking 'form of what?' Substance is therefore a dangerous supplement to form. One cannot sidestep the difficulty by allowing the parties to choose what amounts to consideration because that raises the problem of knowing what the parties have chosen. If one takes the so-called objective test—that is, looks for the manifestation of what they have chosen—then one needs to know what one will accept as an objective referent that signifies the requisite intention. To know what is requisite, one must know the substance of what consideration is supposed to be. We have come round full circle.

Dalton's conclusion is that the only way forward is for doctrine to supplement emphasis on form by injecting a notion of substance. In other words, one cannot after all look exclusively to form. This substantive supplement could be either subjective intention (that is, allow the parties to choose their own version of consideration for this case) or objective notions of value (that is, provide state versions). Each supplementation collides, as we have seen, with a problem of knowledge or power and consequently with a liberal principle. If one turns to subjective intention there is the problem of knowing what it really was. If one determines value objectively there is the problem of the state over-stepping its proper boundary.

The favoured pole of form cannot therefore provide the answers on its own. What is more, there are strong reasons why it would be undesirable even if

41 For an illuminating discussion of different strands of liberalism underlying contract doctrine, see H Collins, above, n 22.

it were possible. Contract law needs a way of preventing uses of power which deny the market and threaten return to pre-liberal power orders. Furthermore, the law of the market is not the law of the jungle and ways must be found of preserving some minimum standards of behaviour. This points to the need for attention to the substance of transactions. One way (but only one) of paying that attention in contract law is through promissory estoppel—a doctrine which expressly looks to substance in its emphasis on unconscionability. But how can we know when to invoke substance (in this case through the generally disfavoured pole of estoppel) and depart from form (the normally favoured pole of consideration)?

Dalton, who is not the first to note that consideration and estoppel each seem to have the potential to swallow the other up,[42] argues that judges draw on a series of devices, 'a few types of feint and parry'.[43] These devices keep some distance between form and substance and tend to prioritise form. To foreshadow our own argument slightly, we can say that these techniques have operated as conventions about how lawyers should reason and they have allowed a degree of determinate application of otherwise indeterminate rules. Thus, it might not be readily apparent to an outsider (a first year law student for example) when a particular situation is correctly analysed as giving rise to an action in promissory estoppel rather than contract. In order to make that judgment, we will argue, the outsider cannot rely on some statement of the rule, but must in addition develop a sense for the conventions about applying the rule. Our extraction from Dalton suggests there are four kinds of techniques claimed, although she nowhere lists them clearly.

Privileging

Drawing on Derrida, Dalton argues that one half of a duality is regularly favoured or privileged. So, for example, form is normally privileged over substance, writing over oral words, words over silence and signature over non-signature.

Displacing

Essentially, this is hiving off uncomfortable parts of doctrine which liberalism does not wish to abandon altogether. For example, quasi-contract in traditional contract courses and texts is somehow a presence lurking at the margins, mysteriously invoked from time to time in circumstances where the analytical scheme of contract law seems to produce the opposite result. Hiving off an area of obvious public intervention seems to protect the apparently private law of contract from contamination. Duress and unconscionability can also be viewed in the same way. They tend to be separated off as occasional safety nets without any satisfying tests as to when they can be used. The displacement most relevant for our purposes is the way that promissory estoppel in the Anglo-Australian tradition has been used as a shield not a sword. Under scrutiny, no compelling reason could be put forward for this and, as it was accepted by the High Court in *Waltons Stores*, logic suggested the other way round.

42 See, for example, G Gilmore, *The Death of Contract*, 1974, at p 72.
43 (1984–85) 94 *Yale LJ* 888 at 1009.

Rhetoric

Rhetoric as a technique for handling dichotomies is the use of language games to mystify or cloud what is going on. An obvious example is the ritual of claiming that one is enforcing intention when the reasonable man in the objective test is just an anthropomorphic male representation of justice dispensed by the courts.[44] The language of intention is rhetoric that 'reprivatises' the result to ease liberalism's concerns about public intervention.

Duty creation

As we have seen, legal liberalism tends (according to CLS) to privilege action over inaction, commission over omission and words over silence, in the sense that it sees more justification for public intervention in the privileged half of each duality. On the other hand, this can be inconvenient when a court wishes to create liability from inaction (the dangerous supplement to action) as it might wish to do when altruism appeals more than individualism. One technique is to create a duty, pretend it was anterior to the facts, and then enforce it. The duty might be created openly, for example by calling an existing relationship fiduciary, perhaps by discovering that an equity has been raised on the particular 'facts' or, less directly, through concepts of constructive notice of the other's understanding.

When taken individually, many of the arguments in 'An Essay in the Deconstruction of Contract Law' could be accepted to some degree by scholars with quite different outlooks. After all, the very division between the courts of common law and equity is often presented as a reflection of competing views on morality and the role of public intervention. It is hardly revolutionary to suggest therefore that doctrine should embody impulses which are in some tension with each other. More controversial, however, may be the views of some CLS exponents, such as Dalton, who hold that law is fundamentally indeterminate so that doctrine does not constrain the outcome of any particular dispute.

The Indeterminacy Thesis

The indeterminacy thesis,[45] which has been controversial since the days of the American Legal Realists,[46] hardly sits easily alongside a post-structuralism claiming regular preference for one pole. If one knows which side of a duality the liberal legal mind tends to favour, how can law be so unpredictable? Dalton recognises this difficulty in a limp way:[47]

44 Lord Radcliffe in *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 at 728. For a recognition of the function of rhetoric, see Viscount Radcliffe, *Not in Feather Beds* (1968) at p 32.
45 CLS scholars all support the indeterminacy thesis, see A C Hutchinson and P J Monahan, 'Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought', (1984) 36 *Stan LR* 199 at 206–7. Highly theoretical accounts can be found in J W Singer, 'The Player and the Cards: Nihilism and Legal Theory', (1984) 94 *Yale LJ* 1 and Peller, above, n 26. For an early statement of it see D Kennedy, 'Legal Formality', (1973) 2 *J of Legal Studies* 351.
46 See, for example, K N Llewellyn, 'Some Realism about Realism—Responding to Dean Pound', (1931) 44 *Harv LR* 1222 at 1238–9.
47 (1984–85) 94 *Yale LJ* 999 at 1009–10.

> but if doctrinal indeterminacy is produced as I have suggested, by the same dualities that structure the rest of our life and thought, that affect the very development of our cultural values and understandings, then indeterminacy must exist at all these levels. Our seeming ability nonetheless to understand and to predict (in a historically contingent fashion) the particular links that decisionmakers create between particular arguments, and the particular fact situations decisionmakers construct from the testimony submitted to them, requires us to search for other explanations.

This sounds like a rather wordy 'back to the drawing board' kind of admission. But is there a way of showing that legal reasoning has sufficient 'leeways of choice'[48] to permit the invocation of dangerous supplements whilst not being impaled on such a radical claim about legal indeterminacy that one loses the structure one seeks to deconstruct?

The CLS thesis about the indeterminacy of law, and the reasons why the thesis is essential to the political aims of CLS, is too large a subject to be dealt with here and is a matter of continuing work for us. Our only purpose in mentioning it briefly in the present context is to vindicate the deconstructionist position that choices do exist to reach for the dangerous supplement in any duality but without committing ourselves to a radical indeterminacy thesis which leads to the paradox we have outlined.

What has been described as the strong indeterminacy thesis[49]—the view that legal doctrine is never able to provide a determinate answer with respect to a given fact situation—is unnecessarily ambitious. Whilst we concede that law permits a far greater range of plausible outcomes than formalistic scholarship would suggest, it can nevertheless be distinguished from purely political or moral argumentation through the conventions that prevail about the way that it is to be used.[50] These conventions might be fragile, specific to a particular community of rule-users and lacking in logical compulsion. They certainly require regular renewal by rule-users. But when they exist they exist.

To give an example, take the history of modern negligence liability. The conclusion of the majority of the House of Lords in *Donoghue v Stevenson*[51] that a manufacturer was liable in negligence to an end-user of his product was a conclusion of law which could have been reached at least in the second half of the 19th century. The concepts central to modern negligence such as the standard of the reasonable man and the duty of care were then available in legal materials and had been available in embryonic form for some time.[52] Why then did the rule not emerge until the 1930s? Fleming's answer to the comparatively late development of negligence is the familiar one. The restriction

48 The phrase is, of course, that of Julius Stone who spent much of his life criticising syllogistic accounts of legal reasoning and drawing attention to its indeterminate nature; see in particular *Legal System and Lawyers' Reasoning* (1964) and *Precedent and Law* (1985), p 1.

49 L B Solum, 'On the Indeterminacy Crisis: Critiquing Critical Dogma', (1987) 54 *U of Chicago LR* 462.

50 As we have said, these views on conventions and their role in legal reasoning cannot be elaborated here for reasons of space. On the role of conventions, however, see O M Fiss, 'Conventionalism', (1985) 58 *S Cal LR* 177; O M Fiss, 'The Death of Law', (1986) 72 *Cornell LR* 1. For a less sympathetic treatment of conventionalism see R A Posner, 'Conventionalism: The Key to Law as an Autonomous Discipline', (1988) 38 *U Toronto LJ* 333.

51 [1932] AC 562.

52 See J G Fleming, *The Law of Torts*, 7th ed, 1987, pp 97 and 125.

on a manufacturer's liability in the 19th century was a product of values and social policies which sought, among other things, the development of a strong industry through limiting individual responsibility for harmful action.[53] So, like more radical scholars, Fleming thinks the answer lies in the ideology of the period.

The problem with this answer is that it does not explain how the possibility of using concepts such as reasonableness and duty of care, with all their inherent indeterminacies, to construct a different outcome were regularly screened out by the judiciary as part of their internal way of engaging in legal reasoning. Surely a fuller explanation is that the reasoning conventions of the time, informed no doubt by prevailing ideologies such as the limited role for the public sphere to enter into the private, did not allow the rules to be operated in certain ways. One notable deviant was the Master of the Rolls in 1883. In *Heaven v Pender*[54] Brett MR attempted to use inductive logic to extract a general principle of negligence liability from the existing case law. His brethren expressly dissented from this part of the judgment but not, we argue, because they specifically thought through all the consequences that such a principle might entail for industry, nor because they could fault the logic, but because in a more diffuse way it offended against their view of the world and sense of how law should be used.[55] Brett MR was literally not reasoning conventionally.

Our argument, then, is that conventions help to fix the application of rules and determine their scope of application. They may not always be articulated, they may not be readily apparent to outsiders or inexperienced rule users and they may be internal to a particular community much smaller than 'a legal system' but they provide some standardisation of outcome for so long as they exist. None of this need threaten the kind of approach that Dalton adopts; indeed it makes it more credible. It rescues her from the paradox which she noted herself. It suggests that conventions about rule use are the reason why one pole might be more regularly chosen whilst simultaneously leaving room for the occasional invocation of dangerous supplements.

We should now draw together some of the strands of the argument before taking it further. The immediate focus of the paper is to examine claims about a turning point in Australian contract law. Whilst such claims are plausible we wish to remain sceptical about them, if only because they are easy to make. We have turned to critical legal studies in the search for a theory about the underlying structure of classical contract law so that we have a benchmark against which to measure alleged change. This has provided us with an analysis of contradictions and choices within contract doctrine stemming from more fundamental antinomies within liberal thought. Having cleared away an impediment to the credibility of the CLS position (namely, the tension between deconstructionism and its formulation of the indeterminacy thesis) we can turn to a case which is said to be part of some sea-change and examine whether different choices are being made and different reasoning conventions invoked.

53 Fleming, above, n 52, pp 94 and 126.

54 (1883) 11 QBD 503.

55 Brett MR, later Lord Esher MR, found an ally in A L Smith LJ in *Le Lievre and Dennes v Gould* [1893] 1 QB 491.

If they are, then one has the makings of a phenomenon which, if repeated sufficiently often and widely, truly does mark a departure.

Deconstructing *Waltons Stores v Maher*

The basic deconstructive steps would be something like these. First, try to determine the reading of the story that dominated the case and speculate on other plausible readings. This might alert us to how the 'facts' have been constructed and give us a preliminary view of which pole of a duality is being favoured. Second, examine directly the duality and determine which pole is favoured. Third, consider the techniques by which the duality has been operationalised. If the normally favoured pole has been taken then relatively little might need to be said. Existing doctrine, which already embodies the techniques, will simply have been invoked. If, however, the dangerous supplement is resorted to then the techniques may well be evident. This is particularly so in a final court of appeal where there may be a stronger convention about giving justifications and where signals need to be sent out about the scope of the relevant convention for this rule in the future: in effect, how doctrine is to be reconstructed.

Reading the text

> Can we .. expose the way law shapes all stories into particular patterns of telling, favours certain stories and disfavours others, or even makes it impossible to tell certain kinds of stories?[56]

It seems to us that there were at least three readings of the story in *Waltons Stores* which could somehow have been processed through existing doctrinal categories. The first, which we might call the classical reading, goes something like this.

The Mahers owned some land. Waltons Stores were interested in opening a store on it. Negotiations took place for the Mahers to knock down existing premises, build new ones and lease them to Waltons. Waltons were in a hurry and wanted the building erected in unusually quick time. The Mahers were happy to do it because they wanted the rental income. They were not acting out of love for Waltons Stores. They retained a solicitor to look after their interests. They assumed that contracts would be exchanged and on completion a lease would be executed. They further assumed that no liability arose either way until exchange. It was standard market-place behaviour.

The Mahers started on the work without exchanging contracts. Because they were worried about going too far they instructed their solicitors to push Waltons. There were still some proposed amendments to the lease to be dealt with. Waltons' solicitors said they had oral agreement from their clients and wrote to the Mahers' solicitors saying that they believed agreement to the amendments was forthcoming and they would let them know tomorrow if they were not. That was the last that the Mahers or their solicitors heard from Waltons' solicitors for two months when the latter announced Waltons' withdrawal.

In the meantime, the Mahers' solicitors had sent their clients' signed part of the contract to Waltons' solicitors describing it 'by way of exchange', the

56 Dalton, above, n 29 at 999.

traditional phrase but clearly inappropriate here. At no stage did they chase up the Waltons' solicitors for the return part of the contract but they wrote to the Mahers warning them they would lose the deal if the building was not completed on time. The Mahers took this as advice to get on with it.

Then things really went off the rails. Waltons had a change of heart about taking the lease (for reasons unconnected with the land). They ascertained from their solicitors that they were still free to withdraw and instructed them to go slow. The solicitors therefore made no response to the Mahers' solicitor.

During this period the Mahers had been busily constructing the new premises. Some of Waltons' staff and also their property consultant knew about this. When Waltons withdrew from the proposed transaction they left the Mahers in an exposed position with the work 40 per cent completed. Under cross-examination, Mr Maher admitted that he knew there was no contract when he commenced the work.

Read in this light, the conclusion on classical principles is that the Mahers took the risk of Waltons withdrawing. They hoped to gain the rental income. In a market system, some risks do not pay off and the loss lies where it falls. If they had thought they were secure then they might examine the advice they received from their solicitors to see whether an action in negligence lies. Failing that, the market system is there to weed out those who do not take sufficient precautions. The market requires clear moments of responsibility. Hence, signature and writing are privileged over words, conduct and silence.

To be clear, we are not saying that this did happen. The post-structuralist endeavour denies that one can separate the events from the interpretation of them. Rather we are saying that this is a plausible reading of the information that has made its way through to a law report. Had the story been presented like this then the conclusion of no liability would have been much easier to arrive at. A year or so earlier, the Privy Council had constructed such a story in *A-G of Hong Kong v Humphreys Estates*[57] and decided just that.

Alternatively, what we might call an estoppel in pais reading could have been adopted. It would have involved a David and Goliath depiction, certainly in terms of the litigants and perhaps also their respective solicitors. It would have dwelt on a departure from standard conveyancing procedure (the prospective lessee preparing the draft lease) which might have confused the actors.[58] It would have discounted some of the answers that David gave to Goliath's counsel in cross-examination because counsel himself confused lessor and lessee in his questioning.[59] It would have suggested that Goliath was trying to have it both ways by leaving the options of withdrawal or continuation open as long as possible. Goliath's solicitor would also have come under some adverse comment.

This reading would suggest that the market will be converted into a power order if large organisations can practice deception (albeit by silence). The public must intervene in order to protect the integrity of the private sphere in the

57 [1987] 2 All ER 387.
58 (1988) 164 CLR 387 at 408.
59 (1988) 164 CLR 387 at 439.

long term. Waltons would have been precluded from denying that they already had a binding agreement with the Mahers, albeit not an agreement crystallised by exchanging pieces of paper.

A third reading might be called the promissory estoppel reading. It differs from the second reading only in the interpretation placed on Mr Maher's answers. In cross-examination he is taken to have admitted that he knew there had been no exchange of contracts when he commenced work but as believing that exchange was a formality.[60] This rules out estoppel in pais because that only precludes departure from an assumed present state of affairs. Mr Maher's acknowledgment that exchange was a formality shows his belief as to the future. Hence, if the Mahers are to have a remedy it cannot be through contract or estoppel in pais. It must be in promissory estoppel. The conduct of Waltons has to be read as a promise to the Mahers that a contract would come about.

In the result, no judge took the first reading. The second was essentially taken by Kearney J at first instance and by the New South Wales Court of Appeal.[61] It was the preferred reading of Deane J and (apparently) Gaudron J in the High Court. The remainder of the court took the third reading.

The choice of poles

The classical reading would have pushed the reader in the direction of the normally favoured pole of form. As we have seen, liberal principles on state intervention into private association suggest that some minimum formal sign is required. In truth, as Dalton shows, this is an impossibility without supplementation either by subjective intention or objective value. Here, the parties had agreed that the formal sign indicating that one must grant and the other must take the lease was to be the exchange of pieces of paper which were to be identical, mutatis mutandis. The parties had not complied with the form they had chosen so, prima facie, there should be no intervention by the state.[62]

Instead, the High Court chose a reading that pushed it in the direction of the dangerous supplement of substance. The substance of this association was that Waltons' behaviour was interpreted as an unconscionable use of the market system. A clear example of this is at the beginning of Deane J's judgment:[63]

> In so far as the substantive merits are concerned, the Mahers have them all: Waltons deliberately failed to speak or to warn in circumstances where, as Priestley JA commented in the Court of Appeal, 'simple standards of honesty and fair dealing required [it] to make known to [the Mahers] that the assumption they were acting on was mistaken'.

It is interesting to note at this stage that the High Court is using the very words that Dalton adopts to describe this dichotomy. The Mahers thought that exchange was a mere formality and they have the substantive merits.

60 (1988) 164 CLR 387 at 407 per Mason CJ and Wilson J.

61 There were actually differences between the findings of the primary judge and the court of appeal but not germane to this point.

62 The curious aspect of the case is that it might still have been easier to manipulate the pole of form in order to reach the result which was thought to be substantively just. One could have looked for some sign that the agreement about exchanging had been abandoned by conduct and that the parties were to be immediately bound.

The techniques

We turn now to the manner in which the substance pole was put into operation. It was done in such a way as to preserve as much of the previous scheme as possible and to prevent the duality from obviously falling in on itself. One of the paradoxical features of judicial innovation is that in creating what is potentially dramatic change it must simultaneously legitimate the innovation by reference to previous doctrine. In simpler terms the particular piece of innovation cannot be seen to sweep away too much. The way this is achieved in *Waltons Stores* is by tampering with the established convention surrounding the techniques we have identified whilst retaining doctrinal language. The use of the techniques might be described as the reconstruction of doctrine after the judges themselves had taken it apart.

Privileging. Because *Waltons Stores* is a case where the normally privileged choices were not made then naturally we see little of this technique in action. Nevertheless there are revealing comments about how privileging has operated in the past and some suggestions as to how it might operate under the new conditions.

There is now recognition that consideration and estoppel can swallow each other up and that consideration has been privileged in the past. This was largely through the use in Anglo-Australian law of promissory estoppel as a defensive equity only, as a shield not a sword. Thus, for example, Mason CJ and Wilson J note that there 'has been for many years a reluctance to allow promissory estoppel to become the vehicle for the positive enforcement of a representation by a party that he would do something in the future'.[64] They note on the same page that enforcing promises in the absence of a pre-existing relationship would 'outflank the principles of the law of contract'. Yet they also impliedly admit, by referring to academic opinion, that it would actually have been more logical that promissory estoppel should have been a sword only.[65]

Despite these acknowledgments, the invocation of substance here is presented in such a way as to make it seem exceptional and to make form and consideration still the first port of call. Privilege is thereby reasserted although in a way that is no more convincing than what went before. Unconscionability, said to be the basis of promissory estoppel, is purportedly confined by the justices. Mere reliance on a voluntary promise does not by itself make it unconscionable for the promisor to breach it. That would completely undercut consideration. But the justices are vague when it comes to suggesting what the 'extra' requirements must be to make a breach unconscionable. According to Mason CJ and Wilson J, there are two. First, the promisor must have played a part in creating the promisee's assumption that the promise would be performed. Second, the promisor must know of the promisee's detriment.

63 (1988) 164 CLR 387 at 434.

64 (1988) 164 CLR 387 at 400.

65 There were two arguments here. The first was that it was more logical that a gratuitous promise should be binding without a pre-existing legal relationship because where the parties were already under contract one would expect that only another contract could undo it. The second was that proprietary estoppel could be used as a sword without a pre-existing legal relationship, so why single out cases where the representation did not concern the acquisition of an interest in land?

When probed, these must be indeterminate rules. One needs only start from the premiss that a voluntary promise of itself will contribute to the promisee's assumption that the promise will be performed and the first requirement is emptied of content. Traditionally, contract law has not taken this position. It has used the argument that it is unreasonable for a volunteer promisee to make that assumption. The unreasonableness of the promisee's belief stemmed, however, from the fact that the law did not enforce such a voluntary promise (so it was unreasonable to take it seriously). As soon as the law does enforce it then the objection falls and it becomes potentially reasonable for a promisee to found her assumption on the fact of the promise itself. This first requirement, then, is simply a way of the court reserving a discretion to be altruistic but masking it.

The second requirement, that the promisor knows of the promisee's detriment, is also capable of manipulation. To begin with, there is the issue of what amounts to detriment. If inaction can be detriment (and it is only a convention that it is not usually regarded as such) then that part is easily satisfied. The promisor's knowledge of the detriment has to be a matter of inference unless the requirement is confined to cases where the promisor later admits it, which would be absurd. Indeed, in *Waltons Stores v Maher* itself there is a strong element of constructive and imputed knowledge. Open the door to constructive knowledge then one slides towards the position that a promisor is deemed to know of detriment when it was reasonably incurred by the promisee. So one just enforces reasonable reliance and outflanks consideration.

The purported limits on unconscionability which are inserted by Mason CJ and Wilson J call to mind Dalton's observation on analogous American cases. She says:[66]

> ... rather than clarifying when the acceptable manipulation of economic advantage shades into unacceptable dealing, unconscionability doctrine reverts to the same endless play around reality of assent, standards of behavior and inequivalence of exchange.

The critical legal scholar who accepts the view that conventions can operate to cure indeterminacy might say of these limits on unconscionability that they will be effective for so long as a community of rule users deploys them in the appropriate way. Just as the 'shield not sword' doctrine could be demonstrated to be illogical, so can the confined version of unconscionability.

Displacement. In Daltons' scheme much displacement is simply a corollary to privileging something else. An example in the case is how the justices deal with silence. Basically, liberalism is reluctant to attribute consequences to silence. If it is to do so then the occasion must be hived off; placed in the category of 'for emergency use only'. Thus, for example, Brennan J says that silence 'will support an equitable estoppel only if it would be inequitable thereafter to assert a legal relationship different from the one which, to the knowledge of the silent party, the other party assumed or expected'.[67] So inaction, the dangerous supplement to action, can only be used to avoid inequity.

66 (1984–85) 94 *Yale LJ* 999 at 1037.
67 (1988) 164 CLR 387 at 428.

Working on the assumption that judges usually want to avoid what they regard as inequity, this seems like saying that judges can invoke silence when they want to. The additional requirement of knowledge by the silent party evaporates as soon as constructive knowledge is admitted.

Rhetoric. The distinction drawn by the justices between contract and the new model estoppel seems to us to be the finest rhetoric. Brennan J, for example, is adamant that contract and estoppel are about different things. Contract is there to enforce expectations and estoppel to avoid detriment.[68] This is important as a general separating device and tactically useful in allowing estoppel to evade the Statute of Frauds.[69] If, however, one starts from the assumption that some detriment arises when a reasonable expectation is not enforced it looks like a distinction without a difference. It is argued by some that the distinction matters in deciding the extent of the remedy. In estoppel the remedy is said to be tailored to the minimum required to avoid the inequity. Even if this is so, it simply tells people that they might expect less under estoppel. It gives no rational way of predicting when either will be found nor what the difference in substance is between them.

Duty creation. We mentioned earlier that duty creation is a useful technique to legitimate invocation of dangerous supplements such as inaction or silence. The issue arises head on here because of Waltons Stores' failure to warn the Mahers of their possible change of mind. It also arises because of Waltons' solicitor's failure to return the Mahers' contract and perhaps to disabuse the Mahers' solicitor of his mistake.

Duties are created most forcefully by Gaudron J. She seems to take the most charitable view of all the justices about the extent to which Waltons knew the Mahers were bashing on. She says that the most probable deduction for Waltons to make was that the Mahers commenced work in the hope or belief that exchange would take place. If that were all then Waltons would have been in the clear. She goes on, however, to argue that because they ought to have been aware that there was a real possibility that the Mahers were under a misapprehension, then Waltons became under a duty to tell the Mahers that the situation had materially changed. So constructive knowlege of a real possibility is enough to create the duty. Waltons' failure in this regard was actually only described as a proximate cause of the Mahers' detriment but that was enough for Gaudron J.

There seems also to be some kind of duty-creation going on regarding Waltons' solicitor. Brennan J[70] and Deane J,[71] asserted that retention of the Mahers' signed part contract was only justified for so long as Waltons intended to go through with the transaction. It seems to us that the solicitors may honestly have taken the conventional position in the legal profession that one does not run into ethical difficulties about failing to disclose a client's change of heart until one is asked about it. The mere fact that someone decides to send one a contract does not, ordinarily, impose any obligation to do anything

68 (1988) 164 CLR 387 at 423.
69 (1988) 164 CLR 387 at 433.
70 (1988) 164 CLR 387 at 418.
71 (1988) 164 CLR 387 at 423.

about it, or even acknowledge receipt. Given that no argument about detinue was presented, it is difficult to see why there was any obligation to return the document.

Conclusion

We said at the beginning that our purpose was to probe a claim that Australian contract law is at some kind of turning point. The minimum requirements to sustain it would seem to be these. First, there must be an analysis of the old. Second, there must be raw data of the new. Third, there must be some way of signifying that the difference between the old and the new is one of substance.

The value that we see in deconstructive accounts such as Dalton's is this. First of all they offer a version of the fundamental structure of the old. They assert that doctrine is constructed around dualities and that these dualities stem from contradictions within the political philosophy that shaped the classical law. They suggest also a number of techniques that have been deployed (we say absorbed into conventions) in order to handle these contradictions; privileging, displacing and so forth.

Second, deconstructionism could not be confined to what liberal legalism has carved out as a particular area of law; in our case, contract law. If the method is sound, one should be able to discern these techniques in action throughout legal discourse. This is particularly valuable where the watershed is one that arguably is evidenced in constructive trusts, contract doctrine, unconscionability, fiduciary law and more besides. It therefore offers a constant method of analysis across categories.

Third, deconstructionism would suggest that the more evidence one amasses of the invocation of dangerous supplements then the more persuasive is the case that the deep recesses of legal thought are seeing the world in a different way and constructing reasoning conventions to reflect that vision. This does not simply boil down to advice to read and count a lot of cases. It tells you what to look for and count.

Fourth, this method offers some handle on change that is more precise than general claims about 'the move towards social democracy' or 'postliberalism' or 'indigenous socialism' being reflected in our law. In its own way it enables one to reprocess the data of case law to help construct such claims.

Our analysis of *Waltons Stores v Maher* would suggest that the case is consistent with the making of fundamentally different conventions for handling the conflicts between self and other; partly because of the way the story was read, partly because issues of substance were addressed and partly because those issues were dealt with by direct resort to dangerous supplements rather than manipulation of favoured poles. On the other hand, the techniques used to reconstruct doctrine make us cautious. What seem to us to be arbitrary spacers inserted between the categories of contract and equitable estoppel and the devices used to justify the outcome indicate a continuing willingness to bring a particular story face to face with the language of moral evaluation.

Naturally we have only examined one case. This was partly because of the space required to explain and justify the method but partly also because the remaining case law said to form part of the turning point falls far short of the data set we would require anyway. It is quite possible that conventions

will arise to limit considerably the impact of *Waltons Stores*. Put simply, judges will tend not to read the stories in the way that the High Court did here. They will just not use promissory estoppel as a sword very often. Techniques might arise to give a veneer of logic to this in a similar way to ones still being advanced in England and Wales for not having it as a sword at all. What we might see, therefore, is a limited adjustment in the use of dualities but nothing that indicates a major change in lawyers' visions of the world. The critical legal studies position should be that nothing is inevitable or determined, whether by precedent or the forces of economics or morality (this indeed is the principal reason for the CLS rejection of Marxism) but it can be changed when its basis in thought is made clear.

Conscious as we are that, despite some iconoclasm, we have reached a rather modest conclusion, it is appropriate to end by touching on the practical importance of these matters for lawyers of different kinds. First, there is the question of training. Early in a lawyer's training she learns a method of reading a law report which seems to be an efficient use of time; that is to scan the key facts, extract the legal issues, pick out the ones relevant to the task in hand and see how they were dealt with on those key facts. This, in some elusive way, helps her to make progress on another set of 'facts' which confronts her.

CLS does not go so far as to claim this to be fundamentally misguided but it suggests a fuller reading method which comes nearer to the core issues in the case. Once one traverses the stylised distance of doctrinal language and reaches those core issues one might understand better the conventions which, as we said earlier, are not otherwise readily apparent to inexperienced rule users. This remains a spartan claim at present but if there is anything in the notion that legal reasoning is a series of specific conventions which reduce the indeterminacy of legal rules then a new reading technique which appreciates this may lead to a better understanding of how the conventions are deployed. If this is so then it is possible that one becomes a better predictor of the use of conventions and accordingly of outcomes.

This leads to the second practical justification for this method: the business of prediction.[72] It seems likely that any move away from the kind of formalism we defined earlier will result in a loss of predictability, if only because the move will signify less regular use of particular poles. Nevertheless some predictability might still be tapped from a system if its apparently new workings are understood.

72 Mr Justice Priestley refers to the 'primary and intensely practical question for lawyers' of when 'words, written or spoken by one person to another, give rise to legal liability', above, n 2 at 202.