THE GULF BETWEEN APPEARANCE AND ESSENCE IN LAW

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I Introduction

In a penetrating insight the French realist novelist Guy de Maupassant noted that the credo that must guide a modern novelist is the capacity to distinguish the surface structures that express everyday life from the structures that force people 'to think and understand the deeper, hidden meaning of events.'[1] In effect, Maupassant was creating a conceptual framework that challenged the artist to reach beyond the deceptive obviousness of the world of visible relationships when tracking the human condition. Maupassant was issuing a call to go beyond the everyday experience of surface phenomena and grasp the essence of human life. For those engaged in law Maupassant's words strike a deep chord. Maupassant was writing about literary artistry but his words are equally applicable to the study of law. Maupassant's words are a reminder to legal theorists that the social and economic context of legal doctrine must be explored. The technical indicia of law must not be allowed to shield from exposure the theoretical assumptions that are hidden in legal doctrine. The political and economic factors underpinning legal principles must not be hidden below the surface. Focusing on the surface structure of law renders invisible the forces that produce problems requiring adjudication and legitimates the systemic inequalities of the social system.

Maupassant's framework of analysis and his epistemology acts as an inspiration for shining a critical light on those who fetishize legal principles. Maupassant's structural approach encourages reflection on the misguided assumptions evident in portraying law as a system of apolitical rules. He assists in drawing attention to the fact that the decontextualisation of legal issues renders invisible important social phenomena that are the template for legal texts. Specifically what is hidden by proponents of legal conservatism who engage in the systematic presentation of the immediately visible elements of law is the concept that the system of legal rules is a surface structure that masks underlying power relationships. Maupassant's insight

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1 G de Maupassant, *Bel-Ami* (Penguin, 1975) 9.

raises the prospect that one of the tasks confronting those in the legal field is to engage in a searching analysis that illuminates the gulf between appearance and essence. This exercise can be of invaluable assistance in pinpointing how legal forms in areas such as the common law contract of employment express socio-economic relationships. The contract of employment and its internal logic and how prominent intellectuals have theorized its conceptual foundations will be the axis of this article.

The conceptual poverty of mainstream Australian contract of employment scholars is exemplified by their impressionistic analysis that focuses only on the indicia that comprise the legal contractual rules. Employment law needs to be seen through a wider conceptual lens that views its parameters being circumscribed not by universal and abstract legal principles but an ensemble of economic relationships. At bottom law is a concentrated expression of socio-economic forces and the thinkers that have plumbed the depths of their society in order to expose the underbelly of how the selling of labour power is both a legal and economic phenomenon require elucidation. These thinkers were not duped by surface appearance. They understood how the inner logic of law is belied by its surface manifestation. In that sense they are in unison with Maupassant who saw the individuals in his novels as bearers of social relationships.

The aim of this paper is to utilise the work of a series of eminent thinkers who penetrated the surface appearance of the contract of employment in order to reveal the institutional and social structures that governs its operation. From different angles Adam Smith, Max Weber, Robert Hale and Karl Marx excavated the hidden structures of the contract of employment. They made a unique contribution to the structural analysis of the labour contract. Whilst due recognition must be given to Smith, Weber and Hale, it has to be stated that Marx towered over these thinkers. Weber and Hale were born later than Marx but that is immaterial when calculating who went furthest in examining the deeper layers of the employment contract. Marx delved further into the fissures of the employment contract than any other thinker born before or after him. Marx is the last thinker canvassed in this article because he is a counterpoint to Smith, Weber and Hale. Marx simply excavated the labour contract at a more forensic level than Smith, Weber and Hale. Ever the dialectician Marx developed the concept of a legal superstructure in order to project the image of how juridical forms corresponded to the economic structure of society.[2] Guided by dialectics Marx eschewed any concept that law was an autonomous entity separate from the economic base.[3] For Marx

2 K Marx, *Capital, Volume One* (Penguin, 1979) 178.

3 K Marx, *Preface and Introduction to a Contribution to the Critique of Political Economy* (Foreign Languages Press, 1976) 3.

the legal superstructure or judicial forms expressed economic factors. Thus the content of a contract of employment reflects an economic relationship. A dialectical duet between ideological, political and economic phenomena exists that ensures the legal form of the contract of employment is circumscribed by the social relations of capitalism. Althusser in his work that reinforces the contemporary importance of Marx observed that law was a crucial component of the ideological state apparatus.[4] From this Althusserian perspective the labour contract helps cement the ideological hegemony of the ruling elite who buy and profit from the purchase of labour hours whilst operating under the umbrella of bourgeois law and a state that represents the accumulation requirements of capital.

In a practical sense the common law contract of employment is an important province of law. In a market economy of atomistic individuals the labour contract is the instrument that links producers together. There can be an argument about the role and importance of contract law as it impacts on intra-capitalist relationships. John Gava has noted studies showing the minor role played by contract law in commercial disputes between business entities.[5] But the wage contract balancing relations between capital and labour is the bedrock of the social system and its importance cannot be exaggerated. The hiring of labour has proved resistant to statutory intervention and it remains a province of common law contractual concepts. This phenomenon has reinforced the capacity of the labour contract to express the economic interests of the dominant class. It will be argued in the course of this article that the web of juridical relations expressed by the wage contract mirror promethean forces that shape its inner content. The work of Smith, Weber, Hale and Marx will be adduced to illuminate how these thinkers searched for the essence of the law governing the recruitment of labour in a capitalist economy. This article will utilise these thinkers to delve below the surface to dissect how the employment contract is determined by a matrix of social relations that govern its role. In the process light will also be shed on the nature of the underlying relationships that control society.

4 L Althusser, *Lenin and Philosophy and Other Essays* (New Left Book, 1977) 137, 139.

5 J Gava, 'The Perils of Judicial Activism: the Contracts Jurisprudence of Justice Michael Kirby' (1999) 15 *Journal of Contract Law* 174.

II The Outer Rim of the Employment Contract

A *Adam Smith*

With the repeal of the British master and servant legislation in 1875 the scene was set for the emergence of voluntary exchange relations. Henceforth the legal system regarded the employment relationship as on a par with every other contract in a market society. Just like any other contract a breach would result in an injured party having the capacity to seek a legal remedy. The employment relationship became the core factor for binding a society of formally atomistic individuals in a web of market mechanisms.[6] The wage bargain offered the prospect to individuals of a free contract based on the unbridled choice of those vested with juridical equality. Autonomous individuals in charge of their own affairs became the proclaimed cornerstone of a private property-based society.[7] The free will of the parties operating in a contractual context of mutual rights and obligations became the clarion call of a market society. An age of free will and choice predominated in the labour market. Thinkers such as Maine hastened to give their support to contractual relations with their indicia of free will, juridical equality and absence of coercion.[8] Contract law operated to subordinate the social relations of the workplace to contractual logic. Wage-labour was legally conceptualised in contractual terms. The triumph of the commodification of labour power and treating workers as just another factor of production in a world of commodity production was sealed by the wage contract.

Not all legal philosophers were sanguine on the issue of utilising the general law of contract for regulating employment relations. Even before the inception of the ordinary law of contract to regulate the market for labour power Adam Smith issued a caveat about the contractual form being applied to wage-labour. Although Smith is renowned for developing his notion of an invisible hand that acts to co-ordinate individual economic decisions and achieve a holistic functioning system that maximises efficiency, growth and free competition, Smith was no simple apologist for free-market forces. The moral philosopher within Smith ensured that he was a subtle and nuanced thinker. He was a Professor of Law capable of noting to his students that '[t]he labour and time of the poor is in civilized countries sacrificed to the maintaining the rich in ease and luxury.'[9] Smith also understood the parlous

6 A Fox, *Beyond Contract: Work, Power and Trust Relations* (Faber and Faber, 1974) 181.

7 J Wightman, *Contract: a Critical Commentary* (Pluto Press, 1996) 2.

8 R B Seidman, 'Contract law, the free market, and state intervention: a jurisprudential perspective' in M R Tool, W J Samuels (eds) *State, Society and Corporate Power* (Transaction Publishers, 1989) 18.

9 Quoted in R L Meek, *Smith, Marx, & After* (Chapman and Hall, 1977) 11.

psychological aspect of factory capitalism. He grasped the deleterious aspect of an intensive division of labour. Once a worker was made an appendage of a machine Smith saw the 'mental mutilation' that followed.[10] He was alert to the fact that the process ensured a one-dimensional human being 'as stupid and ignorant as it is possible for a human creature to become.'[11]

Smith pioneered the view that profit was a product of the capital-labour nexus and it was 'a deduction from the produce of labour.'[12] Thus he possessed a basic and limited model of labour exploitation. He supported this economic insight with a concept of the inequality of bargaining power that suffused the wage contract. Smith perceived that beyond the mystique of law and its imagery of freedom of contract those buying labour power had the capacity to coerce by imposing terms on those constrained by lack of economic freedom. He averred: 'It is not, however, difficult to foresee which of the two parties must, upon all ordinary occasions have the advantage in the dispute, and force the other into compliance with their terms.'[13] Smith was also prophetic enough to understand that whereas the sellers of labour hours were formally free and equal in the labour market this did not imply that state power was deployed in a neutral and apolitical fashion. For whenever a contractual dispute arose Smith argued that the employers 'never cease to call aloud for the assistance of the civil magistrate.'[14] Smith understood that the state and its laws expressed the power of a dominant class.

Smith was forthright in his belief that unrestrained egoism operating in a market setting would fuel competitive forces that would benefit individuals and society, but he was wracked by doubt. His encyclopaedic mind produced subversive ideas that challenged key tenets of his liberal creed. His fundamental premise was that socio-economic phenomena had to be explained from the perspective of selfish individualism. Thus it was human nature and not objective structures that shaped the operation of the economy.[15] According to Smith society comprised atomistic individuals who weighed up the costs and benefits of contracting into social relationships. Smith conceived of socio-economic institutions as a product of individuals operating according to the logic of innate egoism. Individuals chose their role in economic life and acted as rational utility maximisers when calculating their market roles.[16] In effect, Smith failed to transcend the hegemonic ideology of his age that was based on free and unfettered markets and his misgivings about the human cost of

10 Ibid 13.
11 Ibid.
12 Ibid 7.
13 A Smith, *The Wealth of Nations* (Penguin, 1986) 169.
14 Ibid 170.
15 I Rubin, *A History of Economic Thought* (Pluto Press, 1989) 169.
16 Ibid 187.

competitive individualism was reduced to marginal observations. The effect of this was that Smith's cult of the individual prevented him from marshalling a forensic analysis of the social relations that lay beneath the surface of monetary exchange in a market society based on the commodification of labour power. Smith's overarching credo of selfish individualism stopped him from penetrating to the deep structures that determined the economic formation and moulded the consciousness of those involved in market exchanges. He was, in the final analysis, a prophet of market individualism and selfish liberalism and this was a stumbling block to him following the logic of his more radical ways of seeing. In sum, Smith could only offer partial insights on the subterranean forces that shape a labour contract. This was due to the fact that Smith accepted that labour was the source of wealth but he included capital in the category of labour and thus rationalised the right of capital to appropriate the output of wage workers.[17] Smith's embryonic labour theory of value was built upon by Marx who devised the concept that it was the working class alone and the combined value of their labour power that was the source of wealth in a capitalist economy.[18]

B *Max Weber*

Max Weber is one of the most influential figures in the social sciences. At university he undertook a legal studies program. Like Smith he was driven to understand the fundamental dynamic that underpinned the structures of modern society. He searched for explanatory concepts that would pinpoint the underlying relationships that explained social phenomena. In line with Smith he understood that a market society rested on formal free labour and the wage contract embodied this arrangement. He noted that labour was bought and sold on the market and thus was like any other commodity.[19] He also had the theoretical acuity to note that the structure of law was designed to lend stability and certainty to profitmaking.[20] Weber was cognisant of the fact that private property was the pillar of modern society, and the source for the wealthy to use their market domination to 'increase their power in the price struggle with those who being propertyless, have nothing to offer but their labour or the resulting products.'[21] Weber came close to plumbing the depths of the contractual form. Writing in the early part of the twentieth century he believed that formal equality was a mask that cloaked exploitation. For Weber contractual freedom exploited the benefit of property ownership

17 R L Meek, *Studies in the Labour Theory of Value* (International Publishers, 1956) 71.
18 K Marx, *Wage Labour and Capital* (Progress Publishers, 1974) 12.
19 K Allen, *Max Weber: A Critical Introduction* (Pluto Press, 2004) 35.
20 Ibid
21 Ibid 83.

and vested the employer with the capacity to rule the lives of the employee.[22] Weber observed that 'the formal right of a worker to enter into any contract whatsoever with any employer whatsoever does not in practice represent for the employment seeker even the slightest freedom in the determination of his own conditions of work.'[23] In short, Weber enunciated the notion of legally sanctioned compulsion being the keynote of a wage contract.

Despite his sharpness as a social critic Weber proved incapable of delving deep enough to explore the inner structure of the employment contract. It was not just the case that Weber never provided a full blown study of the labour contract that would have shown the full scope of his theoretical and methodological framework on workplace dynamics. His scattered thoughts on bourgeois power relations in the workplace and the nature of the employment contract are sufficient to judge the quality of his ideas on the topic of asymmetrical work relations. Of germane importance in explaining Weber's deficiencies is the fact that he failed to break free of the iron cage of his class and its hegemonic ideology. The quip about Weber being the bourgeois Marx is salient.[24] He championed social forces that were in direct collision with the moral and legal philosophy that Marx first began to absorb when he was a law student. Weber was a disciple of Nietzsche and the guiding principles of his mentor proved to be the captain of his consciousness. For Nietzsche relations of domination ruled humankind and possessed a timeless quality.[25] Weber adopted Nietzsche's metaphysical and pessimistic view that 'the struggle for power is at the heart of human life.'[26] Biological determinism undergirded Weber's epistemology. His spirit was shaped by the precepts of social Darwinism.

Weber proudly identified himself as 'a class conscious bourgeois' and was a fierce advocate for the power struggles of the German bourgeois elite of his age. He recognised that the feudal Prussian landowners were a decaying class and that they needed to cede state power to the industrial and financial bourgeoisie.[27] Weber was an ultra-nationalist wedded to an imperialist foreign policy that was bent on Germany winning its place in the sun.[28] As German trade expanded and inter-imperialist rivalry flourished the corollary would be 'a situation in which power alone will have a decisive influence on the extent

22 M Weber, *Economy and Society* (University of California Press, 1978) 730.
23 Ibid.
24 A Callinicos, *Theories and Narratives* (Polity Press, 1995) 110.
25 Ibid 111.
26 Allen, above n 19, 82.
27 Ibid 24.
28 Ibid 19.

to which individual nations will share in economic control of the world.'[29] Apart from his acceptance of war as a measure to support a greater Germany he was a social imperialist. He believed that not only would colonies benefit German industry but an imperialist program would stifle class conflict and 'provide a mechanism to conciliate the working class and win them to an imperialist outlook.'[30] It's a rich irony that a thinker who perceived so clearly some of the key aspects of the bondage underlying the wage contract viewed imperialism with its driving force of colonial enslavement as a panacea to domestic ills. That German global hegemony would enslave millions of foreign workers to the type of oppression that he saw as implicit in the wage contract escaped Weber's methodological framework.

Just as Smith believed that human nature could be engineered to promote the welfare of society, Weber saw imperialism as a way to harmonise German society. The conceptual confusion of these seminal figures closed them off from a true anatomy of the market economy and its corresponding legal system. Weber was capable of piercing aspects of the downside of capitalism but his overarching ideological fidelity to Germany's social structure ensured he lacked the motivation to fully unmask the deep structures that make the wage contract an instrument based on exploitation and subordination. Put simply, Weber believed the working class was incapable of taking over the state and introducing a new egalitarian network of ownership relations. At his inaugural professorial lecture at Freiburg in 1895 Weber 'declared that the workers were politically immature and incapable of effective power.'[31] Weber even found the bourgeois democracy available in the fledgling Weimar republic unpalatable. He confided to the arch reactionary Field-Marshall Ludendorff: 'Do you credit that I take this swinish state of affairs that we now have as a democracy?'[32]

Speaking about his famous essay 'The Protestant Ethic and the Spirit of Capitalism' Weber openly declared it 'was a factual refutation of the materialist conception of history.'[33] Its central thesis that the transition to capitalism was spearheaded by religious and metaphysical ideals put him at odds with Marx's economic materialist explanation for the rise of capitalism.[34] For Marx the materialist interpretation of history was based on the conception that the property system including the way the economic surplus under capitalism was accrued through the labour contract produced a political, ideological and legal

29 Ibid 20.
30 Ibid 22.
31 D G Macrae, *Weber* (Fontana, 1982) 57.
32 Ibid.
33 Ibid 58.
34 Ibid 59.

superstructure that enforced the position of the ruling elite.[35] Furthermore, religious ideas trailed behind the advent of the capitalist mode of production.[36] In a nutshell, Weber was an idealist philosopher and fervent anti-socialist and his politics and ideology precluded him from adopting a radical approach to the subtle anatomy of the labour contract. Weber understood that economic factors were important in shaping legal doctrine. He realised there was a mutual relationship between economic and legal structures.[37] But he was a walking contradiction. He was ultimately held captive by the idea that law was primarily an autonomous system of rules.[38] He was prone to fetishizing legal rules. For Weber law was in effect an independent force, and legal thought – and not underlying economic phenomena – had been a central plank in the rise of capitalism.[39]

C *Robert Hale*

Robert Hale graduated from Harvard Law School in the opening decade of the twentieth century. Few thinkers have rivalled his sophisticated attempt to examine the wage contract and highlight its asymmetrical nature. For Hale the fixation of mainstream academics on contract indicia was disappointing for he felt it diverted attention from the network of coercive relationships that he averred was the bedrock of contract law. The free contract mantra of conventional academics obscured the fact that there was no genuine consensual bargain struck in contractual exchanges, and to believe consent was a factor in employment relations only highlighted the mystique of law. Hale's work was an antidote to the view that law is a corpus of autonomous principles separate from their economic formation. Hale grasped the disciplinarian culture that underpinned ostensibly depoliticised rules. Whilst bargaining arrangements were draped in the credo of freedom of contract Hale noted that coercion was endemic and the exercise of 'choice does not indicate lack of compulsion.'[40] Hale noted that the judiciary render invisible the social forces that shape their reasoning and thus ensure coercion underpins every bargain.[41] Judicial ideology hides from view economic relations pivoted on domination and subordination. In Hale's vivid phrase the economy is 'shot through with coercion.'[42] Equality before the law is true in name only as the level of legal protection is dependent on the quantum of private property that individuals

35 K Marx, F Engels, *The Communist Manifesto* (Penguin, 2002) 235, 238; Marx, above n 3, 3.
36 K Marx, F Engels, above n 35, 241.
37 D Trubek, 'Max Weber on Law and the Rise of Capitalism' (1972) 3 *Wisconsin Law Review* 724.
38 Ibid 736–7, 739, 746.
39 Ibid 731.
40 R Hale, 'Bargaining, Duress, And Economic Liberty' (1943) 43 *Columbia Law Review* 606.
41 Ibid.
42 Quoted in N Duxbury, 'Robert Hale and the Economy of Legal Force' (1990) 53(4) *The Modern Law Review* 430.

deploy. By acquiescing in the uneven distribution of wealth inequalities are grounded in the legal apparatus.[43]

For Hale the judiciary needed to eschew dealing with facts abstracted from the surrounding circumstances of wealth and power. The lack of a holistic analysis rendered the surrounding circumstances invisible and ensured that theoretical assumptions were not excluded but hidden from view. The upshot was that hierarchies of economic and legal power were reinforced. Nowhere was the effect of excluding wealth and power from sight when negotiating bargains more insidious than in the area of labour law. Hale realised that 'our capacity to contract is governed by a pre-existing regime of property relations and our ability to engage in or abstain from this process at any particular time will be governed by the extent of our bargaining power *vis-à-vis* others.'[44] Just because one exercised choice in entering a transaction does not indicate a lack of economic compulsion, when the freedom to decline an employment offer is circumscribed.[45] Furthermore, inequality of bargaining power between workers and bosses ensured that the pressure that each could apply in negotiating a labour contract was 'unevenly distributed, with the result that some are economically strong, others economically weak. Hence the direction of economic coercion will flow from the party which is best able to govern price.'[46] In every bargain each party surrenders to some degree the freedom to act as one pleases, but Hale was adamant that 'the economically strong retain a considerable residuum of liberty and property; the economically weak, very little.'[47] When Thomas Piketty notes in regard to contemporary capitalism that the 'relative power of different social groups' plays a role in setting wages and points to employers having 'more bargaining power than workers' he is on the same wavelength as Hale.[48]

Hale was not unwavering in his belief that the relationship between employer and employee was premised on coercion. His equivocation was a signal of his conceptual confusion. Hale asserted the power of employees 'to withdraw their labour gives them a certain coercive power against the owner, and lessens the power to impose terms on them.'[49] With these words Hale sails close to promoting the view that mutual coercion was a theme in the relationship between employer and employee. Whilst it is incontrovertible that

43 Ibid 437–8.
44 Ibid 433.
45 Ibid.
46 Ibid.
47 Ibid.
48 T Piketty, *Capital in the Twenty-First Century* (The Belknap Press of Harvard University Press, 2014) 305, 312.
49 Duxbury, above n 42, 431.

undertaking strike action can deliver wage increases and some improvement in working standards, it fails to break the contractual bond joining worker and employer. It suspends the operation of the labour contract for the duration of a strike. A strike has no lasting impact on the social structures of power. The resort to striking is an expression of resistance to managerial prerogatives and the unequal distribution of income but it is a periodic outburst. The strike is an interlude that by its very nature ratifies the essential framework of the employment relationship. It ensures that workers remain tied to the wage system and its systemic inequalities. Striking allows bargaining over the conditions of servitude but at the same time it ensures adhesion to a social system based on wage labour. If Hale had spelt out that the role of strikes, trade unions and collective bargaining offset to some degree the lopsided relationship between capital and labour he would have been on firmer ground. However the role unions or other bodies can or cannot play in mitigating the rule of capital is in the final analysis inconsequential. Strikes cannot alter the social structure of the power of societies based on wage contracts. The compelling point is that Hale was oblivious to the degree to which the spectre of unemployment and poverty acts as a whip to compel workers to enter wage contracts; and, although a strike may be cathartic, the periodic withdrawal of labour has no transformative power. The asymmetrical nature of the wage contract is undiminished by strikes.

Hale's restricted vision of the social relations of a market economy led to him offering only a partial critique of the wage contract. Hale was forthright in seeing law as a vehicle for allocating political power.[50] But his primary focus on how law conditioned economic life was unconvincing. By placing undue emphasis on how law shaped economic development Hale was looking in the wrong place for the taproot of the contract of employment. Hale projected an image of law guiding economic aspects of life.[51] There is a sense in Hale that law shapes economics. Although there is a causal connection between law and the economic formation Hale failed to illuminate how law is subordinate to economics. Hale failed to grasp how economic activity conditioned not only law but the whole of society. Hale's misleading analysis of power led him to believe that by using legal enactments there could be a change in the relative distribution of coercive power to benefit workers that would reduce income inequality and repair the democratic deficit. This cautious reformist program was utopian. It forgot that the state represents class power, and that the upper economic strata would never participate in schemes to dilute their economic

50 B H Fried, *The Progressive Assault On Laissez Faire Robert Hale and the First Law and Economics Movement* (Harvard University Press, 1998) 3.

51 Ibid 8.

and legal stranglehold on those supplying labour hours.[52] The unequal world of the wage contract is held together by a network of interconnected power relationships. Hale would have benefited from undertaking a serious reading of Marx's political economy writings. Instead of Marx's emphasis on economic exploitation Hale spoke in more moderate social democratic tones of unequal bargaining power and government action in the form of 'pro-union and pro-worker legislation as necessary to counterbalance the force of concentrated capital.'[53] This line of argument omits that parliament is not the locus of power in a market economy. It is the network of ownership relations that is the benchmark of power. Parliament aids in reproducing and protecting the hegemonic economic interests that rule a wage labour society. To look to parliament for salvation and social justice is to look in all the wrong places.

Fried in her important work on the US realist movement notes that early twentieth century legal progressives typified by Hale 'offered a more moderate version of the Marxian critique, one that at least in theory could coexist with a liberal democracy.'[54] She astutely continues that: 'Unlike Marx, they did not believe that the maldistribution of wealth was an inevitable by-product of capitalism, and most stopped short of calling for abolition of private property or enforced equality as a cure.'[55] It is now appropriate to turn to Marx and his attempt to chart the depths of the employment contract.

III The Inner Rim of the Employment Contract

From his earliest days of enrolling in law at the University of Berlin in 1836 Marx was writing to his father and sketching out his plan to develop a philosophy of law.[56] Even as a young student the precocious Marx pursued an interdisciplinary and contextual approach to law.[57] In 1837 Marx noted to his father that he was endeavouring to 'unite his studies of law and philosophy in a work on the philosophy of law.'[58] Marx combined his university study of jurisprudence with work on philosophy and history.[59] Later, political economy became the focal point of his scholarship. The mature Marx focused more on property relations and less on law but his early legal studies proved invaluable when he turned his gaze to the structure of the labour contract. At

52 R Miliband, *Capitalist Democracy in Britain* (Oxford University Press, 1984) 96.
53 Fried, above n 50, 47.
54 Ibid 42.
55 Ibid 43.
56 A Megill, *Karl Marx: The Burden of Reason* (Rowman and Littlefield, 2002) 45; W A Suchting, *Marx: An Introduction* (Wheatsheaf Books, 1983) 4.
57 Megill, above n 56, 46.
58 Suchting, above n 56, 4.
59 Ibid.

its most elemental level Marx viewed the labour contract as an instrument of coercion.[60] In important aspects his vision of the employment contract and its coercive nature parallels the critique spelt out in Smith, Weber and Hale. But Marx plumbed the depths of the labour contract and its coercive edge in a far more forensic fashion than any other thinker has achieved. In Marx's case, as Macpherson observes, coercion was a product of 'the separation of labour and capital, that is, the existence of a labour force without its own sufficient capital and therefore without a choice as to whether to put its labour in the market or not.'[61] Marx defined the employment relationship as 'forced labour no matter how much it may seem to result from a free contractual arrangement.'[62] Lacking the means of production that are monopolised by the capitalist class formally independent workers are forced to sell labour hours or confront unemployment and penury. At one level contract law in Marx's schema was a legitimating ideology. It promises freedom but it chains workers as surely as the prisoners in Plato's Cave are entrapped by false consciousness.[63]

Up to this point anyone studying Smith, Weber and Hale would be struck by the resemblance between their framework of analysis and the one employed by Marx. They had all studied law and each one of them had excavated the labour contract and discerned the mystification of law and its capacity to give the appearance of equality to what was in practice an asymmetrical relationship. The only difference was that Marx went deeper in exploring how juridical categories diverted attention from the reality of the coercive nature of the labour process. Marx's nuanced theoretical framework explored how law hides the true relationship between classes and how the freedom of contract mantra cloaks a level of social reality where domination and subordination rule. Marx excavated the inner rim of the employment contract and peeled back the façade of juridical equality to expose its exploitative roots.

Marx examined the difference between the notion of deep structure and surface structure. In effect he searched for the inner logic guiding the development of the capitalist labour market. Marx peered below the visible phenomena of market relations expressed in individual preferences, money, prices, and circulation of commodities. Marx inspected the nature of social relationships in a market society to fathom the depths of a contract based on selling labour hours. He looked at the core of the contractual structures that underpin the wage system. Marx pierced the surface of formal legal equality to discover the systemic inequality that constitutes the wage contract.

60 K Marx, *Grundrisse: Foundations of the Critique of Political Economy* (Penguin, 1973) 611.
61 C B Macpherson, *Democratic Theory: Essays in Retrieval* (Oxford University Press, 1973) 146.
62 K Marx, *Capital, Volume Three* (Penguin, 1981) 958.
63 Plato, *The Republic* (Penguin, 2007) 240.

According to Marx, on the surface of society employers and employees were individual subjects endowed with equality and free to make choices. Thus freedom of contract prevailed. The workers were bound by a contractual relationship that ensured they were juridically free. The signal contribution of capitalism had been the defeat of feudalism and its penal employment statutes and the inception of a free market based on contractual relations.[64] But Marx's mission was to get underneath the surface of the contractual relationship. He noted that below the surface phenomena were 'invisible threads' shaping the course and destiny of employees entrapped by the 'legal fiction of a contract.'[65] At bottom contract law was a shield that rationalised material inequalities and condensed the interests of the power elite. Formal equality, as Eagleton notes, 'serves to obscure real inequalities of wealth and class.'[66] Marx's analytical task was to pinpoint the interpenetration between the contract of employment that operates at a visible level on the surface of society and the property relations that are the base of society and govern the operation of the buying and selling of labour power. The juridical basis of contract law had to be sought in the economic formation. As Marx put it: 'The juridical relation, whose form is the contract...is a relation between two wills which mirrors the economic relation. The content of this juridical relation (or relation of two wills) is itself determined by the economic relation.'[67] In effect, the juridical form encompassing the labour contract is a component part of a legal superstructure that is closely aligned to the economic formation. This is not to be interpreted as economic reductionism for the legal superstructure interacts with economic relations. The reflection of the economic formation in legal principles is a subtle and dialectical interconnection. For as Engels noted law is an ideological conception that 'reacts in its turn upon the economic basis and may, within certain limits, modify it.'[68] Certainly Marx discerned that in practice the law ignored the systemic inequalities that ruled the social relationship between capital and labour. It accentuated the formal equality aspect whilst camouflaging the economic inequality angle. Contract law was thus an elaborate form of legitimation and ideological mystification. In effect, legal equality masked the true contours of wage labour. The hallowed freedom of contract was matched by workers being 'free from the means of production and an appropriator who has absolute private property in the means of production.'[69] This insight became the guiding principle for Marx as he developed his analysis of how formally free workers provided a surplus that ensured they were the victims of extra-legal exploitation.

64 S Vettori, *The Employment Contract and the Changed World of Work* (Ashgate, 2007) 6.
65 Marx, above n 2, 719.
66 T Eagleton, *Why Marx Was Right* (Yale University Press, 2011) 103.
67 Marx, above n 2, 178.
68 Quoted in C Slaughter, *Marxism and the Class Struggle* (New Park Publications, 1975) 50.
69 K Doogan, *New Capitalism? The Transformation of Work* (Polity Press, 2009) 102.

In Marx's scenario the labour market was a deep structure that shaped the reproduction of the social system. What was truly distinctive about his contribution was the search for the internal structure hidden behind the visible functioning of a wage contract. Marx's framework of analysis for understanding the labour contract was pivoted on taking juridical equality seriously and seeking its origins in the equal exchange that occurred when wages were exchanged for labour.[70] Marx accepted that the worker receives full value in exchange for her labour. The contract was based on equal exchange, free will and equivalence.[71] Marx stressed that both parties to the contract of employment 'contract as free persons, who are equal before the law…Equality, because each enters into a relation with the other, as with a simple owner of commodities, and they exchange equivalent for equivalent.'[72] In sum, the worker is not cheated by the wage bargain struck. A realm of legal mutual obligations binds together employers and employees in an agreement between two formal equals. If the content of the contract belies the contractual form it is not apparent at a surface level. At that level there is no indication of the worker being exploited. This subtle form of analysis that separates the inner mechanism from the visible functioning of a contract of employment distinguishes Marx from Smith, Weber and Hale.

If the appropriation of unpaid labour and thus exploitation takes place under the guise of a contract between free producers then the hidden internal logic of the wage bargain must be unearthed.[73] If the juridical notions of equality can be ultimately reduced to viewing the contract of employment as a legal fiction then the 'appearance of equality in what is actually inequality' has to be excavated.[74] Marx has to go to the hidden abode of production to verify his thesis. Marx had to transcend bourgeois equality. He had to show how bourgeois equality, freedom and justice applies in the act of the worker selling labour hours but how bourgeois justice and its jurisprudence sanctions unfreedom and inequality once the worker steps into the workplace. In his mature years Marx was as unflinching in facing this epistemological challenge as he was when he was a law student in Berlin dreaming of advancing the borders of philosophy and creating a better world.

70 A Edie, I Grigg-Spall, P Ireland, 'Labour Law' in I Grigg-Spall and P Ireland (eds), *The Critical Lawyers Handbook* (Pluto Press, 1992) 108.

71 Ibid.

72 Marx, above n 2, 280.

73 M Godelier, 'Structure and Contradiction in Capital' in R Blackburn (ed), *Ideology in Social Science Readings in Critical Social Theory* (Fontana, 1972) 337.

74 F Jakubowski, *Ideology and Superstructure in Historical Materialism* (Allison and Busby, 1978) 47.

Marx was scathing about what happened once a wage bargain was struck. He opined that it opened up a new and dehumanising vista. He noted that 'the money-owner now strides out in front as a capitalist; the possessor of labour-power follows as his worker.'[75] Legal niceties evaporated as the worker 'holds back, like someone who has brought his own hide to market and now has nothing else to expect but – a tanning.'[76] According to Marx the different methods that governed how the economic surplus is extracted from workers have in every class society decided the nature of the legal rules regulating work. Marx wrote:

> The specific economic form in which unpaid surplus labour is pumped out of the direct producers determines the relationship of domination and servitude … It is in each case the direct relationship of the owners of the conditions of production to the immediate producers in which we find the innermost secret, the hidden basis of the entire social edifice.[77]

The transition to capitalism revamped not only the economic form of production and profitmaking but it also led to a transformation of the contractual relations of work.

The ascendancy of waged work signalled a new era in siphoning unpaid surplus labour from an underclass. The emergence of wage labour and the steady growth in the nineteenth century of big industrial enterprises coupled with trade union formation and agitation toppled the five hundred year reign of the law of master and servant.[78] The punitive statutory enactments and judicial doctrine of master and servant law that echoed the age of unfree serf labour began to disintegrate.[79] The penal labour laws of the master and servant era based on the disciplining and subordination of workers collapsed in the mid-nineteenth century as the expansion of a free trade economy generated the demand for a contract law that mirrored equal exchange, free will and equivalence.[80] The *Employers and Workmen Act* of 1875 in Britain granted formal legal equality to workers.[81] The growth of the commodification of labour power and the equality at market level of the buyer and sellers of labour hours created a new legal framework. The juridical guarantee of freedom of contract underpinned the emergence of a blanket wage system.

75 Marx, above n 2, 280
76 Ibid.
77 Marx, above n 62, 927.
78 D Hay, P Craven, 'Introduction' in D Hay and P Craven (eds), *Masters, Servants, and Magistrates in Britain and the Empire, 1562–1955* (The University of North Carolina Press, 2004) 1; D Simon, 'Master And Servant' in J Saville (ed), *Democracy And The Labour Movement* (Lawrence and Wishart, 1954) 188.
79 Simon, above n 78, 195.
80 Hay, Craven, above n 78, 6; Simon, above n 78, 199.
81 Simon, above n 78, 199.

Hidden below the surface of the wage contract and its aura of formal equality Marx illuminated the process that involves the extraction of profit from formally free workers. It was in the heart of the production process that Marx found the inner rim of the employment contract and justification for his claim that the legal superstructure served the economic formation.[82] The mirroring of the economic relation in the contractual terms is apparent from the fact the 'capitalist has the right to direct my work and assign my tasks.'[83] What is also of prime importance in forging the link between the law and economy 'is that whatever the labour produces during the period of the contract belongs to the capitalist, not to the labourer.'[84] And the fundamental thing produced in the workplace in the course of the contract is the surplus that is appropriated by employers. Beyond the surface impression of equality the employment contract sanctions unpaid surplus labour being pumped out of workers. The employer pays the full value of labour-power and this is the root cause of the equal exchange, free will and equivalence that combined together result in juridical equality at the level of the contract. But the contract stipulates a set number of hours of daily work and it extends beyond the point that the worker reproduces the equivalent of their cost of living. Once the point is reached that the reproduction cost of the worker is surpassed every second, minute and hour is unpaid surplus labour. As Harvey pithily puts it:

> Labourers, in short, are paid the value of labour-power, and that is that. The capitalist then puts them to work in such a way that that not only do they reproduce the value of their own labour-power, they also produce surplus-value.[85]

This capital accumulation process is the source of Marx's biting view that in the final analysis the free contractual agreement boils down to forced labour and economic bondage.[86]

IV Conclusion

The Janus Head of the labour contract has two faces. One face is predicated on imagery exhibiting all the virtues associated with juridical equality. The other face is the one seized upon by Smith, Weber, Hale and Marx. Just like Maupassant they searched for the deep structures that explained the totality of social relationships. They reached underneath the surface of the contractual relationship and grasped the link between what occurs at the visible level of the juridical form and its coercive content that resides in social relationships comprising power and subordination. Smith, Weber and Hale were first class

82 Marx, above n 3, 3; Marx, Engels, above n 35, 238.
83 D Harvey, *A Companion to Marx's Capital* (Verso, 2010) 119.
84 Ibid 120.
85 Ibid 124.
86 Marx, above n 2, 723.

thinkers but ultimately they only scratched below the surface in their search for the inner logic of the labour contract. Marx from an early age eschewed the hegemonic ideology of his age and he knew more and went deeper than other philosophical pilgrims in the search for the taproot of the labour contract. He pursued the fountainhead of the contract of employment and in the process forged the link between the surface structure of juridical equality and its connection with economic exploitation and the matrix of social relations epitomised by coercion and domination. Although this paper has given the palm to Marx for his work in showing the cloaked oppressive world of the employment contract the great thinkers that preceded and followed him have all contributed and expanded upon our insight into a contract that has shaped and continues to shape the modern social structure. They provided a theoretical and methodological framework that contemporary students can draw upon when adding to the legal canvass that encompasses the buying and selling of labour hours in a capitalist economy.