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Twisting the Tourniquet Around the Pulse of Conventional Legal Wisdom: Jurisprudence and Law Reform in the Work of Robert A. Samek

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Twisting the Tourniquet Around
the Pulse of Conventional Legal
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Robert A. Samek

Table of Contents

- I. Introduction
 - II. Law, Morals and the Legal Point of View
 - III. From Critique to Reconstruction
 - IV. From Theory to Praxis: Social Law Reform
 - V. Conclusion
-

I. *Introduction*

We are doomed historically to history, to the patient construction of discourses about discourses and to the task of hearing what has already been said.

Michel Foucault¹

The name Robert Samek² first came to my attention in the summer of 1985 as part of a research project carried out under the auspices of the Law Reform Commission of Canada.³ I was struck by what at the time seemed to be a complete contrast in two of his publications; his book, *The Legal Point of View*⁴ and an article, "A Case for Social Law Reform".⁵ Although only a few years apart, it seemed impossible that the two works could have come from the pen of the same author: the former

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1. *The Archaeology of Knowledge* (London: Tavistock, 1972). Introduction.

2. Former Professor of Law, Dalhousie University.

3. I wish to acknowledge my gratitude to the Law Reform Commission of Canada which made research into Samek's work possible. Particular thanks to Mr. Justice A. M. Linden who encouraged pursuit of this project. Hans Mohr and Allan C. Hutchinson at Osgoode Hall Law School also provided criticisms of an earlier draft. All the usual disclaimers apply.

4. New York: Philosophical Library, 1976 (hereinafter *L.P.V.*).

5. (1977), 55 Can. Bar Rev. 409.

was traditional, opaque, dull, pedantic and repetitive; the latter iconoclastic, lucid, fresh, aggressive and inspiring. Further research reinforced this seeming antinomy; a host of technical articles on contract law counterbalanced by a series of polemics which appeared to be somewhere to the left of the Conference on Critical Legal Studies, and an obscure book with a Greek sounding title, *The Meta Phenomenon*.⁶ A mystery was beginning to develop.⁷

Making a few inquiries in academia I found that many had heard the name "Samek", some recalled having "read something of his at sometime", and a few even remembered that he had something to do with jurisprudence, but almost no one could say anything concrete, let alone enlightening, about his work. As the enigma deepened my interest heightened and so I contacted the Law School at Dalhousie University and, at last, a few substantive comments began to emerge: no, he wasn't schizophrenic; no, he wasn't utopian; yes, he was a sincere, intense, passionate and committed academic of the highest integrity, but certainly not in the mainstream of contemporary Canadian legal thinking. A similar story developed in the course of conversations with past and present members of the Law Reform Commission who knew Samek.

Having exhausted all my contacts, the conclusion was one of respect for, but relative ignorance of, the person and his work. My curiosity unsatisfied, I decided that there was only one thing for it, to put my nose to the grindstone and do the research myself. This entailed a reading and re-reading, analysis and counter-analysis, critique, reflection and synthesis of over thirty articles and two books.⁸ In one sense, my task was made easier by the conspicuous lack of response to, and critical commentary on, Professor Samek's work,⁹ which meant that I did not have to rebut any counter-interpretations. In another sense, however, I felt isolated, unsure if I was on the right track and concerned in case I was misinterpreting the work. Despite some lingering reservations,¹⁰ I now

6. New York: Philosophical Library, 1981.

7. At about the same time I had just finished reading Umberto Eco's *The Name of the Rose*.

8. For an indispensable and almost complete bibliography of Professor Samek's work see, (1985), 7 Dal L.J. 469 Appendix A. It omits only one early article, "Contracts for Work and Materials and the Concept of Sale" (1962), 36 A.L.J.. Further, his last two articles have now been published: "Language, Communication, Computers and the Law" (1985), 7 Dal. L.J. 196 and "Euthanasia and Law Reform" (1985), 17 Ottawa L.R. 86.

9. Although the *L.P.V.* received several reviews most of his other work has been ignored. The only exceptions that I have found are Professor Fridman's unduly sarcastic response to Samek's developing theory of contract law with the Disneyesque title "Restitution Revindicated or the Wonderful World of Professor Samek" (1979), 29 U. of T. L.J. 160 and Underwood-Lewis' passing comments in his "Survey of Canadian Law: Jurisprudence" (1984), 16 Ottawa L.R. 172 at 175-81.

10. I should also point out that my interest in jurisprudence is from the legal not the philosophical perspective and that my familiarity with philosophy is, at best, sketchy. All due

feel comfortable with Samek's work and confident enough to present this reconstruction of his theory in order that his thoughts will be more accessible to those who might be interested.¹¹

II. *Law, Morals and the Legal Point of View*

Do not ask me who I am and do not ask me to remain the same . . .

Michel Foucault¹²

As early as 1963, while still specializing in Commercial Law, Samek tentatively began to articulate his longstanding interest in linguistic philosophy and apply it to legal problems. Although it is a brief article, "The Concepts of Act and Intention and their Treatment in Jurisprudence"¹³ is important for at least four reasons.

First, with what will become characteristic zeal, Samek questions the wisdom of the *mens rea/actus reus* dichotomy fundamental though it is to the common law tradition. Second, he utilizes as the basis of his critique "ordinary language analysis". He claims that although in ordinary usage there is an important distinction between "intentional" and "voluntary", when we say that "A does X" there is a presumption that A's act is both voluntary and intentional,¹⁴ that "*prima facie* an agent is responsible for his act".¹⁵ The upshot of this, in Samek's opinion, is that not only is it superfluous to qualify an act as both voluntary and intentional, but also that "act and intention can only be understood if we recognize their interdependence".¹⁶ They cannot be separated, and in purporting to do so criminal discourse distorts ordinary language usage. The only qualification he adds is to allow for "negative usage", that is,

apologies to any philosophers who may be appalled with the poverty of my philosophy — the faults lie with me, not with Samek who was very familiar with an incredible variety of modern thinkers.

11. Before proceeding further, two caveats are necessary. First, for reasons of time and space I have barely touched upon Samek's theory of contract law, but I would suggest that, with the benefit of hindsight, it does fit within his programme of radical social, political and legal transformation insofar as it is a courageous attempt to reform contract law from within and to make it respond in a humanitarian and equitable way to the conflicts which it is called upon to resolve. Secondly, I wish to make it clear that the purpose of this article is very modest; it is an attempt to provide a guide, a map if you like, to Samek's sometimes very elusive and therefore difficult arguments. As such, although I have reservations about certain of his claims, I have kept my own critical commentary to a minimum. I make no apologies for the parasitical nature of this article for my intention is exposition in order to facilitate and stimulate discourse. Bob Samek had important things to say and it seems to me that current Canadian jurisprudence can do with all the input it can get!

12. *Supra*, note 1 at 17.

13. (1963), 41 *Australasian Journal of Philosophy* 198.

14. *Id.* at 216.

15. *Id.* at 205.

16. *Id.*

reference should only be made to intent and voluntariness in order to negate any attempt to reduce A's responsibility for X.

Third, the article demonstrates Samek's iconoclastic propensity, his willingness to challenge the heavy artillery of English Positivism. He argues that the dichotomy of act and intention stems from John Austin's narrow view that acts are "muscle movements", and that Austin's jurisprudential heirs, including Salmond and Glanville Williams, have failed to transcend this unidimensional interpretation. Samek's own view is that "an act is an intervention in a state of affairs"¹⁷ which may include muscle movements but also incorporates much more, such as "acts of concentration and endeavour" and even "omissions",¹⁸ that is, acts which have no physical basis.

Finally, we are cautiously introduced to what is perhaps the key argument of Samek's early jurisprudence, the idea of "the point of view". Drawing on the work of, *inter alia*, G.E.M. Anscombe and J.L. Austin¹⁹ he claims that "there is no such thing as the authoritative version of what the agent does".²⁰ Samek's argument is that an agent may appear to be doing a variety of things depending upon the perspective of the person observing the activity. For example,²¹ a lawyer and a lay person both observe the same fact situation: A and B are arguing in a bar, A strikes B, B breaks a glass and thrusts it into A's face. To the lay person it is a pub brawl, to the lawyer it is a situation which raises issues of assault, self defence and excessive force. Samek's thesis is that the same fact situation can be interpreted in different ways depending upon the observer's "point of view" — to the lay person, it's an ugly fight, to the lawyer it raises questions of law.²² What he is suggesting is that there is no objectively

17. *Id.* at 207.

18. *Id.* at 208. It is important to note, however, that although omissions may be perceived as interventions, Samek posits that "this usage is to be deprecated". Samek at this stage in his development, is unwilling to go too far. However, over twenty years later in "Euthanasia and Law Reform", *supra*, note 8 he argues forcefully that the dichotomy of act and omission is false, at least with regard to life-support machines.

19. Samek's early jurisprudence and his theory of contract law are heavily inspired by Austin's ideas. Samek's present claim is derived from Austin's "A Plea for Excuses" (1956-57), *LXVII Proceedings of the Aristotelean Society N.S.* 1.

20. *Supra*, note 13 at 209.

21. This is my example, not Samek's.

22. There is of course no reason why the lawyer cannot also see it as an ugly fight; however because of her training and lifestyle, she tends to see the world through a legalistic grid. Similarly when a lawyer and an architect observe Bay Street, Toronto, the lawyer tends to think of the legal transactions going on behind the glass and the architect wonders (in horror?) at the structures. For polemical criticisms of the legalistic *weltanschauung* see Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy* (Cambridge, Mass.: Afar, 1983) and Stephen Halpern, "On the Politics and Pathology of Legal Education" (1982), 32 *J. Legal Ed.*

true right answer, that the best we can do is to seek an answer to the necessarily subjective and limited question which is asked from “our point of view in the given situation . . .”²³ When applied to the legal question of whether an agent is responsible for her act so that she cannot plead an excuse, Samek suggests that:

for that task it will be sufficient to establish that the act *under the description in which we are interested* (i.e., from the legal point of view, R.F.D.) was an act which the agent decided to do.²⁴

In short, Samek is willing to presume that from the legal point of view the agent intends her acts and that *actus reus* and *mens rea* questions are unnecessary except to rebut possible defences.

Samek’s nascent critical consciousness becomes more explicit the following year with “The Dynamic Model of Judicial Process and the *Ratio Decidendi* of a Case”.²⁵ Two central arguments emerge from this clear and cleverly constructed paper; first, that the doctrine of *ratio decidendi*, insofar as it is based upon a static model of the judicial process, is both untenable and misleading; second, judicial creativity through a dynamic model of the judicial process is both inevitable and desirable. In brief, Samek seeks to introduce clarity, realism and honesty into our thinking about the judicial process.

Samek constructs his thesis on the (broken) backs of Hart, Cross, Simpson, Derham and Levi, all of whom, he claims, in their espousal of the doctrine of binding *ratio decidendi*, are ultimately committed to a static model of the judicial process. He posits that such a model:

depicts the judicial process essentially as a process of classifying or subsuming new fact situations under existing rules . . . (and necessarily) presupposes a legal system consisting of closed rules.²⁶

For Samek such a presupposition is invalid. Following H.L.A. Hart he argues that “the nature of the judicial process”, the “ramifications of law” and the range of possible fact situations inevitably make for “a system of open-textured rules”.²⁷ Consequently there is a disturbing contradiction between the traditional theory of the judicial process and the inevitable reality of activist judicial interpretation.

It is important that we notice the depth of Samek’s critique. He is explicitly rejecting both rule formalism and the obedience model which are two of the basic tenets of traditional legal positivism. He argues that a command cannot be a command if it is equivocable, and that rules are

23. *Supra*, note 13 at 207.

24. *Id.* at 211.

25. (1964), 42 *Can. Bar Rev.* 433.

26. *Id.* at 435.

27. *Id.*

inherently indeterminate. Although he uses Hart's idea of "open-textured rules", he goes beyond him in claiming, "nor will it do to say that the core of a rule may be certain even if the penumbra is not".²⁸ Samek is pointing to the "structural indeterminacy of all open-textured rules"²⁹ both in ambit and content. The static model of the judicial process is therefore deprived of its foundation. If the static model collapses, so also must the ideal of a binding *ratio decidendi* for not only is it dependent upon the elusive determinative rules, but also a given fact situation may not be covered by existing rules or it may be covered by two or more rules.³⁰ Samek even suggests (although he does not provide any argument) that the concept of a binding *ratio* is a fiction.³¹

On the basis of this critique he tentatively adumbrates an alternative dynamic model of the legal process, one which advocates both the reality and desirability of judicial activism and creativity. The judges' role is more than one of mere classification, they are involved in *decision-making*. The judiciary ought to be concerned with "the good" and not be mere minions of an archaic past.

. . . the acceptance of a static model has tended to identify the judicial process with authority rather than with reason, justice and social policy. It has resulted in an inverted pragmatism, which clings to judicial pronouncements, however conflicting, ambiguous and unsatisfactory as the sole *terra firma* in legal analysis.³²

But neither must the judiciary be given a *carte blanche*; hierarchical deference must give way to progressive critique, "judicial *dicta* must be examined on their own merits and not accepted as revelations beyond inquiry".³³

Three key themes underline Samek's dynamic model of the judicial process. The first is a recognition that law is functional — it is a means

28. *Id.* at 436.

29. *Id.* at 435. The seriousness of his critique is well illustrated by an important footnote, where he appears to embrace both "fact skepticism" and subjectivism:

Facts are not hard particles which can be classified into "material" and "immaterial". Our way of looking at the world is conditioned by our interest, by our point of view, but according to the purpose in hand. The different kinds of maps in an atlas are good examples of purpose criteria of materiality Any description of a fact situation is influenced by a number of factors including the purpose for which it is made (*Id.* at 436-437, footnote 7.)

By demonstrating relativism through indeterminacy, Samek is gradually moving towards his critique of "essence" approaches. As will become clear this idea will have matured by the time of the *L.P.V.*

30. *Id.* at 448.

31. *Id.* Samek does not develop this claim, but for a full discussion of his theory of fictions see, "Fictions and the Law" (1981), 31 U. of T. L.J. 290.

32. *Id.* at 433.

33. *Id.* at 434.

to a just solution, not an incestuous end in itself. Therefore, it must be malleable in order that the judiciary can make decisions in a “normative fashion”. Second, since there are no necessarily determinative right answers, decisions must be based upon the most rational and persuasive arguments put forward by counsel who “use the authorities” but do not succumb to them. Flexibility is vital in order to reach the best decision possible. Third, the judge is not, however, an autonomous moral agent, “free to make decisions arbitrarily or as he (*sic*) thinks fit”. He must act in accordance with the obligations of a judge.³⁴ He must recognize structural constraints as limiting his authority but not totally fettering it. Legal concepts and authority are “open” and pliable and the judge must use the techniques of following, distinguishing and over-ruling conscientiously. Dogma must not trump ductility, and there must always be a willingness to “blaze new conceptual trails”, if possible.³⁵ Acceptance of such a model would obviously require abandoning the doctrine of binding *ratio decidendi* but this, claims Samek, would lead neither to chaos nor catastrophe.

The denial of the binding force of *ratio* does not prevent us from saying that a later court has misunderstood a rule laid down by a precedent court. Similarly there is no reason why there cannot be more than one construction of a rule laid down by a precedent court. The rule itself is not a matter of prediction, but the construction of the rule is . . . the denial of binding force to rules laid down in single cases does not mean that such rules may not be laid down.³⁶

Although Samek draws on potentially subversive themes such as subjectivism, relativism, inherent indeterminacy, malleability and openness, he refrains from outright agnosticism; he seeks merely to reintegrate law with justice, not to critique either: “Properly understood the doctrine of precedent is quite consistent with the dynamic model of the judicial process”.³⁷ His liberalism is relative only to the inherent conservatism of legal positivism.

This transitory streak of liberalism in Samek’s theoretical development emerges in two other articles, one dealing with punishment, the other with the enforcement of morals. The motivating force underlying “Punishment: A Postscript and Two Prolegomena”³⁸ is the practical problem of how to attenuate criminal activity as humanely as possible. He criticizes other writers in the field for starting at the wrong end of the

34. *Id.* at 446. See also Ronald Dworkin, *Law’s Empire* (Cambridge, Mass.: Harvard University Press, 1986).

35. *Id.* at 446-7.

36. *Id.* at 443-4.

37. *Id.* at 448.

38. (1966), 41 *Philosophy* 216.

spectrum, in the realm of theory rather than practice; this not only results in a failure to find any solution, it exacerbates the situation by obscuring the real problems. Samek again seeks to introduce some clear thinking into the debate in order to render the issues more accessible and therefore remediable.

His first claim is that his predecessors, Flew and Hart and Baier, have mistakenly confused the concept of punishment with a legal or quasi-legal system of punishment. Samek insists that, on the contrary, the former need not entail the latter.

All that is necessary for a case of punishment to occur is that a person . . . inflicts deliberately and not primarily for the sake of any beneficial consequences which may flow from his action, anything likely to cause discomfort to a victim who is capable of experiencing it, provided that the person inflicting the discomfort would claim, if asked to give a reason for his action, that he is inflicting it because of something . . . for which he holds the victim accountable.³⁹

He argues that with this interpretation there are many acts of punishment which are clearly non-legal. Punishment can, and must, be understood as distinct from the legal system.

Second, the above definition also allows us to distinguish the meaning of punishment from its justification. Therefore, *contra* Hart, he argues that punishment is not necessarily retributive because the meaning of punishment is prior to, and distinct from, its justification. Punishment, depending on the purpose of the person inflicting it, may therefore be based upon any one of several diverse justifications, such as retribution, deterrence, rehabilitation or purgation.

Having made these vitally important distinctions, which enable us to perceive the issues more clearly, Samek proceeds to his central thesis that retribution is an inadequate justification for the legal system's use of punishment. He outlines three arguments to support his claim: first, retribution presupposes free choice but the law does not permit such choice; second, a legal system is inherently incapable of dealing with every wrongdoing, and thus a wrongdoing should only be made illegal if to do so would, on balance, be beneficial for the community; and third, retribution is divorced from such social utility, because it believes in the infliction of punishment as an end in itself and not as a means towards the communal good. Retribution is therefore incapable of providing justification for legal punishment.

Samek's own preference (which in retrospect may be overly sanguine) is to pursue the spirit of Barbara Wooton's enterprise⁴⁰ and advocate a

39. *Id.*

40. *Crime and the Criminal Law*, (London: Stevens, 1964).

“humane and utilitarian system . . . designed to reduce crime and rehabilitate offenders”.⁴¹ He further suggests that any movement in this direction, adjusted as it will be to “the needs of the community and of individual offenders”, will not involve the infliction of discomfort as an end in itself and therefore it would be wrong to call it a system of punishment.

Samek also adopts a liberal stance in discussing the role which the law should play in “The Enforcement of Morals”.⁴² He opines once again that the debates are opaque because several distinct issues have been telescoped by insufficiently reflective analysis. To remedy the situation he posits that there are four distinct alternative positions on the issue of the enforcement of morals:

- a) the enforcement of morals as such in the stronger sense, that is, every immoral act should *eo ipso* also be an illegal act;
- b) the enforcement of morals as such in the weaker sense, that is, some immoral acts should *qua* such acts also be illegal acts;
- c) the enforcement of morals in the stronger sense, that is, the immorality of some acts should be the decisive factor in making them illegal; and
- d) the enforcement of morals in the weaker sense, that is, the immorality of an act should be a relevant factor in deciding whether to make it illegal.⁴³

Having cleared the air Samek argues that only (d), the enforcement of morals in the weaker sense, is defensible. His justification is quite liberal in that he simply recognizes the limits of law: “. . . what is grist to the fine mill of morality may well escape the clumsy engine of law or be mangled by it”.⁴⁴ Yet, as shall become clear, he does believe that morality is a relevant factor in deciding whether to make an act illegal — law and morals are interconnected. Furthermore, he develops the key theme of “The Dynamic Model”,⁴⁵ the creative role of the judiciary: “. . . it is more fruitful to think of legislators and judges as craftsmen who work upon moral and other values to the form of law for the benefit of the society they serve”.⁴⁶ It is important to note, however, that in Samek’s opinion such moral activism is legitimate because in a liberal and democratic society both the legislators and the judiciary “serve”. His purpose in this article has, in part, been to clarify the issues so that these trusted personnel can do their task even better.

41. *Supra*, note 38 at 229-30.

42. (1971), 49 Can. Bar Rev. 188.

43. *Id.*

44. *Id.* at 221.

45. *Supra*, note 25.

46. *Supra*, note 42 at 221.

Finally, at this stage, Samek also appears to favour Mill's liberal utilitarianism as the basis for both moral and legal decision-making.

There can be no question of enforcing merely conventional moral values either through moral or legal sanctions. Only values which have satisfied the principle of utility can be enforced, and their appropriate mode of enforcement must be decided on the balance of utilitarian considerations. Conventional moral values are relevant as candidates to be tested on the principle of utility for moral or legal enforcement, but they do not themselves constitute approved moral or legal values.⁴⁷

The foregoing articles are also important when perceived as prolegomena to Samek's treatise, *The Legal Point of View*, because many of the key themes developed in this later work began their gestation period in these early essays.

On publication, the *L.P.V.* was fairly widely reviewed but, in general, received unfavourable assessment.⁴⁸ At the very beginning of the book Samek invokes Wittgenstein and warns us that we must always ask the right sort of questions. We must always ask — What purpose do we wish to achieve? It seems to me that some of Samek's critics failed to apply this criterion to the *L.P.V.* They failed to ask what was Samek's purpose and therefore failed to understand what he intended to do. The result is that some of the criticisms are unfair to Samek, while others are simply off the mark. By the same token, however, Samek must also share some of the blame for the poor reception of his work. Most fundamentally, he never makes his thesis absolutely clear, preferring instead to let it emerge from a comparison with his jurisprudential predecessors. In my opinion, the key to understanding the *L.P.V.* is to be found in the discussion of the relationship between law and morals, but why Samek decided to leave this to the postscript remains a mystery.

From a different perspective, the *L.P.V.* can be perceived as Samek's first major step away from the dominant tradition in Anglo-Canadian jurisprudence but without any clear recognition on his part as to where he wanted to go. It is a protest against the jurisprudential hegemony of legal positivism — “. . . without justice what are kingdoms but great bands of robbers”⁴⁹ — but without articulation of any substantive alternative.

47. *Id.* at 208.

48. Michael Bayles (1976), 21 Wayne L.R. 191; Alan Watson (1975), 91 L.Q.R. 574; Philip Slayton (1975), 21 McGill L.J. 164; J. Underwood Lewis (1975), 7 Ottawa LR. 691; S.F.D. Guest (1975), 6 N.Z.U.L.R.; Randal R. Marlin (1975), 2 Dal. L.J. 553; I.M. Yeats (1977), 6 Adelaide L.R. 178.

49. Samek prefaces his work with this naturalistic quote from St. Augustine, but strives to avoid the natural law tradition as much as legal positivism. This interpretation of the *L.P.V.* as a negative reaction against positivism as opposed to a constructive, novel theory is reinforced

The *L.P.V.* is not a particularly accessible book so it might be useful if I briefly outline the central themes of Samek's thesis.⁵⁰ The *L.P.V.* is a two tiered work; it is both a book in jurisprudence *per se* and a book about jurisprudence. Our concern will be with the novel aspect, his "new organizing concept, or new model . . . call(ed) the legal point of view".⁵¹ However, for the sake of completeness we ought to be aware that it is upon this foundation that he constructs the second, much longer part of the book, the analysis and evaluation of his jurisprudential predecessors. He synthesizes and succinctly criticizes four "command theories of law", those of Hobbes, Blackstone, Bentham and Austin; Kelsen's "norm model"; Hart's "recognition model" and Fuller's "aspirational model". His aim is not to "trash"⁵² them, rather it is to constructively appreciate their various strengths and weaknesses.

. . . looked at in the light of the new model the old models will acquire new meaning and a new value; instead of being condemned for their inevitable failure to capture the true essence of law, they will be judged by their success in illuminating certain aspects of law which are of value to the legal point of view.⁵³

Following Wittgenstein's *Philosophical Investigations*⁵⁴ he argues that

by a comment he made ten years later in "Language, Communication, Computers, and Law", *supra*, note 8 at 196-7:

We must not look for the essence of anything or view it in terms of the conventionally held approach. There comes a point when this approach is exhausted, when it has nothing left to offer us and our inquiries become self-defeating. The prevalent analytical approach to jurisprudence is a case in point; it is a complement of the legal positivism it purports to analyse. The worst of it is not the slant of its own perspective as the blotting out of alternatives. By co-opting all "respectable" opposition, it becomes tyrannical Linguistic philosophy has made some valuable contributions to jurisprudence after it had ceased to be innovative in its own sphere. But now it is played out; we need new perspectives to lift jurisprudence out of its present rut.

50. For a very useful map on how to read the *L.P.V.* see, Bayles, *supra*, note 48.

51. *Supra*, note 4 at 86-7.

52. Trashing is a method of legal argument currently in vogue through the work of the Critical Legal Studies Movement. In essence, it is a form of negative critique. Trashing has a very explicit political intention; it seeks to delegitimize both law and the dominant forms of legal argument.

53. *Supra*, note 4 at 87. This aspect of his work need not detain us any further, except to say that perhaps the greatest strength of the book is his, at times, excellent condensation of the arguments of his predecessors. Not only does he develop his own insights he also provides perceptive and lucid outlines of their main arguments and compact compilations of the major criticisms. This section of the work serves as a valuable introductory text to many of the leading jurisprudential theorists. One qualification, however, is necessary; rather surprisingly, he appears to misunderstand Hart's interpretation of Austin.

54. (Oxford: Blackwell, 1968). Translated by G.E.M. Anscombe. Some commentators query whether his interpretation of Wittgenstein is accurate; I am unqualified to decide. However, any such criticism seems trivial and purist because it is quite clear what Samek's position is. It doesn't really matter whether it is Wittgensteinian or not.

“What is law?” type questions, insofar as they tend to produce responses which make claims to having discovered objective truths, are doomed to failure.⁵⁵ This is so for two reasons: such questions misunderstand both the nature of the philosophical enterprise which cannot be concerned with the general, universalizable truths, and the nature of concepts themselves which are ultimately no more than malleable instruments.

In *Philosophical Investigations* Wittgenstein held that language was an instrument which served different needs and different interests in different ways and that the main source of philosophical puzzlement was the quest for generality.⁵⁶

Samek agrees with Hart in rejecting “theory built on the back of definition”, but he goes further in claiming that language, even in its ordinary usage, is “bent”⁵⁷ by the context in which it is used. He concludes that all attempts to seek the essence of law are futile and inappropriate; in seeking to do too much they overstretch themselves, ultimately undermining their own valid insights.

Samek’s deliberately therapeutic⁵⁸ response is contextual and subjective — “. . . the meaning of words vary with and are bounded by their use in different language games”.⁵⁹ His argument, in brief, is that

55. “For our purpose the most important lesson to be learned from Wittgenstein is this: the ‘What is X?’ type question tends to initiate the wrong sort of inquiry. It prompts us to look for the essence of X which remains constant, independent of the context in which it is used. Thus the question: ‘What is Law?’ has led to a wild goose chase after the essence of law.” (*Supra*, note 4 at 9-10.)

56. *Supra*, note 31 at 294.

57. *Supra*, note 4 at 38.

58. This idea of therapy is important in so far as it forces us to recognize the limited nature of Samek’s argument. One of the main criticisms that has been levelled at Samek is that he never makes it totally clear what he means by “essence of law approaches”; he simply claims that all his predecessors adopted this approach and were thereby fundamentally misconceived in their projects. Further, since the legal point of view exists in contradistinction to the elusive essence of law we are also very uncomfortable with it. In defence of Samek, I would suggest that we identify essence of law approaches with claims to objective truth (that this or that is necessarily what law is about), and the legal point of view with contextualism, subjectivism, malleability and relativism — it makes no claims on the monopoly of truth. The legal point of view is, in Samek’s opinion, the most useful way to understand the functions of the contemporary legal system. Therefore, therapy is all he can offer — all he can do is to show us where we have gone wrong and let us work the rest out for ourselves. His theory prevents him from developing any alternative “right answer”. Elsewhere he suggests that

the philosopher is like an analyst . . . who does not have to prescribe a cure for a patient. All he has to do is to find the cause of his entanglement. The object of therapy will be to give him a clearer view of his condition and to stop him from worsening it by worrying over the senseless problems which have brought it about. (*Supra*, note 31 at 295.)

This therapeutic approach is also an important aspect of Continental Critical Theory. (*See, eg. Jurgen Habermas, Knowledge and Human Interests*, (Boston: Beacon Press, 1971) Part Three.)

59. *Supra*, note 4 at 8.

words and concepts have no intrinsic essence, rather they vary not only in time and space but also in their purposive usage. Consequently, all we can do is to offer heuristic, functional models which admittedly do not capture all the divergent uses, but which are still “fruitful” for a particular purpose which we may have in mind. (As will become clear, Samek’s purpose is to discuss the inevitable relationship between law and morality.) Such a model is a “provisional corrigible construct, composed of the building blocks of many other models”⁶⁰ and, as such, avoids the problems of the essence of law approaches because it denies the objective question of true or false and replaces it with the criteria of more or less fruitful.

In using the concept of “points of view” we avoid the claim of having caught the essence of law or morality, and limit ourselves to merely presenting a subjective model of a point of view . . . hence there is no need to imprison everything that passes for law in our model.⁶¹

. . . It does not demand the reduction of the rich and complex ordinary concept of law to one or more of its aspects.⁶²

To support his argument Samek distinguishes four functions of discourse: assertion, evaluation, prescription and performance.⁶³ Only the first two need concern us here. For Samek, an evaluation is a considered opinion, acceptable to the best informed opinion in the world.⁶⁴ An assertion, on the other hand, is a truth claim, something which is conclusively verified by the best opinion in the world. He opines that questions of legal philosophy cannot be assertive truth claims since consensus is impossible;⁶⁵ such questions (and their answers) can at best only be evaluative. With regard to law, we can only offer “an evaluative model of a set of postulates which express the speaker’s pro or con attitude to (law) about which he has formed a considered opinion”.⁶⁶ This model is

60. *Id.* at 52.

61. “Law and Morals: A New Approach” (1976), 27 *Humanities Association Review* 16 at 17.

62. “The Objects and Limits of Law Reform” — unpublished report for the L.R.C. (1976). In my opinion this extensive report is the most comprehensive, coherent and unified statement of all of Samek’s work. Various of his published articles are spin-offs from this work; for this reason I often use this as my basic text when there is an overlap. It is a great pity that the Commission never published this report.

63. *Supra*, note 4, Chapter Two. These appear to be drawn from the work of J.L. Austin. Although in the present work Samek only concentrates upon the assertive and evaluative functions, in a series of articles over a period of fifteen years he strives to develop an objective theory of contract law based upon the idea of performative utterances subject to infelicitous inequities. An analysis of this innovative approach to the problems of contract law must, unfortunately, await another occasion.

64. *Id.* at 24-5.

65. Some may interpret this as an identification of truth with consensus. However Samek’s later work on paradigms would reject any such correlation (*see below*).

66. *Supra*, note 4 at 26.

neither true nor false, it can only be evaluated to the extent that it is more or less fruitful in helping us to understand law.

Samek embraces a relativistic conception of philosophy, jurisprudence and law.

On these philosophical foundations Samek proceeds to mark out the field of interest (which he emphasizes is distinct from the essence of law) occupied by the legal point of view as “that mode of institutional social control which is enforced through the effective application of a norm system by courts acting as norm authorities of the system”.⁶⁷ A norm system (which is what gives the legal point of view its formal structure⁶⁸) is a “hierarchical system of impersonal prescriptions, the issuing of the lower units of which is enjoined or permitted by the higher”.⁶⁹ A legal norm is valid if it is a “genuine norm of a legal norm system”.⁷⁰ Samek also attempts to account for some of the complex functions which law fulfills in contemporary society by drawing a distinction between “action-guiding norms”, that is, permissions, and “committing norms”, that is, obligations.⁷¹ Finally, the content of legal norms is adopted from values from various points of view, especially the moral one which provides the foundation values of a legal system. Put simply, Samek argues that, from the legal point of view, the legal system is a norm-enforcing system, laws are norms, and laws have a moral content.

At first blush, one may be tempted to identify this theory with that of Hans Kelsen. It is true that there are important similarities — Samek admits that his theory is constructed from the building blocks of his predecessors — but there are at least two fundamental differences. First, Samek rejects the Grundnorm as a “hollow concept”, and posits instead that validity can be derived from a “hydra-headed model”, that is, several distinct ultimate norm authorities may found a system, provided they are

67. *Id.* at 87-8.

68. *Id.* at 339.

69. *Id.* at 54.

70. *Id.* at 73.

71. *Id.* at 62. Several critics have overlooked this distinction and accused Samek of having a uni-dimensional, coercive and “penal” interpretation of law. Although Samek fails to develop this distinction he is acutely aware of the various roles which modern law does fulfill. Indeed one of the motivational forces for Samek in writing the *L.P.V.* was to allow for the complexity of law. Elsewhere Samek has outlined the “remedial” and “channelling” functions of contract law in “The Requirement of Certainty of Terms in the Formation of Contract: A Quantitative Approach” (1970), 48 Can. Bar Rev. 203; the ideological role of law in “Justice as Ideology: Another Look at Rawls” (1981), 50 Can. Bar Rev. 787 and; the communicative aspect of law in “Language, Communication, Computers and Law”, *supra*, note 8. Furthermore, although law does fulfill a host of functions, ours is an increasingly legalistic society; more and more laws are perceived as being the solution to more and more social and human problems. Samek may not be as wrong as his critics might think!

“logically consistent”.⁷² Second, and more importantly, he rejects Kelsen’s pure theory, through his claim that there is an inevitable connection between law and morality.

We must look at this last claim in more detail since, as I have already suggested, it is the key to understanding the legal point of view. Throughout the treatise Samek recognizes that there are various points of view: political, moral, legal, legal-philosophical, scientific, aesthetic, religious, psychological, *et cetera*. Although he never analyses any of these in detail he does claim that each point of view “occupies an exclusive field of interest”⁷³ and that models constructed from different points of view (that is, for different uses) cannot conflict. Samek applies this to the relationship between law and morals and argues that the interest underlying the legal point of view is social control by the courts and tribunals through a norm system, while that underlying the moral point of view is “human obligations *qua* such obligations and human aspirations *qua* such aspirations”.⁷⁴ Contemporary law is primarily concerned with enforcement, and contemporary morality is primarily concerned with obligations and aspirations. This positivistic streak in Samek’s work appears to be reinforced when he outlines nine distinctions between the legal and moral points of view.⁷⁵

There is, however, another side to the legal point of view apart from that of repressive enforcement. He posits that there is “an intimate connection between law and justice”,⁷⁶ that law has an “internal morality”,⁷⁷ that “law must be fashioned in the image of morality”⁷⁸ and that any attempt to divorce the two is “dangerous and futile”.⁷⁹ Indeed, he even goes so far as to suggest that if “values diametrically opposed to those which are normally enforced by a legal system” are being enforced then it is not a legal system.⁸⁰ Claims such as these tend to force Samek into the widely discredited natural law tradition which identifies law with morality. Samek, however, resists this naturalistic slippery slope by recognizing that the invocation of naturalism would be yet another essence of law approach reducing law to morality. He refuses to escape the Scylla of positivism only to be swallowed by the Charybdis of natural law.

72. *Id.* at 185-9. Bayles argues persuasively, however, that Samek’s own argument is weak insofar as logical consistency is an inadequate foundation (*see supra*, note 48 at 202.)

73. *Supra*, note 4 at 88.

74. *Id.* at 316.

75. *Id.* 317-9.

76. *Id.* at 341.

77. *Id.* at 344.

78. *Id.* at 335.

79. *Supra*, note 42 at 188.

80. *Supra*, note 4 at 194-5.

Samek argues that we need not be impaled on the horns of this false dilemma, that through what might be called a “foundational theory” law and morals can be conceived of as two “separate but overlapping systems”.⁸¹ Samek’s liberating proposal is that the moral point of view provides the foundation values for the legal norm system which *adapts* them to its own requirements.

. . . we must not think of taking over moral rules lock, stock and barrel . . . they . . . still have to be adapted from their moral environment to serve the special end of *legal enforcement*.⁸²

And again,

. . . in my model the characterizing feature of the legal point of view is its concern with the *enforcement* of certain values, predominantly moral, which are adapted for that purpose from other points of view through the machinery of courts or tribunals acting as norm authorities of a norm system.⁸³

Gradually Samek’s own position is beginning to surface as he becomes more confident of what he wishes to say. No longer is he content to be descriptive *à la* pseudo value neutrality of legal positivism. Prescriptivism begins to emerge. Not only is there an “indirect but permanent” relationship between the legal and moral points of view, they are, and ought to be, complementary. “Legal justice presupposes a moral foundation. If we detach law from morality and make it a creature of mere power relations, we turn it into a sham”.⁸⁴ He continues,

. . . a judge must adopt the legal point of view, yet he must never close the door to the moral point of view . . . or he will cease to be a judge of the law and become its prisoner.⁸⁵

Claims such as these force Samek to reconsider his earlier argument that law and morals occupy exclusive fields of interest. Although he reiterates the thesis, in the course of so doing two significant developments occur. First, he expands significantly his conception of the moral point of view.

Human rights, from the moral point of view, are reducible either to human obligations owing to right holders or to human aspirations . . . the moral point of view is concerned with *human values as such* and not merely with the effective enforcement of a particular system of values . . . it is *the universal human dimension*, as distinguished from its mere adaptation for the purpose of a particular technique of social control, that provides the guiding principle for marking of the legal point of view from the moral point of view, legal values from moral values.⁸⁶ (My emphasis added)

81. *Id.* at 188-9.

82. *Supra*, note 42 at 221.

83. *Supra*, note 4 at 229.

84. *Supra*, note 61 at 18.

85. *Supra*, note 4 at 320.

86. *Supra*, note 61 at 18-9.

Second, and interconnectedly, he qualifies his earlier argument by suggesting that although no logical conflict between the two points of view is possible, practical ones are unavoidable, and then continues:

The only rational solution (of such conflict) will be (for the agent) to comply with the obligation to which he attaches a higher value . . . the nature of his choice will depend upon how highly he values the ends which he seeks to achieve by adopting the various points of view. As a person becomes more conscious of the rational connection between his various ends, he may be said to commit himself to a way of life. This will involve arranging the various ends which he seeks to realize into a hierarchical order of preference, so that any conflict which may arise between them can be resolved in favour of the more important end. If we accept the view that the end — whatever it may be — which a person seeks to realize through the adaptation of the moral point of view is the highest end, then in any conflict between that end and any other end the former must prevail.⁸⁷

What we are experiencing here is a very important shift in Samek's position. Previously, as we have seen, he had advocated liberal utilitarianism but in the course of writing and contemplating the *L.P.V.* he seems to have abandoned this position and embraced in its place the Kantian humanist perspective of the autonomous, free-choosing and rational moral agent.⁸⁸ It also suggests a further shift towards subjectivism, that individual rationality should be prior to the objective authority of the law.

Samek, it seems, is torn between two conflicting visions of law: law as repressive and coercive enforcement, and law as a vehicle for justice. He has not yet given up on the instrumental potential of law. His foundational theory is an emotional plea for the mutual reinforcement of law and justice. This, however, is a double-edged sword. Should law lose its saving grace of being a means to the end of justice, then the legal point of view may no longer merit a continued existence.⁸⁹

III. *From Critique to Reconstruction*

The way back to reality is to destroy our perception of it.

Bergson⁹⁰

Not long after the publication of the *L.P.V.* Samek explained that his

87. *Id.* at 19.

88. Unfortunately, Samek never tells us why he foregoes utilitarianism. Hans Mohr has suggested that Samek, like many others in the late 1960s and early 1970s, recognized the limits of liberal utilitarianism and therefore turned to moral theory in search of an alternative approach, a move which inevitably led to Kant.

89. *Supra*, note 61 at 21.

90. Quoted in Jill Vickers', "Memoirs of an Ontological Exile: The Methodological Rebellions of Feminist Research" in Miles and Finn (eds.) *Feminism in Canada: From Pressure to Politics*, (Montreal: Black Rose Books, 1982).

purpose had been to facilitate an understanding of legal phenomena but that this in no way implied his acceptance of, or a justification for, the *status quo*.⁹¹ From the mid-1970s onwards, Samek's concern was to develop his own radical perspective on contemporary law and society and to provide some indications as to how we might begin to transcend "the here" and move closer towards "the there." In this section I shall attempt to reconstruct Samek's multifaceted thesis first by outlining his critique of contemporary society, the Rule of Law, lawyers, legal doctrine, justice and rights, and law reform. On this foundation, I shall adumbrate his own affirmative vision, beginning with his epistemological claims and progressing to his perceptions of law, justice and rights. In the final section of this Paper I shall concretize his claims through an analysis of the theory and praxis of social law reform.

Samek's jumping-off point is his proposal that in order to make any progress we must begin at the right end of the telescope; we must put ourselves, our thoughts and our conceptual framework into the contemporary social context. He posits that

. . . there has been a whole new concatenation of social evils that have been spawned by the industrial revolution and which have been multiplied a millionfold by the evergrowing technological power of mass production.⁹²

Inspired by the New Left, he posits that capitalism and the market economy are inherently exploitative, that they alienate, dehumanize and commodify the person into a producer/consumer.⁹³ Modern technology⁹⁴ exacerbates this process of reification, with the consequence that the great ideals and promises of Liberalism have been deflated to superficial and ephemeral "consumer rights". Distortion, distraction and perversion are the order of the day.

Government, politics and legislation can only be understood in this context. Not only is modern government subject to the stultifying weight and rigid structure of bureaucracy, its function is to represent the various pressure groups and to juggle their conflicting interests in order to preserve its own existence through a never-ending stream of *ad hoc*

91. Indeed, as early as 1973, a year before the publication of the *L.P.V.*, Samek had already launched his first major broadside against the commodifying and dehumanizing nature of contemporary society in the course of his proposals for reform of the law in relation to pornography. "Pornography as a Species of Second Order Sexual Behaviour: A Submission for Law Reform" (1973), 1 Dal L.J. 265.

92. "Pornography" — unpublished report for the L.R.C. (1976) at 53.

93. *Supra*, note 91 at 276-7. See also his excellent, "Beyond the Stable State of Law" (1976), 8 Ottawa L.R. 549 at 554.

94. He defines technology as "the system of means employed by men in a given society to satisfy their social objectives" (*supra*, note 93 at 551.)

compromises.⁹⁵ Politicians, who in general are constrained by their party platform and the vested interests which support them, preoccupy themselves with trivia and gloss over the important issues. Not surprisingly, legislation, the output of this non-system, is ineffective. It is sporadic, piecemeal and incremental; legalistic; dependent upon its political “sex appeal” rather than some recognized need; biased; temporally constrained; externally coercive rather than internally motivating; and it assumes an essentially static social matrix.⁹⁶ Legislation, at best, can only be reformist, incapable of any genuine social change because it is “locked within the politico-legal framework of the existing system”.⁹⁷

Samek is equally critical of the legal profession. First, lawyers are a small interest group who, through their “proprietary claims”,⁹⁸ have almost exclusive control over the law and law reform. In a legalistic society such as ours their monopolistic strength has been an “unmitigated boon”⁹⁹ for no one but themselves. Second, they utilize their manipulative skills at the behest of vested interests, including their own:

. . . with expert (legal) guidance almost everything is possible. Black can be turned into white, tax evasion into tax avoidance, fraud into legitimate enterprise. The free enterprise system not only allows but promotes the exploitation of law for everybody with the money to pay the lawyer. The adversarial system protects the individual in the jungle by its own methods.¹⁰⁰

Third, consumerism has enveloped the legal profession so that we now have the provision of “mechanized professional services to depersonalized customers” instead of a sympathetic, needs-oriented response.¹⁰¹ The judiciary is also guilty of this system’s approach — “. . . some magistrates work hand in hand with the police and there is no visible accused, only a succession of files which are opened and shut”.¹⁰² Fourth, lawyers as

95. For example, he suggests that the federal and provincial governments were not really arguing about the *Charter*, rather they were arguing about the balance of power within the system. The means of power became an end in themselves and the important issues which ought to have been discussed were either bandied about and bartered or ignored completely. “Untrenching Fundamental Rights” (1982), 27 McGill L.J. 755 at 771.

96. *Supra*, note 62 at 12-3.

97. *Supra*, note 5 at 416.

98. *Supra*, note 62 at 18.

99. *Id.* at 55.

100. *Id.* at 131-2.

101. *Id.* at 19. Samek lays the same charge against the medical profession arguing that there are major similarities between these two prestigious and imperialistic professions.

102. *Id.* at 60. It should be noted, however, that Samek appears to have an ambivalent attitude towards the judiciary, because he qualifies the foregoing statement with, “other judges are finishing agents for the legislature. They are forever making its crude structures inhabitable for the law and infuse the bare bones with life” (*id.*). This uncharacteristically benign view of

practitioners and “realistic” practical men (*sic*) have a very constrained sense of vision. They subject the future to the yoke of the present¹⁰³ and, at best, will only indulge in legalistic tinkering with the system. Finally, legal education is identified as being a vital component in the reproduction of legalistic myopia. Legal acolytes, instead of experiencing the liberating effects of education,¹⁰⁴ are trained to perceive the world and social interaction through a blinkered legalistic grid; to indulge in legal reasoning “however unreasoning”;¹⁰⁵ and to adopt a conservative and retrospective *weltanschauung* concentrating on doctrine, precedent and *stare decisis*.¹⁰⁶ Ultimately, “the pupil ends up like his master . . . chewing the cud . . . a prisoner of his education and a captive of the system.”¹⁰⁷

judges manifests itself elsewhere, for example, in his praise of Lord Denning’s doctrine of “equitable mistake” and the latter’s efforts to bend the law so that justice may be done. *See*, “The Synthetic Approach to Unjustifiable Enrichment” (1977), 27 U. of T. L.J. 335. Furthermore, he praises the majority of the Supreme Court of Canada for its decision in the Patriation Case, *Re Constitution of Canada* (1982), 125 D.L.R. (3d) 1, in that they refused either to reduce convention to law or divorce them completely. Either approach, in Samek’s opinion would have been excessively legalistic and poor praxis. “In the circumstances the (Supreme Court’s) decision was probably as wise as it could be. It pointed the finger in the right direction.” (“Law and Convention, A Peep Behind the Patriation Case”(1982), Dal. Cont. Legal Ed. 30 at 37.)

But again, Samek will not go too far:

We must not overestimate the power of the judges and their capacity to deliver the goods. Recruited from the profession, they generally continue to wear its blinkers. Their world is the law and everywhere they struggle like fish in the net. In seeking to escape the noose they tighten it at every turn. Judges are not so much bound by the rules as their states of mind. Their education speaks louder than the rules, for it is only through this that the rules speak at all. (*Supra*, note 62 at 60.)

It seems to me that Samek is struggling to maintain some firm territory. Having given up on Parliament and legislation almost completely, he does not wish to relinquish that other arena of praxis and discourse, the courts. He wants to leave open the possibility that this might be one area which, if suitably transformed, could be useful for his programme of praxis. It also allows him to posit that if we could break the ideological power of conservative legal education and blaze new conceptual and socio-moral trails then this might filter up to the courts which, persuaded by the force of rational argument, might develop the law in a more humanitarian direction.

103. *Supra*, note 62 at 8.

104. “Legal Education and University Education” (1964), 8 J.S.P.T.L. 1.

105. *Supra*, note 62 at 91.

106. *Supra*, note 25.

107. *Supra*, note 62 at 91. Samek also blames legal academics for the sorry state of legal education. They often act as the minions of the profession, doing the dirty work and preparing the novices for their integration into the rarified realm of legalism. Elsewhere he makes several rather caustic comments about the motivation behind much academic scholarship and discourse. For example, referring to the dialogue between Rawls and his critics, Samek comments that “in these elevated philosophical jousts, reputations are made but never lost. What is lost are the underlying issues which remain cloaked by the ideology”. (“Justice and Ideology” (1981), 59 Can Bar. Rev. 787.) For Samek, the means of philosophical discourse in

Legal doctrine, “the swaddling balms of legal education,”¹⁰⁸ is archetypical of the incestuous fetishism of the contemporary legal system. Doctrine is not only reified, it is deified as “the highest diety in the (legal) pantheon and the centrepiece of the (legal) cult”.¹⁰⁹ Furthermore it is narcissistic, assumed to have a life, a logic and a dynamic of its own.¹¹⁰ Therefore doctrine is both:

socially meaningless and downright harmful . . .
 . . . in a courtroom often nothing is gained. The internal status of law is often upheld at heavy social cost, and its internal consistency at the price of deepening contradictions.¹¹¹

Although Samek moves on from the *L.P.V.* he never abandons the basic theme of the book, that coercive repression through enforcement is the most important (though not the only) function of the contemporary legal system.¹¹² He delineates a fundamental contradiction in our attitude to law. First, in a legalistic society such as ours there is a naive belief in the magic of law — “. . . an astonishing number of people believe that anything can be done merely by making it law, and that nothing can be done except through its instrumentality”.¹¹³ Simultaneously, however, we distrust both lawyers and the law and strive to curtail their power through the myth of the separation of powers. Further, since contemporary law is “incurably repressive” it is “unfit to bear the burdens that have been thrust upon it”.¹¹⁴ He rejects our idolatrous worship of the common law system arguing that, “It does not follow its own course . . . regulate its own creation . . . obey its own authorities or set its own pace for change”.¹¹⁵

On the contrary, law is inextricably caught up with the moral, social, economic and political matrix within which it is confined. The Rule of Law must therefore be open to critique and the legal process evaluated in action. He argues that not only is the legal process mechanistic, dilatory, inaccessible, expensive and uncertain,¹¹⁶ a parasitical encrustation,¹¹⁷ retrospective and adversarial, preoccupied with technique rather than

pursuit of “the good” have become ends in themselves: publications, reputation and tenure. Samek’s criticisms are a potent reminder to all of us that continual self-reflection on our actions and intentions is vital if we are not to be carried away on the crest of an egoistic wave.

108. *Supra*, note 62 at 67.

109. “Law and Convention”, *supra*, note 102.

110. *Supra*, note 62 at 73.

111. *Id.* at 72.

112. Samek does, however, change his terminology from “enforcement” to “control”.

113. *Supra*, note 62 at 25.

114. *Id.* at 35.

115. *Id.* at 104.

116. *Id.* at 57.

117. *Id.* at 66.

justice,¹¹⁸ it is also fundamentally misdirected. It is concerned with pathological conditions, with superficial *ex post facto* cures rather than with the deep structural prevention of things which should never have happened. “Even prophylactic law is negative — it is concerned with the prevention of harm rather than promotion of good”.¹¹⁹ Finally, law too has become reified and commodified.

Law today is the handmaiden of a materialist, possessive and capitalist society. Abolish the high regard for property and material possessions and the need for law will be drastically reduced . . . If the law courts still look like temples, the money changers have invaded them with a vengeance, and law is regularly bought and sold like a commodity. In all but name, in fact, our legal system has become largely an appendage to our economic system.¹²⁰

Samek sharpens his critique of contemporary society, law and legal ideology in his discussions of the *tour de force* of deontological liberalism, John Rawls’ *A Theory of Justice*¹²¹ and the *Canadian Charter of Rights and Freedoms*.¹²² In both these articles he makes explicit his antipathy for liberal society, liberal values and liberal law.

Samek’s fundamental criticisms of Rawls are that he is a reformer, that he assumes that the basic structure of our society is nearly just and that he believes that compliance with the two principles of justice will bring us closer to the virtuous society via minor modifications of the *status quo*. Samek locates the source of Rawl’s misconception in the latter’s “ideological false consciousness”.¹²³ He argues that the theory of justice for a nearly just society jars discordantly with the harsh reality of the welfare statism of late capitalist society.

For all Rawls’ desperate attempts at rationalization the facts do not support his thesis. The thirst for material benefits has not slackened with their growth and liberty has been used to swell the demand for consumer goods and services. People want what they are conditioned to demand by the prevailing ideology. It is the better off who have the clout that get their way, and they do not hesitate to press for an even larger share of the cake. The voice of the worst off — the growing army of unemployed and unemployables, the single families, the unskilled and the unschooled, the

118. *Id.* at 98.

119. *Id.* at 55.

120. *Id.* at 103-6.

121. *Supra*, note 107.

122. *Supra*, note 95.

123. *Supra*, note 107 at 787. Ideology is without doubt one of the most bandied-about terms in contemporary moral, political, social and jurisprudential discourse, and consequently has become almost meaningless. To his credit, Samek does strive to give us some indication of what he means by the term — although he refuses to give a “definition”. However, I must admit that I am still confused about his interpretation.

sick and the incorrigibly poor — remains unheard. Most grudge the crumbs which are thrown to them to satisfy the conscience of the rich. Not only are they not being helped by the overconsumption of the higher up on the payscale, they are paying for it out of the moneys saved on their keep. Status consciousness and envy have not disappeared and the rational life plans which are supposed to show the value of liberty are largely devoted to rising in the hierarchy at the expense of the less advantaged.¹²⁴

In short, Liberalism has failed to live up to its promises and has contented itself with the provision of “consumer satisfaction and career success”.¹²⁵

Having uncovered Rawls’ philosophical misunderstanding, Samek proceeds to challenge Rawls on several disparate grounds, but only two need detain us here. In bifurcating the political and socio-economic liberties, giving absolute priority to the former, Rawls does two things: first, he permits massive social and economic inequality; and second, *de facto* he limits legitimate change to reform of the *status quo*, not its transcendence. Furthermore, not only is Rawls’ theory a “restatement of the liberal credo”,¹²⁶ it is a legitimization, rationalization and justification of contemporary society, “putting it on a moral pedestal”.¹²⁷ Rawlsian justice reinforces an inherently corrupt and inhumane social structure:

He distinguishes between two meanings of ideology; the first “denotes what Marx described as ‘false consciousness’ of a superstructure of a social system or theory”; the second “stands for the basic ideas which lie at the foundation (of a social system) without any judgement as to their objective validity”. (*Id.*, at 787 and *supra*, note 95 at 755-6.) In these two articles Samek appears to choose the first interpretation, although he recognizes that the idea of false consciousness tends to suggest that there is a true one which can be found by penetrating the superstructure, a conclusion which, as a subjectivist, Samek is unwilling to admit. He posits,

We can say something is false without knowing the state of affairs because we are clear that it is not what it is represented to be. The superstructure of a social system or theory can be considered false insofar as it is out of line with the professed reality of its foundation. This does not require any absolute standard or a knowledge of what the true foundation of the society or theory is. (*Supra*, note 107 at 787.)

Samek’s claim is that Rawls’ theory of a nearly just society does not fit with the social reality. However, elsewhere he adopts the second, broader conception of ideology. For example, in “Beyond the Stable State of Law” he claims that “insofar as social objectives can be synthesized and stated within the framework of a socio-political programme, they might be said to constitute an ideology”. (*Supra*, note 93 at 551-2.) And again, in “Language, Communications, Computers and Law” he delineates the two interpretations and explicitly chooses the second. (*Supra* note 49 at 195, footnote 5.)

This inconsistency is a problematic manifestation of his earlier claim that words have no intrinsic meaning, that they depend upon their author’s usage. My own preference is for the broader “descriptive” interpretation. See “Tales of Centaurs and Men” (1987), 26 *Osgoode Hall Law Journal* (forthcoming).

124. *Supra*, note 107 at 799.

125. *Id.* at 806.

126. *Id.* at 801.

127. *Id.*

Rawls' essentially procedural approach . . . identifies justice with the Rule of Law . . . and projects the rational unto the actual and the absolute unto the relative. The established paradigm is put beyond question and acquires the status of a quasi-divine fiat.¹²⁸

Samek also vehemently rejects the legalistic usurpation of rights which has developed them as one of the key tenets of Liberalism. His critique of rights can be understood on two (interconnected) levels, philosophical and practical. Echoing Marx, he argues that our current conception of rights is derived from our "libertarian ideology . . . they have an individualistic slant and each person is treated as an atomic subject of rights which are guaranteed against an essentially hostile community".¹²⁹ When tied to the adversarial legal system rights tend to polarize rather than reconcile the parties by encouraging

. . . a selfish fragmentizing attitude on the part of citizens who are taught to subject their civic and human aspirations to their alleged self-interest.¹³⁰

The practical effect of contemporary rights reflect their philosophical poverty. Samek launches a multi-faceted and scathing critique against the *Charter* claiming as follows: despite their appearance of absolutism the rights contained therein are relative because, of necessity, they have to be interpreted; the rights are legalistic and courts-oriented; the provisos render them weakest at the moment when they are most required; the

128. *Id.* at 808.

129. *Supra*, note 95 at 768. See also Marx's brilliant essay "On the Jewish Question" in *Early Writings*, T.B. Bottomore (ed.), (New York: McGraw Hill, 1964)

Much of Samek's critique appears at first sight to be Marxist-inspired; his use of Marxist slogans and terminology, his adoption of the base/superstructure metaphor, his critique of the dichotomy of political liberty and economic equality, his portrayal of law as coercion, ideological mystification and legitimation, and his aspiration that it will "wither away". It would, however, be a grave error to so categorize him for he is too much of a free thinker to abandon liberalism only to embrace Marxist dogma. "Nor will a counter ideology open our eyes; it will close them merely in another direction. Unless we see ideology for what it is, it will continue to deceive us." (*Supra*, note 107 at 803.) Samek also makes it clear that the differences between the western bloc and the eastern bloc may not be as great as we might think — both are tyrannical. Finally, Samek is inspired by a plethora of great thinkers from Mill to Hegel, Bentham to Kant, Marx to Nietzsche and Vaihinger to Marcuse. To identify one as his mentor ignores the breadth of his learning and the power of his intellect. It also suggests an intention to vilify him since "Marxist" is a pejorative term in most legal discourse!

130. *Supra*, note 62 at 104; see also *supra*, note 5 at 426. It is interesting to note that Samek says "alleged self-interest" and not simply "self-interest". The implication here is that selfishness ultimately contradicts our best interests. Robert Axelrod in *The Evolution of Co-operation* (New York: Basic Books, 1984) argues that limited altruism and mercy are more efficient and benefit the individual in the long run much better than rights claims or the infliction of punishment. I am grateful to David Cohen for bringing Axelrod's work to my attention. Cohen has attempted to apply this approach in his "Mercy, Altruism and Mistake in Contract Law" (unpublished manuscript presented to the Faculty of Law, Osgoode Hall Law School, November 1985).

emphasis is on legal procedure not social ends; s. 15 does little for women, except perhaps to make them more like men; affirmative action will only provide the appearance of equality for a few; language rights are merely entrenched in a bureaucratic structure rather than encouraged at the grass roots level; the rights are non-enforceable against private individuals; the only real beneficiaries will be the bureaucrats and the lawyers; the whole constitutional package is a political compromise, not a beneficial moral or social policy; and worst of all, it is in accordance with

the great liberal tradition (that) economic rights do not qualify for inclusion in the political *Charter* lest they contaminate the purity of its doctrine with everyday problems.¹³¹

He concludes that the *Charter* is unpragmatic “cheap moralizing”¹³² “full of political wind”,¹³³ “designed not to change the *status quo* but merely to give it greater appeal”.¹³⁴

We can complete our overview of Samek’s critical jurisprudence with a brief analysis of what he portrays as legal law reform. In a series of articles he develops two ideal-typical models of law reform — the legal and the social. He suggests that current law reform practices correlate most closely with legal law reform and that his preferred approach is social law reform. Legal law reform, cramped as it is “in its legal ghetto”¹³⁵, is superficial because it begins and ends with the law and legal practices, it is controlled and enforced by lawyers, and it is concerned with purely legal solutions. It assumes, like Rawls and *Charter* supporters, that the common law and modern society are nearly just, or at least perfectable through incremental reforms. More often than not the result is “legal inflation”, more and more laws which are ultimately counterproductive causing despair, apathy and frustration.¹³⁶ The whole approach tends to make law reform an end in itself, rather than a means to a social end. At best, it polishes the surface, failing to come close to the core problems of contemporary society; at worst, it fulfills the ideological role of mystification and distraction, making it appear as if problems are being seriously considered and resolved, when in fact the real ones are merely being moved to the periphery. Legal law reform is mere tidying up, giving the law a better image through a brush-up and a scrub.¹³⁷

131. *Supra*, note 95 at 756-7.

132. *Id.* at 761.

133. *Id.* at 771.

134. *Id.* at 768.

135. *Supra*, note 5 at 415.

136. “The Philosophy of Law Reform” — unpublished report for the L.R.C. (1976) at 12.

137. *Supra*, note 5 at 418.

Although Samek is an iconoclast, his aim is not to conduct a nihilistic scorched earth campaign; on the contrary, his eschatological critique is intended to be emancipatory, opening up new vistas, new potentials and providing us with a few concrete suggestions about how we might proceed.

Perhaps the best way to understand Samek is to go all the way with him and familiarize ourselves with his “discovery” of the “meta phenomenon”.

The meta phenomenon is the human propensity to displace “primary” with “secondary” concerns, that is, concerns about ends with concerns about means. The latter come to be perceived as primary, and distort the former in their own image. The new primary concerns are in turn displaced by the new secondary concerns about the means to be adopted to achieve the new consciousness . . . and so on. The progression is not linear but global. If we think of the total number of primary concerns of a man, a society, an ideology as a sort of gravitational field, it will be distorted continually by the pull of a growing mass of secondary concerns. The result is an increasing loss of balance, a relentless slide to the peripheral.¹³⁸

Legal doctrine provides a perfect example of the meta phenomenon process: *stare decisis* is meant to be a means towards the end of justice in that like cases are to be treated alike. However, undue deference to, and respect for, anachronistic authority becomes an end in itself and justice is submerged in the wake of the dynamic of logical consistency.

More generally, Samek argues that if we can never be sure what is an end and what is a means, what is primary and what is secondary, we can never be sure of what is true and what is false. This leads him to make some very radical claims about the impossibility of absolutism and the inevitability of conventionalism.

. . . beliefs such as the earth is flat, matter is solid, space and time are distinct . . . are conventionally true, not absolutely so. The fact that the truth of certain propositions appears to be unchallengeable does not guarantee their truth in a transcendent sense . . . it merely shows the limits of conventional truth.¹³⁹

In brief, Samek proposes that we reject our pretensions to absolute truth and objectivity and instead content ourselves with the acceptance of relativism and subjectivism. What we perceive and how we perceive it depends upon our interpretative structures, and we must struggle against infusing anything with a transcendent truth value.

Social phenomena are only such by virtue of the paradigm that treats them as genuine. Recognition of this relativity saves us from factualizing the

138. *The Meta Phenomenon* (New York: Philosophical Books, 1981) at 4-5.

world in the image of the prevailing ideology. A true paradigm is itself contradictory . . . there is no correct picture. Every world is constructed; there is no knowledge, logic or rationality which is independent of presupposed values.¹⁴⁰

The consequences of these claims are manifested in Samek's theses that change is inevitable; contextualism is essential; subjectivism is unavoidable; and human agency is vital.¹⁴¹

Samek rejects the hegemonic belief that the world changes only incrementally, suggesting instead that we are in a constant state of flux and that instability and change are the norm. He posits that this lack of fit between the perception (stability and incremental change) and the reality (transience) is due to humankind's unwillingness to face up to the harsh reality of contingency. "Man's craving for stability makes him suppress the passage of time and endow the evervanishing now with permanent significance".¹⁴² Not only is time evanescent, so too is our conceptual knowledge and its tools. Knowledge is neither absolute nor universal; such perceptions and understanding are also dynamic. Samek reinforces his argument by drawing on the work of Donald Schon and Thomas Kuhn.¹⁴³ He develops, and adapts, Kuhn's paradigm thesis to argue that change, even epistemological change, *contra* the traditional gradualist approach, is "revolutionary" and "discontinuous".¹⁴⁴ He further indicates that the contemporary paradigm, Liberalism, is in fact in the chaotic post-paradigm stage and that "what is needed is a whole new system, a whole new way of looking at the world, and trying to change it".¹⁴⁵

If stability is impossible and contingency inevitable the relevant questions then become — How does change come about? In which direction ought it to go? These are two obviously interconnected questions, and Samek's answers are unequivocal. In discussing technology and its destructive capacity he rejects fatalistic reification and

139. *Supra*, note 31 at 291.

140. *Supra*, note 107 at 788.

141. In my opinion, Samek's later work demonstrates several of the traits which Jill Vickers has characterized as "feminist methodological rebellions" (*supra*, note 90). Vickers' brief article is very useful as a heuristic device in coming to terms with just how fundamental an alternative perspective can, and must, be. Whether the radicalism of the perspective is the sole reserve of feminism is a moot point which goes beyond the confines of this Paper, but I would suggest that insofar as Samek has been successful his efforts would tend to challenge the feminist monopoly. The parallels with continental deconstructionism are also revealing.

142. *Supra*, note 31 at 315.

143. Donald Schon, *The Displacement of Concepts* (London: Tavistock, 1963) and *Beyond the Stable State* (New York: Norton, 1973); and Thomas Kuhn, *The Structure of Scientific Revolutions* (2nd ed., Chicago: University of Chicago Press, 1970).

144. *Supra*, note 62.

145. *Id.* at 88.

the determinism of the “technological imperative” claiming instead that “most of our social ills are self-inflicted not preordained”,¹⁴⁶ and that the fault lies with the dominant ideology which permits the appearance of the autonomous technological dynamic.

It is our ideology that has perverted technology for its own exploitative ends. If technology seems out of control, it is because our ideology has exploited its destructive potential and is continually accelerating its destructive power. What is wrong with modern technology is that it has been fashioned in the image of our ideology and that it has been subjected to its ends.¹⁴⁷

Thus, Samek rejects structuralism and places the blame squarely on the shoulders of our corrupt and dehumanizing mentality. Recognition of this has a liberating and therapeutic value — if the cause of the problem is human agency, then human agency can also provide a possible solution.

All our seemingly intractable problems are eminently soluable and the cures lie in our own hands . . . The remedy is not to turn our back on modern technology as such but to recreate it in a different image. This will lead to the destruction of its destructive forms and to the salvaging of all that is good in it by the constructive redeployment of its uses.¹⁴⁸

Some may object at this point that Samek is an idealist who, in underestimating the power of structural constraints, can only provide utopian solutions. Samek is acutely conscious of this possible criticism and qualifies the foregoing. “All this is not to deny that the state of technology of a particular society in a particular time frame is a factor in shaping its ideology”.¹⁴⁹ Drawing on a continuum developed by Joseph Femia,¹⁵⁰ I would like to suggest that there are four possible interpretations of the relationship between technology and ideology: (a) ideology determines technology (idealism); (b) ideology and technology interact on a more or less equal basis (common sense); (c) technology determines the forms of ideology (structuralism); and (d) technology determines which forms of ideology are possible (open). Samek, on my interpretation, would fall within the fourth category; our social context and our stage of development determine the range of possible outcomes, “but free political and ideological activity is ultimately decisive in determining which alternative prevails”.¹⁵¹ Samek’s is a constrained voluntarism.

146. *Id.* at 56.

147. *Id.* at 112-113.

148. *Id.* at 140 and 113.

149. *Id.* at 113.

150. *Gramsci's Political Thought* (Oxford: Clarendon Press, 1981) at 121.

151. *Id.*

This interpretation finds support in his posthumously published, "Language, Communication, Computers and Law"¹⁵² which demonstrates that he is neither a luddite nor a fatalist. Although (or more accurately, because) he recognizes the threat to humanity that computers pose¹⁵³, he argues that properly understood and utilized, they may advance humanity, in this case by facilitating research on the function of the legal system and in improving the communicative functions of law.¹⁵⁴ In arguing that computers should be restrained as a means and not considered as an end in themselves, he is battling to retain the normative and purposive aspects of law against the tyranny of scientism.¹⁵⁵

One of the greatest dangers of technology is that it disempowers us, "marvellously reducing our sense of responsibility",¹⁵⁶ undermining our common humanity and reducing us to mere role occupants. A central theme of Samek's philosophy is to negate the negation of the rich, creative and dynamic force of purposive human action and to emphasize the context-transcending capacity of humanity if only this awareness could be realized and sufficient motivation developed. We need to regain our faith in the power of human agency, "the motivation must be human in the sense that it must draw on the open potential of human beings."¹⁵⁷

In relocating purposive human action centrestage, Samek inevitably encounters the Pandora's box of moral, political and legal philosophy. Which values ought we to pursue? Instead of balking at this subjectivist void, and drawing inspiration from equity,¹⁵⁸ he does provide several

152. *Supra*, note 8.

153. *Id.* at 209-10.

154. *Id.* at 221.

155. Bruce Ackerman has recently voiced similar concerns about the dark shadow of an Orwellian technological imperialism.

For however skilled the computer analysts of the future become in finding relevant facts, I see very few signs of a reawakening of the technocratic mind from its positivist slumbers. Instead, my conversations with M.B.A.'s and M.P.A.'s and PhD.'s in universities, industry and government have often revealed a commitment to a kind of value discourse so primitive and vulgar that it would make even Chicago school lawyers blush. (*Reconstructing American Law* (Cambridge, Mass.: Harvard University Press, 1984) at 108-109.)

Ackerman's solution is to put our faith in the lawyers who, in his opinion, have historically been the guardians of the virtuous society. The elitism of this proposal is highly problematic since there is little evidence to suggest that lawyers would be (are?) any less technocratic than computer specialists. Samek's proposed solution is that all experts should be kept in their cage, and this includes lawyers and politicians. As we shall see, Samek is a radical democrat.

156. *Supra*, note 62 at 115.

157. *Supra*, note 5 at 414.

158. He is, of course, referring to a pre-positivist equity:

The heart of equity was the beating heart of justice and that could never be curtailed in any system of rules In its heyday, equity did have the courage to take a deeper

tentative guidelines. In 1976 he suggested that we pursue “the best and sanest of those values . . . most consistently appealed to by the Canadian people . . . consistent with the kind of society we really want to live in”.¹⁵⁹ The following year he proposed “. . . those communal values most commonly appealed to by the Canadian people . . .”¹⁶⁰ and posited that primary among these was the aspiration of respect for human life and dignity. Finally, as we shall see, he advocates that we strive to fulfill the fundamental human needs vital to human survival — anything else is superficial and empty rhetoric.¹⁶¹ Samek, it is suggested, is a radical Kantian humanist.

These philosophical and epistemological claims have a radical impact upon Samek’s jurisprudence, most significantly in the proposition that “the state of the law is no more stable than the state of the society with which it is inextricably bound”.¹⁶² Although instability in “law, society or anything else”¹⁶³ cannot be mastered we can “learn to live with it”¹⁶⁴ but only if we recognize it. Unfortunately, the human craving for stability and absolute solutions has had a “particularly distorting effect on law”¹⁶⁵ making it appear that law is the antithesis of revolutionary and discontinuous change.¹⁶⁶ Samek’s claim is that stability in the law, and even the common law vision of gradual change, is a “myth” that obfuscates the reality.

Several consequences flow from this dynamic interpretation of law and the legal process. The first is the very iconoclastic claim that, contrary to the dominant conception, law is inherently subjective and therefore can make no claims to a transcendent, absolute justice or “the good”.

Kuhn’s concept of the paradigm suitably adapted to the very different discipline of legal philosophy provides a useful antidote to the truth that the law is objective. It helps us become aware that legal phenomena can

look at the real problems behind the technical facade of law . . . when equity declined from the personal directives of a court of conscience into a mechanical system of technical rules, it lost its inspiration and its genuine potential for law reform. (*Supra*, note 136 at 14-5.)

Furthermore, equity is the inspirational source of Samek’s contractual theory. It is also interesting to note that Roberto Unger, the guru of the C.L.S. movement, also draws on equity in the development of his “deviationist” theory of contract law. “The Critical Legal Studies Movement” (1983), 96 *Harvard Law Rev.* 563. Indeed, there is a remarkable correlation of the themes, presuppositions and aspirations of the two jurists.

159. *Supra*, note at 136 at 17 and 22.

160. *Supra*, note 5 at 414.

161. *Supra*, note 95 and 107 *passim*.

162. *Supra*, note 62 at 88.

163. *Supra*, note 93 at 558.

164. *Supra*, note 62 at 107.

165. *Id.* note 94.

166. *Supra*, note 93 at 558.

be apprehended only by virtue of a paradigm that treats them as genuine. Conventional wisdom is wrong in classifying legal data as if they were independent facts capable of being handled neutrally by legal value tools. The whole process of classification . . . takes place within the ideological cocoon of the paradigm.¹⁶⁷

This, of course, allows him to go further and argue that there is no reason why we should be unduly deferential to the Rule of Law; that radical critique — indeed “revolution” — is essential if we are to progress; and that there is no necessary right answer, “no one solution, let alone one solution for all”.¹⁶⁸

A useful method for coming to terms with Samek’s claim is his very comprehensive discussion of legal doctrine which he perceives as a quintessential aspect of the contemporary legal system. Samek’s argument is that the traditional legalistic approach which sees doctrine, precedent and *stare decisis* as the foundation of an authoritative, but adaptable, legal system is both misconceived and distorting. He applies Kuhn’s theory of paradigms, and their self-transcendence, to legal doctrine, demonstrating a correspondence between the development and decline of a doctrine and the pre-paradigm, mature paradigm, post-paradigm dynamic. In his difficult but thought-provoking “Fictions and the Law”¹⁶⁹ he argues that fictions (in which he includes legal doctrine) are useful, indeed indispensable,¹⁷⁰ and even desirable¹⁷¹ for an understanding and ordering of the complexity and dynamic of human interaction. The problem with them is that they tend to cease being a means and take on a momentum and reality of their own. What starts as a dynamic means turns out to be a static barrier to change.

Samek argues that legal doctrine, as a fiction, should not be conceived as an end in itself, but rather as means to a social end — it should be instrumental and flexible, not *a priori*. Unfortunately, within the present context legal doctrine is misused and plays a vital role in maintaining the illusion that the law is both stable and self-contained.

In order to keep the law stable the strategy is to hide any changes which are made by stretching the old concepts to accommodate the new . . . the fiction allows . . . expansion; it appears that nothing has changed (and) the myth of stability is maintained.¹⁷²

167. *Id.* at 557.

168. *Id.* at 557-8. It is at this point that he parts company with Kantianism.

169. *Supra*, note 31.

170. “. . . the tendency to reason through fiction is fundamental to human thought.” *Id.* at 306.

171. *Id.* at 313.

172. *Id.* at 315. The example which Samek uses is the development from physical possession to constructive possession.

Thus, legal doctrine as fiction is a “conservative strategy for change”,¹⁷³ a “strategy of dynamic conservatism”.¹⁷⁴

The reason why these tactics are objectionable in Samek’s eyes is not because of the internal contradictions and anomalies which they can give rise to (which are the bread and butter topics for legal academics) but rather the external incongruity, manipulation and mystification which is taking place. Samek claims that what appears to be a mere expansion of a legal doctrine may in fact be a reflection and obfuscation of a major shift in socio-political attitudes, a major policy change or a vital change in the moral climate. We thereby encounter:

a vitally important disanalogy between law and science. Because law is second order, the anomalies which erode a legal paradigm do not all or even predominantly result from the internal development of legal doctrine, but are merely the result of changes in the external moral and social phenomena with which it deals. A new paradigm is needed to meet the internal and external anomalies of the post-paradigm period.¹⁷⁵

Samek’s thesis makes sense of, and is reinforced by, two contemporary developments. First, from the feminist perspective Carol Gilligan has argued that the methods and results of traditional psychological development theory, as exemplified by the work of Kohlberg, are inadequate because they account for only one, basically masculine, perspective. The “different voice” is ignored. However, due to recent research and argument, what had been paradigmatic has, through internal critique, passed into a post-paradigm stage.¹⁷⁶ This external development has had its effects upon law and legal theory, since many of the male assumptions built into the law are now being challenged. An excellent example of this is Clare Dalton’s thesis that Rawls’ theoretical construct is built upon an assumption of “macho in the original position”.¹⁷⁷

Another example may be the potential impact of the *Charter* on the nature of decision-making by the Canadian judiciary. Since at least the 1960s there has been a gradual shift away from the

173. *Id.*

174. *Supra*, note 93 at 550. It is important that we remember that Samek is a subjectivist and a relativist and therefore that he is not juxtaposing fiction and reality. Fictions are real insofar as they contribute to our perception of the world; it’s what we do with them, not what they are, that is important. Similarly, truth has no monopoly over reality for, as he suggests, “Truth is stranger than fiction”. (*Supra*, note 31 at 317.)

175. *Supra*, note 62 at 86.

176. Carol Gilligan, *In A Different Voice* (Cambridge Mass.: Harvard University Press, 1981) and I. Marcus and P. Spiegelman, “Feminist Discourse: Moral Values and the Law, A Conversation” (1986), Buffalo L.R. (forthcoming).

177. Clare Dalton, “Remarks on Personhood” (unpublished Paper presented to the Faculty of Law, Queens University at Kingston, Spring 1985).

paradigmatic judicial function of adjudication towards at least some consideration of policy decisions.¹⁷⁸ The evidence tends to suggest that this swing will continue. The proposition is that at the present moment we are experiencing a post-paradigmatic epoch in legal decision-making and that the judiciary are desperately seeking some new *terra firma* on which to construct and legitimize their increasingly policy-oriented decisions. A perfect example of this is the contortions of both Madame Justice Wilson and Chief Justice Dickson in the *Operation Dismantle* case.¹⁷⁹ Again I think it is important that we reiterate the depth of Samek's claim, "... paradigms are a theory of revolutionary discontinuity, an attack against the traditional incremental view of (legal) progress".¹⁸⁰

The second key theme of Samek's radical jurisprudence is that law can only, and must only, be understood in its social, moral and political context. The tendency of lawyers to conceive of law as a coherent, autonomous and self-contained discipline — manifested for example in the theory of the separation of powers — is explicitly rejected. Law, legal process and legal practice are both reflections of, and contributors to, the contemporary social matrix. The obvious consequence of this contextualist claim is that law should not be conceived of as an *a priori* end in itself. Law is desirable only in so far as it is instrumental to the achievement of some social good; or, to use the contemporary jargon, for Samek the good is prior to the right.

Having recognized that law should be contextual, second order and instrumental, Samek proceeds to argue that contrary to the current tendency to seek a legal remedy to every social (and even personal) problem, we should recognize the limits of law. He suggests that we should always be reflective and query whether recourse to the law is either pragmatic or useful:

... fundamental social ills may not be amenable to legal cures; legal reform does not (necessarily) entail social reform, and what might be wrong with society is the underlying ideology that cannot be changed on its own terms. Looked at in this light, the stability of law may be an evil rather than a good in as much as it merely hides the social instability beneath and postpones the day of reckoning.¹⁸¹

Working on this basis, he suggests that racism flourishes in Canada even though the Constitution, as the symbolic representation of our very

178. Paul Weiler, "Two Models of Judicial Decision-Making" (1968), 46 Can. Bar Rev. 406.

179. *Operation Dismantle et al. v. The Queen*, [1985] 2 S.C.R. 441.

180. *Supra*, note 62 at 82.

181. *Id.* at 105.

liberal tolerance, would suggest otherwise. Law is inherently incapable of solving the problem of racism; on the contrary, it tends to obscure the reality and create false impressions about possible cures, "a society with an innate sense of human rights does not need to embody them in law".¹⁸² What is required is moral, social, political and even economic change which, at best, the law can only ratify.¹⁸³ This, in turn, should encourage us to seek and develop alternative methods of achieving social and personal goals.

The foregoing reference to rights would appear to contradict Samek's earlier rejection of justice and rights in his discussion of Rawls and the *Charter*. However, on reflection, I would suggest that there is no contradiction in his work, that what Samek is rejecting is contemporary conceptions of justice and rights and that he does have an alternative powerful vision, but one which he only cryptically reveals.

Samek implies that by beginning with the ideal, Rawls' theory is doomed because he starts at the wrong end of the spectrum. Samek advocates that "we need to see justice in a new light",¹⁸⁴ that we must look at society as it is presently constituted and recognize its inherent inhumanity. In so doing we will realize that "to speak of justice in society and in the world in which we live is to confound justice with custom".¹⁸⁵ Drawing on Pascal,¹⁸⁶ he argues that we ought not to confuse justice with custom and goes as far as to suggest that at the present time they may be opposites — ". . . if custom and law are not just then we should do our utmost to free ourselves from their grip. True equity . . . is a challenge to the law, not a gloss on it".¹⁸⁷

182. *Supra*, note 95 at 761.

183. Samek's claims apply *verbatim* to one of my own concerns, the problem of Northern Ireland. For example, the recent "Hillsborough Accord" between Mrs. Thatcher and Dr. Fitzgerald seeks to provide what is essentially a legal solution to a complex and multifaceted social, economic, political, cultural and legal problem. Merely conferring a power on civil servants from the government of the Republic of Ireland to review (but not veto) British policy decisions and increasing the number of Catholics in the police, army and judiciary will not solve any of the problems. Worse still, not only will it exacerbate the situation at home, abroad it will create false impressions as to possible solutions. It is hard to believe that Mrs. Thatcher and Dr. Fitzgerald really believe that this is the way towards a resolution of the situation and this, in turn, suggests that the real motive behind the Accord is something else — the necessity for "increased co-operation on security matters"/repression, as the legitimization crisis deepens in both Britain and Ireland.

184. *Supra*, note 107 at 807.

185. *Id.*

186. Although he praises Pascal for recognizing the distinction between justice, law and custom, and the popular tendency to identify justice with law, he is fiercely critical of both Pascal's elitism in maintaining the deception on the grounds that the people are incapable of bearing the truth, and his transcendentalism in identifying justice with God.

187. *Id.* at 808-9.

Striving to remain pragmatic (as opposed to idealist or practical) he argues that to provide a definition of justice would not only confuse it with custom — language as restrictive convention — but also would misdirect the inquiry. Instead, rather obscurely, he adopts an “existential”¹⁸⁸ approach and directs our attention to the “paradox of human existence in an inhuman world”¹⁸⁹ which we can take to mean our reifying, consumerizing and commodifying world. Justice is “the negation of the negation”, the denial of the denial of our common humanity and the recognition of “our fundamental equality”. In a society such as ours, racked as it is by commercialism and consumerism, with the consequential massive inequality as manifested in the polarities of extreme poverty and wasteful abundance, “if justice is to have any real meaning, it must seek to correct this imbalance, it must concern itself above all with the needs of the poor.”¹⁹⁰ Justice then is teleological, praxis-oriented, a means to the end of fulfilling the *needs* of all human beings, not philosophical idealism *à la* Rawls. Justice, therefore, cannot be defined; it knows no boundaries, for the common needs of humanity are forever expanding and contracting. Justice as needs points the way but imposes no limits because the real needs of humanity, based as they are on our open potential, are limitless. Conceptions of justice which ignore these needs are simply rhetorical.

This radically humanist and egalitarian strain in Samek’s thought becomes even more explicit in his interpretation of the meaning of fundamental rights. He argues that rights, as epitomized in the *Charter*, have to be untrenched from their ideological (*i.e.*, legalistic) base, related back to their origins in our common humanity and redirected towards pragmatic social goals. Drawing heavily on William Conklin,¹⁹¹ — in particular his themes of “common humanness”, “potentiality”, “process of becoming”, “inner sphere of life” and “open potentiality of persons” — Samek claims that our individualism and entitlement to rights stem from our common humanity, our membership of the human species. It is only by giving up our differences, the “roles that swallow the man”¹⁹², that we can assert our individualism. Samek illustrates his argument by reference to handicapped persons:

... the handicapped are not entitled to any fundamental rights as such; but they have as human beings the fundamental right not to be discriminated against on the ground of physical or mental instability . . . they are

188. *Id.* at 810.

189. *Id.*

190. *Id.*

191. *In Defence of Fundamental Rights*, (Alphen aan den Rijn: Sijthoff & Noordhoff, 1979).

192. *Supra*, note 95 at 775.

protected against being treated as a special category of subhumans because they are handicapped. Surely it is paradoxical that we first have to cripple them as persons in order to compensate them in small part for the damage we have done.¹⁹³

This humanist foundation allows him to develop a presuppositional objection to a constitutionally entrenched *Charter of Rights*. Fundamental rights are not a “handout . . . from any state or its officials” and to accept them as such “is in effect to surrender them”.¹⁹⁴ Once we are prepared to accept our rights as conferrals from the state we place ourselves in its hands, for what the state has given it can also take away. He warns us, at our peril, never to deny that the origins of our rights are in human dignity.

A second objection to incorporation of rights into a charter is that in being “documented” they become institutionalized, part of a bureaucratice superstructure; as such rights lose their dynamic, the charter ceases to be a means and becomes an end in itself.¹⁹⁵

Rejecting the definitional and employing the existential approach he argues passionately that we must conceive of rights in terms of primordial fundamental rights necessary for survival as human beings. He posits that in view of our “fundamental equality” it is “idle and obscene” for us to talk about rights unless we recognize the “absolute priority of fundamental needs” such as subsistence and survival. Rights, like justice, are a way of responding to the human predicament; the paradox of human existence in an inhuman world of exploitation, domination, technological imperialism and life-depriving inequality.

. . . if fundamental rights are to have any real meaning they must above all protect the claims of the poor; for just as the poor are the greatest victims of inequality (and injustice) so they suffer most from their rightlessness.¹⁹⁶

Again the emphasis is on pragmatic rights as a response to needs — “. . . economic rights are not granted by generous governments . . . they are the most basic fundamental rights since they are a response to man’s most fundamental needs”.¹⁹⁷ For Samek, rights (like justice and truth) are a means to a better society, not an end in themselves; they are relative, not absolute. Furthermore, they can never be exhaustively listed since they are based upon the open potential of all human beings; they should, by their nature, have a dynamic, open and liberating effect.

193. *Id.*

194. *Id.* at 785.

195. *Id.* at 757.

196. *Id.* at 773.

197. *Id.*

To conclude, in the Samekian vision, justice and rights are not primarily legal. Being founded in the “bedrock of human existence” they require a much deeper and broader perspective “than law can afford”.¹⁹⁸ However, he does not cast law on the scrapheap of ideological mystification totally. He recognizes that law is vitally important in the matrix of contemporary social interaction and he seeks to use law as means to the good end of enhancing humanity — to convert legal law into social law. It is to this that we can now turn.

IV. *From Theory to Praxis: Social Law Reform*

There is much to be said for stealth and subtlety as methods of revolution, if revolution there must be.

Latham¹⁹⁹

Samek’s affirmative vision and programme is most explicitly articulated in his “new philosophy of law reform”²⁰⁰ which prosletyses that

what needs to be done is to open up a whole new network of arteries and veins of communication, conciliation and reconciliation to dispose of the enormous range of social problems that are now being fed into the already clogged channels of legislation and legal enforcement . . . searching for new ways of solving old problems, putting (our) trust not in the letter of the law but in the spirit that first conceived it as an instrument of social justice.²⁰¹

Not only does this programme encapsulate the key themes of Samek’s thought, it also provides important guidelines about how we might begin to constructively transcend the contingent but alienating “here” and move towards an increasingly humanist “there”.

Having recognized and reconciled himself with transience and the inevitable dynamic of human and social interaction, Samek argues that change is not necessarily for the better and that, contrary to our much-vaunted progress, we may be being increasingly sucked into the vortex of destruction and negation.²⁰² Yet, he refuses to succumb to fatalistic pessimism. Inspired by his faith in the liberating potential of purposive human agency, he reiterates the desideratum that “human freedom” be “rechannelled”²⁰³ and that we respond to the economic, socio-political and moral needs of contemporary society not only nationally but also

198. *Id.* at 787.

199. *The Law and the Commonwealth*, (London: Oxford University Press, 1949) at 534.

200. *Supra*, note 136 at 2.

201. *Id.* at 23.

202. In a veiled critique of traditional radicalism he argues that “revolutions made of hate and despair can never usher in the new promised land . . . in the negation of the old . . . lies the seed of the new”. (*Supra*, note 62 at 91).

203. *Id.*

internationally on the basis of our common humanity. His aim is to fit law, as the technique of social law reform, into this scheme. Again utilizing and adapting Kuhn's paradigms he claims that contemporary liberal society, ideology and law are riddled with such severe contradictions that they must be perceived as being in their post-paradigm period.

Law reform is most called for in the unsettled state of affairs of the post-paradigm era when the contradictions of the old paradigm era are taking their toll. Its task there is to achieve a breakthrough from one paradigm to another by giving form to what is inchoately present . . . law reform (can be) paradigm-creating.²⁰⁴

The moment of weakness is the moment of emancipatory opportunity, and unless we consciously and constructively seize the time the new paradigm that will emerge may be even more repressive. Law can, and must, play a vital role in this period of radical and discontinuous change.

In order for this to happen, however, we must surrender our fetishized attitude to law; we must reject any *a priori* conception of law and recognize both its instrumental and contextual nature, that it is a means to an end and not an end in itself.²⁰⁵ Similarly, we cannot and ought not to isolate and divorce legal change from social change²⁰⁶ for the two interact in a "dialectical process"²⁰⁷ — law reform is both a reactive reflection of and a proactive response to the needs and dynamics of society:

. . . although the immediate subject of law reform is law and the immediate reason for reforming the law is dissatisfaction with the law as it is, the ultimate subject matter of law reform is the complex of social practices which are (or are not) regulated by the law of a given society, and that the ultimate reason for reform of the law is dissatisfaction with our social practices or some of them. The immediate task of the law reformer is to bring about a change in the law but his ultimate task is to bring about a change in social practices.²⁰⁸

The obvious lesson to be learned is that we must start at the right end — we must begin with social practices not the law or doctrine; law must be brought into line with desirable social practices, not the other way round. This, he claims, entails a very different, socio-political conception of law reform than traditional, horizontal, superstructural, ephemeral and "legalistic law reform".

204. *Supra*, note 5 at 424.

205. *Supra*, note 62 at 61-2 and 125.

206. *Id.* at 103.

207. *Supra*, note 5 at 410.

208. *Supra*, note 62 at 1.

Neither the existing political system, nor the wider ideological framework within which it operates presents an ultimate boundary to law reform Law reform is not concerned with the legal superstructure but with the underlying social problems. Hence we must always probe down vertically beneath the legal symptoms to reach the roots of the social ills, and we must follow these roots wherever they lead us. The real task of law reform is the characterization and treatment of primary social phenomena. The vertical view of law reform is the human view.²⁰⁹

Any other approach to law reform will be fruitless.

Always the pragmatist, however, Samek points out that the dichotomies of legal and social, horizontal and vertical²¹⁰ are ideal typical and that current law reform practice demonstrates traits of both approaches, although it clearly favours the traditional approach. His aim is to tilt the balance in the other direction so that social law reform has priority.²¹¹ In recognizing the dynamic between legal and social law reform, Samek attempts to maintain some middle ground between the rock of “tinkering” and the hard place of utopianism in order that we can begin to deal with the difficult problems which need to be dealt with here and now. He admits that legal law reform may be essential as a *stopgap* response to pressing issues but we must constantly remind ourselves that it is no more than this; that it is neither a palliative nor a solution and that it should be developed or transcended whenever possible, “even as we patch we (must) think insistently and consistently of the bigger tasks . . . we must not be sidetracked”.²¹² Thus, although we may only be making adjustments, our intention must always be “to adjust the present system out of existence”.²¹³

Because contemporary society and law are in their twilight years, what is needed is a revolution, not a bloody or violent revolution but a “fundamental, discontinuous and qualitative change”.²¹⁴ Social law reform can fulfill a pivotal role as a “no man’s land between reform and revolution”²¹⁵ because the reforms should, as far as possible, be disconnected from their present polishing roles and utilized in their

209. *Id.* at 28 and 33.

210. Throughout his polemic “The Objects and Limits of Law Reform” (*supra*, note 62), he develops these polarities to include: legal/social; horizontal/vertical; internal/external; narrow/(very) wide; semantic/purposive; practical/pragmatist; realist/visionary; incrementalism/transcendence; present/future; closed/open; complacent/radical; unidimensional/multidimensional; incoherent/consistent; impervious/perspicuous; static/dynamic; simple/complex; adversarial/conciliation; traditional/new; mechanical/human.

211. *Id.* at 16; *see also, supra*, note 176 at 10.

212. *Id.* at 102.

213. *Id.* at 123

214. *Id.* at 14.

215. *Id.*

primary sense of “re-form”.²¹⁶ More specifically, the revolution of which Samek speaks is one of our perceptions, our *weltanschauung*, a rationalization of what is important and what is not, what is desirable and what is not, what could be achieved if we only wanted to, and how it could be achieved. Samek is talking about a revolution that recognizes purposive human agency, empowerment, respect for human dignity (with all that that entails), and the inevitability of subjectivity.

Fundamental to Samek’s affirmative vision is his faith in the self-emancipatory capacity of humanity²¹⁷ and it is for this reason that he portrays his crusade as “aspirational law reform”.²¹⁸ Since law is always in a state of flux it is up to us to decide whether we wish to take it in view of the unavoidable “inadequacy of conventionally accepted solutions”.²¹⁹ Therefore, the underlying dynamic of aspirational law reform ought not to be any mechanistic, structural or systems imperative but rather socio-human needs and the creative force and open potential of human motivation, “the will to change manifesting itself”.²²⁰

Law cannot be reformed from within; it must be reformed from without. This requires transcending the prevailing ideology by raising our consciousness and refocusing law on the reality to come. What we need is a revolutionary change in our “world view” brought about creatively by the personal efforts of individuals and not mere mechanical change in ideology imposed on us from above.²²¹

Samek seeks to develop aspirational law reform as a technique to counteract the ontological barrier of humankind’s fear of change. He argues that our petrified paralysis is a by-product of our debilitating “advanced” society and that the only way back to empowerment is through action — and social law reform is one, but only one, way in which we can begin to do this. This entails a rejection of the myth that legal expertise is an essential pre-condition for law reform²²² and recognition that the “ultimate responsibility for law reform must remain inalienably”²²³ with “the concerned citizen”.²²⁴ This, of course, relates to his radically democratic vision of society because not only is “public participation a *sine qua non* of a free society”²²⁵ but also the public must

216. *Supra*, note 5 at 420.

217. *Vice versa*, he also believes in humankind’s destructive capacity.

218. *Supra*, note 62 at 99-102.

219. *Id.* at 102.

220. *Id.*

221. *Id.* at 107.

222. *Supra*, note 136 at 124-5.

223. *Id.* note 25.

224. *Supra*, note 5 at 414.

225. *Supra*, 136 at 25.

be encouraged to accept their human and civic responsibilities by “being persuaded to apply their shoulder to the social wheel rather than cast the burden on a already overburdened legal machine”.²²⁶ Participation and empowerment are closely interconnected:

. . . in a really free and democratic society every decision should make a human difference and consume human energy — the energy of the person making it, of those implementing it and those who are affected by it.²²⁷

Samek is, of course, aware that real reforms are only possible when people are prepared to pay the price, that internal motivation is essential if we are to bring about changes in social practices and that the trick is to encourage people to recognize their benefits as well as their losses.²²⁸

As a consequence of both its humanist foundation ²²⁹ and the certainty of evanescence, social law reform must be conceived of as an ever open, dynamic, self-reflective, self-revitalizing, non-permanent process which accepts that there is no one solution good for all time for any social problem.

There are many tasks of law reform, not just one. There are many agents of law reform not just one. There is no ideal solution, only a straining of solutions, a confronting of contradictions and a persistence in eliminating them²³⁰

It must be visionary and progressive, continually encompassing new territory and opening up new horizons, seeking out “potentials that can be realized”²³¹ and attempting to achieve them through an activist role in the development of contemporary social practices. Ultimately, social law reform is:

the complement, the conscience of the law. Since it is based upon the open potential of human motivation, it cannot be closed by any ideology, and since it acknowledges paradigmatic change it cannot be locked into any paradigm . . . it is incurably relative in both space and time²³² . . . social

226. *Id.* at 24.

227. *Supra*, note 62 at 128.

228. A useful parallel can again be drawn from the impact of the feminist movement. If we males respond to feminist arguments, then inevitably our positions of power and prestige will suffer not only psychologically but also socially, financially and hierarchically. On the other hand, we may well benefit in non-tangible ways because in recognizing and developing “feminine attributes and values” we may reap the benefits of a more empathetic and caring world view. But it is difficult for even sympathetic males to come to terms with these imponderables.

229. “. . . the uncertainty of the dynamic creative force of human motivation is vital to a self-sustaining human system that must necessarily always transcend any particular form.” *Supra*, note 62 at 31.

230. *Id.* at 34.

231. *Id.* at 23.

232. *Supra*, note 5 at 435.

law reform has no fixed boundaries, it must create its own homeland and yet it must never settle there.²³³

Samek strives to be as pragmatic as possible in his suggestions for the methods of social law reform. Drawing on the *L.P.V.* he argues that legalism and legislation should not have a monopoly on the methods of law reform because they entail coercive and repressive techniques which may be unsuitable for the resolution of many social problems. Even when prophylactic, such measures are limited in that their aim is prevention rather than the promotion of the good; for example, through conciliation and reconciliation.²³⁴ Second, and more importantly, since our starting point must always be primary social phenomena rather than the law, law reform must be a “very wide”²³⁵ purposive and contextual response to the multifaceted multiplicity of social and human problems. Legalism will therefore be only one of several potential solutions, “and not the exclusive or even predominant one”.²³⁶ The required flexibility in law reform can only be “brought about by moral, economic, political, psychological, sociological, educational and other methods which are conducive to its ultimate object of changing social practices”.²³⁷

Further, with uncharacteristic detail, he develops a five point functionalist blueprint for the programme of radical law reform:

- a) Reception; picking up signals from the community that something is awry.
- b) Monitoring; empirical research to follow-up the signals.
- c) Evaluation; a comprehensive determination of the source of the discontent.
- d) Recommendation; response to the problem and suggestions for reform.
- e) Implementation; in the “most appropriate manner”.²³⁸

This process is, of course, self-repeating.

The reader might object that the foregoing implies Samek’s acceptance of institutions as a necessary vehicle for social law reform but that this contradicts his earlier claims for the desirability of human motivation and the concerned citizen as reformer. The answer to this, I think, is that Samek wants to get from here to there without becoming utopian, by blurring the line between reform and revolution and by using the potential of contemporary society and its institutions to transcend itself.

233. *Id.* at 409.

234. *Supra*, note 136 at 23.

235. *Supra*, note 62 at 45.

236. *Id.* at 40.

237. *Id.*

238. *Id.* at 124.

He argues that the break with the past and present cannot be clean, that the new must rise from the old:

. . . what is required is that we raise our consciousness as human beings and see the institutions and the roles they play in a new perspective. This raising of consciousness, if it is to become more general or acceptable, requires a change in existing institutions, but they must be changed from within until they are ready to be changed from without.²³⁹

In an ideal world contemporary institutions would be undesirable — indeed superfluous — but this is certainly not an ideal world and institutions are what we've got and so we must render them as responsive as possible — “. . . institutions may be used but they must always remain under human control and their efficiency must be judged in human terms and in regard to human acts”.²⁴⁰

Samek's own relationship with the Law Reform Commission of Canada can be interpreted as an attempt to put this theory into practice. He demonstrates a restrained praise for its Working Papers on *The Criminal Process and Mental Disorder*,²⁴¹ *Diversion*²⁴² and *Imprisonment and Release*²⁴³ because of their broader, critical perspectives and their suggestions for alternative solutions. He also makes several positive comments about the Commission's independence of mind, sense of vision and early determination.²⁴⁴ While a consultant with the Commission he wrote several reports²⁴⁵ which provide the foundation for the radical turn in his thought and his switch of emphasis from philosophy to praxis. He viewed the Law Reform Commission “by reason of the very ambiguity of its institutional status” as a Trojan horse within the legal system with a capacity to “prepare the ground for radical law reform”.²⁴⁶ Unfortunately, the Commission proved to be insufficiently responsive (overly constrained) and as the 1970s wore on it became less socio-oriented. Samek left the Commission, by all accounts very disappointed. Indeed, his last publication is a sustained critique of the Commission's work on euthanasia, which he accuses of bearing all the hallmarks of legalistic, technical and metaphysical law reform.²⁴⁷

239. *Id.* at 121.

240. *Supra*, note 5 at 426.

241. No. 14 (1975), *supra*, note 136 at 4-5.

242. No. 7 (1975), *id.* at 16.

243. No. 11 (1975), *id.*

244. *Id.* 21 and *supra*, note 62 at 6.

245. “The Objects and Limits of Law Reform” 1976; “Pornography”, 1976; “The Philosophy of Law Reform”, 1976.

246. *Supra*, note 62 at 131. For example, he points out that s.11(d) of the *Law Reform Commission Act* could allow for a programme of social law reform.

247. *Supra*, note 8.

Samek's “failure” at the Commission tends to suggest a weakness in his constructive theory; his

Again the reader might object that Samek is deliberately confusing the issues, that his programme is really political and that it has nothing to do with law, except in name. Samek pre-empts and rebuts this objection on two grounds: first, although his law reform proposals are revolutionary, they are still legal in that law takes on a teleological, contextual role as an important player in the campaign of social transformation.²⁴⁸ Second, in a legalistic society such as ours almost all social change is tied in some way or other to “the apron strings of legislation”; legislation is always inextricably involved, either to ratify social change or to bring the anachronistic legal system into line.²⁴⁹ Law, in the present historical-political conjuncture, is a vital arena in which the battle for social transformation must be fought.

This socio-political and pragmatic approach to law reform, through which law becomes praxis, obviously exposes Samek to the traditional objection that what is desirable is the rule of objective law not subjective men (*sic*). Samek’s response is simple (and all the more radical for being so): “The social neutrality of law is a myth”.²⁵⁰ By this stage this claim should come as no surprise to us, nor should his supporting arguments. First, since human agency is a central factor in his thesis, then human involvement in, and responsibility for, the nature and extent of the current legal system is unavoidable. Second, because our primary concern is with social practices, and law is an encrustation upon these, then law inevitably reflects and reinforces the values of such practices — “. . . as a functional instrumentality law can never be neutral; it is always on the side of the values it seeks to enforce”.²⁵¹ Thus, for example, he argues that the decision whether or not to enforce certain social practices inevitably involves a value judgement and that even non-enforcement is a subjective value judgement to preserve the *status quo*. Non-action is just as political as activism.²⁵² And again, in discussing the process of judicial decision-making he posits that legal reasoning is an *ex post facto*

underestimation of the strength of structural constraints and his overly optimistic perception of human agency. For example, at a recent conference on the penal system almost everyone present, and in particular those who work *within* the system, adopted a critical humanist perspective, and yet despite this “consensus” the feeling at the end of the conference was that little could or would change. It may be, however, that we should not be so pessimistic, that as the 1980s progress there is still a flickering and perhaps increasing sense of dissatisfaction and a festering desire to transcend the limits of the present. The tragedy of Bob Samek is that, in being ten years too early, he was a “loner” incapable of doing very much to actively bring about that which he so sincerely believed.

248. *Supra*, note 62 at 44.

249. *Supra*, note 136 at 4.

250. *Id.* at 21.

251. *Supra*, note 62 at 66.

252. *Id.*

rationalization of what the judge considered to be a just or politically correct decision.

. . . according to legal convention decisions are reached on the basis of legal reasoning. In fact this is hardly ever so. Judges are usually prepared to do justice through the law . . . judges for the most part use the law, they look for a way of doing what they consider to be right . . .²⁵³

Thus, in the *Patriation* case:

the policy decision came first and the legal reasoning followed suit . . . indeed this makes sense. Law is the cart not the horse — it is harnessed to the social values which it serves and has not a life of its own.²⁵⁴

Samek's claim is very strong; it is both descriptive and prescriptive. Judicial activism is both unavoidable and desirable:

. . . a court's decision should always be normative not conventional; it should be based on what ought to be done and not what is conventionally accepted . . . where the political context is crucial to implementing the social objectives of law the judges must have the courage to speak out.²⁵⁵

Likewise, law reform must grasp the subjectivist nettle; indeed this is inevitable once its ultimate concern is recognized to be social practices where "very fundamental value judgements"²⁵⁶ are unavoidable. The law reformer, as the conscience of the law, must be prepared to make value judgements and decisions at every one of the five stages of law reform²⁵⁷ and she must be willing to propose "revolutionary changes if (she) believes they are called for".²⁵⁸ Samek struggles hard to strike a balance between the individualistic and subjective decisions of the reformer and Canadian community values. He explicitly rejects crest of the wave majoritarianism — ". . . the law reformer should not be a rubber stamp of so-called popular demands — progressive or conservative — unrefined by (her) own evaluation,"²⁵⁹ and although he advocates that the final decision must rest with the reformer he simultaneously abjures

253. "Law and Convention", *supra*, note 102 at 35.

254. *Id.* There is a very real danger that Samek may be overstating his case in his enthusiasm for teleological judicial reasoning. Law is not, at least at the present time, infinitely malleable; there are important structural constraints which limit its radical utility. Samek, it is suggested, should have been more cautious in his optimism for judicial activism. I would agree that the law is inextricably entwined with value judgements, but that due to the nature of the legal process and legal hierarchy these values are conservative and retrospective. I would be very skeptical of viewing the Canadian judiciary as a vanguard for progressive transcendence! Recent *Charter* decisions reinforce my concerns.

255. *Id.* at 84.

256. *Supra*, note 136 at 7.

257. *Supra*, note 62 at 26-7 and 40.

258. *Id.* at 84.

259. *Supra*, note 136 at 22.

arbitrary and idiosyncratic preferences in proposing that reformers be “sure of their ground (before) depart(ing) from the communal values”.²⁶⁰

Again reconstructing Samek’s variegated comments, it would appear that the “communal values” which he refers to are those that have their roots in our espousal of our respect for human dignity and life.²⁶¹ His aim is to take us at our word, articulate the social, political, legal and even economic consequences of “high falutin” moral claims, estop us from transgressing them, and shove them back down our hypocritical throats! Not only must we have regard for the primordial human needs vital for survival, we must seriously respect all our fellow human beings. Thus, for example, law reformers should condemn both capital punishment and inhuman forms of imprisonment, first because it is doubtful if they achieve any desirable social goal, and second (and more importantly) because they are inconsistent with respect for human dignity.²⁶² Once again it is a radical humanism which underlies his vision of aspirational law reform. This, of course, is only a starting point and, fully conscious of the pluralistic nature of Canadian society, he suggests that we should “engage in a living dialogue of values which will result in a richer and more open mosaic”.²⁶³ This, however, is futile until we resolve the primary concern of respect for human life and dignity.

Samek not only theorizes about the nature, methods, purposes and form of social law reform, he also makes specific suggestions for reform of the law relating to pornography and euthanasia. He argues that the traditional approach to pornography²⁶⁴ has been to perceive it as one aspect of the obscenity issue and opines that this approach is misconceived. His argument, in brief, is that in trying to squeeze pornography into the obscenity basket we are adopting an essentialist approach, seeking an underlying unifying factor for what are, in fact, diverse social and moral practices. This leads to wrong diagnoses, wrong recommendations and wrong solutions. “One of the great dangers of the essence approach is that it tends to lump together quite distinct problems under the cloak of essential homogeneity”.²⁶⁵ Recognition of the

260. *Supra*, note 5.

261. This interpretation is based upon phrases such as:

the best and sanest of those values consistent with the kind of society we really want to live in”, *supra*, note 36 at 22; “those communal values most consistently appealed to by the Canadian people”, *supra*, note 5 at 414, and “our preferred values should be those which we purport to prefer and as long as we pay lip service to them we should be estopped from going back on them”, *id.* at 424.

262. *Supra*, note 5 and note 136 at 22.

263. *Id.*

264. *Supra*, note 91.

265. *Id.* at 269.

limitations of the essentialist approach has an emancipatory effect; it allows us to look at the issues in a more direct manner, determine what we think is wrong and decide if law can be of any instrumental value in providing a possible solution. His critique opens up new horizons and allows for the pursuit of alternative, more effective, solutions.

Samek then draws an important distinction between first-order sexual behaviour, within which he includes “overt sexual behavior, normal or abnormal, self-directed or other-directed . . . for example, group sex, bestiality, masturbation, indecent exposure, and sexual fantasies” and second-order sexual behaviour which includes “pornography, running theatres, brothels, strip joints, massage parlours, etc.”²⁶⁶ Samek’s concern is a limited one — how to deal with the second-order sexual activity of pornography.²⁶⁷ Taking the Law Reform Commission’s *Study Paper on Obscenity*²⁶⁸ to task, he argues that the problem of pornography is linked to the enslaving, exploitative, alienating, dehumanizing and commodifying nature of a commercialized capitalist society. Sex has been stripped of its spiritual and human dimension and turned into a commodity; the participants have been reified and the voyeurs consumerized.²⁶⁹ Samek’s diagnosis is that the evil of pornography is to be found in the undue commercial exploitation of sex. Law, he suggests, can make a limited contribution to the solution of the problem, but not the criminal law because it is clumsy, misdirected, and ineffective. The alternative approach suggested is that after sustained empirical research has been carried out, administrative measures — specifically, expensive licencing and taxation — should be developed to hit the porn industry where it hurts — financially. The decisions should be made on the admittedly subjective criteria of “undue,” “commercial” and “exploitation” by administrative tribunals.²⁷⁰ But again, dealing with the social problems of pornography through legal administrative solutions should not be an end in itself; rather, it is a means to an end, an imaginative and empowering first step towards a more humane and mutually responsive society.

266. *Id.* at 270-1.

267. It is important to recognize the modesty of his proposal; the distinction between first- and second-order activity is strategic, not *a priori*. He believes that state intervention in first-order sexual behaviour would be the enforcement of morals in the stronger sense, and therefore unacceptable. But that does not commit us to any “anything goes” philosophy; because there are important differences between first- and second-order behaviour, there may be state intervention in second-order but not first-order behaviour. He sees “no inherent contradiction between being a sexual freedom fighter and an opponent of pornography”. (“Pornography”, *supra*, note 92 at 54.)

268. No. 23 (1972).

269. *Supra*, note 91 at 275-8.

270. *Id.* at 281-7.

Samek's posthumously published "Euthanasia and Law Reform"²⁷¹ is a very powerful and passionate manifestation of his shift from theory to praxis, or at least the subjugation of philosophy to social necessity.

(With regard to euthanasia) it is wrong to start off with the law as it is or with the existing philosophical categorizations. Rather we should look at the dissatisfaction that is expressed with the primary practice or the controlling secondary practice The complaints that surface are about the roadblocks that face the dying and incurably ill who want to be released from their suffering and the meaninglessness of their lives.²⁷²

Thus, for example, he rejects the distinction between active and passive euthanasia as being not only legalistic and metaphysical, but also false in view of the advanced nature of modern technology and our already highly dependent drug culture.²⁷³

He draws our attention to the reality — that we already practice euthanasia under the legitimating misnomers of "allowing to die" and "pain-killing" and yet we insist on preserving the illusion and prolonging the agony. Law reform should concern itself with the basic issue (which is normative, not logical). How should we respect the dignity of the patient? The first step is to set our thinking straight and to recognize that part of the problem lies in the pejorative slant which language now projects into the word "euthanasia" by identifying it with "murder". In its original Greek form "euthanasia" had meant "happy death", but even if at the present it does mean killing we must look at the context and not the emotive term. "If it is killing it is justified killing and one of the gentlest and most humane known to man."²⁷⁴

This allows us to understand euthanasia as a situation in which:

a competent person who is dying or suffering from an incurable or fatal illness requests a registered medical practitioner to terminate his suffering and the practitioner grants his request, primarily out of compassion.²⁷⁵

271. *Supra*, note 8.

272. *Id.* at 78-9.

273. *Id.* at 92-4. He also ridicules a variety of *legerdemain* in the contemporary debate and the interest group opportunism of those seeking symbols and causes at the cost of human dignity:

. . . almost every day we read or hear of horror stories in which persons have been subjected to painful and demeaning medical treatment against their will. The so-called mercy deaths are an exception and they have become more and more rare as more and more busybodies organize for their own ends to enforce outdated legal statutes against the defenceless and hopelessly ill. What could be more undignified than having to fight long, drawn-out legal battles against the powers of the state in order to be allowed to die with dignity. (*Id.* at 113.)

He is particularly scathing about the hypocrisy of the pro-life movement. (*Id.* at 110-1.)

274. *Id.* at 90.

275. *Id.*

Such an interpretation reinforces the disconnection of euthanasia and execution and emphasizes the happy, peaceful and willing aspects of it. Euthanasia is, therefore, archetypically voluntary and the law should respect the wishes of the petitioner. Non-voluntary euthanasia, as in the case of a comatose patient, should be legally permissible provided that the “appropriate protective procedures are followed”. Involuntary euthanasia poses no problems for it is a contradiction in terms.²⁷⁶

Third, Samek’s ultimate argument is that respect for human life necessarily entails respect for the quality of that life and the process of dying. If the patient chooses to die then the state ought to facilitate as peaceful, as painless and as compassionate a death as is possible.²⁷⁷

The patient’s request is simple. He sees no point in going on when he has nowhere to go; he wants to end his days without being a further burden to himself and his family What right has the state to say no? To have to come to the state cap in hand, *in extremis* to be allowed to die a little faster shows the condition of slavery to which we have sank. If it is right to keep the government out of the bedrooms of the nation, it surely has no place on our deathbeds.²⁷⁸

The ultimate question is, of course — What is Samek’s prognosis for the future? In view of what has gone before, any such question is, in one sense, unfair. Samek, the unrepentant relativist, does not, indeed cannot, offer us any general theory of law; law of the past is different from law of the present and both are necessarily different from law of the future. Thus, the legal point of view is inaccurate and inapposite as a description of primitive societies because they had no enforcement mechanism; similarly, “simply because the legal point of view has remained prevalent in the so-called socialist countries does not mean that it is here to stay”.²⁷⁹ The one lesson that history can teach us is that the future is open, that it is in our hands.

Although our immediate task is to follow on from the preceding examples of subversive, pragmatic, and immanent transcendence this should only take place within a larger, more speculative framework. Samek suggests that, although ideals are unobtainable in a very imperfect world such as ours, that does not mean that we should forgo them completely and succumb to the stultifying dead weight of practicality. On the contrary, fully conscious that they are unachievable, we should perceive ideals as elusive but inspirational goals which keep driving us on

276. *Id.* at 101-7.

277. Samek is also careful to point out that doctors also have a choice; they cannot be forced to respond to a patient’s request.

278. *Supra*, note 8 at 114.

279. *Supra*, note 62 at 54.

towards fulfilling not only our insatiable, creative potential but also in structuring a society conducive to mutation and responsive to our human needs. Idealism can be of heuristic value.²⁸⁰

The Samekian ideal with regard to law is that its coercive, repressive and enforcing aspects be “reduced to the vanishing point”,²⁸¹ and that this, for the time being at least, should be our ultimate goal. Simultaneously, however, we must temper our optimism that a Kropotkinian society of mutual aid and “spontaneous harmony” could ever exist, “that we will ever be able to dispose completely with some enforcement mechanism for recalcitrant cases”²⁸² But again, we must also curtail our pessimism and our consequential idolatry for the adversarial system. Samek’s suggestions are twofold. First, we should recognize both the limitations and alienating tendency of the law. Law is inherently incapable of filling in for the increasing poverty of human interconnectedness and social cohesiveness; on the contrary, it tends to exacerbate the centrifugal dynamics. Therefore, “reduction should be the order of the day”.²⁸³ Second, “there is no good reason why persuasion, conciliation (and reconciliation) cannot increasingly take the place of legal sanctions”²⁸⁴ in the resolution of social and interpersonal conflict. Such techniques are not only cheaper, quicker and less traumatic, their therapeutic, healing value is more lasting and prospective than the pathological adversarial system. The barriers to such a change in emphasis are not structurally determined; they lie within ourselves, the direct product of our prejudices, lack of vision, and self-interested positions in the legal-bureaucratic hierarchy.

V. Conclusion

A man more sinned against than sinning.

Shakespeare, *King Lear*

The year 1984 was a bad one for Canadian jurisprudence. It saw the passing of three of Canada’s leading jurists: Bora Laskin, F.R. Scott and Robert Samek. However, while the contributions of both Laskin and Scott have been widely recognized, celebrated and even criticized, Samek’s input has remained virtually unknown. The Canadian legal community should be ashamed of itself.

The researching and writing of this essay has been a jurisprudential archaeological dig. I have attempted to sift through what now exists of

280. *Id.* at 58.

281. *Id.* at 94.

282. *Id.* at 56.

283. *Id.* at 65.

284. *Id.* at 56.

Samek's (legal) life and work, to distinguish the important from the unimportant, to follow through on some of the cryptic clues and finally to reconstruct, in the best light possible, Samek's interpretation and vision of jurisprudence and law reform. It is my sincere hope that I have done justice (whatever that might mean) to his work.

Traditionally, academics have discussed the work of another either to build their own reputation on the (broken) back of their predecessor, or at least to suggest tentative criticisms or further insights into what has gone before. I resist this imperative/temptation not because I accept blindly Samek's arguments — indeed I have several fundamental reservations — but because that is not the purpose (point of view) of this article. My aim has been modest: to (re)introduce the Canadian jurisprudential community to the critical claims of one of its own. If it can be said that Canada's legal historians have been masochists,²⁸⁵ then its jurists have been sadists insofar as they have inflicted the worst injury possible on one of their peers — wilful ignorance of his work.²⁸⁶ This essay has been no more than an attempt to rectify this wrong in the hope that others might now wish to go back to re-evaluate Samek's contribution to Canadian jurisprudence.

My own opinion is that it has been substantial. Inspired by a plethora of continental thinkers, in particular Marx, Nietzsche and Wittgenstein, Samek broke the chains of positivistic colonialism and struck out into uncharted jurisprudential regions. As the first post-modern Canadian jurist, he attempted to reconnect jurisprudence with some of the wider debates developing in the philosophical community. Aspects of his work are reminiscent of certain trends within feminism and even echo the claims of philosophy's *enfant terrible* — deconstructionism. More importantly, Samek sought to contextualize jurisprudence, to ensure that it remained relevant to the current politico-historical conjuncture, and to develop it as a pragmatic critique of the inequality and hierarchy of post-industrial society. Proactively, he sought to infuse the rationalist Rule of Law with a hefty dose of irrational (com)passion and humanity.

For his sins, he was peripheralized.

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285. G. Parker, "The Masochism of the Legal Historian" (1974), U. of T. L.J. 279.

286. The one exception to this criticism is Christine Boyle whose work, on occasion, makes particular reference to Samek's vision of social law reform.