How Does Law Matter?

Milton C. Regan, Jr.

Observers as far back as De Tocqueville have remarked on how American culture tends to transform political issues into legal ones. Law seems to matter in the United States to a degree that may be unsurpassed in any other nation. Yet what exactly does it mean to say that law matters in the life of a particular society? Just what is the relationship of law to the larger culture?

One answer that has gained prominence in recent decades is what we might call an instrumental account of law. It asserts that law is a tool that we use to create incentives and disincentives for certain kinds of behavior. Legal regulation is justified only if we can point to some fairly direct changes in behavior that are likely to occur as a result of it. On this view, the claim that a law matters because it expresses important moral values is the last refuge of a fuzzy thinker. It is an attempt to paper over an inability to describe precisely how individuals will behave in response to the law. The popularity of the instrumental account of law may reflect the pragmatic strain in American life, which is oriented toward concrete consequences rather than theoretical abstractions. Instrumentalism can be seen as a reaction against Legal Formalism, an earlier theory that supposedly depicted law as possessing an internal logic divorced from concern about its human impact.

If we examine instrumentalism more closely, however, we will see that it is only one way to incorporate into law an appreciation of human concerns. A growing body of scholars in the past few years has argued that law in fact operates in a more complex and diffuse way than instrumentalism asserts. An *expressive* account of law directs attention to law's role in proclaiming social norms. Such norms provide a vocabulary of judgment that helps constitute everyday life as a world of distinct human meaning. If we expand our vision of law to take this function into account, we will have a richer sense of the complex relationship between law and culture.

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The Instrumental Account of Law

Let us begin with a closer examination of the instrumental view. A good place to start is with the law and economics movement, which represents a particularly self-conscious attempt to formulate a rigorous instrumentalism. While not all instrumentalists subscribe to this school of thought, examining the economic approach to legal issues is a good way of appreciating the implications of a strictly instrumental approach to law.

Law and economics scholars, for example, have formulated a distinctive approach to tort law, the body of law that determines when one party must compensate another for injuries that she has caused.[1] One might assume that rules of tort liability serve to articulate basic concepts such as fault, responsibility, and corrective justice that help construct our moral universe. Economic analysts, however, see things differently. They regard tort law as designed to create incentives for parties to take an "efficient level of care." That is, tort rules ideally encourage individuals to invest in measures to prevent harm to others only up to the point where the cost of doing so does not exceed the benefits from avoiding injury. On this view, when the legal system decides when one party must compensate another for the harm that she has caused, it is not saying anything about moral obligation. Rather, it is implicitly seeking to promote efficient resource allocation. As one scholar describes the economic analysis of tort law: "To be at fault is not to act in a morally culpable way or to fall below a standard of care with which one is morally compelled to comply. To be at fault is to act inefficiently; no more, no less."[2]

What are the implications of thinking about tort law in this way? Consider the practice of awarding punitive damages, which exceed an injured party's actual losses. The typical explanation for awarding punitive damages is that they are imposed in order to punish the wrongdoer for morally egregious conduct. Law and economics scholars, however, regard morality as irrelevant to the award of punitive damages. From their perspective, punitive damages are intended to take account of the fact that not all tortious behavior will be detected.

Suppose, for instance, that we can calculate the cost of inflicting an injury on someone at $100,000. This figure represents the full social costs that a person should take into account in deciding whether to engage in activity that will inflict this harm. Ideally, tort law will require a wrongdoer to pay this amount as compensation to her victim. If the chance of detection is only 25%, however, someone contemplating risky behavior would calculate her likely costs at only $25,000. If she gains a benefit worth, say, $40,000 from the activity, she will engage in it – even though doing so actually produces a net loss of $60,000 for society. For this reason, say economic analysts, we must set potential damages at $400,000, so that any actor contemplating the activity who takes into account the probability of detection will calculate her costs at $100,000. In this example, the $300,000 in damages that exceed the actual injury represent punitive damages. Punitive damages therefore are justified only because they have the potential to affect behavior.

This account of tort law tends to lead to the conclusion that there should be a cap placed on the punitive damages that a jury can award. If tort law is intended to prompt persons to

1 *See, e.g.*, Steven Shavell, Economic Analysis of Accident Law (1987); A. Mitchell Polinsky, An Introduction to Law and Economics 37-49, 65-71, 95-104 (1983); Guido Calabresi, The Costs of Accidents (1970).

2 Jules Coleman, Risks and Wrongs 239 (1992).

compare the costs and benefits of engaging in activity that poses a risk to others, then parties should be able to ascertain in advance just what costs will be associated with what activity. Punitive damages therefore should be limited, say, to some predictable multiple or proportion of actual damages, which will allow persons to make the calculations necessary to choose efficient courses of action. By contrast, to leave the decision to the jury based on its sense of moral outrage makes such calculation extremely difficult, and may cause a person to refrain from risky activity whose benefits exceed its costs.

Note that the logical consequence of this approach to law is that one should obey the law only if the benefits of doing so are less than the costs. As Daniel Fischel, a law and economics corporate scholar has put it, a firm may "find it advantageous to violate a law deliberately and pay the penalty." In other words, "[t]he optimal level of violations of law … is not zero."[3] A company might conclude that making a defective product safer would be more costly than simply paying damages to those injured by it. In that case, it should not improve the product.

Consider, for example, the calculations of Ford Motor Company officials in the 1970s with respect to the likelihood that gas tanks in Ford Pinto automobiles would explode when struck from behind by objects moving faster than twenty miles an hour. Internal company documents concluded that the additional cost of making the gas tank safer at higher speeds would be greater than the cost resulting from the estimated 180 deaths and 180 serious burn injuries per year which might be avoided by making a safer gas tank. More precisely, Ford calculated the benefits from a safer tank as the avoidance of costs of $200,000 per death, $67,000 per injury, and $700 per vehicle. Based on the estimated number of deaths, injuries, and damaged cars and trucks, the benefits came to $49.5 million per year. The costs, however, were $11 per vehicle. With estimated sales of 12.5 million vehicles, these came to a total of $137 million. As a result, Ford officials concluded that redesigning the gas tank was not economically justified, based on concern that higher prices would reduce sales.

As it happened, Ford was in compliance with federal safety standards at the time, not least because it had lobbied hard to prevent higher standards from being enacted. Even if Ford had been in violation of federal law, however, that would have been irrelevant from a law and economics perspective. As long as the cost of obeying the law was greater than the cost of compliance, Ford was justified in continuing to sell Pintos without any design changes.

The law and economics approach to tort law thus reveals two assumptions that are basic to an instrumental account of law. First, law has no intrinsic moral force, but is simply a cost that parties must take into account in deciding how to behave. We use law as an instrument for imposing costs in order to affect these decisions. Second, persons are instrumentally rational, weighing the costs and benefits associated with pursuing alternative goals. Law and economics seeks to make the law a more scientific instrument by relying on rational choice theory to predict how different legal rules will affect behavior.

The Rationalist & the Skeptic

Law and economics is confident that we can use law to create effective incentives and disincentives. In this sense, it reflects what I will call a *rationalist* version of instrumentalism. Someone can accept instrumental premises, however, but doubt that law can have much effect on behavior. What I will call a *skeptical* version of instrumentalism argues that law

3 Daniel R. Fischel, *The Corporate Governance Movement*, 35 Vand. L. Rev. 1259, 1271 (1982).

primarily should seek to accommodate existing behavior, rather than channel it in new directions. Both versions of instrumentalism take behavioral consequences as the touchstone of how law matters. They differ, however, on their view of the causal relationship between law and behavior. A rationalist sees behavior as a response to legal incentives, while a skeptic sees law primarily as a reflection of underlying behavior and the attitudes that accompany it.

A good place to appreciate both the contrast and similarity between these two approaches is family law. A rationalist seeks to influence the behavior of family members by changing the mix of costs and benefits that accompany various courses of action. For instance, some economic theorists suggest that more generous financial compensation at divorce will prompt an efficient division of labor within the family.[4] Ideally, the spouse with greater earning power will specialize in market labor, while the spouse with lesser economic prospects will assume primary responsibility for domestic tasks. A spouse may be reluctant to stay home or work part-time, however, for fear of suffering economically if the partners divorce. Thus, economists argue, the prospect of a financial award in the event of divorce will provide assurance that specializing in domestic matters will not result in disadvantage. Divorce law thus matters to a rationalist because it rewards or penalizes certain forms of behavior, thereby directing them toward desirable ends.

A skeptic, however, questions our ability to use family law in this way. She argues, for instance, that people rarely are even aware of family law rules. Even if they are, law's influence pales compared to psychological and emotional factors that are far more powerful. Rather than attempt to change behavior, the skeptic argues, we should ensure that law accurately reflects the underlying social reality that it seeks to regulate. This means that law reformers must constantly be attentive to whether social conditions have outrun the law and rendered it ineffective or even counterproductive. A classic example of such reform is the enactment of no-fault divorce laws beginning in 1970. For the skeptic, these laws simply brought the law into line with changing attitudes toward marriage.

A skeptic therefore would be dubious about using the law of divorce awards to change marital behavior, because spouses decide how to arrange their lives based primarily on non-legal considerations. We generally should allow them to determine for themselves how to divide economic assets at divorce, rather than attempt to impose standard rules that may not reflect their actual needs and desires. On this view, courts should encourage private ordering by enforcing divorcing spouses' agreements like any other contracts, as long as no fraud or duress is involved.

Despite their differences, neither the rationalist nor the skeptic regards divorce law as an attempt to do justice between the parties, or to express ideals about commitment, sacrifice, or fairness within marriage. Both assume that law matters because of its relationship to behavior, not to values or preferences. In very simple terms, we might think of values as shaping preferences, which in turn produce behavior. Both the rationalist and skeptic generally take values and preferences as given. The rationalist believes that law matters because it can change behavior by altering the costs and benefits associated with pursuing particular preferences. The skeptic believes that law matters because laws that accurately reflect existing values and preferences can

4 *See, e.g.*, Allen Parkman, No-Fault Divorce: What Went Wrong? (1992); Lloyd Cohen, *Marriage, Divorce, and Quasi-Rents; or "I Gave Him the Best Years of My Life,"* 16 J. Legal Stud. 267 (1987).

make it easier for people to pursue the ends they desire. Each proceeds from the premise that we must take people's commitments as we find them, but they advance to different conclusions based on their views of the capacity of law to alter behavior.

We must of course be sensitive to the effect of law on behavior, and need also to ensure that legal requirements take into account how people actually lead their lives. The instrumental approach to law, however, is striking for its insistence that the exclusive significance of law is its direct relationship to behavior. How did we get to a point where this claim has such influence? One reason may be that both forms of instrumentalism can claim the pedigree of Legal Realism, a powerful school of legal thought that emerged earlier in this century.

Legal Realism & the Instrumental View

The rationalist and the skeptic share a common intellectual heritage: Legal Realism. Legal Realism was a reaction against what has been called Legal Formalism, an account of law dominant until the early part of this century. At least as reconstructed by many legal historians, Legal Formalism asserted that the correct outcome in a legal dispute is determined by reasoning deductively from a set of core legal principles. The imagery is of the judge discerning the objective logic of the law, then applying that logic to the parties at hand without the influence of any personal or political predilections. The classic example of formalism in legal lore is the Supreme Court's 1905 decision in *Lochner v. New York*,[5] which struck down as unconstitutional a state law limiting the number of hours that bakers could be required to work. The Court declared that inherent in the liberty protected by the Fourteenth Amendment is freedom of contract, and that this principle requires that individuals be able to decide for themselves the terms on which they work.

Lochner has been harshly criticized on the ground that the Court's commitment to the abstract principle of liberty of contract blinded it to the concrete reality of unequal bargaining power between employers and employees. For critics, the Court in *Lochner* seemed to regard law as, in Justice Oliver Wendell Holmes' pejorative phrase, a "brooding omnipresence in the sky"[6] unconnected to practical human affairs. Holmes underscored the difference between formalism and its opponents in his famous insistence that "[t]he life of the law has not been logic: it has been experience."[7] Following Holmes' lead, the Legal Realists of the 1920s and 1930s aggressively challenged the purported objectivity of formalism by demonstrating the inevitable role of discretion in legal interpretation. They emphasized the importance of value choices in adjudication, and directed attention to the social consequences of legal decisions. Their focus was on law as a dynamic human creation designed to achieve social ends, rather than a transcendental system of ineluctable logic.[8]

Both the rationalist and the skeptic share Legal Realism's insistence that law matters because of its role in attempting to meet human needs and concerns. Both purport to express a hard-headed approach to law that highlights practical behavioral consequences and eschews vaguer and more diffuse conceptions of the role of law. The rationalist can be seen as the heir of that school of Legal Realism that sought to use social science to improve our ability to use law to promote behavioral

5 198 U.S. 45 (1905).

6 *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1916) (Holmes, J., dissenting).

7 Oliver Wendell Holmes, Jr., The Common Law 1 (1881).

8 For a compilation of some of the most significant Realist works, see American Legal Realism (William W. Fisher III, Morton J. Horwitz, & Thomas A. Reed eds. 1993).

change and social welfare. She is optimistic about using scientific insight to understand both individual motivation and patterns of group behavior. By contrast, the skeptic believes that humility about our scientific capabilities should lead us to respect existing arrangements as presumptively responsive to the needs of their participants. The skeptic can invoke the Realist scholar Karl Llewellyn in support of this position. While Llewellyn's legacy is complex,[9] the aspect of it relevant here is Llewellyn's work as the prime force behind adoption of the Uniform Commercial Code. That model statute in large measure seeks to codify as law the actual practices of commercial actors.

Both rationalist and skeptic can thus invoke the legacy of Legal Realism as support for their view that law is an instrument that enables humans to achieve certain purposes. While the rationalist is more optimistic than the skeptic about our ability to understand human behavior, both reflect a commitment to the lessons of "experience" rather than the axioms of "logic." We should question, however, whether instrumentalism is the only way to acknowledge that law has importance because of its human consequences.

An Expressive Account of Law

In one sense, the claims of instrumentalism seem obvious and uncontroversial. Few of us in contemporary society would accept the claim that legal reasoning is simply a process of deduction from abstract principles, or that the law develops independently of human needs and concerns. Even if we acknowledge the centrality of human experience to law, however, is an instrumental view of law the only viable account of how law matters?

We can begin to gain a sense of the limits of the instrumental approach by returning to family law. Consider the proposal by Elisabeth Landes and Richard Posner that we create a market for adopted children, in which parents of newborns would be allowed to sell them to adopting parents at whatever price they could command.[10] Landes and Posner reflect the rationalist strain of instrumentalism in their claim that this market would be an effective way to respond to the shortage of children available for adoption. They argue that it would create incentives that would increase the supply of such children, by affecting the behavior of those persons who otherwise might place children in foster care, have an abortion, or decide not to bear any children. By contrast, current legal rules that prohibit or limit the payment of money for adoption artificially depress the supply by granting adoption agencies a quasi-monopoly over the provision of available children. The creation of a market for adoptions thus represents the use of law to create incentives for behavior that would produce social benefits.

Landes and Posner reflect the skeptical strand of instrumentalism in their suggestion that the existence of a "black market" for adoptions indicates that current legal restrictions simply make more expensive, rather than prevent, adoptions for sale. People already are willing to buy and sell newborn children because of powerful desires that cannot be thwarted by law. Since it is powerless to affect this behavior, existing law therefore merely drives up the cost of such activity, making it harder for people who want children to obtain them. In sum, Landes and Posner maintain that "the baby shortage and black market are the result of legal restrictions that prevent the market from operating freely in the sale of

9 *See* William T. Twining, Karl Llewellyn and the Realist Movement (1985).

10 Elisabeth Landes & Richard Posner, *The Economics of the Baby Shortage*, 7 J. Legal Stud. 323 (1978).

babies as of other goods."[11]

The proposal for a market in adoptions has met with a firestorm of criticism. Yet such a reaction may be puzzling to one who subscribes to an instrumental account of how law matters. Indeed, an instrumentalist can only be perplexed by family law in general. It is reasonable to assume that law ranks low among the factors that affect familial behavior, yet few areas of the law evoke such passionate controversy. People clearly seem to believe that family law matters, but not in the way that instrumentalists claim. Much seems at stake, but an instrumental account of law is powerless to tell us what it is.

The reason is that law does not simply establish incentives and disincentives for various forms of behavior. It also helps constitute a cultural world by investing it with moral meaning. It expresses what is valuable and what is not, what merits praise and what deserves blame, and what we may reasonably expect from one another. Behavior constitutes human action, rather than mere brute physical events, because it has meaning that rests on social norms. As Cass Sunstein has pointed out, law has the potential to "reconstruct existing norms and to change the social meaning of action" by making pronouncements about appropriate behavior.[12]

Think of domestic violence against women, for instance. For years, law treated such conduct as part of "private" disputes in which law enforcement officers should not intervene. Husbands generally were exempt from prosecution for rape when they forcibly imposed sexual relations on their wives. The message sent by such a legal regime was that husbands had the authority within marriage to use physical force if they deemed it necessary to "discipline" their wives. Recent legal changes have sought to change the meaning of such behavior. Police officers now are directed to arrest batterers, and husbands can no longer claim immunity from rape laws. This signals that violence by husbands against wives is just as much a criminal act as when done between strangers. In other words, the meaning of such conduct has changed from "discipline" to "violence"; from a private matter to one of public concern. This is but one example of the way that law, as Mary Ann Glendon has put it, "tells stories about the culture that helped to shape it and which it in turn helps to shape: stories about who we are, where we came from, and where we are going."[13]

To be sure, the greater prospect of punishment may deter violent behavior. The law, however, seeks not simply to force husbands to conduct a different cost-benefit analysis. Ideally, men will internalize a norm of respect toward their wives that leads them to regard violence as inconsistent with being a good husband. In other words, law has the potential to serve as an element of socialization. As the Model Penal Code observes, "Legal norms and sanctions operate not only at the moment of climactic choice, but also in the fashioning of values and of character."[14] This suggests that the instrumental account is misguided when it takes values and preferences as external to the law. Law is not simply a neutral vehicle for enhancing or inhibiting the pursuit of independently derived ends. Instead, it provides a framework for evaluative judgment that is integrally involved in the formation of those ends. Law matters not simply because people pursue their purposes differently in light of it. Rather, it matters because it helps shape selves who find some purposes more worthwhile

11 *Id.* at 339.

12 Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021, 2031 (1996). *See also* Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. Chi. L. Rev. 943 (1995).

13 Mary Ann Glendon, Abortion and Divorce in Western Law 8 (1987).

14 Model Penal Code § 209(2) explanatory note (1985).

than others.

As a result, most people tend to regard law as having moral force, rather than solely as a cost that they must take into account in weighing the benefits and disadvantages of alternative courses of action. Tom Tyler's work on why people obey the law makes clear that an instrumental perspective is insufficient to explain how people regard legal rules. Tyler suggests that "[c]itizens act as naive moral philosophers, evaluating authorities and their actions against abstract criteria of fairness."[15] If a legal regime satisfies such criteria, persons "will feel personally committed to obeying the law, irrespective of whether they risk punishment for breaking the law."[16]

Debates over issues such as tort law, divorce awards, and baby-selling therefore have a moral dimension whose significance is not fully captured by an instrumental account of law. Rules of tort liability are not meant simply to create incentives and disincentives, but to express norms about how individuals should act toward one another. As Jules Coleman has observed, an economic analysis of tort law regards the relationship between victim and injurer as contingent, significant only insofar as each serves as a vehicle for advancing the general goal of cost-effective accident prevention. Such a perspective neglects the function of tort law in achieving corrective justice. The victim's suit "is based on his claims about what the injurer *did* to him, not on the fact that the injurer is better suited than he to reduce accident costs."[17] By determining which injuries should be deemed wrongful, tort law serves to constitute a normative world of rights and obligations.

A manufacturer of a dangerous product who regards damage liability as just a cost of doing business thus expresses contempt for those who will be killed or injured by its product because it fails to treat the victims with the respect that is due them. As Marc Galanter and David Luban argue, punitive damages are intended to inflict an "expressive defeat" on such a wrongdoer, by publicly refuting his implicit claim that his interests justify injuring others.[18] Only an award that exceeds actual damages can "convey the message that a norm is categorical, that it demands compliance and not cost-benefit analysis."[19] The danger of a cap on punitive damages is that it may make it more feasible to treat such damages as a cost of doing business. This fear that instrumental calculation will displace moral injunction dates back perhaps most prominently to Kant, and likely well before that.

Similarly, controversy over financial awards at divorce is impassioned in part because it speaks to the meaning of fairness between husbands and wives. A regime that imposes negligible obligations on a spouse who increased his earning power while his partner cared for children at home signals that spouses engage in sharing and sacrifice at their own risk. It treats partners as relatively self-sufficient individuals who have remained essentially untransformed by the experience of marriage. Such persons can and should look to their own interests in the realm of intimate relationships. The pervasive metaphor is one of contract, the device through which autonomous individuals explicitly surrender some of their sovereignty in the pursuit of advantage. In such a world, the only normative basis of obligation is consent.

While the contractual paradigm does cap-

15 Tom R. Tyler, Why People Obey the Law 165 (1990).

16 *Id.* at 3.

17 Coleman, Risks and Wrongs, *supra* note 2, at 381.

18 Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 Am. U. L. Rev. 1393, 1432 (1993).

19 *Id.*

ture some features of marriage, it neglects most people's belief that, in Hegel's words, the purpose of marriage "is to begin from the point of contract … in order to supersede it."[20] A rule that recognizes more expansive financial claims at divorce arguably is more consistent with this aspiration. It sends the message that marriage is a joint undertaking that shapes the identities of both partners. In such a relationship, vulnerability and reliance, not simply contractual agreement, can be the source of rights and duties.

Finally, the debate over Landes and Posner's proposal to permit sales of newborn children at market value raises profound questions about parental responsibility, human worth, and the institution of the market. Those who oppose a market for adoptions are concerned not with market failures, which can be remedied by regulation, but by a practice that has the potential to alter our understanding of what it means to be human. Two objects for sale at the same price are fungible. For many people, to treat children in this way would contravene Kant's admonition that humans beings have dignity rather than a price. For instance, would children fetch a higher or lower market price depending on whether they were perfectly healthy or had birth defects, had parents of high or low intelligence, or possessed a certain ethnic background? Should purchasers be able to return a child before a certain period of time if they were not satisfied with its responsiveness or behavior? If an unexpected medical condition appears, should they be able to cancel the contract or at least receive some form of damages? Such practices are uncontroversial for standard products traded in market exchanges, but their application to human beings likely leaves most of us uneasy at best.

An expressive account of law thus offers an understanding of how law matters that is richer than a purely instrumental approach. It recognizes that law plays a part in constructing a world of human meaning, in which human beings do not simply "behave" but "act." Any account of law that neglects this dimension cannot fully capture its significance and power. Indeed, returning to De Tocqueville, it may be that ethnic heterogeneity and the absence of longstanding traditions in the United States have required that law play an especially important role in expressing American social norms.

The Dialectic of Being & Meaning

I have argued that acknowledging the importance of human experience to the law need not confine us to an instrumental account of how law matters. The expressive dimension of law also speaks to vital human concerns that are less tangible but no less crucial. Even as we appreciate the expressive role of law, however, we must remain attentive to its limitations. First, it may be tempting to promote laws of purely symbolic significance as a relatively painless substitute for grappling with the stubborn complexities of social problems. As Mark Tushnet and Larry Yackle suggest, expressive laws seek to change values and preferences, albeit indirectly, but symbolic statutes "simply make a statement."[21] Imposing the death penalty on drug "kingpins," for instance, or basing parole policy on the phrase "three strikes and you're out" may be satisfying as a primal expression of anger and disapproval, but may have little if any effect on the underlying problems of drug use and criminal behavior.

20 G.W.F. Hegel, Elements of the Philosophy of Right 203 (Allen Wood ed. & H.B. Nisbet tr. 1991).

21 Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 Duke L.J. 1, 75 (1997).

This blindness to behavioral consequences is not necessarily confined to those who would use law cynically for political mileage. Reformers of all stripes may promote well-intentioned laws that are ineffective or even counterproductive. Economic regulation, for instance, may be adopted in the spirit of protecting the public from injurious behavior. Unanticipated business responses to a particular measure, however, may leave consumers worse off than before. Similarly, a deregulatory law may be enacted as part of an agenda to promote market efficiency by reducing regulatory costs that ostensibly create competitive disadvantage. Some laws, however, may free corporations to engage in behavior that ultimately reduces, rather than enhances, competition. In the realm of intimate relations, a law requiring spouses jointly to decide whether a wife should obtain an abortion may be designed to encourage shared marital deliberation on important life events.[22] In good marriages, however, such deliberation likely already occurs. The law thus may affect only those marriages that are in some distress. Effectively giving a husband a veto over the abortion decision in such instances risks forcing a woman to bring a child into a troubled household, and can create an imbalance of power that undermines, rather than promotes, genuine marital unity. Those who frame their justification for law in expressive terms thus may be vulnerable to criticism for unleashing the curse of unintended consequences.

A second limitation of conceptualizing law as expressive is that it is extremely difficult to trace and analyze the extent to which any given law actually serves an expressive function. One difficulty stems from the possibility that there may be no clear consensus on precisely what message a law conveys. For some, divorce laws that seek to effectuate a "clean break" between spouses express a norm of equality and independence. For others, such laws valorize work in the paid labor force over non-wage work in the domestic sphere. One who objects that another's characterization of the law does not reflect its "real" meaning may be hard-pressed to offer a convincing demonstration of this claim.

Even if there is relatively wide agreement on the norm that a law seeks to inculcate, however, it may be impossible to demonstrate that the law has the desired effect. How do we know, for instance, that prohibitions on baby-selling actually reinforce in individuals the importance of human dignity? Cause and effect is, to put it mildly, a vexingly elusive phenomenon in this realm. Any given law is but one strand in an interwoven fabric of socialization; the effort to isolate the contribution of any given strand is unlikely to be of much value. These difficulties in identifying when law is performing an expressive function obviously can make it hard to defend a law on this ground. They also, however, can be exploited by supporters of a provision, who may contend that focusing simply on immediate behavior misses more subtle effects of the law – which can never be disproved with certainty.

The imprecision of an expressive account of law thus can be enlisted in the service of both irresponsibility and rigid Utopianism. An instrumental approach to law can help save us from this fate through its insistence on attention to concrete behavioral consequences. At the same time, however, confining ourselves to the instrumental dimension may reinforce the assumption that existing attitudes and values are beyond influence. An expressive model emphasizes that we need not accept this assertion. Law can provide what the philosopher Dorothy Emmet in another context has called a "regulative ideal": a vision that may be unrealizable, but which sets a direction and offers a

22 *See Missouri v. Danforth*, 428 U.S. 52 (1976).

basis for criticizing actual behavior.[23] The fact that we cannot always live up to our aspirations does not mean that law should abandon the attempt to express them.

Each vision of law therefore speaks to an important feature of human existence. Law must take account of who we are, but also who we hope to become. We tack back and forth between these points both in our daily lives as individuals and in our shared collective lives as a society. We accommodate ourselves to circumstances even as we strain against them. Furthermore, those circumstances are never simply given to us; our understanding of them is shaped in part by the significance we project onto them. Experience and imagination continuously interact in an ongoing process whose reconciliations are always provisional. Instrumental and expressive accounts of law capture the respective terms of this dialectic between what Arthur Leff called "being" and "meaning."[24] Each acts as a corrective to the other, checking any impulse to embrace a univocal model of the enterprise of law.

My contention therefore is not that an expressive theory of law should replace the instrumental one. Rather, it is that we should be wary of any tendency to accept the latter as the last word. This inclination toward the instrumental may have momentum in a scientific age in a pragmatic nation. An expressive account of law may seem insufficiently empirical to an instrumentalist, and thus too prone to the kind of vague pronouncements about law that characterized Legal Formalism. Yet we should strive to heed Aristotle's admonition that we must not seek more precision of a subject than its nature allows. Human experience is tangled, complex, and diffuse, not easily captured by scientific models of behavior and motive. To conceive of law not simply as an instrument but as one strand in the web of human meaning is perhaps to see it as a "brooding omnipresence." If so, however, it is one that dwells not in the sky, but among and within us.

23 *See* Dorothy Emmet, The Role of the Unrealisable: A Study in Regulative Ideals (1994).

24 Arthur Leff, *Law and*, 87 Yale L.J. 989 (1978).