

Michigan Law Review

Volume 109 | Issue 6

2011

What We Make Matter

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Recommended Citation

Sherman J. Clark, *What We Make Matter*, 109 MICH. L. REV. 849 (2011).

Available at: <http://repository.law.umich.edu/mlr/vol109/iss6/1>

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FOREWORD

WHAT WE MAKE MATTER

*Sherman J. Clark**

INTRODUCTION

The *Michigan Law Review's* Survey of Books Related to the Law provides an annual opportunity not only to consider a range of legal issues and views, but also to think about the range of ways we argue about and study the law. In this Foreword, I would like to suggest that we think not only about how we choose to argue, but also the potential consequences of those choices. When we study or argue about law and politics, we routinely and sensibly consider the possible unintended impact of particular substantive rules and policies. Here I suggest that we should attend as well to the potential indirect effects of our arguments themselves.

In particular, the occasion of a broad survey offers a chance to reflect on what we let or make matter about the law—our underlying and often unexamined choices and assumptions regarding what sorts of considerations are worth taking into account. I do not mean simply that a wide range of methodologies can be brought to bear on legal issues. This is of course true, and well-illustrated by the collection of books surveyed here; but I mean to highlight something arguably deeper, for which methodology is an inadequate proxy. Any given piece of legal scholarship not only makes use of some approach or set of methods and not only represents a particular view or set of views about a given issue, but also reveals, or conceals, a set of claims or assumptions about what does or ought to matter about law or politics. Any argument about the doctrinal coherence of legal rules either assumes or argues that coherence matters. Any discussion of the efficiency consequences of law or policy inherently argues or assumes that efficiency is worth thinking about. Any investigation of the interaction between law and culture asks us to recognize that culture matters.

Now, it has long been recognized that law is potentially constitutive of what might be called, loosely, social norms. Segregation, for example, did not just reflect but also helped teach and maintain racism. Indeed, several of the books reviewed in this survey recognize and explore the ways in which law can indirectly form social norms, variously understood. Jennie Suk, for example, in *At Home in the Law*, recognizes the impact of the law of domestic violence and self-defense on conceptions of privacy and women in society. Naomi Cahn and June Carbone, in *Red Families v. Blue Families*, highlight the ways in which political debates about marriage and sexuality

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help construct, and polarize, views on family life. Alexandra Natapoff, in *Snitching*, recognizes the potential destructive force of the use of informants on community life. The broader lesson is that the law does not simply reflect, but can also construct, our sense of what is acceptable or unacceptable, desirable or undesirable, even right or wrong; so we ought to be aware of this possibility when we think and argue about the law.

This much granted, I suggest that argument itself—including legal scholarship, law teaching, political rhetoric, and public policy advocacy—is also potentially constitutive. Moreover, I would suggest that the ways in which we argue, and in particular the assumptions on which we base our arguments, are potentially constitutive not just of particular norms, but of something arguably deeper. What we let or make matter in our collective conversation about law and policy may help construct our sense of what matters in life. And what we let matter in our lives determines to some extent our capacity to thrive—to live full and productive lives.

So, three questions: First, in what ways might legal and political argument, as opposed to the substance of law or policy, be constitutive of character, broadly defined? Second, how might that construction of character thereby impact our capacity to thrive? Finally, what if anything can or should we as participants in this conversation do about it? Beyond acknowledging and taking responsibility for the indirect consequences of our scholarship, teaching, and advocacy, can we learn to argue in ways that, without compromising our professional obligations or substantive commitments, might enhance rather than diminish our ability to live well and fully?

Before I can say anything more about what that might mean, I need to pause and acknowledge a set of predictable objections, even aversions, to talking about law and politics in this way. Because these reactions are not merely obstacles to thinking and talking about the impact of law on our capacity to thrive, but also symptoms of the underlying difficulty itself, they are worth highlighting at the outset.

First is the sense that legal argument ought not to have to do with such things—questions of what really matters in life or what leads to or constitutes a rich and full life. Perhaps such matters are simply beyond the appropriate realm of law or legal scholarship. If a person hired to fix your DVD player were to opine on what sort of movies you should watch, you might well tell him to just fix the thing and stay out of your business. Perhaps when it comes to the question of what makes for human thriving, law should just stay out of it entirely. This gets to the heart of the matter: any consideration of these issues will presumably have to respect the pragmatic fears and autonomy concerns underlying the objection. But the short answer is straightforward. Law is arguably “in it” already, and perhaps inevitably so.

If law or legal argument does in fact have an impact on our capacity to thrive, it simply will not do to take the position—whether rooted in a political theory, a pragmatic fear of abuse, or an unwillingness to deal with things hard to measure—that law should have nothing to do with thriving. We might desire that the oil, coal, and nuclear power industries should have

nothing to do with public health or the environment. They do. My effort in this Foreword, as in other recent work, is to suggest how law in general, and here legal argument in particular, might similarly impact our ability to live rich and full lives, whether we like it or not. If so, we should face it and take responsibility for it.

The other, related reaction I have come to expect when trying to think about the impact of law or politics on thriving is more instinctive than theoretical, and somewhat inchoate. Many legal academics seem to have a strong negative reaction to anything with the odor of preaching. In part, I may have been guilty of inducing this gag reflex by the way I have chosen to address some of these issues—using the language of character and virtue. But to some extent the problem is intrinsic and will have to be confronted by anyone who hopes to consider the indirect impact of law on thriving. Indeed if, as I suggest, one of the ways in which our modes of legal and political argument may diminish our capacity to thrive is by making it difficult for us to talk in public about character or virtue without rolling our eyes, an aversion to this sort of talk is evidence of the need for this kind of conversation rather than reason to avoid it.

I. CONSTITUTIVE PERSUASION

Recognizing the potential impact of argument on character requires an account of argumentation. This is perhaps most usefully framed as a theory of persuasion. When we make an argument, whether in our scholarship, in court, in the context of some negotiation, or even in the classroom, we are presumably engaged in an effort to persuade—understood broadly as an effort to reach, move, or come to terms with another person. On some occasions we may seek to persuade someone to take some specific action—acquit or convict, vote for or against a legislative measure. Often, however, as in our scholarship, we are simply hoping that our readers will consider a position and take into account something we consider important. In either case, the argument is a kind of social act—a communicative act—which hopes to make something happen, if only in the mind of our listener or reader.

In general, what determines the success or failure of that effort? It is not solely or even primarily the intrinsic logical force of the argument that determines whether it will reach or move those to whom it is made. We all know this to be true. We have all had the experience of making an argument to which our listener has no good response, yet that fails to persuade. We might sometimes wish, as Robert Nozick mused, that we could craft arguments so powerful that they would set off reverberations in the brain—either accept the argument or die.¹ But fortunately, argument does not work that way. Persuasion is an alternative to coercion, not a form of it.

Instead, what we need to do is to figure out what sorts of arguments, made in what ways, will resonate with and reach the particular person we

1. ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 4 (Harvard Univ. Press 1981).

hope to move or come to terms with. We need to make or find space in that person's mind and worldview for the view we seek to reach or have considered. Successful persuasion is thus as much diagnostic as creative—as much about understanding people as crafting arguments. Successful lawyers, politicians, negotiators, teachers, and scholars know and do this instinctively. To the extent they actually move people, it is not simply through the intrinsic power of their arguments, but also because they are able to engage with the worldviews of others.

Much more can and certainly ought to be said about persuasion seen in this light. Most obviously, we might ask what makes an argument resonate with particular people. Classical rhetoric speaks to this question, albeit not in our precise terms. And how can we better develop the ability to understand others in ways that will help us persuade? Is social science our best teacher here, or perhaps rather diverse intellectual companionship? More deeply, should we lament or celebrate this apparent disconnect between logic and rhetoric? Here, however, I want to leave these important questions aside and focus instead on the ethical implications of persuasion. What responsibilities attend the making of arguments, understood in this way?

The key lies in the possibility that we do indeed *make*, rather than simply find, space for the outcomes and considerations for which we argue. We have no warrant for assuming that the worldviews we explore in an effort to persuade are fixed or exogenous to our arguments. Instead, we should consider the likelihood that in making arguments we do not merely respond to but also, if indirectly and incrementally, influence the way people see the world. If so, and if the way in which people see the world can impact their capacity to thrive, we may bear some responsibility for what our arguments do to those we attempt to persuade.

Consider a concrete hypothetical. Imagine you are trying to persuade folks in your city not to approve funding for a new subway line. Assume your reasons are completely legitimate: you have crunched the numbers and simply believe the proposed subway line would be a waste of money and would not bring the benefits its proponents suggest. Now imagine you realize that you could sway some of your neighbors with a subtle appeal to race-based fear—perhaps by hinting at or subtly evoking visions of “thugs” from the other side of town having easier access to good neighborhoods. This is hardly a stretch. You might well choose to eschew that argument. Why? In part because you might consider it simply wrong to appeal to racism. But you might also quite sensibly realize that by making that sort of argument, even and perhaps especially if you did so indirectly and subtly, you would not just be appealing to but also helping to construct and reinforce fear and prejudice.

This is perhaps too easy an example, given that racism is so obviously a negative trait; but what makes it an appropriate and illuminating illustration is not simply that racism is bad, but rather that attitudes towards race are complicated, often in flux, and not fully transparent even to those who hold them. The same can certainly be said of our deeper priorities. None of us could say, simply or directly, what matters to us in life—at least not if we

are at all reflective about the matter. We are, rather, always in the process of working it out. And we work it out not solely or even primarily through abstract reflection, but also in and through our actions. We figure out what matters to us in life in large part by deciding (or assuming) and acting or forming opinions based what matters to us about this thing or that. If so, when we persuade someone to act or form an opinion based on some set of considerations, we may be helping them make those things matter.

Even if persuasion were merely diagnostic and creative, argumentation would still have ethical implications. In addition to thinking about what substantive positions and ideas we are willing to advocate, we should also consider ethical limitations of appropriate argumentation—not to lie or deceive, for example. But if legal and political argument, like law and politics more generally, can be constitutive as well as instrumental, our responsibilities do not end there. And we, as lawyers, scholars, policymakers, or teachers, cannot dodge that responsibility simply by saying that we are not talking about the larger questions of character and thriving. It will not do to claim that such matters are beyond the scope of our arguments if they are not also beyond the scope of our influence.

Two decades ago, Jerry Frug suggested that whenever we make an argument, we are implicitly presenting a particular set of traits and perspectives—a particular character.² Whatever the substance of a particular argument, we are also saying, indirectly, “Here I am. Be like me.” Frug applied this insight in an effort to give meaning and substance to argumentation—to anchor it, but in a way that, consistent with the critical tradition Frug was engaging, would not require assuming the possibility of any easy objectivity or neutrality. Frug recognized that if argumentation is an ongoing constitutive act, we need not choose between granting to legal argument the power to achieve objectivity on the one hand or dismissing it as mere empty rhetoric on the other. Argumentation is an indirect way of talking about how to be. The critical tradition hinged on recognizing that what people do and believe is often less a consequence of their purportedly objective arguments and reasons and more a product of who they are—their deep-seated assumptions, priorities, affiliations, and the like. Frug saw that even if this is true, argumentation is far from irrelevant, because it is or can be one of the things that make us who we are.

But how so? How does argument indirectly constitute character? Primarily, I think, by assuming and appealing to some vision of what ought to matter about the issue at hand. Recognizing this does not require that we assume every argument is in some way a manifestation of the speaker’s own character, as Frug’s formulation might seem to suggest. Perhaps arguments often do evince something about the character of the speaker, albeit indirectly; but here we can set aside the difficult question whether and how arguments *reveal* character. My aim here is rather to think about how they may construct it. Even if an argument does not necessarily say, “Be like me,” it inevitably does say, at least, “Be the kind of person who cares about

2. Jerry Frug, *Argument As Character*, 40 STAN. L. REV. 869 (1988).

these things." For example, the hypothetical argument about the subway line described above would invite people to develop the fear invoked. Even the most impersonal of arguments can thus be understood as constitutive once one recognizes that an essential component of who we are is what we let or make matter.

At a general level, this last proposition should not be a particularly controversial observation. One of the ways we define ourselves is by what we care about, what we believe matters. What is more difficult to determine is the extent to which legal or political or scholarly arguments may influence our sense of what matters. The difficulty is the same one faced by those who have recognized the constitutive effects of substantive law and policy. How could we determine the extent to which Jim Crow and segregation taught, rather than merely reflected, discrimination and racism? How could we measure the degree to which laws restricting the rights of women helped construct rather than merely manifest attitudes towards women? It is difficult to imagine how these things could be tested or measured empirically. But it would be both foolish and irresponsible to assume that the only things that matter are those we can measure. In fact, that very habit of mind—the tendency to equate importance with measurability—may be one of the most potentially damaging character traits we risk constructing through our legal and political discourse.

But even if we cannot measure the impact of argument on this aspect of character, there are some things we can say about the matter, beginning with a potential mechanism. Recall that argument persuades, when it persuades, not by force of logic alone but through resonance—by making or finding space in a particular person's view of the world. Add to this the realization that the worldviews we explore are not fixed and fully coherent edifices but rather ongoing works in progress, and we can see how arguments may have their impact.

Granted, as to some simple issues, it may be safe to assume that people can and do completely compartmentalize their thinking. What a person decides or assumes to matter in building a bridge or scheduling trash pickup may have little or no impact on their ongoing efforts, conscious and subconscious, to work out what matters to them in life. So, when we argue about such matters, perhaps we need not give any thought to the impact we may be having on those we persuade. But our public conversation is rarely restricted to such topics. When we debate and decide more complicated issues—education, taxation, immigration, affirmative action, gay rights, war, and indeed most of the issues about which people care enough to argue—we are, whether we acknowledge it or not, arguing about things that touch on who we are, and thus potentially constructing our sense of what matters.

Nor do we need to imagine that any one particular argument on one particular occasion is likely to have a tremendous impact on any one person's sense of what matters. The effect is likely to be both gradual and cumulative. This is true also of the frequently acknowledged ways in which law matters, including the potential deterrent effect of tort and criminal law, as well as the economic effect of taxation. That the influence of our arguments

may be incremental does not mean it is small, or that we should avoid taking responsibility for it.

II. WHAT WE MAKE MATTER

What is even harder to nail down is the larger question of how the influence of our arguments might impact our capacity to thrive. If life priorities could be safely viewed as merely tastes, akin perhaps to favorite foods or preferred styles of dress, we might acknowledge our impact on them without feeling the need to worry about it. But we cannot make that assumption. On the contrary, it seems safe to assume that what we let or make matter does have something, and perhaps a great deal, to do with how well and fully we are able to live.

But how? To call this a difficult question is beyond an understatement. It has been a large part of the business of millennia of philosophical and religious thought—social science and psychology having only recently turned to the question—to consider how what we care about and pursue in life can enable us to thrive or inhibit us from doing so. Uncertainty is piled on uncertainty. What does it mean to thrive? What conduces to thriving? What role do our priorities and goals play in the process? Indeed, the very depth and difficulty of these questions helps explain why they are often disregarded in legal and political discourse. If it were necessary to answer these questions fully before considering the possible impact of law, or of our efforts at persuasion about law, we would have little choice but to leave the matter alone. We might, even having recognized and acknowledged the connection between law, persuasion, and our capacity to thrive, simply throw up our hands and set the question aside.

But we do not have to throw up our hands, because there is at least one thing we can say with some confidence about the connection between what we let matter and how well we are able to live. Having made that point elsewhere at some length,³ I will not rehearse the entire argument here. Indeed, I do not think the basic claim should provoke any sincere objection or controversy—at least at a certain level of generality.

So here it is, simply put: neither objective material well-being, however measured, nor the satisfaction of subjective preferences, however calculated, is sufficient for or even a necessary component of a rich and full life. This is a remarkably broad claim, I know; but perhaps we should switch the burden of proof. While it has been recognized since Aristotle that a certain level of material security is useful or even necessary for thriving, no evidence shows, no good philosophical reasoning supports, and no religious tradition holds, that material well-being or preference satisfaction are the central elements of human thriving. Search classical philosophy or modern, the Old Testament or the New, the Koran, the Analects of Confucius, the Buddhist

3. Sherman Clark, *Neoclassical Public Virtues: Towards an Aretaic Theory of Law-Making (and Law Teaching)*, in *VIRTUE IN THE LAW* (forthcoming 2011), available at <http://ssrn.com/abstract=1552413>.

Dharma, or modern happiness research. No one seems to argue or believe that marginal increases in material well-being are the key to a rich life. I do not mean to be glib; but this much I will take as given. Something more than material well-being is necessary to any worthy vision of human thriving.

Now, we cannot expect to know or agree on just what this something more is, exactly. Meaning? A sense of belonging or community? Creative outlets? A connection to nature? Purpose? Companionship? Presumably a rich and full life hinges on some combination of these and other difficult-to-define things. I certainly do not claim to know. Thinking about what we really need, and pursuing it, is our ongoing human work. But do know this at least: being safer, richer, or healthier is not enough; nor is getting more of the stuff we think we want.

To this I would add one modest claim. Because we are not likely to figure out exactly what will allow us to thrive, we at least need to maintain our willingness and capacity to search for it. We need to remind ourselves, and teach ourselves, to pursue and care about things that we cannot measure or define with precision. If so, to the extent that we come to believe or act as though we believe that what really matters in life is either objective well-being or preference satisfaction, we risk diminishing our capacity to search for and find the things that might enable us to thrive. If our ways of arguing about law and politics are doing this to us, we ought to be aware of it, perhaps guard against it, or at least acknowledge responsibility for it.

But what can debase can perhaps also ennoble, and there is no reason to assume that the indirect effects of our conversations about public life need or always do diminish us. Having acknowledged and taken responsibility for how the ways in which we are able to talk may impact the fullness with which we are able to live, perhaps we can learn to argue and advocate in ways that enrich rather than impoverish.

III. ENNOBLING ARGUMENTATION

Having acknowledged the potential, if incremental and cumulative, impact of our arguments on those we persuade, what if anything should we do about it? Grant that persuasion about law and politics, like substantive law and policy, may be constitutive of character and thus capacity to thrive. It is perhaps another thing entirely to make that constitutive function an explicit goal of argumentation. This returns us more concretely to the question of whether it is somehow inappropriate or illegitimate for law, or legal argument, to concern itself with such matters.

In particular, consider three potential objections to making the constitutive force of persuasion a conscious consideration in the construction of legal and political arguments. First, is it somehow an illegitimate intrusion on autonomy to try to influence the priorities and worldviews of those we attempt to persuade? Second, and closely related, would such an effort be in some way too dangerous or prone to misuse? Third, is it consistent with our scholarly and professional obligations to consider the constitutive effects of

our arguments, rather than focusing exclusively on our scholarly aims or substantive advocacy goals?

The potential political-theoretical objection to the consideration of character and thriving in the making of law or legal arguments is rooted in principles of equality and autonomy. These are at bottom the same principles that give rise to concerns about the legitimacy of law itself. There are of course numerous ways to specify these concerns, but the basic moves are familiar. Grant that all people are, or are to be treated as, equally entitled to respect—equally capable of making and entitled to make their own choices about life. By what right do any of us, through law or politics, exert coercion over others? It has been the core work of liberal theory for centuries to try and answer this question, generally by invoking various forms of consent, actual or implied.

But note that it is the coercive force of law that requires justification. The beauty, as well as the difficulty, of using persuasion to help people thrive is that it is not coercion. When law requires people to do things—pay taxes, go to school, or wear motorcycle helmets, for example—or prevents people from doing things they might want to do, we arguably need to justify that. We need to decide whether and when it is ever legitimate to coerce people for their own good or whether we need always defend coercion on the ground that it protects the autonomy of others. But persuasion does not create those difficulties. Nothing about respect for equality or autonomy precludes us from trying to convince people to do, or be, what we think is best for them.

Some might suggest that while *explicit* efforts to persuade people to live in certain ways are not coercive, there is something potentially troubling if not strictly coercive about *implicit* efforts to achieve the same end. One could even describe implicit constitutive persuasion of this sort as a form of indirect deception, and thus objectionable or illegitimate. There are, I think, two good responses to this objection. First, there is no necessity for deception. We need no more hide than hide from the fact that our arguments may shape the worldviews of those we persuade. Nor, however, need we introduce every argument with a disclaimer: “Caution, this argument relies on and may construct in the reader the following priorities and character traits thought by the writer to be conducive to thriving” For perspective, it is worth keeping in mind that marketers and advertisers are framing and constructing and then appealing to worldviews every day in an effort to profit, and they are neither concerned with the indirect consequences nor explicit about what they are doing. Do we consider it impermissible deception for Ralph Lauren to paint a picture of a life to which we are indirectly encouraged to aspire? If not—if we find the indirect construction of priorities and aspirations to be within bounds when done in the interest of profit—perhaps we should not hold ourselves to a stricter standard when acting or arguing in the interests of helping people thrive.

More to the point, arguments will have indirect consequences of one sort or another. Presumably we should be as unwilling to deceive people for the sake of their thriving as we are unwilling to deceive them for the sake of

their material comfort; but the inherently indirect way in which persuasion potentially constructs character means the process can never be entirely explicit. If we were to try to identify and describe all of the ways in which a particular argument assumes and thus may construct underlying worldviews and priorities, we would thereby simply produce a different sort of argument (about worldviews and priorities) with yet other indirect and potentially constitutive consequences. It is something of an infinite regress. Trying to be explicit in an argument about the implicit consequences of the argument is like trying to look directly at what is in one's peripheral vision. Something ever lurks or hovers. Awareness and responsibility are all that can be asked.

In other words, the alternative to the thoughtful, if implicit, construction of worldview is not neutrality, but rather the thoughtless construction of worldviews. What follows, in terms of theoretical legitimacy at least, is that we be as aware as we can of and as responsible as we can about the things we may be doing to each other through our arguments.

But perhaps the objection is as much pragmatic as theoretical—as much a concern about competence as about legitimacy. This concern seems to have the most force when considering the potential impact of substantive law, as opposed to legal argument, on character and thriving. Perhaps we simply do not trust lawmakers to know what consists in or will conduce to thriving. As one colleague put it to me recently, not only are questions of character and thriving none of their business, but such matters are also above their pay grade. If so, those who make law should focus on providing the background conditions and goods necessary to thriving, leaving it to each of us as individuals or in private associations to think about and pursue the deeper things we arguably need. Perhaps they should just stay out of it. Just build the roads, and let each of us decide where to drive on them.

As to substantive law, the best answer to this objection is the one suggested above. Where we are able to drive is determined at least in part by what roads we have decided to build. Law and politics almost certainly impact our capacity to thrive whether we like it or not. I have elsewhere described a number ways in which this is potentially the case.⁴ Law imposes responsibilities and provides opportunities through which character traits are built; it structures community life in ways that do or do not conduce to thriving; it facilitates or inhibits the development of private organizations through which ways of being are examined and explored; it allows or prevents the flourishing of those who might model for us ways to be and thrive; it influences how and how well we educate our children; and perhaps most critically, it can foster or undercut our capacity for aspiration and imagination essential to our growth. Much more could be said about all of this, but the upshot is straightforward. We may not trust oil companies or tobacco companies to know what is best for the environment or our health; but the answer to that difficulty is not to encourage them to ignore the impact they may have.

4. *Id.*

Turning back to the potential impact of argument, as opposed to substantive law, the same logic applies with perhaps even greater force. If we do not trust ourselves to know what will or will not conduce to the thriving of those we persuade, the answer cannot be to disregard the impact we may have. Instead, we should be willing to ask ourselves whether we are inadvertently helping to construct worldviews and priorities that may do damage. At least, we can and should try to take responsibility for what we do, and, using our best judgment regarding what we do know about thriving, avoid doing more harm than good. At best, we should ask ourselves whether there are ways in which our arguments might, as best as we can figure the matter, actually help people see the world and themselves in ways which will enable them to live well.

A different sort of objection would point to our professional obligations. Consider first advocacy, which presents perhaps the starkest potential conflict between the immediate demands of argumentation and the indirect constitutive effects. Can a lawyer representing a client justify allowing the potential indirect impact of her arguments on the character and thriving of those she persuades play any role in determining what arguments she is willing to make on behalf of her client? Can a negotiator justify considering the impact of her arguments on those across the table, when presumably her professional obligation is to make the best deal possible for those on whose behalf she is negotiating?

These are real and difficult questions, but the short answer is simply that advocates should consider the character-constructing effects of their arguments in the same way they consider other potential limitations. The professional ethical obligation of zealous advocacy has never meant unlimited advocacy; and just as we refuse to lie to or bribe or threaten others on behalf of our clients, perhaps we should also hesitate to debase others.

This, however, misleadingly casts the matter as though we always need to choose between effective and ennobling arguments. But we have no reason to assume that to be the case—no warrant for believing that we must diminish in order to persuade. In fact, it is equally likely that in many contexts the ennobling aspects of arguments will be either orthogonal to or even consistent with the persuasive force of those arguments. My father put it this way: "Every man wants to see himself as a good man. Help him do it. Hold him to it." Presumably, people want to understand themselves as people who value more than just money or objective gain. If we can help them do that, we can not only help them thrive, but also help them be willing to concede to us or our clients some of the lesser things necessary to resolve a particular dispute. Fortunately the things that matter to thriving tend not to be zero sum. What is required, therefore, at a general level, is that we use our imagination and creativity to ask ourselves whether we can often best persuade by appealing to the best selves of those with whom we argue. In particular, helping people see themselves as caring about more than measurable, immediate benefits can perhaps make space for the particular outcomes our professional and personal commitments require us to pursue, while at the

same time helping to construct worldviews conducive to thriving more broadly.

Experience gives us reason to believe that this may often be possible. Negotiators recognize that one way to make the best deal is to help those with whom they negotiate recognize that they are not just in it for the money. Trial lawyers appeal to competing, if never-fully articulated, visions of justice or fairness. Teachers, of law in particular, can choose to encourage and help students articulate arguments rooted in visions of who we might be rather than what we might get, or they can dismiss those arguments as irrelevant. Scholars decide what they make matter. Politicians evoke, and thus help establish, competing views of community life and shared priorities. All of these are potential opportunities to ennoble even as we persuade, and in particular to help those we persuade to retain and develop the capacity to aspire to more than they can describe with precision, and thus to pursue the difficult-to-define things that might enable them to thrive.

But this is perhaps too abstract, so consider at least one concrete example—an example, I think, of an opportunity squandered. In 2009, President Obama gave a speech on the importance of education, which was broadcast in schools around the country.⁵ The brief controversy surrounding the speech quickly receded once it was clear that the speech was largely an apolitical call for students to stay in school and study hard. But what seems to me the most noteworthy thing about the speech went largely ignored. Nowhere in the speech, which ran to some eighteen minutes, did the president say anything about the intrinsic appeal and value of learning. The entire focus was on the instrumental value of education, for the students themselves and for the country. Education is necessary so that students can get good jobs and solve problems.

True enough, but painfully small—and this from a president we know to be capable of more. Arguably, learning is one of the things that makes for a full and rich life—perhaps more so than objective well-being. If so, one reason our children need to get good jobs is so they can have the resources and ability to grow and learn, not *merely* vice-versa. One might even argue that until we replace or at least supplement our pursuit of material well-being with something at least analogous to a love of learning, we remain trapped in a futile cycle in which it is difficult or impossible to thrive. Now, a consideration of the role of learning in thriving is obviously beyond the scope of this Foreword, and would have certainly been beyond the scope of the president's speech. But he could have said something about it. He could at least have avoided taking as the basic assumption of his argument that the main reason we need to learn is so that we can earn, and thus risk further entrenching the view that what really matters in life is what sort of job we can get or what sort of practical problems we can solve.

5. President Barack Obama, Prepared Remarks of President Barack Obama: Back to School Event (Sept. 8, 2009) (transcript available at <http://www.whitehouse.gov/MediaResources/PreparedSchoolRemarks/>).

In fact, in 2010, the president made a similar speech, and included the following:

But the truth is, an education is about more than getting into a good college or getting a good job when you graduate. It's about giving each and every one of us the chance to fulfill our promise; to be the best version of ourselves we can be.

Now, one might well ask for more. Or, we can roll our eyes and call this sort of talk heavy-handed or clichéd. But keep in mind that this was in a speech to school children, and as much as we might wish for a richer account of the intrinsic value of education, it at least includes some reference to something other than purely instrumental ends.

One can also ask how much impact either speech made on anyone's view of the world, or how much difference it would have made had the president made brief mention of the ways in which learning can enrich a life as much or more than material success. But one can ask the same thing about the entire speech. To what extent did he really convince any student to stay in school or study hard? If the speech was worth making, it was because of the possibility that it might move someone, at least indirectly, at least at the margins. And if it moved someone, it was probably not because of the logical force of the argument. Do we really imagine a young person saying to himself: "Wow. He is correct. I will now decide, based on the force of that logic, to stay in school and study rather than drop out and get stoned?" No. If the speech moved any young people, it was because it got into their view of the world to some extent and in some way—and subtly altered the way in which they thought about education. However marginal that alteration, it is likely to have had as much of an indirect effect on their capacity to thrive as a direct effect on their decision to stay in school.

CONCLUSION

Space permitting, one could provide unlimited additional illustrations, large and smaller, and in greater detail. Indeed it would be a worthwhile project, albeit beyond the scope of this Foreword, to try to describe as concretely as possible how persuasion might construct priorities in various contexts and how that in turn might impact those persuaded. For now, consider this brief Foreword a call for a certain kind of thinking—for an awareness of what might be called the virtue ethics of persuasion. Reading the wide range of books reviewed in this Survey, we are reminded of the broad potential impact of law and politics, including indirect and unintended constitutive and cultural effects. As we each make our own arguments, whether in our own scholarship, in court, in the public policy arena, or even in the classroom, we should consider not only the consequences, direct and indirect, of the substantive rules and policies for which we argue, but also the potential impact of our arguments themselves.

Granted, unlike the president, most us will not have the opportunity to speak to millions of young people about something as central to their thriving

as learning. But there are a lot of us, and we talk and write about a lot of things. Just as the substantive impact of any given argument or article or speech or law school class is likely to be small, so too is the indirect constitutive effect, and thus the impact, on the priorities and potential thriving of those we seek to persuade. But presumably we say what we say in the hope that it will make a difference, and not merely to get tenure or get elected or impress others with our cleverness. If so—if we do hope to move people in some way—we should be willing to think about and take responsibility for where we are moving them. We should be willing to think about not just what we are convincing people to do, but also who we are helping them to become.