

ARTICLE: THE CHARACTER OF PERSUASION

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Text

[*61]

Francis Cardinal George highlights the influence of law on culture. By "culture," Cardinal George is referring not merely to a set of identifiable national or local characteristics, but to something deeper, something more like public character. In his words, "it is especially the hierarchy of values, the relative importance of each of the goods present in every authentically human culture, [that] defines a culture's particularity, its genius." ¹ Challenging the frequently-repeated claim that "you can't legislate morality," Cardinal George points out that we do just that, whether we acknowledge responsibility for it or not. His claim is not that we can control culture directly through legislation - that we can force people to adopt one set of values or another - but rather that the substance of our laws implicitly "testifies" to, and thus teaches, particular visions of right and wrong. ² When a particular set of values is embodied in the law, it is as if trusted friends and relatives were to remind us - subtly, perhaps, but every day - of what they stand for, what they consider important. Our friends and relatives may not be able to force us to accept their values, but if we respect them and want to think well of them, their constant "testimony" would have some impact. A primary example is the regime of de jure school segregation in the American South prior to *Brown vs. Board of Education*. ³ The laws invalidated by the court were at the outset effects rather than causes of racism. Cardinal George goes on to ask, however, "Does anyone doubt for a second ... that legally required segregation ... reinforced, perpetuated, and over time, helped to create that culture?" ⁴

[*62] Having been invited to comment on the issues raised by Cardinal George, I would like to make two closely-related points. Ultimately, I suggest that there is an additional way in which lawyers may influence culture, understood as the values and priorities of the community, not just through the rules we argue for, but also through the ways in which we choose to argue. As Cardinal George has emphasized the cultural consequences of policy, I hope to highlight the cultural consequences of persuasion. Before I can do that, however, I need to make explicit my working assumptions about what makes an argument persuasive. In the first half of this essay, therefore, I outline what seems to me a helpful and potentially illuminating way of thinking about persuasion. ⁵ Only then do I

¹ Francis Cardinal George, O.M.I., *Law and Culture*, [1 Ave Maria L. Rev. 1 \(2003\)](#).

² *Id.* at 3, 5.

³ [347 U.S. 483 \(1954\)](#).

⁴ Cardinal George, *supra* note 1, at 6.

turn to an exploration of the potential consequences of persuasion, understood in this way. I suggest that we should be alert not only to the immediate results of our arguments, whether a particular argumentative goal is legitimate or worthwhile, but also to the long-term consequences of our rhetorical choices.

Although generations of legal scholars, indeed entire schools of legal thought, have examined the complicated relationship between law and culture,⁶ the focus has generally been on either the substance of legal rules or the procedures through which those rules are made and enforced. With few exceptions, however, little attention has been paid to the cultural consequences of how we choose to argue. The most significant exception is the scholarship that might loosely be grouped under the heading of "law and rhetoric" or "law as rhetoric," the most important example of which is the work of James Boyd White.⁷ White's work resists summary, but one of his central insights is that the ways in which we talk with one another do not just influence but, in an essential way, constitute our various communities. To the five hundred year-old debate between faith and works, he would add words. Granted, we are defined to some extent by what we believe, and to some extent by what we do. Given the [*63] importance of various forms of "conversation" in the construction of community, however, White would add that we also define ourselves through what we say. This essay is an effort to suggest one of the ways in which this might be true - one mechanism through which rhetoric might help to construct community.

At a less theoretical level, lawyers have long recognized that certain ways of arguing are out of bounds, such as lying to the court.⁸ Such restrictions are intended primarily to protect the integrity (and civility) of legal proceedings and, by extension, to allow for the best possible substantive outcomes. Are we prepared to conclude, however, that arguments will never have consequences beyond a particular proceeding and outcome? Are we prepared to say that once lawyers have complied with minimal standards of honesty and civility, they should give no more thought to the consequences of the arguments they choose to make?

The gist of my concern is straightforward and grows out of how I have come to understand persuasion. A persuasive argument is one that responds to the concerns and priorities of the particular person one is trying to persuade, one that resonates with his or her worldview and self-understanding. On this account, when we persuade we have done more than offer a list of reasons for holding an opinion or taking an action. We have, whether consciously or not, evoked and appealed to some particular set of beliefs, concerns, and priorities. In the process, we may have done more than simply persuade that person on the issue at hand. We may also, whether intentionally or not, have helped to reinforce and entrench the particular "hierarchy of values" to which we have appealed. If so, and if we agree with Cardinal George that these are central aspects of public character, then we may bear some responsibility not only for the things we persuade others to do, but also for the sort of people we help them become.

Persuasion

An academic colleague of mine is fond of saying that "it takes an argument to beat an argument." At one level he simply means that, among colleagues at least, well-reasoned arguments deserve well-reasoned responses. I agree. What I question, however, is the further [*64] implication that people are in some way required to accept a conclusion unless and until they can counter the arguments offered in support. In fact, each of us can recall occasions when we felt as though we had made irrefutable arguments, and had fully responded to each of the

⁵ See Sherman J. Clark, *Literate Lawyering: An Essay on Imagination and Persuasion*, 30 *Rutgers L.J.* 575 (1999) (making some of the points highlighted in this first part but in a somewhat different context).

⁶ A list would include Legal Realism; the Law and Society movement (including its current "Law and Norms" manifestation); Critical Legal Theory; Critical Race Theory; and Critical Feminist Theory.

⁷ James Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (1985); see also Margaret Jane Radin, *Contested Commodities*, 2-6 (1996) (suggesting that excessive reliance on the language of economics inclines us towards a problematic "universal commodification").

⁸ See, e.g., Model Rules of Prof'l Conduct R. 3.3 (2001) (Candor Toward the Tribunal); R. 3.5 (Impartiality and Decorum of the Tribunal); R. 4.1 (Truthfulness in Statements to Others).

arguments made by a person we were trying to persuade, only to have that person refuse to change his or her mind. The temptation in such situations may be to write that person off as obstinate, or otherwise not amenable to persuasion; and in some cases that may be true. But it is also possible that we have misconceived the persuasive endeavor. Perhaps it is neither accurate nor helpful to think about persuasion as primarily an effort to "beat an argument."

It seems to me that this is a fundamental difficulty with much modern rhetorical theory.⁹ The tendency is to focus on the form and structure of arguments, with an emphasis on logical coherence and validity, which leads in turn to conceiving of persuasiveness as though it were a quality intrinsic to arguments, theoretically independent of particular listeners.¹⁰ One is reminded of Robert Nozick's remark that "philosophers need arguments so powerful that they set up reverberations in the brain: if the person refuses to accept the conclusion, he dies."¹¹ To our good fortune, no such arguments are available. We simply cannot coerce others into seeing things our way through the raw power or logical force of our arguments. In the end, even if people are unable to find any flaw in the logical chain leading from an agreed-upon premise to a desired conclusion, they can, and regularly do, simply choose to remain unpersuaded.

The sport and combat imagery so often used to describe argument is therefore misleading. Persuasion is not like tennis or boxing where the goal is to hit a shot or deliver a blow so well that one's adversary cannot counter it. Nor is the goal primarily to meet or deflect each of the particular argumentative shots taken by an adversary. Instead, the successful argument is one that can be embraced by the person one hopes to reach. Similarly, the best response to an argument is often not to deflect it, or even defeat it, but rather to embrace it, and **[*65]** make it your own. Persuasion depends not on finding the strongest or best arguments in the abstract, but on finding arguments that resonate with particular listeners. The most persuasive lawyer, therefore, is not necessarily the one with the most theoretical sophistication, or with the largest repertoire of arguments at his or her disposal, or with the greatest facility for finding the flaws in the arguments of others. Instead, the lawyer most likely to persuade judges, juries, colleagues, and others in the real world is the lawyer who has also learned (or who reads people well enough to sense instinctively) what sorts of arguments, made in what sorts of ways, will hit home with a particular listener.

The first and most significant consequence of this approach to persuasion is that it forces one to focus on the "diagnostic" aspects of argument.¹² Without a grasp of the way in which a particular person understands and sees the issue in question, it will be difficult if not impossible to figure out what kinds of arguments, made in what ways, will resonate with that person. Whether a lawyer arguing before a judge, a legislator trying to reach colleagues, or a business negotiator trying to secure important concessions, the first and vital step is to put oneself as fully as possible into the shoes of the person one is trying to persuade. This process, which I have described elsewhere as "sympathetic engagement,"¹³ is at one level quite simple: just a matter of understanding as well and fully as possible the worldviews of those you hope to persuade. It is simple, however, only in the sense that swimming the

⁹ The best and most influential works are Ch. Perelman, *The Realm of Rhetoric* (William Kluback trans., Univ. of Notre Dame Press 1982); Ch. Perelman & L. Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation* (John Wilkinson & Purcell Weaver trans., Univ. of Notre Dame Press 1969) (1958); and Stephen Edelston Toulmin, *The Uses of Argument* (1958).

¹⁰ See, e.g., Paul T. Wangerin, *A Multidisciplinary Analysis of the Structure of Persuasive Arguments*, 16 Harv. J.L. & Pub. Pol'y 195 (1993) (critiquing and suggesting modifications to Toulmin's rhetorical categories).

¹¹ Robert Nozick, *Philosophical Explanations* 4 (1981).

¹² It should be evident that my focus here is on the kinds of situations routinely faced by lawyers, in which the listener considers the issue at hand to be significant, and is willing to devote some thought to the matter. These contexts might be contrasted with commercial advertising, for example, where the effort is to reach people who can be expected to devote very little attention to the matter. In social-psychology terms, these are contexts in which people are likely to engage in "central route processing" rather than "peripheral route processing" meaning that they are more likely to attend to the substance of arguments. See Richard E. Petty & John T. Cacioppo, *Communication and Persuasion: Central and Peripheral Routes to Attitude Change* 3, 11 (1986).

¹³ Clark, *supra* note 5, at 579-80.

English Channel is simply a matter of getting from one side to the other: easy to describe, much harder to accomplish.

Sympathetic engagement is difficult in part because a person's opinions can rarely be understood in isolation, but must be understood as aspects or facets of a larger worldview and identity. It is perhaps commonplace to note that people can become "attached" [*66] to their opinions,¹⁴ but that formulation may actually understate the connection between opinion and identity, particularly regarding matters about which people care deeply, or to which they have devoted a great deal of thought. We must somehow come to terms with our lives: explain our successes, justify our failures, and make sense of our experience. In the process, by necessity, we each develop some account - however hazy, provisional, and incomplete - of how the world works and how we fit into it. Our opinions grow out of and then become part of this worldview. Strongly held opinions are thus connected in ways perhaps dimly understood but deeply felt, not only to one's opinions on other, related matters, but also to one's sense of self. Persuasion, in this understanding, is an effort to make or find space for a particular outcome in the worldviews - the mental landscapes - of those we seek to persuade.

This process is rendered all the more difficult by the fact that people will not always be willing to describe to you everything that concerns them about a particular issue. Indeed, they may rarely be able to do so. I do not mean that people are necessarily disingenuous when they explain themselves, although in some cases they certainly can be. My point is simply that unless people are extremely self-aware, extremely articulate, and have reflected deeply on an issue, it will be difficult for them to put into words the full range of beliefs, understandings, assumptions, and priorities that have come together to inform their view of that issue. As a result, even when people are trying hard to be honest, the reasons they give for their opinions are likely to be partial, and to some extent post hoc. They will give you what seem to them like good reasons for holding an opinion. Perhaps they will give you what they think you will accept as good reasons. They may not be willing or able, however, to give you a full account of what that issue really means to them. Nevertheless, persuasion requires one to get beneath the explicit arguments people make and to delve into the real, complex, and often obscure set of values and priorities that have brought them to their current opinions.

All lawyers recognize the importance of being familiar with the opponents' arguments. This is true, but not for what might seem to [*67] be the obvious reason. We need to understand our adversaries' arguments not solely, or even primarily, so that we can meet or defeat those arguments, but for two additional and more fundamental reasons. First, the arguments people make can be important clues - signposts, if you will - that can help one navigate a person's worldview. They can reveal a great deal about what a person thinks is important and about what sorts of reasons ought to be given weight in a particular context. Second, affirming and acknowledging (and in some cases responding to) specific arguments may be the best way to show a person that he or she has been heard and understood. This is why many successful lawyers will begin an argument by expressing agreement with as much as possible of what an adversary has said. In fact, it is often useful to go one step beyond that, and actually make arguments for one's adversary by providing additional reasons why an adversary's concerns are legitimate and important. Ultimately, the aim is to show that the result one is advocating is consistent with, even grows out of, the very concerns and priorities that are most important to one's adversary, whether or not those concerns and priorities happen to be reflected in the particular arguments that the adversary has chosen to make.

On occasion, the opinions and positions of one's adversaries will seem incomprehensible, or perhaps comprehensible only as the product of obstinance, or worse. There are times, particularly with issues about which one feels strongly, when it seems as though only greed, or prejudice, or a willful and selfish blindness to the truth, can explain our adversaries' actions and opinions. Understand, however, that no one sees himself or herself as merely obstinate or greedy or prejudiced. Each person has some way of viewing the world in which he or she is at least trying to do the right thing and in which his or her opinions are the right ones. Until you can comprehend that

¹⁴ This is acknowledged in one of the most important pieces of persuasive writing in American history, Federalist 10, in which James Madison recognized that "as long as the connection subsists between [man's] reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves." The Federalist No. 10, at 58 (James Madison) (Jacob E. Cook ed., Wesleyan Univ. Press 1961) (1787).

worldview, you will fail to reach that person. Put differently, persuasion is less about showing people that they are wrong, and more about showing them how they can be right, on their own terms. Sympathetic engagement is in this sense a constructive rather than combative, stance toward persuasion, aiming for assent rather than surrender. The response to a truly successful argument is not so much "uncle" as "amen."

This means that persuasion, when successful, can be remarkably subtle. There will rarely be a clear moment of victory, let alone a dramatic argumentative coup-de-grace. In fact, when a skilled lawyer is able to find or make space for an outcome in a particular listener's [*68] worldview, the lawyer's active role in the process will not always be obvious at all. It may simply look like two people realized that in the particular situation at hand they do not disagree as much as they thought, or that a particular circumstance does not actually require them to resolve their deeper underlying disagreements. Argument is thus like many other difficult skills in that those who do it well can make it look easy. Where persuasion differs, however, is that when done best, it may not look like anything at all. It may even look as though those who have been persuaded have actually "won" the argument. They leave feeling listened-to and vindicated, with a sense that they have gotten what they really wanted in the first place. They may realize only upon reflection, if at all, that someone has been hard at work, albeit subtly, making them feel listened-to, helping them redefine what vindication might mean in the situation at hand, and guiding them to an awareness of what they really wanted.

Similarly, it is not clear that those engaged in persuasion are always aware of what they do. Watch a successful lawyer at work. Why has she chosen that combination of arguments? Why has she chosen to make those arguments in just that way? She may not be conscious of having made an effort to navigate, let alone manipulate, the worldview of her listeners. Why, then, did she choose to emphasize those points, rather than others? Why did that particular anecdote or illustration seem the best way to make those points? Somehow, through a combination of intuition, training, and experience, she has learned to sense what sorts of arguments, made in what sorts of ways, are likely to hit home.

On the one hand, it is a good thing, perhaps even inevitable, that we learn to exercise this skill almost automatically. Just as a baseball player can hardly afford to be thinking in the middle of a game about the physics of the throw from shortstop to first base, we may argue more effectively when we can practice sympathetic engagement almost reflexively, more as a habit of mind than as a conscious strategy. On the other hand, there are risks inherent in the fact that we are not always conscious of exactly what we do when we persuade. The most obvious risk is simply that we may be less successful than we could be if we were willing to give the matter more thought. Even elite athletes devote a certain amount of attention to mechanics, if not during a game then in practice. The deeper risk, however, is not merely that we will on some occasions fail to persuade, but that we will on many occasions fail to recognize the indirect side-effects of persuasion. Because we are not always [*69] aware of why we have chosen one set of arguments rather than another, it is perhaps too easy for us to ignore the potential long term consequences of our choices.

Character

If each of our worldviews were set in stone, if we could navigate mental landscapes of others without leaving any tracks, there might be no reason to worry about the impact of argument on character. In fact, however, none of us has a fully developed and coherent worldview or sense of self. Although we each have certain deeply held beliefs and opinions, certain relatively stable features of our mental landscapes, we are each at the same time engaged in an ongoing process of figuring out who we are. Life is complex, as are we. How do the key features of our worldview fit together? Which of our sometimes conflicting opinions and beliefs are most important to us, most truly ours? What does holding certain beliefs or taking certain positions say about us? Successful persuasion recognizes and works with this malleability, this possibility for growth. It is for this reason that I describe persuasion as an effort to find or make space in the mental landscape of the person with whom one hopes to come to terms. When we appeal successfully to a particular vision of the world or of the self that the person we are trying to reach holds, we are not just making use of that feature of his or her mental landscape, we are reinforcing it, and bringing it into prominence. We are asking that person to embrace an account of himself or herself in which that feature is as we have described it, in which things fit together as we have suggested. We are asking that person to say "amen" not

just to a particular conclusion, but implicitly to a particular, if inevitably partial and provisional, description of himself or herself.

Jerry Frug indirectly recognized the potentially creative or constitutive nature of persuasion when he noted that argument can be understood as a process through which we hold ourselves out as a model to those we hope to persuade, and invite them to share in a particular self-description or "character."¹⁵ He suggested that when we offer a set of reasons or justifications on behalf of a particular claim, we are presenting ourselves as the sort of person for whom those kinds of reasons matter, to whom those sorts of justifications [*70] carry weight. On Frug's account, we are saying, implicitly, "be like me."¹⁶

What Frug has identified, however, seems to me just one manifestation of a more general phenomenon. He is correct to point out that when we persuade, we are holding up and appealing to a particular self-description or character. We are asking our listeners to embrace an account of themselves as the sort of people for whom the reasons we have given are the kinds of reasons that matter. Further, one of the best ways to paint that picture may be to model it for them, to present ourselves as an embodiment of the character we are encouraging them to embrace as a self-description. Ultimately, however, what we proffer when we persuade are pictures not of ourselves, but of those we hope to persuade. Whether or not we choose to say "be like me," we are always saying, implicitly at least, "be like (this particular account of) you."

This distinction highlights an important set of questions about what might be called "argumentative integrity." In particular, to what extent should one be willing to appeal to values that one does not share? At one extreme, it seems unobjectionable to appeal honestly to character traits one authentically respects, even if for various reasons they are not part of one's own self-conception. Role-based values are perhaps the clearest case. In talking with a military officer, for example, one might appeal to a certain vision of honor and duty without purporting to be a paragon of those virtues. At the other extreme, it would strike most of us as problematic to lie about one's own basic commitments, such as pretending to be a Muslim when one is not in an effort to appeal to an ostensibly "shared" set of commitments and traditions. Between the easy cases, however, lie a wide range of different possibilities, and a rich and complex set of ethical questions. For example, assuming it is unacceptable to pretend to share another's worldview if in fact one does not, is it acceptable to pretend to respect or sympathize with that person's concerns? Does this sort of instrumental prevarication compromise one's integrity, or is it merely an acceptable, perhaps even desirable, form of civility? These sorts of questions have less to do with how our arguments constitute the characters of others, which is the particular focus of this essay, and more to do with the ways in which rhetorical choices reveal and help construct the characters of those who do the persuading. Although this essay does not attempt to [*71] answer these questions directly, my hope is that the other-regarding ethical constraints suggested here will provide an additional way of thinking about, if not resolving, some of the closely-related integrity-based concerns.

Turning now to the consequences our arguments might have for others, consider an illustration. Suppose you are encouraging your neighbors to build a new community center. You have a range of arguments available to you. You can talk about the benefit to the children of the community, or about the economic benefit that will come when businesses feel comfortable locating nearby. Suppose, however, that an additional argument also occurs to you: an appeal to racism. Suppose you could persuade members of this community by subtly reminding them that building a community center would allow their children to avoid contact with the black kids from an adjacent neighborhood. Should you employ this argument? One of the reasons you might decide not to, I suspect, is that you would be at some level aware that such an argument could have toxic side-effects. By making an argument of that sort, particularly if it proves successful, you would have done more than simply assist in building a community center. You would have assisted at least some members of that community in understanding themselves in a particular way.

¹⁵ Jerry Frug, *Argument as Character*, [40 Stan. L. Rev. 869, 872-73 \(1988\)](#).

¹⁶ *Id.* at 873.

Would one argument make racists out of the community, or even out of the particular community members you have persuaded in that way? Of course not. If, however, you and others repeatedly made arguments that subtly, if not overtly, appealed to an insular, racist vision of that community, your arguments, over years of community life, would help to instantiate just that self-understanding. Again, the illustration parallels that used by Cardinal George to illustrate the potential impact of substantive law on public character. Just as segregationists laws were in the first instance reflections of a pre-existing culture and would not have been enacted in the first place if that culture were not already deeply racist, an appeal to racist sentiments in an argument over a community center could not be effective were such feelings not already a part of the particular person's worldview. However, just as the laws enforcing segregation also reinforced the culture out of which they had grown, so too would repeated successful appeals to a racist conception of self and community help to reinforce that conception.¹⁷

[*72] An appeal to racism is a particularly egregious example, an easy case of an argument that most of us would consider out of bounds. Some arguments are like cyanide, toxic under any circumstances. There may, however, be more subtle dangers. There may be ways of arguing that are not obviously or inherently poisonous, but which are better analogized to ice cream or candy. By relying excessively on certain kinds of readily made and easily swallowed arguments, perhaps we are behaving like a parent who gives children candy for breakfast, lunch, and dinner because it is easier than trying to figure out whether there are other things they might eat, or trying to help them develop a taste for more healthy foods. Of course, we may not bear the same level of responsibility for the characters of those we persuade as parents do for the health of their children. Does that mean, however, that we can legitimately disclaim any responsibility for the long-term consequences of our arguments?

By way of illustration, consider two broadly defined categories of arguments on which we tend to rely a great deal, and which may have what some would consider unfortunate consequences for the character of our community. I have in mind appeals to self-interest and appeals to individual autonomy. Clearly, there is nothing inherently wrong with these arguments. Individual autonomy is an important value, and it would simply be denying human nature to pretend that self-interest is not a key motive for much of what people do. Still, we might question our excessive reliance on these particular arguments. If it is true that we are helping to entrench the values and priorities to which we successfully appeal; and if generations of lawyers, policy-makers, and academics rely again and again on arguments rooted in self-interest and individual autonomy, we should hardly be surprised to find that our culture is increasingly selfish and individualistic. If, on the other hand, we would prefer to **[*73]** see our culture develop in different ways, perhaps we should try to construct different kinds of arguments.

Before fleshing out these examples, I should emphasize that they are illustrations rather than normative claims. Obviously, we will each need to decide for ourselves which public values and priorities we are willing to help construct and entrench. From there we can begin to think about what sorts of arguments we are willing to make. Some might desire a culture in which artistic freedom or intellectual achievements are more highly respected. Others might hope for a society that places a higher priority on honor or loyalty. Some might desire a community in which religion plays a larger role in public life, while others may prefer to construct a vision of public character in which religious faith is relegated to the private sphere. My aim, in this essay at least, is not to argue that we ought to try and encourage this or that particular vision of public character. Instead, I simply suggest that whatever we aspire

¹⁷ The social-psychologist might reasonably ask whether this assertion has or could be tested. There is, to my knowledge, no research directly on point, no work that empirically tests the claim that responding to certain kinds of reasons and arguments regarding things about which one considers important (or more precisely, understanding oneself as having responded to certain kinds of reason and arguments) will over time increase the importance or prominence of those sorts of reasons within one's overall view of the world. Indeed one can readily imagine the difficulties that would attend an effort to isolate and measure this effect. Ultimately, my concern rests on the same grounds as does that expressed by Cardinal George. Just as it would be difficult to prove empirically that segregation laws helped to entrench a racist culture, it would be difficult to demonstrate conclusively that racist arguments would help to reinforce racist worldviews. In neither case, however, should we disregard or deny responsibility for what experience, common sense, and honest reflection suggest are the likely, if not inevitable, consequences of our acts and arguments.

to, we ought to ask ourselves whether our own rhetorical choices may be playing a role in our failure to bring about the world we desire.¹⁸

If the arguments we now rely upon so heavily were the only kinds of arguments capable of persuading, I am not sure we would have any way out of a sort of spiral: if we hope to be persuasive, we have no choice but to navigate the worldviews of those we hope to persuade. As a result, if the only routes into or through those worldviews were those marked by concerns for autonomy and self-interest, we would have no choice but to follow those paths, however much we might regret entrenching those priorities. It is not at all clear, however, that these well-worn paths are really the best. Perhaps we make these arguments because, being familiar, they are the easiest to make, rather than because they are the most effective. Rather than figure out what sorts of arguments will resonate with a particular listener, we fall back on the least common denominators likely to appeal to most people most of the time. If we were willing to use our imagination and truly engage with those we hope to reach, we might find that many people would respond as well or better to [*74] nobler appeals. We might find that on occasion the high road, though perhaps less traveled, is in fact a better route to persuasion.

In thinking about our alternatives, two things ought to be kept in mind. First, it may not be necessary to sacrifice persuasion in order to attend to the impact of our arguments on the character of our community. By using our imagination, by using real sympathetic engagement, it may be possible to discover arguments that are both less toxic and more persuasive. This will not always be possible. As in every area of a lawyer's professional life, there will be times when the ethical dilemma may have to be confronted;¹⁹ but we need not enter into the project assuming that we are being asked to place our concern for the cultural consequences of our arguments above our responsibility to the particular clients and causes on behalf of which we are arguing. A second, closely related point is that arguments need not be mutually exclusive. Instead of trying to pit our preferred vision of character against the concerns for autonomy and self-interest to which we most often appeal, it will often be possible to offer the values and priorities we would like to reinforce as additional, complementary reasons.

Start with that most elementary of persuasive methods: the appeal to self-interest. In most contexts, a lawyer or negotiator would be foolish to forego the opportunity to argue that a proposed outcome will benefit a particular listener in some way. It may be possible, however, to give that person additional, other-regarding reasons for his or her actions or opinions. First of all, this may actually help in persuasion, if only by helping to avoid insulting and alienating that person with an implicit charge of selfishness. Even if, however, that person might have been persuaded by a straightforward appeal to self-interest, providing additional, "better" reasons may have an impact on the way in which that person comes to understand his or her own decision. Without sacrificing persuasion, it may in this way be possible to help that person highlight and perhaps reinforce the less selfish features of his or her character. At the least, it might be possible to avoid encouraging that person to see himself or herself as [*75] a person for whom self-interest is the sole or primary motivating force.

Obviously, one does not determine a person's character merely by providing ostensibly selfless explanations for what are at bottom selfish actions and opinions. In fact, if the reasons offered serve solely as post hoc justifications and have no real resonance at all in the worldview of that person, the additional arguments may have done more

¹⁸ That said, I readily acknowledge that I have not chosen these examples randomly. Our culture places a high priority on individual autonomy and material prosperity, while attaching relatively scant value to things like meaningful work and a sense of purpose, which are arguably more important to human happiness. Similarly, I do feel that our society's focus on individual liberty and self-fulfillment may have made it increasingly difficult for many of us to build the kinds of lasting bonds and community relationships that might allow us truly to flourish. These are obviously claims I cannot elaborate, let alone demonstrate, in an essay of this length.

¹⁹ In setting these ethical dilemmas aside, I do not mean to diminish their significance. Indeed, one of the central questions of legal ethics is how lawyers should deal with potential conflicts between clients' interests and the lawyer's broader obligations to the profession and the community. Ultimately, a full examination of the cultural consequences of arguments would include an account of how those consequences ought to be balanced against the short-term demands of persuasion under various circumstances. My aim in this essay is simply to suggest that our arguments may have such consequences, and that they may not be inevitable in every case.

harm than good. They may have merely helped that person construct a character of hypocrisy and self-deception. We should, however, be cautious about throwing around these pejorative terms. In particular, we should keep in mind the difference between self-deception and aspiration.

If people were truly selfish to the core, it would be neither effective nor helpful to appeal to a non-existent concern for the well being of others. Assuming, however, that most people are not thoroughgoing sociopaths, arguments focusing on the well being of others are not necessarily wasted, even in circumstances where such an appeal might not alone be enough to persuade. Granted, selflessness may not be the dominant feature in many people's mental landscape; yet so long as it is there somewhere, it can be built upon and brought into greater prominence. We can take what might have started as largely a post hoc justification and help it develop into a real, if partial, reason for action. In this way, we can help strengthen both the desire and the ability of others to understand themselves as motivated in part by concern for others. This is not hypocrisy, but hope. It is not a matter of helping people delude themselves, but rather a process through which we may be able to help people see, and perhaps grow into, the best possible vision of themselves.

More common, perhaps, than overt appeals to self-interest are arguments that reinforce the importance of individual autonomy by presenting a vision of the world in which the self is the central concern. In fact, autonomy arguments of various sorts are ubiquitous in our legal and political discourse. In debates over issues ranging from tort reform,²⁰ to tobacco regulation,²¹ to gun control,²² to free [*76] speech,²³ to marijuana decriminalization,²⁴ parties appeal to the importance of individual choice and autonomy. So pervasive are these sorts of appeals, that it seems silly even to list examples. This may, on the whole, be a good thing, given the obvious dangers inherent in legal systems that fail to respect autonomy. If, however, we find ourselves dissatisfied with the extent to which our culture has become atomistic and individualistic, we ought to think about the extent to which our own arguments may be contributing to the situation.

The danger does not lie in the arguments themselves. Rather, the concern is that excessive reliance on readily made and easily swallowed claims of autonomy may lessen our appetite for, or even render unpalatable, other forms of argument. For example, consider the arguments in the debate over motorcycle helmet laws, which have been made at various times in many states. Invariably, helmet law advocates argue that helmets should be required because injuries to helmet-less riders end up costing all of us money in the form of increased public health expenditures and insurance rates.²⁵ At one level, there is nothing remarkable about this argument, which is simply a variation on the familiar claim that seemingly "victimless" crimes may have indirect social costs. What I do find remarkable, however, is that in many cases this seems to be the only argument helmet law advocates are publicly willing to rely upon. In particular, they seem almost to disavow any concern for the health and well-being of the

²⁰ See, e.g., Michael I. Krauss, *Restoring the Boundary: Tort Law and the Right to Contract*, Policy Analysis (Cato Institute, Washington, D.C.), June 3, 1999.

²¹ Peter Schwartz, Ayn Rand Institute, *The Threat of the Paternalistic State*, at <http://www.aynrand.org/medialink/paternalisticstate.shtml> (July 23, 2002) (on file with the Ave Maria Law Review).

²² See, e.g., Tom Clancy, Editorial, *My Gun is Not Your Business*, Wash. Post, Apr. 2, 1989 at C5.

²³ See, e.g., Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, *10 Wm. & Mary Bill Rts. J.* 647 (2002); Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence*, 3 Harv. C.R.-C.L. L. Rev. 159 (1997).

²⁴ See, e.g., *Brief of Amici Curiae The National Organization for the Reform of Marijuana Laws, et al. United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001) (No. 00-151).

²⁵ See, e.g., *Picou v. Gillum*, 874 F.2d 1519 (11th Cir. 1989); American College of Emergency Physicians, *Every Motorcyclist Should Wear A Helmet*, at <http://www.acep.org/1,995,0.html> (on file with the Ave Maria Law Review); J. Kevin Lacy, Highway Safety Research Ctr, *Motorcycle Helmet Crash Cost in North Carolina*, (April 2001), available at <http://www.hsrc.unc.edu/pdf/2001/helmet> version2.pdf (on file with the Ave Maria Law Review).

riders themselves. ²⁶ Why so? Why does it feel out of bounds to point to one's desire to protect our fellow citizens from death and injury, particularly young people who may be more prone to engage in risky behavior?

[*77] Helmet law advocates may avoid paternalistic arguments in part because they are doing exactly what I have suggested people need to do if they hope to be persuasive: engaging sympathetically with the worldviews of those they hope to persuade. Those who oppose helmet laws most vehemently, often seem to do so out of a worldview in which individual liberty and autonomy are prominent, even dominant, features. Opponents of motorcycle helmet laws employ a rhetoric of individual freedom and personal responsibility, of a desire and right to be "in the breeze" on one's own terms, free of government babysitting. Helmet law advocates may reasonably sense that paternalistic arguments will not persuade, and may just further alienate, these committed opponents. There may, however, be costs to allowing one's most strident opponents to set the terms of the debate. First, there may be many people who are less heavily invested in the anti-helmet law position, and who might be more open to other forms of argument. More to the point, however, are the potential long term consequences of reinforcing a worldview, a public character, in which autonomy interests loom so large that a desire to save money on insurance is somehow more legitimate than a concern for the lives and health of community members.

This is just one manifestation of an inability to make and respond to arguments rooted in visions of community membership. It is at least plausible, however, that deeper and more serious consequences may follow from a worldview centered on the individual. Public attitudes toward school funding, zoning, housing policy, and taxation, for example, may all be influenced by the extent to which we have learned to see ourselves as members of communities with shared goals and responsibilities, rather than as a mere collection of individuals. I have always been struck, for example, by the lack of public outcry, even debate, over the incredibly regressive taxation carried out through the device of state run lotteries and numbers games. The only plausible explanation seems to be an implicit reliance on the autonomy of lottery players as a justification for their exploitation. After all, no one forces people to play the lottery. ²⁷

[*78] Again, if an appeal to individual autonomy were always the best route to persuasion, people could hardly be expected to forego those arguments out of concern for their potential indirect consequences. A refusal to make a wider range of arguments, however, may actually cost people opportunities for persuasion, opportunities that might not require any compromise of integrity. Consider, as a final illustration, what may be the most contentious of all issues, abortion. Abortion rights advocates rely largely on a particular autonomy-based argument, as evinced by the preferred label for the cause, "pro-choice." There are good reasons for pro-choice advocates to focus on the individual autonomy of women. Above all, it is a concern for the plight of women trapped in unwanted pregnancies that motivates the pro-choice cause, and the arguments they make honestly reflect that concern. One might ask, however, whether a refusal to consider other sorts of arguments might be costly. For example, an argument rooted in the idea of choice is simply not going to move the person who sees the unborn fetus as a fully human life. To that person, one might as well advocate a return to slavery on the grounds that it is your choice whether to own slaves.

As someone whose own pro-life sentiments run deep, I have some insight into what sort of arguments might be more effective. Consider, for example, the way in which a thoughtful pro-choice colleague recently talked with me about this issue. She began by suggesting that one might be able to argue for certain abortion rights even

²⁶ As one commentator observes, "strenuous efforts are usually made to justify them in non-paternalistic terms." 3 Joel Fienberg, *The Moral Limits of the Criminal Law: Harm to Self* 135 (1986), quoting John Kleinig, *Paternalism* 82 (1984).

²⁷ Thomas Jefferson himself defended lotteries in this way, as "a tax laid on the willing only." In his defense, Jefferson did go on to make explicit his assumption that lottery players would be those "who can risk the price of a ticket without sensible injury" an assumption he might be forced to rethink were he to see the lines of people at convenience marts and liquor stores waiting to play twenty, thirty, or forty dollars worth of daily numbers. Others have defended lotteries on the basis of this "defensive autonomy" argument. See, e.g., Richard E. Sincere, Jr., *Keep the Lottery - It's Better than Taxes*, *Metro Herald*, May 2, 1997, <http://www.arg-media.com/articles/virginia/va14.htm> (on file with the Ave Maria Law Review); Edward J. Stanek, *A Critique of Lottery Critics*, address at the North American Association of State and Provincial Lotteries Twenty-Third Annual Meeting (Sept. 29, 1997). For a broader examination of lotteries see generally Charles T. Clotfelter & Philip J. Cook, *Selling Hope: State Lotteries in America* (1989).

beginning with the assumption that the fetus is, from conception, a life worthy of as much respect as any person young or old. My colleague did not pretend to share this assumption, but she did make what seemed to me like a real effort to take the assumption seriously, to try and understand my deeply held views on the issue. She then asked me whether I would support a law requiring a mother to donate a kidney to a four-year-old child if a transplant were required and she were the only available donor. Clearly, most mothers would do so willingly, even eagerly. But would we be willing to force them to donate an organ? Here, my colleague suggested, is a way of thinking about the burden imposed on women by unwanted pregnancy that does not require us to dismiss the humanity of the unborn child.

[*79] Is this some sort of unbeatable argument, guaranteed to persuade? Does it logically compel acceptance? Of course not. Any lawyer could find a dozen ways to "distinguish" the two situations equated here. As I have tried to emphasize, however, persuasion does not work through the coercive force of unbeatable arguments. It works, when it works, by finding or making space in a particular person's worldview. This is an argument, which, thanks to the sympathetic engagement practiced by my colleague, at least has some chance of beginning to navigate the worldview of those for whom the fetus is a life. Although abortion may be the subject about which people's opinions are more deeply entrenched than in any other context, here is an argument that at least begins a discussion. Moreover, it is a way of thinking and talking that does not require us to privilege individual autonomy over any and all other values. It is an argument that addresses the issue as a question of how we as a community share and allocate difficult and important obligations. It seems to me that if arguments of this sort are available even in the context of this most contentious issue, they may be available elsewhere as well.

In a wide range of contexts, we rely heavily upon autonomy arguments for the same reason we rely upon appeals to self-interest - because they are so easy to make, and because most listeners so readily embrace them. In this essay I have tried to suggest that we should attend to the potential costs of these seemingly easy rhetorical choices. Initially, we may be missing out on opportunities for persuasion - failing to reach people who might be reached if we were willing to make a real effort at sympathetic engagement. What ought perhaps to be of deeper concern, however, are the potential indirect effects of our arguments. My fear is that we are not just appealing to, but are also helping to construct and entrench, the explicitly or implicitly self-centered or atomistic worldviews to which we so readily and frequently appeal. If so, and if we refuse to develop the imagination necessary to figure out whether our listeners might respond to arguments grounded in more admirable visions of self and community, we can hardly deny responsibility if we find in our community, and in ourselves, less and less to admire.