

1-15-2013

To Teach and Persuade

Sherman J. Clark

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Law and Society Commons](#), [Legal Education Commons](#), and the [Religion Law Commons](#)

Recommended Citation

Sherman J. Clark *To Teach and Persuade*, 39 Pepp. L. Rev. Iss. 5 (2013)
Available at: <https://digitalcommons.pepperdine.edu/plr/vol39/iss5/15>

This Symposium is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact Katrina.Gallardo@pepperdine.edu, anna.speth@pepperdine.edu, linhgavin.do@pepperdine.edu.

To Teach and Persuade

Sherman J. Clark*

- I. INTRODUCTION: LAW AND RELIGION
- II. CHARACTER AND THRIVING
- III. PERSUASION AND CHARACTER
 - A. *Direct Exhortation*
 - B. *Direct Attribution*
 - C. *What Traits?*
 - D. *Modeling Character*
 - E. *Indirect Engendering*
 - F. *Context and Community*
- IV. CONCLUSION: THINKING AND PERSUADING

I. INTRODUCTION: LAW AND RELIGION

Legal speech and religious speech inevitably do some of the same work. Both are vehicles through which we both talk about and become the kind of people we are. Granted, those of us who teach and argue about the law do not often conceive of our work in this way. That is part of what I hope to begin to remedy in this essay. While the construction of character is a more obvious aspect of religious than legal thought, law, including legal argument, can be constitutive in similar ways. If so—if our ways of talking about the law serve some of the same ends as do our ways of talking about religion—then we may be able to learn how better to talk about the law by thinking about how we talk about religion. I do not mean things like paragraph structure or argument organization or the proper use of headings, but rather something more subtle and more fundamental. One way to put it is this: legal speech can learn from religious speech how to be less small, and perhaps more ennobling.

More specifically, those of us who speak and teach about the law may be able to learn from religious ways of speaking and preaching how better to

* Kirkland & Ellis Professor of Law, University of Michigan Law School. This Article is a part of Pepperdine University School of Law's February 2012 conference entitled, *The Competing Claims of Law and Religion: Who Should Influence Whom?*

think about and take responsibility for the potential impact of what we say on those to whom we speak. And by impact, here I mean not merely our influence over what people do. We should, of course, be thoughtful about and take responsibility for what we persuade people to do. But I mean something more. We should also pay attention to the effects we may have on who people become, and, ultimately, whether they thrive. While lawyers rarely, if ever, confront such matters, preachers do. They have no choice. Those who talk about religion are forced by their subject matter to address questions of character and thriving—to think and speak about the ways in which who we are impacts how well and fully we live. This is never easy, nor should it be, but preachers cannot be afraid to talk about what matters, even when the things that matter prove difficult to define or impossible to measure. Lawyers should aspire to the same courage, and may be able to learn from the ways in which preachers speak in the face of this challenge.

II. CHARACTER AND THRIVING

Because legal work does not often force us to wrestle with difficult questions of character and thriving, we can and do often ignore such matters. But ignoring difficult questions does not make them go away; and ignoring these sorts of difficult questions does not mean that lawyers have no impact on the character or thriving of those to whom we speak. It simply means that we are not aware of or thoughtful about the impact we may have. We should be.

The title of this essay is taken from a speech which is in some sense both legal and religious. The speech is that of Socrates to the Athenian jurors, as reported or re-created by Plato in the *Apology*.¹ This is a legal speech in that Socrates is responding to legal charges.² It is also a religious speech, however—both in that the charges to which he responds are religious in nature and, more fundamentally, in that he broadens and enlarges the conversation to encompass matters which may seem to us more appropriate to religious than legal speech, but which are, in fact, at the heart of both.³ In the process, Socrates explains why he has refused to engage in the usual and expected practice of pleading for sympathy.⁴ He first says that to do so would be improper, for particular reasons to which we will return.⁵ More generally, Socrates argues and illustrates that his responsibility is not merely or even primarily to secure an acquittal—an end we can take as

-
1. PLATO, *APOLOGY OF SOCRATES* (translation by author).
 2. *Id.* at 18a–b.
 3. *Id.* at 19b–c, 24b–c.
 4. *Id.* at 34b–c.
 5. *Id.* at 34d–35b.

standing for any of the things for which and about which we argue in the law—but rather to teach and persuade.⁶ These, he explains and illustrates, are always the dual motives of thoughtful responsible speech; they have guided the conduct of his life and they will motivate and guide his speech and conduct in the face of death.⁷

What then does it mean to take responsibility for our speech as not merely a vehicle through which we persuade others and seek various ends—as crucial, as much a matter of life and death, as those ends may be—but also as a way in which we, inevitably if often indirectly, teach? And in what way can those who teach and persuade about law and those who teach and persuade about religion learn from each other how better to confront and live up to this responsibility?

The first and most basic lesson law can take from religion, and from Socrates, is that what matters is not just what we can get or do, but also who we are. To my knowledge, no religious tradition teaches that the most important things in life are how rich we are, how safe we are, how long we live, or any such measure of objective well-being. Let alone does any worthwhile tradition hold that our lives should be measured by how many of our various preferences we are able to satisfy. Instead, religious thought recognizes that what matters more is what kind of people we are able to become. And on this point, religious thought is simply right. Character matters. I do not mean to be glib, but in fact I do not think many would express good faith disagreement with this point—at least stated at this level of generality. Now, I do not mean that character matters in the abstract sense that it is ontologically more important than material well-being or preference satisfaction. That may be true, but that is not my claim here. Nor do I mean that character matters in the strictly religious sense that certain ways of being will better please God or will earn one the reward of an afterlife. That may be true as well, but I claim no such insight. Instead, what I mean is that whether we live full and happy lives—whether we thrive here in this life—depends as much on what kind of people we are able to become as it does on any measurable aspect of material well-being or any degree of preference satisfaction.

Now, some will object that even if character is central to thriving, law and legal speech should have nothing to do with either—that it would be somehow inappropriate for lawmakers or legal scholars or law teachers to think about the effects of what we do and say on those with whom we act

6. *Id.* at 35b–c.

7. *Id.* at 29c–d.

and speak. For example, one form of this objection would point out that we can never expect a clear or objective definition of what it means to thrive, let alone can we hope for general agreement on the matter. Perhaps the reason to focus on small things, like health and wealth and safety, is that at least those things can be defined and measured with some precision, and we can presumably all agree that they are, for whatever little good they do, good things. If so, the objection goes, law and politics should focus on providing these sorts of basic prerequisites, and leave deeper questions to private life—to religion, perhaps. Alternatively, and closely related, perhaps it would represent an illegitimate intrusion on autonomy for public institutions, such as law, even to consider such matters. Or perhaps we might simply doubt the capacity of lawyers and lawmakers to think about these things well, and thus, prefer they leave the matter alone entirely.

These are real and serious objections, which can take many forms. Ideally, I would do what persuasive lawyers and thoughtful scholars do. I would respond to these objections fully before moving on to whatever particular issues I hope to examine.

I am, however, faced with two related difficulties. First, I cannot re-justify my entire project each time I talk about it. I recall one workshop in which I never got to the matter I hoped to address because the entire hour was spent justifying the legitimacy of my inquiry to a handful of very smart and thoughtful, but skeptical, colleagues. More to the point, these seemingly threshold objections actually go to the heart of the matter. For example, my focus on rhetoric rather than regulation is intended in part to respond to autonomy concerns. In addition, the willingness and capacity to talk about and aspire to things we cannot define with precision is itself one of the traits I will suggest we should most strive to develop and engender. More generally, these questions—questions of why and how we might thoughtfully take into account and take responsibility for the effects of our work in the law on character and thriving, without, for example, impinging illegitimately on the autonomy of others or intruding inappropriately on matters better left to private institutions—are the very things I hope to examine. So, these seemingly threshold objections must be met through, rather than as a prelude to, the sort of conversation I hope to engender.

So, for now, let this much suffice. Unless we can assume that law and the ways we talk about law have no impact on our character and thriving, it is simply irresponsible to disregard that impact. And it is not safe to assume that the ways we talk about the law have no impact on who we are. We become who we are in part through the communities in which we live and grow, and law—including, crucially, how we talk about law—helps construct those communities. More than that, we become who we are, as individuals and communities, in large part through how we act and how we speak, and law is a vehicle through which we act and speak as a community.

Legal speech, like religious speech, may therefore construct character, which in turn may impact our capacity to live well and fully, whether we like it or not. We cannot simply wish away the effects of what we do and say. We may think that oil companies should have nothing to do with the environment, or that international trade should have nothing to do with human rights, but they do. We can ignore the indirect consequences of what we do and say in the law. We can fail to take responsibility for those consequences or declare them to be out of our jurisdiction, but we cannot thereby make them go away.

I cannot demonstrate empirically that persuasion impacts character, in large part because character is not something that can be measured. It might be possible for social scientists to test the matter, but it would be difficult. The changes about which I suggest we should be concerned are almost certain to be incremental and cumulative. Although I use specific examples to illustrate the ways in which speech may construct character, what we need to think about are the potential effects of our persistent habits of speech over time. Imagine trying to determine whether smoking causes cancer by conducting experiments in which subjects are asked to smoke a few cigarettes and then are tested for cancer. We might well conclude that smoking has no effect. Moreover, we are trying to be thoughtful about not only potential changes in people's attitudes about the things about which we persuade them, but rather subtle changes in their thinking more generally—not just their opinions, but their character. We could improve our imagined smoking research by extending the experiment over time or by using epidemiological rather than experimental data. That is possible because smoking and cancer are things we can define clearly and measure. Persuasion and character are neither. But that does not mean we can safely or in good conscience ignore the link between the two. Indeed, as I suggest below, the willingness and ability to confront things we cannot define or measure is itself a trait we should try to engender.

In the meantime, if we have good reason to be concerned, based on what we do know about persuasion, that when we convince we may also construct, we have equally good reason to consider and be thoughtful about that possibility. And we do have good reason to be concerned.

III. PERSUASION AND CHARACTER

Having made the point at some length in a recent essay,⁸ and hoping to explore rather than simply repeat it here, I will not rehearse systematically the entire general argument for believing that persuasion may be constitutive of character. The basic claim, however, is this: persuasion succeeds, if it succeeds, not by force of abstract logic, but by finding or making space in the constitutive world views—the beliefs, understanding, and priorities—of those we persuade. Unless we believe that the beliefs and understandings and priorities of those we persuade are always fully developed and permanently fixed, we should recognize that when we persuade we do not simply find, but, crucially, sometimes also may *make* space in their world views. When we persuade, we also teach; when we teach, we may construct. If so, we should think about what we may be doing to people when we persuade them. For example, one might hesitate to use an appeal to racism as a persuasive device, even in an effort to persuade people to do something one considers good and valuable. Why? In part because one might recognize that to appeal to racism risks constructing or entrenching it. We should take responsibility for not just what we persuade people to do, but also for who we help them become in the process.

As noted, in the *Apology*, Socrates does not plead for his life or for sympathy in the way that that the jurors would have expected. In explaining why, he makes explicit what is implicit throughout his speech—his awareness of and concern for the indirect constitutive impact of his speech. After noting that it would cast the city in a bad light if those thought best among them were seen to behave so shamefully, he gets to the heart of the matter:

Apart from reputation, Gentlemen, it does not seem to me right to plead with the jury or to try to get off the hook by begging, rather than to teach and persuade. Not for this is a juror empanelled—to hand out justice as a favor; but rather to judge according to it. And he has sworn not to favor whoever he should prefer, but to judge according to the law. And we should not accustom you to disregard your oath; nor should you become accustomed to doing so. For then neither of us would be displaying piety.⁹

The Greek here translated as “accustom” and “accustomed” are forms of the verb ἐθίζω (*ethidzo*), which means something deeper than the translation might suggest. It is the source of our words “ethic” and “ethical,”

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

9. PLATO, *supra* note 1, at 35b–c.

and connotes not merely habits of action, but also habits of mind, ways of thinking and being—character as well as conduct. Socrates is not merely saying that breaking an oath is a harmful or wrong thing to do. He is also saying that being an oath-breaker is a bad way to be. He is explicitly concerned not only with what he might persuade them to do, but with who he might help them become in the process.

In thinking about how we might emulate Socrates and take responsibility for the ethical consequences of our efforts at persuasion, it may be helpful to identify four overlapping ways in which speech may construct character: direct exhortation, direct attribution, modeling of traits, and, most subtle but also perhaps most crucial, various modes of indirect attribution and development. My particular emphasis here is on the last of these possibilities—on the indirect ways in which our speech may help constitute traits, priorities, or capacities in those to whom we speak. Nothing hinges on these particular labels, and my aim here is exploration rather than typology. My goal is not to construct a theory of constitutive rhetoric, but rather to think more fully about the ways in which we—often indirectly and inadvertently—may construct or influence the character, and thus the capacity to thrive, of those we teach and persuade.

A. Direct Exhortation

First, and perhaps most obviously, there is direct exhortation. Religious speech often exhorts listeners to specific traits, directly connecting certain ways of being to benefits and rewards here on earth or in the hereafter. The Sermon on the Mount is perhaps the most powerful example,¹⁰ but we could list virtually unlimited examples.

Legal or political speech can, under certain circumstances, try to do this sort of thing as well. Think of FDR or Churchill exhorting citizens to courage in the face of need or strife, or Presidents Kennedy or Bush or Obama encouraging public spirit and selflessness. But this most obvious method of building character through speech may, in the legal and political context, in fact, be the least interesting, and the least problematic. First of all, it is not clear how often in day-to-day legal or political life we will find it

10. *Matthew 5:1–10* (New King James Version) (“Blessed *are* the poor in spirit, For theirs is the kingdom of heaven. Blessed *are* those who mourn, For they shall be comforted. Blessed *are* the meek, For they shall inherit the earth. Blessed *are* those who hunger and thirst for righteousness, For they shall be filled. Blessed *are* the merciful, For they shall obtain mercy. Blessed *are* the pure in heart, For they shall see God. Blessed *are* the peacemakers, For they shall be called sons of God. Blessed *are* those who are persecuted for righteousness’ sake, For theirs is the kingdom of heaven.”).

appropriate or effective to speak in such direct ways about character and thriving. Most contexts for legal or political speech are ones in which we are unlikely to make, and our listeners unlikely to be receptive to, direct sermons on how to live.

In fact, direct exhortation in legal and political speech is perhaps more likely to set up obstacles than to enhance either persuasion or teaching. To describe a legal argument or political speech as a sermon or as preaching can carry connotations of self-righteousness and closed-mindedness—neither of which perceptions are conducive to persuasion. To the contrary, successful persuasion is marked above all by the ability to communicate to one's listener that one has heard and understood the listener's point of view. Moreover, when character traits are extolled directly, there is less question of failing to take responsibility for the traits we may construct on those we persuade, and less risk that there will be unintended negative consequences. Listeners can agree or disagree, accept or reject explicit arguments about how to live, and to that extent, explicit exhortation is not problematic in the same ways that the indirect influence of our arguments might be.

B. Direct Attribution

A less obvious, but still explicit, way argument can build virtue is by what might be called direct attribution. Sometimes we can nurture traits not by preaching them, but rather by attributing those traits to those with whom we speak. If this is done thoughtfully—and, crucially, if the seed is there to be nurtured—we can build virtues by helping people see themselves as having that virtue.

Socrates does this, early in the *Apology*, when he attributes the virtue of fair-mindedness to the jurors to whom he is speaking. Having described the charges leveled against him on the present occasion and throughout his life, and claimed that those charges were false, Socrates continues:

Now perhaps someone among you might respond: “But, Socrates, what is the trouble about you? Where have these accusations against you come from? For certainly all this talk and dispute about you has not arisen with you doing nothing different than others, unless you were doing something other than most men; so tell us what it is, so that we may not act rashly in your case.”¹¹

Socrates attributes to the jurors, by literally putting words into their mouths, a desire not to act rashly. He does not, in this passage, exhort them to the trait of fair-mindedness, but rather credits them with it. What he is doing is

11. PLATO, *supra* note 1, at 20c–d.

giving them a way of seeing themselves—helping them see what they look like in that light. Like a tailor encourages a man try on a suit: If he recognizes how good he looks and feels in it, he is more likely to wear it.

Socrates attributed to his hearers a question, and thus a set of concerns and motives. Similarly, contrast the questions that John F. Kennedy and Ronald Reagan each suggested Americans ask themselves. In 1961, Kennedy famously attributed to his hearers an unselfish willingness to be of service: “*Ask not what your country can do for you—ask what you can do for your country.*”¹² Two decades later, Ronald Reagan attributed to us a very different motive: “[*I*]t might be well if you would ask yourself, are you better off than you were four years ago?”¹³

And back to Socrates: When he makes the bold claim that his troublesome questioning has actually been a great service to his city, he likens Athens, and by implication the jurors to whom he is speaking, to a thoroughbred horse, noble and well-bred, but grown sluggish and thus in need of a gadfly. Again, he is directly, although not heavy-handedly, attributing to his listeners a set of traits—good breeding, nobility, and strength—so that they can learn to see themselves in those ways.

Now, if these traits were not to some extent present, this would be to no effect. It would be neither persuasive nor constitutive. Moreover, it is neither our nor Socrates’ aim to abet hypocrisy and self-delusion. But our legal and academic culture seems to be sufficiently adept at puncturing those, and unfulfilled aspiration is not hypocrisy. We are very good at taking a man down a peg when we feel he deserves it. We should learn also how to lift him up.

Allow me to offer an example neither legal nor religious, but rather personal. In the late 1960s, my mixed-race family moved into a working-class white neighborhood just outside of Baltimore. To say that there was panic among the neighbors might be slightly too strong, but only slightly. Many feared that what had happened in other nearby communities would happen there—rapid racial change, lower housing values, perceived deterioration. White flight. My father, who was black, talked with the men as he would see them outside, washing their cars, trimming their neat hedges, sitting on their porches. Sometimes, not having been invited in, he would stand on a driveway or a front stoop with an uncertain and potentially

12. President John F. Kennedy, Inaugural Address (Jan. 20, 1961), in ROBERT DALLEK & TERRY GOLWAY, *LET EVERY NATION KNOW: JOHN F. KENNEDY IN HIS OWN WORDS* 82 (2006).

13. Governor Ronald Reagan, Presidential Debate (Oct. 28, 1980), in KIRON K. SKINNER ET AL., *THE STRATEGY OF CAMPAIGNING: LESSONS FROM RONALD REAGAN & BORIS YELTSIN* 196 (2007).

unfriendly neighbor, make some small talk about the weather, cut the tension by offering and sharing a smoke. He would pause, look up and down the street of neat brick homes as if appreciating it for the first time, and say something like this:

Believe it or not, I get what you're looking at. I do. You're looking out for your family. You're thinking you can't afford to sit and wait until it's too late. Then you're stuck in a bad neighborhood with a house you can't sell. I hear you. And I don't mean to get into your business, but for a lot of people what they've got invested in their house is a big part of what they've got. They can't afford to risk that. I get that too. So, you're thinking maybe you should sell quick if you can—get out while you can. Listen, I haven't gotten a chance to get to know you real well yet, but I can already tell one thing about you. You don't want to leave your home where you've made a life, where your kids are happy, just because some black folks moved in down the street. You don't judge a man by color. I can see that. That's why I knew I could talk to you. You judge a man by how he works—how he takes care of his family. And you're just trying to take care of yours. I can relate. That's all I'm doing here—trying to take care of mine. So the way I see it, what we have to do is find how to talk to the neighbors—let you all let each other know that if you don't sell your house no one can buy it—let each other know not to let some slick real estate agents bust up your neighborhood and run you out of your homes.

Now, it would be nice if I could report that conversations like this always had the desired effect. But some neighbors, as my father knew, really were so poisoned by racism and fear that they would rather uproot their families than live by black folks. And so some did. But many were not, and did not. The neighborhood changed, but slowly, and remained for many decades that all too rare American phenomenon—the truly integrated community. And, more to the present point, some of those conversations may have had another, indirect effect. Just as the fear-mongering of real estate churners bred racism and xenophobia, I like to think that my father's attribution of better motives may have helped construct and reinforce those better motives.

It may seem as though this example of potentially constitutive personal conversation may not tell us much about whether speech in other contexts may have similar effects. First, even assuming that my father's character-building impact has not been rather magnified by the lenses of time and filial pride, how many people will find themselves with the opportunity and capacity to be similarly influential? Second, can this sort of thing really

happen when we talk to groups and in public, as opposed to one-on-one on Baltimore Stoa?

Good questions, and ones which to some extent answer each other. Granted, few, if any, talks will be as salient as I like to think my father's may have been; even as to him, I hesitate to over-claim. The fact is that few particular conversations will make a substantial impact on anyone's character. Nor did any particular cigarette ever give anyone cancer. Again, the effect is marginal and cumulative—like the effect of particular legal rules on the economy, or the effect of lawnmower engines on global warming. That, however, is exactly why turning from private to public discourse may give us more, rather than less, reason to think about the potentially constitutive effects of the way we speak. In thinking about the effect of any particular example of speech, therefore, the direction of the vector may matter more than its magnitude. Although particular examples are the best, if not the only, way to get at the problem, we really need to think about the cumulative effect of the ways we choose to teach and persuade, and the more subtle and indirect ways in which we may have those effects.

C. What Traits?

To think well or usefully about the more subtle and indirect ways in which our speech may influence the character and thriving of those with whom we speak, we need to think a bit more concretely about character and thriving. What do we mean by character? We are not referring to a binary trait, such that a person could be said simply to have character or not, or even to a one-dimensional quality, such that one person might simply have more character than another. I understand, of course, what we mean when we speak in those ways, as we often do. We are presumably using the term "character" as shorthand for a set of more specific traits and priorities and capacities—perhaps integrity, honesty, and the like. There is nothing inherently wrong with using the term in that way—to allude to and draw on an implicit, if vague, cultural agreement about a set of useful or desirable qualities—but here we need to be more specific. What traits, priorities, and capacities should we be willing indirectly to help constitute in those we persuade? More to the point, how are those aspects of character connected to thriving?

I recognize that to offer even a partial and tentative substantive account of character and human thriving in the context of making a point about legal and religious rhetoric may seem like unnecessary hubris. It is not. It is not

unnecessary because trying to think about the effect of speech on character without considering what traits we hope or are willing to construct would be like talking about medicine without some sense of what we mean by health. We could do it, but not well. In particular, as we turn to the more indirect, even inadvertent, ways in which speech may construct traits, it is even more critical to ground the conversation in at least some sense of what those traits might be. Nor is there any greater degree of hubris revealed by this effort than that which is on display in the hundreds or thousands of pieces of legal scholarship which, although not addressing such matters explicitly, blithely rely on implicit, but unexamined, assumptions about these critical underlying questions.

For example, those who ground their utilitarian thinking in objective well-being or preference satisfaction may purport not to be making claims about human thriving, but they are. All such accounts assume that whatever it is they are trying to maximize will conduce to human thriving. Either that or, not to put too fine a point on it, they are pointless. Imagine a line of legal scholarship devoted to figuring out how the law can make people's hair blonder. That would be silly. But why? Because we have no reason to believe that making people's hair blonder is a worthwhile way to spend our time and resources. But why? Because we have no reason to believe that making people's hair blonder is an important component of or vehicle for human thriving. And that is always, at bottom, our goal—to thrive.

Utilitarian thinking is worthwhile to the extent that we assume that whatever we are trying to maximize—whether objective goods such as health, wealth, safety, and the like, or preference satisfaction of some sort—are components of or will conduce to better lives. These assumptions may be sensible in some cases, but are not entitled to the hegemony they enjoy. In fact, it is not at all clear that these are the primary components of human thriving. Utilitarians have a theory of thriving—that it consists in or is facilitated by some form of objective well-being or preference satisfaction. Otherwise, why care about those things? Presumably, they do not believe they are just trying to dye our hair. And we too have a theory of thriving—that it depends at least in part on character, on what sort of people we are able to become. We are simply more willing to explore ours.

To this end, then, let me offer a set of traits which we might hope to construct, or at least not undercut, through our speech. I have started to develop this account more fully in earlier work, but here a partial sketch of a subset of that account will suffice. The traits I suggest we aspire to engender are what might be described as the inward aspects of what are traditionally described and thought about as external virtues. They are habits of mind which manifest themselves in the habits of action described by the classical

virtues of courage, temperance, piety, wisdom, justice, and prudence.¹⁴ In particular, allow me to focus here on two of these re-imagined classical virtues—the two that will perhaps, at first glance, seem both the least well-suited to modern life and the least appropriate subjects of public concern: temperance and piety. These are traits that augment, rather than limit, the autonomy of those who develop them, and which can be encouraged in ways that fully respect that same autonomy. More to the point, these are virtues which seem at least as likely as health or wealth or preference satisfaction to conduce to a rich and full life in those who develop them.

Now, I do hope this limited and tentative account of just two of many potentially valuable habits of mind will be found appealing and plausible, so far as it goes—especially given the level of generality at which I frame the traits and the fact that they are essentially re-descriptions of traditional virtues long recognized as central by overlapping philosophical and religious traditions. But I do not need agreement on the merits of my particular list of virtues to make my point here. In fact, I welcome disagreement. I hope to encourage conversation about what sorts of traits may conduce to thriving, not end it. But this will give us enough to work with—a tentative set of at least provisionally desirable traits to keep in mind as we think about the indirect ways in which speech may construct character and thus impact the capacity to thrive of those to whom we speak.

Temperance is traditionally understood as restraint in the pursuit of pleasure—self-control, moderation, or abstinence—particularly with regard to physical pleasures such as sex or food and drink. One way to imagine this trait is as a matter of willpower—as simply forcing oneself to forgo or limit pleasures. The restraint or moderation known as temperance, however, can also be understood as an external manifestation of a certain internal trait or habit of mind—a lack of excessive desire or concern about pleasure. A person who does not care much for pleasure is more likely to be moderate in its pursuit. The ways of acting traditionally described as temperance reveal, and potentially construct, a way of thinking. That is what I mean by temperance here—the habit of mind of not caring much about physical pleasure.

14. See, e.g., Sherman J. Clark, *Neoclassical Public Virtues: Towards an Aretaic Theory of Law-Making (and Law Teaching)*, in *LAW, VIRTUE AND JUSTICE* (Amalia Amaya & Hock Lai Ho eds., forthcoming Oct. 2012) [hereinafter Clark, *Neoclassical Public Virtues*]; Sherman J. Clark, *Ennobling Direct Democracy*, 78 U. COLO. L. REV. 1341, 1347 n.7 (2007) [hereinafter Clark, *Ennobling Direct Democracy*].

Now, one way to conceive of this internalized version of temperance is that it must involve inuring oneself—deadening oneself to pleasure. That is how stoicism is often misunderstood—as the capacity to deaden oneself to pleasure, or to pain. But there is a better way to understand stoic thinking, and thus temperance. It is having something better on one’s mind, such that physical pleasures do not loom large. Imagine that you have the chance to attend a great event—fifty-yard-line Superbowl tickets, an audience with the Pope, Yo-Yo Ma performing Bach in an intimate performance for you and a few friends, dinner with Nelson Mandela and Bono—whatever you would consider the most remarkable opportunity. Now, imagine that your chair is not quite as comfortably padded as you might prefer. It is a perfectly good chair, just not so soft as you might ideally desire. You could sit in a softer chair, but that would require you to move to a seat in another room, where you would be limited in your ability to see or hear or participate in the event. I suppose you would not move. Nor, as you listened or watched or participated, would you spend much time thinking about your chair. If someone were to compliment you on your “stoicism” or your “temperance,” you would find the compliment strange and unwarranted. Of course, you would not compromise that wonderful opportunity for the dubious pleasure of a better seat cushion.

That is what I mean by temperance—moderation in pursuit of pleasure because you have something better on your mind. This is, I suggest, a habit of mind worth developing, and one worth helping others develop. It remains to be seen whether or how we can help others develop this trait in ways which do not violate their autonomy or pose the risks which make us fearful of thinking about character, and in particular, how our ways of speaking and arguing might accomplish this end.

But first, let us get one more potentially desirable trait on the table. If we want people to have better things on their mind, we can perhaps help them do just that. The difficulty is that we do not yet know, and certainly cannot yet agree on, what those better things are or should be. Thus we need, or might benefit greatly from, a trait or habit of mind which can help us deal with that difficulty. The traditional virtue of piety—rethought in a way analogous to the way in which we have rethought temperance—may be able to do just that.

Piety is the virtue which perhaps requires the most redescription if it is to be seen as applicable to secular matters, let alone as an appropriate subject of public concern, but it is also the trait which is most central to my account and to my aim in this essay. Traditionally, piety has been understood as the

proper fulfillment of duties to God or the gods.¹⁵ We can, however, redescribe this trait as the habit of mind or capacity engendered by and manifested through outward actions of piety or holiness. And what is that habit of mind? It is the capacity to care about, respect, and pursue things beyond our ken. It is not only this, but it is at least this much. And this much will do. Acts of piety—keeping Kosher, going to Mass, performing the Salah—serve many functions in the lives of those who perform them, but they all do at least this. They reveal a belief and serve as a reminder that much of what matters is beyond our grasp. And this—this capacity to aspire to what we cannot yet measure or define—is the virtue I suggest we should strive to engender.

Why so? Why seek to develop this capacity? Three reasons, at least. First, because the things we can describe precisely and measure are not enough. We know that much. Thriving requires something more. Second, we cannot yet know or agree on what we really need—what that something more is, exactly. That being the case, we need at least to retain the capacity to keep looking. Recall that our inability to define what counts as a rich and full life was initially framed as an objection to thinking about the impact of speech on character or thriving. Here, that very inability is revealed as itself a reason to work to retain a specific trait—the capacity to care about and talk about what we cannot nail down. Finally, it is at least likely that the things which will perhaps conduce to our thriving will be things that we can *never* nail down—things like meaning, purpose, love, and an appreciation of the world’s beauty. And yes, I write this knowing that it is likely to induce eye rolling or a sort of cultural intellectual gag reflex. But that too is more evidence of the necessity for this virtue than a reason not to engender it. In fact, I might define this redescribed form of piety in just that way—as the willingness and ability not to roll our eyes at, and thus avoid thinking and talking about, the things we know matter, simply because those things are hard to understand.

It would be helpful to have a better name for this trait because the term “piety” carries with it an entire range of unfortunate connotations, many of which are almost the opposite of the trait I am trying to describe. It can induce the very eye-rolling resistance the virtue is meant to help us overcome. It can suggest closed-minded sanctimoniousness, while what I mean is in fact a kind of openness. It can suggest small-minded conformity,

15. Piety is defined as “[h]abitual reverence and obedience to God (or the gods); devotion to religious duties and observances; godliness, devoutness, religiousness.” 7 OXFORD ENGLISH DICTIONARY 843 (1970).

while what I mean is just the opposite—a willingness to think and speak in ways and about things which are less small, less bound by the ways in which legal and political conventions encourage us to think and speak. It can suggest fearful meekness, while what I am trying to describe is rather a sort of courage. We roll our eyes when we are afraid to look. Perhaps “aspiration,” a term I have used elsewhere, would be better, but that carries its own connotations at odds with the trait I am trying to describe. Aspiration can suggest focused goal setting, in the sense of deciding and identifying clearly exactly what you want and aiming for it. There is nothing intrinsically wrong with goal setting, but the key feature of the sort of aspiration I suggest is the ability to pursue what we *cannot* yet identify clearly. Perhaps largeness of soul, or something along those lines, would be better, but that would carry connotations as well, and would itself need to be defined. In the end, piety is as good a term as any, and perhaps the need to overcome the gag reflex it may inspire will remind us of the nature of the virtue itself.

D. Modeling Character

With those two related virtues on the table, we can turn to a third way in which persuasive speech may construct character—through the modeling of traits by the speaker. One way to help a man be better is to show him how to be better—by embodying attributes, through both action and speech, in ways which show those attributes to be worthy of emulation.

This is not quite the same thing, though closely related, as the concept of *ethos*, under which heading classical rhetoric has long recognized that the personal credibility and authority of a speaker can be a key element of persuasion. We persuade, in part, by demonstrating to the listener qualities which make us seem worth listening to—expertise, trustworthiness, and experience. Trial lawyers recognize that projecting credibility is as crucial as making clever arguments. Those thinking about homiletics have recognized that a sermon is not merely argument, but also performance¹⁶—one aspect of this performance is the character displayed by the preacher. But these and most examples of thinking about what is sometimes called ethical argumentation focus on the character or perceived character of the *speaker*, which is seen as essentially instrumental to the persuasive or pedagogical goal of the argument or message. My emphasis here is on the *listener*, and on the consequences, rather than the causes, of persuasion.

Socrates, throughout the *Apology*, embodies and models traits he hopes to engender in his hearers and in his city.¹⁷ Most obviously, he shows

16. See, e.g., JANA CHILDERS, *PERFORMING THE WORD: PREACHING AS THEATRE* 9 (1998).

17. PLATO, *supra* note 1, at 17a–42a.

courage in the face of death.¹⁸ In addition, however, he models and seeks to construct the traits we have described as temperance and piety. He demonstrates through his speech, as he did through his life, that he is not focused on pleasure or pain—not because he is inured, but because he has more important things on his mind.¹⁹ He also demonstrates that he is willing to wrestle with things he cannot yet nail down, even when those things become difficult or dangerous to talk about.²⁰ Indeed, his courage is itself arguably a manifestation of those deeper traits. We can do the same. Although our own fora will rarely give us the chance to perform so vividly such central traits, we too can model ways of being through our speech. In particular, we can model the capacity we have described as piety. We can show, perhaps more effectively than we can advocate, the willingness and capacity to aspire to and wrestle with things that matter, but which are difficult to define and measure.

As I suggested above, it is not hubris to try and wrestle with these difficult issues. There is, however, another related, but less well-known, ancient Greek term which does apply: μεγαληγορία (*megalegoria*). Translated literally, it means something like “big speech,” and some translate it as “lofty utterance.” This is the way Xenophon described Socrates’ speech to the Athenian jurors, the same speech more fully recounted by Plato in the *Apology*.²¹ The term is rare in the surviving Greek texts, and where it appears elsewhere often has the negative connotation one might imagine—a combination of hubris and μακρός λογός (*makros logos*), meaning “long talk” or “rigmarole.” As Xenophon uses the term, however, it points to something positive, even essential. It is, in fact, another external manifestation of the internal trait for which we have borrowed the term piety. That trait—the courage and the capacity to aspire to things beyond our ken—shows itself and is constructed through the external sorts of religious observances suggested by the traditional meaning of the term piety. But the courage and capacity to care for larger things reveals itself also in the courage and willingness to speak in larger ways—even when one can expect to encounter cynicism or narrowness in response. *Megalegoria* describes speech which is not big because it is puffed up, but large because it confronts large things—not inflated, but capacious.

18. *Id.* at 29a–b.

19. *Id.* at 35b–c.

20. *Id.* at 29a–c.

21. XENOPHON, *Apology of Socrates to the Jury*, in THE SHORTER SOCRATIC WRITINGS: “APOLOGY OF SOCRATES TO THE JURY,” “OECONOMICUS,” AND “SYMPOSIUM” 9, 9 (Robert C. Bartlett ed., Andrew Patch trans., 1996).

More to the point, just as the external manifestation of this trait in the form of religious observances does not merely reveal, but can also build, the more crucial internal capacity, so too can this other external manifestation, in the form of largeness of speech. Largeness of speech does not just evince, but can also construct—in ourselves and our listeners—largeness of soul. The willingness and capacity to think about character and virtue is itself one of the virtues our speech should help construct, and the willingness to talk about such matters is perhaps the most essential way we can do that. This is one of the ways in which our legal speech could be better and more courageous than it is.

Why courageous? In what way does *megalegoria* display courage, as well as piety? To enlarge and ennoble our speech requires and displays courage because one of the things that keeps our speech small is fear. We can fear being perceived as preachy, smug, or judgmental. These are sensible fears, if only because speakers and arguments perceived in those ways are unlikely to be persuasive. So, we need to think about how we can speak to the things that matter without giving rise unnecessarily to those predictable perceptions.

And there is another closely-related kind of speech-diminishing fear we ought to acknowledge, and which perhaps we must simply overcome. That is the fear of being laughed at—the enduring adolescent fear of seeming uncool. Academic discourse can sometimes encourage a kind of clever cynicism. We relish deflating people or things that seem puffed up—poking holes in pretensions. Fine; but not everything large is merely inflated, and not every aspiration is merely pretention. I think many so-called realists are like small weak boys, afraid of saying something that the other boys might sneer at. We need to grow up and overcome that fear—not allow ourselves to be bullied. As is so often the case with boys, we may find that if we have the courage of our convictions, they will laugh less—it is our insecure discomfort with larger things which produces disdain. Were a boy to show up at school wearing his father's too-large suit, the other boys would laugh, but at the ill fit, not at the size of the suit itself. On a big enough boy, a big suit would fit. If we had only small things to talk about—wealth and preference satisfaction, for example—it would be laughable for us to try and enlarge our speech. But if we hope to model piety of the sort we have described—the capacity to care about large things—we need the courage to model it through *megalegoria*. We need to be brave enough to risk some cynical sneering and speak in ways that are capacious enough to fit.

Two decades ago, Jerry Frug came closer to addressing the potential constitutive effects of persuasion when he noted that a speaker models not just attributes, but also a set of priorities and values, and in appealing to

those, implicitly invites the listener to share those priorities.²² This calls our attention to the less overt ways in which argument may influence character, for modeling traits is not the only, or even perhaps the most important, way in which we may invite our listeners to develop or embody them. What we need to think about are the indirect and inadvertent ways in which we may influence those we persuade.

E. Indirect Engendering

The first and most obvious way we may indirectly enlarge or diminish our hearers is simply through the substantive arguments we choose to make. Whatever we appeal to, we implicitly assume it matters to those to whom we speak. So, every argument we make is a sort of indirect attribution of traits and priorities. If all we appeal to are things like wealth, health, and safety, we reveal an assumption that those are the only things our hearers are capable of caring about, and we help make that assumption a reality.

One reason we so often base our arguments on appeals to such things is that it is easy. Everyone can recognize the value of material goods, so we do not have to work to help people see that value. We can take refuge in least common denominators. Another reason our speech is small is that small is safe. No one will roll their eyes at us or think us presumptuous if we limit our arguments to wealth, health, and safety. If we stay low enough, no one can knock us down. But we want to help people rise above those least and common things and care about better things—things which have a better chance of helping them thrive. We need to find the courage and the capacity to appeal to those better things.

For example, in the context of education policy, if we believe that learning is valuable—that it is or can be part of a full rich life, rather than merely career training or job qualification—we should find ways to describe and appeal to that value. In the context of public spending on sports or art, if we believe that the community-building potential of sports teams or the enriching potential of public art are worth recognizing and preserving, we need to be able to think and talk about those things. In the context of zoning, if we care about, and hope others will care about, the subtle effects of architecture and land use on the quality of our lives or the nature of our community relationships, we need to consider and try to articulate those effects.

22. Jerry Frug, *Argument as Character*, 40 STAN. L. REV. 869, 869–70 (1988).

Nor do I mean merely that we need to be able to talk about principles such as fairness or equality. That matters, and talking about values such as these can be one way to talk about who we are, but we need also to find ways of describing and appealing to traits and capacities which are not derived ontologically from some set of principles, but which we feel will help us thrive. In the context of anti-discrimination law, for example, we need to be able to think and talk, not merely about purported moral, constitutional, or other mandates, but also about the ways in which how we treat each other helps us grow in our ability to live fully and well.

None of this is easy. The impact of law on how we live and thrive is hard to talk about in part because it is hard to think about. How can we communicate and appeal to what we have not really figured out? But all of us who think and communicate for a living have learned something about that difficulty. We have learned that the process of attempting to communicate a difficult idea is one of the ways—sometimes the best and only way—to work it out. Moreover, recall that one of the virtues we hope to engender, for which trait we have borrowed the term piety, is the willingness and capacity to aspire to and care about things we cannot nail down. If so, we should display that willingness and capacity. Rather than ducking hard, but important, things, we should find ways of thinking and talking about them.

Recall also that one of the ways in which we may construct character through speech is through attribution. When we attribute a trait or capacity, we give a hearer a chance to see himself in that way. We turn his attention to that aspect of his character, in the hope that he will like what he sees and will want to grow, and grow into, that part of who he is. Above, I highlighted the possibility of attributing traits directly and explicitly. But perhaps a better way to attribute a quality or capacity is by demonstrating, rather than merely expressing, our belief that our hearers have that quality or capacity. The size and scope of our speech can not only model the courage and capacity to wrestle with difficult questions of character and thriving, it can also reveal our belief that our hearers have or can develop that courage and capacity. By contrast, a fearful avoidance of big things reveals, and thus can entrench, the very smallness we hope to overcome. Talking down to people is no way to lift them up.

Socrates did not talk down to the jurors. Instead, he used his death as he had used his life—in an effort to ennoble those with whom he spoke. His willingness to enlarge the scope of his defense revealed his belief that his jurors were or could be large enough to hear him. Now, one might be tempted to say that Socrates' effort was not a success. After all, the jury convicted him. But the point here is not that larger speech will guarantee victory. Again, Socrates was concerned not with saving his own life, but with helping and encouraging his hearers—among whom we must now

number ourselves—to develop the traits and capacities that could help them thrive. He wanted them to value their souls over their safety, for which capacity we have borrowed the term “temperance.” He wanted them, and now us, to care for what matters, even when it is hard to define and difficult to explain, which capacity we have called “piety.” And to those ends, he not only extolled and modeled, but also attributed to his hearers, directly and indirectly, the ability to develop these capacities. It is hard to know whether or to what extent *that* effort was a success. It remains to be seen. Or perhaps we should say it remains up to us.

Given the willingness and desire to wrestle with bigger things in our speech, it remains difficult, and comes with risk. How can we enlarge our speech in ways that might enlarge the capacities of our listeners? It will not do to simply puff up our speech with big talk. And here is where legal speakers can learn from religious speakers. They cannot duck these sorts of things, or take refuge in least common denominators. So they find ways.

One thing religious speakers do is employ metaphors and similes to get at things that matter, but are hard to define. So essential is metaphor, in particular to religious speech, that one could list unlimited examples. God is described as the Father.²³ The church is described throughout the New Testament as the Bride of Christ.²⁴ Jesus describes himself as the bread of life,²⁵ and his disciples as the salt of the Earth.²⁶

Granted, metaphors bring risk. In particular, having found or grown accustomed to an appealing metaphor, we can be tempted to think we have something figured out when we do not. Metaphors do not spare us the task of thinking about difficult things; they help us perform that task. Where the things we care about can be captured adequately more directly, we should do so, but where things that matter cannot be measured and defined, we should wrestle with them as best we can. The only other option is to ignore them. As one thoughtful theologian put it: “Although metaphor is uncertain and risky, it is not expendable; one must live with the open-endedness since there is no way to get at the principal subject directly.”²⁷ So, we should not

23. See, e.g., 1 *John* 3:1 (New King James Version) (“Behold what manner of love the Father has bestowed on us, that we should be called children of God!”).

24. See, e.g., *Ephesians* 5:22–24 (New King James Version) (“Wives, submit to your own husbands, as to the Lord. For the husband is head of the wife, as also Christ is head of the church; and He is the Savior of the body. Therefore, just as the church is subject to Christ, so *let* the wives *be* to their own husbands in everything.”).

25. See, e.g., *John* 6:35 (New King James Version).

26. See, e.g., *Matthew* 5:13 (New King James Version).

27. SALLIE MCFAGUE TESELLE, *SPEAKING IN PARABLES: A STUDY IN METAPHOR AND THEOLOGY* 45 (1975).

employ metaphors as argument-enders or trumps. We should instead consider what they imply, see what they can help us see, think about the extent to which we are convinced that we have captured something worthwhile well, and meet them with competing metaphors.

Those who write and think about the law do use metaphor, of course, especially when forced to try and describe things which cannot be avoided, but which defy quantification or precise ontological description. The best example may be the law of free speech, and in particular when courts try to articulate the idea and importance of conscience.²⁸

Free speech and conscience are topics that cannot be avoided, and so literally compel the law to broaden its ways of thinking and speaking. We should learn to use similar techniques in addressing other matters that call upon us to enlarge our speech—areas where larger speech may not be compelled by the subject matter, but would be useful and enlarging.

A closely related method of trying to capture and communicate ways of being is through narrative and story. As with metaphor, religious speakers employ narrative constantly. Jesus taught in parables. Preachers illustrate sermons with stories.²⁹ It is at least sometimes possible to capture and communicate a difficult or potentially complicated idea better through narrative than analysis. And the thing we are trying to find ways to talk about here—the impact our ways of being may have on the quality of our lives—may often be the very sort of difficult and potentially complicated thing better illustrated than explained. Where legal scholars have encouraged or employed narrative techniques, it has often been in the service of giving voice to under-represented perspectives and interests.³⁰ That has value, but I am talking here about under-represented *ideas*.

Just as with metaphor, narrative can be well or poorly employed. There is the risk that a story will obscure rather than illuminate. It can be tempting to avoid the work necessary to clarify and communicate a difficult idea by

28. The metaphor used most frequently in free speech cases is that freedom of expression is a “marketplace of ideas.” See *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975) (“The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.”); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . .”).

29. See Michael Quicke, *History of Preaching*, in *THE ART AND CRAFT OF BIBLICAL PREACHING* 64, 65 (Haddon Robinson & Craig Brian Larson eds., 2005) (“*Narrative preachers* have a defining belief that sermons should have a story form that catches listeners up in an experience of God’s truth. Though most preachers use stories, this kind of preaching pays particular attention to hearers’ listening patterns and plans sermons accordingly.”).

30. See, e.g., Jane C. Murphy, *Lawyering for Social Change: The Power of the Narrative in Domestic Violence Law Reform*, 21 *HOFSTRA L. REV.* 1243, 1246 (1993) (“[S]cholars seeking methods to make the law more responsive to those historically unrepresented in lawmaking have argued for a more explicit use of the narrative to highlight the human concerns in a given legal issue.”).

taking refuge in an appealing narrative. More to the point, not every preacher, and certainly not every lawyer, is a good storyteller. Many a sermon has been diminished, and many a congregation bored and distracted, by an overly-long and marginally-relevant story designed to illustrate a point that could have been better and more clearly made directly. I recognize, in fact, that I may have been guilty of that very failing by relating the story of my father at undue length.

The misuse of narrative is not only a poor use of the hearer's time and attention, it is also a potentially diminishing use. Recall that the scope of our speech also attributes and potentially constructs capacities in our hearers. When a preacher or teacher substitutes a cute or clever story for a clear, if difficult, explanation, he or she risks communicating a belief that the hearer does not have the capacity to wrestle with it more deeply or directly. Stories should deepen analysis, not substitute for it. But, as with metaphor, if narrative is the best or only way to communicate an idea—as is particularly likely to be the case with ideas about the relationships between ways of being and thriving—we need to do our best. If my father's story is too long or poorly told, but yet a story is the best way to illustrate my point, I need to shorten it or learn to tell it better or find a better story. What we should not do is abandon stories because they take work. Much less should we abandon a point because it calls for a story. We should enlarge our speech to accommodate the hard things we think matter, not diminish our thinking to fit our easy ways of speaking.

F. Context and Community

One way in which people figure out how to be, and become who they are, is through communities defined in particular ways. Communities—churches, clubs, schools, sports teams, even nations and cities—are not merely associations of people who each have particular goals, priorities, beliefs, or aspirations, and then come together with others who share those. Rather, our communities are also the vehicles through which we articulate our aspirations and beliefs—through which we imagine, as well as seek to develop, traits and capacities.

So, one way in which we can attribute and potentially engender traits or priorities is by describing or portraying a community as defined in part by those traits or priorities. This is not so much a separate way in which speech may construct character, as it is one of the ways in which various forms of direct and indirect attribution do their work. In addition to attributing capacities to particular individuals or even particular audiences, we can

attribute them to the communities through which our hearers define themselves.

Religious speech does this regularly and naturally. Rabbis talk about the tradition and community that is Judaism. They talk, argue, and preach about what aspects of practice and belief are or are not essential to that tradition and community. Preachers talk about what it means or ought to mean to be a Christian, and they too talk and argue, both between and within denominations, about what ways of being and believing are central to that identity. Nor is this true only for highly hierarchical religions or denominations, or in those in which membership in a particular community or communion is considered central to identity or essential to salvation. Even those ways of thinking that most emphasize the individual's direct relationship with God, and those most ecumenical in their theology, often understand themselves as communities—defined in part by those very ways of being. In each context, these conversations about community are not just about belief and practice, but also about character. Religious communities define themselves in part by what they think and what they do, of course, but also define themselves by what kind of people those beliefs and practices show them to be or help them become. So, those who speak about religion know that one way to help a person develop is by helping to define a community through which he can do so.

Lincoln did this, perhaps most famously in the Gettysburg Address, when he described the nation as one “dedicated to the proposition that all men are created equal.”³¹ This was not merely description, it was construction. Few at that time would have placed this introductory phrase from The Declaration of Independence at the center of American political identity. But Lincoln did. He highlighted that thread—that aspect of who we are—and offered it as way of understanding ourselves which would enable us to make sense of and move forward from the carnage and confusion of civil war. He attributed to the community a desire and capacity to live up to that understanding, and in doing so, helped engender that desire and capacity. Now, it would not have done for Lincoln to simply make up a trait. If the set of capacities and priorities evoked by the usefully vague idea of a people dedicated to equality were not at least nascent in the community and its members, invoking them would have been in vain. We cannot simply attribute traits at will. But communities are often, if not always, in the process of self-definition, especially during difficult times. So, when we speak to and for our communities, we have the opportunity to help them understand and construct who they are.

31. President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), *in* 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN 22, 23 (Roy P. Basler ed., 1953).

So, we should think carefully about what explicit or implicit account of our communities we offer. What do you say about its history, its aims, its defining traits? What do you say about what a particular decision will mean to and say about them? Socrates does this in the *Apology*, both when he describes his city and when he talks about what his conviction will signify.³²

By calling on lawyers to embody in our arguments usefully constitutive descriptions of community, it may seem as though I am asking us to do something beyond the scope of our ordinary and appropriate work. Can lawyers with cases to win, for example, really be expected to take time to define community through particular or valuable character traits? They can. Or rather, they already are. Defining our communities can be a useful persuasive device, and thus a way of doing our regular work. We are already describing community through argument. The only question is how we describe it, and thus what we may help it become. This is perhaps most evident in the context of common-law legal reasoning and argument, which is inherently communitarian in this way. New cases make us try to understand old cases, which makes us try to understand our law more generally, which makes us think about who we are or want to be.

One way we often describe common-law reasoning is as a process of looking to precedent, extracting rules, and applying those rules to new cases. That description is not so much wrong as inadequate. A better description is this: We seek to decide new cases in ways which are consistent with how we have decided cases of that sort in the past. That slightly-altered description of the process reminds us that the so-called legal rules we apply in the common-law are actually descriptions of cases, not independent things. What we want to understand and be consistent with are the cases and their reasoning. And recognizing that, in turn, calls our attention to the fact that the cases are themselves efforts to achieve a larger sort of consistency—efforts to decide particular issues in ways which are consistent with our law more generally. And that calls our attention more deeply to the ways in which our law is reflective and constitutive of who we are.

Now, granted, few cases call upon lawyers to go this deep, and most legal arguments are not the Gettysburg Address. Many legal issues can be dealt with well enough without thinking about or addressing the underlying aspects of community identity or character revealed or constructed by the issue at hand. But some cannot. And some should not. Where the issue at hand does bear a connection to who we are as a community, we ought to be willing to think about and speak to the matter. Moreover, we should

32. PLATO, *supra* note 1, at 38c–42a.

recognize that we are often describing our community even when we do not mean or purport to do so.

At some level, in fact, every argument about what we should do is also an implicit argument about who we are. Habits of mind are engendered and entrenched in part through habits of action. So, if our communities are vehicles through which we act, they are also vehicles through which we decide and become who we are. Our political communities, therefore, like our churches and schools and sports teams, are not just places through which we imagine and articulate traits and capacities, they are vehicles through which we exhibit and develop them. This is why, in earlier works, I have tried to examine some of the ways in which substantive law and politics may impact character and thriving—how public action may influence public character.³³ Here, focusing on argument—on the way we talk about the law—the question is whether we are thoughtful about and take responsibility for the ways in which we are describing and constructing the communities for and to which we speak.

So, setting aside substantive law, each time we argue that something should be done, we invite the community to which we speak to see itself as the sort of community that would or ought to do that thing. This is the attribution of traits by the arguments we make, just as described above, but applied indirectly to individuals through their communities. Even an argument that does not explicitly describe community does so implicitly in at least this way, and we should take responsibility for those descriptions.

And we can do more. We can often include explicit and potentially constitutive descriptions of our legal and political communities in our arguments, and to the benefit of, rather than as an aside to, the substantive points we aim to make. A lawyer arguing a free speech case might highlight the arguably defining traits of openness and honesty and being thick-skinned, which are embodied and encouraged through a robust doctrine of free speech. A criminal defense lawyer might speak to a jury explicitly of how the reasonable doubt standard, or the institution of the jury itself, reflect the community's longstanding commitments to courageous and judicious responsibility-taking.³⁴ An education advocate might argue: "We have always been a community that recognizes that learning is valuable in itself, for personal growth, as well as for career training." Now, if there were no truth to the description, the argument would fail both as persuasion and character construction. But if a description resonates, it may also help define. If a description of community was to some extent true before it was

33. See Clark, *Neoclassical Public Virtues*, *supra* note 14; Clark, *Ennobling Direct Democracy*, *supra* note 14, at 1346–50.

34. See Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381, 2384–89 (1999).

articulated and offered as a potential reason for action, it may well be more true afterwards.

In addition to describing our communities, we can also model traits through and on behalf of them, because we are often members of the communities to and in which we speak. In many cases, in fact, we are likely to be perceived as representative members of those communities. A pastor or rabbi is not merely a member of a congregation, but someone who will be looked to as speaking for, even embodying, that community. Something similar can be said for a political leader or a teacher in a classroom. If so, when we display and model traits, we are not simply saying: "Look at me. This is how I am. Be with me." We are also saying: "Look at us. This is how we are. Be with us."

By modeling ways of being, therefore, we do not merely invite emulation, we also define community and invite inclusion. For example, when a law teacher conducts a first-year class in a particular way, perhaps by showing an appreciation for opposing views or revealing honestly the limits of her own knowledge, she does not simply model that way of thinking on her own behalf, such that the appeal and potential constitutive impact of that example depends entirely on the extent to which students admire or want to emulate her. She also demonstrates for the students a set of traits that they are invited to see as emblematic of the scholarly community and profession they are being invited to join. Similarly, when a preacher shows thoughtfulness and patience, for example, she sets forth those traits as potentially characteristic of the community to which and for which she speaks. And here, too, we can model either ennobling or diminishing aspects of character. Think of the teacher who bullies, or the preacher who threatens, rather than consoles.

How this might work in a particular case depends largely, perhaps entirely, on context. What are the potentially ennobling traits that define the community for which you speak? How can you, in that context, exemplify them in your speech? These questions cannot be addressed at a general level. But that very difficulty is itself perhaps fortuitous. Thinking about how we might model for and construct in our communities valuable traits can usefully encourage and help us to think about the traits themselves. We reflect our communities, but in the process must see ourselves more clearly as well.

There are, I am sure, many more, and more subtle, ways in which our speech may exhort or attribute or otherwise construct character and thus impact our capacity to thrive, and other perhaps more effective ways we may attend to and take responsibility for that reality. I am limited here, frankly,

not just by the space constraints of an essay, but also by my own lack of knowledge and ability. Like most of us trained in the law, I have not been trained in talking about the ways in which law impacts character and thriving, much less in the ways in which our speech about the law may factor into that equation. My effort here, therefore, is not to catalogue those ways, but to call for attention to them. My hope is that the next generation of lawyers will be better in this regard than we are—more capable of thinking and talking about the ways in which our law makes up who we are. If they aim to be so, and if we aim to help them, one place we should look—one example from which we can draw—will be speech about religion. What lawyers have ignored or avoided, religious speakers have been forced to confront, and seeing the kinship between our different, but over-lapping, work can perhaps help us learn to confront those things as well.

IV. CONCLUSION: THINKING AND PERSUADING

As a lawyer and law teacher, my focus has been on what those of us who argue and teach about the law can learn from those who think and talk about religion, but I also believe that those who speak about religion may be able to learn something from us. Lawyers do not always think or speak as deeply or as bravely as do preachers, but there is a sense in which the discipline of the law can enhance and broaden our thinking in ways which may be valuable to those who speak about religion. Lawyers have our own rhetorical challenges—our own potentially educative necessities. In particular, the demands of regular and particularized persuasion force upon us, and can develop in us, the capacity to see difficult issues from the perspectives of others. If this necessity were to conduce merely to relativism or sophistry, as is sometimes assumed or alleged, preachers would perhaps have little to learn from lawyers. But, in fact, the habit of mind of full and thoughtful engagement with opposing views, even if initially developed for instrumental ends, can be an enriching intellectual capacity. Seeing difficult issues from varying angles, which is a capacity lawyers must develop in order to argue persuasively, can help us see and understand those difficult issues better and more clearly ourselves, just as an art lover walks around a sculpture to get a better look, or an explorer triangulates to figure out where he is. And both of these capacities—persuasiveness and understanding—ought to be as much valued and sought by those who speak about religion as by those of us who argue about the law.

At the very least, those of us who teach and persuade about the law can recognize that the habits of mind we have developed as lawyers can help rather than hinder us in our efforts to enlarge our speech—to make it more ennobling. We can think carefully about the ways in which those to whom we speak see or want to see themselves and the world, and we can think

charitably about what they care about or are capable of caring about. If we do, we may find that they do not see or want to see themselves as concerned merely with gain or glory—with costs and benefits and preference satisfaction. We may find that they are willing and eager to aspire to better things—to traits and capacities harder to articulate, but better able to help them thrive—and that they are fully capable of doing so. And if we can see in them that willingness and ability, perhaps we can find in ourselves the courage and capacity to help them articulate those things.
