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Advocacy for Asylum Seekers: Theory, Practice, and Bending Towards Justice

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This essay argues that persuasion has a crucial role to play in human rights advocacy. I will draw on both classical and contemporary theories of persuasion to assess how they can be more effectively used to agitate for legislative change in the legal framework governing immigration detention in Australia. To connect theory with practice, I will explain how key principles of persuasion should be used to help pass the Ending Indefinite and Arbitrary Immigration Detention Bill (2022). This would help bring Australia in line with its obligations under international law and ensure that the issue does not remain faceless.

INTRODUCTION

Australia is not kind to refugees or asylum seekers. Its system of mandatory detention requires that 'unlawful non-citizens'[1] be detained until they are deported from or granted entry into the state.[2] If there is no prospect of removal, the *Migration Act* authorises their

[1] The term 'unlawful non-citizen' is defined in ss 5(1) and 14(1) of the *Migration Act 1958* (Cth) as a 'a non-citizen in the migration zone who is not a lawful citizen'.
[2] *Migration Act* 1958 (Cth) ss 189, 196, 198. See also *Al-Kateb v Godwin* (2004) 219 CLR 562 at [35] (Gummow J), [226] (Hayne J), [298] (Callinan J).

indefinite detention.[3] Causing severe mental[4] and physical harm,[5] this regime has been described as an "an affront to the protection of human rights."[6] It is in this context that the Ending Indefinite and Arbitrary Immigration Detention Bill 2022 ('the Bill') has been re-introduced to Federal Parliament.[7] So far as it would make mandatory detention illegal and ensure that detention for refugees and asylum seekers be 'lawful, necessary, proportionate and for the shortest time possible,'[8] the Bill would bring Australia in line with its human rights obligations under international law.[9]

However, the fact that both major political parties in Australia have historically supported the mandatory detention of non-citizens suggests that those who would like to see the Bill passed must learn how to persuade more effectively.[10] This study will argue that Aristotle's theory of persuasion as set out in *Rhetoric* offers a clear and comprehensive framework for advocates to follow.[11] It is not my intention to deal exhaustively with that text, however. There would be little point in attempting to cover this ground that has been well-travelled by many other writers.[12] My focus here is predominantly practical in that I seek to explain

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[3] *Al-Kateb v Godwin* (2004) 219 CLR 562 at [269] (Hayne J).
[4] Derrick Silove, Patricia Austin and Zachary Steel, 'No Refuge from Terror: The Impact of Detention on the Mental Health of Trauma-affected Refugees Seeking Asylum in Australia' (2007) 4 *Transcultural Psychiatry* 359.
[5] Louise Newman, Nicholas Proctor and Michael Dudley, 'Seeking Asylum in Australia: Immigration Detention, Human Rights and Mental Health Care' (2013) 21(4) *Australas Psychiatry* 315, 318.
[6] Michelle Bachelet, 'Opening Statement by UN High Commissioner for Human Rights' (Speech, 39th Session of the Human Rights Council, 10 September 2018).
[7] Explanatory Memorandum, Ending Indefinite and Arbitrary Immigration Detention Bill 2022 (Vic).
[8] Ibid 2.
[9] The bill purports to ensure that Australian law is compliant and consistent with international human rights law by implementing components of the: *International Covenant on Civil and Political Rights*; *Convention against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment*; *Convention and Protocol relating to the Status of Refugees*; *Convention on the Rights of the Child*; *Convention Relating to the Status of Refugees; Convention on the Rights of Persons with Disabilities*; *International Covenant on Economic Social and Cultural Rights*.
[10] Janet Phillips, 'A Comparison of Coalition and Labor Government Asylum Policies in Australia since 2001'(Research paper series 2016-17, Parliamentary Library, 2 February 2017) 3.
[11] According to Aristotle, a person can produce persuasion through their own character (*ethos*) the emotional state of the listener (*pathos*) or the argument itself (*logos*). I therefore make my argument under three headings; *ethos; pathos*; and *logos* as modes of persuasion.
[12] See, for example, Christof Rapp, 'Aristotle on the Moral Psychology of Persuasion' in Christopher Shields (ed), *The Oxford Handbook of Aristotle* (Oxford University Press, 2012) 589-611; William Fortenbaugh, 'Aristotle's Art of Rhetoric' in Ian Worthington (ed), *A Companion to Greek Rhetoric* (Blackwell Publishing, 2007) 107-23; David J. Furley and Alexander Nehamas, *Aristotle's Rhetoric: Philosophical Essays* (Princeton University Press, 2016).

how advocates can make use of Aristotle's principles to help pass the Bill in Australia. To achieve this, I will also draw on contemporary theories of persuasion. By fleshing out the skeletal framework offered by Aristotle and advancing the thesis that we must shift the narrative surrounding the rights of refugees and asylum seekers to one rooted in hope , I aim to help the human rights advocate employ her persuasive techniques more consciously than Lord Alexander of Weedon KC, who once admitted that he "always suspected that once we attempted to analyse our own approach [to advocacy] it would, like the proverbial piece of China, fall to pieces in our hands."[13] I have also tried to keep in mind Koldo Casla's warning that "strategic framing smells of psychological warfare."[14] While such reservations are not without merit, it is an unfortunate fact of life that decision-makers are unlikely to change the policies in place unless we can compellingly make the case for a viable alternatives.

I Who Cares About Human Rights in Australia?

Persuasion is a distinct mechanism of social influence that drives state behaviour.[15] At its core, it involves the use of argument in an effort to engage and change the mind of others.[16] This may be more easily said than done. As human rights lawyer Julian Burnside has noted: "one of the great problems with human rights in Australia at the moment is not the small numbers of those who are engaged by the subject, it is the large numbers who are silent about it."[17] Despite such difficulty, advocates must learn to prick the conscience of Australians and piece this veil of apathy - it is clear that the courts will not traverse the abyss.[18] In addition to the fact that Australia is one of the few nations in the Western world

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[13] Lord Alexander of Weedon, 'The Art of Advocacy' (Speech, The New South Wales Bar Association, 17 October 1991) 15 <http://classic.austlii.edu.au/au/journals/NSWBarAssocNews/1991/27.pdf>.

[14] Koldo Casla, 'Why Human Rights Campaigning Needs to Change More Than Just Its Framing: The Problem is Not How We Speak – It's Who We Are' *Open Democracy UK* (Web Page, 30 May 2018) <https://www.opendemocracy.net/en/opendemocracyuk/why-human-rights-campaigning-needs-to-change-more-than-just-its-framing/>.

[15] Ryan Goodman and Derek Jenks, 'Sociological Theory Insights into International Human Rights Law' *Institute for International Law and Justice* (2008) 5; See also Ryan Goodman and Derek Jenks, *Socialising States: Promotion Human Rights Through International Law* (Oxford University Press, 2013) 1-17.

[16] Ibid 5.

[17] Julian Burnside, 'Who Cares About Human Rights?' (2003) 23(6) *University of New South Wales Law Journal* 703, 714.

[18] See Aharon Barak, *The Judge in a Democracy* (Princeton University Press, 2006) 18 ("[T]he public must not expect the judge to bridge every gap between law and life. Many limitations, both

lacking a Bill of Rights, its system of parliamentary sovereignty and separation of powers doctrine means that we cannot rely on the judiciary alone to protect human rights.[19] The High Court made this very clear in *Al-Kateb*.[20] In finding that the state's indefinite detention of Ahmed Al-Kateb was "tragic"[21] yet lawful nonetheless, Justice McHugh emphasised that it is not the role of the courts "to determine whether the course taken by Parliament is unjust or contrary to basic human rights."[22]

But if we must take heed of Justice McHugh's warning then we can also take heart in it. The framework governing our system of representative democracy means that through effective messaging, we all have the power to address human rights abuses. His Honour may have hinted at this idea himself in *Al-Kateb* when he said that the only way for Australia to have a Bill of Rights would be "by persuading the people"[23] to amend the Constitution in such a manner. It is not within the scope of this study to discuss whether this idea should be welcome or how we should go about it if it should be. My point is rather that in Australia, advocates for human rights must be willing to learn key principles of persuasion in order to effectively agitate for legislative change. As Sally Engle Merry compellingly argues, the limited enforcement mechanisms of international human rights law means that its impact is primarily "a matter of persuasion rather than force."[24] The tripartite modes of persuasion identified by Aristotle in *Rhetoric* offer the advocate a clear conceptual framework to systematically approach this task.

II ETHOS: Persuasion through Character

A What Is Character?

substantive and procedural, are placed on the judge. His discretion is limited. He functions within a given social and legal framework").

[19] In *Re Woolley; Ex prate Applicants M276/2003* (2004) 225 CLR 1 at [227], Hayne J cited *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 to make the point that the court is limited in its capacity to intervene in the detention of an unlawful non-citizen under s 198(1) of the *Migration Act* because the purpose of the detention is not penal or punitive in character.

[20] *Al-Kateb v Godwin* (2004) 219 CLR 562.

[21] *Al-Kateb v Godwin* (2004) 219 CLR 562 at [31] (McHugh J).

[22] *Al-Kateb v Godwin* (2004) 219 CLR 562 at [74] (McHugh J).

[23] *Al-Kateb v Godwin* (2004) 219 CLR 562 at [73] (McHugh J).

[24] Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press, 2006) 539.

Aristotle argues that character "constitutes the most effective means of persuasion."[25] His idea that "the speaker should show himself to be of a certain character"[26] in order to persuade suggests that he thought there was a performative aspect to this, rather than being based solely on a person's reputation. In *Plato Films v Speidel,* Lord Denning drew a separate but logically related distinction between character and reputation. He observed that: "a man's 'character' … is what he in fact is, whereas his 'reputation' is what other people think he is."[27] The gist of Aristotle's advice is that the advocate should draw these two threads together to create a positive impression in the minds of her audience. Unfortunately, Aristotle does not explain *how* an advocate can cast herself as being of credible character, nor *why* this will have persuasive force. He merely lays down three rather vague traits – good sense, virtue, and good will – and then takes it for granted that "these qualities are all that are necessary, so that the speaker who appears to possess all three will necessarily win the trust of his audience."[28] Despite Aristotle's brevity on the subject, contemporary theories of persuasion provide insight into how these core principles can be applied by advocates who seek to help pass the Bill.

B The Persuasive Force of Character

Aristotle's emphasis on good sense, virtue, and good will suggests he thought there was more to being credible than simply being believed. In advising that an advocate deliver their speech "in such a manner as to render him worthy of trust,"[29] his focus seems to have been on the advocate's ability to cast herself in a positive light on the basis that people "believe good men more fully and more readily than others."[30] In some ways the High Court shares his view that how a person presents themselves is relevant to an assessment of their credibility. In *Melbourne v The Queen*, for example, McHugh J held that a person's manner or demeanour being taken into account as evidence of their character was "deeply rooted in

[25] Aristotle, *Rhetoric*, 1356a4.
[26] Ibid 1356a6.
[27] *Plato Films Ltd v Speidel* [1961] AC 1090 at [1138] (Lord Denning).
[28] Aristotle, *Rhetoric*, 1378a6-20.
[29] Ibid 1356a4.
[30] Ibid 1356a4.

the law."[31] Unlike Aristotle, however, the court in that case did not take it for granted that there was anything intrinsically persuasive about a person's good character. While he agreed that it "may loom large"[32] as "a very persuasive argument,"[33] Justice Kirby observed that the persuasive force of character "may owe more to an appeal to emotion or prejudice than to any identifiable and logical process of reasoning."[34] His Honour's view that character as a means of persuasion works through the audience's emotional disposition towards an advocate has empirical support in contemporary persuasive theory.[35] There, the term 'liking' is used to capture the basic idea that we are far quicker to agree with the ideas of people we like.[36]

C No Silver Tongue Needed

Understanding the liking principle and knowing how to use it will offer the advocate a powerful means of persuasion. It is often used synonymously with words such as 'affinity,' 'rapport,' and 'affection' to describe the feeling of connection between people who share things in common.[37] For the advocate who seeks to draw on the liking principle to persuade an audience, one barrier will be that an audience does not exist in the abstract. It will be made up of different people with different views and emotions.[38] While responding to those sensitivities is a challenge that will test the tact of any advocate, any advocate can pull on the hopes and fears that many of us share to increase their relatability. In terms of the latter, one can make use of the fact that social studies have found public speaking to be near the top of any list of activities that people fear. A recent speech by Dr Daniel Mulino within the House of Representatives serves as a good example.[39] In his advocacy for *The Bill*, he said:

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[31] *Melbourne v the Queen* (1999) CLR 1 at [32] (McHugh J). See also R v Murphy (1985) 4 NSWLR 42 at [54] and *WZARH v Minister for Immigration* (2015) 256 CLR 326 where Kiefel, Bell, and Keane JJ at [21] noted that "the respondent's demeanour at the interview might have led the [decision-maker] to resolve questions of credibility in the respondent's favour."
[32] *Melbourne v the Queen* (1999) CLR 1 at [151] (Kirby J).
[33] Ibid.
[34] Ibid.
[35] Robert B. Cialdini, 'The Science of Persuasion' (2001) 284(2) *Scientific American*, 78.
[36] Ibid.
[37] Ibid 79.
[38] Alexander, above n 13, 11.
[39] Daniel Mulino, 'Official Recording of House of Representatives Proceedings from the Australian Parliament' (Speech, House of Representatives, 3 August 2022) <https://parlview.aph.gov.au/mediaPlayer.php?videoID=585831&operation_mode=parlview>.

"we need to listen to *uhh* people *umm* like the members *ahh* like the, like the people who have been raised in this debate if we're going to make the debate about human and sensible decisions."[40]

One could be forgiven for thinking that an Athenian orator such as Aristotle would have frowned upon the speaker's lack of eloquence – although they would be wrong. In *Rhetoric,* Aristotle advises that the advocate should "attempt to disguise his art and give the impression of speaking naturally."[41] His idea that we should speak naturally is supported by psycholinguistic scholars Villar et al.[42] In a study exploring the impact of fillers words such as 'um' and 'ah', they found that while such words do produce 'disfluent' speech, they also positively affect a speaker's credibility in the minds of their audience.[43] While useful, an advocate should be careful in following Aristotle's advice they 'disguise' their efforts. The deliberate use of filler words in a thinly veiled effort to appear nervous or hesitant is likely to have the opposite effect by creating the impression that one is engaging in strategically deceptive behavior.[44] This will not help them be liked by the audience. Rather than engaging in any trick of advocacy, the point that I hope to make here is that an advocate can feel comfortable being uncomfortable as they discuss Australia's policy of mandatory and indefinite detention with an audience. By increasing her relatability, a certain degree of nervousness will help the advocate build a rapport with her audience. It may be for this reason that the politician Thomas Macnamara advises in his book on public speaking that "if you have never been nervous on the public platform, you have never made a really effective speech."[45]

D Fusing the Two Streams of Authority

[40] Ibid.
[41] Aristotle, *Rhetoric*, 1404b5.
[42] Gina Villar, Joanne Arciuli and David Mallard, 'Use of "um" in the deceptive speech of a convicted murderer' (2012) 33(1) *Applied Psycholinguistics,* 84.
[43] Ibid.
[44] Emily Duvall, Aimee Robbins, Thomas Graham, and Scott Divett 'Exploring Filler Words and Their Impact' (2014) 11 *Schwa: Language & Linguistics*, 35.
[45] Thomas Macnamara, 'How to Make An Effective Speech' in Arthuc Charles Fox-Davies (ed), *The Book of Public Speaking: Volume I* (Caxton Press, 1913) 14. It should be noted that this chapter appears to have been plaguarised and re-published verbatim under the heading 'Lesson Twenty-Sex: The Art of Public Speaking – Concentration Applied to Speech Making' in the occultist Lauron William De Laurence's *The Master Key: The Art of Mental Discipline* (Scott & Company Press, 1914).

In the same sense that we are more likely to trust and agree with people we like, an advocate who can speak or write authoritatively on her topic will be more persuasive. At the outset, however, it is critical to distinguish between two forms of authority as means of persuasion. Cialdini uses the term to describe the "aura of legitimacy"[46] that is created by those who tout their experience, expertise, or legal credentials. In persuasion theory, this is called 'epistemic authority.'[47] It is why, if a High Court judge and law school student were to disagree on a legal point, most of us would be quick to defer to the former due to her expertise in the realm of law – even if the latter might have been correct. However, it is striking that this is not what Aristotle has in mind when he discusses what will lead an audience to "yield to [an advocate's] great authority."[48] His focus is instead on the authority of character, or moral authority. He argues that the persuasive force of expertise and experience comes from the fact that these traits evidence of "moral character."[49] On its face, this may seem like a fallacy; Marcus Einfeld[50] and Dyson Heydon[51] are among the many disgraced judges whose mastery of the law did not prevent them from breaking it.[52]

Nonetheless, the human rights advocate can integrate epistemic authority with moral authority to more effectively persuade by character – the two are not mutually exclusive. Bryan Stevenson may have had this in mind when he said that "a teacher's words can be meaningful, but if you're a compassionate teacher they can be especially meaningful."[53] He seems to have been suggesting that virtue can amplify the persuasive effect of authority

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[46] Cialdini, above n 34, 79.
[47] Robert Pierson, 'The Epistemic Authority of Expertise' (1994) 1 *Proceedings of the Biennial Meeting of the Philosophy of Science Association* (University of Chicago Press, 398).
[48] Aristotle, *Rhetoric* 1355a24-29.
[49] Aristotle, *Rhetoric* 1366b36.
[50] Malcolm Knox, 'Former judge Einfeld gets at least two years' jail … all for lying about a $77 traffic fine' *The Sydney Morning Herald* (20 March 2009) <https://www.smh.com.au/national/former-judge-einfeld-gets-at-least-two-years-jail--all-for-lying-about-a-77-traffic-fine-20090320-93sr.html>.
[51] Kate McClymont and Jacqueline Maley, 'High Court inquiry finds former Justice Dyson Heydon sexually harassed associates' *The Sydney Morning Herald* (22 June 2020) <https://www.smh.com.au/national/high-court-inquiry-finds-former-justice-dyson-heydon-sexually-harassed-associates-20200622-p5550w.html>.
[52] See also Joe Aharfi, 'The Quality of Justice' *Purely Dicta* (Web Page, 4 September 2021) <https://purelydicta.com/2021/09/04/quality-of-justice/>.
[53] Bryan Stevenson, 'We Need to Talk About an Injustice' (Speech, TED conference, 14 March 2012) <https://www.ted.com/talks/bryan_stevenson_we_need_to_talk_about_an_injustice/transcript?language=en>.

which comes from expertise. When Stevenson introduces himself in a now-famous TED Talk on criminal justice system reforms, he does not mention his post-graduate education in law and public policy at Harvard University. Nor does he note the many accolades he has earned as an author and an attorney. Instead, he begins his speech by saying: "I spend most of my times in jails and prisons on death row, I spend most of my time in very low-income communities, in the projects, and places where there's a great deal of hopelessness."[54] Stevenson is aware that in the context of his advocacy, these experiences will give him an aura of moral authority that could not be attained solely by mentioning his legal qualifications.

Unless those seeking to help pass *The Bill* learn to integrate these two means of persuasion, they risk leaving an audience persuaded in their heads when they are wholly unpersuaded in their hearts. In advocating for *The Bill* in Parliament, Dr Sophie Scamps begins her speech with the words: "as a doctor…"[55] The expertise of a doctor is relevant when discussing the poor health conditions of those suffering mandatory detention. But she would likely have been even more persuasive by following the example of Zoe Daniels, who made a similar appeal in the House of Representatives. Daniels begins her speech not by noting her expertise as an author or journalist, but by stating that she has "spent substantial time in refugee camps."[56] By mentioning the camps she has visited in Darfur, Kakuma, Rakhine State, and the Thai-Burma Border, she casts herself as a sincere speaker whose epistemic authority runs parallel with her moral authority. Those who make use of this persuasive technique will be able to more effectively help change the minds of their audience.

III PATHOS: Persuasion through Emotion

A The Stories We Tell

Having built credibility with the audience by establishing her expertise and strong moral character, an advocate should seek to persuade through *pathos.* This is an appeal made to emotions, which Aristotle defines as "those things due to which people by undergoing a

[54] Ibid.
[55] Sophie Scamps, above n 38.
[56] Zoe Daniels, above n 38.

change, differ in their judgements.[57] In spite of his emphasis that an advocate must make emotional appeals to change minds – or perhaps because of it - it is striking that Aristotle does not in direct terms explain *how* an advocate can lead her audience to feel particular types of emotions. Nor does he provide any clear guidance on *what* type of emotions should be appealed to. His treatment of several kinds of emotions is limited to a definition of each; he then leaves it to the reader to discern how these definitions should be used to arouse a particular kind of emotion.[58]

Despite this limitation, we can infer that Aristotle would have thought that stories are particularly powerful means of persuading people not just in their heads but in their hearts. He argues that "when an emotional speaker makes an audience feel with him"[59] the mind of the hearer is "under the impression that the speaker is speaking the truth"[60] on the basis that "his feelings are the same."[61] This idea that feelings bind us together need not involve any leap in logic; stories "move us to care, and hence pave the way to action"[62] when they bring the law down to life and give a face to otherwise abstract theories.[63] For example, the story of a young man who took a risky boat journey from Rakhine State to flee genocidal destructions at the hands of a military "raping our own villages, sisters, and [his] own people"[64] is more likely to shock the conscience than one which dwells on the finer points of international law. As Chris Anderson argues in his guide to advocacy, it is tales of "misfortune, danger, disaster"[65] more than any others which "hasten deep engagement with an audience."[66]

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[57] Aristotle, *Rhetoric,* 1378a20.
[58] Ibid 1378a20-32.
[59] Ibid 1378a22.
[60] Ibid 1378a24.
[61] Ibid.
[62] Toni M. Massaro, 'Empathy, Legal Storytelling, and The Rule of Law: New Words, Old Wounds' (1988) 87 *Michigan University Law Review,* 2105.
[63] Mervi Pantti and Markus Ojala, 'Caught Between Sympathy and Suspicion: Journalistic Perceptions and Practices of Telling Asylum Seekers' Personal Stories' (2019) 41(8) *Media, Culture & Society*.
[64] Nathan Morris, 'Asylum Seekers Languish in Australia with No Work, No Hope, and An Uncertain Future' *ABC News* (10 July 2022) <https://www.abc.net.au/news/2022-07-10/asylum-seekers-no-visas-can-t-work-no-medicare-rely-on-charity/101153320>.
[65] Chris Anderson, 'TED's Secret to Great Public Speaking' (Speech, TED conference, 16 April 2016) < https://www.ted.com/talks/chris_anderson_ted_s_secret_to_great_public_speaking?language=en>.
[66] Ibid.

B Towards Hope-Based Communication

While the personal stories of asylum seekers and refugees have the potential to cut through apathy and engender feelings of solidarity, they should aim to do more than simply shock the conscience.[67] There is a real risk that attempts to "evoke our empathic distress response"[68] solely by telling tales of injustice will further rather than counter the bleak narratives which tend to frame how we talk about mandatory and indefinite detention.[69] In the media, for example, it is common to find articles with titles such as: 'Asylum Seekers Languish in Australia with No Work, No Hope, and an Uncertain Future'[70] or 'Seven Years of Suffering for Australia's Asylum Seekers, Refugees.'[71] Of course, we should not be able to close our eyes to these realities. For Australians to feel "sad, angry, or ashamed,"[72] about them will help pave the way to action as advocates agitate for legislative change. But in doing so, it is critical that these are not the only emotions that they appeal to. Narratives of crisis and peril can inadvertently harm perceptions of the human rights movement's effectiveness as well as its legitimacy.[73] Even if it is passed, the name of *the Ending Indefinite and Arbitrary Detention Bill* is an example of "legislative protections [which] frame human rights in the negative rather than the positive."[74] By setting out what the government *cannot* do rather than what it *should* do, such laws fail to lean on hope and optimism as tools to encourage us to build, grow, and stick together.

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[67] Given that the word *pathos* comes from the Greek *paskhein* (suffer) and *penthos* (grief), it is unsurprising that advocates often make emotional appeals on the basis of injustice.
[68] Massaro, above n 60, 2105.
[69] Thomas Coombes, 'Why the Future of Human Rights Must be Hopeful' *Open Global Rights* (Web Page, 19 February 2019) <https://www.openglobalrights.org/why-the-future-of-human-rights-must-be-hopeful/>.
[70] Morris, above n 62.
[71] Elaine Pearson, 'Seven Years of Suffering for Australia's Asylum Seekers. Refugees' *Human Rights Watch* (Web Page, 16 July 2020) <https://www.hrw.org/news/2020/07/16/seven-years-suffering-australias-asylum-seekersrefugees#:~:text=This%20experiment%20in%20human%20suffering,separated%20from%20families%2C%20futures%20uncertain>.
[72] Misha Ketchell, 'Friday Essay: Worth A Thousand Words – How Photos Shape Attitudes to Refugees' *The Conversation* (Web Page, 29 July 2016) <https://theconversation.com/friday-essay-worth-a-thousand-words-how-photos-shape-attitudes-to-refugees-62705>.
[73] Kathryn Sikkink, 'Rethinking the Notion of A Human Rights Crisis' *Open Global Rights* (Web Page, 31 July 2018) <https://www.openglobalrights.org/rethinking-the-notion-of-a-human-rights-crisis/>.
[74] Australian Human Rights Commission, 'Discussion Paper: A Model for Positive Human Rights Reform (2019)' 29 August 2019.

More positive stories rooted in narratives of hope will help persuade people to be hopeful rather than hopeless about the rights of people in detention. This will be challenge. As Thomas Coombes points out: "for a human rights movement dedicated to exposing abuses, positive communication does not come naturally."[75] Andrew Wilkie's advocacy for the Bill in Parliament serves as one example.[76] The idea that refugees and asylum seekers can be kept in "cruel conditions"[77] by law "until they die"[78] is central to his Second Reading Speech – neither his Second Reading Speech nor the Explanatory Memorandum of the Bill mention the word 'dignity'. An issue with his framing is that it focuses on negatives rather than positives. Wilkie could have been more persuasive by reframing the narrative towards hope. For example, rather than arguing that "the Bill removes the abhorrent and torturous conditions [of detention]"[79] or that the Bill would "stop this pig-headed response by both the government and the opposition,"[80] the Minister could have told stories that speak to the many contributions asylum seekers and refugees make to Australian society.[81] He could also have pointed to our national anthem, which promises: "for those who've come across the seas / we've boundless plains to share."[82] Such a shift towards hope-based communication will help advocates avoid compassion fatigue and give them the energy to sustain their work.[83] It will also encourage them to go on the offensive and come up with solutions rather than only react to problems; calls for the state to provide permanent visas, housing, and

[75] Thomas Coombes, 'A Guide to Hope-based Communications' *Open Global Rights* (Web Page, 24 April 2016) <https://www.openglobalrights.org/hope-guide/>.
[76] He advances his argument on three main grounds: that (i) mandatory and arbitrary detention is immoral; (ii) it is inconsistent with international law, and; (iii) it is expensive.
[77] *Second Reading Speech: Ending Indefinite and Arbitrary Immigration Detention Bill 2022*, Canberra, 1 August 2022, 258 (Andrew Wilkie).
[78] Ibid.
[79] Ibid.
[80] Ibid 259.
[81] See for example the story of Gordon Koang; Paul Donoghue, 'Gordon Koang, South Sudan's 'King of Music', Flees War and Finds a Fan Base in Australia' *ABC News* (20 November 2019) <https://www.abc.net.au/news/2019-11-20/gordon-koang-south-sudans-king-of-music-calls-australia-home/11701678>.
[82] Australian Government Department of the Prime Minister and Cabinet, 'Australian National Anthem' (Web Page, 22 August 2016) <https://www.pmc.gov.au/government/australian-national-anthem>.
[83] Kathryn Sikkink, 'Evidence Indicates That We Should be Hopeful - Not Hopeless - about Human Rights' *Open Global Rights* (Web Page, 29 November 2017) <https://www.openglobalrights.org/evidence-indicates-that-we-should-be-hopeful-not-hopeless-about-human-rights/>.

medical treatment to refugees rather than simply asking for an end to mandatory detention will help advocates follow the advice of Koldo Costo and "communicate hope over fear."[84]

C The Quality of Dignity

Hope-based communication is not limited to storytelling; stories are to narratives what tiles are to mosaics.[85] For this reason, the stories we tell must be part of broader narratives that speak to shared values of humanity. That is precisely what Justice Kirby achieved in *Al Kateb* when he argued that human rights laws "express the common rights of all humanity"[86] which "pre-existed their formal expression."[87] Dignity in the sense Kant[88] used it to describe respect for intrinsic human worthiness may well be chief among these values. That would explain why the preamble of the Universal Declaration of Human Rights begins by recognising "the inherent dignity of all members of the human family."[89] Critically, the preamble goes on to affirm that above all else it is "the dignity and worth of the human person"[90] which demands protection. The preamble's advancement of both logical and moral arguments as to why human rights are universal is why Geoffrey Robertson KC describes it as "an exercise in persuasion rather than law."[91] Clearly, dignity is a shared value capable of bringing people together. In *Monis v The Queen*[92] and *Clubb v Edwards; Preston v Avery*,[93] the High Court has also acknowledged the right to dignity as most central of all human rights by citing the extra-judicial writings of Aharon Barak, who emphasises that "dignity unites the other human rights into a whole."[94] In order to infuse the stories they

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[84] Casla, above n 14, 54.
[85] Narrative Initiative, 'Towards New Gravity: Chartering a Course for the Narrative Initiative' (2017) 15.
[86] *Al-Kateb v Godwin* (2004) 219 CLR 562 at [176] (Kirby J).
[87] Ibid.
[88] Immanuel Kant, *Groundwork for the Metaphysics of Morals*, translated by Thomas E. Hill and Arnulf Zweig (Oxford University Press, 2002).
[89] Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948).
[90] Ibid.
[91] Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (Penguin Books, 2012) 39.
[92] *Monis v The Queen* (2013) 249 CLR 92 at [247] (Heydon J).
[93] *Clubb v Edwards; Preston v Avery* (2019) 267 CLR 171 at [50] (Kiefel CJ, Bell and Keane JJ).
[94] Barak, see above n 18, 5.

tell about asylum seekers with deeper meaning then, advocates should make the case for their rights by placing emphasis on their intrinsic human worth.

D Smiling Advocacy

A separate but logically adjacent part of shifting towards a hope-based narrative means engaging with those who hold different views. Advocates should avoid following the advice of the Center for Community Change when it says that we must "persuade the middle and alienate the opposite"[95] and "make our opponents appear like the outliers they are."[96] If this seems like a needlessly adversarial stance that risks losing the support of potential allies, the Center does not appear to be concerned: "to [such opponents] we say good riddance."[97] Such an approach flies in the face of the idea that we should embrace shared values in order to promote a positive narrative; long gone are the days of the Roman Empire when the words '*si vis pacem, para bellum*'[98] captured the idea that those who want peace should prepare for war. If human rights advocates are serious about building a constructive and unifying movement rooted in positivity, we must stop leaning so heavily on the language of conflict. This is precisely the mistake Conor Gearty makes when he talks about trade as "the Trojan horse within which our human rights warriors can breach all sovereign defences."[99] While he is right to argue that we must set about "creating space for dignity,"[100] preaching a vision of human rights as being rooted in hope while at the same time beating the drums of war and crying for 'human rights warriors' to achieve this taking sides and wining battles is divisive language which will set people apart rather than bring them together.[101] Because it is mediation rather than conflict which lies at the heart of persuasion, human rights advocates who seek to help pass *The Bill* should instead follow the advice of Chief Justice Warren Burger, who encouraged advocates to be "reconcilers not warriors, healers not hired guns."

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[95] Centre for Community Change, 'Messaging This Moment: A Handbook for Progressive Communicators', (Web Page, 20 September 2017) 18 <https://communitychange.org/wp-content/uploads/2017/08/C3-Messaging-This-Moment-Handbook.pdf>.
[96] Ibid 19.
[97] Ibid.
[98] Vegetius, Epitoma Rei Militaris, 3.1.
[99] Conor Gearty, 'The UN and Human Rights: Time for a Great Awakening' 14. <https://therightsfuture.com/wp-content/uploads/2010/09/The_Rights_Future_CT3_The_UN.pdf>.
[100] Ibid.
[101] Coombes, above n 69.

IV LOGOS: Persuasion through Logic

A The Reasoning for Change

Aristotle's third mode of persuasion was *logos*. While *ethos* serves to make the advocate more credible by building up her moral character and *pathos* works by appealing to emotions in order to change minds, *logos* depends "upon the speech itself, insofar as it proves or seems to prove."[102] Advocates most often make this appeal to reason by drawing on facts, data, statistics, and legal arguments. But while *logos* is essential to the delivery of a persuasive argument, advocates should use it carefully. The moral high ground is not as stable as we might assume, and so the idea that "the facts speak for themselves"[103] may undermine the shift towards hope-based communication.

B The Double-Edged Sword of International Law

The fact that Australia's policy of mandatory and indefinite detention contravenes international human rights law makes it an obvious starting point when using *logos* as a means of persuasion to help pass the Bill. In his Second Reading Speech, Andrew Wilkie thus emphasises that "it is inconsistent with international law to be keeping people in these circumstances."[104] Similarly, a recent report by the Human Rights Law Centre begins by pointing out that Australia's asylum and immigration detention policies and practices fall short of the obligations assumed by the state under the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.[105] In the media, an article in

[102] Aristotle, *Rhetoric*, 1356b16-18.
[103] Elaine Pearson, 'Guest Lecture' (Speech, Human Rights Law and Practice: Implementation – Domestic Measures, 25 August 2022). This comment was made in reference to the Xinjiang Report, where the UN Human Rights Office of the High Commissioner noted it's serious concern about systematic human rights violations taking place in China's Xinjiang Uyghur Autonomous Region. The author is grateful to Ms Pearson for giving up her time to deliver a very insightful lecture.
[104] Wilkie, above n 77, 6.
[105] Human Rights Law Centre, 'Torture and Cruel Treatment in Australia's Refugee Protection and Immigration Detention Regimes: Submission to the UN Committee Against Torture's Sixth Periodic Review of Australia, 75th Session, 2022' (3 October 2022) 3.

the *Sydney Morning Herald* notes the Human Rights Commission's warning that the State's policy of detention breaches the binding international convention on the rights of children.[106] Clearly, the international legal structure provides a central 'hook' by which advocates can legitimately call for legislative change.[107]

However, human rights advocates who use international law as a hook risk overestimating the persuasive force of such arguments. While Andrew Wilkie was right to point out that Australia's mandatory and indefinite detention is "at odds with international law,"[108] it is certainly not the case that the state's obligations under such law will always influence its behaviour.[109] The High Court of Australia has repeatedly made clear that the rules of international law do not bind as other rules do.[110] As McHugh J noted in *Al-Kateb*, even the idea that the Constitution "should be read consistently with the rules of international law has been decisively rejected by members of [that] Court on several occasions".[111] Given the Court's emphatic rejection of the idea that it is bound by international law,[112] the advocate who too-often raises the point that Australia's policies are at odds with such laws risks inviting the obvious counter-argument that the Australian legislature is not bound by international law and "may legislate in disregard of it"[113] If it is true that, as Simmons compellingly argues, such arguments "reflect a growing scepticism that the world's idealists have thrown *too much* law at the problem of human rights,"[114] then it is worth considering how advocates can use the concept of human rights law as a lever without neglecting the persuasive principles essential for such rights to flourish.

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[106] Sherryn Groch, 'Limbo: What's Happening to Refugees Still in Immigration Detention?' *The Sydney Morning Herald* (30 January 2022) <https://www.smh.com.au/national/limbo-what-s-happening-to-refugees-still-in-immigration-detention-20220126-p59rgq.html>.
[107] Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press, 2012) 6.
[108] Wilkie, above n 77, 66.
[109] Simmons, above n 106, 5.
[110] *Al-Kateb v Godwin* (2004) 219 CLR 562 at [173] (Kirby J). See also *Polites v The Commonwealth* (1945) 70 CLR 60 (where the High Court decided that the presumption that a statute should be interpreted and applied in conformity with the established rules of international law will be rebutted when the words of the statute are inconsistent with that implication).
[111] *Al-Kateb v Godwin* (2004) 219 CLR 562 at [63] (McHugh J);
[112] That is not to say that international law will have no influence in how courts resolve disputes. International laws, can, for example, be used to provide assistance in the development of the common law, resolving statutory ambiguity, and influencing the principle of legitimate expectation within the realm of administrative decision making – see generally *Mabo v Queensland (No 2)* (1992) 175 CLR 1; *Dietrich v R* (1992) 177 CLR 292; *Minister of State for Immigration and Ethnic Affairs v Teoh.*
[113] *Al-Kateb v Godwin* (2004) 219 CLR 562 at [66] (McHugh J).
[114] Simmons, above n 106, 7.

That is not to say that international law has no place in an argument in favour of passing the Bill. In light of Lord Steyn's *dictum* that in law "context is everything"[115] however, the persuasive effect of international law is strongest when it is anchored to hope-based communication. In his dissent in *Al-Kateb*, Justice Kirby masterfully employed both *logos* and *pathos* as means of persuasion when he emphasised that 'rules' is a word he deliberately avoided using in reference to international law, "preferring as [he does] "principles" or "basic principles"[116] to inform his dissent. He does not frame his dissent in the negative and argue *against* something, for example, by pointing out that Australia's policy of detention is inconsistent with international laws. Instead, Justice Kirby frames his dissent in the positive and argues *for* something: "fundamental freedoms, founded in the notions of human dignity and the principle of justice recognised in the Charter of the United Nations."[117] Another example of *logos* being used to reframe the narrative towards a positive one was an article published in *The Conversation* titled "New immigration detention bill could give Australia a fresh chance to comply with international law."

Rooted as it is in hope-based communication, this type of phraseology serves to conceal the awkward fact that such aspirations lack overriding legal force, while nonetheless articulating the hope that they may one day come to possesses such force through measures taken by Australia through its adoption of international law. The advocate can thus pull on international rule as one lever among many in persuading our government that we should live up to its aspirational values. That may be what President Maxwell of the Victorian Supreme Court of Appeal was referring to in *Royal Women's Hospital v Medical Practitioners Board of Victoria* when he noted "that there is a proper place for human-rights arguments in Australian law cannot be doubted."[118]

B An Economical Decision?

Part of using *logos* as a mode of persuasion means taking the time to think about which

[115] *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at 528.
[116] *Al-Kateb v Godwin* (2004) 219 CLR 562.
[117] Ibid at [172] (Kirby J).
[118] *Royal Women's Hospital v Medical Practitioners Board of Victoria* [2006] VSCA 85 at [72].

logical arguments will resonate most with a specific audience.[119] The point has already been made that an audience does not exist in the abstract. This explains why one of the key qualities of persuasion is careful selection of the points to be argued.[120]As Andrew Hudson warned: "if you're speaking to a group of private sector financiers, talking to them about how egregious the human rights violation is under international law might not be the best play."[121] In such a scenario, it would likely be more strategic to discuss the economic impacts of that human rights violation. Andrew Wilkie seems to have had this in mind when creating his Second Reading Speech in favour of the Bill: "not only is [Australia's policy of mandatory and indefinite detention] illegal and immoral, it's also downright expensive."[122] He goes on to emphasise that it costs "an eye-watering $460,000 to keep a person in hotel detention" in contrast to the $4,500 it would cost to help one live in the community on a bridging visa.[123] Through these powerful propositions, Wilkie fuses together his logical and moral arguments in a manner any human rights advocate could learn from.

Of course, moulding the argument to the audience requires one "to be master both of the facts and legal arguments"[124] which is another reason advocates should not fall into the trap of believing that any kind of appeal to reason will be innately persuasive. As Andrew Hudson emphasised, the good human rights advocate should "be able to see all of the effects of human rights violations and be able to talk to them in different ways." Here, it is crucial to draw a distinction about being *able* to talk about human rights violations and actually doing so. For an advocate to put her selected arguments in a form most likely to appeal to an audience means selecting them carefully. Emphatically, when using *logos* as a means of persuasion an advocate should not cast their net too wide by trying to argue every point.[125]

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[119] Chester Porter, 'Practical Advocacy' (2005) 79 *Australian Law Journal* 607 ("The persuader must select the best arguments. Nothing is achieved by putting all the possible arguments. A selection must be made of those arguments likely to succeed").
[120] Alexander, above n 13, 11.
[121] Andrew Hudson, 'Guest Lecture' (Speech, Human Rights Law and Practice: Key Competencies for Practice, 11 August 2022). The author is grateful to Mr Hudson for giving up his time to deliver a very insightful lecture.
[122] Wilkie, above n 77, 6.
[123] Ibid 7.
[124] Alexander, above n 13, 11.
[125] Porter, above n 118, 608 ("An address should stress the best argument or arguments. The famous kiss of death compliment from the Bench, "Mr Bloggs has said everything possible in favour of his client" could well mean that Mr Bloggs submerged his best points in an effort to be comprehensive").

While it is critical that we deploy the argument that will have the most impact with an audience, we must also be alive to any unintended consequences of such advocacy.[126] Consider, by way of example, the persuasive approach taken by human rights activists who opposed the Bush administration's use of torture in the so-called 'war on terror'. Of course, they drew on international human rights law by pointing to the *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment*.[127] But a separate appeal to reason was even more persuasive – the idea that torture is counter-productive in the sense that much of the evidence elicited will be unreliable.[128]

The danger of this instrumentalist approach is, as Geoffrey Robertson KC points out in *Crimes Against Humanity*, that "certain forms of torture often work."[129] The fact that torture of the kind practiced by Augusto Pinochet in Chile and Saddam Hussein in Iraq are "so bestial that a Western state could never sanction it"[130] does not mean Western states would shy away from torture if less outwardly heinous methods were discovered that could be proven to work. In that scenario, the logical argument human rights activists have raised against torture would be utterly undermined. In a similar sense, advocates should not lean too heavily on economic arguments in favour of passing *The Bill*. If they do, and mandatory and indefinite detention ever *does* become economically viable, such arguments could prove catastrophic. This is one more reason why, above all else, weight must be placed on the human right to dignity and its regard on "a human being as an end, not as a means to achieve the ends of others."[131] It is only through this shift towards hope-based communication that advocates can reframe the narrative surrounding human rights towards a more positive future.

V CONCLUSION: Bending Towards Justice

Eleanor Roosevelt once asked where universal human rights begin. It was a rhetorical question, and her answer was that they begin "in small places, close to home – so close and

[126] Hudson, above n 120.
[127] Robertson, above n 90, 715.
[128] Ibid.
[129] Ibid.
[130] Ibid.
[131] Barak, see above n 18, 26.

so small they cannot be seen on any maps of the world".[132] Christmas Island, Manus Island, or Nauru come to mind. She made the point that "unless these rights have meaning there, they have little meaning anywhere." This essay has argued that in light of the limited enforceability of international human rights law, persuasion is a crucial means by which advocates can ensure that such rights *do* have meaning there. I began by explaining why this is necessary. People suffer, directly and often tragically, because Australia jails them indefinitely with neither trial nor charge for as long as it takes to send them to the place from which they fled and whatever fate awaits them there. And as Roosevelt points out: "without concerted citizen action to uphold [human rights] close to home, we shall look in vain for progress in the larger world."[133]

I divided this essay into three parts to argue that the principles set out by Aristotle in *Rhetoric* offer a strong conceptual framework to the advocate who seeks to persuade people in their heads as well as their hearts that there is a better way. I fleshed out this skeletal framework by drawing on contemporary theories of persuasion, which helped me advance my main thesis: that the way we talk about human rights must be rooted in a more positive narrative of hope. By placing weight on dignity as chief among our values, we can create a new vision of human rights – not only as a set of laws to be followed, but as golden threads which bind us all together in our shared humanity. Of course, any optimism about the future of human rights law in Australia must be tempered by the acknowledgment that certain people will be very difficult to persuade, and some will never change their views. Just as the skilled doctor may practice her art flawlessly and still fail to heal each and all of her patients, the human rights advocate cannot persuade each and every audience. These are unfortunate facts of life, and this essay is limited by the lack of guidance it offers in regard to dealing with those who would remain aloof from the values which govern human rights. But such realities are not fatal to the idea that we can engage in hope-based communication not only to help pass *The Bill* in Australia but change the prospects for human dignity around the world. As Martin Luther King Jr reminded us: "the moral arc of the moral universe is long, but it bends towards justice."[134]

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[132] Eleanor Roosevelt, 'Where Do Human Rights Begin?' (Speech, Tenth Anniversary of the United Nations Declaration of Human Rights, 10 December 1958).
[133] Ibid.
[134] Martin Luther King, 'Sermon at the National Cathedral in Washington' (Speech, 13 March 1968).

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Convention on the Rights of Persons with Disabilities

Convention on the Rights of the Child

International Covenant on Civil and Political Rights

International Covenant on Economic Social and Cultural Rights

Universal Declaration of Human Rights

Human Rights Law and Practice

Self Marking Sheet

Student Number: 748 348

Question: How can people be more persuasive as they advocate for the human rights of asylum seekers and refugees in Australia?

Criteria	Not Shown	Low	Medium	High	Very High	Excellent
Suitability of format						■
Relevance of A to Q/topic					■	
Coherence and structure				■		
Level of Research					■	
Level of analysis					■	
Exp, grammar, spelling				■		
Footnotes and bibliography			■			

Comments: Some reflective thoughts on my essay are:

1. My essay is ambitious. I bring a lot of energy into the topic and have read widely in researching it. But this ambition is also problematic, in that, by attempting to pivot between ancient and contemporary theories of persuasion – while trying at the same time to advance my own thesis – I risk casting my net too wide, leaving less room for analysis and argument than I would like. I was quite frustrated that I could not work out how to address this issue.

2. I have tried to make my prose clear and readable and think the standard of editing is generally high. However, I do have a tendency to structure my discussion around particular

examples or quotations, rather than systematically analysing the evidence in order to build an argument (see e.g. p.12 where I critique Andrew Wilkie MP's Second Reading Speech).

3. I kept one eye on John's 'Essay Guidelines' document while drafting and editing this, and am a little nervous about the bit which says: "If I see a dozen of www addresses I'll be getting very concerned about the quality of your research". I understand the point being made (need high quality sources) but it also seems to me that a lot of the 'pioneers' of 'hope-based communication' and positive narrative ideas (e.g. Kathryn Sikkink, Thomas Coombes etc) publish on *Open Global Rights* rather than in academic journals.

4. I think the referencing is OK, but I am still very much getting a hang of AGLC4. The MULR Guide is obviously very helpful, however there were some cases where I still struggled to work out how to cite things. For example, the Elaine Pearson and Andrew Hudson guest lectures/class discussions left an impact on me that I felt ought to be referenced – but I am not sure if this is appropriate, or if they were correctly cited. I could not find many (any) journal articles etc which reference in-class discussion.

5. I tried to keep the essay under 4500 words but hit it a bit long. The 'Essay Guidelines' document says Word Code 2 applies (meaning it would be *max* 4950 words) but in the evening session where we talked about this John said we are alright to go past that – hoping I didn't misunderstand anything, or I may be in some strife.

6. I learned a lot and had a lot of fun writing this essay. It is very far from perfect, but I am probably happier with it than any I have written before. I will continue researching this area.