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Rhetorical Evil and the Prison Litigation Reform Act

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I. Introduction

This article exposes the misleading presumptions and rhetorical devices that allowed a bad bill to become law. How? The rhetorical performances of the four senators who proposed and passed the Prison Litigation Reform Act (PLRA) created narrative constructions that labeled, sustained, supported, and justified the need for harsh intercession into the federal-court system.¹ Discussion on the final passage from the 1995 Senate floor was dominated by four senators: Robert Dole (R, Kansas),² Orrin Hatch (R, Utah),³ Spencer Abraham (R, Michigan),⁴ and Jon Kyl (R, Arizona).⁵ These Congressional sponsors of the Prison

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¹ See generally A LEGISLATIVE HISTORY OF THE PRISON LITIGATION REFORM ACT OF 1996, Pub. L. No. 104-13, 110 Stat. 1321 (Bernard D. Reams & William H. Manz eds., 1997).

² 141 CONG. REC. S7524–25 (daily ed. May 25, 1995); 141 CONG. REC. S14,413–14 (daily ed. Sept. 27, 1995). During the September 27, 1995 debate, Senator Dole is identified as speaking for himself, Mr. Hatch, Mr. Abraham, Mr. Kyl, Mr. Reid, Mr. Specter, Mrs. Hutchison, Mr. Thurmond, Mr. Santorum, Mr. Bond, Mr. D'Amato, and Mr. Gramm. Pre-enactment documents of the legislative history available at *Margo Schlanger*, UNIV. MICH. LAW SCHOOL FACULTY HOMEPAGE, <http://law.michigan.edu/facultyhome/margoschlanger/Pages/PrisonLitigationReformAct> (last visited Mar. 31, 2018).

³ 141 CONG. REC. S14,418 (daily ed. Sept. 27, 1995); 141 CONG. REC. S18,136–37 (daily ed. Dec. 7, 1995). Of the identified speakers, only Senator Hatch remains in office today.

⁴ 141 CONG. REC. S14,316–17 (daily ed. Sept. 26, 1995); 141 CONG. REC. S14,418–19 (daily ed. Sept. 27, 1995).

⁵ 141 CONG. REC. S14,418 (daily ed. Sept. 27, 1995); 141 CONG. REC. S19,1113–14 (daily ed. Dec. 21, 1995).

Litigation Reform Act of 1996 abused professional rhetoric. They offered misleading statistics. They told stories that combined into a woven narrative⁶ of inmate abuse of the legal system, in which inmates purportedly file frivolous grievances. They told only one side of stories, ignoring any prisoner's legitimate facts behind the court filings. They repeatedly labeled federal judges as "liberals" who were willing to grant any inmate any frivolous request. They insisted that tax dollars were thrown away on inmate filings costs. To top all that off, they insisted that their audience, the other Senators, should fear thousands of violent inmates, court-freed and roaming the streets.

A parsing of their testimony offers strong evidence that, moving forward, concerned citizens should insist that public legislative speech be guided by strong ethical standards. At their best, public speakers should employ rhetorical devices that balance honesty and an obvious statement of both sides of an argument need to be at least acknowledged—if not given a full discussion. Then listeners—readers can trust the messenger and the message. Aristotle explained this essential element in persuasive rhetoric: listeners (and readers) require a comfortable, complicit sense of the speaker's (and writer's) having moral values, of persuading through reasoning and fact. Thus, to be persuaded, the listener wants to hear reasoning that is sufficiently plausible. Ideally, the motives of the speakers should not be self-serving but rather of benefit to a larger good—here, to the court system, inmates, and the public.

Joseph Campbell explained the need for ethical speech:

Ethics is a way of teaching you how to live as though you were one with the other [here, the speaking senators and their audience, but also America's inmates]. You don't have to have the experience because the [speaker] gives you molds of actions that imply a compassionate relationship with the other. It offers an incentive for doing this by teaching you that simply acting in your own self-interest is sin.⁷

In these public speeches, the four senators did not imagine themselves as representatives of the inmates they re-judged and condemned to limited court access. They functioned more as the ancient Greeks did: "The buccaneering chieftains in the *Iliad* did not want justice. They wanted to take whatever they chose because they were strong and they

⁶ See generally Binny Miller, *Telling Stories about Cases and Clients: The Ethics of Narrative*, 14 GEO. J. LEGAL ETHICS, 1 (2000). Professor Miller reignited my interest in ethics during a Georgetown Law School conference, after a D.C. semester where I had the opportunity to walk and discuss ethics with Father Drinan.

⁷ JOSEPH CAMPBELL WITH BILL MOYERS, *THE POWER OF MYTH* 281 (1991).

wanted a god who was on the side of the strong.”⁸ Senators with their bully pulpit hammered rather than taught.

I have drafted and redrafted this material for ten years. I do understand “irony”: my word choice and organization are not balanced or neutral. They condemn. This article is “public discourse.” Its goal is to examine the four senators’ rhetoric through Aristotelian lenses, searching out thematic evil and slanted language. I assure readers that I have examined my goals, and I hope that the rhetoric I deliberately use here will benefit the larger good—the amendment or replacement of the PLRA. My second goal is to encourage readers to examine their own prose for these abused rhetorical elements and evaluate whether they, too, benefit the common good.

Speakers and writers manipulate rhetoric for many reasons, chief among them to persuade audiences to agree with a message they might otherwise ignore or disagree with. Manipulating rhetoric in public discourse can be dangerous, though. In the context of the PLRA speakers, the rhetoric endangered the liberty and property of thousands of inmates—and perhaps endangered their lives as well, by reducing court access. The purported impetus of the PLRA was to provide a practical screening mechanism to filter unwarranted inmate claims.⁹ The growing prison overpopulation and overcrowding was certainly creating a tsunami of grievances, which placed an additional burden on the courts and an urgent need to reduce the federal-court docket. Thus an urgency helped push a bad policy. Scholar Linda Berger describes these special moments in time as the Kairos tipping points: essential moments when an argument seems sensible, rightful, and thus more persuasive than it would have been before, and maybe after.¹⁰

The senators obviously felt the need to step outside the professional standards of ethical speech, because the PLRA introduced harsh restrictions for inmate petitions. Among other requirements, it limited injunctive relief; it added an exhaustion requirement of administrative remedies (yielding access through the local requirements); it reduced or eliminated attorneys’ fees; it offered state judges the ability to screen, dismiss, and waive reply pleadings; and it required filing fees even of indigent inmates.¹¹

8 EDITH HAMILTON, *MYTHOLOGY: TIMELESS TALES OF GODS AND HEROES* 7 (2017).

9 See generally Squire Servance, Jones v. Brock: *New Clarity Under the Prison Litigation Reform Act*, 3 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 75, 82 (2008); Jones v. Brock, 127 S. Ct. 910, 925–26 (2007).

10 Linda Berger, *Creating Kairos at the Supreme Court: Shelby County, Citizens United, Hobby Lobby, and the Judicial Construction of Rights Moments*, 16 J. APP. PRAC. & PROCESS 147, 150–52 (2015).

11 110 Stat. 1321-71, as amended, 42 U.S.C. § 1997e *et seq.*

To get other senators to vote for those unusually harsh corrections to pro se filings, the sponsoring senators slipped the PLRA as a rider into an omnibus appropriations bill for farmers.¹² Thus in addition to unethical use of rhetoric, the senators resorted to a common but unethical tactic of “hiding” the bill within another, more popular one. With their minds and perhaps attention elsewhere, then, the Senate audience may not have been aware of deceitful rhetoric but instead were convinced by the rhetorical manipulation of repetition, false statistics, and hyperbole about federal courts’ excessive “interference” with inmate litigation.

Abuse of rhetoric might be difficult to recognize within today’s flaming Twitters and fast-moving political slogans. And yet . . . it is essential for those within the legal profession to stand back, reflect, and parse this congressional language precisely because it allowed fear and emotion to overcome logic. Beginning in 1998, thousands of citizens lost much of their ability to seek redress from cruel prison conditions.

II. Abuse of a Rhetorical Theme

A review of their congressional rhetoric allows a practical legal rhetorician to evaluate the arguments through a wide-ranging set of criteria, most handed down from Aristotle. These four speeches provide examples of an abused, embedded rhetorical theme of Chaos; ipse dixit statements of exaggeration and false–bogus language; and repetition of the theme while ignoring opposing views. Most professional rhetoric employs a theme, an underlying message that weaves into and around the discussions, facts, and conclusion. In the PLRA speeches, the common theme is Chaos: the federal courts and their prison oversight have created Chaos and discord throughout the nation’s states. To make this point, the speakers break professional standards with gross distortions, simultaneously denigrating federal-court review of inmate filings. The *ethos* should reflect character, but what character? Aristotle believed that the speaker “must inspire confidence, credibility, good senses, good morals, good will.”¹³ Each of the four speeches was filled with false language and false anecdotes: in retrospect, we can judge that the duplicity instead produced disrespectful language and distorted values.

The four senators employed a primary characteristic of political rhetoric—a **rhetorical theme**:¹⁴ they framed the need for political action

12 The PLRA was part of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321.

13 ADINA ARVATU & ANDREW ABERDEIN, RHETORIC: THE ART OF PERSUASION 6 (2016).

14 Rhetorical themes can be used, and can be abused, of course. We remember the speeches and writings of Churchill, Martin Luther King, Nimitz, and Lincoln, for instance, for their strong patriotic rhetorical themes.

(restricting prisoners' court access) as "Our" battle against Evil. These speakers repeated metaphors of overreaching federal courts and of frivolous filings by bored and wily inmates. A subliminal message throughout is of a rightful Throne (power over inmate litigation) usurped by Evil (liberal federal judges). The strategy reinforced the theme and worked.¹⁵ The senators chose metaphoric verbs to connect the states' prison-litigation struggles with the struggle of Heroes attempting to Save the Nation. Reviewed through the lens of this archetypal theme of battle and retribution, the senators' rhetoric is a solid, interwoven mass of persuasion. If "liberal federal judges" and whining inmates are the Evil, then Congress is perfectly positioned to set itself as Savior, the Knight who protects the Kingdom from Chaos, Crime, Abuse of Process, and Abuse of Taxpayer Money.¹⁶ The rhetoric of the four senators reviewed below played on that ancient myth of Hero Saving the Kingdom. And in the rushed five days of testimony, those four senators trumpeted that story¹⁷ of the perceived crisis in America's courts of Law and Order.

It's not a bad story:

The narrators and theme: The storytellers (Defenders of Traditional Values) are the impassioned Congressmen. These Defenders created a dichotomy of exclusion and confusion: "we" are the defenders of state courts, and "they" are the overreaching federal courts.¹⁸ The repetition of this Us–Them theme was an exaggeration of a "kind of ritualized exclusion"¹⁹ that separated Congressional listeners from both the traditional judiciary and the prison population. Exaggerating the dichotomy between "Us" and "Them" allowed speakers to pull listeners into their privileged world and even discouraged independent thought about "The Other."

The story: Liberal federal judges have stolen the Power from the rightful owners—state judges and prison officials. To develop that theme, the senators embedded coded cultural tropes of mythic representation.

15 The Senate audience probably read *The Chronicles of Narnia* series to their children, C.S. Lewis' tale of children who have to protect the kingdom of Narnia from Evil and restore the throne to its rightful owner. They may have watched their children or grandchildren play *Dungeons and Dragons*, a wildly popular board game with heroic figures and wildly evil villains.

16 Anthony G. Amsterdam and Jerome Bruner provide a brilliant and extended application of a similar theme and its consequences on the race-discrimination decisions in *MINDING THE LAW* (2000).

17 "[T]he telling of the story is also the interpretation of a story . . ." NEIL FORSYTH, *THE OLD ENEMY: SATAN AND THE COMBAT MYTH* 95 (1989).

18 Discussing a similar strategy in *Spencer v. Texas*, 385 U.S. 554 (1967), Anthony G. Amsterdam points out rhetorical "manipulation to posture the Court exactly where it wants to be between the historically established, immemorably venerated tradition of prudence and the ever-lurking, imminently menacing danger that threatens the Nation if judges stray from that tradition." Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 355, 360 (1992).

19 Richard Boyd, *Narratives of Sacrificial Expulsion in the Supreme Court's Affirmation of California's 'Three Strikes and You're Out' Law*, 11 LEGAL COMM. & RHETORIC: JALWD 83, 86 (2014).

Like a repeated metaphor, a rhetorical trope is used in a figurative sense, invoking a feeling or memory. For instance, when readers find a ticking clock in a scene, they recognize passing time.²⁰ The deliberate tropes in the senators' speeches concentrated on the Hero archetype. In our Western culture, a White Knight is the good guy, just as cowboys in white hats are assumed to be the Heroes on an old movie.²¹ Listeners respond to these cultural tropes without realizing the source of their response.²² The senators constantly alluded to federal judges who abused their limited positions. But the implicit message was decoded and received as senators recognized the threat and danger to the traditional world of Power. Naturally, to save our historically safe and privileged Nation, our Defenders had to pass this bill.

Professor Ruth Anne Robbins investigated the relationship between mythology and folklore heroes to lawyering decisions and their choices of rhetoric; she concluded that "people respond—instinctively and intuitively—to certain recurring story patterns and character archetypes."²³ Whether the four speakers came to their rhetorical choices deliberately or not, they ended up using markedly similar language of insult about "them" and of power for "us." The Senate voted to implement the PLRA. The rhetoric overcame the real consequences for the country's inmates. As Professor Robbins explained, "we respond viscerally to certain story patterns unconsciously."²⁴ Following the consistently repeated storyline of a usurped Throne, listeners voted the PLRA into law.

A. "Us" versus "Them" with Senator Dole

Senator Dole began the series of speeches with a strong emphasis on "us" versus "them," dividing "our" individual states and prison officials from the "other," the federal judiciary.²⁵ Senator Dole created an archetype, the Usurped Throne, to convince Congress that their vote would Return Control of Our Country. He offered no credible, empirical foundation. Instead, he promoted the Hero archetype (we) offering guidelines to "restrain" (as in a battle) federal judges. Emphasizing the unnecessary

20 Additional tropes can be found at <https://literaryterms.net/trope/> (last visited Mar. 31, 2018).

21 Songs elicit the same cultural-specific responses. For example, 1970s Western-world moviegoers recognized John Williams' music score to *Jaws* even if it were used in commercials. Danger!

22 See Jonathan Yovel, *Running Backs, Wolves, and Other Fatalities: How Manipulations of Narrative Coherence in Legal Opinions Marginalize Violent Death*, 16 LAW & LIT. 127, 135–36 (2004).

23 Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Character and Paradigm of the Archetypal Hero's Journey*, 29 SEATTLE U. L. REV. 767, 768 (2006).

24 *Id.* at 769.

25 See 141 CONG. REC. at S14,413–14.

intervention of liberal judges, Senator Dole accused them of “micro-managing,” an abstract yet familiar pejorative synonym for “control.” Micromanaging was bad:

- “Tough new guidelines . . . will work to *restrain liberal Federal judges* who see violations on constitutional rights in every prisoner complaint and who have used these complaints to *micromanage State and local prison systems.*”²⁶

Was a review of inmate petitions “micromanaging”? Senator Dole gained his rhetorical power with a narrative that “exists chiefly in its ability to justify its particular rendition of events and the actions that may derive from the telling of that story in that way.”²⁷ His worry actually centered on the injunctions and judicial oversight of appalling prison conditions that were revealed by those petitions; Senator Dole lumped petitions and injunctions together. The Senate will save the nation and its criminal-justice system by taking away its proper role in prison oversight; and thus it came to pass.

Joseph Campbell anticipated this universal story:

The usual hero adventure begins with someone from whom something has been taken, or who feels there’s something lacking in the normal experiences available or permitted to the members of his society. The person takes off on a series of adventures beyond the ordinary, either to recover what has been lost or to discover some life-giving elixir. It’s usually a cycle, a going and a return.²⁸

B. “Chaos! Be Afraid” with Senator Hatch

Senator Hatch stepped into the Chaos story line by emphasizing fear: the nation should fear an out-of-control federal judiciary; citizens should fear inmates who might win court cases and be released to commit “vicious crimes.”²⁹ Senator Hatch’s rhetoric of fear allowed him to bang home his theme: What would happen if the Senate and the PLRA did not stop these imprisoned criminals who churn out frivolous and excessive prison litigation? The crushing burden would overcome our court system.³⁰ The pendulum of possible responses swings only one way: Wake up! Save the Nation!

²⁶ *Id.* at S14,414 (emphasis added).

²⁷ Boyd, *supra* note 19, at 87.

²⁸ CAMPBELL WITH MOYERS, *supra* note 7, at 152.

²⁹ See 141 CONG. REC. at S14,418; 141 CONG. REC. at S18,137.

³⁰ See 141 Cong. Rec. at S18,136-37; ; 141 CONG. REC. at S14,418.

Senator Hatch called on Congress to stand on the side of taxpayers against criminals and federal judges—an odd duality of Evil. The PLRA would “restore balance” against federal-court orders, setting up the proper Kingdom once the federal judges’ orders are limited.³¹ The red herring in this logic is of course the scope of the PLRA, which has nothing to do with the laws citizens might break that land them in prison to begin with.

- “[The PLRA will] help *restore balance* . . . and will *ensure* that *Federal court orders* are *limited* to remedying actual violations of prisoners’ rights, *not letting prisoners out of jail*.”³²
- “*Nearly every day* we hear of *vicious crimes committed by individuals who should have been locked up*.”³³

Allowing inmates a chance to rejoin society would be “another kind of crime committed against law-abiding citizens.”³⁴

He insisted that states’ “competent administrators” would look out for society’s interests “as well as the legitimate needs of prisoners.”³⁵ These would be, presumably, the same administrators who created the incident or rules that inmates were petitioning to improve. He urged Congress to keep Us safe by slamming the revolving door on the prison gate. Those of Us Outside those gates would be, ergo, safe. This language continued the implicit message that the Senate needed to restore the glorious past.

C. “We Will Eliminate Intrusive Oversight,” with Senator Kyl

The third Senator who battled the Evil of excessive prison litigation shamed the courts’ legitimate and mandated procedures. Senator Kyl announced that his testimony was to focus exclusively on Special Masters, those experts chosen by the courts to oversee court-ordered repairs to broken prison systems.³⁶ Special Masters are special investigators; as part of Federal Court Decree, Special Masters oversee the corrections of problems within a prison system. They have the power to visit prisons, interview both personnel and inmates, evaluate, and eventually make recommendations to both the prison administrators and the court.³⁷

31 See *id.* at S14,418.

32 *Id.* (emphasis added).

33 *Id.* (emphasis added).

34 *Id.*

35 *Id.*

36 *Id.*

37 See Legal Information Institute, *Special Masters*, WEX, [https://www.law.cornell.edu/wex/special_master_\(last\)](https://www.law.cornell.edu/wex/special_master_(last)) (last visited Mar. 31, 2018) (describing the duties and powers of a special master); Vincent Nathan, *The Use of Masters in Institutional Reform Litigation*, 10 U. TOL. L. REV. 419, 435

(1979) (describing the role of the Special Masters in the litigation that culminated in the Fifth Circuit’s decision in *Newman v. State of Alabama*, 559 F.2d 283 (5th Cir. 1977)). A more recent example of using a Special Master in a criminal case: On Oct. 13, 2016, U.S. District Judge Julie Robinson named attorney David R. Cohen a Special Master as a third-party expert to examine the facts and determine if inmates’ constitutional rights had been violated when the Correction Corporation of America (CCA) recorded client–attorney jail and prison meetings and turned the recordings over to prosecutors. See *generally* United States v. Black, No.16-CR-20032, 2018 Westlaw 398457 (D. Kan. Jan. 1, 2018).

Senator Kyl made use of the persuasive rhetorical device that Aristotle described as “shame”:³⁸ he manipulated conventional reactions to the use of Special Masters and so turned traditionally sound rhetorical elements—statistics or examples—into unexpected negative attacks.³⁹ He shaped his audiences’ reactions by switching these legitimate judicial actions into shameful ones, and assumed no one (“us”) would want these shames to continue.

- “[S]pecial masters, who are *supposed to assist* judges as factfinders . . . all *too often* have been *improperly used*....”⁴⁰

Senator Kyl set the Senate members up as external judges of Special Masters, hoping to cleanse the system. Note Senator Kyl’s use of the loaded adjective “lavish” and the passive, ambiguous “was allowed” that subtly encouraged listeners to believe Special Masters needed to be curtailed or eliminated.⁴¹ Improperly directing these federal experts to investigate inside the prison systems allowed these Special Masters to function as tools of the Enemy, micromanaging and interfering with local and states’ proper authorities.

Senator Kyl also used synecdoche, where a part is made to represent the whole. He used a few examples of Special Masters to tar the whole system:

- “[Special Masters allow] maintaining *lavish law libraries* to distribut[e] **up to** 750 tons of Christmas packages each year.”⁴²
- “One special master was *even allowed* to hire a chauffeur, at taxpayers’ expense, because he said he had a bad back.”⁴³
- “In Arizona, special masters have *micromanaged* the department of corrections, and have performed all manner of services *in behalf of* convicted felons.”⁴⁴

Staying within the archetype of Savior, Senator Kyl surgically separated the Special Masters from “us,” from powerful senators, from reasonable state judges who know better than pesky outsiders. The PLRA

³⁸ Aristotle defined shame as “a certain pain or agitation over bad deeds, present, past, or future that appears to bring one into disrepute.” Nicholas Higgins, *Shame on You: The Virtuous Use of Shame in Aristotle’s Nicomachean Ethics*, 9.2 EXPOSITIONS 1, 2 (2015) (citation omitted).

³⁹ See 141 CONG. REC. at S14,418.

⁴⁰ *Id.* (emphasis added).

⁴¹ See *id.*

⁴² *Id.* (emphasis added).

⁴³ *Id.* (emphasis added).

⁴⁴ *Id.* (emphasis added).

discussions reflect a concern throughout penal institutions that the federal takeover of the Fifth Circuit federal prisons could happen anywhere, and no prison official would want that intrusion into their domains. One of the most famous and far-reaching uses of the Special Masters is, indeed, a prison case, *Ruiz v. Estelle*. This 1980 class-action injunction by Judge William Justice sent Special Masters throughout the entire Texas prison system and took until 1999 to finally be resolved.⁴⁵ Today the word Ruiz sends shivers down the collective backs of wardens.

D. “Let’s Punish this Evil, Save State Court System, Save Taxpayers,” with Senator Abraham

The mythic story continued. Senator Abraham wanted retribution for the loss of power and the insult to taxpayers caused by purportedly excessive prison-condition litigation. He saw punishment as appropriate and encouraged “hard time” for inmates; he assumed hard-line punishment would make society safer.⁴⁶ His draconian rhetoric appealed to the human propensity for negativity, for expecting or assuming the worse.⁴⁷ His heroes, of course, would be the senators who vote to pass the PLRA so that state officials could properly get back to work using their discretion to review inmate petitions. Senator Abraham produced a traditional Strawman fallacy,⁴⁸ mischaracterizing the courts’ actions so the Heroes could attack the federal courts, which had “control” versus “elected officials.”

- “[J]udicial orders entered under the federal law have effectively *turned control* of the prison system away from *elected officials* . . . over to the courts.”⁴⁹

45 See generally *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982); see also *Cruel and Unusual Punishment: Ruiz*, THE TEXAS POLITICS PROJECT, https://texaspolitics.utexas.edu/archive/html/just/features/0505_01/ruiz.htm (last visited May 2, 2018). Indeed, the entire Congressional record of the PLRA debates is replete with derogatory references to the “intrusions,” “takeover,” and “overreach.” *Ruiz’s* success resulted in bitterness and righteous anger from most state and prison officials. Prison authorities just couldn’t see the need for oversight by federal observers. For instance, former Texas warden Lon Bennett Glenn blames all current prison problems on the federal judge who overhauled prison conditions and thus created, he believes, the expensive, vast network of the Prison Industrial Network. He liked the way the system ran before Judge William Justice ruled against its barbarism. See generally LON BENNETT GLENN, *THE LARGEST HOTEL CHAIN IN TEXAS: TEXAS PRISONS* (2001).

46 See 141 CONG. REC. S14,418–19.

47 See Kenneth D. Chestek, *Of Reptiles and Velcro: The Brain’s Negativity Bias and Persuasion*, 15 NEV. L. J. 605, 613–14 (2015) (“Because the negativity bias is thought to be an evolutionary adaption, it is very deeply seated in our psyches. It probably resides in the amygdala, the portion of the brain that is closely associated with emotional processing and fear responses.”).

48 See Elizabeth Fajans & Mary Falk, *Shooting from the Lip: United States v. Dickerson, Role [Im]morality and Ethics of Legal Rhetoric*, 23 U. HAW. L. REV. 1, 18 (2000) (discussing the concept of a “strawman argument”).

49 141 CONG. REC. at S14,419 (emphasis added).

He mischaracterized the attempts to correct prison conditions by stating that they were undoing the national prison system.

- “[Federal judges’ interventions were] undermin[ing] the legitimacy and punitive and deterrent effect of prison sentences.”⁵⁰

Sen. Abraham never let his audience forget that prisons were intended to be bad places for bad people. He used hyperbole and ambiguous language to describe the Chaos of the current system of federal judicial Power.

- “By *interfering* with the fulfillment of this punitive function [hard time], the courts are effectively *seriously undermining the entire criminal justice system*.⁵¹

Somehow this senator had decided that the federal judiciary had usurped the Throne and had taken indefinite control of prisons—for their own whims.

- “[N]o longer will prison *administration be turned over to Federal judges* for the indefinite future for the slightest reason.”⁵²

The “indefinite” control included intrusive micromanagement, already defined as a leading Evil in this mythic battle.

- “This balanced bill that . . . puts an end to *unnecessary judicial intervention and micromanagement*.”⁵³
- “[Our bill] requires that the relief be *narrowly drawn* and be the *least intrusive* means of protecting the Federal rights.”⁵⁴
- “[Our bill provides that] States will be able to run prisons *as they see fit* unless there is a Constitutional violation”⁵⁵

While the federal courts were micromanaging, they also cost taxpayers too much money. This fear-mongering reference is not followed by any specific costs.

- “The courts, in turn, *raise the costs* of running prisons far beyond what is necessary”⁵⁶

.....

50 *Id.*

54 *Id.* (emphasis added).

51 *Id.* (emphasis added).

55 *Id.* (emphasis added).

52 *Id.* (emphasis added).

56 *Id.* (emphasis added).

53 *Id.* (emphasis added).

If prisoners were rewarded by an interfering federal court's requiring prisons to follow the law, prisoners would receive an unearned profit.⁵⁷ In the scary world that Senator Abraham described, inmates who filed frivolous petitions would also profit when they were set free on society; no one wanted prisoners to profit. The PLRA would prevent their release, somehow, and provide a blow in the epic battle against the current Chaos.

II. Ipse Dixit

A second characteristic abuse of rhetoric is the use of ipse dixit,⁵⁸ to discourage questioning and critique.⁵⁹ The ipse dixit statements insert unsupported (bogus) terminology; false anecdote; fear-inducing language; false statistics; exaggeration; sarcasm and mockery; and the deliberate mingling of general and specific terms like "courts" and "liberal federal judges." By forcefully stating their conclusions as fact,⁶⁰ the four senators discouraged questioning. The false anecdotes and exaggerations reveal a contempt for the ideal discourse that a Congressional audience should have expected, and, perhaps most surprising and most discouraging, their stereotyping, mockery, and exaggeration reveal a staggering disrespect for the federal court system and its judges.

A. Sarcasm, Insult, and Abused Statistics with Senator Dole

Ipse dixit rhetoric can take many forms, including offering an incomplete perspective with statistics and using undefined terms. When Senator Dole introduced this bill, he labeled it the "new and improved version of S. 866 . . . to address the alarming explosion in the number of frivolous lawsuits filed by State and Federal prisoners."⁶¹ He did not define "frivolous."⁶² Senator Dole quoted American Enterprise Institute scholar

⁵⁷ Franklin Zimring describes the underlying logic: "The modern politics of criminal justice involve rhetoric that imagines criminal sentencing as a zero-sum game between victims and offenders. If one prefers the victim, then punishment should be increased. Those who oppose increasing punishment must, in this view, prefer offender interests to victim interests. To live in this kind of world is to deny that expert opinion is of any real importance in making policy." Franklin E. Zimring, *Populism, Democratic Government, and the Decline of Expert Authority: Some Reflections on "Three Strikes" in California*, 28 PAC. L. J. 243, 253 (1996).

⁵⁸ Ipse dixit statements are "Latin for 'he himself said it,' meaning the only proof we have of the fact is that this person said it." WILLIAM C. BURTON, *BURTON'S LEGAL THESAURUS* (4th ed. 2007).

⁵⁹ Fajans & Falk, *supra* note 48, at 17 (describing an ipse dixit argument as one "asserted without support but so forcefully as to discourage questioning or critique").

⁶⁰ Senator Dole read into the record a letter from a group of state attorneys general that argued "[t]his amendment will take us a long way toward curing the vexatious and expensive problem of frivolous inmate lawsuits." 141 CONG. REC. at S14,418.

⁶¹ 141 CONG. REC. at S14,413.

⁶² There is a legal distinction between "legally frivolous" (can't meet technical requirement for stating a claim) and "substantively frivolous" (no legitimate grievance). LYNN S. BRANHAM, *LIMITING THE BURDENS OF PRO SE INMATE LITIGATION: A TECHNICAL-ASSISTANCE MANUAL FOR COURTS, CORRECTIONAL OFFICIALS, AND ATTORNEYS GENERAL* 40–42 (ABA

Walter Berns as the source of an underlying premise that the number of due-process and cruel-and-unusual-punishment complaints filed by prisoners “has grown astronomically—from 6,600 in 1975 to more than 39,000 in 1994.”⁶³ Senator Dole did not report the underlying statistics—the astronomical growth of the prison population during those years.⁶⁴ Thus he created a false dichotomy of bogus terms that appeared to stand on solid ground.

Senator Dole abused statistics when he used them to insult the judiciary and mock the democratic concept of releasing overcrowded prisoners:

- “In 1993, . . . Florida put 20,000 prisoners on early release because of a prison cap order issued by a *Federal judge who thought* the Florida system was overcrowded and thereby inflicted cruel and unusual punishment on the State’s prisoners.”⁶⁵

Senator Dole allowed an ambiguous “estimates” of costs for his basic generalization for “no-merit” inmate lawsuits:

- “The National Association of Attorneys General *estimates* that inmate civil rights litigation costs the States *more than* \$81 million each year. Of course, most of these costs are incurred defending lawsuits that *have no merit whatsoever*.”⁶⁶

In addition to taking statistics out of context and insulting inmate petitioners, Senator Dole also appealed to the subliminal context of survival. He connected citizens’ subliminal and explicit fears to the need for the PLRA. He referred to “violent criminals”⁶⁷ rather than, for instance,

1997). Undoubtedly, Senator Dole and his staff understood this distinction but did not raise it. However, the Cato Institute agreed that prisoners’ lawsuits needed curtailment, apparently, and referred to the PLRA as “a revolution” against court orders that responded to inmate litigation. Ross Sandler & David R. Schmammann, *Empowering Local Lawmakers: The Prison Litigation Reform Act*, CATO INSTITUTE (Feb. 10, 1997), <https://www.cato.org/publications/commentary/empowering-local-lawmakers-prison-litigation-reform-act> (last visited Mar. 31, 2018). The authors observed that the PLRA “is a revolution longed for by many localities. Twenty-four prison agencies nationwide chafe under population caps imposed by federal courts, and more are subject to court orders regulating prison conditions in general.” *Id.* Sandler and Schmammann then repeated, verbatim, the incorrect and undocumented list of Michigan petition topics. *See id.*

⁶³ 141 CONG. REC. at 14,413. Professor Berns was known for dismissing the “pious sentiment” of citizens who believe that criminals need rehabilitation rather than death. *See generally* WALTER BERNs, FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY (1979). Senator Dole’s use of Professor Berns’ opinions and facts—right at the beginning of his floor speech—set the tone, the theme, and the conclusion to the debate.

⁶⁴ Lynn Branham explains that while it is true that the number of state prisoner cases filed in federal court had risen dramatically in the years preceding passage of the PLRA, the numbers have not increased faster than the number of people put into state prisons over the years 1980–1995. BRANHAM, *supra* note 62, at 26–28.

⁶⁵ 141 CONG. REC. at S14,414 (emphasis added).

⁶⁶ *Id.* at S14,413 (emphasis added).

⁶⁷ *Id.*

“inmate petitioners.” Anyone would fear a violent criminal. Then he connected these criminals with citizens’ taxes. He stated that taxes would be “better spent prosecuting violent criminals” so that local law enforcement could better use that money “fighting illegal drugs, or cracking down on consumer fraud.”⁶⁸ He thus reassured senators that their constituents would approve of the PLRA.

His vocabulary screamed “fear!” and compared court filings to the plague and explosions: “Explosion,” “plaguings,” “astronomically,” “no merit whatsoever,” “thousands of violent criminals back on city streets,” “disastrous results,” “alarming explosion in the number of frivolous lawsuits,” “the litigation explosion now plaguing our country.” The prison world as he exaggerated it was out of control, and the federal judiciary’s role in the disaster needed to end.

Senator Dole mocked inmates’ prison problems: “insufficient storage locker space, a defective haircut by a prison barber, the failure of prison officials to invite a prisoner to a pizza party for a departing prison employee, and yes, being served chunky peanut butter instead of the creamy variety. The list goes on and on.”⁶⁹ Importantly, the list is also false. The Hon. Jon O. Newman, Circuit Judge for the United States Court of Appeals for the Second Circuit, investigated the exaggerated claims of the Attorneys General, news reports, and legislators about three cases Senator Dole used to exemplify inmate complaints. Judge Newman stated, “I was skeptical of the description of these three cases because it had not been my experience in twenty-four years as a federal judge that what the attorneys general describe was at all ‘typical’ of prisoner litigation.”⁷⁰ Judge Newman decided to review the court documents. Among the facts were these:

In the “chunky peanut butter” case, the prisoner did not sue because he received the wrong kind of peanut butter. He sued because the prison had incorrectly debited his prison account \$2.50 under the following circumstances. He had ordered two jars of peanut butter, one sent by the canteen was the wrong kind, and a guard had willingly taken back the wrong product and assured the prisoner that the item he had ordered and paid for would be sent the next day. Unfortunately, the authorities transferred the prisoner that night to another prison, and his prison account remained charged \$2.50 for the item he had ordered but never received. . . . Their misleading characterization of the case was repeatedly

68 *Id.*

69 *Id.*

70 Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 *BROOK. L. REV.* 519, 521–22 (1996).

cited during congressional consideration of proposals to limit prisoner litigation.⁷¹

Professor Steve Johansen distinguishes between stories meant to represent truth and those intended as mere example of what might happen;⁷² these PLRA stories were repeated as truth rather than hypotheticals.

Senator Dole also abused the standards of professional rhetoric by cherry-picking one academic to quote during this last Senate floor presentation.⁷³ That academic, current University of Pennsylvania Professor John J. DiIulio Jr., would later be described by the *New York Times* as “super scapegoating” troubled youths through his coining of the term “super-predator” and his apocalyptic pronouncements of impending disasters from youth crime that only harsh prison sentences could restrain.⁷⁴ In addition, he harshly criticized federal judges for being too soft on juveniles.⁷⁵ Senator Dole quoted one of his quips during the debate regarding a federal judge:

• “Federal Judge Norma Shapiro has *single-handedly decriminalized property and drug crimes* in the City of Brotherly Love . . . Judge Shapiro has done what the city’s organized crime bosses never could; namely, turn the town into a major drug smuggling port.”⁷⁶

In scholarly articles and T.V. interviews, the professor had repeatedly predicted an impending disaster that required harsh prison sentences to restrain.⁷⁷ The *New York Times* reporter Clyde Haberman later summed up the hysteria and false statistics that Senator Dole alluded to: “What

⁷¹ *Id.* at 522.

⁷² Steven J. Johansen, *This is Not the Whole Truth: the Ethics of Telling Stories to Clients*, 38 ARIZ. ST. L. J. 961, 988–89 (2006).

⁷³ See 141 CONG. REC. at S14,414

⁷⁴ DiIulio, then a political scientist at Princeton and now a Professor of Politics, Religion, and Civil Society at the University of Pennsylvania, popularized the term “superpredator” for youths, a concept that led to adult sentencing. See Clyde Haberman, *When Youth Violence Spurred ‘Superpredator’ Fear*, N.Y. TIMES, Apr. 4, 2006, <https://www.nytimes.com/2014/04/07/us/politics/killing-on-bus-recalls-superpredator-threat-of-90s.html> (last visited Mar. 31, 2018). This neologism labeled the fear of masses of youths destroying American society; it was later called “super-scapegoating” by critics. See *id.*

⁷⁵ See *id.*

⁷⁶ 141 CONG. REC. at S14,414 (emphasis added). Judge Shapiro’s recent obituary described the relevant case: “In the best-known case involving her, Judge Shapiro oversaw a prison overcrowding case that would be part of the court system from 1971 to 2001. In 1986, she set a cap on the number of inmates to be allowed in the city prison system. When the limit was reached, those charged with nonviolent crimes were let go. The actor Charlton Heston, then president of the National Rifle Association, denounced her for the cap. Others expressed problems with her decision.” *U.S. District Senior Judge Norma Shapiro*, 87, PHILA. INQUIRER, July 23, 2016, http://www.philly.com/philly/news/20160723_U_S_District_Senior_Judge_Norma_Shapiro_87.html (last visited Mar. 31, 2018).

happened with the superpredator jeremiads is that they proved to be nonsense. . . . [A] funny thing happened on the way to the apocalypse. Instead of exploding, violence by children sharply declined.”⁷⁸ Yet leaning on the academic credentials of Professor DiIulio, Senator Dole described a city that put “thousands of violent criminals back on the city streets, often with disastrous consequences.”⁷⁹ Combining sarcasm and insult with synecdoche, he relied on Professor DiIulio’s insult of a federal judge as an example of “liberal Federal judges” who used the population prison cap to release criminals.⁸⁰ Following the mythological journey of the Hero saving civilization, Senator Dole repeated this disrespectful language and breached the ethic of both ethos and pathos.⁸¹ In their essay *Shooting from their Lip*, Elizabeth Fajans and Mary Falk note that

Even representative advocates [like senators] are constrained, however, by the threshold “veracity” principle, which forbids lying and gross distortions. Even though representative advocates do not purport to speak in their own voice [e.g., senators speak for constituents], they can still be guilty of falsehood when they purport to recount facts. Although “certain uses of rhetoric or psychological manipulation to highlight evidence and gain attention are permissible, even if undesirable . . . , outright lying and gross distortion of facts are prima facie . . . criticizable.”⁸²

B. Exaggerated and Loaded Terminology with Senator Hatch

In his speech, Senator Hatch masterly manipulated rhetoric, first using language to invoke fear (*ad baculum*⁸³) and then claiming that the PLRA would “restore balance” and “limit” court orders to “actual violations.”⁸⁴ He began with terminology and anecdotes that pointed to a runaway federal judiciary. The PLRA would save Us:

• “[The PLRA will] help *restore balance* . . . and will *ensure* that *Federal court orders are limited* to remedying actual violations of prisoners’ rights, *not letting prisoners out of jail*.”⁸⁵

His hyperbole was designed to sway the audience with its references to imbalance, to convince his audience that the Senate’s job was to vote for the PLRA and thus restore the Traditional Kingdom. As Joseph Campbell postulates, “That’s the basic motif of the universal hero’s journey—leaving

⁷⁷ See Haberman, *supra* note 74.

⁷⁸ *Id.*

⁷⁹ 141 CONG. REC. at S14,414

⁸⁰ *Id.*

⁸¹ See generally Fajans & Falk, *supra* note 48, at 20, 22, 43.

⁸² *Id.* at 10 (quoting Robert Audi, *The Ethics of Advocacy*, 1 LEGAL THEORY 251, 252 (1995)).

⁸³ ARVATU & ABERDEIN, *supra* note 13, at 5.

⁸⁴ See 141 CONG. REC. at S14,418.

⁸⁵ *Id.* (emphasis added).

one condition [judicial chaos] and finding the source of life [enact the PLRA] to bring you forth into a richer or mature condition.”⁸⁶

To reach that Kingdom, Senator Hatch exaggerated with flame-thrown adjectives. The term “vicious crimes” had nothing to do with prison conditions or habeas request. Rather, it evoked an image of murderers and child rapists. Of course, that term provokes. Similarly, the PLRA would not actually “slam shut the revolving door on the prison gates.”⁸⁷ The PLRA does not address recidivism. Senator Hatch misdirected the topic to confuse prison-condition litigation with the well-publicized problems of reoffending inmates who eventually are returned to prison. Those Senators who wanted to be seen as tough-on-criminals would be subliminally affected by the active, violent verb “slam shut.” Senator Hatch continued misdirecting by labeling the “revolving” door of prison “gates.”⁸⁸ Behind all that negative terminology was the unspoken, ironic reality: the PLRA does not address recidivism.

Sen. Hatch understood his audience and appealed to them from a perspective of old-fashioned intentionalists, those who “transmit [traditions] from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization.”⁸⁹ Insisting that “it is time to wrest control . . . from lawyers and inmates” is “loaded” terminology, also. He pushed the fear buttons of listeners with a physical image of having to pull control back to the states, to pull that control from lawyers, to pull that control from inmates. This language reiterates his theme that the Traditional Kingdom was under attack. Professor Robert Ferguson describes this as “a rhetoric of inevitability that translates into a language of obedience.”⁹⁰ Without intervention, Tradition would be doomed, so the Senate simply had to step in and save the day.

Senator Hatch offered hyperbole as truth and vivid inmate stories as examples to sway listeners to believe that inmate petitions were all frivolous; for instance, employing synecdoche, he used one example to imply the whole system was a scheme against law-abiding citizens. Senator Hatch used those vivid stories to crystalize the anecdotes in listeners’ minds. Each story stands for a larger “truth.” As Professor Berger says, Kairos is a crystallization of the “essential moment [that] leaves us with a lasting image that stands in for and evokes a larger context, picture, or story.”⁹¹ Whatever the audience might have thought of inmates before,

⁸⁶ See CAMPBELL WITH MOYERS, *supra* note 7, at 152.

⁸⁷ See 141 CONG. REC. at S14,418.

⁸⁸ *Id.*

⁸⁹ Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 200, 215 (1990).

⁹⁰ *Id.*

⁹¹ Berger, *supra* note 10, at 155.

or of prisoner litigation, now they will remember that Senator Hatch reported that an inmate sued over trivia—an inferior athletic shoe.⁹²

• “In one *frivolous* case in Utah, an inmate sued *demanding* that he be issued Reebok or L.A. Gear brand shoes”⁹³

How ridiculous that story is . . . and yet how false because the senator did not provide a full picture as he presented the argument. He effectively created a distorted picture of indulged inmates. Notice the verb choice for the prisoner’s petition to the court: he “demanded.” Exaggerated and slanted language may initially move the audience, but the technique comes with a cost to credibility. And beyond the terminology? The anecdote was bogus: when an inmate pays for a brand of shoe from his scanty commissary allowance, he should get that shoe. When he instead receives inferior goods, then he has been robbed of his limited money. Robbed while in prison. When Judge Newman researched the truth behind these anecdotes, he was critical of these dehumanizing false examples. The judge was aware that critics of prisoner litigation believed small-sum complaints should be relegated to forums other than federal district courts. “But such a sum is not trivial to the prisoner whose limited prison funds are improperly debited. The more important point is that those in positions of responsibility should not ridicule all prisoner lawsuits by perpetuating myths about some of them.”⁹⁴ Certainly inmates file lawsuits over nonsense; the “foil hat” group will not go away until we expand mental health coverage outside of jail and prison walls. But trivializing an inmate’s legitimate complaint made a mockery of all complaints.

That lasting image of an inmate whining over Reebok shoes fulfilled that Kairos moment, that point in time that crystallizes in the listeners’ minds.⁹⁵ Senator Hatch’s audience was left with a memorable example of the absurd waste of taxpayer money, “huge costs” spent litigating trivia, which was a “ridiculous waste of taxpayers’ money.”⁹⁶

Senator Hatch added a second anecdote as an example of frivolous litigation, but there are even more problems with the second story.

• “[A]n inmate deliberately flooded his cell, and then sued the officers who cleaned up the mess because they got his Pinochle cards wet.”⁹⁷

First, the Utah legal system doesn’t seem to have a record of it. Second, it defies logic as well. Cherry-picking or inventing nonurgent,

⁹² See 141 CONG. REC. at S14,418.

⁹³ *Id.* (emphasis added).

⁹⁴ Newman, *supra* note 70, at 522.

⁹⁵ Berger, *supra* note 10, at 148–49.

⁹⁶ See 141 CONG. REC. at S14, 418.

⁹⁷ *Id.*

non-life threatening petitioners demeans those who appeal for serious violation of the Constitution or even prison policy. His out-of-context inmate complaints mocked inmates and their appeals.

- “[A] system *overburdened* by *frivolous* prisoner lawsuits. Jailhouse lawyers with little else to do are *tying our courts in knots* with an *endless flood of frivolous litigation*.”⁹⁸
- “[A] *flood of frivolous lawsuits* . . . in Federal courts . . . a *staggering 15% increase* over the number filed the previous year.”⁹⁹

Adding to his extravagant “flood” metaphor, he ignored any statistical context to exaggerate a “vast majority” as having “validity.” He did not distinguish between cases, for instance those disposed of in other forums, disposed of when inmates dropped suits or had their cases mediated. Somehow, from some undisclosed source, he determined that 3.1 percent of inmate petitions had “validity.”

- “The *vast majority* of these suits are *completely without merit*.”¹⁰⁰
- “[O]nly a *scant 3.1 percent* have enough validity to reach trial.”¹⁰¹

If his audience were not convinced with these “statistics,” Senator Hatch repeated:

- “The *crushing burden* of these *frivolous* suits makes it difficult for courts to consider meritorious claims.”¹⁰²

Most stunning of all the mockery is Senator Hatch’s mockery of the intentions of the federal judiciary. He said that federal judges release inmates for “mere technicalities.”¹⁰³ He did not offer one example of these technicalities. He said that federal court orders had, in the past, just “let[] prisoners out of jail.”¹⁰⁴ Senator Hatch insulted the federal judiciary with language that attacked their motives, their rulings, and the consequence of the rulings, labeling the process as “another kind of crime committed against law-abiding citizens.”¹⁰⁵ He repeated his colleague’s insistence that federal litigation allowed judges to “micromanage.” If the Senate passed the PLRA, they would keep frivolous litigation “out of reach of overzealous Federal courts.”¹⁰⁶ He didn’t point to any particular judge but globally insulted them all.



98 *Id.* (emphasis added).
 99 *Id.* (emphasis added).
 100 *Id.* (emphasis added).
 101 *Id.* (emphasis added).

102 *Id.* (emphasis added).
 103 *Id.*
 104 *Id.*
 105 *Id.*
 106 *Id.*

His rhetoric of disdain, of exaggeration and mockery, led listeners to believe that relief from Evil was possible only with the passage of the PLRA. And the alternative if the PLRA was not passed? If the Senate could not stop the Destruction of States' Rights jurisdiction over prison litigation? Obviously chaos, murder, mayhem, and destruction of the American Way.

- “It is past time to *slam shut the revolving door on the prison gate* and to put the key safely out of reach of *overzealous Federal courts*.”¹⁰⁷

C. False Stories and Misquotes with Senator Kyl

Senator Kyl narrowed his attack to the Special Masters as the extension of the out-of-control federal judges; federal judges allowed Special Masters to be extravagant, to be an expensive burden on taxpayers, and to perform duties outside their purview.¹⁰⁸ His “story” was one of the battle between court-appointed overseers and the burdened taxpayers. His exaggerated rhetoric condemned special masters who were “*supposed to assist judges*” but had “too often been *improperly used*.”¹⁰⁹ There, Senator Kyl stepped outside the bounds of professional rhetoric and judicial fact. They did, indeed, assist judges, but Senator Kyl rushed through the negative implication. Moreover, his reference to “improperly used” had little factual basis.

He used several examples to tar all privileges given to Special Masters, implying system-wide abuse: he accused the Arizona Special Masters as being responsible for distributing to Arizona prisons and prisoners' families “up to 750 tons of Christmas packages each year.”¹¹⁰ Why are Christmas packages in this story? Because this telling detail might become the Kairos moment, that moment listeners remember and are both disgusted with a hypothetical overreach and concerned about that overreach affecting taxpayers' budgets. A second anecdote painted Special Masters as pampered demigods riding with chauffeurs.¹¹¹ Using false inference, Senator Kyl mocked one Special Master's need for a temporary driver. Using the rhetorical device of synecdoche, he implied, by extrapolating from one example, that Special Masters have a lavish lifestyle courtesy of the federal judiciary and tax dollars.¹¹²

107 *Id.* (emphasis added).

108 See 141 CONG. REC. at S14418 (remarks of Senator Kyl).

109 *Id.* (emphasis added).

110 *Id.*

111 See *id.*

112 See generally *id.*

Senator Kyl's examples appealed to the collective, subliminal knowledge that all inmates are tricksters out to take anything they can from the state. Thus, despite months of earlier testimony debunking this story, Senator Kyl again mocked an inmate who had petitioned in federal court about "being served chunky instead of creamy peanut butter,"¹¹³ making no reference to peanut allergies, or to an inmate in solitary confinement who filed a petition because he had been served only peanut-butter sandwiches three times a day for months, or as the Honorable Jon Newman discovered, the inmate who did not receive his commissary order.¹¹⁴

After tossing in the repeated reference to peanut butter, Senator Kyl mischaracterized yet another case, an Arizona case that the judge allowed before the court. Senator Kyl said all the time and money involved in that federal petition centered around the consequences of an inmate "denied the use of a Gameboy video game."

- "[I]n response to almost any perceived slight or inconvenience—being served crunchy instead of creamy peanut butter, for instance, or being denied the use of a Gameboy video game—a case which prompted a lawsuit in my home state of Arizona."¹¹⁵

Perhaps Senator Kyl and staff did not investigate the facts of the case. Perhaps. By cherry-picking facts, Senator Kyl ignored the reason a court would agree to hear this case: After his own investigation into the actual facts surrounding the peanut butter incident, Judge Newman chided the prison because it had "incorrectly debited [the inmate's] prison account . . . [S]uch a sum is not trivial to the prisoner whose limited prison funds are improperly debited. The more important point is that those in position of responsibility should not ridicule all prisoner lawsuits by perpetuating myths about some of them."¹¹⁶ Half-truths are simply false. Senator Kyl chose to reduce the underlying facts so he could again insult the judiciary, but he did so at a cost to his professionalism.

Senator Kyl's most egregious conflict with Aristotle's ideal rhetoric is his sarcasm of and belittling of inmate complaints. His concrete examples echoed throughout the Senate chambers with the theme of Chaos and implied that inmates file frivolous petitions merely to clog the system and to allow the federal courts to swoop in for a massive takeover of state prison systems. He even told his listeners that inmates' filing was "free."¹¹⁷

113 *Id.*

114 See Newman, *supra* note 70, at 520–22.

115 See 141 CONG. REC. at S14418 (remarks of Senator Kyl).

116 See Newman, *supra* note 70, at 521–22.

117 *Id.*

It was not free to indigents then, and it is certainly not free after the enactment of the PLRA.¹¹⁸

Senator Kyl apparently found it strange that inmates appealed outside their own state to the federal courts, saying that “Federal prisoners are churning out lawsuits . . .”¹¹⁹ Here, he blamed both the federal laws and the federal courts: “The vast majority of frivolous suits are brought in federal courts under federal laws . . .”¹²⁰ Those pesky federal laws include the Constitution and its amendments, including admonition against cruel and unusual punishment and free speech. Senator Kyl’s language normalized the idea that, through this legislation, Congress could obliterate a traditional duty of federal courts. He didn’t, apparently, blush or blink. Rather, his inflammatory rhetoric led listeners to believe that the PLRA would overcome Chaos and restore Tranquility to the entire criminal-justice system.

The senator concluded his testimony with overt sarcasm about victimization of law-abiding citizens: “These prisoners are victimizing society twice—first when they commit the crime that put them in prison, and second when they waste our hard-earned tax dollars . . .”

- “Federal prisoners are *churning out lawsuits* with no regard to this cost to the taxpayers . . . we can no longer ignore *this abuse* of our court system and taxpayers’ funds.”¹²¹

With “our” traditional, power-filled world in danger, “we cannot ignore this abuse of our court system and taxpayers’ funds.”¹²²

D. Punitive Hard Time and Mockery with Senator Abraham

Senator Abraham’s repetitive word choice reiterated the image of a run-amuck federal judiciary and expensive, coddled inmates.¹²³ His strategy employed the language of War on Crime, which every Senator understood to be really the War on Criminals—New York Governor Rockefeller’s incendiary laws that increased sentences and differentiated between heroin and crack, for instance. These punitive laws sent hundreds of citizens to prison but did not attack the actual source of drugs or causes

¹¹⁸ Under the PLRA, in order to file a federal section 1983 claim, inmates without funds (in forma pauperis) must send an initial court fee of twenty percent from their commissary account of the larger of either their monthly deposit average or their balance for six months. See 28 U.S.C § 1915(a)(1)(2012).

¹¹⁹141 CONG. REC. at S14,418.

¹²⁰ *Id.*

¹²¹ *Id.* (emphasis added).

¹²² *Id.*

¹²³ See 141 CONG. REC. at S14,418–19 (remarks of Senator Abraham).

of drug addiction.¹²⁴ Senator Abraham followed Rockefeller's lead and duplicated the newly invoked fears by insisting that the chaotic federal-court system "undermine[d] the legitimacy and punitive and deterrent effect of prison sentences," despite the PLRA's more limited scope.¹²⁵ He, too, insisted that the federal courts created the current chaos by usurping the establishment's Control of the Kingdom's criminals.

- "[J]udicial orders entered under the federal law have effectively *turned control* of the prison system *away from elected officials* . . . and over to the courts."¹²⁶
- "This [balanced bill] . . . puts an end to *unnecessary judicial intervention and micromanagement*."¹²⁷
- "[T]he decree has been a source of *continuous litigation and intervention* by the court into the *minutia of prison operations*."¹²⁸

He wanted to keep the criminal behind bars as long as possible, without that "intervention" by federal judges. To pull his audience with him as he took steps to deprive inmates of their right to appear before a court, he employed emotionally incendiary language, mocking inmate complaints.

Senator Abraham rang the bell of the unconscious negative archetype for "prisoners" when he insisted that those who are incarcerated "deserve to be punished" and that their lives should be governed by "the old concept known as 'hard time.'"¹²⁹ Bong! Went a subconscious bell inside a listener–reader's head. That terminology harkens back to days of overseers, of chains connecting men who worked in Southern cotton fields, overseen by armed officers on horseback.¹³⁰

Senator Abraham contrasted liberal federal-court-ordered remedies with hard time and, rhetorically, began normalizing the audience's reaction to "punitive."¹³¹

¹²⁴ As New York Governor, Nelson Rockefeller passed drug laws against low-level criminals that kept people behind bars for decades. His zero-tolerance approach became the norm, and changed how the United States punished citizens. *See, e.g.,* Brian Mann, *The Drug Laws that Changed How We Punish*, NPR, Feb. 14, 2013, <https://www.npr.org/2013/02/14/171822608/the-drug-laws-that-changed-how-we-punish> (last visited Mar. 31, 2018).

¹²⁵ 141 CONG. REC. at S14,419.

¹²⁶ *Id.* (emphasis added).

¹²⁷ *Id.* (emphasis added).

¹²⁸ *Id.* (emphasis added).

¹²⁹ *Id.*

¹³⁰ *See generally* VIVIEN M.L. MILLER, *HARD LABOR AND HARD TIME: FLORIDA'S "SUNSHINE PRISON" AND CHAIN GANGS* (2012). Interestingly, penologists know the term to reflect the full length of a prison sentence (like 'flat time', or a maximum security prison, and even a difficult prison condition). *See* CURT R. BLAKELY, *PRISONS, PENOLOGY AND PENAL REFORM: AN INTRODUCTION TO INSTITUTIONAL SPECIALIZATION* 65–66 (2007).

¹³¹ 141 CONG. REC. at S14,419.

- “By *interfering* with the fulfillment of this *punitive* function [hard time], the courts are effectively *seriously undermining the entire criminal justice system*.”¹³²

This contrast is false. Someone living out a prison sentence is indeed doing hard time, but filing a petition about prison conditions has nothing to do with that hard time. A prison sentence will still be hard, even if the inmate receives proper medical care. It will still be hard, even if his legal mail is now restricted from an illegal search. The logic-gap comparison undermined the truth of prison sentences and the truth of inmate filings.

Senator Abraham switched from invoking hard times to fear mongering about economics. In his testimony, he never revealed the actual costs of either former prison settlements or the costs of court-ordered improvements. Thus, Senator Abraham evoked fear by painting a false picture. His language harked back to the theme of the stolen Throne: federal judges took away state control of prison administrators “for the indefinite future for the slightest reason” and raised “the cost of running prisons far beyond what is necessary”¹³³ He did not offer financial statistics for “necessary” or for implied run-away costs.

- “[Taxpayers] deserve better than to have their *money* spent, on keeping prisoners in conditions *some Federal judge feels are desirable*, although *not required* by any provision of the Constitution or any law.”¹³⁴

Taking anecdotes out of context is also false rhetoric. To build on the fears of legislators’ worries about budgets and their constituents’ money, Senator Abraham enumerated six specific complaints about prison life that the court monitors found deficient. His list mocks inmates’ complaints. What if listeners had time and experience to reflect on his abbreviated descriptions of actual complaints that reached the federal courts? Let’s suppose we add context to his version of some complaints:

“First, how warm the food is.”¹³⁵

Suppose food taken to segregated inmates always arrives cold and frequently has not been cooked to proper temperature in, say, pork. Serving cold food could mean serving contaminated food.

“[S]econd, how bright the lights are.”¹³⁶

Suppose Senator Abraham ever slept in prison? The lights are on 24/7. If the bulbs are very, very bright, it’s impossible to sleep. Continuous

132 *Id.* (emphasis added).

135 *Id.*

133 *See id.*

136 *Id.*

134 *Id.* (emphasis added).

bright light is used to torture prisoners; it disrupts sleep patterns that directly affect attitudes and behavior.¹³⁷ Suppose the wattage is so low that inmates cannot read or prepare food. Light is essential in windowless cells, and experts have testified as to the effects of low light on mental health.

“[T]hird, whether there are electrical outlets in each cell.”¹³⁸

Suppose inmates did not have electricity to run the tiny fans that help air circulation—in Texas, for instance, inmates suffer 120 degrees with no air conditioning, and the small fans are essential. Other inmates make coffee, read, or heat meal supplements. Apparently, Senator Abraham considered these electrical uses “nonessential.”

“[F]ourth, whether windows are inspected and up to code.”¹³⁹

Suppose a prison’s windows did not allow in light and air, or the opposite: they allowed insects and rodents, rain and snow. If a monitor has been required in Michigan to inspect prison windows, surely Senator Abraham understood that a three-month Michigan snow could seriously injure or kill an inmate.

“[F]ifth, whether prisoners’ hair is cut only by licensed barbers.”¹⁴⁰

Suppose an unhappy, untrained inmate is chosen to cut others’ hair. Some prisons offer barber schools. Some don’t. All require certain prisoner hygiene, including hair length and condition. If the prison does not require a licensed barber, an inmate might get sliced and diced.

“[A]nd sixth, whether air and water temperature are comfortable.”¹⁴¹

Suppose you are living in Michigan’s below-freezing temperatures, locked in by bars. Or the opposite: it would be cruel and unusual punishment to live in 120-degree temperatures, locked in by bars. (In 2017, Texas prison officials and some state legislators are still attempting to defend the 2012 heat-related death of seven inmates.)¹⁴² Obviously air

137 “Due to the invention of the electric lightbulb in the late 19th century, we are now exposed to much more light at night than we had been exposed to throughout our evolution. This relatively new pattern of light exposure is almost certain to have affected our patterns of sleep. Exposure to light in the late evening tends to delay the phase of our internal clock and lead us to prefer later sleep times. Exposure to light in the middle of the night can have more unpredictable effects, but can certainly be enough to cause our internal clock to be reset, and may make it difficult to return to sleep.” *External Factors that Influence Sleep*, DIVISION OF SLEEP MEDICINE AT HARVARD MEDICAL SCHOOL, <http://healthysleep.med.harvard.edu/healthy/science/how/external-factors> (last visited Mar. 31, 2018).

138 141 CONG. REC. at S14,419.

139 *Id.*

140 *Id.*

141 *Id.*

142 The Fifth Circuit Court of Appeals ruled, in 2012, that extreme heat can violate prisoners’ rights. See *Blackmon v. Garza*, 484 Fed. App’x 866 (5th Cir. 2012). Ex-inmate Eugene Blackmon sued because the heat index was 130 degrees in his cell. In an unpublished opinion, the Fifth Circuit determined that excessive heat could have resulted from deliberate indifference by prison officials because windows in the unit had been sealed shut. See *id.* In 2015, the Fifth Circuit again investigated heat-related injury and deaths in *Ball v. LeBlanc*, 792 F. 3d 584 (5th Cir. 2015). The Fifth Circuit looked at four issues—evidence, Eighth Amendment, disability, and lower-court injunction—in an Angola death-row case and determined that the excessive

temperature should be “comfortable” if not 5-star-hotel cool. And water temperature? In Virginia, the showers were so hot they scalded. In Florida, guards forced one mentally ill inmate into a shower with boiling water to clean off his excrement. When they finally allowed him out, his boiled skin slipped off to the ground, a condition known as “slippage.” He died of infection and exposure.¹⁴³

Senator Abraham wanted state courts and prison officials to return inmate conditions to the way they were supposed to be: hard-time conditions.

After mocking inmates, Senator Abraham degraded and mocked the federal judiciary: “The legislation we are introducing today will return sanity and state control to our prison systems.”¹⁴⁴ Thus the federal judges are . . . insane? Or their decisions are? Perhaps listeners did not catch the blatant irony of Senator Abraham’s insistence that legislators return prisons to the state officials, so that the PLRA could “allow States to run prison as they see fit.”¹⁴⁵ Ironically, if the federal judiciary (They) improved the prison system, their action was “judicial intervention.” If state courts (We) did, the world was again in balance. The senators, as Heroes to state and prison officials, should vote for the PLRA to return the proper authority to the very prison staff that created or ignored the pressing prison problems.

heat did, indeed, violate the Eighth Amendment. *See id.* Prison systems are currently scrambling to comply with this new reality while accepting the state budget realities too. *See* Gabrielle Banks, *Prisoners Reach Settlement with Texas in Air Conditioning Case*, GOVERNING, Feb. 5, 2018, <http://www.governing.com/topics/public-justice-safety/tns-texas-prison-air-conditioning.html> (last visited Apr. 28, 2018). Other cases are pending, including one pursued by the family of Larry Gene McCollom against the Texas Department of Criminal Justice for deliberate indifference over prison temperatures that led to death. Mr. McCollom, convicted of forgery, had no drinking cup or fan. *See generally* Emily Foxhall, *Family Sues TDCJ over Heat-related Death*, THE TEXAS TRIB., June 26, 2012, <https://www.texastribune.org/2012/06/26/tdcj-files-wrongful-death-lawsuit> (last visited Mar. 31, 2018).

143 *See generally* Julie K. Brown, *Behind Bars, a Brutal and Unexplained Death*, MIAMI HERALD, May 17, 2014, <http://www.miamiherald.com/news/local/community/miami-dade/article1964620.html> (last visited Mar. 31, 2018). Darren Rainey, a mentally ill inmate with one month left on a two-year sentence for cocaine possession, died after the deliberate scalding shower inflicted by guards. Florida fired thirty-two employees afterwards, finding wide-spread corruption and malignant retribution. *See id.*; Julie K. Brown, *Dade Correctional Institution warden fired after inmate death reported*, MIAMI HERALD, July 17, 2014, <http://www.miamiherald.com/news/state/article1975951.html> (last visited Apr. 28, 2018). The Florida Department of Corrections also dismissed thirty-two guards in September of 2014 “under intense scrutiny.” *See Fla. Prison Guards Won’t Face Charges in Darren Rainey’s 2012 Shower Death, Family ‘Disappointed and Heartbroken’*, N. Y. DAILY NEWS, Mar. 19, 2017, <http://www.nydailynews.com/news/national/fla-prison-guards-won-face-charges-darren-rainey-death-article-1.3002638> (last visited Apr. 28, 2018).

144 141 CONG. REC. at S14,419.

145 *Id.*

III. Repetition and Ignoring Both the Facts and Context

One characteristic of successful political rhetoric is **repetition**, especially repetition of a thematic word or phrase: repeatedly referring to prisoner litigation as “frivolous,” for instance. The pejorative adjective coded all inmate litigation into a bundle so that listeners—readers could not separate nonfrivolous and frivolous filings. The oft-repeated adjective obscured the legal differences between the cases. The floor debate focused on “frivolous” filings but extended, surreptitiously, to both. Using synecdoche for “prisoner” and “inmate” along with “violent criminal” also blurred a distinction between one example and all inmates. The four senators’ continued repetition confused a listener’s ability to recognize alternatives (“citizen,” “lawbreaker,” “person filing”). Plus, the four speakers repeatedly coded federal judges as “liberal judges” throughout.

Senator Dole needed his audience to appreciate the Chaos he wanted to overcome with the PLRA. Thus he divided the American judiciary into federal judges (bad—They let criminals go free) and state officials and judges (good—They understand Our needs). Senator Dole used the court-ordered prison cap as a Strawman that he insisted had created the “explosion” in inmate lawsuits. To achieve his goals, he repeated his terms:

- For inmates and courts: “convicts,” “violent criminals,” “thousands of violent criminals,” “judges issuing orders,” “restrain liberal Federal judges,” “micromanage,” “judicial micro-management,” “so-called prison population cap,” “prison cap order,” “court-ordered prison cap.”¹⁴⁶
- For consequences: “disastrous consequences,” “alarming explosion,” “explosion now plaguing our country,” “complaints . . . grown astronomically,” “no merit whatsoever,” “disastrous consequences.”¹⁴⁷

Next, Senator Hatch pointed the finger of Judgment by repeating (and repeating) negative thematic words of the federal courts’ Chaos and its causes; on the other hand, he offered positive phrases about the PLRA solution:

- For Chaos: “letting prisoners out of jail,” “overzealous Federal courts,” “micromanaging,” “system overburdened,” “frivolous prisoner lawsuits,” “endless flood of frivolous litigation,” “vicious crimes,” “Frivolous lawsuits,” “staggering 15% increase,”

146 141 CONG. REC. at 14,413–14.

147 *Id.*

“completely without merit,” “crushing burden,” “frivolous suits,” “crushing burden,” “frivolous claims,” “frivolous case,” “ridiculous waste,” “huge costs.”¹⁴⁸

- For positive PLRA: “restore balance,” “slam shut the revolving door.”¹⁴⁹

Senator Kyl followed up with a steady stream of repeated, speculative, and purported “facts” about the collective sins of federal courts and Special Masters. He hammered away at Special Masters’ oversight, repeatedly insisting that Special Masters were the worst of the worst in the federal court system.

- For the federal system and Special Masters: the federal judiciary “improperly used” them; the Special Masters helped the judiciary that “micromanaged”; Special Masters offered “all manner of services”; Special Masters provided services to “convicted felons.”¹⁵⁰
- For consequences of Special Masters to taxpayers: they allowed taxpayers to “foot the bill” with “no regard to this cost to the taxpayers”; “this abuse of our court system and taxpayers’ funds.” (Just reviewing this dizzying list might persuade a reader to conclude that the Special Masters were indeed out of control.)¹⁵¹

Finally, Senator Kyl repeated insults of the petitioning inmates:

- For the federal system: filing grievances was a “recreational activity”; jail-house lawyers were usually “long-term residents of our prisons”; inmates would always file because “it’s free”; “a courtroom is certainly a more hospitable place to spend an afternoon.”¹⁵²

Next up with Senator Abraham who repeated “intervention by the court into the minutia of prison operations,” “courts are effectively seriously undermining the entire criminal system,” “federal courts undermine,” and “federal intervention.”¹⁵³

- For dire consequences: “no longer will prison administration be turned over to Federal judges,” and “end to unnecessary judicial intervention and micromanagement.”¹⁵⁴

148 141 CONG. REC. at S14,418.

149 *Id.*

150 *Id.*

151 *Id.*

152 *Id.*

153 141 CONG. REC. at S14,419.

154 *Id.*

Senator Abraham also repeated his economic fears through ambiguous phrases: “not spending more taxpayer money but by saving it,” “accountable to the taxpayer,” “raise the costs of running prisons far beyond what is necessary,” “People deserve to keep their tax dollars or have them spent on projects they approve,” “money spent,” and “don’t need it spent on defending against endless prisoner lawsuits.”¹⁵⁵

Any one of the above negative and ambiguous characterizations could be recast into a context that would change the image. Any one of these words and phrases could be fairly argued. Instead, the senators used repetition and half-truths about Chaos in the federal-court system that not only allowed but encouraged frivolous inmates to petition the courts and thus burden taxpayers.

IV. Silencing or Ignoring Opposition

A subtle abuse of rhetoric is the silencing of any opposing position. Missing from the brief PLRA floor discussion was the distinction between violent and nonviolent prisoners. Missing was any reference to the historically distinct roles of state and federal courts. Missing also was even a fleeting mention of a federal-prison decision that worked. In this final presentation for the Senate vote, missing is a reference to any individual in jail or prison who filed a nonfrivolous complaint. Silence on these distinctions is not innocent. You must ask, Who profited from these silences? Answer: Those who purport to save the Kingdom from Evil.¹⁵⁶

Senator Dole wanted, really wanted, the federal judiciary taken out of these large prison consent-decree decisions so that they could return the grievance quagmire back to the state officials whose laws had, in part, created the quagmire. His testimony made no mention of alternative solutions: prison design capacity, jail reimbursement, “outsourcing” inmates to balance overcrowded facilities, or any of the other nuances of the over-population problem. What else is missing from his testimony? He neglected to mention the number of required penological steps that any inmate must take prior to reaching a federal court; he neglected to

155 *Id.*

156 See Andre Douglas Pond Cummings, “All Eyes on Me”: *America’s War on Drugs and the Prison Industrial Complex*, 15 J. GENDER, RACE & JUST. 417, 433–42 (2012) (detailing the profit incentives inherent in the Prison system). Officials and stockholders within the Prison Industrial Complex profit. State power brokers who need budgets to flow their way profit. Local sheriffs and constables profit. Certainly, inmates do not. See *id.* For example, an Alabama sheriff certainly profited from the Prison Industrial Complex: He legally took \$750,000 away from inmates’ food budget and used it for his oceanside home. See Camilla Domonski, *Alabama Sheriff Legally Took \$750,000 Meant to Feed Inmates, Bought Beach House*, NPR, Mar. 14, 2018, <https://www.npr.org/sections/thetwo-way/2018/03/14/593204274/alabama-sheriff-legally-took-750-000-meant-to-feed-inmates-bought-beach-house>.

mention how few pro se filings pass through the lower courts before reaching the federal courts.

Senator Hatch withheld context for statistics. His silence on the full picture skewed his entire argument. In hyperbole, Senator Hatch reported a “flood” of federal-court lawsuits, up fifteen percent from the previous year.¹⁵⁷ Yet, yet he did not put that statistic into the overall population increase in the prisons. Statistics need perspective: Senator Hatch taunted that in prison litigation, “only a scant 3.1 percent [of cases filed] have enough validity to reach trial.”¹⁵⁸ Perhaps Senator Hatch did not know how difficult it was to get complaint forms, how state and prison officials thwarted litigation, how few attorneys take inmate cases so that the statistic on pro se filings swamps those petitions underwritten by competent attorneys. He contended that in Utah, 297 inmates had filed suit in 1994, which comprised twenty-two percent of all federal civil cases filed in Utah that year.¹⁵⁹ But missing is the number of suits filed before the prison explosion. Prisoners first filed in federal courts only for constitutional violations; was there a cluster of violations that year? Did the courts routinely vote in favor of the inmates or dismiss the cases? Floating statistics cannot be considered facts, merely part of the facts.

Senator Kyl did not distinguish between legitimate and useful court actions that are outside the purview of a consent decree or Special Master. He was silent about the courts’ reasons for inmate releases. He was silent about any relationship between the vague Special Masters and “inmate releases” (there isn’t one). He was silent about the cost of Arizona inmate litigation before Special Masters, focusing instead on the \$320,000 corrections money spent since 1992.¹⁶⁰ Four years. The senator did not even divide that \$330,000 into annual expenditures, which average \$80,000 a year to resolve the serious and unconstitutional prison abuses throughout the entire state of Arizona. He was silent about the difference between inmates who file legitimate petitions concerning their cases or their prison conditions. Instead, he blamed the Special Masters and consent decrees for allowing inmates access to law libraries.¹⁶¹ Nowhere

¹⁵⁷ 141 CONG. REC. at S14,418.

¹⁵⁸ *Id.*

¹⁵⁹ Many inmates filed many petitions about U.S. prison conditions. In 1994, the Department of Justice, Office of Justice Program, reported that one in every ten civil lawsuits in U.S. District Courts was a Section 1983 lawsuit. In 1992, nine states’ district courts had 2,700 cases. Roger A. Hanson & Henry W.K. Daley, *Challenging the Conditions of Prisons and Jails: A Report on Section 1983 Litigation*, BUREAU OF JUSTICE STATISTICS 3 (1995), <https://www.bjs.gov/content/pub/pdf/ccpjrs83l.pdf> (last visited Apr. 28, 2018).

¹⁶⁰ See 141 CONG. REC. at S14,418.

¹⁶¹ *Id.*

did Senator Kyl mention the federal requirement that all prisons must have law libraries.¹⁶² Rather, he referred to inmates using libraries as enjoying a “recreational activity,” turning a visit to a law library into an indolent, shameful act.¹⁶³

Senator Abraham focused on a Michigan-court consent decree without once, even once, mentioning why the court originally issued a decree. He never mentioned, even once, why his state’s decree was still in place. He focused on the marvels of the current Michigan system and carefully enumerated its many positive features; he was, however, silent on the dates these features were enacted: before or during the consent decree? By suggesting that the system had already been a model of penology wonder, Senator Abraham misled his audience. Senator Abraham was silent about the historical costs of Michigan payouts to successful litigation. Senator Abraham did, however, repeatedly emphasize the costs of federal oversight.

Finally, while emphasizing the cost of oversight, each senator was silent about the cost to inmates and their families—their constituents. The senators were silent on the different types of filings and the different types of inmates they collectively labeled as criminals “who deserve to be punished” instead of being allowed to file “endless lawsuits.” Were some petitioners in prison for writing bad checks? Did perhaps the prisoner die and their families sue? Did a burglar have his leg amputated after prison officials neglected his medical complaints? Silence on the ramifications of this PLRA vote casts a shroud over Senator Abraham’s anecdotes—an embarrassing manipulation of rhetoric deliberately used to hide underlying facts of prison litigation. Therefore, rather than produce a mythical rebirth of a balanced judicial system, this testimony and vote deprived citizens of many Constitutional rights. And rather than emerge as Heroes, these speakers are now seen as the authors of a heinous bill that is costing inmates and their families an opportunity to correct the ills within the prison systems. The four senators, representing the citizens of the United States, were silent on any human consequences of their votes.

The post-PLRA world is ironically still costing taxpayers who must foot the bills for egregious miscarriages of justice that could have been resolved if the underlying grievance system had worked and early

¹⁶² In 1961, the Ninth Circuit offered in dicta that prisons and jails were under no obligation to provide library facilities. *Hatfield v. Bailleaux*, 290 F.2d 632 (9th Cir. 1961). But in 1977, the Supreme Court in *Bounds v. Smith*, 430 U.S. 817 (1971) confirmed that prison libraries were not only required, but law libraries inside the bars were required for “access to the courts.” *Id.* at 828–29.

¹⁶³ See 141 CONG. REC. at S14,419.

problems had been resolved without inmates needing recourse to the appellate courts.¹⁶⁴

V. Conclusion

“Without civic morality, communities perish; without personal morality, survival has no value.”¹⁶⁵ –Bertrand Russell

This review of the four Senators’ PLRA rhetoric reveals a major irony: under the guise of limiting prisoners’ filings, the 1995–96 Congress instead limited the federal judges’ power. Passing the PLRA allowed Congress to use inmates as a means to a different end. It was not staggering federal-court caseloads the senators addressed; it was control. They succeeded, and their deliberate rhetorical sabotage of the American court system remains a shameful reminder of that success.

These Senate floor speeches violated the discourse community of professionalism. As detailed above, this lack of professional standards undermined the speakers’ credibility; beneath the subliminal theme of Hero–Conquest, they chose “nit-picking strategies, pejorative language, stereotypical depiction, exaggeration, inappropriate jocularity, sarcasm, and imperiousness.”¹⁶⁶ Perhaps some listeners and readers can wink-wink about politicians and their clever use of rhetoric. Perhaps some wags can argue that politicians actually have no professional standards.¹⁶⁷ Those responses are disturbing because they give free reign to dishonesty, to a win-at-all-costs mentality, to the destruction of democracy from within.¹⁶⁸

¹⁶⁴ This article examining the rhetoric of the Senate debate cannot extend to a discussion of post-PLRA settlements, but interested readers can look at Margo Schlanger’s extensive scholarship. See, e.g., Civil Rights Litigation Clearinghouse, *Case Profile: Neal v. Michigan Department of Correction, Case No. 96-6986-C2*, <https://www.clearinghouse.net/detail.php?id=5550> (last visited Mar. 31, 2018) (reviewing a case where class-action plaintiffs were awarded \$100 million after intrusive jail body searches); Margo Schlanger, *Jail Strip-Search Cases: Patterns and Participants*, 71 LAW & CONTEMP. PROBS. 65 (2008) (describing events and law behind a Florida \$6.25-million class-action settlement and a California \$15-million class-action settlement). After these large settlements, however, the Supreme Court shut down strip-search petitions, saying the body-cavity searches did not violate the Fourth or Fourteenth Amendments because correctional officers had a “legitimate security interest” and “expertise.” *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 328 (2010). If a jail inmate had been able to appeal the strip search through a legitimate and functioning grievance process and if a lower court had applied the Fourteenth Amendment to these strip searches, the inmates would have found relief, the courts above would not have had to intervene, and the public would not have been hit with these enormous class-action settlements.

¹⁶⁵ BERTRAND RUSSELL, *THE BASIC WRITINGS OF BERTRAND RUSSELL* 336 (2009).

¹⁶⁶ Fajans & Falk, *supra* note 48, at 21.

¹⁶⁷ GAINNI VATTIMO, *A FAREWELL TO TRUTH* xxv (William McCuaig trans., 2009) (“As far as [philosophical aspects of our culture] [go], it is increasingly clear to all and sundry that . . . ‘the media lie’ and that everything is turning into a game of interpretation—not disinterested, not necessarily false, but (and this is the point) oriented toward projects, expectations, and value choices at odds with one another.”)

¹⁶⁸ See *id.* at xxvii (“If I say that the lies of [President George W.] Bush and [English Prime Minister Tony] Blair don’t matter to me as long as they were justified by good intentions, meaning ones I share, I accept that the truth about the facts is a matter of interpretation, conditional upon a shared paradigm.”).

Citizens must depend on elected officials to research and present viable options and balanced decisions. If, instead, important decisions are based on lies and false implicature, then glib politicians endanger our future.

We who believe in the rule of law, and who believe in Democracy, must be vigilant about our own language and examine the language of politicians who shape Democratic law in our names. That means that each of us who represent the law needs to stand against deliberate, unprofessional public speech and prose. Importantly, legal writers should accept their oaths and model professional standards.

Who speaks and writes within the framework of life and liberty? Usually lawyers. Thus the bar is and should be high for those who speak not only of the law but for the law. There are understood constraints on the legal profession: “lying, certain forms of deception, perjured testimony, preventing opposing arguments, misstating the law, tempting the judge [senators] to make decisions based upon means to persuasion that are not part of the rhetorical culture, and any other conduct that can fairly be described as ‘not playing the game.’”¹⁶⁹

Sadly, America’s inmates have learned that PLRA restrictions keep them out of the game.

¹⁶⁹ Jack L. Sammons, *The Radical Ethics of Legal Rhetoricians*, 32 VAL. U. L. REV. 93, 99 (1997).