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SOMETHING JUDICIOUS THIS WAY COMES . . .
THE USE OF FORESHADOWING AS A PERSUASIVE
DEVICE IN JUDICIAL NARRATIVE

Michael J. Higdon *

[I]n Greek romances the gods give the heroes prophetic dreams, which foreshadow what is bound to come—not so that the heroes can struggle with their fate, which is unchangeable, but so that they can bear it more easily.¹

I. INTRODUCTION

In the climactic scene of Steven Spielberg's 1993 film *Jurassic Park*, two adult scientists and two young children are trapped in the control room of the eponymous dinosaur theme park while a ravenous velociraptor ("Raptor") furiously attempts to break in.² Although the room is outfitted with a steel door and powerful lock, the lock can only be activated by the park's high-tech security system; and, unfortunately, that computer system has been disabled with no one being able to reactivate it. Thus, the two adults can only try and hold off the hungry Raptor by bracing the door with their bodies—a battle they are quickly losing. However, just when it seems the battle is lost, something "unexpected" happens. One of the children, a young girl named Lex, runs to the computer, hacks into the park's complicated security files—which, up to this point, none of the adult scientists have been able to access—and resets the door lock, thus saving everyone's life.

* Associate Professor of Law, University of Tennessee College of Law. I acknowledge support from the College of Law for my research on this project. I also wish to thank Peter Bayer, Tom Carns, Ken Chestek, Ruth Anne Robbins, and Rebecca Scharf.

1. GARY SAUL MORSON, NARRATIVE AND FREEDOM: THE SHADOWS OF TIME 107 (1994).

2. The scenes described in the following paragraphs all come from the movie JURASSIC PARK (Universal Pictures 1993).

Now, if someone had not seen the entire film, but merely this isolated scene, that person might easily be a bit nonplussed at the manner in which this conflict was resolved. In fact, such a limited viewer might even find it completely unbelievable that a young girl could hack into a high-tech security system. Furthermore, the fact she was revealed to possess such a talent *at the exact moment* such talent was sorely needed would likely appear just a bit too convenient to be persuasive. After all, as one literary scholar put it, “[T]oo good a story is somehow not to be trusted.”³ Of course, the above-mentioned scene is not the only scene in *Jurassic Park*; in fact, it is preceded by several other scenes, many of which help prepare the viewer for subsequent events. In particular, about twenty minutes prior to the suspenseful Raptor attack, there is a scene in the film that, although seemingly irrelevant at the time, is crucial to setting up the viewer for Lex’s eventual life-saving talent.

In this earlier scene, the children have climbed a tree in Jurassic Park and, during a relaxed moment, are feeding leaves to a friendly (i.e., herbivore) brachiosaur. The scene soon takes a humorous turn when the humongous brachiosaur sneezes all over Lex, precipitating the following dialogue between Lex and her younger brother, Tim:

LEX: Yuck!

TIM: Oh great! Now she’ll never try anything new. Just sit in her room and never come out . . . and play on her computer.

LEX: I’m a hacker!

TIM: That’s what I said—you’re a nerd.

LEX: I’m not a computer nerd, I prefer to be called a “hacker”!

This exchange unfolds quickly, and, meanwhile, the viewer cannot even see the faces of the two children. The two are seen walking away from the camera while engaging in what seems to be merely childish teasing between two siblings. At the same time, one of the adult scientists is walking next to the children, and it is he who is more the focus of the frame. Instead of walking away from the camera like the children, he is actively looking around and investigating the surroundings. In fact, the children’s dialogue abruptly ends when the scientist discovers a dinosaur

3. JEROME BRUNER, MAKING STORIES: LAW, LITERATURE, LIFE 5 (2002).

nest full of recently hatched eggs, thus quickly transitioning the audience to an entirely different topic. Given how the scene is framed, many viewers may not think much about the substance of the children's exchange since the conversation is very short and *seemingly* irrelevant—not only to that scene but to the entire film.

Why then would Steven Spielberg include this earlier scene? The answer is actually quite obvious: doing so made Lex's subsequent action of hacking into a complex computer system more believable. Without the earlier exposition that revealed Lex's talents, the viewer would likely be skeptical that a young girl just happened to possess such skills.

Furthermore, this earlier scene may have an additional benefit. Specifically, some viewers, realizing the need for someone to get into the computer system to reengage the steel door, may have even predicted that Lex would be the one to succeed in that task. Anticipating the event in advance would make the ultimate occurrence of that event all the more believable. As discussed below, people tend to trust conclusions more when they feel they arrived at those conclusions seemingly on their own.⁴

If the earlier scene is so important for setting up the viewer, then why would Spielberg not make the revelation that Lex is a computer hacker more explicit, rather than downplay the entire dialogue? The reason is simple: subtle messages tend to be more persuasive than those that are overt.⁵ Had the earlier scene focused too intently on the disclosure that Lex is a hacker—a disclosure that seemed irrelevant at the time—many viewers would feel manipulated, knowing that they are being force-fed this information simply to make later scenes in the story more believable. Instead, by downplaying the discussion of Lex's computer abilities, most viewers would not realize the relevance of that disclosure until that knowledge is needed to process subsequent events.

In essence, Spielberg created the earlier scene—which, in itself, served little purpose—to foreshadow what happens in the later, more important scene. *Foreshadowing* refers to “[t]he technique or device whereby some situation or event is hinted at in

4. See *infra* Part II.B.

5. See *infra* notes 56–62 and accompanying text.

advance.”⁶ By hinting at things to come, foreshadowing can make a work appear more cohesive as well as more persuasive.⁷ For these reasons, it is no surprise that foreshadowing is employed in a wide range of media.⁸ It has even been documented in historical and scientific writings.⁹ The bottom line is that, for any medium that relies on narrative to convey information, foreshadowing is a very powerful device.

The law is, of course, built heavily on narrative. As Professor Ruth Anne Robbins states, “Even though law is allegedly about something other than stories, i.e. ‘logic’ and ‘reasoning,’ stories nevertheless are there to guide the logic and reasoning.”¹⁰ That being said, narrative that is found in legal documents typically differs in one key respect from the more traditional literary narrative: “Literature, exploiting the semblance of reality, looks to the possible, the figurative. Law looks to the actual, the literal, *the record of the past*.”¹¹ Thus, one of the key components of legal narrative is the legal background that has preceded a current controversy.¹² In other words, for any given legal problem, part of the story must include the relevant law that will ultimately guide the resolution of that particular case.¹³ Within that portion of the legal narrative the writer must address a number of questions: What is the relevant rule of law? What is the policy underlying the rule? What has the rule been interpreted to mean? And what facts have and have not triggered application of the rule? In so doing, the writer establishes the relevant legal precedent that will guide the resolution of the matter currently before the court.

6. GERALD PRINCE, A DICTIONARY OF NARRATOLOGY 33 (2003); *see also infra* notes 67–75 and accompanying text.

7. *See* Nancy Welch, *Sideshadowing Teacher Response*, 60 C. ENG. 374, 378 (1998).

8. Jeffrey K. Zeig, *Seeding*, in BRIEF THERAPY: MYTHS, METHODS, AND METAPHORS 221, 226 (Jeffrey K. Zeig & Stephen G. Gilligan eds., 1990) (“Examples of foreshadowing can be found throughout literature, in theater, in movies, on television, and even in music . . .”).

9. Welch, *supra* note 7, at 378.

10. Ruth Anne Robbins, *An Introduction to Applied Storytelling and to This Symposium*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 3, 6 (2008) (citing BRUNER, *supra* note 3, at 37, 43); *see also* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 110 (2000).

11. BRUNER, *supra* note 3, at 61 (emphasis added).

12. *Id.* at 38–39; *see also* John Leubsdorf, *The Structure of Judicial Opinions*, 86 MINN. L. REV. 447, 473 (2001) (“Opinions tell stories about how law has changed over time.”).

13. BRUNER, *supra* note 3, at 39; AMSTERDAM & BRUNER, *supra* note 10, at 141.

Accordingly, this “precedential story” naturally takes on great importance in typical legal narrative as it is this section that prepares the reader for the ultimate legal analysis. Within judicial opinions, the discussion of legal precedent is particularly crucial given that the judge will rely on this discussion to ultimately explain and justify her ruling. Thus, the question then becomes how *specifically* a judicial opinion can introduce and describe legal precedent so as to make the judge’s ultimate conclusion both more palatable and more persuasive. It is here that, just as in other forms of narrative, foreshadowing becomes a very powerful persuasive technique.¹⁴ Indeed, just as Spielberg purposefully used foreshadowing to make it more believable that a young girl could save the day by hacking into a complex computer system, so too do judges use foreshadowing to lay out and discuss legal precedent so as to make their ultimate disposition of cases more persuasive.¹⁵

The fact that judges use foreshadowing in judicial opinions likely comes as little surprise. However, merely recognizing that judges sometimes rely on this literary device fails to advance our understanding of much deeper issues, including not only the power of the judicial opinion, but also the largely ignored way in which narrative and human cognition impact how legal audiences process legal advocacy. Thus, to begin to explore these more complicated questions, this article discusses why exactly, on a psychological level, foreshadowing is so potent. In doing so, this article seeks to provide a broader understanding of not only this discrete persuasive device, but also of the larger cognitive issues that are implicated by the study of legal advocacy.

To understand the complex psychology behind foreshadowing, Part II will first discuss the role that cognitive psychology plays in how individuals generally process information. By understanding the forward-looking manner with which individuals perceive their environment as well as the power of subtle persuasion, it begins to become clear how foreshadowing can impact persuasion. Part III will then look at foreshadowing more particularly, exploring the device as it has been used in various genres and fo-

14. Cf. AMSTERDAM & BRUNER, *supra* note 10, at 110.

15. See *infra* notes 169–74 and accompanying text. After all, judges—just like the advocates who appear before them—have a strong interest in crafting judicial opinions that are persuasive. *Id.*

ocusing on three specific psychological theories upon which foreshadowing operates: priming theory, schema theory, and inoculation theory. Next, Part IV discusses the way in which judges, in their attempt to persuade others, employ legal narrative and, more specifically, the narrative device of foreshadowing in judicial opinions. Finally, Part V will provide specific examples of how judges use foreshadowing—examples that help illustrate the intersection between legal advocacy, narrative theory, and psychology.

II. THE COGNITIVE PSYCHOLOGY BEHIND PERCEPTION AND PERSUASION

Psychologically, foreshadowing is an extremely persuasive technique. As English Professor Nancy Welch describes, “[a] way to predict, a means to make sense of events that may otherwise confound: that’s what foreshadowing offers and what makes it such a powerful, omnipresent device.”¹⁶ More specifically, Professor David Bordwell offers the following description of why foreshadowing can have such a profound impact on a reader: “[I]f information is unobtrusively ‘planted’ early on, later hypotheses will become more probable by taking ‘insignificant’ foreshadowing material for granted.”¹⁷

Thus, as these descriptions make clear, foreshadowing operates by *subtly* evoking hypotheses in the reader’s mind—hypotheses that will hopefully match the writer’s ultimate conclusion, thereby making that conclusion more persuasive. However, to fully understand why foreshadowing has this effect on readers, it is first necessary to understand the cognitive psychology behind (1) how readers process information and (2) the role that subtlety plays in persuasive discourse. Indeed, what makes foreshadowing potentially so effective is the way in which the device draws upon these components of human cognition.

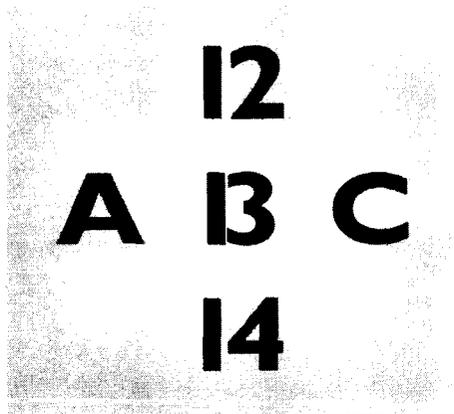
A. *Information Processing: The Constructivist Theory*

To understand the cognitive impact that a judicial opinion is likely to have on a reader, we must begin with the basic proposi-

16. Welch, *supra* note 7, at 378.

17. DAVID BORDWELL, NARRATION IN THE FICTION FILM 165 (1985).

tion that “[a]ny theory of the spectator’s activity must rest upon a general theory of perception and cognition.”¹⁸ However, when it comes to the human brain, perception is not quite as simple as it may appear. Indeed, human perception goes far beyond the discrete stimuli with which people are confronted.¹⁹ This is so because “[s]ensory stimuli alone cannot determine a percept, since they are incomplete and ambiguous.”²⁰ For example, in the sample below, it is hard to tell whether the middle item is the letter “B” or the number “13.”²¹



In attempting to resolve the ambiguity in this example, the human brain is aided by context, with the middle character reading more as the letter “B” when looking exclusively at the horizontal list and as the number “13” when strictly reading vertically. Regardless, the point is more that the middle character, when viewed in isolation, is unclear and thus requires the viewer to search out other data—in this instance, the surrounding context—to establish meaning. This example illustrates that perception is “something more than the direct registration of sensations; . . . other events intervene between stimulation and experience.”²² More specifically, when processing external stimuli, “the inadequate information provided by the senses is augmented

18. *Id.* at 30.

19. *Id.* at 31.

20. *Id.*

21. Example adapted from image in IAN E. GORDON, *THEORIES OF VISUAL PERCEPTION* 118 (3d ed. 2004).

22. *Id.* at 119.

by *unconscious inferences*, which add meaning to sensory information.”²³ Or as William James said as far back as 1890, “[W]hilst part of what we perceive comes through our senses from the object before us, another part (and it may be the larger part) always comes out . . . of our head.”²⁴

In 1867 Hermann Von Helmholtz proposed the prevailing psychological theory that describes this process, known as *constructivist theory*.²⁵ Helmholtz argued that there lies an intermediate process of construction between sensation and perception.²⁶ He posited that the “information available to our senses, taken by itself, provides ambiguous and misleading information about its source,” and, as a result, “perceptions are the product of constant, unconscious supplementation on the part of the perceiver.”²⁷ Ultimately, Helmholtz concedes that “because the information that must be supplemented is inherently ambiguous, perception is essentially a matter of guesswork.”²⁸

Accordingly, under this theory, humans process external data by forming constructions “from ‘floating fragmentary scraps of data signalled by the senses and drawn down from the brain memory banks, themselves constructions from snippets of the past.’”²⁹ As one leading psychology text describes, “Perception is not directly given by the stimulus input, but occurs as the end-product of the interactive influences of the presented stimulus and internal hypotheses, expectations, and knowledge, as well as motivational and emotional factors.”³⁰ More plainly, what we

23. MICHAEL W. EYSENCK & MARK KEANE, *COGNITIVE PSYCHOLOGY: A STUDENT'S HANDBOOK* 54 (4th ed. 2000); see also BORDWELL, *supra* note 17, at 31 (suggesting that humans make inferences about their environment “in an involuntary, virtually instantaneous manner”).

24. GERALD E. MYERS, *WILLIAM JAMES: HIS LIFE AND THOUGHT* 106 (1986) (citation omitted).

25. BORDWELL, *supra* note 17, at 30–31 (noting that constructivist theory “has been the dominant view in perceptual and cognitive psychology since the 1960s”); ELLEN WINNER, *INVENTED WORLDS: THE PSYCHOLOGY OF THE ARTS* 89 (1982).

26. GORDON, *supra* note 21, at 121.

27. WINNER, *supra* note 25, at 89.

28. *Id.*

29. Alan Branthwaite, *Exploring How Advertising Works*, in *THE APPLIED PSYCHOLOGIST* 79, 83 (James Hartley & Alan Branthwaite eds., 2d ed. 2000) (quoting Richard Gregory, *Seeing as Thinking: An Active Theory of Perception*, *TIMES LITERARY SUPPLEMENT*, June 23, 1972, at 707).

30. EYSENCK & KEANE, *supra* note 23, at 54; see also GORDON, *supra* note 21, at 128 (“Signals received by the sensory receptors trigger neural events. Appropriate knowledge interacts with these inputs to create psychological data. On the basis of such data, hypo-

perceive is not so much influenced by the things we encounter, but by the *hypotheses* that these external stimuli provoke in our minds. Indeed, under the constructivist theory, it is this process of forming and testing hypotheses that heavily determines how the human brain perceives its environment:

Perception becomes a process of active hypothesis-testing. The organism is tuned to pick up data from the environment. Perception *tends to be anticipatory*, framing more or less likely expectations about what is out there. . . . The organism interrogates the environment for information which is then checked against the perceptual hypothesis. The hypothesis is thus either confirmed or disconfirmed; in the latter case, a fresh hypothesis tends to appear.³¹

In forming these hypotheses, the human brain will actively fill in missing data.³² More specifically, “[w]hen information is missing, perceivers infer it or make guesses about it.”³³ In addition, “people seek causal connections among events, *both in anticipation and in retrospect*,” and it is these hypotheses that allow individuals to make such connections.³⁴ Furthermore, if during this constructive process the reader is faced with competing hypotheses, the brain will attempt to determine which hypothesis is more likely to be true.³⁵ Of course, in filling these gaps, the human brain does not insert random data, but instead will supply data based on existing knowledge.³⁶ As Professor Ellen Winner describes in *Invented Worlds: The Psychology of the Arts*, “The perceiver does not read in at random. Projections are guided by our knowledge of what objects tend to be like. *We see what we expect to see*. . . . [O]ur guesses are molded by the expectations created by context.”³⁷ Perception, then, is hardly a passive activity. Instead, under the constructivist theory, perception is an “active,

theses are advanced to predict and make sense of events in the world. This chain of events is the process we call perceiving.”)

31. BORDWELL, *supra* note 17, at 31 (emphasis added).

32. *Id.* at 34.

33. *Id.* Of course, this “guessing” can sometimes lead to mistakes. As one psychology text notes, “Perception is influenced by hypotheses and expectations that are sometimes incorrect, and so it is prone to error.” EYSENCK & KEANE, *supra* note 23, at 54.

34. BORDWELL, *supra* note 17, at 34 (emphasis added).

35. *Id.* at 31.

36. WINNER, *supra* note 25, at 90 (“According to Helmholtz, this inference is made possible by our knowledge of the world, gained from experience.”).

37. *Id.* (emphasis added).

goal-oriented process[]”³⁸ with the brain having “to do much in order to gain true knowledge of the world.”³⁹

When it comes to processing narrative, this effort is particularly acute. As Professor Gabrielle Cliff Hodges describes in *Tales, Tellers and Texts*,

Reading, viewing or listening to narrative means not just weaving a way between the worldly and the imagined. It means actively bringing together a multiplicity of skills: textual decoding, interpretation and criticism. Watching films or reading popular fiction sometimes conjures up an image of passivity, but this begins to fade when we understand more fully what is involved in different narratives and consider them critically. Narratives, in whatever medium, make considerable intellectual, linguistic and social demands on the producer: to take into account the audience; to place in sequence and to layer ideas and events; to establish and sustain characterization; to use the medium with fluency and accuracy. They involve an equally complex set of intellectual procedures on the part of the receiver.⁴⁰

Likewise, much has been written on expert legal readers (a group that would, of course, include judges and lawyers) given the complex way in which they are required to process narratives.⁴¹ Indeed, studies have shown the critical nature with which expert legal readers process written data.⁴² Critical reading, as used in this context, is defined as “the act of actively engaging material while it is being read, rather than passively absorbing it.”⁴³

Furthermore, as Professor Philip C. Kissam describes, “Critical readers will bring prejudgments or prejudices to their understanding and evaluating of any text.”⁴⁴ When it comes to reading judicial opinions, the critical legal reader is well aware that the

38. BORDWELL, *supra* note 17, at 31.

39. GORDON, *supra* note 21, at 119.

40. Gabrielle Cliff Hodges, *Trafficking in Human Possibilities*, in *TALES, TELLERS AND TEXTS* 1, 5 (Gabrielle Cliff Hodges et al. eds., 2000) (citing DAVID WOOD, *HOW CHILDREN THINK AND LEARN: THE SOCIAL CONTEXTS OF COGNITIVE DEVELOPMENT* (2d ed. 1998)).

41. See, e.g., LINDA H. EDWARDS, *LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION* 241 (4th ed. 2006).

42. See, e.g., Leah M. Christensen, *The Paradox of Legal Expertise: A Study of Experts and Novices Reading the Law*, 2008 B.Y.U. EDUC. & L.J. 53, 57–60 (2008) (discussing empirical studies on expert legal readers).

43. Debra Moss Curtis & Judith R. Karp, “In a Case, in a Book, They Will Not Take a Second Look!”, *Critical Reading in the Legal Writing Classroom*, 41 WILLAMETTE L. REV. 293, 299 (2005) (citation omitted).

44. Philip C. Kissam, *The Evaluation of Legal Scholarship*, 63 WASH. L. REV. 221, 249–50 (1988).

opinion will culminate in a decision by the judge. As such, under the constructivist theory, it is likely that the legal reader, while processing the opinion, would be actively engaged in forming hypotheses as to the nature of the ultimate disposition. Again, one of the hallmarks of constructivism is how audience members form hypotheses to predict the ultimate outcome of a narrative.⁴⁵

Accordingly, given that a reader's perception of the written word is highly premised on the hypotheses that the reader forms while processing data, an opportunity for persuasion arises. Specifically, if a writer could construct a written document in such a way that the reader is quietly helped to form hypotheses that match the writer's ultimate conclusion, then that conclusion would likely be more acceptable and thus more persuasive to the reader. As detailed below, the literary technique of foreshadowing is crucial in this endeavor.⁴⁶ Of course, to understand why that is the case, one must first understand how it is exactly that readers are persuaded.

B. *The Power of "Subtle" Persuasion*

What makes a particular message persuasive is an extremely complex inquiry that requires consideration of a number of factors: the message itself, the mode of delivery, the characteristics of the speaker, and the predispositions of the receiver, to name a few.⁴⁷ A discussion of each of these is, of course, beyond the limited scope of this article. Nonetheless, there are some characteristics that all persuasive messages possess.

Chief among them is the fact that a persuasive message is one that results in behavioral conversion.⁴⁸ In other words, "individuals are persuaded when they have been induced to abandon one set of behaviors and to adopt another."⁴⁹ One such behavioral outcome, and the one most relevant to foreshadowing, is referred to

45. BORDWELL, *supra* note 17, at 31, 165 ("It is the task of classical narration to solicit strongly probable and exclusive hypotheses and then confirm them . . .").

46. *See infra* Part III.

47. *See generally* JAMES B. STIFF & PAUL A. MONGEAU, PERSUASIVE COMMUNICATION (2d ed. 2003) (discussing the impact of message content transmitter characteristics, and receiver characteristics on overall persuasive value).

48. Gerald R. Miller, *On Being Persuaded: Some Basic Distinctions*, in THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE 3, 6 (James Price Dillard & Michael Pfau eds., 2002).

49. *Id.*

as “response shaping.”⁵⁰ As Professor Gerald Miller describes, “Frequently, individuals possess no clearly established pattern of responses to specific environmental stimuli. In such instances, persuasion takes the form of shaping and conditioning particular response patterns to these stimuli.”⁵¹ Thus, foreshadowing falls into this category because, as is explained more fully in Part III, foreshadowing helps shape the reader’s response to the writer’s eventual argument.

One of the things that makes foreshadowing so effective is that it relies on subtle persuasion, which research shows is a particularly effective way to persuade. Indeed, research has revealed “that an influence agent is more persuasive if the intent to persuade is not obvious.”⁵² Likewise, research also reveals that “a participant’s awareness of the intent to persuade on the part of the influencing agent will result in less message acceptance.”⁵³ In explaining why this is so, Professor Kathryn M. Stanchi offers the following explanation:

Affecting the “self-observation” process of the reader preserves the reader’s impression that she has independently arrived at the decision, when in fact the decision has been influenced by the advocate. Preserving the appearance of audience autonomy lessens the likelihood that the audience will feel coerced and angry, feelings which can lead to the so-called “boomerang effect” in which the message recipient responds to the persuasive message by rejecting it or making a decision opposite to the one advocated.⁵⁴

In other words, “persuasion is less about showing people that they are wrong, and more about showing them how they can be right, on their own terms.”⁵⁵

50. STIFF & MONGEAU, *supra* note 47, at 5. The other behaviors associated with persuasion are “response reinforcing” and “response changing.” *Id.*

51. Miller, *supra* note 48, at 7.

52. Frank R. Kardes, *Spontaneous Inference Processes in Advertising: The Effects of Conclusion Omission and Involvement on Persuasion*, 15 J. CONSUMER RES. 225, 225 (1988) (citing Elaine Walster & Leon Festinger, *The Effectiveness of “Overheard” Persuasive Communications*, 65 J. ABNORMAL & SOC. PSYCHOL. 395, 401 (1962)).

53. Michael Burgoon et al., *Revisiting the Theory of Psychological Resistance: Communicating Threats to Attitudinal Freedom*, in THE PERSUASION HANDBOOK, *supra* note 48, at 213, 224–25 (citing Wendy L. McGrane et al., *The Use of Interactive Media for HIV/AIDS Prevention in the Military Community*, 155 MIL. MED. 235, 238–39 (1990)).

54. Kathryn M. Stanchi, *The Science of Persuasion: An Initial Exploration*, 2006 MICH. ST. L. REV. 411, 422 (2006) (citing Burgoon et al., *supra* note 53, at 213, 215–16).

55. Sherman J. Clark, *The Character of Persuasion*, 1 AVE MARIA L. REV. 61, 67 (2003).

For these reasons, studies show that when processing messages readers are more persuaded by conclusions that are *implicit* rather than *explicit*, especially when the reader is more involved in the communication.⁵⁶ For example, in one famous study, researchers took seven syllogisms, each of which built upon one another.⁵⁷ Cumulatively, the syllogisms lead to the conclusion that smoking cigarettes caused cancer.⁵⁸ Subjects were given the conclusions to a different number of the seven syllogisms and asked to infer the remaining conclusions.⁵⁹ The final result of the study found that acceptance of the overall conclusion positively correlated with the amount of effort the subject had to expend.⁶⁰ In other words, subjects required to expend less effort—because they were given the conclusions to most of the syllogisms—were less accepting of the overall conclusion than those required to expend greater effort.⁶¹ This result can be attributed to what some have called “the ownness bias” or the tendency of “audience members to consider their own thoughts to be stronger than message arguments.”⁶²

Thus, it follows that legal audience members are more persuaded by conclusions they arrive at implicitly rather than those they are explicitly given. In fact, given the skeptical nature of legal readers, subtlety arguably plays an even bigger role in legal argument. As Professor Jerome Bruner points out in *Making Stories: Law, Literature, Life*, because members of the legal audience know that “lawyers tell stories committed to an adversarial rhetoric[,] . . . [l]aw stories simply are not, have never been, and probably will never be taken at face value.”⁶³ Judges tend to be even more skeptical. As Professor Linda Edwards notes in *Legal*

56. “Implicit conclusion” means that the author left it to the audience to draw the intended conclusion instead of stating the conclusion outright (i.e., “explicit conclusion”).

57. See Darwyn E. Linder & Stephen Worchel, *Opinion Change as a Result of Effortfully Drawing a Counterattitudinal Conclusion*, 6 J. EXPERIMENTAL SOC. PSYCHOL. 432, 438 (1970).

58. *Id.*

59. *Id.*

60. *Id.* at 441.

61. *Id.* (“[A]ttitude change was significantly greater the more conclusions the subjects were asked to find for themselves.”).

62. STIFF & MONGEAU, *supra* note 47, at 143 (citing Richard M. Perloff & Timothy C. Brock, “. . . And Thinking Makes It So”: *Cognitive Responses to Persuasion*, in *PERSUASION: NEW DIRECTIONS IN THEORY AND RESEARCH* 67, 84 (Michael E. Roloff & Gerald R. Miller eds., 1980)).

63. BRUNER, *supra* note 3, at 42.

Writing, “While any law-trained reader is a skeptical reader, testing the analysis at each step, a judge is particularly so. This skepticism and testing is the heart of a judge’s job.”⁶⁴

For all these reasons, foreshadowing takes on particular power in legal narrative, because foreshadowing, as detailed in the next section, operates by creating implicit conclusions. Specifically, because expert legal readers tend to be more critical, more skeptical, and more involved when processing legal messages,⁶⁵ the use of foreshadowing and its reliance on both subtlety and implicit conclusions can be a particularly effective method of legal persuasion.

III. FORESHADOWING: THE PSYCHOLOGY BEHIND “PRE-PERSUASION”

Foreshadowing, which exists in a variety of expressive works,⁶⁶ has been defined quite simply as something which “projects onto the *present* a shadow from the *future*.”⁶⁷ In other words, foreshadowing “indicates backward causality” as it is “a shadow cast in advance of an object.”⁶⁸ It is important to note, however, that these shadows are not of “objects that *might* be ahead of us, but only [of] those that *are* ahead of us.”⁶⁹ In so doing, foreshadowing helps “preclude the possibility of options.”⁷⁰ “Indeed, one purpose of foreshadowing . . . [is] to avoid surprises”⁷¹

By casting these shadows, foreshadowing operates to “activat[e] an intended target by presenting an earlier hint.”⁷² Or, as

64. EDWARDS, *supra* note 41, at 241.

65. For a discussion of involvement as it pertains to legal advocacy, see generally Stanchi, *supra* note 54, at 444.

Attempting to trigger response involvement is a common practice in legal brief-writing. Whenever an advocate makes an argument directed at a judge’s concern over public scrutiny, or that is crafted to “sound good” and is likely to be one that easily transfers into the opinion, that is directed (in part) toward response involvement.

Id.

66. Welch, *supra* note 7, at 378; Zieg, *supra* note 8, at 226.

67. MORSON, *supra* note 1, at 11 (emphasis added); see also *id.* at 47 (“[F]oreshadowing gives the reader a sign indicating what *will* happen.”).

68. MORSON, *supra* note 1, at 48.

69. *Id.* at 49 (first emphasis added).

70. *Id.*

71. BORDWELL, *supra* note 17, at 165.

72. Zeig, *supra* note 8, at 222.

one scholar describes, “Through foreshadowing, that early scene simultaneously predicts and confirms a future that then appears as an inevitability, the only course this story could have taken.”⁷³ Of course, the meaning of this early scene is often not understood until later on. As Rolf Lundén states in *The United Stories of America: Studies in the Short Story Composite*, the scene that casts the foreshadow, referred to by Lundén as the “narrative seed,” merely prepares the reader for the ultimate resolution of the story.⁷⁴ In that sense, the scene “is only fully understood in retrospect.”⁷⁵ For example, the *Jurassic Park* scene described at the beginning of this article, in which the young girl was being teased about her computer abilities, might not have led the viewer to anticipate that the young girl would eventually hack into a computer and save everyone’s life.⁷⁶ Nonetheless, the scene does make her subsequent actions much more believable.

Foreshadowing then, by its very nature, is a subtle device. As Professors Bae and Young describe the term, “Foreshadowing *implicitly* alludes to a future event in a manner that makes it difficult . . . to recognize its meaning until *the event actually happens*.”⁷⁷ Or, as noted earlier, the information that is intended to foreshadow later events should be positioned unobtrusively.⁷⁸ Otherwise, the subject may feel manipulated, which, again, can undermine the ability to persuade.⁷⁹ For these reasons, literary scholars caution that “the best clues in a story . . . are camouflaged as ordinary events, ‘without anticipation.’”⁸⁰

These general definitions, however, belie the true complexity and power behind foreshadowing. Far from merely being a literary device, there are a whole host of psychological studies that help explain why the use of foreshadowing has such a powerful cognitive impact. Thus, to better understand the power behind foreshadowing, the remainder of this subsection will discuss three

73. Welch, *supra* note 7, at 378.

74. ROLF LUNDÉN, *THE UNITED STORIES OF AMERICA: STUDIES IN THE SHORT STORY COMPOSITE* 63 (1999).

75. *Id.*

76. *JURASSIC PARK*, *supra* note 2.

77. Byung-Chull Bae & R. Michael Young, *A Use of Flashback and Foreshadowing for Surprise Arousal in Narrative Using a Plan-Based Approach*, in *INTERACTIVE STORYTELLING* 156, 156 (Ulrike Spierling & Nicolas Szilas eds., 2008) (emphasis added).

78. See BORDWELL, *supra* note 17, at 165.

79. See *supra* Part II.B.

80. CHARLES J. RZEPKA, *DETECTIVE FICTION* 29 (2005).

psychological theories, each of which is crucial to understanding the way in which foreshadowing operates: (1) priming theory, (2) schema theory, and (3) inoculation theory.

A. *Priming Theory*

Foreshadowing serves to prepare an audience member for a later point the author will make. Thus, foreshadowing is, in essence, an example of priming, as that term is used in psychology. Quite simply, *priming* refers to the use of a stimulus, or prime, to alter audience members' perceptions of subsequent information.⁸¹ Priming has also been defined as "a procedure that increases the accessibility of some category or construct in memory."⁸² Beyond these general definitions, however, priming is an extremely complex phenomenon. Not only are psychologists unclear about how exactly priming impacts perception,⁸³ but also priming comes in two distinct varieties: affective priming and cognitive priming.

Affective priming is based on the premise that, when confronted with a stimulus, "people unconsciously generate affective reactions to the context[,] . . . [which in turn] may influence subsequent judgments."⁸⁴ For example, one study found that the mood of a viewer while watching a television commercial largely mirrored the mood generated by the television program that immediately led into the commercial.⁸⁵ In this context, affect refers to "expressions of preference"⁸⁶ or, more specifically, the audience

81. Sheila T. Murphy & R.B. Zajonc, *Affect, Cognition, and Awareness: Affective Priming with Optimal and Suboptimal Stimulus Exposures*, 64 J. PERSONALITY & SOC. PSYCHOL. 723, 723 (1993).

82. Curtis P. Haugtvedt et al., *Consumer Psychology and Attitude Change*, in RESISTANCE AND PERSUASION 283, 287 (Eric S. Knowles & Jay A. Linn eds., 2004) (quoting Steven J. Sherman et al., *Priming and the Differential Use of Dimensions in Evaluation*, 16 PERSONALITY & SOC. PSYCHOL. BULL. 405, 405 (1990)).

83. Justin Storbeck & Michael D. Robinson, *Preferences and Inferences in Encoding Visual Objects: A Systematic Comparison of Semantic and Affective Priming*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 81, 82 (2004) ("[T]he underlying mechanism [in studies of priming], if there is a primary one, is unclear.").

84. Youjae Yi, *Cognitive and Affective Priming Effects of the Context for Print Advertisements*, J. ADVERTISING, 1990 No. 2, at 40, 42 (citing Cynthia A. Erdley & Paul R. D'Agostino, *Cognitive and Affective Components of Automatic Priming Effects*, 54 J. PERSONALITY & SOC. PSYCHOL. 741, 741 (1988)).

85. See Marvin E. Goldberg & Gerald J. Gorn, *Happy and Sad TV Programs: How They Affect Reactions to Commercials*, 14 J. CONSUMER RES. 387, 387, 401 (1987).

86. Murphy & Zajonc, *supra* note 81, at 724.

member's "feelings and attitudes" towards the message.⁸⁷ As a result, affective responses have been defined as the "quick and dirty, . . . route for evaluation."⁸⁸

Although affective priming can occur both consciously and subconsciously,⁸⁹ most of the existing studies deal with the latter. For example, in one famous study, subjects were presented with an assortment of novel Chinese ideographs and asked to rate each ideograph as to likeability.⁹⁰ Using a number of control groups, the study found that subjects rated the ideographs "significantly higher" when the ideograph was preceded by a photograph of a smiling face.⁹¹ However, this was only true when the photograph was presented for an extremely short duration—so short, in fact, so as to make it inaccessible to the conscious mind.⁹² Thus, this study, and others like it, concluded (1) it takes only minimal stimuli to produce an affective response,⁹³ and (2) affective judgments are made both quickly and subconsciously.⁹⁴

Of course, as other studies have demonstrated, a prime need not be subliminal in order to produce an affective response. For instance, one study of cinematic music found that music in film can impact the audience's perceived emotions of the film's characters.⁹⁵ "[W]hen asked to label a film character's emotions in an open-ended question, after viewing a scene with 'fear' music, par-

87. See James C. McCroskey et al., *Nonverbal Communication in Instructional Contexts*, in *THE SAGE HANDBOOK OF NONVERBAL COMMUNICATION* 421, 424 (Valerie Manusov & Miles L. Patterson eds., 2006).

88. Storbeck & Robinson, *supra* note 83, at 81 (citing John A. Bargh, *The Automaticity of Everyday Life*, in *THE AUTOMATICITY OF EVERYDAY LIFE* 1–61 (Robert S. Wyer ed., 1997)).

89. Siu-Lan Tan et al., *Viewers' Interpretations of Film Characters' Emotions: Effects of Presenting Film Music Before or After a Character Is Shown*, 25 *MUSIC PERCEPTION* 135, 138 (2007).

90. See Murphy & Zajonc, *supra* note 81, at 723.

91. *Id.* at 725.

92. *Id.* ("In contrast, optimally presented affective priming failed to produce a significant shift in subjects' liking of the 10 repeated ideographs . . .").

93. *Id.* at 723 ("The affective primacy hypothesis holds that affective reactions can be elicited with minimal stimulus input.").

94. Dirk Hermans et al., *A Time Course Analysis of the Affective Priming Effect*, 15 *COGNITION & EMOTION* 143, 144 (2001) ("It is often proposed that the process of automatic stimulus evaluation occurs at a very early stage in information processing, that several stimuli can be evaluated in parallel, and that basic process is fast, unintentional, efficient, and occurring outside awareness."); see also EYSENCK & KEANE, *supra* note 23, at 490 ("According to the affective primacy hypothesis, simple affective qualities of stimuli can be processed much faster than more cognitive ones.").

95. Tan et al., *supra* note 89, at 146.

ticipants indicated the characters were experiencing fear. However, when the same scene was shown with 'happiness' music, participants tended to attribute happiness to the film character.⁹⁶ Furthermore, the study found that "the emotions were generally perceived to be more intense when the music was presented before the scene rather than after the scene."⁹⁷ Accordingly, the researchers surmised that "the pre-scene music served a more effective priming function, invoking schema that guided participants' attention to cues following the music so that the main action sequences were interpreted in a manner consistent with the emotion of the music[.]"⁹⁸ Thus, even though priming need not be subliminal to produce an affective response, it appears to work more effectively when the prime precedes the intended target and the viewer is not overtly aware of the priming influence.⁹⁹

In contrast to affective responses, cognitive responses are defined as "such judgments as recognition memory, feature identification, categorization, and psychophysical judgments that deal with estimates of sensory and perceptual qualities."¹⁰⁰ *Cognitive priming*, then, concerns "the effects of prior context on the interpretation and retrieval of information, focus[ing] on the effects of long-term memory on the processing of new information."¹⁰¹ To illustrate, Professor Youjai Yi describes how cognitive priming might operate when viewing an advertisement for a car:

[T]he advertising context (e.g., a crime story) can prime or activate certain attributes (e.g., safety) to readers, and guide their interpretations of product information in the ad (e.g., car size). These interpretations may result in the formation or change of beliefs about the advertised brand, which will affect consumers' brand evaluations.

96. *Id.*

97. *Id.* ("It appears that hearing the pre-scene music primed participants to look for signs in the facial expressions that match the music's emotions and attributed these emotions to neutral faces.")

98. *Id.* (citing Marilyn G. Boltz, *Musical Soundtracks as a Schematic Influence on the Cognitive Processing of Filmed Events*, 18 *MUSIC PERCEPTION* 427, 428 (2001); Marilyn G. Boltz et al., *Effects of Background Music on the Remembering of Filmed Events*, 19 *MEMORY & COGNITION* 593, 593 (1991)).

99. See Gerald L. Clore & Simone Schnall, *The Influence of Affect on Attitude*, in *THE HANDBOOK OF ATTITUDES* 437, 450 (Dolores Albarracín et al. eds., 2005) ("Increased liking of a stimulus also occurs when participants are not consciously aware of having been repeatedly exposed to that stimulus.")

100. Murphy & Zajonc, *supra* note 81, at 724 (citation omitted).

101. Lars Willnat, *Agenda Setting and Priming: Conceptual Links and Differences*, in *COMMUNICATION AND DEMOCRACY: EXPLORING THE INTELLECTUAL FRONTIERS IN AGENDA-SETTING THEORY* 51, 53 (Maxwell McCombs et al. eds., 1997) (citation omitted).

Since this process affects ad effectiveness primarily by increasing the accessibility of attributes, this aspect of the ad environment will be called a "cognitive context."¹⁰²

Thus, in contrast to affective priming, which primarily concerns triggering a likeability response, cognitive priming, which "is built on the assumption that the frequency, prominence, or feature of a stimulus activates previously learned cognitive structures," is concerned with triggering an analytical response.¹⁰³

Despite this difference, cognitive priming is nonetheless an effective technique primarily due to the way it serves to manipulate memory. Indeed, when presented with novel stimuli, people "do not evaluate all of the information they have or can find about that topic, weight it according to some priorities, and then calculate a logical response."¹⁰⁴ To repeatedly engage in such a process would be crippling to the human mind, given the large number of stimuli with which it is constantly bombarded; instead, humans often use shortcut devices, or schemas, to quickly analyze new stimuli.¹⁰⁵ Cognitive priming operates then by prepping certain schemas so they are more easily accessible. As explained in *Communication and Democracy*, cognitive priming "can be explained by information accessibility, or the idea that recently and frequently activated or primed concepts come to mind more easily than concepts that have not been activated by prior stimuli."¹⁰⁶

102. Yi, *supra* note 84, at 40 (citing Andrew A. Mitchell & Jerry C. Olson, *Are Product Attribute Beliefs the Only Mediator of Advertising Effects on Brand Attitude?*, 18 J. MARKETING RES. 318 (1981)).

103. Willnat, *supra* note 101, at 53.

104. Gerald M. Kosicki, *The Media Priming Effect: News Media and Considerations Affecting Political Judgments*, in THE PERSUASION HANDBOOK, *supra* note 48, at 63, 70-71. Studies on how individuals process news media offer additional support for this method of selective processing. See Willnat, *supra* note 101, at 56 ("Because most people rely on the mass media for information about political events and selectively attend to issues that seem important, the accessibility of information in memory is determined to a great extent by which stories the media choose to cover.").

105. See *infra* Part III.B.

106. Willnat, *supra* note 101, at 54 (citation omitted). To illustrate, Willnat offers the following:

If, for example, a person reads a newspaper article about a new computer virus that destroyed data stored on a government computer and an ambiguous conversational reference to "virus" occurs a few minutes later, the person is likely to think of "virus" as a destructive computer program rather than a microscopic organism.

Id. at 53.

For instance, numerous studies have documented the persuasive impact that cognitive priming plays in the political arena. These studies have labeled this practice "media priming," a term that "refers to the tendency of audience members to evaluate their political leaders according to the particular events and issues that have been highlighted in news reports."¹⁰⁷ The potency of media priming was displayed by Professors Shanto Iyengar and Donald Kinder in an oft-cited 1987 study.¹⁰⁸ In that study, the two scientists presented subjects with a number of news stories, some of which heavily emphasized the important role of a strong national defense program.¹⁰⁹ Subsequently, the subjects were asked to rate the President of the United States on a number of factors, including defense.¹¹⁰ The results showed that "for people who saw multiple stories about defense (i.e., those who were primed on that theme), the impact of ratings on the president's performance on defense was more than twice as great as that for people who were not so primed."¹¹¹ Thus, the human brain, when confronted with a new stimulus, goes in search of previously stored data to aid in interpretation of that stimulus.¹¹² Cognitive priming operates to limit the available data from which the brain will select given that the brain is more likely to immediately consult and rely on previously primed data.¹¹³

Of course, regardless of whether it operates on an affective or a cognitive level, priming succeeds by way of an intermediate step. It is the stored schema this prime evokes that ultimately leads to a particular response in the audience member's mind.¹¹⁴ Accord-

107. Kosicki, *supra* note 104, at 64 (citing Vincent Price & David Tewksbury, *News Values and Public Opinion: A Theoretical Account of Media Priming and Framing*, in *PROGRESS IN COMMUNICATION SCIENCES* 173, 175 (George A. Barnette & Franklin J. Boster eds., 1997)).

108. SHANTO IYENGAR & DONALD R. KINDER, *NEWS THAT MATTERS* 65-69 (1987).

109. *Id.* at 66.

110. *Id.*

111. Kosicki, *supra* note 104, at 72. The study also revealed that, having been primed on the defense-related issues, "a one point improvement in [the viewers'] assessment of [the President's] performance on defense produced nearly a two-thirds of a point improvement in their evaluation of his general job performance;" in contrast, subjects who were not shown newscasts involving defense produced only "about a one-quarter point . . . improvement in evaluations of his general job performance." IYENGAR & KINDER, *supra* note 108, at 66.

112. See, e.g., Willnat, *supra* note 101, at 54.

113. Kosicki, *supra* note 104, at 71 (noting that priming causes individuals to evaluate a stimulus using "only a sample of readily available information").

114. *Id.* at 71-72.

ingly, the next section will discuss the ways in which these schemas influence human perception.

B. *Schema Theory*

Pretend that you are visiting a restaurant for the first time. As you enter the establishment, you likely anticipate that you will be seated, given a menu, offered a beverage, and ultimately served the food that you select from the menu. Why, though, would you hold such expectations? There was no sign on the door preparing you for this string of events and, again, this is your first time ever dining at this particular restaurant. The answer, of course, is simple: these events are anticipated because they are generally what happens when one dines in a restaurant.¹¹⁵

This example, then, provides a very basic example of schema theory. *Schema*, as that term is used in social psychology, refers “to any cluster of features that have become associated with a referent and stored in memory as a unit.”¹¹⁶ Likewise, one of the leading texts on cognitive psychology defines schema as “a structured cluster of concepts; usually, it involves generic knowledge and may be used to represent events, sequences of events, percepts, situations, relations, and even objects.”¹¹⁷ Furthermore, schemas come in a variety of forms: prototypes (what a certain thing tends to look like), templates (a filing system, for example), and procedural patterns (learned behaviors such as how to ride a bicycle).¹¹⁸ Despite the different forms they can take, schemas essentially operate as “cheat sheets” or “rules of thumb.”¹¹⁹

Indeed, “cheat sheet” is an apt description given that humans use stored knowledge, or schemas, to allow the human brain to

115. See KEITH RAYNER & ALEXANDER POLLATSEK, *THE PSYCHOLOGY OF READING* 304 (1989) (“A restaurant schema, retrieved from memory, is essentially a structured sequence of events in a meal. Both a schema and certain *default values* for what happens are retrieved. The default values are presumably the sequence of actions that occur in your ‘normal’ restaurant experience . . .”).

116. Robert S. Wyer, Jr. & Dolores Albarracín, *Belief Formation, Organization, and Change: Cognitive and Motivational Influences*, in *THE HANDBOOK OF ATTITUDES*, *supra* note 99, at 273, 280 (citing SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* 98 (1991)).

117. EYSENCK & KEANE, *supra* note 23, at 252.

118. BORDWELL, *supra* note 17, at 31.

119. KENDALL HAVEN, *STORY PROOF: THE SCIENCE BEHIND THE STARTLING POWER OF STORY* 48 (2007) (noting that schemas are also referred to as “neural maps”).

analyze and comprehend new data much more quickly.¹²⁰ Accordingly, schemas play a large role in almost all human cognition.¹²¹ As noted Professor Steven Pinker describes,

Only an angel could be a general problem-solver; we mortals have to make fallible guesses from fragmentary information. Each of our mental modules solves its unsolvable problem by a leap of faith about how the world works, by making assumptions that are indispensable but indefensible—the only defense being that the assumptions worked well enough in the world of our ancestors.¹²²

Schemas play a key role in the constructivist theory of human perception, described previously, given that schemas allow one person to project the hypotheses and expectations that factor so heavily in the constructivist model.¹²³ Kendal Haven, an expert on the subject of storytelling, describes the theory as follows: schemas “activate banks of prior knowledge to identify the ‘best guess’ for each missing bit of information.”¹²⁴ Haven goes on to point out just how powerful these schemas can be, noting that schemas can “spin a few incoming signals into entire scenarios complete with character profiles, intents, dangers, possible actions, and likely outcomes.”¹²⁵ Thus, humans use schemas to fill in missing data and thus “make the world a more predictable place.”¹²⁶

Furthermore, like foreshadowing in general, the schema we operate under can be quite persuasive.¹²⁷ For one thing, schemas can work to influence initial judgments about new data. In fact, one study found that we tend to have strong affective responses to new people we meet based simply on our perceptions of that person’s membership in a group for which we have already

120. See EYSENCK & KEANE, *supra* note 23, at 254. (“Schemata, thus, encode general or generic knowledge that can be applied to many specific situations, if those situations are instances of the schema. . . .”).

121. *Id.* at 497 (“[S]chemas influence most cognitive processes such as attention, perception, learning, and retrieval of information.”).

122. STEVEN PINKER, *HOW THE MIND WORKS* 30 (2009).

123. See BORDWELL, *supra* note 17, at 164 (“On the basis of such schemata, the viewer projects hypotheses.”); EYSENCK & KEANE, *supra* note 23, at 352 (“A crucial function of schemas is that they allow us to form expectations.”).

124. HAVEN, *supra* note 119, at 48.

125. *Id.*

126. EYSENCK & KEANE, *supra* note 23, at 352.

127. Alexander Todorov et al., *The Heuristic-Systematic Model of Social Information Processing*, in *THE PERSUASION HANDBOOK*, *supra* note 48, at 195, 197 (“Persuasion effects are mediated by simple rules, schemata, or heuristics that associate heuristic cues with a probability that the advocated position is valid.”).

formed certain judgments.¹²⁸ This is because, once formed, schemas can be quite durable.¹²⁹ Accordingly, one seeking to persuade can attempt to provoke certain responses simply by trying to elicit certain schemas in the audience member's mind. As one scholar describes, "[T]hinking about two entities in relation to one another should increase their association in memory and, therefore, should increase the likelihood that calling attention to one of the events will stimulate thoughts about the other as well."¹³⁰

Indeed, so powerful are schemas that humans, when confronted with new information, need not even analyze all new data to process the new information.¹³¹ For example, if shown a picture of a typical home kitchen, most humans would not have to look at many items in the picture to correctly identify that the picture is indeed of a kitchen. Thus, "[s]chemata reduce the amount of processing the perceptual system needs to carry out to identify expected objects . . . , thus freeing up resources for processing more novel and unexpected aspects of the scene."¹³² In fact, one study found that subjects would take twice as long when looking at pictures of scenes that contained unexpected items.¹³³ As a result, not only can an author use schema theory to evoke schemas favorable to the author's purpose, she can also manipulate details to make it less likely that an audience member will recall unfavorable schemas.¹³⁴ More specifically, including things that are seemingly incompatible with certain unfavorable schemas can make the viewer regard that schema as ultimately inapplicable

128. Clore & Schnall, *supra* note 99, at 449 ("Thus, in political discourse, . . . candidates attempt to get voters to place their opponents in undesirable categories and to place themselves in desirable categories. They do so in the knowledge that individuals are painted with the same brush as the categories of which they are seen to be members.")

129. Wyer & Albarracín, *supra* note 116, at 280 ("[W]hen people have formed a representation on the basis of new information, they later use the representation as a basis for judgments and decisions without consulting the information on which it was based.")

130. *Id.* at 283 (citation omitted).

131. EYSENCK & KEANE, *supra* note 23, at 256.

132. *Id.*

133. See Alinda Friedman, *Framing Pictures: The Role of Knowledge in Automated Encoding and Memory for Gist*, 108 J. EXPERIMENTAL PSYCHOL.: GEN. 316, 316 (1979).

134. According to Friedman, subjects "almost never notice missing, new, or descriptively changed expected objects." *Id.* at 340–41. By placing unfavorable schema in a context whereby such schema is expected, an author decreases the likelihood that readers will notice it.

or, at least, more questionable; in either case, the author is slowing the immediate impact this unfavorable schema might pose.¹³⁵

Finally, schema theory not only impacts initial perception, but also has a profound impact on subsequent recall. In 1932 noted psychologist F.C. Bartlett argued that schemas play a critical role in our recollection of stories.¹³⁶ More specifically, "memory is affected not only by the presented story but also by the participant's store of relevant prior knowledge in the form of schemas."¹³⁷ In fact, it appears that the more time that elapses between the event and later recall of the event, the more memory of the exact material is replaced by memory of the schema that the reader associated with that material. For example, one study provided the following story to a number of subjects:

[Carol Harris] was a problem child from birth. *She was wild, stubborn, and violent.* By the time [Carol] turned eight, she was still unmanageable. Her parents were very concerned about her mental health. There was no good institution for her problem in her state. Her parents finally decided to take some action. They hired a private teacher for [Carol].¹³⁸

Other participants received the same story, but the name "Carol Harris" was changed to "Helen Keller."¹³⁹ When later asked about the story, those who were told that the story was about Keller were much more likely to incorrectly believe that the story they were given contained the line, "She was deaf, dumb, and blind."¹⁴⁰ Furthermore, this mistake in recall became more prevalent the longer it had been since the subject was provided the story.¹⁴¹ Thus, a schema, which in the above example was the preexisting knowledge about Keller, can persuasively impact not only initial perceptions, but also subsequent recall as well.

As the next section details, schemas can be employed to not only color how a discrete work is initially perceived and subsequent-

135. *See id.* at 341.

136. *See* F.C. BARTLETT, REMEMBERING: A STUDY IN EXPERIMENTAL AND SOCIAL PSYCHOLOGY 264 (1932).

137. EYSENCK & KEANE, *supra* note 23, at 352.

138. Rebecca A. Sulin & D. James Dooling, *Intrusion of a Thematic Idea in Retention of Prose*, 103 J. EXPERIMENTAL PSYCHOL. 255, 256 (1974).

139. *Id.*

140. *Id.* at 257-58 (emphasis omitted).

141. *Id.* at 262 (concluding "that thematic effects increase with the passage of time").

ly recalled, but also to color how an audience member might perceive future works on the same topic.

C. *Inoculation Theory*

Whereas an author would frequently employ schema theory and affective priming to foreshadow subsequent points within the same work, foreshadowing need not operate solely within a single work. Specifically, many authors might wish to foreshadow and respond to potential objections that a third party may subsequently raise in response to the author's original work. In so doing, the author can help make his original message much more persuasive to his audience. Inoculation theory, as developed and defined by social psychologists, helps explain this phenomenon.

Professor Kathleen Hall Jamieson has argued that, where an author can predict resistance to a particular message, such resistance can be preempted through inoculation.¹⁴² In essence, “[i]noculation theory asserts that people can resist attitude change if they are trained to consciously generate responses to anticipated persuasive messages targeting a particular attitude or value.”¹⁴³ As Professor Kathryn Stanichi explains,

The theory of inoculation is based on the idea that advocates can make the recipient of a persuasive message “resistant” to opposing arguments, much like a vaccination makes a patient resistant to disease. In an inoculation message, the message recipient is exposed to a weakened version of arguments against the persuasive message, coupled with appropriate refutation of those opposing arguments. The theory is that introducing a “small dose” of a message contrary to the persuader’s position makes the message recipient immune to attacks from the opposing side. Inoculation works because the introduction of a small dose of the opposing argument induces the message recipient to generate arguments that refute the opposing argument, the intellectual equivalent of producing antibodies. Once the message recipient generates refutational arguments, she will be less likely to accept the opposing argument when it is presented to her by

142. KATHLEEN HALL JAMIESON, *DIRTY POLITICS: DECEPTIONS, DISTRACTIONS, AND DEMOCRACY* 107 (1992) (“If an attack can be anticipated, the most effective action is pre-emption through use of inoculation.”).

143. Blair T. Johnson et al., *Communication and Attitude Change: Causes, Processes, and Effects*, in *THE HANDBOOK OF ATTITUDES*, *supra* note 99, at 617, 650 (citing Mark M. Bernard et al., *The Vulnerability of Values to Attack: Inoculation of Values and Value-Relevant Attitudes*, 29 *PERSONALITY & SOC. PSYCHOL. BULL.* 63 (2003); Brad J. Sargarin et al., *Dispelling the Illusion of Invulnerability: The Motivations and Mechanisms of Resistance to Persuasion*, 83 *J. PERSONALITY & SOC. PSYCHOL.* 526 (2002)).

the opposing side because she will already have a cache of ammunition with which to resist the opposing argument.¹⁴⁴

As the above quote indicates, successful inoculation involves two components. First, “the most distinguishing feature of inoculation” is the *threat*.¹⁴⁵ In this context, a threat is merely “a warning of possible future attacks on attitudes and the recognition of attitude vulnerability to change.”¹⁴⁶ Such threats “elicit[] the motivation to protect attitudes and, thus, cultivate[] resistance to counterpersuasion.”¹⁴⁷ As Stanchi explains, “[W]hen people read a set of supporting arguments, they experience a ‘threat’ or ‘dissonance’ when presented with an opposing viewpoint. This threat motivates them to develop or seek out refutational arguments.”¹⁴⁸ This is because “people want to resolve dissonance and will gravitate toward a path that allows them to alleviate the threat to the position advocated.”¹⁴⁹ For example, in the context of a campaign to curb teenage smoking, the following “threat” was given to students who had just begun seventh grade: “as a result of significant peer pressure in the seventh grade, many of them would become uncertain about smoking, and some would change their minds and try smoking.”¹⁵⁰

Threats alone, however, are insufficient to create an inoculation effect. To succeed, the threat must be paired with what social

144. Kathryn M. Stanchi, *Playing with Fire: The Science of Confronting Adverse Material in Legal Advocacy*, 60 RUTGERS L. REV. 381, 399–400 (2008) (citing DANIEL J. O’KEEFE, *PERSUASION: THEORY AND RESEARCH* 179 (1990); RICHARD M. PERLOFF, *THE DYNAMICS OF PERSUASION: COMMUNICATION AND ATTITUDES IN THE 21ST CENTURY* 125 (2d ed. 2003); Erin Alison Szabo & Michael Pfau, *Nuances in Inoculation*, in *THE PERSUASION HANDBOOK*, *supra* note 48, at 233, 234). Interestingly, one of the events that led to the development of this theory was a study of the way in which, during the Korean war, American prisoners were persuaded to cooperate with the enemy—not through physical intimidation—but through indoctrination. *Id.* at 400–01. This occurred because the Americans had never been forced to question their patriotism and American values. *Id.* As such, the prisoners lacked immunity to counterarguments and were thus more susceptible to influence. *Id.*

145. Michael Pfau, *The Inoculation Model of Resistance to Influence*, in *PROGRESS IN COMMUNICATION SCIENCES: ADVANCES IN PERSUASION* 133, 137 (George A. Barnett & Franklin J. Boster eds., 1997).

146. Szabo & Pfau, *supra* note 144, at 233, 235 (citing Michael Pfau et al., *Enriching the Inoculation Construct: The Role of Critical Components in the Process of Resistance*, 24 HUM. COMM. RES. 187, 188 (1997)).

147. *Id.* (citing MICHAEL PFAU & HENRY C. KENSKI, *ATTACK POLITICS: STRATEGY AND DEFENSE* 159 (1990)).

148. Stanchi, *supra* note 144, at 406.

149. *Id.*

150. Michael Pfau et al., *Use of Inoculation to Promote Resistance to Smoking Initiation Among Adolescents*, 59 COMM. MONOGRAPHS 213, 219 (1992).

scientists refer to as *refutational preemption*.¹⁵¹ Whereas the threat operates on a primarily emotional level, refutational preemption is primarily cognitive in that it “provides receivers with specific arguments they can use to strengthen their attitudes against subsequent influence.”¹⁵² For example, in the teenage smoking study mentioned earlier, the subjects were not only told of the threat posed by peer pressure; they were apprised of arguments peers might use to encourage smoking and the veracity of those arguments.¹⁵³ Thus, threat and refutational preemption are indispensable counterparts to successful inoculation: “refutational preemption provides scripts; threat provides motivation.”¹⁵⁴

To fully understand, however, the purpose and function of inoculation, one must look beyond psychology to the field of rhetoric. Indeed, classical rhetoric provides its own term for messages that are designed to inoculate audience members from anticipated counterarguments. This term is known as *prolepsis*, and quite simply, has been defined as “the anticipation of an objection” and the preclusion of such an objection “by articulating [it], and even answering [it]” within the original message.¹⁵⁵ Or, as Professor Douglas Walton explains, “Using prolepsis, an agent can use advance strategy to deal with objections he reasonably expects to be felt by his respondent or audience, even before the respondent has voiced that objection.”¹⁵⁶

151. Szabo & Pfau, *supra* note 144, at 235.

152. *Id.* (citing Michael Pfau et al., *Nuances in Inoculation: The Role of Inoculation Approach, Ego-Involvement, and Message Processing Disposition in Resistance*, 45 COMM. Q. 461, 462 (1997)).

153. *See* Pfau et al., *supra* note 150, at 219 (“In the refutational preemption component, specific challenges to their attitudes were raised (e.g., smoking is socially ‘cool’; experimental smoking won’t result in regular smoking; smoking won’t affect me), and then refuted.”).

154. Szabo & Pfau, *supra* note 144, at 235 (“The inoculative pretreatment identifies attitudinal counterarguments, supplies refutations of these counterarguments, and provides an operational model of attitude defense.”).

155. MARK CURRIE, *ABOUT TIME: NARRATIVE, FICTION AND THE PHILOSOPHY OF TIME* 29 (2007); *see also* BERNARD DUPRIEZ, *A DICTIONARY OF LITERARY DEVICES: GRADUS, A-Z* 355 (1991) (defining prolepsis as “[a] figure in which objections or arguments are anticipated in order to preclude their use, answer them in advance, or prepare them for an unfavorable reaction”). Additionally, prolepsis is sometimes referred to as “praemunitio.” *See* JAMES JASINSKI, *SOURCEBOOK ON RHETORIC: KEY CONCEPTS IN CONTEMPORARY RHETORICAL STUDIES* 554, 557 n.14 (2001).

156. DOUGLAS WALTON, *MEDIA ARGUMENTATION: DIALECTIC, PERSUASION, AND RHETORIC* 141 (2007).

As such, prolepsis is considered “an essential part of the argumentation strategy” given that it contributes to an author’s ability to persuade in two ways.¹⁵⁷ First, as Professor Christopher W. Tindale explains, the power of prolepsis lies partly in the fact that “the audience is able to ‘experience’ the reasoning insofar as prolepsis presents to the mind the semblance of an exchange into which the audience enters.”¹⁵⁸ In so doing, the device creates a sense of collaboration between the author and the receiver.¹⁵⁹

Second, the use of prolepsis provides, at least, the appearance of objectivity, as it makes the author appear to be “trying to conceive things from the other point of view and treating that point of view in a reasonable fashion.”¹⁶⁰ Thus prolepsis is very much rooted in inoculation theory as both recognize the persuasive power of two-sided messages, yet operate so as to bolster the strength of one side by actively undermining the other.

In sum, despite the different forms priming, schema and inoculation theory take and the different ways in which they operate on the human brain, the three theories all share one common characteristic: each deals with the process whereby an earlier message results in a subsequent message being more or less acceptable to the audience. Again, this result is what we generally refer to as foreshadowing. Therefore, given the various and complex psychological theories that lie behind this literary device, we begin to see how foreshadowing can operate as such a powerful tool in legal narrative.

IV. THE ROLE OF FORESHADOWING IN JUDICIAL NARRATIVE

Narrative plays a crucial role within the legal system.¹⁶¹ In describing that role, some have even gone so far as to say that “[l]aw lives on narrative.”¹⁶² To explain why narrative is so preva-

157. *Id.* at 142. Walton even describes prolepsis as “the main dialectical element of rhetorical argumentation.” *Id.* at 334.

158. CHRISTOPHER W. TINDALE, *RHETORICAL ARGUMENTATION: PRINCIPLES OF THEORY AND PRACTICE* 84 (2004) (noting that prolepsis allows an author to make a point by employing “a series of imagined objections and counters to those objections”).

159. *Id.*

160. *Id.* at 85.

161. Robbins, *supra* note 10, at 6.

162. AMSTERDAM & BRUNER, *supra* note 10, at 110.

lent within the law, Professors Anthony Amsterdam and Jerome Bruner offer the following description:

[T]he law is awash in storytelling. Clients tell stories to lawyers, who must figure out what to make of what they hear. As clients and lawyers talk, the client's story gets recast into plights and prospects, plots and pilgrimages into possible worlds. . . . If circumstances warrant, the lawyers retell their clients' stories in the form of pleas and arguments to judges and testimony to juries. . . . Next, judges and jurors retell the stories themselves or to each other in the form of instructions, deliberations, a verdict, a set of findings, or an opinion. And then it is the turn of journalists, commentators, and critics. This endless telling and retelling, casting and recasting is essential to the conduct of the law. It is how law's actors comprehend whatever series of events they make the subject of their legal actions. It is how they try to make their actions comprehensible again within some larger series of events they take to constitute the legal system and the culture that sustains it.¹⁶³

Of course, recognizing the prevalence of legal narrative fails to identify the precise role that narrative plays in legal rhetoric or, more specifically, how legal narrative contributes to persuasion. After all, we know that “advocates rely on narrative to persuade”—but why?¹⁶⁴ Well, the reason for this reliance is quite simple: “[narrative] corresponds more closely to the manner in which the human mind makes sense of experience than does the conventional, abstracted rhetoric of law.”¹⁶⁵ In other words, narrative structure contributes to persuasion because “narrative is linguistically or psychologically ‘innate,’ as natural to human comprehension of the world as our visual rendering of what the eye sees into figure and ground.”¹⁶⁶ Indeed, legal narrative “persuades people because of its ‘likeness,’ which, in turn, is based on a person’s knowledge about ‘how things happen in the real world.’”¹⁶⁷

163. *Id.* (citing JANET MALCOLM, *THE CRIME OF SHEILA MCGOUGH* 3–4 (1999) (footnote omitted)).

164. Elyse Pepper, *The Case for “Thinking Like a Filmmaker”: Using Lars Von Trier’s Dogville as a Model for Writing a Statement of Facts*, 14 *LEGAL WRITING: J. LEGAL WRITING INST.* 171, 204 (2008).

165. Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 *MICH. L. REV.* 2225, 2228 (1989) (“In narrative, we take experience and configure it in a conventional and comprehensible form. This is what gives narrative its communicative power; it is what makes narrative a powerful tool of persuasion . . .”).

166. J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 *LEGAL WRITING: J. LEGAL WRITING INST.* 53, 58 (2008) (citing JEROME BRUNER, *ACTS OF MEANING* 47 (1990)) (“Little disagreement exists about the fact that narratives are fundamental to our understanding of human experience . . .”).

167. Bret Rappaport, *A Shot Across the Bow: How to Write an Effective Demand Letter*,

For all these reasons, some have posited that story is the “strongest non-violent persuasion method” we know.¹⁶⁸

And it is not just attorneys who employ the persuasive power of narrative. Indeed, “[j]udges are storytellers too.”¹⁶⁹ As Bruner explains, “Once a case has been decided, the decision may of course be appealed to a higher court—which offers further opportunity for legal storytelling.”¹⁷⁰ As is the case with legal narrative in general, this judicial narrative is often aimed at persuasion: “Writing opinions is a lot like writing briefs. Both are, at bottom, efforts to persuade. Lawyers want to satisfy clients and win courts. Judges want to persuade lawyers, litigants, the community at large that the decision they have made . . . is the absolutely correct one.”¹⁷¹

Although the possibility of appellate review is a particularly motivating force behind the use of persuasive techniques in judicial writing,¹⁷² judges also have long-run persuasive goals when drafting an opinion. As one scholar notes, “Judges have employed storytelling in their opinions,” not only to persuade litigants and other judges, but also to prove to “the unforgiving critique of history that their decisions were correct.”¹⁷³ Indeed, posterity can provide quite an incentive given that, “[m]uch like useful craft objects that withstand the test of time, well-crafted judicial opinions can take on the status of art.”¹⁷⁴

Despite the fact that legal narrative, like traditional literary narrative, has a persuasive function, it is nonetheless unique in

5 J. ASS'N LEGAL WRITING DIRECTORS 32, 46 (2008) (quoting David Ray Papke & Kathleen H. McManus, *Narrative and the Appellate Opinion*, 23 LEG. STUD. FORUM 449, 450 (1999)).

168. DAVID BALL, *THEATER TIPS AND STRATEGIES FOR JURY TRIALS* 102 (2d ed. 1997).

169. Bret Rappaport, *Tapping the Human Adaptive Origins of Storytelling By Requiring Legal Writing Students to Read a Novel in Order to Appreciate How Character, Setting, Plot, Theme, and Tone (CSPTT) Are as Important as IRAC*, 25 T.M. COOLEY L. REV. 267, 293 (2008).

170. BRUNER, *supra* note 3, at 40.

171. Judith S. Kaye, *Judges as Wordsmiths*, 69 N.Y. ST. B.J., Nov. 1997, at 10, 10.

172. Charles M. Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231, 260 n.104 (1990) (“With respect to the reviewing court . . . the trial judge’s goal is, in almost all instances, quite clear and direct: to persuade the appellate judges that her ruling should be left undisturbed.”).

173. Rappaport, *supra* note 169, at 292.

174. Brett G. Scharf, *The Character of Legal Reasoning*, 61 WASH. & LEE L. REV. 733, 751 n.53 (2004) (citing Rose Slivka, *The Persistent Object*, in *THE CRAFTS OF THE MODERN WORLD* 12, 20 (Rose Slivka ed., 1968); Stewart G. Pollock, *The Art of Judging*, 71 N.Y.U. L. REV. 591, 596 (1996)).

at least one respect. Specifically, “literary fiction evokes familiar life with the aim of disturbing our expectations about it,” while “[l]egal stories strive to make the world seem self-evident, a ‘continued story’ that inherits a legitimated past.”¹⁷⁵ Thus, one of the most important parts of almost any legal narrative is the story of the precedent that will guide resolution of a client’s case.¹⁷⁶ As Ronald Dworkin notes, “[A] line of precedent is like a continuing story.”¹⁷⁷ As such, without the inclusion of the necessary precedent, the legal narrative would be incomplete: “In offering an interpretation, a legal storyteller appeals principally to the likeness between her interpretation of the relevant facts in the present case and interpretation of what she claims are similar cases in the past.”¹⁷⁸ Given that a judge’s interest is in convincing a vast number of diverse readers his opinion is legitimate, it comes as little surprise that most judicial opinions first lay out a detailed discussion of the guiding precedent before detailing how those precedents helped determine the outcome.¹⁷⁹

Although the desire to persuade and justify may explain the reasons behind including the precedential story within a legal narrative, the question still remains as to how judges can draft this discussion to make it fit seamlessly into the legal narrative, thus taking advantage of all the potential for persuasion that narrative has to offer. For one thing, if familiarity is what makes narrative such a persuasive communication technique, it follows that successful legal narrative will incorporate the attributes of more traditional narrative. As Bruner points out, “So if literary fiction treats the familiar with reverence in order to achieve verisimilitude, law stories need to honor the devices of great fiction if they are to get their full measure from judge and jury.”¹⁸⁰

175. BRUNER, *supra* note 3, at 49.

176. *Id.* at 38–39, 116 (“Under the circumstances, history as well as precedent becomes relevant to the stories offered by opposing attorneys.”). Thus, legal narrative involves much more than the facts of the client’s case. In fact, narrative pervades legal documents, even operating to “shape the choice of issues and the internal organizational structure of effective arguments.” Philip N. Meyer, *Vignettes from a Narrative Primer*, 12 LEG. WRITING: J. LEGAL WRITING INST. 229, 231 (2006).

177. AMSTERDAM & BRUNER, *supra* note 10, at 141 (citing RONALD DWORKIN, *LAW’S EMPIRE* 228–31, 238–43 (1986)); *see also* Ronald A. Dworkin, “Natural” Law Revisited, 34 U. FL. L. REV. 165, 166–73 (1982).

178. BRUNER, *supra* note 3, at 39.

179. *See, e.g.*, *Solorio v. United States*, 483 U.S. 435, 438–39 (1987) (providing a lengthy discussion of precedent in a court-martial jurisdiction case).

180. BRUNER, *supra* note 3, at 13; *see also* Kenneth D. Chestek, *The Plot Thickens: The*

In so doing, one such device that courts have used is foreshadowing.¹⁸¹ For example, in the 1989 case of *DeShaney v. Winnebago County Department of Social Services*, the United States Supreme Court held that a mother could not pursue a 42 U.S.C. § 1983 claim against a social service agency for failing to remove her child from the home of the child's abusive father.¹⁸² As the dissent pointed out, however, one need not have read the entire opinion to have a pretty good idea of the outcome: "[B]y leading off with a discussion (and rejection) of the idea that the Constitution imposes on the States an affirmative duty to take basic care of their citizens, the Court foreshadows—perhaps even preordains—its conclusion that no duty existed even on the specific facts before us."¹⁸³

This use of foreshadowing in judicial narrative is not surprising given the persuasive value of employing familiar literary devices in legal narrative. Indeed, as noted earlier, foreshadowing is a conventional literary device that has wide application and is one that audience members routinely encounter.¹⁸⁴ More importantly, foreshadowing can be extremely persuasive given the impact it has on human cognition. First off, foreshadowing, properly exercised, is subtle, calling for implicit conclusions.¹⁸⁵ As discussed previously, this subtlety can greatly enhance persuasion, especially to the critical legal mind.¹⁸⁶ Furthermore, foreshadowing recognizes that human perception is based not so much on external stimuli, but on the hypotheses the brain makes on the basis of that stimuli.¹⁸⁷ Foreshadowing, then, by unobtrusively planting clues early on, can help control the creation of these hypotheses, leading the viewer—seemingly on her own—to the conclusion the writer will ultimately be advocating. On a more practical level, foreshadowing is a particularly apt device to use when

Appellate Brief as Story, 14 LEGAL WRITING: J. LEGAL WRITING INST. 127, 137 (2008) ("Fiction writers use a literary tool kit to construct stories that are plausible, readable, and emotionally satisfying. The kit contains at least the following elements: setting, conflict, character, point of view, theme, and plot. Appellate brief writers . . . can use these tools too.").

181. See Rappaport, *supra* note 169, at 293–94 (noting how some judges foreshadow their holding by the way in which they lay out the description of the client's facts).

182. 489 U.S. 189, 193–95 (1989).

183. *Id.* at 204 (Brennan, J., dissenting).

184. See Welch, *supra* note 7, at 378; Zeig, *supra* note 8, at 226.

185. RZEPKA, *supra* note 80, at 29; Bae & Young, *supra* note 77, at 156.

186. See *supra* Part II.B.

187. See *supra* Part II.A.

providing legal exposition, given the fact that the whole point of a legal precedent section is to explain to the legal audience the law that the judge will ultimately apply in reaching her decision. Thus, foreshadowing allows the judge to bridge the discussion of the law with the ultimate legal analysis in such a way that the document is not only more cohesive but more persuasive as well.

V. EXAMPLES OF FORESHADOWING IN JUDICIAL NARRATIVE

With this understanding of cognition, the importance of precedent within judicial narrative and, more specifically, the power of foreshadowing, the only question remaining is how exactly judges incorporate and combine these principles to make their written opinions more persuasive. After all, the “characteristics of judicial opinions are not happenstance,”¹⁸⁸ so what conscious choices do judges make to take advantage of the power of foreshadowing? To help answer that question, this part will detail five principles relating to foreshadowing, looking at specific examples of each and analyzing them in light of the psychological theories discussed in Part III. These principles and their corresponding examples are instructive in that they help broaden our view of how judicial opinions operate on a cognitive level, as well as advance our general understanding of legal narrative and the role this narrative plays in legal advocacy.

A. *Phrasing Rules*

When drafting the legal background section of a judicial opinion, judges will typically begin with at least a recitation of the overarching rule of law. Thus, in an opinion dealing with a substantive due process claim, the judge would likely begin the legal background section with some reference to the Fourteenth Amendment before moving on to substantive due process in general, followed by a discussion of related case law.¹⁸⁹ Given that these rules, in essence, form a large part of the schema that will guide legal readers as they digest the opinion, rule statements present prime opportunities for using foreshadowing. Indeed,

188. Leubsdorf, *supra* note 12, at 447.

189. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 573–77 (2003); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846–49 (1992); *Griswold v. Connecticut*, 381 U.S. 479, 481–84 (1965).

much of the foreshadowing that is found in judicial opinions can be found simply in how the judge lays out the governing rules.

In many instances, this foreshadowing can be found in the subtle word choices that the judge makes. For example, in *City of Cleburne v. Cleburne Living Center, Inc.*, the Court offered the following description of rational basis scrutiny: "To withstand equal protection review, legislation that distinguishes between the mentally retarded and others *must* be rationally related to a legitimate governmental purpose."¹⁹⁰ Following that description, the Court ultimately ruled that legislation requiring special permits of homes for the mentally retarded violated the Equal Protection Clause without a rational basis.¹⁹¹ Now, compare that statement of the rule with the dissent's discussion of *Cleburne* in *Nguyen v. I.N.S.*: "Under rational basis scrutiny, the means *need only* be 'rationally related' to a *conceivable* and legitimate state end."¹⁹² In *Nguyen*, the dissent described the rational basis test to illustrate how the challenged legislation in that case, which dealt with gender discrimination, would likely satisfy rational basis but not the heightened scrutiny standard.¹⁹³ So, both refer to the exact same standard but use different words—subtle word choices that prime the reader such that rational basis scrutiny sounds somewhat easier to survive in *Nguyen* than in *Cleburne*. Thus, minimal word changes can make a rule sound more or less inclusive, thereby foreshadowing the ultimate application of that rule.

Of course, the use of foreshadowing in a governing rule statement need not be so simple. Take, for example, Justice Scalia's opinion in *Michael H. v. Gerald D.*, a case that concerned the due process rights of a nonmarital father with respect to the child he fathered with a married woman.¹⁹⁴ Early in the opinion, Justice Scalia describes the challenged California law as follows: "California law, *like nature itself*, makes no provision for dual fatherhood."¹⁹⁵ At first blush, the reference to nature seems gratuitous—why would Scalia use such wording? Of course, we do not know

190. 473 U.S. 432, 446 (1985) (emphasis added).

191. *Id.* at 448.

192. 533 U.S. 53, 77 (2001) (citing *Cleburne*, 473 U.S. at 440) (emphasis added)).

193. *Id.* at 83 ("If rational basis scrutiny were appropriate in this case, then the claim . . . would have much greater force.")

194. 491 U.S. 110 (1989).

195. *Id.* at 118 (emphasis added).

for sure, but a look at the law as it stood prior to the Court's decision in *Michael H.* provides some possible rationales.

In a series of prior cases, the Court had established that biological ties alone are insufficient to afford a nonmarital father a due process interest in his parental relationship.¹⁹⁶ Instead, only "[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' [will] his interest in personal contact with his child acquire[] substantial protection under the Due Process Clause."¹⁹⁷ Based solely on this line of cases, *Michael H.* seemingly would prevail on his claim given that he had spent significant time and resources developing a relationship with his daughter.¹⁹⁸ Ruling against *Michael H.* meant that Justice Scalia must distinguish this long line of precedent.

Scalia thus began this challenge with the "nature itself" line. With that as his opening, Justice Scalia later phrased the governing rule as follows:

In an attempt to limit and guide interpretation of the [Due Process] Clause, we have insisted not merely that the interest denominated as a "liberty" be "fundamental" . . . but also that it be an interest traditionally protected by our society. As we have put it, the Due Process Clause affords only those protections "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Our cases reflect "continual insistence upon respect for the teachings of history [and] solid recognition of the basic values that underlie our society."¹⁹⁹

Scalia then quickly dismantled *Michael H.*'s appeal to precedent: "As we view them, they rest not upon such isolated factors but upon the *historic respect*—indeed, sanctity would not be too strong a term—*traditionally accorded* to the relationships that develop within the unitary family."²⁰⁰ Scalia was not done stressing the role of tradition and history. Indeed, throughout his opinion he repeated the point many times:

196. See *Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban v. Mohammad*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1972). For an excellent analysis and synthesis of these cases, including *Michael H.*, see Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637 (1993).

197. *Lehr*, 463 U.S. at 261 (quoting *Caban*, 441 U.S. at 392).

198. See *Michael H.*, 491 U.S. at 121.

199. *Id.* at 122 (citations omitted).

200. *Id.* at 123 (emphasis added).

Thus, the legal issue in the present case reduces to whether the relationship between persons in the situation of Michael and [his daughter] has been treated as a protected family unit under the historic practices of our society

....

. . . Since it is Michael's burden to establish that such a power [of the biological father to assert parental rights over a child born into a woman's existing marriage to another man] (at least where the natural father has established a relationship with the child) is so deeply embedded within our traditions as to be a fundamental right, the lack of evidence alone might defeat his case.

. . . What he must establish, therefore, is not that our society has traditionally allowed a natural father in his circumstances to establish paternity, but that it has traditionally accorded such a father parental rights, or at least has not traditionally denied them.²⁰¹

Regardless of whether Scalia did so intentionally, his repeated references to history and tradition as the central inquiry in this determination undermines what was previously considered to be the standard by which such claims were adjudicated. Indeed, prior to *Michael H.*, the schema under which most legal readers would operate was simply that a nonmarital father acquires a liberty interest whenever he has formed a biological and social connection with his child.²⁰² Scalia's opinion, however, effectively alters that schema—or at least muddies it—by repeatedly recasting the claimed liberty interest as instead residing only in those relationships that history and tradition has embraced, which Scalia argues excludes adulterous relationships.²⁰³ This repetition is likely no accident. As one scholar notes, "Repetition reaffirms the data on which hypotheses should be ground."²⁰⁴

Of course it was not through repetition alone that Scalia cast the law in this light—instead, he led the entire characterization down this path with his initial phrase "like nature itself."²⁰⁵ If the reader accepts Scalia's narrative as to the appropriate legal stan-

201. *Id.* at 124–26.

202. *See Lehr*, 463 U.S. at 261; *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

203. An author can make it less likely that a reader will conjure up a certain unfavorable schema to analyze the document if the author includes sufficient details that are seemingly incompatible with that schema. *See Alinda Friedman, Framing Pictures: The Role of Knowledge in Automated Encoding and Memory for Gist*, 108 J. EXPERIMENTAL PSYCHOL. GEN. 316, 340–41 (1979).

204. BORDWELL, *supra* note 17, at 80, 164 (noting that repetition can "direct the viewer toward the most probable hypothesis").

205. *Michael H.*, 491 U.S. at 118.

dard, then Michael H.'s seemingly surprising loss under the Court's previous holdings is perhaps a bit less surprising.

B. *Framing Case Law*

Just as judges can manipulate the way in which they describe governing rules, so too can judges manipulate the way in which they describe analogous case law to foreshadow the court's ultimate ruling. Given the role that precedent plays in legal narrative, this is a particularly apt place for judges to consider the persuasive benefits of foreshadowing. After all, *stare decisis* itself forms part of the overarching schema that guides legal readers when reading a judicial opinion. For this reason, Bruner notes that "[t]o prevail, legal stories must be devised with a sharp eye to discerning which cases in the past were similar to the present one and judged in a manner favoring one's side."²⁰⁶

To illustrate how the principle of foreshadowing operates in case description, consider the following examples taken from the Ninth Circuit's en banc decision in *Rene v. MGM Grand Hotel, Inc.*²⁰⁷ In that case, a male employee who was gay sued his employer under Title VII after enduring numerous taunts and physical assaults at the hands of his male coworkers.²⁰⁸ Both the district court and the initial Ninth Circuit panel granted summary judgment in favor of the employer, reasoning that Rene's claim was essentially based on a claim of harassment due to sexual orientation and not "sex" as required for a Title VII action.²⁰⁹ However, the en banc decision found that Rene did advance a cognizable claim and thus reversed the grant of summary judgment.²¹⁰

Turning to that opinion, the majority states early on its description of the governing rule that "[p]hysical sexual assault has routinely been prohibited as sexual harassment under Title VII."²¹¹ A string citation (with explanatory parentheticals) of twelve cases, each of which involved a physical sexual assault,

206. BRUNER, *supra* note 3, at 43.

207. 305 F.3d 1061 (9th Cir. 2002) (en banc).

208. *Id.* at 1064.

209. *Rene v. MGM Grand Hotel, Inc.*, 243 F.3d 1206, 1207, 1210 (9th Cir. 2001).

210. 305 F.3d at 1068.

211. *Id.* at 1065.

follows.²¹² Shortly thereafter, the majority provides a description of *Oncale v. Sundowner Offshore Services, Inc.*:²¹³

As recounted by the Court, the Title VII plaintiff in *Oncale* had been “forcibly subjected to sex-related, humiliating actions” and had been “physically assaulted . . . in a sexual manner” by other males at his place of employment. We know from the circuit court’s opinion that this physical assault included, among other things, “the use of force by [one co-worker] to push a bar of soap into Oncale’s anus while [another co-worker] restrained Oncale as he was showering[.]”

Based on these facts, the Supreme Court reversed the judgment of the Court of Appeals for the Fifth Circuit, which had affirmed a grant of summary judgment in favor of the defendant-employer²¹⁴

Following this description of *Oncale*, the majority tells us, several paragraphs later, when it moves to the facts of Rene’s case, that “we are presented with the tale of a man who was repeatedly grabbed in the crotch and poked in the anus, and who was singled out from his other male co-workers for this treatment.”²¹⁵ In light of how the majority described *Oncale*, coupled with its explicit mention of these specific facts from Rene’s case, most readers would immediately be able to predict where the majority is heading. Indeed, by casting *Oncale* as being almost completely about physical sexual assault, the fact that Rene also encountered such assaults leads to the immediate prediction that *Oncale* controls and, thus, Rene’s employer should lose. In other words, the Ninth Circuit’s description of *Oncale* effectively creates an association between physical sexual assault and victory for the plaintiff. As a result, learning that Rene suffered such conduct makes it more likely that a reader will immediately associate that fact with victory, given that the reader has been primed to associate those facts with a specific result.²¹⁶

212. *Id.*

213. 523 U.S. 75 (1998).

214. *Rene*, 305 F.3d at 1066–67 (citations omitted) (second emphasis added).

215. *Id.* at 1067.

216. As noted earlier, “thinking about two entities in relation to one another should increase their association in memory and, therefore, should increase the likelihood that calling attention to one of the events will stimulate thoughts about the other as well.” Wyer & Albarracín, *supra* note 116, at 283.

By comparison, the dissent concedes that *Oncale* “involve[d] harassment of the male plaintiff by his male co-workers, some of which was similar to the harassment in this case.”²¹⁷ Nonetheless, the dissent then tells us a bit more about the procedural posture of *Oncale*:

The Fifth Circuit Court of Appeals affirmed summary judgment in favor of the employer on the ground that “Mr. Oncale, a male, has no cause of action under Title VII for harassment by male co-workers.” The sole issue before the Supreme Court on certiorari was whether same-sex sexual harassment is actionable under Title VII. The Court held that it was. However, the Supreme Court explained, “Title VII does not prohibit all verbal *or physical* harassment in the workplace; it is directed only at ‘discriminat[ion] . . . because of . . . sex.’” . . .

. . . .
. . . Thus the Supreme Court in *Oncale* did not hold that the harassment alleged by the plaintiff in that case was actionable under Title VII. The Court, rather, simply rejected the Fifth Circuit’s holding that same-sex harassment could *never* be actionable under Title VII. . . .

After clarifying that same-sex sexual harassment could be actionable under Title VII, the Court remanded to the Fifth Circuit to address the question of whether the harassment was “because of sex”²¹⁸

The dissent then, when moving to its analysis, focused exclusively on why Rene had not proven the alleged discrimination was “because of sex.”

Note that the majority opinion never tells the reader that the case was ultimately remanded for a subsequent determination. Instead, it merely related that the Supreme Court “reversed the judgment of the Court of Appeals for the Fifth Circuit, which had affirmed a grant of summary judgment for the defendant-employer.”²¹⁹ Additionally, it focused almost exclusively on the offensive sexual conduct that was present in *Oncale*, ignoring the Supreme Court’s statement that “Title VII does not prohibit all verbal or physical harassment in the workplace.”²²⁰ The majority’s reason for omitting these items, most likely, was that the majority was tailoring the discussion of *Oncale* to foreshadow the ultimate holding and rationale in *Rene*. If the test is merely “offensive sexual conduct” equals “reversal of summary judgment for

217. *Rene*, 305 F.3d at 1072 (Hug, J., dissenting).

218. *Id.* at 1072–73 (citations omitted) (first emphasis added).

219. *Id.* at 1066–67.

220. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

the employer,” then there can be but one result for Rene, given that the lower court granted summary judgment for the employer and Rene suffered offensive sexual conduct.

Thus, foreshadowing is extremely useful in judicial opinions when the court is describing precedent. First, describing a case broadly can allow the judge to focus on facts in the precedent that are likewise present in the case under consideration so as to foreshadow the court’s ultimate holding, which, of course, becomes more persuasive to the reader if the judge’s characterization of the precedent case is to be believed. In essence, the court is reducing the description of that precedent case to the following formula:

In [*favorable precedent case*], the court ruled that [*whatever ruling the author judge is ultimately heading toward*] because of [*fact or circumstance that exists in both the precedent case and the current case*].

Second, when it comes to unfavorable precedent, a judge can describe the case very specifically, focusing on the facts in the precedent that are missing from the case under consideration. In so doing, the fact that the judge ultimately distinguishes the case is more palatable to the reader given the way in which the case was initially described. Thus, the formula for describing an unfavorable precedent case becomes:

In [*unfavorable precedent case*], the court ruled that [*the opposite ruling the author judge is ultimately heading toward*] because of [*fact or circumstance that exists in the precedent case but not the current case*].

This is not to suggest, of course, that judges engage in formulaic opinion writing. Instead, it is merely to illustrate the essential method by which a court can easily craft a description of a precedent case so as to shape the schema by which the reader will be inclined to hypothesize an outcome that not only feels correct to the reader, but also matches the court’s outcome. The pliable nature of case history makes this a fairly convenient formula. Indeed, as most advocates are well aware, any case can be distinguished or likened to any other case, the trick is merely how broadly or narrowly one reads the precedent case.

For instance, the *Rene* majority read *Oncale* quite broadly, focusing generally on offensive sexual conduct.²²¹ This broad reading, of course, makes it easier for *Rene*'s case to fit under *Oncale*'s ambit. The dissent, by contrast, focused very specifically on *Oncale*, essentially limiting it to one very specific proposition: same-sex harassment will not, per se, defeat a claim under Title VII; rather the plaintiff must prove the harassment was sex-based.²²² This specific formulation of *Oncale* thus makes it harder for *Rene* to avail himself of the *Oncale* holding.

Finally, it is not the intent of this article to imply that judges actively manipulate the holdings of precedential cases to justify a decision the judge has already reached. Instead, this article assumes that most judges exercise good faith in interpreting and applying precedential cases. After all, “[n]o judge or group of judges can state unequivocally and without distortion the holding of a prior case or the precise rule to be applied in the case at hand.”²²³ This is so because “[t]o find and apply a rule of law requires interpretation of past precedent, and the act of interpretation necessarily involves some degree of misreading.”²²⁴ The point here is merely that how judges describe and phrase their interpretation of precedent can foreshadow their ultimate disposition, making it likely that a reader will accept that disposition as just.

C. *Side-Stepping Cases and Rules of Law*

Beyond rules and precedent cases, judges are sometimes swayed by other considerations, most notably public policy. However, when a judge rules in contravention of clear precedent, two concerns may arise. The first, if the judge sits on a lower court, is the fear of being overturned.²²⁵ The second concerns public relations. Indeed, it is unlikely that many judges would welcome the label “activist judge,” but this is precisely the criticism that might arise should the judge’s opinion fail to convince readers that a departure from precedent is justified. Again, foreshadowing is an extremely helpful tool in this situation.

221. See *Rene*, 305 F.3d at 1067.

222. See *id.* at 1074 (Hug, J., dissenting).

223. David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857, 869 (1986).

224. *Id.*

225. See Yablon, *supra* note 172, at 260 n.104.

For example, in a 1993 case, the Supreme Court of Vermont was faced with the question of whether a same-sex partner should be allowed to adopt her partner's biological child without severing the parental rights of the natural parent.²²⁶ The statute in Vermont provided:

The natural parents of a minor shall be deprived, by the adoption, of all legal right to control of such minor, and such minor shall be freed from all obligations of obedience and maintenance to them Notwithstanding the foregoing provisions of this section, when the adoption is made by a *spouse* of a natural parent, obligations of obedience to, and rights of inheritance by and through the natural parent who has intermarried with the adopting parent shall not be affected.²²⁷

This statute was designed to give stepparents the ability to adopt their spouse's child without interfering with the parental rights of the natural parent.²²⁸ However, in this case, the court was faced with a lesbian couple who, at that time, could not legally marry.²²⁹ It would seem, then, that the plain language of the statute would preclude the requested adoption.

Before ruling, however, the court described the governing rule:

In interpreting Vermont's adoption statutes, we are mindful that the state's primary concern is to promote the welfare of children, and that application of the statutes should implement that purpose. In doing so, we must avoid results that are irrational, unreasonable or absurd. We must look "not only at the letter of the statute but also its reason and spirit."²³⁰

Assuming the reader accepts this description of the rule, it comes as less objectionable, and likely even less surprising, when the court ultimately rejects the plain language of the statute and permits "same-sex adoptions to come within the step-parent exception."²³¹

A similar use of foreshadowing can be found in decisions where the court ultimately decides to depart from *stare decisis* and over-

226. Adoptions of B.L.V.B. & E.L.V.B., 628 A.2d 1271, 1272 (Vt. 1993).

227. *Id.* at 1273 (quoting VT. STAT. ANN. tit. 15, § 448 (1993)) (emphasis added).

228. *See id.* at 1274.

229. *Id.* at 1272.

230. *Id.* at 1273 (internal citations omitted).

231. *Id.* at 1276. Note that the earlier statement of the rule could also help inoculate the court against any challenge that it did not follow the plain language of the statute.

turn binding precedent. For example, in *Lawrence v. Texas*,²³² the Supreme Court overturned *Bowers v. Hardwick*.²³³ Before doing so, however, it made the following ominous statement: “The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. *It is not, however, an inexorable command.*”²³⁴ With that statement, the Court’s eventual pronouncement that “*Bowers v. Hardwick* should be and now is overruled”²³⁵ is much less surprising as the reader is primed for that possibility. In fact, many readers would anticipate just such a result based on the way the Court structured the opinion, foreshadowing the impending demise of *Bowers*.

D. *Inoculating*

Judges are no doubt well aware that their opinions can and likely will be used against them by the parties on appeal, by dissenting judges, by future litigants in future cases, and perhaps even by the public at large. As a result, the use of foreshadowing in an opinion may go well beyond simply helping the judge announce and justify a discrete result. Instead, it is entirely conceivable that judges, when crafting a judicial opinion, will frequently take a more long-term view of the impact of their words. It is this context that inoculation theory comes heavily into play. Indeed, it is not uncommon to see portions of a judicial opinion that could only have been prompted by how the opinion might be subsequently used by a third party.

Once again, *Lawrence v. Texas* provides an illustrative example.²³⁶ In a concurring opinion, Justice O’Connor agreed that the Texas law banning same-sex sodomy was unconstitutional.²³⁷ However, in contrast to the majority’s reliance on substantive due process, O’Connor relied on the Equal Protection Clause reasoning that the Texas law at issue did not prohibit sodomy by oppo-

232. 539 U.S. 558, 578 (2003).

233. 478 U.S. 186 (1986).

234. *Lawrence*, 539 U.S. at 577 (emphasis added). Incidentally, compare the majority’s statement of this rule with the way in which the dissent leads off his description of the same rule: “Liberty finds no refuge in a jurisprudence of doubt.” *Id.* at 586 (Scalia, J., dissenting) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992)).

235. *Id.* at 578.

236. *Id.*

237. *Id.* at 579 (O’Connor, J., concurring).

site-sex couples.²³⁸ Regardless, Justice O'Connor devoted the entire next-to-last paragraph of her concurrence to the following statement:

That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere disapproval of an excluded group.²³⁹

From this paragraph, it appears that Justice O'Connor is somewhat concerned that third parties may attempt to use her decision as support in subsequent cases challenging the constitutionality of policies like “Don’t Ask, Don’t Tell” and prohibitions on gay marriage. O'Connor thus tries to inoculate legal audiences against such an argument by (1) identifying the threat (i.e., the use of her concurrence to support such claims) and (2) providing refutational preemptions to combat such threats (i.e., in those cases, there is a legitimate state interest).²⁴⁰

Another circumstance that can precipitate inoculation occurs when a court issues what it knows will be a very controversial opinion that is likely to prompt strong public disagreement. For example, in an opinion denying a motion for a rehearing en banc of *Newdow v. U.S. Congress*,²⁴¹ where the Ninth Circuit ruled that the Pledge of Allegiance was unconstitutional given that it contained the words “under God,” Judge Reinhardt made the following lengthy statement:

The Bill of Rights is, of course, intended to protect the rights of those in the minority against the temporary passions of a majority, which might wish to limit their freedoms or liberties. . . . It is the highest calling of federal judges to invoke the Constitution to repudiate unlawful majoritarian actions and, when necessary, to strike down statutes that would infringe on fundamental rights, whether such statutes are adopted by legislatures or by popular vote

238. *Id.* at 579, 581.

239. *Id.* at 585.

240. *See supra* Part III.C.

241. *Newdow v. U.S. Congress*, 328 F.3d 466, 470–71 (9th Cir. 2003) (Reinhardt, J., concurring).

Moreover, Article III judges are by constitutional design insulated from the political pressures governing members of the other two branches of government. . . .

This is not to say that federal judges should be completely sequestered from the attitudes of the nation we serve, even though our service is accomplished not through channeling popular sentiment but through strict adherence to established constitutional principles. . . . We may not—we must not—allow public sentiment or outcry to guide our decisions.²⁴²

In making this statement, Judge Reinhardt, like O'Connor in *Lawrence*, identified a threat (i.e., people are going to be angry) and then provided refutation preemptions (i.e., it is our job to make such difficult constitutional decisions without reference to public opinion). These are but two examples of judges using inoculation techniques in anticipation of negative consequences that may otherwise flow from their opinion.

E. *Minding "Chekhov's Gun"*

Finally, it is important to keep in mind that for judges, "as for any successful storyteller, it is crucial that his ending seem inevitable."²⁴³ As explained throughout this article, foreshadowing can help provide that sense that the judge's ultimate disposition was inevitable under the governing law. However, for foreshadowing to work properly, the storyteller has to make sure that all the parts of his story "are coherent in relation to the main event."²⁴⁴

This principle is known as "Chekhov's Gun."²⁴⁵ As the name implies, this writing maxim comes from famous playwright Anton Chekhov and "says that if you have a gun going off in the third act of a play, it had better sit on the mantelpiece during the first two acts. Conversely, if a gun is clearly visible on the mantelpiece for two acts, it had better go off during the third."²⁴⁶ Therefore, if the gun has no purpose, then it should not be there in the first

242. *Newdow v. U.S. Congress*, 292 F.3d 597, 612 (9th Cir. 2002).

243. AMSTERDAM & BRUNER, *supra* note 10, at 95.

244. JOSIP NOVAKOVICH, *FICTION WRITER'S WORKSHOP* 87 (1995).

245. *Id.*

246. NANCY KRESS, *DYNAMIC CHARACTERS* 250 (2004); accord *ACADEMIC DICTIONARY OF FICTION* 40 (Ashish Pandey ed., 2005) ("If you put a gun onstage in Act I, Chekhov once wrote, you must use it by Act III.").

place.²⁴⁷ The reason behind this maxim is that “critical plot developments and critical characters must be clearly foreshadowed, not dragged in from left field at the end of your novel.”²⁴⁸ Or, as one author puts it, “any person, place, or thing that enters the text must be integrally related to the fate of the hero. There is no room for ‘just anything that happens to fly by’”²⁴⁹ Failure to adhere to this principle violates the reader’s expectations because if a writer makes the conscious choice to “spend time and verbiage on something early on, [readers] reasonably expect that thing to figure in the climax or denouement.”²⁵⁰

In other words, foreshadowing within a judicial opinion requires both an initial exposure to the relevant law and a later application of that law. Failure to provide both can result in an incoherent and perhaps even confusing opinion. For instance, without some early mention of the applicable law, the reader may feel as though the judge’s last-minute invocation of the law is a bit too convenient to be credible. Conversely, a judicial opinion that discusses a rule of law yet reaches a decision without ever applying that law could frustrate the reader’s predictive hypotheses, which was likely formed on the basis of the seemingly relevant law that the judge included. Given that humans “treasure predictability,”²⁵¹ such a result is to be avoided.

With this basic maxim in mind, take notice of the faithful allegiance to “Chekhov’s Gun” in the remaining principles and examples in this section. Indeed, you will see examples of statements that judges make concerning the “objective” law and the way in which the phrasing of those statements ultimately is relevant to the final disposition.

Additionally, there is another point related to “Chekhov’s Gun” that bears discussion here. When confronted with law that might suggest a ruling contrary to the judge’s final determination, the temptation could arise to omit that law so as not to violate the principle of “Chekhov’s Gun.” After all, on the one hand, if the judge were to raise this law in the legal background section, the

247. LISA SELVIDGE, *WRITING FICTION WORKBOOK* 78 (2006).

248. KRESS, *supra* note 246, at 250.

249. CATHY POPKIN, *THE PRAGMATICS OF INSIGNIFICANCE: CHEKHOV, ZOSHCHENKO, GOGOL* 135 (1993) (citation omitted).

250. KRESS, *supra* note 246, at 250.

251. BRUNER, *supra* note 3, at 13.

reader would likely develop a strong expectation that the judge will subsequently explain how the law does or does not apply. On the other hand, merely stating that the law does not apply in the legal analysis without some explanation could appear a bit dodgy. Therefore, it is not inconceivable to imagine a scenario in which a judge would simply resolve this dilemma by wholesale omission of the troubling law.

Consider, for example, the case of *Romer v. Evans*, where the Supreme Court struck down an amendment to the Colorado Constitution that prevented any state antidiscrimination laws from protecting homosexuals.²⁵² At the time the Court decided the case, *Bowers v. Hardwick*, a U.S. Supreme Court case which upheld the constitutionality of state sodomy laws, was still good law.²⁵³ It would seem then that the existence of *Bowers* would have presented somewhat of an obstacle for the Court in *Romer*. As Justice Scalia noted in his dissent, “[i]f it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct.”²⁵⁴ How then did the majority get around the argument that perhaps, under *Bowers*, the Colorado amendment in *Romer* was constitutional?

Unfortunately, we can only guess, because the majority opinion never mentions *Bowers*.²⁵⁵ This omission is somewhat surprising, especially given that the majority would surely have read Scalia’s dissent prior to publication. Obviously, there could be a variety of reasons why the majority would have not addressed *Bowers*,²⁵⁶ and it is not the intent of this article to ascribe any dishonest motives to the Court’s failure to do so. Nonetheless, it is at least worth asking whether the omission, as well as similar omissions of seemingly relevant law in other judicial opinions, was done intentionally so as not to violate the “Chekhov’s Gun” principle. As Professor Cass Sunstein points out, “the Court’s silence about

252. 517 U.S. 620, 635–36 (1996).

253. *Id.* at 636 (Scalia, J., dissenting) (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

254. *Id.* at 641.

255. See Mark E. Papadopoulos, *Inkblot Jurisprudence: Romer v. Evans as a Great Defeat for the Gay Rights Movement*, 7 CORNELL J.L. & PUB. POL’Y 165, 168 (1997) (“Justice Kennedy, writing for the majority in *Romer*, found *Bowers* entirely unworthy of mention.”).

256. See, e.g., Akhil Reed Amar, *Attainder and Amendment 2: Romer’s Rightness*, 95 MICH. L. REV. 203, 227 (1996) (arguing that the majority did not mention *Bowers* because the case was irrelevant).

Hardwick stemmed from the fact that a majority could not be gotten to (a) distinguish *Hardwick*, (b) approve *Hardwick*, or (c) overrule *Hardwick*. If each of these options was unavailable, silence was the only alternative."²⁵⁷ Of course, this silence comes at a heavy price. As Professor Nan Hunter points out, the failure of the majority opinion in *Romer* to even mention *Bowers* "does weaken the persuasive power of the decision."²⁵⁸

VI. CONCLUSION

Despite the common understanding of the word, "foreshadowing" is not merely a literary device used by clever authors. Instead, foreshadowing plays an integral part in both narrative and, more generally, human cognition. As Professor Angel Medina aptly describes, "Human reason *is* narrative because it extends from its inception and in every one of its acts toward the *foreshadowing* of its total course."²⁵⁹ In other words, this "device" resonates with how the human mind naturally works, thus making foreshadowing an extremely persuasive technique.

To see the power of foreshadowing, one need only examine the narrative found within judicial opinions. Indeed, judges attempt to make their opinions more persuasive by consciously tailoring the way in which they introduce and discuss legal precedent, the goal being to foreshadow the court's ultimate holding. Given the psychology behind foreshadowing, the subtlety with which it operates, and the manner in which legal audiences, like all humans, will read and perceive a judicial opinion, foreshadowing is an exceptionally powerful tool in any judge's arsenal.²⁶⁰

257. Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 65 (1996).

258. Nan D. Hunter, *Proportional Equality: Readings of Romer*, 89 KY. L.J. 885, 897 (2001).

259. ANGEL MEDINA, REFLECTION, TIME AND THE NOVEL: TOWARD A COMMUNICATIVE THEORY OF LITERATURE 30 (1979) (emphasis added).

260. It bears mentioning that, although all of the discussion and examples presented throughout this article concern judicial opinions, the role that foreshadowing plays in persuasion and, more specifically, in legal narrative is not limited to judicial writing. Indeed, many of these same techniques can and have been employed by legal advocates in documents they submit to the court, in an attempt to make the relief they request appear more consistent with the controlling law.