5-2010

Something Judicious this Way Comes... The Use of Foreshadowing as a Persuasive Device in Judicial Narrative

Michael J. Higdon

5-2010

Something Judicious this Way Comes... The Use of Foreshadowing as a Persuasive Device in Judicial Narrative

Michael Higdon

Something Judicious this Way Comes . . . The Use of Foreshadowing as a Persuasive Device in Judicial Narrative

Michael J. Higdon

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 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 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 in the room, "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.

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 that she was revealed to possess such a talent *at the exact moment* such talent was sorely needed would like appear just a bit too convenient to be persuasive. After all, as one literary

[*] Associate Professor of Law, University of Tennessee School of Law. I wish to thank Deans Doug Blaze and Carol Parker, who provided financial support for 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) (emphasis added).

[2] Jurassic Park (Universal Studios 1993).

scholar put it, "too good a story is somehow not to be trusted."[3] Of course, the above-mentioned scene is not the only scene in *Jurassic Park* but, in fact, is preceded by several other scenes, many of which help prepare the viewer for subsequent events. In particular, about thirty 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) Brachiosaurus. 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 during it, the viewer cannot even see the faces of the two children. Instead, the two are seen walking away from the camera while engaging in what seems to be just childish teasing between two siblings. At the same time they are having this exchange, one of the adult scientists is walking next to the children, and it is he who is more the focus of the frame. Indeed, 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 nest full of recently hatched eggs, thus quickly transitioning the audience to an entirely different topic. Accordingly, 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 would just happen to posses such skills. Furthermore, this earlier scene may have an additional benefit. Specifically,

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

some viewers, upon realizing that someone needed 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 *infra*, 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, why then would Spielberg not make the revelation that Lex is a computer hacker more explicit, rather than downplay the entire dialogue on the topic? 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 (again, 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 even 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, much more important scene. In this sense, "foreshadowing" refers to "the technique or device whereby some situation or event is hinted at in advance."[6] By hinting at things to come, foreshadowing can make a work appear more cohesive as well as more persuasive.[7] For those reasons, it is no surprise to learn that foreshadowing is employed in a wide range of media: "[e]xamples of foreshadowing can be found throughout literature, in theater, in movies, on television, and even in music."[8] Furthermore, the use of foreshadowing 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 "[e]ven though law is allegedly about something other than stories, i.e., 'logic' and 'reasoning,' stories are nevertheless there to guide the logic and reasoning."[10] That being said, narrative that is found in

---

[4] *See infra* Part II.B.

[5] *See infra* notes 52-55 and accompanying text.

[6] GERALD PRINCE, DICTIONARY OF NARRATOLOGY 33 (2003); *see also infra* notes 60-67 and accompanying text.

[7] *See infra* notes 16-17 and accompanying text.

[8] Jeffrey K. Zeig, *Seeding, in* BRIEF THERAPY: MYTHS, METHODS, AND METAPHORS 221, 226 (Jeffrey K. Zeig & Stephen G. Gilligan eds, 1990).

[9] Nancy Welch, *Sideshadowing Teacher Response*, 60 COLLEGE ENGLISH 374, 378 (1998).

[10] Ruth Anne Robbins, *An Introduction to Applied Storytelling and to This Symposium*,

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 fact patterns have triggered application of the rule and which have not. In so doing, the writer establishes the relevant legal precedent that will guide resolution of the matter currently before the court.

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 when laying out and discussing the legal precedent so as to make their ultimate dipositions 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

---

14 LEGAL WRITING: J. LEAL WRITING INST. 6 (2008); *see also infra* notes 144-147 and accompanying text.

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

[12] *Id.* at 37-39; *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] *See infra* notes 159-163 and accompanying text.

[14] *See infra* Part IV.

[15] After all, judges (just like the advocates who appear before them) have a strong interest in crafting judicial opinions that are persuasive. *See infra* notes 152-158 and accompanying text.

more complicated questions, the purpose of this Article is to discuss why exactly, on a psychological level, foreshadowing is so potent. In doing so, we gain a broader understanding of not just this discrete persuasive device, but 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 process information generally. 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 focusing 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, Section 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: "if information is unobtrusively 'planted' early on, later hypotheses will become more probable by taking 'insignificant' foreshadowing material for granted."[17]

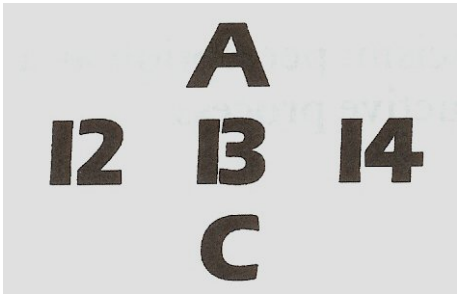
Thus, as these descriptions make clear, foreshadowing operates by *subtly* evoking hypotheses in the reader's mind—hypotheses that will hopefully match the writer's ultimate conclusion, thereby making that conclusion more persuasive. However, to fully understand why foreshadowing has this effect on readers, 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

[16] Welch, *supra note* 9, at 378.
[17] DAVID BORDWELL, NARRATION IN THE FICTION FILM 165 (1985).

upon those 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 proposition 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. This is so because "[s]ensory stimuli alone cannot determine a percept, since they are incomplete and ambiguous."[19] For example, in the sample below, it is hard to tell whether the middle item is the letter "B" or the number "13." [20]



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 vertical list and as the number "13" when strictly reading horizontally. 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."[21] More specifically, when processing external stimuli, "the inadequate information provided by the senses is augmented by unconscious inferences, which add meaning to sensory information."[22] Or as William James said as far back as 1890: "whilst part

[18] *Id.* at 30.

[19] *Id.* at. 31.

[20] Example and image taken from IAN E. GORDON, THEORIES OF VISUAL PERCEPTION 118 (2004).

[21] *Id.* at 119.

[22] MICHAEL W. EYSENCK & MARK T. KEANE, COGNITIVE PSYCHOLOGY 54 (2000); *see also* BORDWELL, *supra* note 17, at 31 (humans make inferences about their environment

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."[23]

The prevailing psychological theory that describes this process is referred to as the Constructivist Theory[24] (and was first proposed by Hermann von Helmholtz in 1867).[25] Hemholtz argued that, between sensation and perception, there lies an intermediate process of construction.[26] Thus, Helmholtz 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 receiver."[27] Finally, Helmholtz concedes that "because the information that must be supplemented is inherently ambiguous, perception is essentially guesswork."[28]

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

---

"in an involuntary, virtually instantaneous manner.")

[23] GERALD E. MEYERS, WILLIAM JAMES: HIS LIFE AND THOUGHT 106 (2001).

[24] BORDWELL, *supra* note 17, at 30-31 (noting that "it has been the dominant view in perceptual and cognitive psychology since the 1960s").

[25] ELLEN WINNER, INVENTED WORLDS: THE PSYCHOLOGY OF THE ARTS 89 (1982); BORDWELL, *supra* note 17, at 30; EYSENCK & KEANE, *supra* note 22, at 54.

[26] GORDON, *supra* note 20, at 121.

[27] WINNER, *supra* note 25, at 89

[28] *Id*.

[29] Alan Branthwaite, *Exploring How Advertising Works*, THE APPLIED PSYCHOLOGIST 79, 83 (James Hartley & Alan Branthwaite eds., 1999).

[30] EYSENCK & KEANE, *supra* note 22, at 54; *see also* GORDON, *supra* note 20, 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, hypotheses are advanced to predict and make sense of events in the world. This chain of events is the process we call perceiving.").

> environment. Perceptions *tend 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. More specifically, "[w]hen information is missing, perceivers infer it or make guesses about it."[32] 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. 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."[33] Of course, in filling these gaps, the human brain does not insert random data, but instead will supply data based on existing knowledge.[34] As Professor Ellen Winner describes in her book, *Invented Worlds: The Psychology of the Arts*, "[t]he 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*. . . our guesses are molded by the expectations created by context."[35] Perception, then, is hardly a passive activity. Instead, under the constructivist theory, perception is an "active, goal-oriented process"[36] with the brain having "to do much in order to gain true knowledge of the world."[37]

When it comes to processing narrative, this effort is particularly acute. As Professor Gabrielle Cliff Hodges describes in her book *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

---

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

[32] *Id.* at 34. Of course, this "guessing" can sometimes lead to mistakes. As one psychology text notes "[p]erception is influenced by hypotheses and expectations that are sometimes incorrect, and so it is prone to error." EYSENCK & KEANE, *supra* note 22 at 54.

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

[34] WINNER, *supra* note 25, at 90 ("Accordingly to Helmholtz, this inference is made possible by our knowledge of the world, gained from experience.")

[35] *Id.* (emphasis added).

[36] BORDWELL, *supra* note 17, at 31.

[37] GORDON, *supra* note 20, at 119.

> 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 characterizations; to use the medium with fluency and accuracy. They involve an equally complex set of intellectual procedures on the part of the receiver. [38]

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. Indeed, a number of studies have shown the critical nature with which expert legal readers process written data.[39] 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."[40] Furthermore, as Professor Philip C. Kissam describes, "[c]ritical readers will bring prejudgments or prejudices to their understanding and evaluating of any text."[41] When it comes to reading judicial opinions, the critical legal reader is well-aware that the 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: "It is the task of classical narration to solicit strongly probable and exclusive hypotheses and then confirm them."[42]

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

---

[38] Gabrielle Cliff Hodges, *Trafficking in Human Possibilities, in* TALES, TELLERS AND TEXTS 5 (Gabrielle Cliff Hodges, Mary Jane Drummond & Morag Styles eds., 2000).

[39] *See generally* 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 previous studies on expert legal readers).

[40] Debra Moss Curtis & Judith R. Karp, *Critical Reading in the Legal Writing Classroom*, 41 WILLAMETTE L. REV. 293, 299 (2005).

[41] Philip C. Kissam, *The Evaluation of Legal Scholarship*, 63 WASH. L. REV. 221, 249-50 (1988).

[42] BORDWELL, *supra* note 17, at 165; s*ee also supra* note 31 and accompanying text ("Perceptions tend to be anticipatory . . .").

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 *infra*, the literary technique of foreshadowing is crucial in this endeavor.[43] 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 just to name a few. 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 or, in other words, "individuals are persuaded when they have been induced to abandon one set of behaviors and adopt another." [44] One such behavioral outcome, and the one most relevant to foreshadowing is referred to as "response shaping."[45] As Professor Gerald Miller describes, "[f]requently, individuals possess no clearly established pattern of response to specific environmental stimuli. In such instances, persuasion takes the form of shaping and conditioning particular response patterns to these stimuli."[46] Thus, foreshadowing would fall into this category because, as is explained more fully in Section III,[47] foreshadowing helps shape the reader's response to the writer's eventual argument. Furthermore, 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."[48] Likewise, research

---

[43] *See infra* Part III.

[44] 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).

[45] JAMES B. STIFF & PAUL A. MONGEAU, PERSUASIVE COMMUNICATION 5 (2003) (the other behaviors associated with being persuaded are "response reinforcing" and "response changing").

[46] Miller, *supra* note 44, at 7.

[47] *See infra* Part III.

[48] Frank R. Kardes, *Spontaneous Inference Processes in Advertising: The Effects of Conclusion Omission and Involvement on Persuasion*, 15 J. CONSUMER RESEARCH 225,

has also revealed that "a participant's awareness of the intent to persuade on the part of the influencing agent will result in less message acceptance."[49] 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.[50]

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."[51]

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.[52] For example, in one famous study, researchers took seven syllogisms, each of which built upon one another.[53] Cumulatively, the syllogisms lead to the conclusion that smoking cigarettes caused cancer. Subjects were given the conclusions to a different number of the seven syllogisms and asked to infer the remaining conclusions. 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. In other words, subjects who were asked to expend less effort (i.e., they were simply given the conclusions to

---

225 (1988).

[49] Michael Burgoon, Eusebio Alvaro, Joseph Grandpre & Michael Voulodakis, *Revisiting the Theory of Psychological Resistance: Communicating Threats to Attitudinal Freedom, in* THE PERSUASION HANDBOOK, *supra* note 44, at 224-25.

[50] Kathryn M. Stanchi, *The Science of Persuasion: An Initial Exploration*, 2006 MICH. ST. L. REV. 411, 422 (2006).

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

[52] By "implicit conclusion," we mean that the author left it to the audience to draw the intended conclusion instead of stating that conclusion outright (i.e., "explicit conclusion").

[53] *See* Darwyn E. Linder & Stephen Worchel, *Opinion Change as a Result of Effortfully Drawing a Counterattitudinal Conclusion*, 6 J. EXPERIMENTAL SOCIAL PSYCHOLOGY 432 (1970)

most of the syllogisms) were less accepting of the overall conclusion than those who had to expend greater effort.[54] 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."[55]

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, subtlety arguably plays an even bigger role in legal argument given how skeptical legal readers tend to be. As Professor Jerome Bruner points out in his book *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."[56] When it comes to judges, this skepticism is even greater. As Professor Linda Edwards notes in her book *Legal 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."[57]

For all these reasons then, foreshadowing takes on particular power in legal narrative given that 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,[58] 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,[59] has

---

[54] *Id.* at 441. ("[A]ttitude change was significantly greater the more conclusions the subjects were asked to find for themselves.).

[55] STIFF & MONGEAU, *supra* note 45, 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).

[56] BRUNER, *supra* note 3, at 42.

[57] LINDA HOLDEMAN EDWARDS, LEGAL WRITING: PROCESS, ANALYSIS & ORGANIZATION 241 (2006)

[58] For a discussion of involvement as it pertains to legal advocacy, *see generally* Stanchi, *supra* note 50, 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.").

[59] *See supra* notes 8-9 and accompanying text.

been defined quite simply as something which "projects onto the *present* a shadow from the *future*."[60] In other words, foreshadowing "indicates backward causality" as it is "a shadow cast in advance of an object."[61] It is important to note, however, that these shadows are not of "objects that *might* be ahead of us, but only those that *are* ahead of us."[62] In so doing, foreshadowing helps preclude the possibility of options.[63] Indeed, one of the purposes of foreshadowing is to avoid surprises.[64]

By casting these shadows, foreshadowing then operates to "activate[e] an intended target by presenting an earlier hint."[65] Or, as one scholar describes: "Through foreshadowing, that early scene simultaneously predicts and confirms a future that then appears as an inevitability, the only course the story could have taken."[66] Of course, the meaning of this early scene is often not understood until later on. As Rolf Lunden states in his book, *The United Stories of America: Studies in the Short Story Composite*, the scene which casts the foreshadow (a scene Lunden refers to as the "narrative seed") merely prepares the reader for the ultimate resolution of the story and, in that sense, "is only fully understood in retrospect."[67] 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 lead the viewer to anticipate that the young girl would eventually hack into a computer and save everyone's life; 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, "[f]oreshadowing *implicitly* alludes to a future event in a manner that makes it difficult to recognize its meaning until *the event actually happens*."[68] Or, as noted earlier, the information that is intended to foreshadow later events should be positioned "unobtrusively."[69] Otherwise, the subject may feel manipulated, which,

---

[60] Welch, *supra* note 9, at 378 (emphasis added); *see also* MORSON, *supra* note 1, at 47 ("[F]oreshadowing gives the reader a sign indicating what will happen").

[61] MORSON, *supra* note 1, at 48.

[62] *Id.* at 49. In other words, "foreshadowing gives the reader a sign of what *will* happen." *Id.* at 47.

[63] *Id.* at 49.

[64] BORDWELL, *supra* note 17, at 165.

[65] Zeig, *supra* note 8, at 222.

[66] Welch, *supra* note 9, at 378.

[67] ROLF LUNDEN, THE UNITED STORIES OF AMERICA: STUDIES IN THE SHORT STORY COMPOSITE 63 (1999).

[68] 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 (Ulrike Spierling & Nicolas Szilas eds., 2008).

[69] *See supra* note 17 and accompanying text.

again, can undermine the ability to persuade.[70] For these reasons, literary scholars caution that "the best clues in a story . . . are camouflaged as ordinary events, 'without anticipation.'"[71]

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 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

As detailed earlier, foreshadowing serves to prepare an audience member for a later point that the author will make.[72] 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.[73] Additionally, priming has also been defined as "a procedure that increases the accessibility of some category or construct in memory."[74] Beyond these general definitions, however, priming is an extremely complex phenomenon. Not only are psychologists unclear about how exactly priming impacts perception,[75] but priming also 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."[76] For example, one study found that the mood of a viewer while watching a television

---

[70] *See supra* Part II.B.

[71] CHARLES J. RZEPKA, DETECTIVE FICTION 29 (2008).

[72] *See supra* notes 60-67 and accompanying text.

[73] Shelia T. Murphy & R.B. Zajonc, *Affect, Cognition, and Awareness: Affective Priming with Optimal and Suboptimal Stimulus Exposure*, 64 J. PERSONALITY & SOCIAL PSYCHOLOGY 723, 723 (1993).

[74] Curtis P. Haugtvedt, Richard J. Shakarchi, Bendik M. Samulson & Kaiya Liu, *Consumer Psychology and Attitude Change, in* RESISTANCE AND PERSUASION 283, 287 (Eric S. Knowles & Jay A. Linn eds., 2003)

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

[76] Youjae Yi, *Cognitive and Affective Priming Effects of the Context for Print Advertisements*, 19 J. ADVERTISING 40, 42 (1990).

commercial largely mirrored the mood generated by the television program that immediately lead into the commercial.[77] In this context, then, "affect" refers to "expressions of preference"[78] or, more specifically, the audience member's feelings and attitudes towards the message.[79] As a result, affective responses have been defined as the "quick and dirty route for evaluation."[80]

Although affective priming can occur both consciously and subconsciously,[81] 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.[82] 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.[83] 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.[84] Thus, what this study, and others like it, have concluded is that, first, it takes only minimal stimuli to produce an affective response: "The affective primacy hypothesis holds that affective reactions can be elicited with minimal stimulus input."[85] Second, affective judgments are made both quickly and subconsciously: "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 of awareness."[86]

Of course, as other studies have demonstrated, a prime need not be subliminal in order to produce an affective response. For instance, one

---

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

[78] Murphy & Zajonc, *supra* note 73, at 724.

[79] *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).

[80] Storbeck & Robinson, *supra* note 75, at 81.

[81] Siu-Lan Tan, Matthew P. Spackman & Matthew A. Bezdek, *Viewers' Interpretations of Film Characters' Emotions: Effects of Presenting Film Music Before or After a Character is Shown*, 25 MUSIC PERCEPTION 135, 138 (2007).

[82] *See* Murphy & Zajonc, *supra* note 73.

[83] *Id.* at 725.

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

[85] *Id.* at 723.

[86] Dirk Hermans, Jan De Houwer & Paul Eelen, *A Time Course Analysis of the Affective Priming Effect*, 15 COGNITION AND EMOTION 143, 144 (2001); *See also* EYSENCK & KEANE, *supra* note 22, at 490 ("According to the affective primacy hypothesis, simple affective qualities of stimuli can be processed much faster than more cognitive ones.").

study of cinematic music found that music in film can impact the audience's perceived emotions of the film's characters: "when asked to label a film character's emotions in an open-ended question, after viewing a scene with 'fear' music, participants 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."[87] 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."[88] 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." [89] Thus, a prime need not be subliminal to produce an affective response. Nonetheless, priming does appear to work more effectively when the prime precedes the intended target and the viewer is not overtly aware of the priming influence.[90]

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."[91] *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."[92] 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

[87] Tan et al., *supra* note 81, at 146.

[88] *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.").

[89] *Id.*

[90] *See* Gerald L. Clore & Simone Schnall, *The Influence of Affect on Attitude*, *in* THE HANDBOOK OF ATTITUDES 437, 450 (Dolores Albarracin, Blair T. Johnson & Mark P. Zanna eds., 2005) ("Increased liking of a stimulus also occurs when participants are not consciously aware of having been repeatedly exposed to that stimulus.").

[91] Murphy & Zajonc, *supra* note 73, at 724.

[92] 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, Donald L. Shaw & David Weaver eds., 1997).

> affect consumers' brand evaluations. 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."[93]

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.[94]

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."[95] 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 short cut devices, or schemata, to quickly analyze new stimuli.[96] Cognitive priming operates then by prepping certain schemata so that they are more easily accessible. As the authors of the influential work, *Communication and Democracy: Exploring the Intellectual Frontiers in Agenda-Setting Theory* explain, 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."[97]

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

---

[93] Yi, *supra* note 76, at 40.

[94] Willnat, *supra* note 92, at 53.

[95] Gerald M. Kosicki, *The Media Priming Effect*, *in* THE PERSUASION HANDOOK: DEVELOPMENTS IN THEORY AND PRACTICE, *supra* note 44, at 70-71. Studies on how individuals process news media offer additional support for this method of selective processing. *See* Willnat, *supra* note 92, 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 chose to cover.").

[96] *See infra* Part III.B.

[97] Willnat, *supra* note 92, at 54. 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 conversation 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.

particular events and issues that have been highlighted in news reports." [98] The potency of media priming was displayed by Professors Shanto Iyengar and Donald Kinder in an oft-cited 1987 study.[99] 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.[100] Subsequently, the subjects were asked to rate the President of the United States on a number of factors, including defense. 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."[101] Thus, the human brain, when confronted with a new stimulus, goes in search of previously stored data to aid in interpretation of that stimulus. Cognitive priming then 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.[102]

Of course, regardless of whether it operates on an affective or a cognitive level, priming succeeds not simply through the introduction of a priming influence. Instead, it is the stored data, or schema, that this prime evokes that ultimately leads to a particular response in the audience member's mind. Accordingly, the next section will discuss the way in which these schema 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 even dining at this particular restaurant. The answer of course is simple: these events are anticipated because these events are

---

[98] Kosicki, *supra* note 95, at 64.

[99] SHANTO IYENGAR & DONALD R. KINDER, NEWS THAT MATTERS 65-69 (1987)

[100] *Id.*

[101] Kosicki, *supra* note 95, at 72. The study also revealed that, having been primed on the defense-related issues, "a one point improvement in [the subject's] 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 to subjects who were not shown newscasts involving defense, where a one-point improvement in defense produced only "about a one-quarter point improvement in evaluations of his general job performance." *see also* IYENGAR & KINDER, supra note 99, at 66.

[102] Kosicki, *supra* note 95, at 71 (priming causes individuals to evaluate a stimulus using "only a sample of readily available information.").

generally what happens when one dines in a restaurant. [103]

This example, then, provides a very basic example of Schema Theory. "Schema," as that term is used in social psychology, refers to "to any cluster of features that have become associated with a referent and stored in memory as a unit."[104] 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." [105] Furthermore, schema 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).[106] Despite the different forms they can take, schema essentially operate as "cheat sheets" or "rules of thumb."[107]

Indeed, "cheat sheet" is an apt description given that humans use stored knowledge, or schemata, to allow the human brain to analyze and comprehend new data much more quickly.[108] Accordingly, schemata play a large role in almost all human cognition.[109] As noted Professor and Scholar Steven Pinker describes:

> We mortals have to make fallible guesses from fragmentary information. Each of our mental modules solves this unsolvable conundrum by a leap of faith about how the world works. We use prefabricated mental cheat sheets to guide the making of indispensable assumptions – the only defense for which being that the assumptions worked well enough in the world of our ancestors.[110]

---

[103] *See* KEITH RAYNER & ALEXANDER POLLATSEK, THE PSYCHOLOGY OF READING 304 (1994) ("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.").

[104] Robert S. Wyer, Jr. & Dolores Albarracin, *Belief Formation, Organization, and Change: Cognitive and Motivational Influences, in* THE HANDBOOK OF ATTITUDES, *supra* note 90, at 273, 280.

[105] EYSENCK & KEANE, *supra* note 22, at 252.

[106] BORDWELL, *supra* note 17, at 31.

[107] KENDALL HAVEN, STORY PROOF: THE SCIENCE BEHIND THE STARTLING POWER OF STORY 48 (2007) (noting that schema are also referred to as "neural maps").

[108] *See* EYSENCK & KEANE, *supra* note 22, 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.").

[109] *Id.* at 497 (noting that "schemas influence most cognitive processes such as attention, perception, learning and retrieval of information.").

[110] STEVEN PINKER, HOW THE MIND WORKS 30 (1997) ("Only an angel could be a

Schemata plays a key role in the Constructivist Theory of human perception, described supra, given that it is schema that allow a person to project the hypotheses and expectations that factor so heavily in the constructivist model.[111] Kendal Haven, an expert on the subject of storytelling, describes the way in which the theory works as follows: schemata "activate banks of prior knowledge to identify the 'best guess' for each missing bit of information."[112] Haven goes on to point out just how powerful these schema can be, noting that schema can "spin a few incoming signals into entire scenarios complete with character profiles, intents, dangers, possible actions, and likely outcomes."[113] Thus, humans use schema to fill in missing data and thus "make the world a more predictable place."[114]

Furthermore, like foreshadowing in general, the schema we operate under can be quite persuasive.[115] For one thing, schema 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 of people of which we have already formed certain judgments.[116] This is so because, once formed, schema can be quite durable: "when 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."[117] Accordingly, one seeking to persuade can attempt to provoke certain responses simply by trying to elicit certain schema in the audience member's mind. As one scholar describes, "thinking about two entities in relation to one another should increase their association in memory and, therefore, should increase the likelihood that

---

general problem-solver.").

[111] *See* BORDWELL, *supra* note 17, at 164 ("On the basis of such schemata, the viewer projects hypotheses."); EYNSECK & KEANE, *supra* note 22, at 352 ("A crucial function of schemas is that they allow us to form expectations.").

[112] HAVEN, *supra* note 107, at 48.

[113] *Id.*

[114] EYSENCK & KEANE, *supra* note 22, at 352.

[115] Alexander Todorov, Shelly Chaiken, Marlone D. Henderson, *The Heuristic-Systematic Model of Social Information Processing*, *in* THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE, *supra* note 44, 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.").

[116] Clore & Schnall, *supra* note 90, 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 with knowledge that individuals are painted with the same brush as the categories of which they are seen to be members.").

[117] Wyer & Albarracin, *supra* note 104, at 280.

calling attention to one of the events will stimulate thoughts about the other as well."[118]

Indeed, so powerful are these schema that humans, when confronted with new information, need not even analyze all new data to process the new information. 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."[119] In fact, one study found that subjects would take twice as long when looking at pictures of scenes that contained unexpected items.[120] As a result, not only can an author use schema theory to conjure up schemata that is favorable to the author's purpose, he can also manipulate details to make it less likely that an audience member will conjure up unfavorable schemata. More specifically, including things that are seemingly incompatible with certain "undesirable" schema can make the viewer regard that schema as ultimately inapplicable or, at least, more questionable; in either case, the author is slowing the immediate impact this unfavorable schemata might pose.

Finally, schemata theory not only impacts initial perception but also has a profound impact on subsequent recall. In 1932, noted psychologist Bartlett argued that schema plays a critical role in what we remember from stories.[121] 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."[122] 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 the state. Her parents finally decided to take

---

[118] *Id.* at 283.

[119] EYSENCK & KEANE, *supra* note 22, at 256.

[120] *See* Alinda Friedman, *Framing Pictures: The Role of Knowledge in Automatised Encoding and Memory for Gist*, 108 J. EXPERIMENTAL PSYCHOLOGY 316 (1979).

[121] *See generally* FREDERIC C. BARTLETT, REMEMBERING: A STUDY IN EXPERIMENTAL AND SOCIAL PSYCHOLOGY (1932).

[122] EYSENCK & KEANE, *supra* note 22, at 352.

> some action. They hired a private teacher for Carol.[123]

Other participants received the same story, but in their case, the name "Carol Harris" was changed to "Helen Keller." When later asked about the story, those who were told 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."[124] Furthermore, this mistake in recall became more prevalent the longer it had been since the subject was provided the story.[125] Thus, schema (which, in the above example, was the preexisting knowledge about Helen Keller) can persuasively impact not only initial perceptions but subsequent recall as well.

Given the impact it can have on subsequent recall, as the next section details, schemata can also be employed to not only color how a discrete work is initially perceived and subsequently recalled, but also how an audience member might even perceive future works on the same topic.

C. Inoculation Theory

Whereas an author would frequently employ schema 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.[126] In essence, "Inoculation 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."[127] As Professor Kathryn Stanchi explains:

---

[123] R.A. Sulin & D.J. Dooling, *Intrustion of a Thematic Idea in Retention of Prose*, 103 J. EXPERIMENTAL PSYCHOLOGY 255, 256 (1974).

[124] *Id.* at 257-58.

[125] *Id.* at 259-62 (concluding that "thematic effects increase with the passage of time").

[126] 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.").

[127] Blair T. Johnson, Gregory R. Maio & Aaron Smith-McLallen, *Communication and Attitude Change: Causes, Processes, and Effects*, *in* THE HANDBOOK OF ATTITUDES, *supra* note 90, at 650.

> 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 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 the opposing side because she will already have a cache of ammunition with which to resist the opposing argument.[128]

As the above quote indicates, successful inoculation involves two components. First, and "the most distinguishing feature of inoculation,"[129] is the *threat*. In this context, a threat is merely "a warning of possible future attacks on attitudes and the recognition of attitude vulnerability to change."[130] Such threats "elicit[] the motivation to protect attitudes and, thus, cultivates resistance to counterpersuasion."[131] As Stanchi explains, "when 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."[132] This is

---

[128] Kathryn M. Stanchi, *Playing With Fire: The Science of Confronting Adverse Material in Legal Advocacy*, 60 RUTGERS L. REV. 381, 399-400 (2008). Interestingly, one of the events that lead 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. This was so because the Americans had never before really questioned their patriotism and American values. As such, the prisoners lacked immunity to counterarguments and were thus more susceptible to influence. *Id.* at 400-01.

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

[130] Erin Alison Szabo & Michael Pfau, *Nuances in Inoculation, in* THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE, *supra* note 44, at 235.

[131] *Id.*

[132] Stanchi, *supra* note 128, at 406.

because "people want to resolve dissonance and will gravitate toward a path that allows them to alleviate the threat to the position advocated."[133] 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."[134]

Threats alone, however, are insufficient to create an inoculation effect. In addition, the threat must be paired with, what social science refers to as, *refutational preemption.* Whereas the threat operates on a more emotional level, refutational preemption is more cognitive, in that it "provides receivers with specific arguments they can use to strengthen their attitudes against subsequent influence."[135] For example, in the teenage smoking study mentioned earlier, the subjects were not only told of the threat that peer pressure poses but also the arguments peers might use to encourage smoking and the truth as to those arguments.[136] Thus, threat and refutational preemption are indispensable counterparts to successful inoculation: "refutational preemption provides scripts; threat provides motivation."[137]

To fully understand, however, the purpose and function of inoculation, one must also 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 a preclusion of such objections "by articulating them, and even answering them" within the original message.[138]

---

[133] *Id.*

[134] Michael Pfau, Steve Van Bockern & Jong Guen Kang, *Use of Inoculation to Promote Resistance to Smoking Initiation Among Adolescents*, 59 COMM. MONOGRAPHS 213, 219 (1992).

[135] Szabo & Pfau, *supra* note 130, at 235.

[136] *See* Pfau, Van Bockern & Geun Kang, *supra* note 134, 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.").

[137] Szabo & Pfau, *supra* note 130, at 235 ("The inoculative pretreatment identifies attitudinal counterarguments, supplies refutations of these counterarguments, and provides an operational model of attitude defense.").

[138] 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 objection 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 L. JASINSKI, SOURCEBOOK ON RHETORIC: KEY CONCEPTS IN CONTEMPORARY

Or as Professor Douglas Walton explains, "[u]sing 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."[139]

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.[140] 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."[141] In so doing, the device creates a sense of collaboration between the author and the receiver.[142] 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."[143] Thus, prolepsis is very much rooted in inoculation theory as both recognize the persuasive power of two-sided messages, yet both 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 refer to generally as foreshadowing. Given then 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

As noted in the introduction to this Article, narrative plays a crucial role within the legal system.[144] In describing that role, some have even gone so

---

RHETORICAL STUDIES 554, 557 (2001).

[139] DOUGLAS WALTON, MEDIA ARGUMENTATION: DIALECTIC, PERSUASION, AND RHETORIC 141 (2007)

[140] *Id.* at 142. Walton even describes prolepsis as "the main dialectical element of rhetorical argumentation." *Id.* at 334.

[141] CHRISTOPHER W. TINDALE, RHETORICAL ARGUMENTATION: PRINCIPLES OF THEORY AND PRACTICE 84 (2004) (Prolepsis allows an author to make a point by employing "a series of imagined objections and counters to those objections.").

[142] *Id.*

[143] *Id.* at 85.

[144] *See supra* note 10 and accompanying text.

far as to say that "Law lives on narrative."[145] To explain why narrative is so prevalent within the law, Professors Amsterdam and 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 tell 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.[146]

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"[147]—but why? 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."[148] In other words, narrative structure contributes to persuasion because of the fact that "narrative is linguistically or psychologically 'innate,' as natural to human comprehension of the world as our visual rendering of what the eye sees

---

[145] ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW: HOW COURTS RELY ON STORYTELLING AND HOW THEIR STORIES CHANGE THE WAYS WE UNDERSTAND THE LAW—AND OURSELVES 110 (2000).

[146] *Id.*

[147] Elyse Pepper, *The Case for "Thinking Like a Filmmaker,"* 14 LEGAL WRITING: J. LEGAL WRITING INST. 171, 204 (2008).

[148] Steven L. Winter, *The Cognitive Dimension of the Agony 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.").

into figure and ground."[149] 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.'[150] For all these reasons, some have posited that "[s]tory may be the strongest non-violent persuasion method we know."[151]

And it is not just attorneys who employ the persuasive power of narrative. Indeed, "[j]udges are storytellers too."[152] 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."[153] 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 cases. Judges want to persuade lawyers, litigants, and the community at large that the decision they have made . . . is the absolutely correct one."[154] Although the possibility of appellate review is a particularly motivating force behind the use of persuasive techniques in judicial writing,[155] judges also have more long-range persuasive goals when drafting an opinion. As one scholar notes, "[j]udges have employed storytelling in their opinions,"[156] not only to persuade litigants and other judges, but also to prove to "the unforgiving critique of history that their decisions were correct."[157] 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 the status of art."[158]

---

[149] J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 53, 58 (2008) (noting that "[l]ittle disagreement exists about the fact that narratives are fundamental to our understanding of human experience.").

[150] Bret Rappaport, *A Shot Across the Bow: How to Write an Effective Demand Letter*, 5 J. ASS'N LEGAL WRITING DIRECTORS 32, 46 (2008).

[151] Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 RUTGERS L.J. 459, 465 (2001) (quoting DAVID BALL, THEATER TIPS AND STRATEGIES FOR JURY TRIALS 66 (1994)).

[152] Bret Rappaport, *Tapping the Human Adaptive Origins of Storytelling*, 25 T.M. COOLEY L. REV. 267, 293 (2008).

[153] BRUNER, *supra* note 3, at 40.

[154] Judith S. Kaye, *Judges as Wordsmiths*, 69 NOV. N.Y. ST. B.J. 10, 10 (1997).

[155] 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.")

[156] Rappaport, *supra* note 152, at 292.

[157] *Id.*

[158] Brett G. Scharffs, *The Character of Legal Reasoning*, 61 WASH. & LEE L. REV. 733, 751 n. 53 (2004).

Despite the fact that legal narrative, like more traditional literary narrative, has a persuasive function, legal narrative is nonetheless unique in at least one respect. Specifically, "literary fiction evokes familiar life with the aim of disturbing our expectations about it,"[159] while "[l]egal stories strive to make the world seem self-evident, a 'continued story' that inherits a legitimated past."[160] 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.[161] As Ronald Dworkin notes, "a line of precedent is like a continuing story."[162] 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."[163] Given then a judge's interest in convincing a vast number of diverse readers that 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.

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 so as 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 then that successful legal narrative will incorporate the attributes of more traditional narrative. As Jerome 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."[164]

---

[159] BRUNER, *supra* note 3, at 49.

[160] *Id.*

[161] *See supra* notes 11-12 and accompanying text; *see also* Bruner, *supra* note 3, at 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." Meyer 12 Leg. Writing 229.

[162] AMSTERDAM & BRUNER, *supra* note 145, at 141 (citing RONALD DWORKIN, LAW'S EMPIRE (1986)).

[163] BRUNER, *supra* note 3, at 39.

[164] *Id.* at 13; *see also* Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 LEGAL WRITING: J. LEAL 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.").

In so doing, one such device that courts have used is foreshadowing.[165] For example, in the 1989 case of *DeShaney v. Winnebago County Dept. of Social Services*,[166] a majority opinion of the United States Supreme Court held that a mother could not pursue a Section 1983 claim against a social service agency for failing to remove her child from the home of the child's abusive father. As the dissent points out, however, one need not have read the entire opinion to have a pretty good idea of the outcome: "by 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 facts before us."[167]

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, thus, is one that audience members would have routinely encountered.[168] More importantly, however, foreshadowing can be extremely persuasive given the impact it has on human cognition. First off, foreshadowing, properly exercised, is subtle, calling for implicit conclusions.[169] As discussed *supra*, this subtlety can greatly enhance persuasion, especially to the critical legal mind.[170] Furthermore, foreshadowing recognizes that human perception is based, not so much on external stimuli, but the hypotheses the brain makes on the basis of that stimuli.[171] 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 while providing legal exposition given the fact that the whole point of a legal precedence section is to explain to the legal audience the law that the judge will ultimate 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.

---

[165] *See* Rappaport, *supra* note 152, at 293 (noting how some judges foreshadow their result by the way in which they lay out the description of the client's facts).

[166] 489 U.S. 189 (1989).

[167] *Id.* at 204 (Brennan, J., dissenting).

[168] *See supra* notes 8-9, 59 and accompanying text.

[169] *See supra* notes 68-71 and accompanying text.

[170] *See supra* Part II.B.

[171] *See supra* Part II.A.

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 do judges incorporate and combine these principles to make their written opinions more persuasive. After all, the "characteristics of judicial opinions are not happenstance,"[172] so what conscious choices do judges make to take advantage of the power of foreshadowing? To help answer that question, this section will detail five principles relating to foreshadowing, looking at specific examples of each and analyzing them in light of the psychological theories discussed *supra*.[173] These principles and their corresponding examples are instructive in that they help 1) broaden our view of how judicial opinions operate on a cognitive level and 2) 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 then moving on to substantive due process in general, followed by a discussion of analogous case law. 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, 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.*,[174] 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 interest."[175] Following that description, the Court ultimately ruled that the legislation in that case, which required special permits of homes for the mentally retarded, violated

---

[172] Leubsdorf, *supra* note 12, at 447.
[173] *See supra* Part III.
[174] 473 U.S. 432 (1985).
[175] *Id.* at 446.

the Equal Protection clause given its lack of a rational basis.[176] Now, compare that statement of the rule with one a dissenting opinion, citing to *Cleburne*, gave in *Nguyen v. I.N.S.*:[177] "Under rational basis scrutiny, the means *need only* be 'rationally related' to *a conceivable* and legitimate state end."[178] In *Nguyen*, the dissent was describing 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.[179] 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 decision in *Michael H. v. Gerald D.*,[180] a case that concerned the due process rights of a nonmarital father *vis a vis* the child he fathered with a married woman. Earlier on in the opinion, Justice Scalia describes the challenged California law as follows: "California law, *like nature itself*, makes no provision for dual fatherhood."[181] At first blush, the reference to nature seems gratuitous—why would Scalia use such wording? We, of course, do not know for sure why he made this choice, but looking 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,[182] the Court had established that biological ties alone are insufficient to afford a nonmarital father with a due process interest in his relationship with a child. Instead, only "[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming 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."[183] Based solely on this line of cases, then, Michael H. seemingly would prevail on his claim given that he had spent

---

[176] *Id.* at 448.

[177] 533 U.S. 53 (2001).

[178] *Id.* at 78.

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

[180] 491 U.S. 110 (1989)

[181] *Id.* at 118.

[182] *See* Stanley v. Illinois, 405 U.S. 645 (1972); Quilloin v. Walcott, 434 U.S. 246 (1978); Caban v. Mohammad, 441 U.S. 380 (1979); and Lehr v. Robertson, 463 U.S. 248 (1983). 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).

[183] Lehr, 463 U.S. at 261.

significant time and resources developing a relationship with his daughter. 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, a bit later in the opinion, Justice Scalia 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.*[184]

Scalia then quickly dismantles Michael H.'s argument that the Court's previous decisions on nonmarital fathers supports his argument: "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."[185] Still Scalia is not done stressing the role of tradition and history. Indeed, throughout his opinion he repeats the point many times:

- "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."[186]

- "Since it is Michael's burden to establish that such 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."[187]

---

[184] 491 U.S. at 122.
[185] *Id.* at 123.
[186] *Id.* at 124.
[187] *Id.* at 125.

- "What we 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."[188]

Regardless of whether Scalia did so intentionally, his repeated references to history and tradition as being the central inquiry in this determination helps undermine 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. 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).[189] This repetition is likely no accident. As one scholar notes: "Repetition reaffirms the data on which hypotheses should be ground."[190]

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

---

[188] *Id.* at 126.

[189] As noted earlier, 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 supra* notes 119-120 and accompanying text.

[190] BORDWELL, *supra* note 17, at 164; *see also id.* at 80 (Noting that repetition can "direct the viewer toward the most probable hypothesis").

manner favoring one's side."[191]

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.*[192] 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.[193] Both the district court and the initial Ninth Circuit panel granted summary judgment in favor of the employer, reasoning that, in essence, 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.[194] However, in the eventual en banc decision, discussed below, the majority finds that Rene has indeed set out a cognizable claim and thus reverses the grant of summary judgment.[195]

Turning to that en banc 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."[196] What follows is then a string cite (with parenthetical) of twelve cases, each of which involved a physical sexual assault.[197] Shortly thereafter, the majority moves on to its description of *Oncale v. Sundowner Offshore Servs., Inc.*[198]:

> 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 for the defendant-employer.[199]

Following this description of *Oncale*, the majority tells us, several

[191] BRUNER, *supra* note 3, at 43.
[192] 305 F.3d 1061 (9th Cir. 2002).
[193] *Id.* at 1064.
[194] Rene v. MGM Grand Hotel, Inc., 243 F.3d 1206 (9th Cir. 2001).
[195] *Id.* at 1068.
[196] *Id.* at 1065.
[197] *Id.* at 1065-66.
[198] 523 U.S. 75 (1998).
[199] Rene, 305 F.3d at 1066.

paragraphs later when it moves to the facts of Rene's case, that: "[W]e 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."[200] 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 "defendant-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 (seemingly on his own) that fact with victory given that the reader has been primed to associate those facts with a specific result.[201]

Compare, however, the majority's description with that of the dissent. The dissent does concede that *Oncale* "did involve harassment of the male plaintiff by his male co-workers, some of which was similar to the harassment in this case."[202] 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 harassment is actionable under Title VII. The Court held that is 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

[200] *Id.* at 1067.

[201] 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." *See supra* notes 117-118 and accompanying text.

[202] Rene, 305 F.3d at 1072 (Hug, J., dissenting).

> 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."[203]

The dissent then, when moving to its analysis, focused exclusively on why Rene had not proven that 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."[204] 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 assault in the workplace."[205] 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 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 a precedent case. First, describing that case broadly can allow the judge to focus on facts in the precedent case 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 essentially 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 that case is more palatable to the reader given

---

[203] *Id.* at 1072-73.
[204] *See supra* note 199.
[205] Oncale, 523 U.S. at 80.

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 that also matches the court's outcome. The pliable nature of cases 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. This broad reading, of course, makes it easier for Rene's case to fit under *Oncale's* ambit. The dissent, in 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, but the plaintiff still must prove that the harassment was sex-based. This specific formulation of *Oncale* thus makes it harder for Rene to avail himself to the *Oncale* holding.

Finally, it is not the intent of this Article to imply that judge's 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."[206] 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."[207] The point here is merely that *how judges describe and phrase* their interpretation of precedent can foreshadow the judges' ultimate disposition, making it likely that a reader will accept that disposition as just.

---

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

[207] *Id.*

C. Side-Stepping Cases and Rules of Law

Beyond rules and precedent cases, judges are sometimes swayed instead by other considerations, most notably public policy. However, when a judge rules on the basis of the latter, seemingly 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.[208] The second, concerns public relations. Indeed, it is unlikely that many judges would welcome the label "activist judge," but this is precisely the term that might arise should the judge's opinion fail to convince readers that this departure from the "law" is justified. Again, foreshadowing is an extremely helpful tool in this situation.

For example, in a 1993 case, the Supreme Court of Vermont was faced with whether a same-sex partner should be allowed to adopt her partner's biological child without severing the parental rights of the natural parent.[209] The statute in Vermont provided that:

> 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.[210]

This statute was designed to give step-parents the ability to adopt their spouse's child without interfering with the parental rights of the natural parent. However, in this 1993 case, the court was faced with a lesbian couple who, at that time at least, could not legally marry.[211] 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 as follows:

> In interpreting Vermont's adoption statutes, we are mindful that the state's primary concern is to promote the

---

[208] *See supra* note 155 and accompanying text.
[209] Adoptions of B.L.V.B. and E.L.V.B., 628 A.2d 1271 (Vt. 1993).
[210] *Id.* at 1273 (quoting 15 V.S.A. § 448) (emphasis added).
[211] *Id.* at 1272.

> 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."[212]

Assuming the reader accepts this description of the rule, it then 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."[213]

A similar use of foreshadowing can be found in court decisions where the court ultimately decides to depart from *stare decisis* and overturn what would have otherwise been binding precedent. For example, in *Lawrence v. Texas*,[214] the Supreme Court overturned *Bowers v. Hardwick*.[215] 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.*"[216] With that statement, the Court's eventual pronouncement that "*Bowers v. Hardwick* should be and now is overruled"[217] is much less surprising as the reader has been primed for that possibility. In fact, many readers would have anticipated just such a result based on the way the Court had 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 either 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

---

[212] *Id.* at 1274.

[213] *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. *See infra* Part V(E).

[214] 593 U.S. 558 (2003).

[215] 478 U.S. 186 (1986).

[216] Lawrence, 593 U.S. at 577. 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).

[217] *Id.* at 578.

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*[218] provides an illustrative example. In a concurring opinion, Justice O'Connor agreed that the Texas law, which banned same-sex sodomy, was unconstitutional.[219] However, in contrast to the majority, which relied on substantive due process, O'Connor instead relied on Equal Protection given that the Texas law at issue did not prohibit sodomy by opposite-sex couples. Regardless, Justice O'Connor devoted the entire next-to-last paragraph of her concurrence to make 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 fall 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.[220]

From this paragraph, it would appear 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 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).[221]

Another circumstance that can precipitate inoculation is when a court issues what it knows will be a very controversial opinion, one that is likely to prompt strong public disagreement. For example, in an opinion[222]

---

[218] *See supra* note 214.
[219] *Id.* at 579-85 (O'Connor, J., concurring).
[220] *Id.* at 585.
[221] *See supra* notes 129-137 and accompanying text.
[222] Newdow v. U.S. Congress, 328 F.3d 466 (9th Cir. 2003).

denying a motion for a rehearing en banc of *Newdow v. U.S. Congress*,[223] 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 those statutes are adopted by legislatures or by popular vote. . . . 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.[224]

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."[225] 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

---

[223] 292 F.3d 597 (9th Cir. 2002).
[224] *See supra* note 222, at 470-71.
[225] AMSTERDAM AND BRUNER, *supra* note 145, at 95.

relation to the main event."[226]

This principle is known as "Chekhov's Gun." 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."[227] Instead, if the gun has no purpose, then it should not be there in the first place.[228] 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."[229] Or, as one author puts it, "any 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."[230] Failure to adhere to this principle violates the reader's expectations in that 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."[231]

In other words, foreshadowing within a judicial opinion requires both an initial exposure to the relevant law followed later on by the 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 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,"[232] 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.[233] 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, however, there is another point related to "Chekhov's

---

[226] JOSIP NOVAKOVICH, FICTION WRITER'S WORKSHOP 87 (1995)

[227] NANCY KRESS, DYNAMIC CHARACTERS 250 (2004); ASHISH PANDEY, DICTIONARY OF FICTION 40 (2005) ("If you put a gun onstage in Act I, Chekhov once wrote, you must use it by Act III.").

[228] LISA SELVIDGE, WRITING FICTION WORKBOOK 78 (2007).

[229] KRESS, *supra* note 227, at 250.

[230] CATHY POPKIN, THE PRAGMATICS OF INSIGNIFICANCE 135 (1993).

[231] KRESS, *supra* note 227, at 250.

[232] BRUNER, *supra* note 3, at 13.

[233] *See infra* Part V(B)-(E).

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 said law so as not to violate the principle of "Chekhov's Gun." After all, if the judge were to raise this law in the legal background section, the reader would likely develop a strong expectation that the judge will subsequently say 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 as why not could appear a bit dodgy. It is not inconceivable then 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*[234] in which the Supreme Court struck down an amendment to the Colorado Constitution that prevented any state anti-discrimination laws from protecting homosexuals. At the time the case was heard, however, *Bowers v. Hardwick,*[235] a U.S. Supreme Court case which upheld the constitutionality of state sodomy laws, was still good law. 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 in *Romer*, "If 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."[236] How then did the majority get around this argument that perhaps, under *Bowers*, the Colorado amendment in *Romer* was constitutional?

Unfortunately, we can only guess because, in fact, the majority opinion *never even mentions* its earlier decision in *Bowers.*[237] This omission is somewhat surprising to be sure (especially given that the majority would surely have read Scalia's dissent prior to publication). Obviously, there can be a variety of reasons why the majority would have not addressed *Bowers*,[238] 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 intentional so as not to violate the "Chekhov's Gun" principle. As Professor Cass Sunstein points out, "the Court's silence about Hardwick stemmed from the fact that a majority could

---

[234] 517 U.S. 620 (1996).

[235] *See supra* note 215.

[236] Romer, 517 U.S. at 641 (Scalia, J., dissenting).

[237] 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 ("Justice Kennedy, writing for the majority in Romer, found Bowers entirely unworthy of mention.")

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

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." [239] 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."[240]

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, "[h]uman reason *is* narrative because it extends from its inception and in every one of its acts toward the *foreshadowing* of its total course."[241] 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, as discussed and illustrated *supra*,[242] 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 also 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. [243]

---

[239] Cass R. Sunstein, *Leaving Things Undecided*, 110 HARV. L. REV. 4, 65 (1996).

[240] Nan D. Hunter, *From Outlaws to In-Laws: Issues Surrounding the Evolving Legal Status of Lesbian and Gay Individuals*, 89 KY. L.J. 885, 897 (2001).

[241] ANGEL MEDINA, REFLECTION, TIME AND THE NOVEL: TOWARD A COMMUNICATIVE THEORY OF LITERATURE 30 (1979).

[242] *See supra* Part V.

[243] It is bears mention 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.