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The Power of Priming in Legal Advocacy: Using the Science of First Impressions to Persuade the Reader

First impressions count. They are powerful and they are long lasting. They can influence whether you get a job or a second date and how people judge you in the long term.[1] In one study, for example, students formed an impression about their instructor after viewing only a few seconds of the instructor's teaching on videotape.[2] These early and quickly formed impressions were remarkably consistent with the end-of-the-semester student evaluations of the

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[1] *See* Daniel G. Linz & Steven Penrod, *Increasing Attorney Persuasiveness in the Courtroom*, 8 LAW & PSYCHOL. REV. 1, 9–10 (1984); *see generally* MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING 3–17 (2005).

[2] GLADWELL, *supra* note 1, at 12–13; Nalini Ambady & Robert Rosenthal, *Half a Minute: Predicting Teacher Evaluations from Thin Slices of Nonverbal Behavior and Physical Attractiveness*, 64 J. PERSONALITY & SOC. PSYCHOL. 431, 435–36 (1993).

instructor.[3] In other words, people judge quickly and tend to cling to those judgments.

Legal advocates have long known the importance of first impressions.[4] They understand that first impressions are critical in brief writing and that the early parts of the brief, as well as headings and lead sentences, offer valuable opportunities to influence the decision maker's view of the case. Advocates may not know, however, that their instincts about the importance of first impressions are borne out by a series of psychological studies that confirm the enduring nature of first impressions and, most significantly, demonstrate the degree to which advocates possess considerable control to determine the first impressions of others.

This Article teaches legal advocates about the sometimes nuanced and surprising ways in which the reader's first impressions can be shaped to the client's advantage, primarily by focusing on a process called "priming." Priming refers to a process in which a person's response to later information is influenced by exposure to prior information.[5] Priming is a strong and consistent reaction. Priming can affect our feelings, viewpoints, behaviors, and, even literally, what we see. For example, if we are primed to think about baseball, we are more likely to remember seeing a baseball on a table even if the table is crowded with many different objects of which the baseball is only one.[6] This will happen even if you glance at the table only momentarily; you will perceive—and remember seeing—the baseball.[7] The baseball will be the most vivid object to you. Subconsciously, when your mind looked at all the objects on the table, it was "looking" for the baseball.

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[3] GLADWELL, *supra* note 1, at 12–13; Ambady & Rosenthal, *supra* note 2, at 434–35, 438.

[4] MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 184 (2d ed. 2006); CHARLES R. CALLEROS, LEGAL METHOD AND WRITING 217 (5th ed. 2005); RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE 314 (6th ed. 2009).

[5] E. Tory Higgins, *Knowledge Activation: Accessibility, Applicability, and Salience*, *in* SOCIAL PSYCHOLOGY: HANDBOOK OF BASIC PRINCIPLES 133, 134 (E. Tory Higgins & Arie W. Kruglanski eds., 1996).

[6] Russell H. Fazio, *On the Automatic Activation of Associated Evaluations: An Overview*, 15 COGNITION & EMOTION 115, 127–28 (2001) (citing David Roskos-Ewoldson & Russell Fazio, *The Accessibility of Source Likability as a Determinant of Persuasion*, 18 PERSONALITY & SOC. PSYCHOL. BULL. 19 (1992)).

[7] *Id.* at 128.

In legal advocacy, priming tells us that structure is a key component of persuasion. It confirms that those lead parts of the brief—the early sections, the lead paragraphs and sentences and the headings—are critical persuasion points. But the priming studies take us further than this basic information. The studies can tell us how to highlight favorable information so that the judge sees and remembers that favorable information. In other words, they tell us how to get the judge to "see" the baseball on the table among all those other objects. But priming also offers valuable information about *what* information to highlight. Among all those objects on the table, do we really want the judge to see the baseball? Or something else? The priming studies can help us with these difficult decisions.

The contribution of this Article is the synthesis of legal advocacy and the psychological studies of priming. It shows advocates how priming can help them make better strategic decisions in their briefs and gives specific examples of different ways to use priming in persuasive writing. Part I defines the basic concept of priming and gives examples of different ways that priming works. Part II begins the application of the priming studies to law. The focus of Part II is on priming the reader's emotional response through theme and story. It also examines how emotions can impact decision making in unexpected ways. Part III moves from emotional priming to semantic priming. It examines how to influence the decision maker's view of the case by using particular vocabulary and description in key, strategic places in the brief. Finally, Part IV focuses on the risks of priming, as well as the limitations of the priming studies as applied to law. Ultimately, it calls for additional studies of priming in the legal context.

I
PRIMING DEFINED

Priming plants a seed in the brain. This "seed" causes us to form an impression that we then use to interpret new information. So, for example, we are more likely to see Pete Rose[8] as a "baseball player" rather than a "gambler" if we had earlier been exposed to words about

[8] For those who do not remember him, Pete Rose was a great baseball player who played for and managed the Cincinnati Reds. He was banned from baseball in 1989 for betting on baseball, including betting on games involving the Reds. The Pete Rose example is taken from Eliot R. Smith et al., *Accessible Attitudes Influence Categorization of Multiply Categorizable Objects*, 71 J. PERSONALITY & SOC. PSYCHOL. 888, 890 tbl.1 (1996).

baseball like *bat*, *strike*, or *New York Yankees*. In this example, the "prime" or stimulus (the words or information about baseball) "excites" an area of the brain that contains information about a particular category (like baseball). Then, when confronted with new information, the person who has been "primed" uses the excited or primed knowledge category to evaluate the new information.[9] It can be represented (somewhat over simply) by this equation:

> Prime/stimulus → excites stored knowledge category → knowledge used to evaluate new information.[10]
>
> New York Yankees → excites stored knowledge category baseball → knowledge category (baseball) is used to evaluate new information (Pete Rose).

The stimulus or prime is a word related to baseball, and the target is the characterization of Pete Rose as a baseball player rather than a gambler.

Priming works because the stimulus makes certain words, impressions, and feelings more immediate and accessible to the brain. When a knowledge category in the brain (e.g., the category "baseball") is activated by a prime, this temporarily increases the accessibility of that knowledge category.[11] The increased accessibility increases the likelihood that the knowledge category will be activated by subsequent information (e.g., Pete Rose). Like a computer, when your brain is confronted with information, it searches through its "files" or "categories" for relevant knowledge that will help it perceive and understand the information. Like cached items in your computer, the relevant categories that are most recent and accessible to the brain are the ones most likely to be accessed in response to the information.[12] Priming makes a category more

[9] Higgins, *supra* note 5, at 135; *see also* Linz & Penrod, *supra* note 1 ("First impressions provide a convenient way for observers to integrate their subsequent impressions.").

[10] Higgins, *supra* note 5, at 135.

[11] E. Tory Higgins et al., *Category Accessibility and Impression Formation*, 13 J. EXPERIMENTAL SOC. PSYCHOL. 141, 142 (1977); Thomas K. Srull & Robert S. Wyer Jr., *The Role of Category Accessibility in the Interpretation of Information About Persons: Some Determinants and Implications*, 37 J. PERSONALITY & SOC. PSYCHOL. 1660, 1661 (1979) (Once a trait or schema is made more accessible by previous cognitive activity, the likelihood that the schema will be used to encode new information is increased.); *see also* Christine Jolls et al., *A Behavioral Approach to Law and Economics*, *in* BEHAVIORAL LAW AND ECONOMICS. 13, 37–38 (Cass R. Sunstein ed., 2000) (discussing availability heuristic).

[12] Higgins, *supra* note 5, at 135; Higgins et al., *supra* note 11.

"accessible" to the brain and more likely that the brain will use that category to process subsequent information.[13] If you are thinking about baseball, Pete Rose is a baseball player; by contrast, if you are thinking about gambling or slot machines, the first association you will likely have when someone says "Pete Rose" is "gambler."[14] Similarly, if you are told that a particular teacher is effective, you form an impression of that teacher (as effective and competent) through which subsequent information is filtered.[15] The priming effect increases with the number of times the knowledge category is activated.[16] In other words, the more priming words or stimuli used, the stronger the priming effect.

In the Pete Rose example, the priming stimulus "New York Yankees" would be a semantic one. The words "New York Yankees" tend to lead people to think of the word "baseball" when confronted with "Pete Rose." New York Yankees and baseball are of the same semantic category (sports). But priming can be accomplished through other means such as stories, videos, and descriptions of behavior. Additionally, impressions other than word associations can be primed. For example, people can be primed to judge people or things as having certain traits or characteristics.[17] In one study, subjects were exposed to scrambled phrases that suggested hostile behavior, such as "leg break arm his."[18] After reading these phrases, the subjects were more likely to characterize people they encountered, or people's behavior, as hostile or aggressive.[19] In this example, the categories "aggressive" and "hostile" are stimulated by words, but the effect is an impression, not a word. The stimulus phrases influenced something bigger than an individual word: how the subjects saw the world around them.[20]

13 Srull & Wyer, *supra* note 11, at 1662.

14 Fazio, *supra* note 6, at 128 (citing Smith et al., *supra* note 8, at 890).

15 Linz & Penrod, *supra* note 1, at 10.

16 Srull & Wyer, *supra* note 11.

17 *Id.* at 1662.

18 *Id.* at 1663. The subjects in the study were given a set of four words and asked to underline the three words that would make a complete sentence. *Id.* So, for example, subjects were given the word set "leg break arm his," and they had to underline the words to make the sentence "break his arm" or "break his leg." *Id.*

19 *Id.*

20 Note that behavior can also be primed. For example, people have been primed to behave more aggressively and to walk more like an elderly person. John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 237 (1996).

Emotions can also be primed, particularly by stories. For example, people who read a vignette about a student's mother dying were primed for the emotion "sadness." Priming emotions is particularly powerful because emotions are so connected to decision making. For those who read the sad vignette about the student's mother, later events were seen through a lens of sadness and hopelessness. This affected their decision making and later judgments about people and events, as well as their expectations of future events.[21] Here again, the process of priming through a particular stimulus is the same, but neither the stimulus nor the effect is an individual word. Rather, the stimulus is a story, and the effect is a feeling.

Once an impression is primed, it tends to last. We are inclined to pay less attention to subsequent information, even information that contradicts the impression.[22] One theory is that subsequent information is just not weighted as heavily as that first impression.[23] This undervaluation of later information is, generally, not done consciously; rather, reliance on first impressions is a kind of mental shortcut that we take automatically.[24]

The potential power of priming in legal advocacy is evident. The early sections of a brief, such as the Statement of Facts, the Question Presented and the Summary of the Argument in an appellate brief, and the Preliminary Statement or Introduction in a motion brief, can work as primes for the case as a whole. These sections can prime the reader to see the case in a particular way by pushing the theme of the case and evoking particular emotions in the reader. It is more than a figure of speech to say that readers "get a feel" for the case from the first parts of the brief. It is literally true. In most litigation, the "feel" readers get from a case is not preordained; readers can have any number of emotions about a set of facts. Advocates want to be able to control the "feel" readers get from a case, and priming can help with

[21] Dacher Keltner et al., *Beyond Simple Pessimism: Effects of Sadness and Anger on Social Perception*, 64 J. PERSONALITY & SOC. PSYCHOL. 740, 742–43 (1993).

[22] Linz & Penrod, *supra* note 1; *see also* Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, *in* BEHAVIORAL LAW AND ECONOMICS, *supra* note 11, at 144, 147–48 (discussing cognitive conservatism, which describes how people tend to be biased against revising their opinions). Cognitive conservatism suggests that once you get a decision maker to accept your view, the decision maker will be strongly biased in favor of keeping that view. *Id.* at 147–51 (Once a commitment is made, attitudes and beliefs will shift to preserve feelings of consistency.).

[23] Linz & Penrod, *supra* note 1, at 10.

[24] *Id.* at 9.

that. For example, it is possible for sports fans to feel many emotions about Pete Rose's actions: anger, disappointment, or even sympathy. Priming studies can show us which emotional response is most advantageous to our client's position and show us how to evoke that emotion.

Priming can also help advocates present neutral or ambiguous information or information that is otherwise susceptible to more than one impression or interpretation. Within the Statement of Facts, for example, there will be highly emotional and compelling facts but also a fair number of details that are mundane, technical, ambiguous, or susceptible to more than one characterization. Similarly, in the Argument section, advocates must sometimes set out rules, statutes, or regulations that are neutral or ambiguous in their application to the case. Priming studies reinforce that it is critically important to introduce ambiguous information with headings or thesis sentences or paragraphs that are crafted to subtly push the reader's perception of the remaining paragraph in a particular direction. Learning about semantic priming and how it works can also help advocates to create those desired impressions. In the Pete Rose example, maybe the writer must lay out Rose's many attempts to overturn the decision banning him from baseball. Readers could easily see those attempts as the quest of a man who loved the game or as the obsession of an egomaniac who could not accept responsibility for his actions. Priming studies can help the advocate influence a reader's view of those facts by guiding her strategic decisions about the vocabulary and crafting of those lead sentences and paragraphs.

Priming can also be used to introduce rules or other legal material as a way of coloring the reader's perception of the meaning of those rules. For example, the rule that a player cannot be inducted into the Baseball Hall of Fame if he has "tarnished the game" is ambiguous. A skillful lawyer representing Rose might try to prime the reader's impression of what "tarnish" means by stating something like:

> The Hall of Fame rule is meant to ban those true wrongdoers who have violated, in a serious way, the rules of fair play and the trust of baseball fans, such as those players who have taken steroids to artificially increase their batting power, or those who cheat in order to make money or otherwise advance themselves. The rule is not meant to be so broad that it will ban those who have personality flaws or make occasional errors of judgment. Rather, the rule is that a player will be banned from the game only if he has "tarnished the game." A paradigmatic example of a player who "tarnished the game" is "Shoeless" Joe Jackson, who conspired with gamblers to fix the 1919 World Series.

In this example, the ambiguous phrasing of the rule, "tarnish the game," is preceded by persuasive language seeking to prime the reader's perception of what the words of the rule mean.

Priming has tremendous potential utility in legal advocacy. In the next Part of this Article, the focus is the application of emotional priming studies to legal advocacy. Part III then changes focus to semantic priming and its uses in legal advocacy.

II
PRIMING EMOTION THROUGH THEME AND STORY

One of the earliest decisions a legal advocate must make is what the overarching theme or feel of the case is going to be. Almost every textbook on persuasive legal writing emphasizes the importance of having a theme or theory of the case.[25] The theme should be pushed particularly strongly in the Statement of Facts and in other preliminary parts of the brief, such as the Question Presented, the Summary of Argument, or the Preliminary Statement. Choosing a theme that will run throughout the entire brief is a critical decision for the advocate because the theme will influence how the reader views the story and how the reader feels about the story and the parties involved.[26]

What is missing from the textbooks is more detailed guidance about how to choose a theme, and many lawyers still struggle with this critical concept. The priming studies can help with this by showing advocates how to choose and execute a theme that will evoke emotions and impressions that are favorable to the client. This kind of emotional or thematic priming is different from semantic priming in that the stimulus is a theme or story (not a word or a phrase), and the resulting effect is an emotion (as opposed to a related

[25] *See, e.g.*, BEAZLEY, *supra* note 4, at 37–38; LAUREL CURRIE OATES & ANNE ENQUIST, THE LEGAL WRITING HANDBOOK: ANALYSIS, RESEARCH, AND WRITING 380 (4th ed. 2006); RONALD WAICUKAUSKI ET AL., THE WINNING ARGUMENT 87 (2001); *see also* Randy Lee, *Writing the Statement of the Case: The "Bear" Necessities*, 10 WHITTIER L. REV. 619, 620, 623–24 (1989).

[26] RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT 211–16 (2d ed. 2003); BEAZLEY, *supra* note 4, at 37–38; LINDA H. EDWARDS, LEGAL WRITING & ANALYSIS 206–07 (2d ed. 2007); NEUMANN, *supra* note 4, at 291–300; *see also* Lee, *supra* note 25, at 620, 623–24.

word).[27] The studies reveal some surprising and novel information about emotion and its impact on decision making.

Theme is critical to memory and retention; it helps readers remember the details of a story because readers can put the details in context.[28] A coherent theme also helps a reader fill in blanks in a story. If there are details missing or if some information is ambiguous, readers will infer and interpret details that are consistent with the overarching theme.[29] Readers will then "remember" these inferences as being part of the story.[30]

Theme is vital to persuasion because of its connection to emotions. The theme of a case can evoke powerful emotions—stories of injustice provoke anger, and stories of tragedy provoke sadness. Emotions are critical to decision making and are inextricably tied up with how people make judgments. Yet, the role of emotions in decision making has long been disparaged in law. Like most other Western philosophies, law has long adhered to the Platonian view that the human mind is torn between the rational and the emotional, and decision making is best left to the superior rational brain.[31] Under this view, emotions are destructive to decision making, and havoc ensues when human beings let their base natures drive decision making.[32] Until recently, even the scientific study of decision making was dominated by the Platonian view, and decisions were assumed to be the product of a purely cognitive process.[33] But more recently, studies in neuroscience have confirmed that emotions play a key role in decision making, and even tangential emotions unrelated to the

[27] In semantic priming, both the stimulus and the resulting effect are words that are of the same semantic category, like "cat" and "tiger" or "bird" and "hawk."

[28] KENDALL HAVEN, STORY PROOF: THE SCIENCE BEHIND THE STARTLING POWER OF STORY 37 (2007); Linz & Penrod, *supra* note 1, at 5–6.

[29] HAVEN, *supra* note 28, at 37–39; Linz & Penrod, *supra* note 1, at 5–6.

[30] HAVEN, *supra* note 28, at 37–39; Linz & Penrod, *supra* note 1, at 5–6.

[31] JONAH LEHRER, HOW WE DECIDE 9–10 (2009). For an excellent example of how the Platonian view still persists in law, see, e.g., ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 32, 41 (2008) ("Appealing to judges' emotions is misguided . . . persuasion is possible only because all human beings are born with a capacity for logical thought.").

[32] LEHRER, *supra* note 31, at 10.

[33] George Loewenstein & Jennifer S. Lerner, *The Role of Affect in Decision Making*, *in* HANDBOOK OF AFFECTIVE SCIENCES 619, 619 (Richard J. Davidson et al. eds., 2003).

decision at hand can have "a significant impact on judgment and choice."[34]

The idea that emotions are, or should be, severed from decision making conflicts with what neuroscience tells us about how the brain works. Reason depends on emotion, and emotion is central to decision making.[35] In the brain, emotional and cognitive/rational pathways overlap; they are intertwined.[36] In other words, emotion helps you decide, and those instinctual, emotional reactions upon which we sometimes base our judgments can be highly accurate.[37] Emotions do not always lead to the best decisions, but they sometimes do. Whether the influence is positive or negative, however, emotions are nevertheless *always* present in decision making.[38]

Thus, advocates who ignore the emotional aspects of their cases are missing a critical opportunity to influence their readers. Because emotions are so central to decision making, legal advocates would be well advised to strive to control the reader's emotions about the case and to do so early. A key way to do this is through the story of the case and its theme. Structurally, theme and story come early in the brief, which makes them excellent emotional primes. The reader should see the theme very early in the brief: in the Question Presented, in the Preliminary Statement (in a motion brief), or in the Summary of Argument (in an appellate brief). Moreover, the full story of the case comes relatively early in the brief in the Statement of Facts. It is often one of the first sections readers look at to orient themselves to the case, which makes it an excellent opportunity for priming. The story is also a good prime because of its emotional power. Most readers will give the story of the case particular attention and will remember the case in story terms.[39] Except for a

[34] *Id.*; *see also* Jennifer S. Lerner & Dacher Keltner, *Beyond Valence: Toward a Model of Emotion-Specific Influences on Judgment and Choice*, 14 COGNITION & EMOTION 473, 477 (2000); ANTONIO DAMASIO, DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN 34–79 (Penguin Books 2005) (1994) (detailing human studies showing a strong link between the brain's emotional pathways and decision-making ability); LEHRER, *supra* note 31, at 13.

[35] LEHRER, *supra* note 31, at 13–15.

[36] DAMASIO, *supra* note 34; Loewenstein & Lerner, *supra* note 33, at 619–20.

[37] LEHRER, *supra* note 31, at 14–16, 35–37.

[38] *Id.* at 13–27. For a neuroscientific explanation of the predominance of emotion in decision making, chapter two of Lehrer's book, which summarizes how dopamine neurons facilitate knowledge and decision making, is an excellent source. *Id.* at 36–41.

[39] HAVEN, *supra* note 28, at 27 (quoting Kathryn Braun-Latour & Gerald Zaltman, *Memory Change: An Intimate Measure of Persuasion*, 46 J. ADVERTISING RES. 57, 57–72 (2006) (The human brain is "wired" to think in story terms.); STEVEN PINKER, HOW THE

handful of people, like those with so-called photographic memories, most people remember things in story form.[40] Indeed, the story form enhances our memory and improves our ability to remember content.[41] But not all stories are equally memorable or powerful. It is up to the advocate to tell the most emotionally powerful story that the facts will allow.

According to neuroscience, there are four qualities that make a story particularly memorable because they make our memories particular vivid and enduring. Stories are memorable if they "break a script (an expectation), . . . are consequential (have impact), . . . involve emotional charge, and . . . have value (meaning)."[42] As one author put it, "[y]ou may not remember the first time you touched a dog, but you will remember the first time a dog bit you. You won't remember the first time you kissed your grandmother, but you will remember the first time you were kissed on a date."[43]

So, when legal advocates look at the facts of the case, we should ask ourselves: What are my most emotionally powerful, memorable facts? Is this a story of injustice (requiring the court to step in)? A story about redemption? A story about how bad things sometimes happen that cannot be fixed by the legal system? How do these facts make the reader feel? Angry? Sad? Satisfied that justice has been done?

These are important questions for legal advocates. The emotions evoked by the story and its theme can affect the reader's judgment in a number of ways.[44] Emotions can affect cognition (how people think) and perception (what people see).[45] Decisions can be altered by what scientists call "expected emotions," which are the decision maker's predictions about how she will feel about the consequences of a particular decision.[46] They can also be affected by what

MIND WORKS 37 (1997)); *see also* Linz & Penrod, *supra* note 1, at 6 (Story is a very powerful organizing device.).

40 HAVEN, *supra* note 28, at 68.

41 *Id.* at 69.

42 *Id.* at 68 (citing Sidonie A. Smith, *Material Selves: Bodies, Memory, and Autobiographical Narrating*, *in* NARRATIVE AND CONSCIOUSNESS: LITERATURE, PSYCHOLOGY, AND THE BRAIN 86, 92 (Gary D. Fireman et al. eds., 2003)).

43 *Id.*

44 Loewenstein & Lerner, *supra* note 33, at 621.

45 Keltner et al., *supra* note 21, at 740.

46 Loewenstein & Lerner, *supra* note 33, at 620. Expected emotions are a good example of the interrelation of emotion and rational judgment because they involve a

scientists call "immediate emotions," which refer to the decision maker's feelings at the time of the decision.[47] Immediate emotions can be related to a decision, such as deciding not to go on a trip because of anxiety associated with the thought of a plane ride. In other contexts, immediate emotions can be wholly unrelated to a decision, such as a supervisor firing an employee because of anger over an earlier fight with her spouse.[48]

The advocate's theme and story of the case is likely to impact both expected and immediate emotions. Drawing a story's characters and their motivations and struggles in a particular way can influence the reader's feelings about the consequences of deciding one way or another (expected emotions).[49] For example, if you tell a story that highlights a widow's precarious financial situation in a case where the insurance company is refusing to pay on her husband's life insurance policy, you will likely affect the court's feelings about the consequences of a decision that favors the insurance company.[50]

Telling the story in a particular way can also influence a reader's feelings at the time of reading the brief (immediate emotions).[51] For example, facts about a devastating injury or a work environment plagued by race or sex discrimination can make the reader feel angry or disgusted. In one recent Supreme Court case, *Burlington Northern & Santa Fe Railroad Co. v. White*, a female forklift operator was demoted from her job and harassed because she complained about her supervisor's sexual comments and behavior.[52] The plaintiff's brief noted a number of disturbing incidents, including one in which the plaintiff's male supervisor forced the plaintiff to shine a flashlight on him while he was urinating.[53] It described how, shortly after

cognitively based, rational judgment about how the person is going to feel if she makes a particular decision. *Id.* at 633.

47 *Id.* at 627.

48 *Id.*

49 Professor Michael Smith calls this "emotional substance." MICHAEL R. SMITH, ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING 11–12 (2d ed. 2008).

50 Indeed, the feelings evoked by this prime are powerful, as expected regret is usually stronger than anticipated joy. Russell Korobkin, *Behavioral Economics, Contract Formation, and Contract Law*, *in* BEHAVIORAL LAW AND ECONOMICS, *supra* note 11, at 116, 130–33.

51 This is akin to what Professor Michael Smith calls "medium mood control." SMITH, *supra* note 49, at 11–12.

52 Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006).

53 Brief for Respondent at 1 n.2, *White*, 548 U.S. 53 (No. 05-259), 2006 WL 622126, at *2 n.2.

reporting her supervisor for this incident, the plaintiff was removed from the forklift job for which she was hired and moved to a less desirable, more strenuous, and dirtier job.[54] After the plaintiff complained about the reassignment, the plaintiff's supervisor again retaliated by suspending her without pay for thirty days based on a fabricated story that she was insubordinate. The plaintiff's brief highlighted that the suspension occurred only weeks before the Christmas holiday, leaving her struggling to make ends meet and without enough money to make or buy a holiday dinner.[55] At no point were any of plaintiff's tormentors stopped from continuing the behavior or adequately punished for it.

The plaintiff's story is a classic anger prime; it tells an archetypal story of an underdog who is picked on by bullies who are not punished or constrained.[56] When the underdog tries to fight back, the unfair treatment escalates. The description of the continuous unfair treatment of the plaintiff, one bad act after another without any consequences for the perpetrators, makes her work environment seem like a place of lawless anarchy. To top it off, the plaintiff's brief adds powerful details, such as the facts about the holiday, to impress upon the reader the impact of the unfair treatment. The reader cannot help but feel angry when reading these facts (immediate emotion). In *White*, the Supreme Court ruled unanimously for the plaintiff, and the plaintiff's terrible Christmas was highlighted in the opinion.[57]

The impact of immediate emotions, like anger, on decision making can be direct or indirect.[58] In the *White* case, for example, if the Justices felt angry at the injustice against the plaintiff and this led them to rule in her favor, that is an example of a direct impact.[59] But immediate emotions can also function much more indirectly and subtly. Our emotions at the time of decision making can alter our

54 *Id.* at 2–3, 2006 WL 622126, at *2–3.

55 *Id.* at 4 & n.13, 2006 WL 622126, at *4 & n.13.

56 *See* Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypical Hero's Journey*, 29 SEATTLE U. L. REV. 767, 773 (2006) (urging advocates to use fictional archetypes to tell a persuasive story); *see also* Jolls et al., *supra* note 11, at 22–23 (discussing "bounded self-interest," which shows that people feel unfairness and injustice keenly and will even abandon self-interest to punish it).

57 *White*, 548 U.S. at 72–73.

58 Loewenstein & Lerner, *supra* note 33, at 627.

59 *Id.* The example in Loewenstein of a direct influence is if anxiety about investing your savings deters you from investing in a risky fund. *Id.*

expectations about the desirability of a decision, our assessment of risk, or our processing of the expected consequences.[60]

On the most basic level, positive emotions tend to make people more optimistic, and negative emotions tend to make them pessimistic.[61] These feelings of optimism or pessimism have a direct impact on cognitive function. The result of pessimism, for example, is a narrowed focus of attention and motivation to process information more deeply and systematically.[62] This makes some sense; negative emotions usually mean that something is wrong, and that suggests to the brain that more careful, focused attention on the situation is warranted.[63] For example, studies on emotional priming have shown that people in negative moods take more time to make a decision, focus on particular details of the decision, and remember more negative information.[64] People in positive moods are quicker to decide and tend to focus their attention more broadly and less on specific details.[65] Even this general information is quite useful to the advocate. A story that elicits negative feelings—sadness, guilt, or the like—is likely to cause the judge to look at the case more carefully. It is going to make the judge feel a strong sense of the negative details of the case—details that are already disproportionately more powerful than positive information.[66] This could explain why in *White*, the Supreme Court took note of the relatively small detail of the holiday timing of the plaintiff's suspension.

Plaintiffs are the most obvious candidates for taking advantage of negative emotions. Plaintiffs want the decision makers to take action and to give them something. Telling a story that evokes negative feelings can make decision makers feel a sense of "wrong" that requires righting, making them more inclined to take action to remedy the feeling of "wrongness." But evoking negative feelings in the judge should be undertaken judiciously. Negative feelings also may make judges take a closer, harder look at the details of the case. Advocates employing this strategy should be confident that their case

[60] *Id.*

[61] *Id.* at 628.

[62] *Id.* at 629.

[63] *Id.*; Keltner et al., *supra* note 21, at 740.

[64] Loewenstein & Lerner, *supra* note 33, at 629.

[65] *Id.*

[66] This is called the "negativity bias." *See* GORDON B. MOSKOWITZ, SOCIAL COGNITION: UNDERSTANDING SELF AND OTHERS 346–47 (2005) (summarizing studies on disproportionate power of negative information); *see also* LEHRER, *supra* note 31, at 81.

could withstand a close look. Negative moods are probably good for cases with favorable details—cases that benefit from a close look at the "trees" as opposed to the "forest." A positive mood is better for cases that have an impressive big picture aspect to them, such as cases that implicate bigger policy questions.

On the other hand, defendants often prefer that the judge take no action in the case (i.e., do nothing for the plaintiff). This is an advantageous position because of the "omission bias," which refers to the preference people have for inaction over action.[67] Omission bias also helps appellees and nonmovants because judges, like most people, will tend to favor omission over commission. But defendants can make the situation even more advantageous by telling a more positive story that makes the judge feel more optimistic. This can lead the judge to feel that everything is fine and intervention is not needed. This contradicts somewhat the conventional wisdom, which is that defendants with bad facts should tell their stories quickly using language that is dry, neutral, and devoid of emotion.[68] But, the studies on priming suggest another option for defendants with bad facts: try to tell an optimistic, positive story. Telling a positive story in a case with bad facts might seem like a tricky task, but it is not impossible.

A recent news story illustrates this option. In July of 2009, a swim club in suburban Philadelphia rescinded its invitation to allow a group of African American children to swim at the club one day a week.[69] When the children went to the club the first day, they endured racial comments and behavior, including white parents' taking their children

[67] *See* Mark Spranca et al., *Omission and Commission in Judgment and Choice*, 27 J. EXPERIMENTAL SOC. PSYCHOL. 76, 103 (1991). For example, most people find it more immoral for someone to actively encourage a companion to eat something harmful than to sit by silently while a companion orders something that the person knows is harmful. *See id.* at 85–86; Ilana Ritov & Jonathan Baron, *Reluctance to Vaccinate: Omission Bias and Ambiguity*, *in* BEHAVIORAL LAW AND ECONOMICS, *supra* note 11, at 168, 169. Another example is that people tend to find it more immoral for a person to kill someone than to let someone die. *See* Ritov & Baron, *supra*.

[68] *See, e.g.*, EDWARDS, *supra* note 26, at 193–94 (suggesting less detail, less visual imagery, and less space for negative facts); MICHAEL R. FONTHAM ET AL., PERSUASIVE WRITTEN AND ORAL ADVOCACY IN TRIAL AND APPELLATE COURTS 43–45 (2d ed. 2007); CATHY GLASER ET AL., THE LAWYER'S CRAFT: AN INTRODUCTION TO LEGAL ANALYSIS, WRITING, RESEARCH, AND ADVOCACY 359 (2002) (urging a "restrained tone" when representing a "corporate polluter" as opposed to an injured child); LAUREL CURRIE OATES ET AL., JUST BRIEFS 110–11 (2d ed. 2008).

[69] Zoe Tillman & Max Stendahl, *Montco Swim Club Accused of Racial Discrimination*, PHILA. INQUIRER, July 9, 2009, at B1.

out of the pool.[70] For the club, these facts were terrible: an emotionally wrenching example of overt racial bigotry perpetrated against innocent children and a powerful entity (the club) that capitulated to and encouraged this bigoted behavior. But the club later reversed the rescinding of its invitation, apologized, and invited the children back.[71] The parents of the excluded children consulted a lawyer and considered suing based on their children's emotional distress.[72] The lawyer representing the swim club could decide to deliberately select an "all's well that ends well" theme by telling a story about how the club learned its lesson and all the children, African American and white, can now all swim together.[73] Making this choice would mean emphasizing, in the early parts of the brief and the story, that the children were welcome again to swim at the club and that the club took prompt remedial action, acknowledged the mistake, and used its power to make everything right. This theme of "everything's ok now" can also be useful in injury cases (where the plaintiff has overcome the injury or where the defendant has tried to make good) and in discrimination cases (where the employer has a policy and tried to fix the problem internally or where the plaintiff was promoted and given substantial raises despite harassment).

The power of negative feelings is also at the root of several cognitive biases. For example, most people have what is called "loss aversion."[74] Loss aversion refers to a phenomenon in human decision making in which losses are perceived to be more significant than gains.[75] In other words, people tend to weigh losses more heavily than gains in choosing between options.[76] For example, in the seminal study of this phenomenon, the subjects, including university

[70] *Id.*

[71] Derrick Nunnally & Zoe Tillman, *Creative Steps Rejects Offer to Return*, PHILA. INQUIRER, July 14, 2009, at A1.

[72] Vernon Clark, *Montco Club Set to Ask Campers Back to Its Pool*, PHILA. INQUIRER, July 13, 2009, at A1.

[73] I am grateful to my colleague, Susan DeJarnatt, for this example.

[74] LEHRER, *supra* note 31, at 76–77; *see generally* Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, SCIENCE, Jan. 30, 1981, at 453 (finding that it makes a difference whether a question is framed in terms of losses or gains).

[75] LEHRER, *supra* note 31, at 77; Edward J. McCaffery et al., *Framing the Jury: Cognitive Perspective on Pain and Suffering Awards*, *in* BEHAVIORAL LAW AND ECONOMICS, *supra* note 11, at 259, 261–62 (noting that gains are less valued than losses); *see also* Tversky & Kahneman, *supra* note 74.

[76] Jolls et al., *supra* note 11, at 44 (It makes a big difference if something is presented as a loss or gain from the status quo.).

faculty and physicians, were given a hypothetical in which a terrible disease is expected to kill 600 people.[77] The subjects were asked to choose between options. A vast majority preferred the option in which 200 of the 600 people would be saved over an option in which 400 of the 600 would die, even though both were exactly the same outcome—just phrased differently.[78] This difference is attributed to the strong aversion people have to risking loss.[79] This aversion stems from the desire to avoid expected emotions associated with loss, such as fear, dread, regret, and anxiety.[80]

Decision makers can be primed to view situations as gains or losses, and that prime will affect the decision that is chosen. So, for example, it may be advantageous for a plaintiff in a pharmaceutical case to frame the question in the case as whether the company should have marketed the drug when it knew that the drug would harm people. This frame can be part of the core theory of a plaintiff's case. Or, in an environmental case, the government or environmental group might frame the question as whether a statute or regulation should be interpreted in a way that will cause the extinction of a species of animal. Or, in an appellate case, priming the reader by pointing out the grave policy consequences of a rule is a way of taking advantage of loss aversion. These primes evoke the negative emotions that people feel when confronted with the risk of loss, and they make it more likely that the decision maker will reject the decision that will cause the loss (and cause the decision maker to have those feelings).

It is unclear what a defendant should do in these situations. The defendant can try to frame the case in terms of gain (how many people would be helped by the drug, how many jobs are created by an exception to the environmental statute), but, because losses loom larger than gains, it is uncertain how effective these competing frames will be. Generally, anticipated regret is stronger than anticipated joy.[81] What happens in many cases is that both sides frame in terms of loss: for example, in the pharmaceutical case, the defendant could

[77] Tversky & Kahneman, *supra* note 74.

[78] *Id.*

[79] *Id.* at 453, 457–58. The loss aversion phenomenon has been tested in a multitude of contexts, including with jury instructions and damage awards. McCaffery et al., *supra* note 75, at 263–69 (Higher damage award values were associated with an instruction that asked jurors what they would accept as payment to suffer the injuries described.).

[80] George F. Loewenstein et al., *Risk as Feelings*, 127 PSYCHOL. BULL. 267, 269–70 (2001).

[81] Korobkin, *supra* note 50, at 133.

argue that more people would have died without the drug than with it. With the plaintiff arguing that more harm was done by the drug than would have been done had it never been sold, the parties are essentially pitting loss against loss. The science is not clear about how decision makers react when both sides prime for loss, but there is no question that such a frame makes a favorable decision for either side psychologically unappealing to the decision maker. It is hard to imagine that either side is getting an advantage from the strategy, but more studies are needed before making a definitive conclusion.

Beyond simply trying to evoke generally positive or negative feelings, advocates should think about what particular negative or positive emotions are evoked by the story and the theme. Researchers are just beginning to study how particular emotions such as anger and sadness can affect decision making in different ways. The early research shows that different emotions cause different evaluations of similar situations.[82] For example, sadness tends to be connected with the perception that events are beyond human control, and this increases the tendency to view situational factors, rather than people, as responsible for events.[83] Anger, on the other hand, is connected to the perception that negative events are predictable and under human control, which results in a tendency to blame people for events as well as increase the perception that human causes for events are more likely.[84]

Researchers prime for sadness by telling stories about terrible events that "just happen." For example, in one study, subjects were primed for sadness by reading about a student who was called home from school by a mother's sudden illness, from which the mother soon after dies.[85] Subjects felt sadness because the vignette depicted terrible events that the characters in the story were powerless to control.[86] By contrast, subjects were primed for anger with a story about a teaching assistant who gives a student a poor grade, refuses to

[82] Keltner et al., *supra* note 21, at 741; Lerner & Keltner, *supra* note 34, at 477 (Each different emotion "activates a cognitive predisposition to appraise future events in line with the particular emotion.").

[83] Keltner et al., *supra* note 21, at 741; Lerner & Keltner, *supra* note 34, at 477–78.

[84] Keltner et al., *supra* note 21, at 741; Lerner & Keltner, *supra* note 34, at 478–79.

[85] Keltner et al., *supra* note 21, at 742.

[86] *Id.* Some commentators might refer to these "Job-like" stories as stories that pit man against God. 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, 469 (2001).

discuss it, and then humiliates the student in front of the class.[87] In this story, the bad events were depicted as having a human cause (the teaching assistant), and this fueled feelings of anger and blame.[88] Similarly, stories of injustice, particularly about people violating social or legal norms without consequence, are especially likely to prime feelings of anger. For example, in one study, subjects being primed for anger were shown a video of a person beating a helpless teenager and then were told that the person suffered no consequences for the crime.[89]

Once primed for sadness, the subjects tended to attribute events to situational causes, as opposed to blaming people for them.[90] Those who read the sad story were likely to see future events as due to impersonal circumstances beyond anyone's control.[91] They were less likely to see human agency as the cause of events. Sad people are also more likely to examine information relevant to a decision very carefully; sadness is associated with less certainty about decisions.[92] Anger, on the other hand, particularly when connected to feelings that social mores or norms have been violated without consequence, tends to reinforce tendencies to blame.[93] Angry people are more likely to see the hand of man in future events. These feelings can increase a decision maker's desire to blame individuals (as opposed to random fate) for events and can make decision makers overlook mitigating details.[94] Angry people generally do not closely examine information relevant to a decision; they tend to be certain that they already have enough information and tend to make shortcut decisions.[95]

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87 Keltner et al., *supra* note 21, at 742.

88 Some commentators might refer to this kind of story as a "man versus man" story or a "man versus machine" story. Foley & Robbins, *supra* note 86.

89 Julie H. Goldberg et al., *Rage and Reason: The Psychology of the Intuitive Prosecutor*, 29 EUR. J. SOC. PSYCHOL. 781, 783–85 (1999).

90 Keltner et al., *supra* note 21, at 750–51.

91 *Id.*; Deborah A. Small & Jennifer S. Lerner, *Emotional Policy: Personal Sadness and Anger Shape Judgments About a Welfare Case*, 29 POL. PSYCHOL. 149, 152 (2008).

92 Small & Lerner, *supra* note 91, at 152–53.

93 Goldberg et al., *supra* note 89, at 781–82, 790; Small & Lerner, *supra* note 91. It is worth noting here that one commentator has made a forceful argument distinguishing anger from disgust and has convincingly argued that, while anger might have a legitimate place in law, disgust should not. MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 14–15, 99–107 (2004) (distinguishing anger at wrongs done from disgust, which is connected to mortality and our discomfort with our own bodies).

94 Goldberg et al., *supra* note 89, at 781–82.

95 Small & Lerner, *supra* note 91, at 152–53.

In the study where subjects were primed for anger with the video beating, the subjects were later given a series of vignettes about people who were usually careful but who had been negligent and caused harm to another person.[96] One vignette, for example, was about a foreman on an assembly line who had always been scrupulous about safety but was particularly busy one day. "On [that busy day], he noticed a safety guard was improperly attached but did not do anything until the end of the day. As a consequence, a worker lost two fingers."[97] When the subjects were primed for anger and injustice, they were more likely to be punitive in their judgments of the negligent people and were less likely to take into account mitigating factors such as a lack of intent to cause harm or a prior record of careful behavior.[98]

Interestingly, those subjects who saw the video beating but were then told that the assaulter had gone to jail were *not* more punitive in their judgments.[99] This suggested to researchers that the emotional "carry over" effect resulted from a strong need to enforce social norms and values. In other words, people need to have their feelings of justice satisfied.[100] If feelings of justice are satisfied, decision makers are not any more punitive than those who were not primed. However, if feelings of justice are not satisfied, and the decision maker has lingering feelings of injustice, he will tend to be more punitive in his judgments.[101] This is yet more support for an "all's well that ends well" strategy for defendants who have bad facts.

When considering an overall theme for a brief, advocates should consider how the emotions evoked by the theme will impact the reader's decision making—both the content of that decision making (less or more punitive) and the process of it (less or more attention). Through the theme, the advocate can prime the decision maker to feel particular emotions about events and characters, sometimes in surprising ways. In a typical litigation where something bad happened to the plaintiff and the plaintiff seeks to blame the defendant, a dominant theme of injustice that makes the reader angry can work in the plaintiff's favor.[102] Particularly effective is a story

96 Goldberg et al., *supra* note 89, at 795.

97 *Id.*

98 *Id.* at 789–90.

99 *Id.* at 789.

100 *Id.* at 790.

101 *Id.*

102 *Id.* at 789.

that highlights how people who behaved badly suffered no consequences for their bad actions. This kind of story will cause readers to look for fault, to see actions as blameworthy, and to overlook or minimize mitigating evidence.[103]

The Question Presented, or issue statement, is a great place for thematic priming. Although the issue statement is usually quite brief (in an appellate brief it is often just one sentence), it comes very early in the brief and can set the tone for all the material that follows. It is the place where the advocate should introduce her theme and lay the groundwork for the emotional tone of the brief. The Question Presented can, in a short, pithy sentence, convey a story of outrageous injustice, primarily through its use of the facts. Consider this Question Presented from *Safford v. Redding*, the Supreme Court case involving a thirteen-year-old girl who was strip-searched because school officials believed she was carrying ibuprofen (Advil):

> Whether a school official should know not to order the traumatic strip search of a child based on an unreliable accusation that the child previously possessed ibuprofen and no information that she possessed ibuprofen in her undergarments at the time of the search.[104]

Putting aside its grammatical problems, this Question Presented does a good job of conveying, in a short space, some outrageous facts. The clear implication in this Question Presented is that school officials, who should have known better, subjected a child to a serious, invasive, and humiliating procedure based only on flimsy and unreliable evidence of a relatively trivial transgression. Noteworthy in this question are the words used to describe the parties. Those who performed the search are "school officials," a term that connotes both power and faceless bureaucracy.[105] In contrast, the thirteen-year-old plaintiff is twice referred to as a "child," a word highlighting the plaintiff's vulnerability and powerlessness. The Question Presented is, in effect, a little story about dominant authority figures victimizing a powerless child for no legitimate reason—a classic anger prime.[106]

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103 *See* Keltner et al., *supra* note 21, at 741.

104 Brief for Respondent at i, Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633 (2009) (No. 08-479), 2009 WL 852123, at *1.

105 The actual search was conducted by a school nurse and an administrative assistant to the principal; both were female. *Safford Unified Sch. Dist. #1*, 129 S. Ct. at 2638.

106 Recall that the anger prime used in the psychological studies is a video depicting an adult beating a helpless teenager. *See* Goldberg et al., *supra* note 89 and accompanying text.

Another good example is from *Batson v. Kentucky*, in which the Supreme Court decided that it was a violation of a defendant's constitutional rights for the prosecution in a criminal case to use peremptory strikes to exclude people of certain races from the jury[107]:

> In a criminal case, does a state trial court err when, over the objection of a black defendant, it swears an all white jury constituted only after the prosecutor had exercised four of his six peremptory challenges to strike all of the black veniremen from the panel in violation of constitutional provisions guaranteeing the defendant an impartial jury and a jury composed of persons representing a fair cross section of the community?[108]

Here again, the Question Presented tells a little story that is a classic anger prime about an underdog who is persecuted by those with power. The Question Presented makes clear that the prosecutor attempted to win the case not on the merits but by taking advantage of racial bias. The entity with the obligation and the power to enforce fairness in the proceeding (the trial court) abandons its duty and ignores the cheating strategy of the prosecutor, allowing the injustice to stand.

The Statement of Facts is another key (and obvious) place for priming emotion in the brief. *Safford v. Redding* is a good example because in that case the plaintiff's Statement of Facts describes how school officials who strip-searched a young girl looking for a couple of ibuprofen later characterized the search as not a "big deal"[109]:

> Having turned up no evidence to suggest any misconduct by Savana [Respondent], Wilson [the school Vice Principal] nonetheless immediately ordered Romero [the school administrative assistant] to take Savana to the nurse's office . . . . The two school officials then directed Savana to undress. With both officials staring at Savana, she took off her pants and her shirt. The officials did not notice any pills hidden in Savana's clothing, on her body, or under her panties or bra. Still, they told Savana to pull out her panties and bra and to move them to the side. This order forced Savana to expose her genital area and breasts to the school officials. The observation of Savana's genital area and breasts, like the search of her backpack, failed to reveal any pills.
>
> The school officials' viewing of Savana's naked body was "the most humiliating experience" of her life. Embarrassed and scared, Savana held her head down throughout the strip search "so that they could not see that I was about to cry."

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[107] Batson v. Kentucky, 476 U.S. 79, 139 (1986).

[108] Brief for Petitioner at i, *Batson*, 476 U.S. 79 (No. 84-6263), 1985 WL 669926, at *i.

[109] Brief for Respondent, *supra* note 104, at 7, 2009 WL 852123, at *7.

. . . .

> Savana was not permitted to call her mother before or during the search. When Savana told her mother about the strip search later that day, her mother was extremely upset. Savana's mother demanded a meeting with the Principal, who told Savana and her mother that he "did not think the strip search was a big deal because they did not find anything."[110]

In this excerpt, the description of the search and its invasiveness, as well as the impact on the young girl who suffered through it, is detailed and vivid, two qualities that will make it more memorable.[111] The writer takes his time here, laying out each step in the humiliation suffered by the child (directed to undress, then directed to pull aside her underclothes) and each time contrasting it with the continuing lack of any evidence or justification. The graphic description evokes surprise and anger; the chronology of events is organized so that the extremity of the strip search of a young schoolgirl is contrasted with the trivial reason for the search (ibuprofen), as well as its futility (no ibuprofen ever found). The excerpt ends by describing Savana's reaction to the search (her "head down" in shame, almost crying, "the most humiliating experience" of her life) and juxtaposes it with the principal's dismissive statement that the "search" was not "a big deal," indicating that the school officials suffered absolutely no consequences and had no remorse for putting this child through such an ordeal. This is an excellent example of an anger prime.

Although anger is an obvious emotion that advantages plaintiffs, sadness can also work for plaintiffs in some cases. In cases where the plaintiff is not seeking to blame the defendant but is instead arguing that she is entitled to, or deserves, something like social security, welfare, or other government benefits, sadness is likely to work better than anger. Indeed, a recent priming study about benefits shows that

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110 *Id.* at 2–3, 7, 2009 WL 852121, at *2–3, *7 (internal citations omitted).

111 HAVEN, *supra* note 28, at 68–69; R. Reed Hunt, *The Concept of Distinctiveness in Memory Research*, *in* DISTINCTIVENESS AND MEMORY 3, 3 (R. Reed Hunt & James B. Worthen eds., 2006) (distinctive events attract attention and the greater attention we pay to these events enhances our memory of them); Daniel Reisberg, *Memory for Emotional Episodes: The Strengths and Limits of Arousal-Based Accounts*, *in* MEMORY AND EMOTION: INTERDISCIPLINARY PERSPECTIVES 15, 17 (Bob Uttl et al. eds., 2006) (emotional events tend to be well-remembered and the memories of them long lasting because they are vivid); Jefferson A. Singer, *Memory, Emotion, and Psychotherapy: Maximizing the Positive Functions of Self-Defining Memories*, *in* MEMORY AND EMOTION, *supra* at 111, 217 (The more "movie quality" and vivid a memory is, the more emotion is attached to it, and the more memorable it is.).

evoking anger might backfire on a plaintiff asking for aid.[112] If the reader is made to feel angry and punitive and looking for someone to blame, but there is no obvious culprit, there is a risk that the reader's anger could turn against the plaintiff. In the benefits study, subjects were primed for either anger or sadness and then given a vignette about a divorced mother of three small children who is seeking government aid.[113] The subjects were asked whether they would decrease or increase aid to the mother.[114] Subjects primed for anger were less likely to increase aid, in part because they tended to blame the mother for her situation.[115] Subjects primed for sadness were likely to increase aid to the mother in part because they saw her predicament as caused largely by external factors.[116] So, in cases where plaintiffs are seeking to paint themselves as deserving of some benefit and there is no clear culprit to blame, sadness is the emotion most likely to get them what they want.[117]

A good example of this appears in the plaintiff's brief in *Kerrigan v. Commissioner of Public Health*, the Connecticut Supreme Court case legalizing gay marriage. In this brief, the advocate primed for theme and emotion in the first section of the Argument, another early structural point of emphasis. In this excerpt, the plaintiffs began their argument with a combination of factual and legal material designed to make the reader feel that, because of a situation beyond their control, the plaintiffs have been denied a fundamental right to which they are entitled:

> The Plaintiffs are sixteen individuals—Connecticut residents, citizens and taxpayers. They are in their 30's, 40's, 50's and 60's. Most of them are parents, and several have cared or are caring for aging relatives. Each also participates in the larger community where they reside—in West Hartford, Colchester, Middletown, Wilton, Derby, Woodbridge, New Haven and West Haven. Three have dedicated their professional lives to public school students:

112 Small & Lerner, *supra* note 91, at 155–56.

113 *Id.*

114 *Id.* at 156.

115 *Id.* at 158, 164.

116 *Id.*

117 It is worth noting here that the cognitive dimensions of sadness and anger played a large role in the decision making. Researchers noticed that when the subjects who were primed for sadness were distracted—when they were prevented from engaging in the deep thinking process associated with sadness—their decisions more closely resembled those of angry people. Researchers distracted the sad subjects by forcing them to listen to and characterize tonal sounds on a tape while they were making their decision about the mother's government aid. *Id.* at 161, 164.

> two as teachers (in Hartford and Woodbridge) and one as a school principal. Three work in the insurance field. One has spent her career at General Electric while another operates her own database company. Five work in medical care: as an assistant to disabled adults; as a therapist and marriage counselor; as an AIDS educator; as an acupuncturist; and as an HIV and AIDS case manager for a non-profit agency. One is a librarian at a private university while another is an administrative law judge.
>
> Beyond that, the Plaintiffs are eight same-sex couples in committed relationships for between 11 and 31 years who were each denied a marriage license by the State of Connecticut. This case raises two central questions: 1) Is it permissible under the Connecticut Constitution to deny the right to marry to these Plaintiffs? 2) Given the legislature's enactment of the civil union law after this case was filed, and its acknowledgement of both the common humanity of gay people and their rights to equal treatment in their family lives, is it constitutional for the legislature to deny marriage where it also creates only for gay people a separate legal system, with a different name, and deems them eligible for all state-based rights available to married spouses?[118]

The Argument begins by reinforcing the "common humanity" of the plaintiffs through factual argument. This first paragraph pushes the theme of the brief by showing that the plaintiffs are people like everyone else: neighbors, workers, parents, and community members. The second paragraph contrasts the "common humanity" of the plaintiffs with the fundamental right denied to them. While it certainly points to the state as the entity denying these rights, the phrasing is more about entitlement than blame. Notice how the passive voice, a grammatical construction that hides the entity doing the action, is used in the second paragraph ("were each denied a marriage license"), contributing to the feeling that things "just happened."[119]

Moreover, the juxtaposition of the first paragraph, which vividly portrays the humanity of the plaintiffs, with the second, in which they are denied a basic human right, tells a sad and sympathetic story of fundamental rights denied.[120] These opening paragraphs are an excellent prime. The first paragraph allows the reader to identify with

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[118] Brief for Plaintiffs-Appellants at 7, Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008) (No. S.C. 17716), 2006 WL 5247529, at *7.

[119] It is interesting to contrast this with the passage from *Safford*, in which school officials are frequently the action takers; they are the subjects of aggressive verbs like "ordered" and "directed."

[120] Professors Robbins and Foley might call this "man versus machine." Foley & Robbins, *supra* note 86.

the plaintiffs (maybe the reader's beloved Aunt worked for General Electric) and then follows up with the fundamental right that was kept just out of reach by the government.

The prime reinforces the theme of good, everyday people being kept from important and well-deserved rights by arbitrary government action. This brief is also a good example of how the early argument sections can prime the reader's view of the law and the case as a whole. While the memorable quality of stories gives a priming advantage to the Statement of Facts, the argument sections can combine story with the kind of strong legal argument that is not appropriate for the Statement of Facts.

In contrast to plaintiffs, for whom anger can be an effective emotion, defendants (in most cases) will probably want to avoid eliciting anger because anger leads the reader to blame people, and the defendant is an easy target. But the defendant is not without recourse. The conventional wisdom in law has been for defendants with "bad facts" to tell an emotionally neutral story—glossing over the bad facts as quickly as possible with dry, neutral language.[121] But because we now know that emotion is an integral and significant part of decision making, the choice to tell a "neutral" story essentially cedes emotional power to the other side. It lets the other side control the emotion of a case, giving up a critical part of the persuasive process.

The science on emotional decision making does not leave the defendant without options, however. First, defendants can tell their own "justice" story—one in which bad things happened, but justice has already been meted out. If a story highlights that any transgressions were dealt with fairly and those who behaved badly were adequately punished, the feelings of injustice and anger that the plaintiff might seek to evoke may be neutralized. For example, in *Holloway v. Caldera*, a Title VII hostile work environment case, the defendant-employer argued that it had taken all reasonable steps to stop the harassment. Upon learning of the plaintiff's grievance against her supervisor, the employer removed the supervisor from his oversight of the plaintiff and shortly thereafter transferred the supervisor to another facility and relieved him of all supervisory

121 *See supra* note 68 and sources cited therein.

duties.[122] This convinced the court that the employer had discharged its duty under Title VII.[123]

If it is not possible to tell a story of justice already served, the defendant could try to write the facts with a theme of passivity to evoke the impression that bad things sometimes happen. A reader who feels sad is likely to feel that there is simply no one to blame. It is consistent with a theme that there are some wrongs that are simply beyond the law's power to redress. This may lead a judge to attribute the events that the plaintiff endured as simply a part of life, which can often lead judges to question whether the legal system affords (or should afford) the plaintiff a remedy. Consider this example from the defendant's brief in *Miller v. Missouri*, a case in which a worker sued his employer because he suffered a serious knee injury while working on a highway construction job:

> At approximately 10:30 a.m. on 9-29-05, Mitchell Miller was working at the pull-paver machine, shoveling asphalt to fill voids on the roadway. . . . [Miller] began walking, at a "brisk" or "fast" pace, back to his truck . . . . After walking approximately 150 feet, [Miller] felt a pop in the back and left inside of his right knee. He immediately experienced right knee pain, and his knee began to stiffen. . . .
>
> At the time just before employee felt the pop in his right knee, nothing specific happened, either to his knee or his body. [Miller] had been walking on asphalt pavement blacktop, i.e., regular highway pavement. . . .
>
> . . . [Miller] was just walking along, and suddenly, his knee popped.[124]

Notice how the defendant describes the accident without any reference to the actions of the defendant or the condition of the highway. While lawyers may know to try to tell the story from their clients' point of view,[125] it is important to realize that this can mean leaving the client out of the story. In other words, an advantageous theme can be that the client is not a part of the story at all. This example illustrates that strategy. Every sentence begins with the

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[122] Brief of Defendant-Appellee at 4, Holloway v. Caldera, 226 F.3d 641 (5th Cir. 2000) (No. 99-31333), 2009 WL 33727630, at *4.

[123] *Holloway*, 226 F.3d at 641.

[124] Substitute Respondent's Brief of Missouri Highway & Transportation Commission at 17–18, Miller v. Missouri Highway & Transp. Comm'n, 287 S.W.3d 671 (Mo. 2009) (No. SC89960), 2009 WL 929861, at *17–18.

[125] Robbins, *supra* note 56, at 772.

plaintiff as the subject, as the action taker. This gives the impression that the plaintiff is an actor in charge of his destiny and leaves the defendant out of the equation entirely. Note also that the use of passive language reinforces feelings of random fate raining down on the plaintiff. The plaintiff did not trip on the blacktop; he just "felt a pop" in his knee. "Nothing specific happened"; rather the plaintiff "was just walking along" and "suddenly" his "knee popped."[126] The Missouri Supreme Court found in favor of the defendant, noting specifically that the plaintiff's injury could have happened anywhere and was not job-related.[127]

However, sadness can be a double-edged sword for the defendant, and defendants need to be careful when priming for sadness. The study on government aid to the mother shows that sadness can sometimes work for a plaintiff by making the decision maker feel that the plaintiff is deserving of a remedy or by making the decision maker feel that a "wrong" must be righted.[128] The studies are not definitive regarding how sadness might affect decision making in situations where a plaintiff is seeking to blame the defendant, as opposed to arguing for benefits without regard to culpability. Sadness may work best for defendants in cases like *Miller*, where a theme of "things happen" is plausible given the facts and where a defendant can credibly draft the facts in a passive way that de-emphasizes the defendant's role in the events that injured the plaintiff.

In sum, the theme of the case is an important emotional prime, and emotions are critical to the reader's judgment and view of justice. It is critical for the legal advocate to take advantage of the early sections of the brief to prime the reader's view of the story and the case. But perhaps more importantly, the advocate must be conscious of how different emotions have different impacts on the reader and use these to the greatest advantage for his client.

III

PRIMING TO INFLUENCE THE READER'S VIEW OF THE FACTS AND LAW

Having made a decision about theme, the next step for the advocate is crafting the brief to highlight that theme. Decisions about structure are essential to this. The first paragraphs of key sections of the brief,

126 Substitute Respondent's Brief, *supra* note 124, at 18, 2009 WL 929861, at *18.

127 *Miller*, 287 S.W.3d at 674.

128 Small & Lerner, *supra* note 91, at 155–56.

such as the Statement of Facts, the Preliminary Statement, or the Argument, present valuable opportunities to prime the reader's impression of the case. Headings that introduce sections of the Statement of Facts or the Argument are also excellent primes. Similarly, introductory sentences—those thesis sentences that introduce more neutral information—should be crafted to prime the reader's view of the material that follows. This is especially critical in the Statement of Facts, to control the story and the theme, and in the Argument, to control the reader's view of the law.

The priming science demonstrates that the first impression that the advocate gives the judge is absolutely critical. Once a reader is primed, information that follows the prime is viewed through the lens of the impression created by the prime. Even irrelevant and ambiguous information will be viewed through the lens of the primed impression. Indeed, the priming effect is more pronounced when the later information is ambiguous.[129] For example, students tend to rate an instructor more favorably if they are told, prior to the instructor's arrival in class, that the instructor is a "warm" person than when the instructor is described as a "cold" person.[130] Students saw the same instructor and same behavior, but they had very different perspectives on it because of the prime.[131]

In another study, subjects read a series of scrambled phrases that primed them for either the personality trait "hostile" or the personality trait "kind." Those primed for hostility read phrases like "leg break arm his."[132] Those primed for kindness read phrases such as "the boy hug kiss."[133] These subjects then read a passage about a person named Donald and were asked to characterize him.[134] The passage described a series of behaviors involving Donald that were either

129 Srull & Wyer, *supra* note 11, at 1661–62.

130 Higgins et al., *supra* note 11, at 141 (citing Harold H. Kelley, *The Warm-Cold Variable in First Impressions of Persons*, 18 J. PERSONALITY 431, 435 (1950)). Also interesting here is the metaphoric quality of the prime. "Warm" is associated with positive traits such as kind, pleasant, or sympathetic, whereas "cold" has negative connotations. *See* John A. Bargh, *What Have We Been Priming All These Years? On the Development, Mechanisms, and Ecology of Nonconscious Social Behavior*, 36 EUR. J. SOC. PSYCHOL. 147, 153–55 (2006); *see generally* GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (1980).

131 Harold H. Kelley, *The Warm-Cold Variable in First Impressions of Persons*, 18 J. PERSONALITY 431, 433–35 (1950).

132 Srull & Wyer, *supra* note 11, at 1663.

133 *Id.*

134 *Id.* at 1664.

irrelevant (such as "[w]e used my car, since Donald's car had broken down") or ambiguous (such as "a salesman knocked at the door, but Donald refused to let him enter") with respect to the primed trait of hostility or kindness.[135] Those who were primed for hostility overwhelmingly characterized Donald as "hostile" or "aggressive."[136] Conversely, those primed for the trait of kindness characterized Donald's behavior, based on the exact same paragraph, as kind or pleasant.[137]

Once primed, the decision maker will remember primarily his *impression* as opposed to the actual facts or information. The decision maker's memory may even distort the facts to conform to the primed impression.[138] For example, once the subjects in the hostility priming case were primed for hostility, the subjects used *their own impressions and memories*, not the passage, to interpret the data about Donald.[139] Once the subjects had formed an impression of Donald, they used *that impression*, not the vignette about Donald, to judge and remember Donald.[140] As with the subjects who "saw" only the baseball among the many objects on the table, those primed for hostility quite literally *remembered* Donald as a hostile person, when the vignette provided no real support or evidence for this "memory."[141] This is how important and powerful it is to control the decision maker's first impressions of the case.

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[135] *Id.*

[136] *Id.* at 1164–65.

[137] *Id.* at 1668. The effect with the "kindness" prime was a bit weaker, leading researchers to conclude that it is easier to prime for negative traits than positive ones. *Id.* at 1671. This is perhaps the result of a negativity bias. *See supra* note 66 and sources cited therein.

[138] In one study, for example, an average-sized Black man on his lunch break was categorized as "lazy." Higgins et al., *supra* note 11. He was then remembered by subjects not only as lazy but as a large man "sprawling idly in the park doing nothing all day." *Id.* This tendency toward distortion and bias, as well as the likely schemata most people have involving stereotypes, certainly counsels in favor of using priming ethically and honestly. A dishonest prime that plays on stereotypes or group-based bias is unethical and immoral. *See infra* notes 195–200 and accompanying text.

[139] *See* Srull & Wyer, *supra* note 11.

[140] *See id.* at 1670.

[141] The resilience and tenacity of first impressions has been well documented in social science. For example, in one study, students formed an impression of a teacher after seeing a video of the teacher for *two seconds*. Ambady & Rosenthal, *supra* note 2, at 438. Their evaluations at the end of the semester were strongly consistent with that first, fleeting impression they had. *Id.*; *see also* GLADWELL, *supra* note 1, at 12–13 (summarizing Ambady's study).

Priming strongly suggests that the legal advocate should pay close attention to the material that comes first in each major section and paragraph in the brief. Those lead paragraphs and sentences, as well as headings, should be carefully and deliberately crafted to prime the reader's view of the material that follows. Priming can be particularly helpful with facts that are legally relevant but have minimal emotional power or with facts or rules that are ambiguous. The priming reaction is strongest with ambiguous information and information that is susceptible to two or more meanings.

The Statement of Facts is a critical place to create a first impression because readers will remember the story. Of the many structural decisions that confront advocates in the Statement of Facts, one of the earliest and most important is how to begin. This is a critical decision because priming studies unequivocally show that the behavior that is singled out for that first paragraph, and the words used to describe the behavior, contribute to the formation of an impression that will then be the foundation for the decision maker's memory of the events and people involved in the case. This impression can drive the case because it can mean the difference between, for example, a reader's seeing the client as a hero who has struggled against adversity or a whiny reprobate who blames others for her problems.[142]

Too often, lawyers waste that first paragraph by using it to lay out a dry recitation of the background facts in a case. The convention is to use that first paragraph of the facts to give the judge context and background, which is certainly a good idea. But the writer can set out context and background while also priming the reader to see the case in a certain way. Consider this opening from *DeShaney v. Winnebago County Department of Social Services*,[143] the case in which a child's mother sued the Department of Social Services for standing idly by while the child was irretrievably injured by his abusive father. This opening paragraph of the Statement of Facts takes full advantage of the opportunity to prime the reader's impression of the case:

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[142] *See* Robbins, *supra* note 56, at 776–77, 781–82. Professor Robbins argues that lawyers should cast their clients in the role of archetypal hero, a character who has certain universally understood qualities and emotions who is on a journey toward a particular goal. *Id.* at 779–82. As an example, she suggests the idea of casting a domestic violence client as the "hero" of her own story—a novel idea when representing clients who are habitually categorized as "victims." *Id.*

[143] DeShaney v. Winnebago Cnty. Dept. of Soc. Servs., 489 U.S. 189 (1989).

> Four-year-old Joshua DeShaney became totally and *permanently brain-damaged* as of March 8, 1984, because of the cumulative effects of a continuing process of physical abuse commited [sic] upon him by his father and the father's paramour over a long period. Fourteen months before his injuries became irreparable[,] the local child protection agency began *the active phase* of its case management of Joshua's physical abuse and neglect situation, initially arranging for protective custody for his physical protection from abuse; the defendant officials returned him to the abusive home, *on their own decision* and without court action, and *actively followed* him at all times thereafter, *dutifully recording* in internal documents the child's deteriorating situation and their fears for his safety but *taking no action* whatever to protect the child.[144]

Not a perfect opening, but designed to have a significant impact on the Court's view of the case and the parties involved.[145] Joshua is depicted as helpless and young (four years old), as well as irreversibly injured in a horrific way ("totally and permanently brain damaged" from abuse, "irreparabl[y]" injured). The child protection agency is depicted as simultaneously active in its involvement and passively negligent: they "actively followed" Joshua but took "no action whatever" except for the useless activity of "dutifully recording" the abuse. The picture that emerges of the agency is a caricature of a bunch of useless bureaucrats who passively observe a terribly abusive situation yet remain mired in inertia except for pointlessly writing reports. The paragraph tells the reader quickly and clearly why the parties are before the Court while also pushing a particular perspective on the facts. The paragraph is also a good anger prime; who would not be furious with that ineffectual agency for failing to do anything to help a child in such desperate need?

Headings, too, can be excellent primes. Every legal story, no matter how compelling, contains details that must be included but are dull, technical, or ambiguous. A strong heading can prime the reader to see those technical details in the light most favorable to the client.

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144 Brief for Petitioners at 3–4, *DeShaney*, 489 U.S. 189 (No. 87-154), 1987 WL 880157, at *4–5 (emphasis added).

145 The majority opinion of the Supreme Court strongly suggests that this prime influenced the Court's view of the story. Although the petitioner ultimately lost the case, it certainly succeeded in influencing the Court's perception of the facts. Similar images dominate both the petitioner's and the Court's facts, even though the respondents disputed many of the petitioner's factual claims. Importantly, both recitations depict the child protective agency as bureaucratically documenting known abuse while doing nothing to stop it. In this way, the petitioner's first paragraph clearly influenced the Court's perception of the events and its perception of the neglect and bureaucracy of the child protection agency. *See DeShaney*, 489 U.S. at 191–93.

This excerpt from the petitioner's brief in *Ricci v. DeStefano*, a case in which white firefighters sued because the fire department threw out the results of a test for captain because minority test takers scored overwhelmingly poorly, demonstrates this strategy:

> III. Respondents Strove to Ensure the 2003 Exams Were Job-Related and the Promotion Process Was Race-Neutral.
>
> Respondents engaged Industrial/Organizational Solutions, Inc. (IOS), a professional testing firm with experience in public safety, to develop promotional examinations that would identify those with the knowledge, skills, and abilities (KSAs) needed to perform the command responsibilities of captains and lieutenants. The NHFD [New Haven Fire Department] is a multi-disciplined emergency-service agency in a port city with major transportation networks. Lieutenants and captains must have a sophisticated level of KSAs and must possess considerable scientific and tactical knowledge, leadership skills, and good judgment. Apart from fire science, they must be well versed in building and high-rise construction, structural collapse, tactical response protocols for fire and non-fire-related catastrophes, confined-space and high-angle rescue, use of sophisticated equipment, and other subjects. They report directly to a battalion chief and indirectly to the chief. They must be able to train, discipline, and lead first responders. At the direction of the state, the NHFD also responds to medical emergencies and must provide pre-hospital medical care.[146]

In this paragraph, the petitioners had to lay out some relatively technical information as evidence that the test was relevant and unbiased. While not neutral or wholly ambiguous, the information is also susceptible to different interpretations. For example, the reader could agree with the statement that "[l]ieutenants and captains must have a sophisticated level of KSAs and must possess considerable scientific and tactical knowledge, leadership skills, and good judgment" and also find that the test at issue was not job-related. This is the kind of information that cries out for a prime. Here, the heading provides it by asserting that the respondents "strove" to ensure that the test was "job-related" and "race-neutral." These characterizations of the test can effectively influence how the reader perceives the rest of the information in the paragraph, even though much of that information can cut both for and against the petitioners. But, by starting the paragraph with a strong prime, the reader is more inclined

[146] Petitioners' Brief on the Merits at 6–7, Ricci v. DeStefano, 129 S. Ct. 2658 (2009) (Nos. 07-1428, 08-328), 2009 WL 453242, at *6–7 (internal citations omitted).

to see each sentence as evidence of the respondents' utmost effort to ensure that the test was fair, job-related, and race-neutral.[147]

Priming also helps when the legal advocate confronts ambiguous or confusing law, particularly statutory material. Like ambiguous or neutral facts, law can be introduced with strong thesis sentences designed to influence the reader's view of what the law means. For example, in *United States v. Begay*, the Supreme Court had to interpret the Armed Career Criminals Act (ACCA), which defines "violent felony" in a particularly convoluted and confusing way.[148] The petitioner, Begay, had been convicted three times for felony driving while intoxicated (DWI). The question was whether DWI is a "violent felony" under the ACCA. In this excerpt from petitioner Begay's brief, counsel lays out the text of the ACCA only after priming the Court with pointed thesis sentences designed to influence the reader's view of the ACCA's purpose and effect:

> Congress passed the ACCA in 1984 and amended it in 1986 to single out for particularly severe punishment "career offenders—those who commit a large number of fairly serious crimes as their means of livelihood, and who, because they possess weapons, present at least a potential threat of harm to persons." The ACCA requires the imposition of a minimum sentence of fifteen years and increases the maximum sentence from ten years to life imprisonment for certain defendants convicted of a violation of 18 U.S.C. § 922(g). Section 922(g) prohibits particular categories of people from possessing firearms. The dramatic ACCA enhancement applies to those . . . defendants who have a total of three prior convictions for "serious drug offenses" or "violent felonies."
>
> Congress narrowly defined "violent felony" as a "crime punishable for a term exceeding one year" that fits within one of two classifications. Under § 924(e)(2)(B)(i), a crime is a "violent felony" when it "has as an element the use, attempted use, or threatened use of physical force against the person of another."

[147] It is, of course, impossible to know what the Justices perceived when they read the paragraph. But there are some clues. The Justices certainly never stated in the opinion that they thought the test was "race-neutral," but a central point of the opinion is that the respondents failed to show that there existed an "equally valid, less discriminatory" alternative to the test. *Ricci*, 129 S. Ct. at 2679. In other words, the Court may have been convinced that the respondents *strove* to ensure a race-neutral test, as argued by the petitioner's heading. And, interestingly, the Court found that there was no "genuine" dispute that the test was "job-related"—even though the City of New Haven, in fact, disputed this fact. The Court found that the City's position was untenable and wholly contradicted by the record. *Compare* Petitioners' Brief on the Merits, *supra* note 146, at 19–20, 2009 WL 453242, at *19–20, *with Ricci*, 129 S. Ct. at 2678.

[148] Begay v. United States, 553 U.S. 137 (2008).

> Under § 924(e)(2)(B)(ii), a crime is a "violent felony" when it "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."[149]

In this excerpt, the writer deliberately leads into the ambiguous statutory text with information about the ACCA that is designed to prime the court with the idea that the ACCA was meant to target felons who committed deliberately violent crimes like robbery or rape, not the more negligent DWI. The lead paragraph emphasizes the "dramatic" and harsh penalties of the ACCA, which suggests that the statutory text should not be read so broadly to include crimes other than those involving the most serious, violent behavior. The prime here is powerful, but subtle; it does not argue. It simply notes what the statute was meant to do. In this way, it also taps into the "status quo" bias, the term for people's preference for preservation of the status quo.[150] Because this prime is phrased to suggest not that the ACCA *should* be interpreted this way but that the ACCA simply *is* this way, it is advantageous to the advocate. It makes the decision maker feel as though a contrary interpretation would upset an already existing legal interpretation.[151]

In the following example of priming to introduce adverse law, the advocate uses a common legal technique: the slippery slope. The slippery slope is a form of loss aversion prime. In this case, *Hein v. Freedom From Religion Foundation, Inc.*, the respondents sought taxpayer standing to challenge the Bush Administration's use of taxpayer money to fund faith-based initiatives.[152] The Seventh Circuit Court of Appeals had held that the taxpayer organization had standing to sue. The petitioners argued that affirming the Seventh Circuit would clog the federal courts with taxpayer complaints:

> The court of appeals' decision, if allowed to stand, would fundamentally distend *Flast* [the Supreme Court case outlining a narrow exception to the prohibition against taxpayer standing] by unmooring the doctrine from its historic roots and constitutional justification. Rather than reflect a particularized and historically sensitive application of Article III, the court of appeals would transform the doctrine of taxpayer standing into a roving license for

[149] Brief of Petitioner at 13–14, *Begay*, 553 U.S. 137 (No. 06-11543), 2007 WL 3276496, at *13–14 (internal citations omitted).

[150] Korobkin, *supra* note 50, at 118–19.

[151] Of course, this same bias operates any time that a legal advocate uses precedent to show that a decision is mandatory or inevitable.

[152] Hein v. Freedom From Religion Foundation, Inc., 551 U.S. 587, 596–97 (2007).

> any one of the more than 180 million taxpayers in the United States to challenge any action of the Executive Branch that offends that individual's own view of the Establishment Clause's proscription.[153]

In this artfully rhetorical[154] prime, which appeared in the petitioner's Summary of Argument, the petitioners frame the appellate court's decision as a loss—and a big one. It boils down to an argument that plays squarely on loss aversion: "If you affirm, severe consequences will result." It raises the threat of 180 million federal court suits based on a multitude of idiosyncratic beliefs about the proper interaction of religion and government. This seemed to resonate with Justice Alito, who wrote the majority opinion: "[I]f every federal taxpayer could sue to challenge any Government expenditure, the federal courts would cease to function as courts of law and would be cast in the role of general complaint bureaus."[155]

That first impression created by the prime is not only powerful but also wide reaching. Priming impressions often have a kind of domino effect in that they can "spread" to other related impressions. In the Donald study, for example, not only did the subjects "remember" Donald as "hostile," the trait for which they were primed, but the subjects also "remembered" him as having other negative traits as well.[156] These other negative traits were, at most, indirectly related to the primed trait of hostility, and they bore no relation to the vignette.[157] For example, subjects who were primed with the hostile behavioral sentences were more likely to "remember" Donald as selfish, boring, and narrow-minded, even though these traits have (at best) a tenuous relation to priming stimuli such as "leg break arm his."[158] The connection seems to be that they are all negative traits, which suggests that, in our minds, people who are hostile also have a host of other negative qualities or that, once we have judged someone

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153 Brief for the Petitioners at 10 *Freedom From Religion*, 551 U.S. 587 (No. 06-157), 2007 WL 62299 *10.

154 The language here is perhaps a little overblown, but nevertheless it demands the reader's attention. The phrase "fundamentally distend *Flast*" begs to be read aloud (try it). The other language is similarly jarring: the Court of Appeals "distend[s]" and "unmoor[s]" *Flast*, turning it into a "roving license" for 180 million potential taxpayer complaints. That is quite a rhetorical picture.

155 *Freedom From Religion Foundation*, 551 U.S. at 593.

156 Srull & Wyer, *supra* note 11, at 1670.

157 *Id.*

158 *See id.* at 1664–65 & fig.1(B).

negatively, we see them through jaundiced eyes.[159] A similar result was obtained with the "kindness" prime, although the impression did decay over time more quickly than the "hostility" prime, which suggested to researchers that negative impressions are more lasting.[160]

This effect is due to "spreading activation." A prime has the potential to excite not only the reader's knowledge categories for the words and behaviors directly associated with the prime but also other categories that are associated, even distantly, with the primed word or behavior. The distantly associated categories will then be used by the reader to interpret new information.[161] So, for example, if you are primed with the word "lion," your knowledge categories about "lion" will be stimulated. If you later read about a large mammal stalking and attacking its prey, your first thought is likely to be "lion." That is the simplest, most direct "priming" effect. But in addition to "lion," other knowledge categories related to lion will be stimulated. These categories could include concepts directly related to the concept "lion," such as: Africa, mane, carnivore, feline, or more attenuated concepts such as tiger and zebra.[162] This spreading activation is due to semantic memory, your brain's "organized knowledge about words and their meanings and referents."[163] Memory can be thought of as a network of concepts that are all interconnected to each other by links.[164] The links represent various relationships between concepts. The relationship (or link) can be strong or weak, depending on the strength of the association between the concepts, and it can be direct (as in lion:mane) or indirect (as in lion:tiger).[165] A concept or

159 *Id.* at 1670. The researchers noted that "once behavioral information is encoded, these encodings affect judgments of the person who manifested the behavior with respect to both the trait originally primed and other traits that are related to it only *indirectly through the subjects' implicit personality theories*." *Id.* (emphasis added).

160 *Id.* at 1671.

161 Higgins et al., *supra* note 11, at 143 (Exposure to a trait term, such as "hostile," should activate its trait category meaning, and this meaning will then "prime" or further activate, closely associated trait categories, like "aggressive" or "mean."); Srull & Wyer, *supra* note 11, 1661–62.

162 TIMOTHY P. MCNAMARA, SEMANTIC PRIMING: PERSPECTIVES FROM MEMORY AND WORD RECOGNITION 11–12 (2005).

163 Higgins et al., *supra* note 11, at 143.

164 MCNAMARA, *supra* note 162, at 11.

165 *Id.* at 11. An easy to understand explanation of "spreading activation" and the strength or weakness of various associations can be found at Dave Droar, *Memory and Connections: Spreading Activation*, http://www.arrod.co.uk/archive/concept_spreading_activation.php (last visited Oct. 10, 2010).

impression is "activated" when you read about it or think about it.[166] Once a concept or impression is activated, the activation spreads throughout the links to other related concepts.[167]

For legal advocates, this is important information. As with words, our memories process behavioral information in terms of schemata of interconnected traits and behaviors, with varying levels of specificity and generality.[168] Like "lion" and "mane," which are semantically related, "break arm" is connected to the traits "aggression" and "hostility" in our minds and memories. But, like "lion" and "zebra," there are also connections between hostility and other negative traits, such as selfishness and narrow-mindedness. All of these connections are potentially activated by one prime, though with different degrees of strength.

So, if you are successful in painting another party as a liar, a disreputable person, or a person possessing some other unfavorable trait, the reader is likely to remember that person as having all kinds of unpleasant traits. Of course, the same is true if your client is painted in an unfavorable way by the other side. These kinds of negative impressions are quite strong and will require a great deal of positive advocacy to overcome.[169] As with any powerful tool, this one should be used carefully and with subtlety and with careful consideration of any possible backlash that might undermine your ultimate position.[170]

Careful word choice is important to the priming effect. But priming is more than simply finding a "magic word" (not all priming is semantic). Priming also works when subjects read a description of *behavior* that activates the impressions or adjectives sought to be primed.[171] For example, in the Donald experiment, subjects were primed for hostility (and other negative traits) by rearranging scrambled sentences like "leg break arm his."[172] In that experiment,

166 MCNAMARA, *supra* note 162, at 13.

167 *Id.*

168 Srull & Wyer, *supra* note 11.

169 LEHRER, *supra* note 31, at 81 (discussing negativity bias); *see also supra* note 66 and accompanying text.

170 Attacking the other side has many risks; perhaps the least of which is that it invites the other side to attack you.

171 Srull & Wyer, *supra* note 11, at 1662. A behavioral trait does not have to be primed with the exact word or trait sought to be stimulated; a behavioral trait will also be primed by exposing a person to "behavioral instances of the trait." *Id.*

172 *Id.* at 1163.

readers simply associated the behavior described in those sentences with hostility and aggression—they were never primed with the particular words "hostile" or "aggressive." Rather, they came up with the words on their own.

For the legal advocate, using only description without a particular term is a risky strategy. But this aspect of priming can still be useful to the advocate. First, it can be useful in the Statement of Facts where the advocate must state the facts without too much overt argument. If you want the judge to think "this is sexual harassment" without arguing that legal point in the Statement of Facts, then you should describe the behavior in such a way as to lead to the stimulation of the knowledge category for sexual harassment. But perhaps more useful is that a description can be combined with the use of a precise term that encapsulates the behavior. For example, the lead sentence of a paragraph can use the "magic word," and then the rest of the paragraph can describe behavior consistent with that word. This way, the reader is primed by the lead sentence to interpret the rest of the paragraph consistently with the prime, but the paragraph itself also functions as a prime to excite the desired category. For example, consider this excerpt from the Statement of Facts in a sexual harassment case:

> Crawford [Petitioner] told the investigators that Hughes [Petitioner's supervisor] had sexually harassed her and other employees. Crawford reported that "on numerous occasions" Hughes "would come to my window and ask to see—he would say, 'Let me see your titties.'" He "always" would "grab his crotch and state 'you know what's up,'" and "there was times" Hughes "would approach her window and put his crotch up to the window." On one occasion "Hughes came into her office and she asked him what she could do for him and he grabbed her head and pulled it to his crotch."[173]

In this example, the thesis sentence primes the reader with the phrase "sexually harassed," which excites the reader's knowledge category for that phrase. The passage then describes in some detail the behavior of the supervisor, which certainly seems like sexual harassment. This reinforces the prime of the thesis and creates an overall picture of an out-of-control, harassing supervisor.

Once the writer has chosen the words that will prime the reader, some repetition of those words will strengthen the priming effect.

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[173] Brief for the Petitioner at 3, Crawford v. Metro. Gov't of Nashville, 129 S. Ct. 846 (2009) (No. 06-1595), 2008 WL 1721898, at *3 (internal citations omitted).

While the advocate does not want to overdo repetition because this can backfire, a small amount of repetition of a key thematic phrase can embed the phrase in the reader's memory and make the reader likely to interpret later information through the lens of that word or phrase.[174] More space devoted to the words or descriptions related to the theme sought to be primed also strengthens the priming effect. Researchers noted that when subjects read more sentences involving hostile actions, they were more likely to use the activated trait to interpret new information.[175] Therefore, for factual details or cases that support the advocate's position or theme of the case, "unpacking" that information to take up more space in the brief will also strengthen the priming effect.[176]

The following example, taken from the Statement of Facts in the petitioner's brief in *Davis v. Monroe County Board of Education*, is a good example of unpacking and repetition in a prime. These passages come near the beginning of petitioner's Statement of Facts. *Davis* involved the question of whether a school is liable under Title IX for peer sexual harassment:

> In the first of several instances, starting in December of 1992, a classmate identified as "G.F." repeatedly attempted to touch LaShonda's [Petitioner's] breasts and vaginal area and told her in vulgar terms that he "want[ed] to feel her boobs" and "want[ed] to get in bed" with her. Both LaShonda and her mother reported these incidents to classroom teacher Mrs. Diane Fort. In January 1993, Mrs. Fort assured [LaShonda's mother] that the principal had been informed about the harassment.
>
> The harassment continued, as did the complaints and requests for assistance by LaShonda and Mrs. Davis. In February 1993, G.F. placed a doorstop in his pants and behaved in a sexually suggestive and harassing manner. This time, LaShonda and her mother complained to Coach Whit Maples and Mrs. Joyce Pippin, the teachers in whose classes this misconduct occurred. In March 1993, LaShonda and other girls whom G.F. had sexually harassed tried to arrange a meeting with Principal Querry, but Mrs. Fort refused to allow them to proceed, stating "[i]f he wants you, he'll call you." In April 1993, G.F. rubbed against LaShonda in a sexual manner in the school's hallways as the students went to lunch. LaShonda reported this incident as well to Mrs. Fort. . . .

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174 BEAZLEY, *supra* note 4, at 50–52.

175 Srull & Wyer, *supra* note 11, at 1662.

176 *See, e.g.*, EDWARDS, *supra* note 26, at 213 (expand details and imagery of good information).

> By May 1993, G.F.'s sexual harassment of LaShonda had persisted for five months; school officials still had not responded to her requests for help.[177]

In this passage, the advocate fully unpacks, step by step, every instance of sexual behavior suffered by the petitioner, in detail. The advocate repeats not only words (primarily "harass" and "harassment") but also instances of behavior, both by G.F. and school officials. The juxtaposition of the repeated acts of harassment against the continuing lack of response by school officials makes this a compelling example of a prime.

In sum, priming not only works to influence the reader's feel for the "big picture" of a case but also can be used at any number of other points in the brief. It is a powerful influence over the reader's view of information, including "micro" level details. It can influence the reader's view of the facts or the law, or it can create an enduring impression of the characters involved in the case. Priming can be accomplished through the judicious use of particular words, through descriptions of behavior, and through a combination of all these techniques. It can create vivid, lasting impressions that will stay with the reader long after the informational detail has been forgotten.

IV
THE RISKS OF PRIMING

Although priming is a consistently strong reaction, its application to law is not seamless, and its use by legal advocates comes with some risks and uncertainties. Priming in brief writing certainly can help the advocate influence the judge's decision making. But, even in the scientific experiments, which generally evaluate priming in relatively simple and direct testing contexts, there is not a perfectly straight line between priming and decision. The line is likely to be even less direct in the persuasive writing context, where an advocate's use of priming will be competing with many other diverse variables that can potentially influence the judge's view of the case. Unfortunately, there are few studies that test priming in the legal context and almost no data involving briefs or persuasive legal writing. This is an area ripe for study that would close the gaps in our knowledge about how priming would work in this important context.

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[177] Brief for the Petitioner at 4, Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999) (No. 97-843), 1998 WL 792418, at *4.

One of the primary differences between the legal context and most priming studies is that, at least ideally, in the legal context there are two sides vigorously pushing their clients' often diametrically opposed positions. This differs from many priming experiments in which the subjects of the study are primed one way or another but not in two opposing directions.[178] While the current priming studies give legal advocates a great deal of useful information, they do not tell us with certainty who will prevail if both sides employ priming in their briefs. For example, a judge in one case may hear two opposing stories with very different emotional themes, such as a theme of injustice versus a theme of sadness. Or each side might try to present the same facts in a different light.[179] The studies are unclear about how priming would work in such a competing context or about which influence would be paramount. Advocates should still take advantage of priming—the data are certainly clearer about what happens when one side primes and the other side does not—but advocates should also be cognizant about what the data do not tell us.

If both sides in litigation attempt to prime the reader, there is some evidence that the decision maker might be more influenced by the first impression. In some contexts, people are more likely to remember, and be influenced by, the first piece of information to which they are exposed.[180] This is called the "primacy effect."[181] To complicate matters, however, the primacy effect is often contradicted by the "recency effect," which states that people will remember, and be influenced by, the last information to which they are exposed.[182]

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178 *See, e.g.*, Higgins et al., *supra* note 11, at 144–45; Srull & Wyer, *supra* note 11, at 1663. One possible exception is the studies on anger and justice in which one set of subjects was primed for anger with the video of the beating and then told that the perpetrator had been punished. Goldberg et al., *supra* note 89, at 783–84. The result of these studies is that anger's influence on decision making is mitigated by feelings that justice has been served. *Id.* This is an example of two competing primes, although, of course, the study has far fewer variables than the usual litigation.

179 For example, in *Ricci*, the white firefighters case referenced *supra* notes 146–47, the petitioners presented the facts about the skills necessary for a firefighter captain (tactical knowledge, leadership, etc.) as evidence of the relevance of the test. Respondents could use the same facts to show that the test was an inaccurate measurement of these skills.

180 For explanations of the primacy and recency effects, see, for example, Curtis Haugtvedt & Duane Wegener, *Message Order Effects in Persuasion: An Attitude Strength Perspective*, 21 J. CONSUMER RES. 205, 205–07 (1994); DANIEL J. O'KEEFE, PERSUASION: THEORY AND RESEARCH 253–54, 263 (2d ed. 2002); DAVID A. SOUSA, HOW BRAIN SCIENCE CAN MAKE YOU A BETTER LAWYER 73–74 (2009).

181 O'KEEFE, *supra* note 180; SOUSA, *supra* note 180.

182 *See, e.g.*, Kristi A. Costabile & Stanley B. Klein, *Finishing Strong: Recency Effects in Juror Judgments*, 27 BASIC & APPLIED SOC. PSYCHOL. 47, 56–57 (2005).

The studies are, in many ways, conflicting, but there is clear indication that people tend not to remember, and are not persuaded by, material that comes in the middle of a presentation.[183] On average, primacy seems to have a slight advantage over recency, but this varies by context, and in some contexts, the recency effect prevails.[184]

In the jury trial context, interestingly, recency seems to be far more influential, and studies suggest that trial lawyers for *both sides* should present their material in a climactic order with the most important material at the end.[185] There are no studies from the persuasive writing and brief-writing arena, however, so at this point we can only speculate about whether primacy or recency would prevail in brief writing. For example, a quick analysis of the data would suggest that the appellee is at a disadvantage because her brief will often be sandwiched in the middle between the appellant's opening brief and reply brief. But this quick analysis fails to account for any number of contextual variables, including time delays, general judicial dislike of reply briefs,[186] judicial predisposition to a certain outcome, and, of course, the potentially unequal merits of the two sides.

Another significant variable that potentially affects the impact of priming (and primacy effects) is the order in which judges and clerks read. Judges and clerks may not necessarily read the briefs in the order in which the briefs are filed; often judges and clerks wait until all the papers are filed to read them, so there is no guarantee that the papers will be read in any particular order.[187] Judges and clerks may not even read one brief all the way through before moving on to the next. They may skip back and forth between the various filings; between the various filings and the record; or between the filings, the record, and any particularly salient authorities. And, to further complicate matters, there is no guarantee that the judges and clerks

183 SOUSA, *supra* note 180, at 73–75.

184 *See* Costabile & Klein, *supra* note 182, at 56 (noting that some studies find a strong primacy effect and some find a recency effect); *see also* O'KEEFE, *supra* note 180; SOUSA, *supra* note 180.

185 Costabile & Klein, *supra* note 182; Laurens Walker et al., *Order of Presentation at Trial*, 82 YALE L.J. 216, 226 (1972) (both parties should present evidence in climactic order).

186 ALDISERT, *supra* note 26, at 269 ("Reply briefs are not the favorite children of appellate judges.").

187 Indeed, a recent text notes that some judges are "reverse readers," meaning that they start with the reply brief and work their way back to the opening brief. SCALIA & GARNER, *supra* note 31, at 73–74.

will read the briefs in order, from page one to the end. Although judges are likely to read the paragraphs of a particular section in order, they may not read the Question Presented or the Summary of Facts first, or even the first heading and issue first. Again, legal advocates would be well advised to prime in their briefs anyway but to be cognizant of the limitations of the effect in certain contexts, as well as the limitations of the available data.

The priming effect will also vary depending on the depth of attention that judges and clerks give to the briefs. Priming is largely an unconscious reaction; this is a source of its power.[188] For example, people do not consciously think, I just heard about baseball, so that's why, when I hear Pete Rose, I think baseball player. The process is not nearly that linear or deliberate. Rather, it is a brain shortcut that is an automatic function of our memory process.[189] As a result, by forcing more deliberation and conscious attention to the process of decision making, priming can be counteracted.

For example, the emotion of anger leads people to rely on relatively simple heuristics and easily processed cues in decision making; it is not a deep-thinking emotion.[190] In one of the anger priming studies, for example, researchers sought to determine whether stimulating increased self-reflection about decision making would mitigate the effect of angry emotions.[191] To do this, the researchers told some of the subjects in an anger priming study that an "expert" would interview them at the end of the study to assess their responses and reasoning.[192] Researchers hypothesized that subjects who were held more accountable for their decisions would override their feelings of anger and engage in deeper and more complex processes.[193] The results showed that the subjects who were primed

[188] *See, e.g.*, Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 6 (1989) ("A crucial component of automatic processes is their inescapability; they occur despite deliberate attempts to bypass or ignore them."); Nicholas Epley & Thomas Gilovich, *Just Going Along: Nonconscious Priming and Conformity to Social Pressure*, 35 J. EXPERIMENTAL SOC. PSYCHOL. 578, 579 (1999) (noting the unconscious and automatic nature of the priming response); Jennifer S. Lerner et al., *Sober Second Thought: The Effects of Accountability, Anger, and Authoritarianism on Attributions of Responsibility*, 24 PERSONALITY & SOC. PSYCHOL. BULL. 563, 564 (1998) (The connection between anger and more punitive decision making "operates outside of conscious awareness.").

[189] Linz & Penrod, *supra* note 1, at 9.

[190] Lerner et al., *supra* note 188, at 563.

[191] *Id.* at 564.

[192] *Id.* at 566.

[193] *Id.* at 564–65.

for anger but also held accountable to the expert were less punitive in their judgments and reported that they engaged in a more deliberative decision-making process than those who were not accountable.[194] This suggests that the depth of attention that judges and clerks give to the briefs, as well as their degree of awareness of their own decision-making processes, can potentially have an impact on the effectiveness of priming strategies. Moreover, the degree to which judges and clerks feel "accountable" for their decisions will also have an impact on the priming effect. It is also possible that legal advocates can counteract any priming strategies through tactics that encourage more deliberation and awareness of decision making or that rouse feelings of accountability (for example, through mentioning the possibility of reversal on appeal).

The subconscious nature of the priming phenomenon also means that advocates must be particularly mindful of ethics. It is possible to prime someone to make a wrong or biased decision.[195] Priming works because of the caches of "knowledge categories" in our memories. So, to the extent that we carry prejudices, stereotypes, or other biases as part of the knowledge categories in our brains—and we all do[196]—it is possible for priming to tap into this information. For example, people who heard an observer remark that an "average-sized Black man" sitting on a park bench during his lunch hour was "lazy" *remembered* a "big, healthy" Black man "sprawling idly" on a park bench and "doing nothing all day."[197]

In another study, subjects were primed with words suggesting race (e.g., Black, Negro, slavery) and racial stereotypes (e.g., lazy, poor).[198] They then read the Donald vignette and attributed to Donald hostile characteristics, even though there were no words suggesting hostility in the prime.[199] Researchers concluded that subjects had been primed to think of Donald as African American and then had attributed hostility to Donald because hostility is a

194 *Id.* at 571.

195 *See supra* note 138 and accompanying text.

196 *See, e.g.*, Devine, *supra* note 188, at 5–6.

197 Higgins et al., *supra* note 11 (citing Jerome Bruner, *Social Psychology and Perception*, *in* READINGS IN SOCIAL PSYCHOLOGY (E. Macoby et al. eds., 1958)). All of the fabricated "remembered" impressions were primed by the word "lazy."

198 Devine, *supra* note 188, at 9–12.

199 *Id.* at 10–12.

stereotypical characteristic associated with that racial category.[200] These results counsel advocates to be scrupulous about their use of priming. Because priming can tap into our unconscious stereotypes with particular tenacity and power, advocates must make special efforts to use this strategy ethically and morally and to be vigilant to avoid tapping into unconscious and harmful stereotypes.

CONCLUSION

In sum, priming is a potentially powerful tool for legal advocates. It can help influence the decision maker's feel for the entire case, it can strengthen and guide the theme of the case, and it can also help with smaller details such as the characterization of certain facts or rules. It has potential application throughout all sections of a brief, from the Question Presented, to the Statement of Facts, to the Summary of the Argument, and to the Argument itself. The priming studies also clearly tell us that emotion is pivotal to decision making and that different emotions can have particular, different impacts on decision making. Overall, it confirms that legal writers have multiple opportunities to greatly influence the decision maker's perception and that structural decisions are central to this influence.

Although the priming studies contain a wealth of important information for the legal advocate, much work remains to be done. There is a significant gap in the literature regarding how priming works in the legal context, particularly in the persuasive brief-writing context. Studies about the efficacy of priming in law would be a fruitful collaboration between lawyers and psychologists, helping both sides to refine their disciplines. Studies in this area would certainly be eminently useful to legal advocates, who could use the psychology to learn and refine the skill at the heart of lawyering: how to persuade effectively and ethically.

[200] *Id.* at 11–12. This is an example of "spreading activation" in priming. Even subjects who did not exhibit high amounts of racial prejudice on the Modern Racism Scale, which is one measure of bias, could still be primed to elicit prejudicial responses. *Id.*