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WINDOWS AND 'WINDOWS': REFLECTIONS ON LAW AND LITERATURE IN THE DIGITAL AGE†

If art teaches anything . . . it is the privateness of the human condition. Being the most ancient as well as the most literal form of private enterprise, it fosters in a man, knowingly or unwittingly, a sense of his uniqueness, of individuality, of separateness – thus turning him from a social animal into an autonomous 'I.' – Joseph Brodsky, 1987 Nobel Lecture

I *Introduction*

Our digital age surrounds us with an ever-growing quantity of information, with fragmented stories and counter-stories, and with an incessant flow of moving images. Poetic structures are disjointed, coherent narratives inaudible.[1] Literature, it seems, is rapidly losing its cultural prominence;[2] its claim and aspirations to have a significant bearing on other disciplines appear less and less viable. In particular, the interdisciplinary study of law and literature finds itself today in a confused and aimless state, its once well established status threatened, its once clear *raison d'être* in doubt.

Nevertheless, I will argue here that it is now more essential than ever to focus on the links between law and literature, because literature – and, in particular, the poetic idea – possesses unique abilities to constitute and maintain the senses of self and of the other upon which the authority and legitimacy of law depend. I will present the poetic idea as an expression of a particular stance toward the world, one ascribing to poetics the power to generate messages that make possible effective interpersonal communication. Poetic productions can faithfully represent, as nothing else can, their author's inner experiences, consciousness, values,

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1 See Shulamit Almog, 'From Sterne and Borges to Lost Storytellers: Cyberspace, Narrative and Law' (2002) 13 Fordham I.P.Media & Ent.L.J. 1 [Almog, 'From Sterne'].

2 For a thorough elaboration of this claim see Sven Birkerts, *The Gutenberg Elegies: The Fate of Reading in an Electronic Culture Age* (Winchester, MA: Faber & Faber, 1994) [Birkerts, *Gutenberg*].

feelings, and needs, as well as those of other persons. Poetic expressions resonate with a wide audience, the members of which can relate to them and conduct themselves in their light. These expressions can help forge and sustain well-functioning interpersonal relationships, which the law, too, wants to encourage. Thus, I argue, to abandon the poetic idea is to waste a resource highly valuable to the legal enterprise.

I begin by positing a paradigm of *literature alongside law* that delineates a theoretical framework for addressing the interrelationships between law and literature. The notions of poetic justice and poetic licence are then put forward as complementary themes, illustrating the interplay between law and literature. After establishing the need for the poetic enterprise in general, I will criticize authors who underline the importance of specific literary genres, concluding that the form of the narrative as such, not its particular genre, is the most powerful means of instilling a sense of self as well as an attentiveness to the other. At this point, I will make some remarks about the future of narrative in a digital environment, maintaining that the 'digital storm' we are facing challenges law as well as literature and that the notions of poetic justice and poetic licence can help both fields to face these challenges successfully.

II *The paradigm of literature alongside law*

The academic study of law and literature is generally considered to have begun in 1973, with the publication of James Boyd White's *The Legal Imagination*.[3] The book inspired a wave of additional investigations, and the discourse related to law and literature has been fruitful and varied.[4] It seems, however, that the law and literature enterprise has lost some of its thrust. In a recent article, Kenji Yoshino describes law and literature as currently presenting conflicting symptom of health.[5] Though

3 James B. White, *The Legal Imagination* (Boston: Little, Brown, 1973) [White, *Legal Imagination*].

4 For a detailed bibliography of the major publications up to the mid-1990s see Ian Ward, *Law and Literature: Possibilities and Perspectives* (Cambridge: Cambridge University Press, 1995) at 246 [Ward, *Law & Literature*]. For a listing of later publications in the field see Shulamit Almog, 'One Young and the Other Old: Halachah and Aggadah as Law and Story' (2003) 18:2 Can. J.L. & Soc'y 27 at 28 n.4 [Almog, 'One Young']. See also Jerome Bruner, *Making Stories: Law, Literature, Life* (Cambridge, MA: Harvard University Press, 2002) [Bruner, *Making Stories*]; Melanie Williams, *Empty Justice: One Hundred Years of Law, Literature and Philosophy* (London: Cavendish Publishing, 2002); Thane Rosenbaum, *The Myth of Moral Justice* (New York: HarperCollins, 2004); Sinkwan Cheng, ed., *Law, Justice and Power: Between Reason and Will* (Stanford, CA: Stanford University Press, 2004). The law and literature discourse has dwindled somewhat in the last few years, a development that may be connected to our subject here – the standing of literature and literary studies in the digital age.

5 Kenji Yoshino, 'The City and the Poet' (2005) 114 Yale L.J. 1836.

impressively penetrating the legal academy and attracting many literary and legal scholars, the field, Yoshino claims, is 'caught in a limbo' and has never achieved the status of other interdisciplinary fields such as law and economics, legal history, and jurisprudence.[6]

I believe that the thriving of certain disciplines generally linked to the humanities, such as law and history, law and cultural studies, and law and film, is, to a large extent, a consequence of the discourse on law and literature. Thus, the growing interest in other links between law and the humanities does not overshadow the past interest in law and literature; it is generated from law and literature and exhibits the latter's importance and vitality. Nevertheless, I agree with Yoshino's assessment of the current state of the discipline and wish to suggest a reason for the problem he identifies.

One cause of the decline of law and literature, I maintain, is a digital technology that, in making possible an explosion of published material, has tended to render poetic enterprises less prominent than they once were. The digital age changes cultural habits and, consequently, the nature and substance of literature.[7] We are now exposed to endless numbers of texts that are widely distributed a few seconds after being created or even while being created. Yet the attention spans and the time allotted for receiving such texts is gradually decreasing, and the ability to gain meaningful insights turns out to be more and more elusive.[8] In a virtual environment, saturated with intangible data, reality becomes indescribable; as it gets more 'digital,' it moves further and further from old perceptions of physical and emotional existence. Yet the same cultural phenomenon that explains the marginalization of literature also points to the need for it. Against the background of the widening schism between the advancement of technology and the human capacity to contain and process that advancement, the old lore of poetics stands out as a means of addressing the schism and comprehending the new digital environment. Proficiency in poetics can help

6 Ibid. at 1837.

7 See Birkerts, *Gutenberg*, supra note 2. It seems that the term 'digital' hardly needs elaboration. Digital technology is a method of storing, processing, and transmitting data by using electronic or optical pulses, usually denoted as zeros and ones.

8 An interesting illustration of tendencies initiated by the digital condition is the journalistic shift from sophisticated titles, rich in context and connotation, toward simplified titling aimed at optimizing the results of search engines. If in the past writers aimed to please scrutinizing editors and readers, they now customize titles (and perhaps texts) according to programs that simulate the digital algorithms used by search engines. Such programs generate journalism that is created according to digital marketing standards; see Steve Lohr, 'This boring headline is written for Google' *The New York Times* (9 April 2006), 4:14, online: *The New York Times* <http://select.nytimes.com/gst/abstract.html?res=F70715F73A540C7A8CDDAD0894DE404482>.

us develop narratives that make sense of the changed reality, and this is one way in which literature may be of service to law.[9] Law, as the institution charged with the task of regulating human action, needs poetic tools to handle the new digital abundance. As I will argue later on, poetics may be changed and modified according to digital demands, but, in one way or another, its presence and its use remain essential.

Nevertheless, the relation between literature and law is not solely an instrumental one. To be sure, the instrumentalist paradigm has so far dominated law and literature studies. A common practice has been to subdivide the field into two principal areas: 'law as literature' and 'law in literature.'[10] The study of *law as literature* seeks to adapt the methods and terminology used in literary criticism to the internal needs of law, such as the analysis of legal texts or the evaluation of legal poetics and rhetoric. The main concern of *law in literature* is the contribution made by literary works to the better understanding of law and legal mechanisms. Thus, both subdisciplines appear to start from the premise that literature is to be studied primarily to serve the purposes of the law, whether by enhancing our understanding of how law operates, disclosing law's limitations and flaws, or using literary accounts to make normative statements – implicit or explicit – about the law.

I believe, however, that there is another way to see the relationship between the two disciplines, one free of the hierarchical implications of the conventional categorization. A good term for this perception would be 'literature alongside law.' The latter paradigm maintains the lines separating one area from another, but it also reveals the elasticity of those

9 As to literature's influence on our perceptions of reality, I recently wrote, 'Literary creations ... represent a network of relations between human beings, between events and between world components [...] Literature makes us acknowledge that we live within a reality which consists of endless and timeless relations and interrelations between those networks, most of which are hidden, and which exert an influence and are subject to influence by each other.' Shulamit Almog, 'Literature Alongside Law as a Contemporary Paradigm' (2001) 13 Cultural Dynamics 57 [Almog, 'Literature'].

10 For elaboration see Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York: New York University Press, 1995) at 150–3; Robert Weisberg, 'The Law–Literature Enterprise' (1988) 1 Yale J.L. & Hum. 1; Ward, *Law & Literature*, supra note 4 at 22–7. Some have noted that a sharp distinction between the two fields is hardly attainable: see Ward, ibid. at 26; Minda, ibid. at 166. Others have offered somewhat different categorizations. Richard Posner suggests the distinction between 'literary texts and legal texts' and 'literary texts as legal texts': Richard Posner, *Law and Literature* (Cambridge, MA: Harvard University Press, 1998) at 10, 209. Robin West mentions three major classifications: examination of legal themes in literary works, examination of the links and nexus between literary criticism and legal criticism, and reference to legal texts as literature: Robin West, *Caring for Justice* (New York: New York University Press, 1997). Still, the distinction between law in literature and law as literature seems to prevail.

lines and the fluidity of the areas they define. It thereby emphasizes the indispensable links between distinctive cultural systems and the impossibility of creating permanent boundaries or hermetically sealed enclaves of discourse. The literature-alongside-law paradigm depicts both law and literature as social practices in constant interaction. It contends that aesthetics and poetics are an inextricable part of law, just as legal and ethical structures are an essential part of aesthetic expression.[11] Narrative, as a basic component of human experience, continually provides one of the formative as well as change-inducing forces of cultural activity, including legal activity.

The literature-alongside-law paradigm[12] comprises two stages of inquiry. The first critically examines the perception of law as an autonomous, self-contained system by emphasizing the inherently limited nature of law. Literature makes us acknowledge how partial law is when it stands alone. Law acquires adequate meaning only when set within a broader context. Through literature, law is perceived not as an ultimate network but as simply one available model of reference for segments of reality.

The second stage of the literature-alongside-law paradigm reflects the goal of dealing with the limits and occasional failures of law. Literature reveals law's faults, but it does not negate the notion of law altogether. Like law, literature manifests the aspiration to achieve a fuller understanding of human existence, despite the impediments to that understanding posed by the difficulties inherent in the human condition. Identifying the limitations of law is important for prescribing remedies. Once the failures of existing law have been identified, the next step is to put things right, to aim toward the complex and constantly changing equilibrium between law, human needs, and human limitations. Of crucial importance to this task is the literary use of imagination, which can bridge the gap between the needs and interests of the individual and those of the community. Imagination does this by cultivating the faculty of sympathy, that is, by developing sensitivity for the suffering of the other as well as a capacity for identification with him or her. Through this process, the other is transformed into one of us, and our acknowledgement of his or her pain is deepened. The facilitation of this process, which leads toward human solidarity, is one of the main goods of

11 See Miller on the subject of the necessary link, even if it is not symmetrical or harmonious, between the whole system of ethical norms and narrativity: J. Hillis Miller, *The Ethics of Reading* (New York: Columbia University Press, 1987) at 2 [Miller, *Ethics*]. Miller stresses the essentiality of this link in spite of its inherent problems: '[T]he moral law gives rise by an intrinsic necessity to storytelling, even if that storytelling in one way or another puts in question or subverts the moral law.' Ibid.

12 For elaboration of this paradigm see Almog, 'Literature,' supra note 9. See also Almog, 'One Young,' supra note 4.

literature.[13] Joseph Conrad, in his preface to 'The Nigger of the Narcissus,' describes how the literary imagination evokes recognition of the resemblance between all human beings, thereby creating a sense of solidarity:

> [t]he artist appeals to ... the latent feeling of fellowship with all creation – and to the subtle but invincible conviction of solidarity that knits together the loneliness of innumerable hearts, to the solidarity in dreams, in joy, in sorrow, in aspirations, in illusions, in hope, in fear, which binds men to each other, which binds together all humanity.[14]

Accordingly, if the first stage of the literature-alongside-law paradigm makes clear the conflict between individual and public and stresses the difficulties the law faces in dealing with that conflict, the second stage suggests possible answers by using narratives that derive from imagination. Narratives focusing upon the plight of individuals pave the way for sensitivity and attentiveness to others. Imagination that is embedded in literary narratives supports law's effort to satisfy the human needs of all subjects of a legal order.

The digital environment intensifies the need for the discourse of literature alongside law. We are encircled with images that erratically bring together the trivial and the substantial, the horrifying and the pleasant, the amusing and the disturbing. By their common setting in the digital field, each of these images carries equivalent value. Each is fully exchangeable with another, and each is equally important or unimportant. A fragment depicting the death of hundreds of people seems reminiscent of images from computer games or video clips, and it rapidly gives way to images relating to fashion, gossip, or entertainment. In addition, the credibility of the images offered as a representation of reality is swiftly being eroded. Once an image is digitized, it can be easily and repeatedly metamorphosed or transferred to other contexts. The ready availability of software that allows for the effortless and sophisticated manipulation of images renders every image inherently volatile and makes us all sceptical about what we see and hear. Our ability to differentiate between images and to form evaluative judgements is diminished, as is the capacity of representations to portray accurately the objects they represent.

In these circumstances, it is more essential than ever to recognize literature's capacity to distil meaning from a chaotic array of data and thereby enable us to constitute and maintain our sense of self. This particular capacity of literature is indispensable to law, for, as I will argue later

13 Richard Rorty, *Contingency, Irony and Solidarity* (Cambridge: Cambridge University Press, 1989), alludes to the roles of literature and the imagination in a similar context..

14 Joseph Conrad, 'The Nigger of the Narcissus' in Joseph Conrad, *Four Tales* (London: Oxford University Press, 1954) 4 at 4.

on, law must rely on a stable sense of self and of the other in order to function and to maintain authority and legitimacy. To prepare the way for this argument, I must introduce two concepts that explicitly link literature and law: poetic justice and poetic licence.

III *Poetic justice and poetic licence*

'Poetic justice' is generally defined as punishment of vice and reward of virtue, usually in an ironically appropriate manner. For example, when a person plots to unjustly harm another person and ends up trapped in his or her own scheme, we often describe the situation as exhibiting poetic justice. The term was apparently originated by Thomas Rymer, a seventeenth-century literary critic, at a time 'when it was believed that a work of literature should uphold moral principles and instruct the reader in correct moral behaviour.'[15]

In a wider, borrowed sense, the term 'poetic justice' denotes the ability of the mimetic work of art to refer to justice, or the way in which the notion of justice is reflected in poetic articulations. This is the sense in which *Poetic Justice* is used as the title of Martha Nussbaum's book, which asserts a link between the literary work and just judgments.[16] As this line of thought suggests, poetics helps us formulate the idea of justice, for it is through stories and metaphors that we first begin to 'sense' justice or injustice.

The primary meaning of 'poetic licence' is the (acceptable) deviation from fact, form, or rule by an artist or a writer for the sake of achieving a desired effect.[17] It is a kind of implicit permit to turn away from the rules of grammar and language; in the broader sense used here, it is, as well, the freedom to deviate deliberately from normally acceptable rules and practices of thought, behaviour, and speech. In view of this, the poetic notion facilitates and promotes two complementary moves: conceptualizing, by means of poetic utterances, the idea of justice and its realizations (or lack thereof); and freely deviating from old rules in pursuit of sharper, more precise utterances.

Both of these moves make use of poetics to realize the sense of self, and both are important to the proper functioning of law. As Benjamin Cardozo remarked, judges, even if they use 'fixed and settled rules,' cannot expect to reach a 'paradise of justice that would declare itself

15 *Encyclopaedia Britannica Online*, *s.v.* 'poetic justice,' online: Britannica.com <http://www.britannica.com/eb/article-9125517/poetic-justice#665894.hook>. See also *Merriam-Webster's Collegiate Dictionary*, 10th ed., *s.v.* 'poetic justice.'

16 Martha C. Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (Boston: Beacon Press, 1995) [Nussbaum, *Poetic Justice*].

17 Ibid. at 671.

by tokens.'[18] In order to hone the sense of justice, judges, as well as others who function within the legal domain, draw from manifestations borrowed from many sources. Narratives are such a source. Narratives transform abstract notions of justice into expressions laden with tangible meaning. They cultivate the capacity to imagine what others went through, to put ourselves in their place, and to imagine steps that can be taken in order to address situations of injustice. A well-constructed narrative can make us see in our mind's eye another person's circumstances and emotions and can help us to identify with them. It may also train our ability to remedy situations that are perceived as unjust.

Examples of narratives that carry the potential to educate our sense of justice are innumerable. Take, for instance, Shakespeare's *Measure for Measure*. Angelo, deputy for the absent Duke of Vienna, decides to revitalize the city's dead-letter law against fornication and insists on the execution of Claudio, who made his betrothed, Juliet, pregnant without the church's formal approval. Isabella, Claudio's sister, who is about to enter a nunnery, approaches Angelo and begs mercy for her brother. Angelo, attracted and tempted by her beauty, demands her chastity in return for Claudio's life. When the shocked Isabella refuses and threatens to expose him if he will not sign the pardon for her brother, Angelo answers thus:

> Who will believe thee, Isabel?
> My unsoiled name, th'austereness of my life,
> My vouch against you, and my place i'th'state,
> Will so your accusation overweigh
> That you shall stifle in your own report,
> And smell of calumny ...[19]

As the plot unfolds, the Duke of Vienna, who discovers Angelo's scheme, decides to remedy the situation. When Isabella tells him about her intention to publicly expose Angelo, the disguised Duke advises against doing so, for practical reasons (she will not be believed), and convinces her to cooperate in the execution of a 'bed trick' that exposes Angelo's hypocrisy. The plan is to send Mariana, Angelo's deserted fiancée, to his bed, disguised as Isabella, and then, says the Duke to Isabella,

> by this is your brother saved, your honor
> unattained, the poor Mariana advantaged, and the
> corrupt deputy scaled.[20]

18 Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven, CT: Yale University Press, 1921) at 166–7.

19 William Shakespeare, *Measure for Measure* in Stanley Wells & Gary Taylor, eds., *William Shakespeare: The Complete Works* (Oxford: Clarendon Press, 1988) 789 at act 2, scene 4.

20 Ibid. at act 3, scene 1.

The plan succeeds. Angelo's vile scheme is exposed, and he is publicly denounced, though he has the benefit of Isabella's mercy and forgiveness.

Measure for Measure presents a stylish intimation of what poetic justice means. Walter Pater explains how, on a deeper level, poetic justice is reflected in the play's design:

> The action of the play, like the action of life itself for the keener observer, develops in the conception of this poetical justice, and the yearning to realize it, the justice of which Angelo knows nothing, because it lies for the most part beyond the limits of any acknowledged law ... It is for this finer justice, a justice based on a more delicate appreciation of the true conditions of men and things, a true respect of persons in our estimate of actions, that the people in *Measure for Measure* cry out as they pass before us ...[21]

At another level of poetic justice, Angelo is ironically treated in an appropriate manner. He plots to harm Isabella unjustly and ends up trapped by others who have used his own scheme against him. In order to achieve this outcome, poetic licence is applied, for the ordinary rule against deceit is suspended for justice's sake. When the Duke reassures Isabella that 'if you think well to carry this, as you may, the doubleness of the benefit defends the deceit from reproof,'[22] we tend to concur ardently. We perceive the creative deceit as an implementation of poetic licence (practised by both Shakespeare, who has 'conjured' the deceit, and by his character, the Duke) that is a required step on the way to poetic justice.

This brings to mind a statement by Nussbaum: 'if one cannot imagine what women suffer from sexual harassment ... one won't have a vivid sense of that offence as a serious social infringement that the law should remedy.'[23] Nussbaum mentions two stages evoked by exposure to meaningful stories. The first is experiencing the other's pain; the second is judicially assessing the 'justifiability' of the pain and acquiring motivation to alter the situation that caused it.[24] These two stages, which are actually a sort of application of the notions of poetic justice and poetic licence, are both present when we read *Measure for Measure* today, just as they were present centuries ago.[25]

21 Walter Pater, *Appreciations* (London: Macmillan, 1889) at 190.

22 Shakespeare, *Measure for Measure*, supra note 19 at act 3, scene 1.

23 Nussbaum, *Poetic Justice*, supra note 16 at 91.

24 Ibid.

25 For a reading that juxtaposes *Measure for Measure* with contemporaneous situations of sexual harassment and abuse of power see Daniel Kornstein, *Kill All the Lawyers?* (Princeton, NJ: Princeton University Press, 1994) at 57.

IV *The perception of self*

In his novel *Atonement*, Ian McEwan describes the most meaningful moment in the life of thirteen-year-old Bryony Tallis, who becomes a writer over the course of the story. Bryony secretly watches the meeting between her sister and a young neighbour and at the same time ponders how to translate her experience into a story. At that moment she grasps the meaning of a consciousness different from her own and unique to another person. All at once, she clearly understands the uniqueness of every consciousness, the resemblance between all the different consciousnesses and her own, and her power as a writer to represent all this:

> And only in a story could you enter these different minds and show they had an equal value. That was the only moral a story need have.[26]

The dialectical recognition of the uniqueness of every consciousness, and of the profound resemblance among all consciousnesses, characterizes both literary composition and reading. Again, Shakespearean characters aptly illustrate this point. Consider Richard III, one of Shakespeare's most infamous villains.[27] Richard plots, lies, and kills his closest kindred, boasting that he 'can smile, and murder whiles I smile,' 'and set the murderous Machiavel to school.'[28] Yet this ruthless villain is utterly unnerved by nothing more than imagining the untold tales of his victims. The victims died without telling the stories of their ordeals, but Richard senses that these silenced stories are imperishable and will find a way to reach not only other, but also his own otherwise invulnerable conscience:

26 Ian McEwan, *Atonement* (London: Vintage, 2001) at 40 [McEwan, *Atonement*]. Realizing the uniqueness of each consciousness is no guarantee of being able to interpret or 'understand' the contents of a consciousness different from our own. The resemblance between our consciousness and all other human consciousness, a resemblance that we constantly sense exists, may provide useful hints for interpreting the consciousness of others, but to the same degree it may deceive us. In *Atonement*, Bryony totally misinterprets the meaning of the events she witnesses. Cecilia, Bryony's sister, removes her upper clothing and enters the fountain in the garden of the family's country house. Robbie Turner, a neighbour and childhood friend, watches her. Bryony, who is actually witnessing a growing attraction between the two, is convinced that Robbie is somehow abusing her sister. The tragic consequences of this misconception prescribe the fates of the novel's characters.

27 William Shakespeare, *Richard III* in Stanley Wells & Gary Taylor, eds., *William Shakespeare: The Complete Works* (Oxford: Clarendon Press, 1988) 183.

28 Richard makes these boasts in his soliloquy in *Henry VI, Part III*, in Stanley Wells & Gary Taylor, eds., *William Shakespeare: The Complete Works* (Oxford: Clarendon Press, 1988) 91 at act 3, scene 2.

> My conscience hath a thousand several tongues,
> And every tongue brings in a several tale
> And every tale condemns me for a villain
> Perjury, perjury, in the high'st degree!
> Murder, Stern Murder, in the dir'st degree,
> All several sins, all used in each degree,
> Throng to the bar, crying all, 'Guilty, Guilty'![29]

Hamlet is another Shakespearean character who is occupied with thoughts about narrative upon his death. During his last moments he pleads to Horatio,

> If thou didst ever hold me in thy heart,
> Absent thee from felicity a while,
> And in this harsh world draw thy breath in pain,
> To tell my story.[30]

Hamlet believes that by a story he could reach other minds. 'Report me and my cause aright to the unsatisfied,'[31] he beseeches his friend, highly aware of the capacity of a story to represent him after he is gone.

Richard and Hamlet acknowledge the power of stories from different standpoints. For Richard, stories are potential weapons pointed against him; for Hamlet, the power of the story is restorative and recuperative. It is the story that will clarify his 'cause' and explain his choices and actions. Richard is painfully aware of the uncontrollable influence of potential stories to destroy him, while Hamlet strives for a tale that will faithfully represent his cause and generate empathy toward him. Notwithstanding these distinctions, Shakespeare endowed both Richard and Hamlet with similar intuitions about the narrative's ability to create a significant link between the consciousness of the teller and those of others.

Literature presents the uniqueness of every consciousness; indeed, it may offer the richest, most precise, and most accessible representation of the essence of human consciousness that is available to us. Writers, in a sense, conduct experiments that are not workable in any other way. In the words of the writer Abraham B. Yehoshua,

> I can imagine human situations that have not actually occurred in order to examine through them all kinds of complex moral dilemmas. I can create a

29 Shakespeare, *Richard III*, supra note 27 at act 5, scene 3.

30 William Shakespeare, *Hamlet* in Stanley Wells & Gary Taylor, eds., *William Shakespeare: The Complete Works* (Oxford: Clarendon Press, 1988) 653 at act 5, scene 2.

31 Ibid.

situation that might serve as a moral 'laboratory' in which, under laboratory conditions, one can penetrate things and reach their sources . . .[32]

When the 'thought experiment' conducted by the writer succeeds, the result is twofold: we acquire a useful means by which to evaluate the human reality surrounding us, and, in doing so, we find that our own independent, separate identities are crystallized. A rich perception of the self takes shape, composed of our consciousness and our constant interest in other people.

But what does law have to do with 'thought experiments' conducted by literature? And what has it to do with literary attempts to represent, in various ways, the individual particularity and autonomous character of human consciousness?

In fact, this aspect of literature is profoundly tied to the most basic rationale of law. There can be no system of law that is not based, first and foremost, on recognition of the uniqueness of individual consciousness. Such recognition is a prior condition to the idea that one is capable of choosing between good and evil, or between what is right and what is wrong. It likewise underlies the obligation to respect and defend the individuality and autonomy of every self, and the concept of human rights is firmly bound to it. The very notion of personal duty and personal rights, without which law cannot exist, is based on the simultaneous recognition of each person's uniqueness and of the qualities that are common to all. The premise that every person has an autonomous consciousness, possessing distinctive features, allows for choice and justifies the assignment of responsibility. Applying that premise is essential for law, as it is fundamental for literature.

Acceptance of the uniqueness of each consciousness cannot be taken for granted, however. Think of the doubts and reservations that have long been raised with respect to the idea of the self. Consider the various theories of the 'subject' according to which the individual is merely the product of political, economic, and social processes.[33] These theories

32 Abraham B. Yehoshua, 'A Judge and an Author – Conversations with Itzhak Englard and Abraham B. Yehoshua' (2002) 18 Bar Ilan L. Studies 17 at 29. Compare David Lodge's description, through the words of Helene, the heroine of his novel *Thinks. . .*: 'consciousness is simply the medium in which one lives, and has a sense of personal identity. The problem is how to *represent* it, especially in different selves from one's own. In that sense novels could be called thought experiments. You invent people, you put them in hypothetical situations, and decide how they will react. The "proof" of the experiment is if their behavior seems interesting, plausible, revealing about human nature.' David Lodge, *Thinks* . . . (London: Penguin, 2001) at 61–2 [Lodge, *Thinks*].

33 Notable scholars who have dealt with this issue from this perspective include Jacques Lacan, Louis Althusser, and Julia Kristeva. For a description of the theory of the subject see David Macey, *The Penguin Dictionary of Critical Theory* (London: Penguin, 2000) at 368.

undermine the idea of personal identity and individual consciousness as factors that generate meaning. As David Lodge describes it (through a character in his novel),

> The idea of the self is under attack today, not only in much scientific discussion of consciousness, but in the humanities too. We are told that it is a fiction, a construction, an illusion, a myth. That each of us is 'just a pack of neurons,' or just a junction for converging discourses. . . .[34]

Although law is known for its excessive fondness for fictions and constructions, it cannot accept the idea that the autonomous, individual 'self' is a fiction, a construction, or a 'discourse.' (That a corporation is a 'person,' of course, is a fiction routinely employed in the law, but that is a quite different matter from the phenomenon I am examining.) Law needs a continuous flow of convincing representations for the particularities of human consciousness, or, in other words, for the conception of the self. The legal use of terms and conceptions such as good faith, negligence, *mens rea*, intention, consent, and numerous others depends upon an implicit assertion of the existence of a 'self' that can act in good faith, or with consent, or without intention, or negligently, or with *mens rea*. The sense of certainty regarding the existence of the 'self' is vital for all those doctrines, as it is for law generally.

And yet the existence of the self, even if assumed by law, cannot, as a practical matter, be taken for granted within the legal system. It must be bolstered and confirmed through external observation. Law must rely upon implicit yet convincing validations of the idea of self, its existence, and its uniqueness. Art in general is invaluable in this context, but literature is a tool of central importance, for it collects the evidence, skilfully translates it into narratives, and thus creates for us credible representations of the consciousness of others. In other words, the cognizance of self and other is not just 'there,' all over our existence; it is something that has to be crafted, and authors of literature are the craftspeople.

C.S. Lewis describes this power of literature in his memorable essay *An Experiment in Criticism*.[35] Through literature we actualize our desire to see

34 Lodge, *Thinks*, supra note 32 at 319. As genetic research develops in the scientific world, more and more theories from this field penetrate into realms never connected to science. In a recent publication, Dean Hamer, chief of gene structure at the US National Cancer Institute, argues that religious beliefs also originate from genetic roots. Hamer claims that 'every thought we think and every feeling we feel is the result of activity in the brain . . . we follow the basic law of nature, which is that we're a bunch of chemical reactions running around in a bag.' See J. Kluger, 'Is God in Our Genes?' *Time Magazine* (29 November 2004) 50 at 53.

35 C.S. Lewis, *An Experiment in Criticism* (Cambridge: Cambridge University Press, 1965) at 138 [Lewis, *Experiment*].

outside ourselves: 'We demand windows. Literature as Logos[36] is a series of windows, even of doors.'[37] Gazing through the windows of literature promotes what can be described paradoxically as 'either an enlargement or as a temporary annihilation of the self.'[38] The Logos characteristic of literature allows us to undergo various experiences that differ from our own and to contrast them with our own personal experiences. The degree of interest and utility that we derive from the 'foreign' experiences changes according to the different personalities of each reader. Some experiences might seem typical (prompting us to say to ourselves, 'How true!'), while others seem unusual (to which we respond, 'How strange!').[39]

Literature thus arouses different emotional reactions in different readers. The principal thing, it seems, is not the type of reaction literature evokes from those exposed to it but its power to open windows of observation into the consciousness of others and thus to broaden and deepen the observing consciousness: '[I]n reading great literature I become a thousand men and yet remain myself ... I transcend myself, and am never more myself than when I do.'[40]

Paradoxically enough, it may be the increased awareness of literature's power (and that of art in general) to create the perception of the self that wears down its effectiveness. The more awareness there is of the craft involved in representing, the more 'crafty' the representation will seem. Some express their wariness of art by giving up the printed word, which is perceived as essentially insincere, and replacing it with an immediate interactivity that supposedly cannot lie.[41] Some years ago, Iris Murdoch suggested that 'it may in fact be, in this age of frightful self-consciousness, wise and healthy to admit that art is a sort of conjuring trick,'[42] and her words seem even more apposite now, when digital possibilities challenge almost every convention pertinent to any form of art, thus exposing the 'conjuring trick' previously concealed in whole or in part.

36 Lewis attributes two characteristics to a literary work. The first is the Logos of the work, which is the story that the work narrates, the description presented in it. The second is the Poiema of the work, or its formal structure, the way its various parts are streamlined, its construction. Ibid. at 132. The power of a literary work lies in the merging of these two characteristics.

37 Ibid. at 138.

38 Ibid.

39 Ibid. at 140.

40 Ibid. at 141.

41 See Katherine Hayles's contemplations on virtual books and their implications for perceptions of the subject and the self. Katherine Hayles, 'The Condition of Reality' in Peter Lunenfeld, ed., *The Digital Dialectics* (Cambridge, MA: MIT Press, 1999) 4.

42 Iris Murdoch, *Existentialists and Mystics: Writings on Philosophy and Literature* (1998; New York: Penguin, 2000) at 239 [Murdoch, *Existentialists*].

But recognizing the poetical device and its complexity does not obviate the need for its services; rather, it adds to the work of art another dimension, which is also significant for law. Art, and especially literature, carries within it the critical realization of its own imperfection.[43] The perception of the self that is created by literature is of great value precisely because it is not fixed and rigid. It responds to changing times, and it is altered and reshaped in accordance with them. Literature reflects the doubts, suspicions, and misgivings that are related to the perception of self. It thus provides law, as well as all other social institutions, with an ever-critical, ever-questioning environment that is vital for achieving adjustments and modifications in the perception of the self.

V *The perception of others*

Martha Nussbaum opens her *Poetic Justice* by reminding us of literature's ability to allow us 'to imagine what it is like to live the life of another person who might, given changes in circumstances, be oneself or one of one's loved ones.'[44] Nussbaum attributes to this ability the special benefit of promoting ethical skills that produce empathic and merciful judgement.[45] She devotes her main discussion to the genre of novels, focusing on the realistic Anglo-American novel, especially those that deal with social and political themes.[46]

Here two questions may be raised: Does fiction, in fact, exercise the special influence that Nussbaum attaches to it?[47] And is that special influence, if it exists at all, exercised by the genre of the novel?

Regarding the first question, it is difficult to reply unequivocally to the question, 'What impression is made by reading?' Even though the accumulation of experience may lead to conclusions about the kind of

43 Ibid. at 240.

44 Nussbaum, *Poetic Justice*, supra note 16 at 5.

45 Ibid. at 12.

46 Ibid. at 7. Nussbaum also mentions the poetry of Walt Whitman, but she explains that Whitman's commitment to narrative style, together with his engagement with concrete matters, bring him close to the novel form of writing.

47 For aesthetic criticism that attacks the instrumental use that Nussbaum makes of literature see, *e.g.*, Richard A. Posner, 'Against Ethical Criticism' (1997) 21 Philo.& Lit. 1. For psychological criticism that raises doubts about the causal connection between reading and merciful judgement see ibid.; see also S. Stow, 'The Politics of the Ethical Criticism Debate' (2000) 24 Philo.& Lit. 185. For moral criticism that deals with the ethical problems involved in the type of judgement that Nussbaum tries to promote through reading see N. Papas, 'Fancy Justice: Martha Nussbaum on the Political Value of the Novel' (1997) 78 Pacific Philo.Q. 278. For Martha Nussbaum's response to some of the arguments raised see Martha Nussbaum, 'Exactly and Responsibly: A Defense of the Ethical Criticism Debate' (1998) 22 Philo.& Lit. 343.

influence likely to be exercised by certain genres or specific works on a large number of readers, the process of reading is ultimately personal and unique. The impression made by a work may not only differ from reader to reader but even change for the same reader who is exposed to the same work at different times. But even if we reject Nussbaum's position regarding the link between reading and the improved ability to make ethical judgements, one may accept her view of literature as promoting the recognition of each person's distinctiveness. Literature does promote 'viewing each person as separate with a single life to live,'[48] and it helps us in perceiving the richness and complexity of each person's inner world.[49] An enhanced sensitivity to the difference and individuality of the other is an important achievement in itself, even if one does not link it to the development of judgement skills of one kind or another. Indeed, it may be that being in a 'judgemental state of mind' is not compatible with the growth of sensitivity toward others. Judgement of any kind can be seen as the result of an inward gaze, meant to reach a personal and independent decision that is a clear reflection of the deciding self. Immersion in another person through narrative, on the other hand, allows us to become detached from ourselves.

C.S. Lewis refers to a slightly different but very relevant aspect of the same problem by considering the view that literature allows us to make optimal judgements of ideas, opinions, beliefs, and the like. When we read a work of fiction, says Lewis, there is no point in dealing with the question of how much it may influence our opinions one way or the other, although some kind of influence is possible. The great contribution of reading fiction is simply 'entering fully into the opinions, and therefore also the attitudes, feelings and total experience, of other men.'[50] Lewis suggests that we think about how strange it would be to decide between materialism and theism by reading Lucretius and Dante and, on the other hand, how desirable it would be to learn what it means to be materialists or theists by reading the works of these two authors.[51]

'Good' reading, then, is reading that causes us to detach our gaze from ourselves and from the way in which our image is reflected in our surroundings. The release from ourselves achieved through fiction is, among other things, a release from the need to judge. Ian McEwan expresses this idea through the figure of Bryony, who discovers, as previously mentioned, the dialectical ability to recognize at the same time the differences to be found in other people and their resemblances to

48 Nussbaum, *Poetic Justice*, supra note 16 at 76.
49 Ibid. at 120.
50 Lewis, *Experiment*, supra note 35 at 85.
51 Ibid. at 85–6.

herself. Bryony is excited because the tiresome need to judge other people has become unnecessary, and all at once she has been freed of the burden of making moral decisions about every situation she encounters:

> [H]er excitement was in the prospect of freedom, of being delivered from the cumbrous struggle between good and bad, heroes and villains ... She need not judge. There did not have to be a moral. She need only show separate minds, as alive as her own, struggling with the idea that other minds were equally alive ... other people are as real as you.[52]

According to this view, the cognizance of another person's consciousness, and the awareness of its resemblance to our own, releases us from the need to judge. It transfers us to another dimension – the dimension of observation, which might result in wonder, empathy, anger, emotion, fascination, or even boredom. Recognition of the other might sometimes lead toward a judgemental stance, but it is not necessarily linked with judgement – empathetic or otherwise – and may even lose its sharpness and particularity when harnessed to the burden of judgement. At the same time, even if reading does not necessarily promote high-quality judgement, it makes another centrally important contribution, namely attentiveness. The course of life brings us into constant contact with other people, with their thoughts, feelings, opinions, and life experiences. Sometimes a picture we briefly observed, or a random sentence we overheard, can be potent enough to generate significant insights that pertain to the relationship between ourselves and others. But besides all the serendipitous insights that our personal paths create, there have always been stories.

The story that we tell another person has the power to make him or her listen to us. And the story we are told has the power to capture our attention and focus it on the other. Such attentiveness is essential for legal discourse. Among other things, it enables law to form the complex and ever-changing equilibrium between the needs of the individual and the interests of the public, and between the particular case and the general norm.

VI *Between spaciousness and 'chaste compactness': Novel and story*[53]

Which literary genres will optimally promote the purposes of constituting and maintaining our sense of self and of fostering attentiveness to others?

52 McEwan, *Atonement*, supra note 26 at 40.
53 Walter Benjamin, 'The Storyteller: Reflections of the Works of Nikolai Leskov' in Hannah Arendt, ed., *Illuminations*, trans. by Harry Zohn (London: Jonathan Cape, 1970) 83 at 91 [Benjamin, 'Storyteller'].

Are novels the most suitable vehicle to fulfil this mission? Perhaps the clarity and lucidity of short stories and their often unambiguous message will be more appropriate for the purpose at hand. If, indeed, short stories are the preferred genre, are oral narrations superior to written stories? Do they create a more significant impact?

According to Walter Benjamin, real storytellers have the ability to put themselves into the story and thereby to share their experience with others: '[T]hus traces of the storyteller cling to the story the way the handprints of the potter cling to the clay vessel.'[54] A story may be said to be true if it transmits experience in a way that allows the audience to make future use of what was narrated. The story is a collective human creation with a long ancestry, one that has been put together from 'transparent layers which constitute the most appropriate picture of the way in which the perfect narrative is revealed through the layers of a variety of retellings.'[55]

The perfect story, then, is transmitted orally, with the narrator facing the audience. Such a story need not be long, detailed, or burdened with profound analyses. On the contrary: 'There is nothing that commends a story to memory more effectively than that chaste compactness which precludes psychological analysis.'[56] Such a story will blend well with the experience of the listeners and make a lasting impression on them.[57]

Benjamin contrasts the story and the novel. In his view, the hearers of a story assimilate the narrated account into their own life experiences and pass it along to others. Reading a novel, in contrast, is a lonely activity; readers devour a novel's contents in order to discover some strange fate foreign to their own experiences. The novel is important to them not because of the experience they may gain but 'because this stranger's fate by virtue of the flame which consumes it yields us warmth which we never draw from our own fate.'[58]

The novel isolates its readers, Benjamin goes on, but the story is based on perpetual continuity and on the unbroken link between one story and another, between storytellers and their listeners. In contrast to the absolute finality of the novel, whose audience does not 'hope to take the smallest step beyond that limit at which [the author] invites the reader to divinatory realization of the meaning of life by writing "Finis,"'[59] the story never ends: 'there is no story for which the question as to how it continued would not be legitimate.'[60]

54 Ibid. at 92.
55 Ibid. at 93.
56 Ibid. at 91.
57 Benjamin exemplifies this by a brief anecdote taken from Herodotus:
58 Benjamin, 'Storyteller,' supra note 53 at 101.
59 Ibid. at 100.
60 Ibid.

Martha Nussbaum perceives the novel differently. The novel, she suggests, 'constructs a paradigm of a style of ethical reasoning.'[61] It is 'a living form and in fact still the central morally serious yet popularly engaging fictional form of our culture.'[62]

Nussbaum identifies in the novel an ability to turn readers into friends who are emotionally involved in the fates of the fictional characters[63] while simultaneously allowing them to make generalizations of universal importance. She thus attributes to the novel a kind of influence quite opposite to that described by Benjamin.

Despite these differences, however, the views of Benjamin and Nussbaum seem to be in agreement regarding the unique ability of fiction to impress, penetrate, and influence. The two might well have agreed even upon the central importance of narrative in this regard.

Again, does the novel's breadth help in creating an awareness of another person's consciousness, or does the 'chaste compactness' of the short story serve this purpose better? Even if we acknowledge the value of novels in general, do nineteenth-century novels provide a suitable model for moral thinking? Iris Murdoch, for example, has argued that while preferable to modern novels, the novels of the nineteenth century are marred by their obvious submissiveness to social norms.[64] She herself attributes special importance to the genre of tragedy, which is 'most intensely concerned with the most individual thing.'[65] Nussbaum remarks that, in our day and age, cinema may be the main narrative medium, and films may yield contributions similar to those she attributes to the novel.[66] We may therefore ask, Which of the many forms of narrative is most effective? Which form will sustain the power of narrative in digital times?

There are different, even contradictory, views regarding the ways in which various types of narrative exert their influence, and resolving the disputes definitively is difficult, if not impossible. But there may, in fact, be no need for such a resolution, for it is the form of the narrative,

61 Nussbaum, *Poetic Justice*, supra note 16 at 8.
62 Ibid. at 6.
63 Ibid. at 9.
64 Murdoch, *Existentialists*, supra note 42 at 217. Anita Brookner, in a 2003 novel, offers another explanation for the appeal of nineteenth-century novels. She sees the magic of these novels in their simple and reassuring pattern of narrative: 'One comes back to nineteenth-century novels again and again, largely because of the sheer beauty of the reasoning: happiness at last, achieved through the exercise of faithfulness and right thinking.' Anita Brookner, *The Rules of Engagement* (London: Penguin, 2003) at 199 [Brookner, *Rules*].
65 Murdoch, ibid. at 215.
66 Nussbaum, *Poetic Justice*, supra note 16 at 6.

not its genre, that is the powerful means of instilling attentiveness to the other.

It seems the attribution of cultural centrality to narrative needs no proof.[67] The complex ties that bind law and narrative have gained much attention. The story is essential to all legal discourse, not only to judgement. In *The Legal Imagination*, White suggests the following experiment:

> Think of or read a law case, imagine the characters freed from the page and alive in a storyland, and ask what their story would be like. You are familiar, for example, with the ubiquitous personage of the law of torts, the Reasonable Man, and could write a story about him, I suppose: A Day in the Life of the Reasonable Man ... If you cannot imagine that a novel built around characters defined in this way would have any interest for you, how can legal talk about the same characters, the same events, have any interest?[68]

If legal discourse fails to arouse interest, it will lack the power to gain the legitimacy, authority, and status needed for its effective functioning; and in order to arouse interest, it will need a story. The law case itself, however, cannot autonomously evoke the sort of interest White is looking for. Law must lean upon implicit sources that are associated, consciously and unconsciously, with 'legal talk' and that make us realize how law is connected to ourselves and to others. Those sources are the extra-legal stories mostly produced by literature.

The exact source of such a story, its length, and the medium in which it appears are much less important than the ability to narrate and to listen to stories, whether they are imagined, inserted in a few lines of a text, or spread over hundreds of pages. The story does not necessarily promote empathetic judgement (though it might be conducive to such an objective), but the capacity to translate certain issues into stories is essential for the very act of judgement, since expressing something as a story infuses it with ethical meaning.[69]

VII *Narratives and law in the digital environment*

Do technological developments threaten to erode the ability of any poetic product, whether a novel, a written short story, or an oral one, to build bridges between separate individuals and thus to nurture the sense of justice? In his last book, *Six Memos for the Next Millennium*,[70] Italo

67 See Terry Eagleton, *Shakespeare and Society* (New York: Schocken, 1967) at 81.
68 White, *Legal Imagination*, supra note 3 at 244–5 .
69 See Miller, *Ethics*, supra note 11
70 Italo Calvino, *Six Memos for the Next Millennium*, trans. by Patrick Creagh (London: Vintage, 1996).

Calvino mentions the often-encountered concern for the fate of books and literature in the age of post-industrial technology. Such apprehensions, he writes, are groundless, for literature's unique qualities will ensure its future existence. Literature emblematizes a special method of knowledge; it serves as a boundless encyclopaedia of relations among human beings and events.[71] A literary work generates wide circles of influence:

> [t]he matter in hand spreads out and out, encompassing ever vaster horizons, and if it were permitted to go on further and further in every direction, it would end by embracing the entire universe.[72]

This description focuses upon the special abilities of literatures to serve certain human needs that are as urgent now as they ever were. However, inspiring as it is, it does not address the pressing question: Are technological developments wearing away the potency and relevance of poetic articulations?

In 1936 Benjamin wrote, 'The art of storytelling is reaching its end because the epic side of truth, wisdom, is dying out.'[73] But even if the decline of the story took place, according to Benjamin, against the background of the rise of the novel, the new form of data transmission has ominous implications for both the novel and the short story. This is because the ever-increasing flow of information, while it manages to evoke wide attentiveness, does so without creating meaningful experience. Benjamin analyses the phenomenon of 'sterile attentiveness' in an essay titled 'The Work of Art in the Age of Mechanical Reproduction.'[74] There he points out how the distinction between narrators and their audiences has become blurred as a consequence of mass journalism, the changed perceptions of time and reality brought about by the cinema, and the way in which the continuous flow of moving pictures distracts the mind, interfering with critical evaluation and judgement.

Benjamin's words appear prophetically appropriate to the cultural processes that characterize the present. It may well be that contemporary digital capacities have influenced the age-old ability to 'connect' to stories. The new 'Windows' that Microsoft has generated and dispersed all over the world hardly reveal the landscapes seen through the literary windows of which C.S. Lewis wrote.

Digital technology was perceived from its first appearance as carrying a potential to change the traditional systems by which meaning is produced

71 Ibid. at 105.
72 Ibid. at 107.
73 Benjamin, 'Storyteller,' supra note 53 at 87.
74 Walter Benjamin, 'The Work of Art in the Age of Mechanical Reproduction' in John G. Hanhardt, ed., *Video Culture: A Critical Investigation* (New York: Visual Studies Workshop Press, 1986) 27.

and received. That potential is already materializing with increasing momentum, creating what might be called a 'digital condition.' The term 'condition' conveys the sense that digital possibilities, because of their encompassing nature, create not only revolutionary technological options that affect culture at large but also a new experience, a new state of being, a new state of mind. The digital technology permeates epistemology in a manner that renders the digital condition inseparable from the construction of meaning.[75]

One of the most salient aspects of the digital condition is the interchangeability of stories, storytellers, and addressees. Digital technology enables any story at any stage to merge into another story, while its reader may become its author or co-author. The dedicated storytellers envisaged by Benjamin and the diligent novel writers admired by Nussbaum are replaced by 'wreaders,' a new status in which readers have the role of writers as well.[76] Creators and consumers alike share access to most representational systems and have the opportunity to trace, store, distribute, and manipulate any audiovisual content.

Most stories we are exposed to are now digitally produced, distributed, and consumed. They are rapid, visually loaded, and fragmented, and they look alike.[77] New cultural habits, such as shorter attention spans and the continuous consumption of instant, rapidly changing audiovisual messages, will probably invade legal fields and generate changes in the links between law and narrative.[78] The change this essay is concerned with is the diminishing capacity of law to benefit from literary narratives that used to support and sustain its practices. The digital environment and

75 I use the term 'digital condition' to denote one aspect of the digital phenomenon, namely, the distinct ability of digital tools to create, present, and manipulate images and representations with unprecedented velocity, frequency, and form. Andrew Shapiro points out six features that can characterize the capacity of these tools: many-to-many interactivity, flexibility, packet-based distribution networks, interoperability, large bandwidth or carrying capacity, and universality. See Andrew Shapiro, *The Control Revolution* (New York: The Century Foundation, 1999) at 15–8.

76 Marie-Laure Ryan, *Narrative as Virtual Reality* (Baltimore: Johns Hopkins University Press, 2001) at 9 [Ryan, *Narrative*]. See Ryan's observation as to the meaning of this new status: 'If working one's way through the maze of an interactive text is suddenly called writing, we will need a new word for retrieving words from one's mind to encode meaning...' Ibid.

77 Consider, for example, a typical newscast, in which digital bytes bring together scenes of real violence, trifling pieces, and dense commercials into the customary thirty-minute 'news' sequence, which is hardly distinguishable from the sequence that was broadcast yesterday or the day before, or from certain reality shows or computer games.

78 In another work I elaborate on this issue and, while distinguishing different sorts of narratives that function in the legal realm, explain how they are influenced by the digital condition: Almog, 'From Sterne,' supra note 1 at 1–34; see also Shulamit Almog, 'Creating Representations of Justice in the Third Millennium: Legal Poetics in Digital Times' (2006) 32 Rutgers Comp.& Tech.L.J. 183.

the representational atmosphere it creates may weaken literature's ability to produce stories potent enough to attract stable attention and to foster insights that are essential to constituting and maintaining our sense of self. The incessant digital outpouring of fragmented images may lead toward poetic failure, toward difficulties in creating and receiving structured stories that demand time, attentiveness, and narrative awareness. If the 'knack of technology'[79] overshadows the 'the knack of stories,' literature's narratives may turn out to be ineffectual to law.

Let me attempt to describe the poetic failure the digital condition may cause with the help of terms borrowed from an entirely different field.

Dysnarrativia is a neurological disorder that damages the ability to tell stories and to understand them.[80] Accumulated experience shows that this disorder fatally disrupts the sense of self and of the other.[81] Another neurological disorder, which might perhaps referred to as 'dysvisualia,' is described by Oliver Sacks:

> there is a rare but dramatic neurological disturbance that a number of my patients have experienced ... when they may lose the sense of visual continuity and motion and see instead a flickering series of 'stills.'[82]

The effect, explains Sacks, is somewhat like that of an improperly shot and presented film.[83]

If it is possible to speak of collective disorders of the type described by Sacks, then the possibility that they might develop as a result of the digital condition will have an impact on law. Until now, literature functioned as the primary source of the narratives upon which law depends for the cultivation of the virtues – self-awareness, attentiveness to others, the sense of justice – that sustain it. Literature fulfilled this function not only by means of the personal literary experience gained from books actually read but also by constituting a more extensive collective reservoir that always stands at our disposal as a body of knowledge, a vital source of meaningful images, and a stimulus that ignites the imagination and generates hope. Such structured narratives, whether in novels, short stories, or films, are facilitated by poetics. Yet the digital condition rigorously challenges the poetic notion. The constant exposure to an ever-growing flood of digital images, sounds, sights, and experiences interrupts the ability to focus attention on a structured story and to situate it within a wider context of human

79 To borrow Max Frisch's expression. See Max Frisch, *Homo Faber*, trans. by Michael Bullock (New York: Harcourt, Brace, Jovanovich, 1959).

80 Bruner, *Making Stories*, supra note 4 at 86.

81 Ibid.

82 Oliver Sacks, 'In the River of Consciousness' *The New York Times Review of Books* (15 January 2004) 40.

83 Ibid.

knowledge and experience. Sven Birkerts suggests a possible explanation for this change, surmising that the experience of 'hard copy' readers is different from the experience of the 'digital reader':

> Print also posits a time axis; the turning of pages, not to mention the vertical descent down the page, is a forward-moving succession, with earlier contents at every point serving as a ground for what follows. Moreover, the printed material is static – it is the reader, not the book that moves forward. The physical arrangements of print are in accord with our traditional sense of history. Materials are layered; they lend themselves to rereading and to sustained attention. The pace of reading is variable, with progress determined by the reader's focus and comprehension.[84]

The digital reading experience, on the other hand,

> Can be passive, as with television watching, or interactive, as with computers. Contents ... are felt to be evanescent. They can be changed or deleted with the stroke of a key. With visual media (television, projected graphs, highlighted 'bullets') impression and image take precedence over logic and concept, and detail and linear sequentiality are sacrificed. The pace is rapid, driven by jump-cut increments, and the basic movement is laterally associative rather than vertically cumulative.[85]

Mario Vargas Llosa advances another hypothesis. New technologies, he believes, give preference to images and flatten verbal capacities. Written language in a digital environment is kept to an indispensable minimum, so that the rich possibilities language offers are barely tapped.[86]

How will our narrative capacities and needs adapt to the new digital condition? It may well be that the digital condition will produce a new and revolutionary poetics.[87] After all, the concept of poetic licence permits and promotes the adjustment of every poetic medium to different cultural settings and to specific needs. Creations that are written and published in and for the Web already have some poetic qualities that are unique to their digital medium.[88] New modes of storytelling

84 Birkerts, *Gutenberg*, supra note 2 at 122.

85 Ibid. at 130.

86 Mario Vargas Llosa, 'The Premature Obituary of the Book: Why Literature?' *New Republic Online* (5 August 2001), online: Ostinata.com <http://www.ostinata.com/joomla/images/ap/intro/why_literature.pdf> [Vargas Llosa, 'Premature Obituary']

87 Janet Murray envisions a 'cyberbard,' a future storyteller who is 'half hacker, half bard,' and will carry literary imagination into unknown territories. See Janet H. Murray, *Hamlet on the Holodeck: The Future of Narrative in Cyberspace* (New York: Free Press, 1997) at 9.

88 See, *e.g.*, Loss Pequeño Glazier, *Digital Poetics* (Tuscaloosa: University of Alabama Press, 2002) at 4. See also Robert Kendall, 'Writing for the Next Millennium: The Birth of Electronic Literature' *Poets & Writers Magazine* (November/December 1995), online: Robert Kendall's Home Page <http://www.wordcircuits.com/kendall/essays/pw1.htm>. For another reference to the new poetic tools created by the cyber-creative environment see N. Katherine Hayles, 'Bodies of Texts, Bodies of Structures: Metaphoric Networks in New Media' in Lauren Rabinovitz & Abraham Geil, eds., *Memory Bytes* (Durham, NC: Duke University Press, 2004) 257.

and story listening will likely evolve along with hybrid forms of poetics. One possibility is the enhancement of verbal storytelling with visual and audio documents.[89] Digital stories will be much shorter, perhaps, and will become subordinate to other types of sensory data.[90] If this occurs, the stories that serve as legal representations will be transformed accordingly. Narratives in courts may become much shorter, faster, clip-oriented, heavily augmented with visual images, and may be subjected to sophisticated audio and visual editing. Some of these novel methods of representation are already at hand in the legal domain.[91]

VIII *Conclusion:*

'*But I, who had been singing ...*'

> We numbered many in the ship,
> Some spread the sails, some pulled, together,
> The mighty oars; 'twas placid weather.
> The rudder in his steady grip,
> While I, from doubts and sorrows free,
> Sang to the crew ... When suddenly,
> A storm! And the wide sea was rearing ...
> The helmsman and the crew were lost.
> No sailor by the storm was tossed
> Ashore – but I, who had been singing.
> I chant the songs I loved of yore,
> And on the sunned and rocky shore
> I dry my robes, all wet and clinging. (Alexander Sergeyevich Pushkin, 'Arion')[92]

Moving images, bits and pieces of data, fragments of stories, sounds and noises constitute the digital storm we are now facing. Law, while

89 See Marie-Laure Ryan, 'Beyond Myth and Metaphor: Narrative in Digital Media' (2002) 23 Poetics Today 605.

90 Ibid. at 607.

91 Two practices that have aroused controversy are CGE (computer-generated evidence) and the IEPS (integrated evidence presentation system). For an examination of the procedural aspects of these devices see Elan E. Weinreb, '"Counselor, Proceed with Caution": The Use of Integrated Evidence Presentation Systems and Computer Generated Evidence in the Courtroom' (2001) 23 Cardozo L.Rev. 393.

92 Alexander Sergeevich Pushkin, *The Poems, Prose and Plays of Alexander Pushkin*, trans. by Avrahm Yarmilinsky (New York: Modern Library, 1943).

modifying itself in order to deal with the new situation, still depends upon perceptions of the self and of the other, and literature is one of the principal producers and maintainers of such perceptions. Yet neither can literature escape the impact of the digital storm. We have witnessed the emergence of new digital genres, such as hypertexts, chats, and blogs, and a novel 'digital language' that typifies these genres. Alongside this abundance there are efforts to translate the entire literary corpus into digital data.[93]

How will law look, read, and sound when the novelty of the digital condition has faded and its ubiquity has become a commonplace all take for granted? How will literature fare in such an environment? Will literary narratives continue to function as 'denominators of human experience through which human beings may recognize themselves and converse with each other, no matter how different their professions, their life plans, their geographical and cultural locations, their personal circumstances'?[94]

Law, in order to function adequately in the stormy digital landscape and in order to preserve its legitimacy, distinctiveness, and authority, is very much in need of such 'denominators of experience.' Pushkin's poem, excerpted above, captures the notion of this need. Arion was a legendary Greek poet who lived in Corinth. While sailing home after winning a poetry competition in Sicily, he was attacked by his fellow sailors, who attempted to kill him in order to take possession of the prizes he had won. Arion managed to persuade his assailants to let him sing a last song. After finishing his song, a hymn of praise to Apollo, Arion threw himself into the sea, but a dolphin who was attracted by the song saved his life and carried him to land.[95]

Pushkin borrows (and alters) the legend of Arion to depict the intensity and cogency of poetic articulation, its power to bring those who master it safely through storms, its potential to aid in overcoming the upheavals created by unforeseen shifts. It is the bard who alone survives the storm, and he survives by the knack of singing. The old craft that delivers him safely to shore is poetics. The permission to sing given by the sailors is a kind of poetic licence, and it produces an outcome we experience as poetic justice, the sense of which supports the enterprise of law.

93 See Google Books Library Project, online: Google <http://books.google.com/googleprint/library.html>.

94 Vargas Llosa, 'Premature Obituary,' supra note 87.

95 Herodotus, *The Histories*, Book 1, trans. by Robin Waterfield (Oxford: Oxford University Press, 1998) at 23–4. According to this version of the story, the king of Corinth did not believe Arion's story. Only after the sailors appeared in Corinth, claiming that Arion had decided to remain in Italy, was the truth revealed, whereupon the treacherous sailors were punished.