

# **HOW DIGITAL TECHNOLOGIES ARE CHANGING THE**

## **PRACTICE OF LAW**

**BY SHULAMIT ALMOG**

### **FOREWORD**

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Significant changes in communication technology invite significant changes in mind and culture. From the invention of the printing press to the proliferation of film, television, and computer images dancing across electronic screens everywhere – social institutions and cultural forms follow the patterns that our meaning making tools lay down. In the current digital age, print literacy now competes with visual literacy. And the linear style of print-based narrative competes with the associative meaning-making style of the non-linear word, sound, and image montage. Our tools change our mind. And when the mind changes no social institution, including law, is exempt from the ensuing wave of transformation.

In this volume, Shulamit Almog turns her sharp diagnostic eye on the effects of that wave – she calls it the “digital condition” – as it washes over the law. What shall become of law as it makes its way through the storm of digital transformation? There is much to consider here, and the stakes could hardly be higher. The fate of truth and justice in our time depend upon how (or whether) we ride out the storm that is upon us. As Almog notes, digital culture is a culture of the perfect copy, and of the endlessly replicated simulacrum. Law’s legitimacy depends, however, on the ability to maintain public belief in law’s capacity to arrive at, and make judgments based on, what is true. If it is the case, as Almog asserts, that “the goal of verisimilitude becomes almost unattainable in our

current, simulacra-saturated environment,” the note of concern in her voice is understandable.

A similar concern assails law’s capacity to do justice in the emerging digital culture. As Almog notes, “the profusion of rotating [digital] fragments” disseminates content on an equal playing field, with each fragment “endowed with equivalent value” [7]. And yet, notwithstanding the highly flattened nature of this discursive field, legal judgments must be made. Decision makers, whether judge or juror, must cull one fragment from another and ultimately elevate one meaning above others for the sake of the judgment that must be rendered. When the time comes to select a preferred legal story in the adversarial contest for belief and judgment, discrete normative criteria must be tapped and duly applied. In so doing will the decision maker rely on aesthetic templates promulgated by the “photographs, video clips and computer applications” that currently flood our global popular culture? Will legal and ethical norms governing judgment merge into aesthetic ones? The danger is real, Almog contends, so long as the line between reality and simulacrum grows increasingly blurred and it becomes “more and more difficult to detect separate, independent ‘events’ and to distinguish such events from the news or reports that describe them.”

Cast into a flattened domain made up of equally tangible digital fragments, jurists face the heightened challenge of identifying valid and compelling claims of authority and legitimacy. In digital culture, however, this kind of normative claim is at risk of becoming “an illusionary image that will soon fade and vacate its place for the next image in the endless cycle of simulacra” [94]. Like the character in Jorge Luis Borge’s short story, “The Aleph,” the legal decision maker has no choice but to withdraw from the seemingly infinite flow of undifferentiated digital totality. As Almog notes, when it comes to the creation of narrative the “Sisyphean” attempt to capture totality must fail [104], for some “privileged relationship to the ‘real’” – some authoritative differentiation among elements – is required in order for stories to be produced in the first place.

Narratives are meaningful not only to the extent that they reflect discrete normative choices, but also to the extent that they are finite, closed. They must be crafted by purposeful choices such as where and how to begin and end. These choices also reflect the import of the “second order writing” about which Almog writes in chapter two [75]. Indeed, without that higher point of reference, we face a real danger of narrative demise.

If law, as Almog suggests, is becoming more like Borges' infinite "aleph" (which we experience today as an infinite digital continuum) – if in the age of electronic filings, digital documents are sent to court clustered with charts and graphs and still images together with audio-visual clips and simulated (or documented) three-dimensional or totally immersive realities, if clips of sound and image crowd out the words that hanker but fail to close upon themselves, if legal documents and briefs like openings and closings in court stream live in images and sounds, flecked with the fragmentary legal nugget, neatly lifted off the net and nestled into place in the advocate's montage, what then will rule the ruling that comes in the end? Is it still the moral of the story? Or did the decision maker "do the right thing" (or at least do some thing) simply in response to the impact that some legal or descriptive fragment impelled? Or perhaps, as the dominant practice of plea bargaining in criminal cases and of negotiated settlements in civil cases suggests [75], legal narrative is in the process of dissolving into an endless series of calculations. Calculations, however, are not stories, nor can they give rise to that vital ethical resource that story telling provides.

Truth and justice are never unmediated. The construction of meaning starts at the physiological level of human perception and travels through a myriad of historically acquired, culturally informed filters and tools. Indeed, even if there were such phenomena as "the naked truth" or "unadulterated justice" before which we might stand, still we would have to speak or write or visualize what we make of their meaning in order to communicate and seek consensus with others. It is of no small concern, therefore, to take stock of the cultural sources from which law's stories are made and remade over time. Legal narratives, Almog observes, are constructed like any other, taking as their source "all the known stories concerning human behavior" [87]. Almog refers to these inherited cultural sources and tools of meaning making by their old, familiar name: "poetics". In so doing she conveys the valuable insight that we live not only with, but also as the craft of representation constitutes us in our identity and in our social and political worlds among others.

Law, too, is a crafted world of stories, but its stories are marked by a difference, for they are backed by the naked power of the state. Law's narratives wreak violence (upon the condemned) and also civilize violence (in deterring the would-be civil wrongdoer or criminal defendant and in mediating violence when it is inflicted upon the victim). Much

depends on how we tell the law's stories – on what gets told, and what gets left out, on what violence may be sanctioned (by law) and what violence law alone may perform. At least part of the answer to this question involves the nature of the mediation by which legal narratives are crafted into a meaning-laden state. Sometimes the mediation may be linear, in the form of words lining the page; sometimes the mediation may be non-linear, as in the quick flowing image on the screen. Sometimes one mediation may seem to threaten another, as when the drawing power of the quick-paced montage manages to dampen the effects of slower-paced, perhaps more patiently crafted and closely plotted narratives. Perhaps, over time every discrete form of expressive mediation is fated to be assimilated within a new one, neither lost nor preserved intact, but rather born anew within the reformulated context of a novel remediation. At any rate, one thing seems clear, namely: significant changes in aesthetics alter the way truth and justice are received and judged as such.

If so much rides on law's stories and, by logical extension, on the tools we use in creating and responding to them, there is good reason to wonder: what happens to law and the world of constitutive norms that it weaves into our lives when law's storytelling tools change? Do new tools tell new tales? Do changes in mind and culture bring about new truths and new ways of performing justice? This is the vital question that Almog examines in chapter three. If law derives its authority, at least to some significant degree, from popular cultural sources, it behooves us to understand the impact and meaning of that adaptation today. Almog refers to this phenomenon as the “cinematization” of our thinking about justice [131].

Every discrete form of mediation provides an aesthetic template for making and interpreting legal meaning. Accordingly, Almog argues that we must strive to understand how that template operates upon law and with what effect. At the same time, discrete forms of mediation (by voice, print, or audio-visual montage) also provide ethical benchmarks. They present different normative models for how best to think and feel about the discrete events that they describe. And therein lies the ethical core of Almog's work. For if the digital condition, under which law must now be rethought, disrupts the narrative process, there are ethical consequences to be reckoned with. This is the import of chapter four, where Almog works through Walter Benjamin's seminal insight regarding the mechanical ‘cinematization’ of judgment. Cinematization, Almog argues,

disrupts the traditional storytelling process by blurring the distinction between author and audience [125]. Moreover, in Almog's view, the digital culture ramifies this disruptive effect by "eroding the age-old ability to 'connect' stories." It's all a part of the totalizing, flattened flow of digital fragments upon which we may gaze from the various 'windows' that open upon the constantly changing digital landscape before us. We may ride those fragments, but to what end, in the pursuit of what meaning, what character, what ethical significance?

And so Almog concludes on a note of caution. Legal fragments, modeled on the digital condition under which they have been produced and disseminated, may have no less impact on law and society than the most carefully plotted legal narratives. Of course, unlike the latter, legal fragments are fated to remain utterly forgettable and utterly forgotten once they happen by. This fragmented ("un-narratable") digital condition might well foreshadow a new, highly contingent, impulse-ridden jurisprudence. It is a jurisprudence of impacts, but not reasons, a Kafkaesque jurisprudence of imperatives without significance. This describes one possible fate of law in the digital age. It is a portrait of law trapped in the infinitely ramified, ahistorical now, law without past or future. This is a picture of law in ruins.

Given the stakes, it behooves us to take up Shulamit Almog's invitation to consider well the legal ramifications of digital poetics. Law's fate and the fate of narrative are entwined in one destiny. We struggle to inscribe and re-inscribe the meaning of the ethical self through law's stories. But meaning is never guaranteed. And naked power always remains, waiting to engulf us, when meaning fails. These are the stakes of law in the digital age when tools of self-expression change and the fate of the legal mind and the legal culture wait upon the currents of the digital storm. Will we learn to master the currents of power-without-meaning and craft anew the stories of law that etch ethical significance into our social and political lives together? Will new "digital bards" arise to take on this challenge? [183]

One thing is certain: when law is but sound and fury truth and justice signify nothing. As the digital condition bears down on us like a storm, "it requires special measures suitable for dealing with it" [190]. Our fate lies in our own hands, for we are the tool makers and the tool wielders. We tell our own tale, for bad or for good. With this

volume that fate, and perhaps how we might learn to master it, becomes a little clearer, though by no means less fraught and freighted with the consequences of legal poetics and the stories that they avail (or avail not) in the digital age.

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