Creating Representations of Justice in the Third Millennium: Legal Poetics in Digital Times

Shulamit Almog
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I. INTRODUCTION

November 2003 saw more than its share of overwhelming events. Four deadly terrorist explosions shook Istanbul in quick succession. The violence in Iraq escalated, causing many deaths. The Middle East swung widely between eruptions of violence and renewed hopes for cease-fire. However, the event that most captured the public’s attention that month was one of a distinctly legal nature. On November 20, 2003, superstar Michael Jackson surrendered in Santa Barbara, California, on a warrant accusing him of multiple counts of child molestation. After posting bail in the amount of $3,000,000, he was released to await continuance of the proceedings.

Digital signals diligently reproduced, manipulated and reorganized the images of the story, spreading them throughout the world through every conceivable channel. The landing of the private jet that ferried Jackson with his wrists clasped behind his back, Jackson’s departure from the sheriff’s facility free of handcuffs and flashing a “V” sign, or his later flashing of a peace sign before disappearing from sight—these pictures readily created a series of images that could have fit well in any of Jackson’s promotional video clips.

Another series of images soon followed. Jackson flew to Las Vegas, and then drove with his entourage to his hotel, “trailed by media helicopters and cheered by dozens of people who lined the roads to catch a glimpse” of him. A gigantic, uncontrollable
digital spectacle was created.

After a trial that lasted four months, the jury acquitted Jackson on all charges. Cameras were not allowed in the court in Santa Maria, California, but the reading of the statement on behalf of the jury was broadcast in real time by all major American and international television news channels. Judge Rodney Melville read, “We the jury feeling the weight of the world’s eyes upon us all thoroughly and meticulously studied the testimony[ and] evidence and...confidently came to our verdicts.”

The Michael Jackson website featured a scrolling calendar that highlighted historic events such as “Martin Luther King is born,” “The Berlin Wall falls” and “Nelson Mandela is freed.” The last event in this chain, the Jackson acquittal, was annotated by the following text: “Remember this date, for it is a part of HlStory,” borrowing from the title of Jackson’s 1995 greatest-hits album. Soon enough, the digital coverage became news in itself. A day after the acquittal, news headlines read: “Jackson Site Hails Verdict As ‘Historic.’”

It is too early to tell whether the future will validate the label of “historic,” and exactly what part the Internet plays in the present and will play in the future construction and shaping of the event.

11. Id.
13. Id.
15. Interestingly, even before the acquittal, the Jackson trial presented itself as an intriguing subject for academic research. In May 2005, the international journal Social Semiotics published a call for articles for a special issue about the Michael Jackson trial. See CFP: The Michael Jackson Trial, Literary Calls for Papers Mailing List, May 10, 2005, http://cfp.english.upenn.edu/archive/2005-
It is, however, already evident that the original core of the event, a legal proceeding that ended with an acquittal, is almost lost within the fiery, ever-widening digital discourse encompassing it.

Was that digital spectacle compatible with the legal proceeding that initiated it, or did it contradict the interests of the legal process? What sorts of stories were created within the digital environment? Did they work in tandem with the legal story, which was fairly straightforward at that point, consisting solely of authorized officials fulfilling their duty and initiating a formal criminal proceeding against an individual? Although the entire episode began with the initiation of a formal legal proceeding, the spectacle that drew huge crowds of spectators and commentators seems at first glance to have had very little to do with representing justice or serving any legal aims. What comes to mind is Guy Debord’s insightful, perhaps prophetic, suggestion that “[i]n the integrated spectacular, the laws are asleep; because they were not made [to function alongside these] new production techniques.”

The Jackson affair is a paradigmatic case of legal poetics’ failure in a digital environment. This case, as well as numerous other proceedings that somehow acquired a digital presence, demonstrates how the impact of traditional legal representations is dramatically altered by the shift to digital technology. This article deals with this change by offering vocabulary and modes of thought to help evaluate the digital condition’s impact on the creation of legal representations.

My core contention is that digital times require epistemological changes that influence the efficacy of traditional legal poetics. Specifically, the digital condition pulls in two directions by modifying the fashioning of legal representations, yet preserving the established poetic apparatus based on traditional poetic tools.

05/0045.html (on file with the Rutgers Computer and Technology Law Journal). The editors explained, “We are interested in exploring the reasons the Michael Jackson media spectacle has resonated across cultural and national borders, the forms of media practices it has enabled and also the particular ways in which coverage of this celebrity scandal provides insight to contemporary cultural formations.” *Id.*

In this article, law will be perceived as a system equipped with representational means that aim to convince the legal audience that law is able to skillfully and expertly translate the abstract idea of justice into correct, concrete decisions. Borrowing concepts and terminology from the field of aesthetics, I describe in poetical terms the legal system’s use of various representational tools that employ visual, textual and ritual mechanisms.

I start by delineating the principal concepts and notions that underlie the hypothesis regarding the interrelations between poetics, law and the digital condition. I describe the manifestations of legal poetics within two main arenas: the visual and the verbal (or linguistic). As will be discussed in further detail, space and time are the axes of the system on which the poetic mechanisms—visual and linguistic—operate.

Next, this article illustrates several potential failures in a legal poetic mechanism and explains how such failures may affect the legal project. The article proceeds by juxtaposing the digital condition and legal poetics. I draw a distinction between mechanisms aimed at “digitalizing law” (that is, attempts to transform the legal field into a province of the digital realm), and mechanisms aimed at “legalizing cyberspace” (attempts to force the traditional legal tools onto the digital phenomenon). These two conflicting trends intensify the growing sense of perplexity surrounding the existing legal poetic systems.

I conclude by asserting that the law is obligated to facilitate the entry of the digital phenomenon into its realm only up to the point at which its poetic apparatus begins to be impaired. To identify that point, it is necessary to be well aware of the law’s role as a creator of representations and of the part played by poetic tools in that enterprise. That sort of awareness is a precondition to the development of improved representational tools that will enable the law to function competently in a digital environment.

17. In law, unlike some artistic representation systems, representation is not necessarily the dominant issue. It is one component of the manifold phenomenon of law, though one more dominant than commonly perceived.
II. “DIGITAL CONDITION” & “LEGAL POETICS”: DEFINITIONS

Let me begin by elaborating on some of the terms that will be used in the following, starting with “digital condition.”

A “defining technology,” according to J. David Bolter, is a technology that:

develops links, metaphorical or otherwise, with a culture’s science, philosophy, or literature; it is always available to serve as a metaphor, example, model, or symbol. A defining technology resembles a magnifying glass, which collects and focuses seemingly disparate ideas in a culture into one bright, sometimes piercing ray. Technology does not call forth major cultural changes by itself, but it does bring ideas into a new focus by explaining or exemplifying them in new ways to larger audiences.18

Following Heidegger19 and Benjamin,20 it seems that the defining nature of technologies derives, to a large extent, from their influence upon the production of meaning. Digital technology was perceived from its first appearance as carrying the potential to significantly change the traditional systems by which meaning is produced.21 That potential is already materializing with increasing momentum, creating what might be called a “digital condition.”

As used in this paper, the term “digital condition” primarily

21. Feinstein, supra note 20, at 274-75.
denotes 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.22 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.23 With these distinctive features, the digital tools use bytes as their atom units24 to reveal a new existence, rather than a mere modification or perfection of the old one.

The term “condition” conveys the sense that digital possibilities, because of their total and encompassing nature, create not only revolutionary technological options that affect culture at large, but also a new experience, state of being, and state of mind. Digital technology permeates our everyday lives and our ideas about epistemology in a manner that renders the digital condition inseparable from the construction of meaning and, thus, from the human condition.

The digital condition continuously generates a huge corpus of thought and research that aims to explore its practical and conceptual implications in every conceivable field.25 Law is no exception: the technological shift has raised practical legal issues, as numerous as they are perplexing, that need to be addressed.26

Although much has been written about the nexus of law and current technology, the intersection of the digital condition and the production of legal meaning has not gained much critical attention. I will focus on this intersection by sketching out a critical understanding of how the digital condition bears on the production and reception of legal representations. I contend primarily that the digital condition has significant consequences for the traditional employment of legal poetics.

Following Aristotle’s definition, we normally employ the term “poetics” in analyzing aesthetic semantic fields. In a more general sense, which enables us to locate poetical practices in legal fields, poetics is a system of rules that delineates how meanings are generated in a particular field and why they are accepted as meaningful.

Law in fact has its own poetics. Those poetics seek to convince society that legal institutions uniquely control the activation of justice. Through the rational use of several means of representation, law seeks to constitute phenomenological embodiments of the intangible concept of justice. Without such representations, the concept of justice would remain abstract and unrecognizable, and the legal system would find it difficult to create the impression that it is truly doing justice. The poetics of legal representations is manifested, to a large degree, in legal procedure and in formal and informal practices that are activated through legal institutions.


28. The earliest theory of poetics is Aristotle’s work that was described as “a mere manual on poetry in general and on epic and dramatic literature in particular.” John Gassner, Introduction to the Fourth Edition of S. H. BUTCHER, ARISTOTLE’S THEORY OF POETRY AND FINE ART, at xxxviii (S. H. Butcher trans., Dover Publ’ns 1951), referring to ARISTOTLE, ARISTOTLE’S POETICS, in BUTCHER, supra, at 7.
The roots of legal poetics are found in the ancient past,\textsuperscript{29} and are still present and dominant in almost every aspect of law today. The basic patterns of legal poetics have survived the upheavals and turmoil of time and history. However, the digital condition vigorously challenges the efficiency and value of those well-rooted patterns by eroding their ability to achieve verisimilitude.

"Verisimilitude," another term used in aesthetic criticism, means the quality of seeming to be true or "having the appearance of" being real.\textsuperscript{30} In representation, verisimilitude means the apparent "truth" or accuracy of the depiction. A main characteristic of many articulations produced by legal poetics is that they are oriented to verisimilitude.\textsuperscript{31}

Legal verisimilitude is expressed in the legal system's attempts to produce a readily recognizable reenactment of reality. The depiction of a past event during legal proceedings is intended to faithfully reconstruct the "true" event, exactly as it "really" took place. Consequently, witnesses are required to speak "nothing but the truth," a demand that no human can literally fulfill.\textsuperscript{32} The legal deliberation is intended to represent an authentic process of rational, balanced and coherent decision making. In striving for verisimilitude, the law tries to minimize and obscure the undeniable fact that neither judge nor jury actually had an unmediated encounter with the event that they are being asked to evaluate. In a nutshell, legal poetics strives to achieve verisimilitude through the creation of temporal and spatial distinctiveness, the setting of hierarchies between representations and the meticulous use of iconography.\textsuperscript{33} However, verisimilitude becomes almost unattainable in our current, simulacra-saturated environment.

"Simulacra," another term derived from aesthetics, is a concept developed by several thinkers, including Jameson,\textsuperscript{34} Baudrillard,\textsuperscript{35}
and Deleuze and Guattari, that describes contemporary culture as a continuous flow of images or copies "whose relation to the model has become so attenuated that it can no longer properly be said to be a copy." An example of simulacra is the profusion of rotating fragments that represent "news." A typical contemporary news session comprises a sequence of fragments that relate indiscriminately to the trivial and the substantial, the horrifying and the pleasant, the amusing and the disturbing. Our ability to differentiate between the images according to cogent criteria and to evaluate and form judgments is thereby diminished, as is the capacity of representations to create verisimilitude.

The digital condition upsets the legal-analog scenes that suggest verisimilitude. It fosters departure from the well-known, highly connotative performance of "producing justice" and challenges it—even threatens it. The digital condition wears away the idiosyncratic nature of the legal performance—the trial. It turns the legal performance into something similar to numerous other performances. The legal performance loses its potency and validity.


38. I make extensive use here of the terms "image" and "representation." Each term carries an immensely rich semantic, ideological and conceptual charge, a full discussion of which is beyond the scope of this work. For the sake of coherence, I use "image" in this article to stand for any kind of sensory presentation, whether literal or figurative, of an original source, and "representation" to stand for a presentation of an image that bears with it a construction of meaning of some sort. As those definitions suggest, the terms are kindred, but they are not identical. The core difference lies in the way each expression is produced. A representation is a poetic product. Its core essence is the meaning it creates. The meaning can be assigned to the representation both by its creator at the time of the creation, and by its addressees through their interpretation. An image, too, can be meaningful (and then it will rise to the level of representation), but it can also be a random creation. In the digital condition, many images are merely accidental. Duplicates, copies and repetitions that are often created unintentionally and are assigned no meaning by recipients remain nonrepresentational images.
because it is surrounded by a constant flow of countless other performances. In light of this flow, it is hardly possible to discern the legal performance as more authentic, powerful, or valid than any other performance.

As mentioned, the entire Michael Jackson digital spectacle, with all its conflicting components, clearly demonstrates this point. It denies any distinctive temporal or spatial borders, or the borders between the real and the fictive, the image and the source. It goes on anytime and anywhere—in the sheriff’s facility, in cars, in jet planes, in fancy hotels, in Neverland and in countless other locations. The various forms of staged performances merge with segments of “real life,” creating an abundance that blurs all conventional distinctions, including the distinction between the legal performances and other kinds of representations.

Images that represent the up-to-date “news” event, like the arrest, merge with well-known images from the past and from the imagined future. Court TV’s June 2004 coverage of the huge sum allegedly paid by Michael Jackson to a California boy to drop earlier accusations of molestation against him proliferated rapidly in digital domains, becoming easily confused with the 2004 case in which similar charges were brought by another California boy.\(^{39}\) Inconsistent iconography flows ceaselessly in digital highways and byways: handcuffs, the “V” sign, the confinement of the sheriff facility, the crowds in Las Vegas, and the private jet.\(^{40}\) Added to these are Jackson’s face and figure together with images from Ghosts\(^{41}\) and Black or White\(^{42}\) and numerous other sounds, images and texts, all of which create semantic fields that spread uncontrollably, overlap, merge, and mix. The countless representations do not lend themselves to hierarchic ordering. They do not reveal their relation to reality or their distance from or proximity to it. Any image is as suspect or as credible as any other; in other words, any digital product has the same claim to be

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40. See supra notes 6-7 and accompanying text.
41. GHOSTS (Heliopolis & MJJ Prods. 1997).
42. BLACK OR WHITE (MJJ Prods. 1991).
perceived as "real" as any other cultural product. Photographs, video clips and computer applications are as real as court buildings and as real as digital images of deliberations being held in those buildings. It becomes more and more difficult to detect separate, independent "events" and to distinguish such events from the news or reports that describe them.

Following Bolter and Grusin’s description of this process, digital pageants emerge as part of current events, such as elections, trials or deaths of famous people, and, in disseminating information about such events, the digital arena becomes a full participant in the incorporation of media into the event itself. One may say that the live following of the O.J. Simpson affair by cable stations, such as Court TV, together with the intensive web coverage of and reference to the episode, first defined "reality television." What is to distinguish substantially between, on the one hand, so-called "reality shows" that now take place in digital arenas and on television screens and, on the other, the vigil attendant on legal cases that have captured the public eye? What is the future of the most paradigmatic creation of legal poetics—the adversary trial?


44. See generally id. (a thought-provoking description of the way in which the 1997 "Nanny trial" rapidly evolved into a surreal fusion of digital data). Louise Woodward, a nineteen-year old British au-pair, was accused of murdering the baby in her care. Id. at 183. Judge Hiller Zobel’s decision in the case was the first criminal ruling to be released on the Internet immediately upon its pronunciation. Id. at 194; see Commonwealth v. Woodward, No. 97 Crim. 0433 (Mass. Sup. Ct. Nov. 10, 1997), available at http://www.courttv.com/woodward/zobel.html (on file with the Rutgers Computer and Technology Law Journal). Senft reviews the wide digital coverage that merged legal documentation from the case with numerous other images (of Princess Diana or O. J. Simpson, for instance) interjected by fans and opponents and with relevant music, and concludes that Woodward, like other digital icons, created new patterns for understanding what is "real." See Senft, supra note 43, at 200.


The adversary trial, an event that addresses all relevant matters in one proceeding, in one place, at one time, using traditional poetic tools, is fundamental to the traditional Anglo-American legal system. How will the digital condition affect the singularity of this legal event and its status as a "real" event?

In order to adequately address such questions and examine the epistemological changes the digital condition has had on the efficacy of conventional legal poetics, especially as reflected in the adversary trial, one must go far back and look at the early roots and objectives of poetics at large.

III. POETICS: WHEN MEANING MATTERS

In its primary denotation, poetics is the system of aesthetic principles that determine the nature of any literary form.\textsuperscript{47} The linguistic use of the term refers also to the attempt to comprehend and describe how such principles operate. Thus, for instance, the poetics of narrative involve an attempt to define and distinguish the components of narrative and analyze "how particular narratives achieve their effects,"\textsuperscript{48} and the poetics of the detective genre would consist of defining the main features of the form and elaborating the critical criteria by which that form might best be understood and analyzed.\textsuperscript{49}

The word poetics derives from the Greek poietes, which means "maker" or "poet.\textsuperscript{50} The earliest theory of poetics is found in Aristotle's Poetics, written sometime in the middle of the fourth century B.C.\textsuperscript{51} The Poetics is the first-known full-scale effort to systemize the mechanisms by which literary texts produce certain effects, such as pleasure, amazement, amusement, or belief.\textsuperscript{52}


\textsuperscript{48} See JONATHAN CULLER, LITERARY THEORY: A VERY SHORT INTRODUCTION 84 (1997).

\textsuperscript{49} See MARTIN GRAY, supra note 30, at 92 (defining "genre").

\textsuperscript{50} DAVID MACEY, THE PENGUIN DICTIONARY OF CRITICAL THEORY 300 (2000).

\textsuperscript{51} See id.; Francis Fergusson, Introduction to ARISTOTLE, ARISTOTLE'S POETICS 1, 2 (S.H. Butcher trans., 1961)

\textsuperscript{52} As he says in his first paragraph, Aristotle aims to treat "[p]oetry in itself and of its various kinds, noting the essential quality of each; to inquire into the
Aristotle, who perceived poetics as "the art of imitation or representation" (mimesis),\textsuperscript{53} limited his observations to the characteristic qualities of tragic drama and how they are achieved. But his work goes far beyond and pertains to the constructing principles of any literary expression. The Poetics entailed an entire field of scholarship that significantly exceeded Aristotle's initial objective.

Over time, the term has come to be much more widely applied. Today, "poetics" refers to how meanings are produced and why they are accepted as meaningful in any particular field, not necessarily within the literary domain.\textsuperscript{54} To put it differently, poetics views a semantic field in terms of the effects it generates in those who encounter it. Hence, contemporary works deal with "poetics of belief,"\textsuperscript{55} "poetics of colonization,"\textsuperscript{56} "poetics of gender,"\textsuperscript{57} "poetics of manhood,"\textsuperscript{58} "poetics of postmodernism,"\textsuperscript{59} and "poetics of the new history."\textsuperscript{60} In all those various contexts, the term poetics is imported from its homeland in the realm of aesthetics and applied to an attempt to formulate and convey a system of interrelated rules that underlie a regularity of phenomena, together with an effort to reveal how those rules create representations that "work" or govern the construction of meaning within a certain area.

Poetics, according to this description, comprises two facets, each

\textsuperscript{53} See CULLER, supra note 48, at 70; see also MACEY, supra note 50, at 253-55 (defining mimesis).

\textsuperscript{54} See infra notes 55-60 and accompanying text.


\textsuperscript{56} See generally CAROL DOUGHERTY, THE POETICS OF COLONIZATION: FROM CITY TO TEXT IN ARCHAIC GREECE (1993).

\textsuperscript{57} See generally THE POETICS OF GENDER (Nancy K. Miller, ed., 1986).

\textsuperscript{58} See generally MICHAEL HERZFELD, THE POETICS OF MANHOOD: CONTEST AND IDENTITY IN A CRETAH MOUNTAIN VILLAGE (1985).

\textsuperscript{59} See generally LINDA HUTCHEON, A POETICS OF POSTMODERNISM: HISTORY, THEORY, FICTION (1988).

\textsuperscript{60} See generally PHILIPPE CARRARD, POETICS OF THE NEW HISTORY: FRENCH HISTORICAL DISCOURSE FROM BRAUDEL TO CHARTIER (1992).
pertaining to a different temporal direction. The first looks to the past. It examines an expression that has been produced, aiming to decipher the pattern or the code that was used in forming it and loading it with a certain meaning. The facet other faces the future, examining the capacity of deciphered code to create new expressions that will generate certain desired effects. In this sense, the poetic endeavor has an extrapolating nature, since it uses gathered data in order to predict future outcomes. In both cases, whether looking to the past or to the future, the central point of the poetic practice and dialogue is the representational capacity of a set of rules. The two temporal facets of the poetic endeavor are beautifully illustrated in W.H. Auden's description of the formal system of interrelated laws that characterizes poems:

A poem is a rite; hence its formal and ritualistic character. Its use of language is deliberately and ostentatiously different from talk. Even when it employs the diction and rhythms of conversation, it employs them as a deliberate informality, presupposing the norm with which they are intended to contrast. The form of a rite must be beautiful, exhibiting, for example, balance, closure and aptness to that which it is the form of.

Poetic discourse is not warmly received in the legal domain. For one thing, law's self-perception as a meaning-creating system is not so developed as that of the arts. The realities of meaning creation and our susceptibility to the effects of poetic representations have an unsettling impact on the legal system. Ignoring poetics facilitates envisaging the legal process as a highly trustworthy way for discovering truth, justice or correct


interpretations, rather than as a mechanism that produces sometimes-predictable meanings with the aid of poetic tools that do not necessarily pertain to values such as truth or justice. Even before delving into the investigation of poetic subtleties, some may object to the mere acknowledgement of the connections between law and language and to the view of the law as a “literary” occupation; such acknowledgment might shed too much light on some manipulative aspects of the law, and raise doubts as to its alleged objectivity.64 Consequently, the poetics of law tends to be overlooked or declared hardly relevant to legal discourse.65

Nevertheless, once we become aware of the poetic aspects of the practice of law, we can hardly ignore what Karl Llewellyn termed the law’s “craft-like” quality.66 Llewellyn wrote:

Out of the conjunction of activities and men around the law-jobs there arise the crafts of law, and so the craftsmen. Advocacy, counseling, judging, law-making, administering—these are major grouping of the law-crafts...At the present juncture, the fresh study of these crafts and of the manner of their best doing is one of the major needs of jurisprudence.67

What Llewellyn refers to as “the manner” of the legal crafts “best doing” is essentially the mystery of poetics.

64. See generally THE RHETORIC OF LAW (Austin Sarat & Thomas R. Kearns eds., 1994).
65. See Peter Goodrich, Officium Poetae, 23 LIVERPOOL L. REV. 139, 145 (2001). Nonetheless, poetic notions often appear in legal discourse. See, e.g., JAMES BOYD WHITE, The Judicial Opinion and the Poem: Ways of Reading, Ways of Life, in HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 107 (1985) (maintaining that through adequate education, we learn to read and understand legal texts, and by that to decipher representations created by legal poetics); RICHARD WEISBERG, POETICS AND OTHER STRATEGIES OF LAW AND LITERATURE 4 (1992) (maintaining that, in law, “form and substance are one,” and that the main role of poetics in law is to “fill the ethical void in which legal thought and practice now exist”); Lenora Ledwon, The Poetics of Evidence: Some Applications From Law & Literature, 21 QUINNIPIAC L. REV. 1145, 1149 (2003) (“Evidence law, in particular, has strong affinities with the idea of poetics as a shaping with words, or the creating of stories, for evidence is the area of law perhaps most closely tied to story.”).
67. Id.
IV. LEGAL POETICS: "THE TRIAL'S BEGINNING!"

"Chorus again!" cried the Gryphon, and the Mock Turtle had just begun to repeat it, when a cry of "The trial's beginning!" was heard in the distance.

"Come on!" cried the Gryphon, and, taking Alice by the hand, it hurried off, without waiting for the end of the song.

A trial is an undertaking that solemnly proclaims itself and demands, through visual and linguistic means, singular attentiveness. Having captured its audience's attention, the judicial process aims to convince that audience that the spectacle of the process is the spectacle of justice being made. The legal process, through its various stages, represents the abstract notion of justice.

Before attempting to explore how the poetic instrument is activated in the legal sphere, four brief preliminary remarks are in order. The first two refer to the role poetics plays within the wider context of law's special institutional and cognitive functions. The latter two touch upon the nature of any poetical discourse.

To begin with, by discussing the representational dimension, I do not imply that producing representations is the law's only or even main end. The creation of representations is a tool that aids in performing law's distinctive social functions. Law defines our duties towards other individuals and the state, and it creates a mechanism for resolving conflicts by providing binding interpretations of those duties. Otherwise, such conflicts might lead toward violence, endless cycles of revenge and the ruin of societal constructs. The accomplishment of such immense missions necessitates employing a variety of means, including the poetic tools that are the main interest here. However, acknowledging the existence and functions of such tools does not mean refuting or denigrating law's imperative societal roles and functions; rather, it advocates awareness of the means that facilitate the performance of law's roles and functions.

It should also be noted that the creation of legal representations is influenced not only by inner poetic mechanisms, but also by other means, such as social and cultural conventions and contingent

68. LEWIS CARROLL, ALICE IN WONDERLAND, in THE COMPLETE WORKS OF LEWIS CARROLL 15, 103 (Barnes & Noble 1994) (1865).
political circumstances that are beyond the scope of this work. Such matters are extensively dealt with in the law and society discourse.\textsuperscript{69}

Second, unlike some artistic or aesthetic systems in which the creation of representations is the essence of the enterprise, representations in law are instrumental to other ends, such as the achievement of appropriate answers or solutions. Law often enough generates appropriate, reasonable and even optimal resolutions of conflicts or of problematic situations, and the representational dimension merely complements the substantive adequacy of the outcome. Consequently, the legal process may well be at the same time both a representation of justice and a mechanism that produces "real" justice.

Third, suggesting that poetics plays a significant role within the legal arena does not necessitate ascribing moral values or intents to poetics per se. Since poetics is employed for certain purposes, it may sometimes give rise to ethical questions, such as the moral desirability or value of those purposes or the ethical duty to use or avoid particular poetical means,\textsuperscript{70} but investigating the mechanism of poetics as such is a separate issue. Poetics could be examined merely with reference to its efficacy and its capacity to achieve a desired effect. In Aristotle’s words, “[t]he standard of correctness is not the same in poetry and politics, any more than in poetry and any other art.”\textsuperscript{71} Such an assertion establishes the independence of poetic discourse and its separateness from other fields, especially ethics.\textsuperscript{72}

Finally, use of the same poetic rules does not necessarily produce identical expressions. In Horace’s phrasing, “[f]or my


\textsuperscript{70} For a discussion of similar issues in literary context, see Wayne C. Booth, Are Narrative Choices Subject to Ethical Criticism?, in Reading Narrative: Form, Ethics, Ideology 57, 75 (James Phelan ed., 1989). For discussion of the ethics of judicial narratives, see Shulamit Almog, As I Read, I Weep—In Praise of Judicial Narrative, 26 Okla. City U. L. Rev. 471, 491 (2001).

\textsuperscript{71} Aristotle, supra note 28, at 99.

\textsuperscript{72} Butcher, supra note 28, at 222.
part, I cannot see what profit there is in study without a rich vein of genius, or in genius untrained; so much does the one require the other’s aid, and so friendly is their conspiracy.”

Acknowledging the correlation between talent, effort and poetic skills ensures realistic tolerance regarding the mediocrity of certain articulations, including those generated in law’s domain: “In certain things that which is middling and will pass is rightly tolerated. A middling attorney or barrister is far bellow the excellence of eloquent Messalla, and does not know as much as Aulus Cascellius, and yet he is esteemed.”

In the following, the manifestations of legal poetics within two main arenas, the visual and the verbal, will be addressed. Such manifestations derive from what might be referred to as formal and informal legal poetics. Rules of legal procedure are seemingly a sort of formal manual of legal poetics. Alongside this formal set of rules functions another system that is not anchored in written procedure, but can be described as an informal poetic system. It is the amalgamation of the formal and informal poetics that governs the way law looks, sounds and is perceived.

V. VISUAL POETICS OF LAW

Alice had never been in a court of justice before, but she had read about them in books, and she was quite pleased to find that she knew the name of nearly everything there. “That’s the judge,” she said to herself, “because of his great wig.”

The judge, by the way, was the King; and as he wore his crown over the wig...he did not look at all comfortable, and it was certainly not becoming.

“And that’s the jury-box,” thought Alice; “and those twelve creatures,” (she was obliged to say “creatures,” you see, because some of them were animals, and some were birds.) “I suppose they are the jurors.”

Alice had read in books about courts of law, and that is why she

74. Id. at 59.
75. Carroll, supra note 68, at 104.
could name nearly everything she saw. The court of the King of Hearts, despite its peculiarity, maintained some of the visual representations that Alice recognized as belonging to a court of law. Like Alice, we are all able to categorize a court as such by applying previous knowledge as to the visual iconography of law. Trials rely on the iconographic status of certain elements to provide each legal performance with a general meaning that exceeds the bounds of the specific occasion. Décor, dress, and recognizable visual rituals signify that a particular legal proceeding is of the genre, “trial.”

The intricate visual choreography of the trial is determined, to a large extent, by legal procedure, which is actually a system of meaning-construction that is applied in the course of legal performances. Procedure dictates much of what we see in courts; it establishes the nature and sequence of the scenes that are produced and experienced during the trial.

The overwhelming majority of trials are held in courthouses built for that purpose. The concept of fixed courts—that is, the designation of specific sites for adjudication—has endured from ancient times to the present day in almost all legal systems. A courthouse is more than a building; it is also a literal and emblematic domain that embodies social ideology.

The architecture of courthouses and courtrooms varies with the ranking of the courts they house within the legal system’s hierarchy and their stature within the government. Typically, the higher courts are endowed with a plethora of external and internal visual images that augment their stature, particularly so when those courts are politically influential. The empowerment of the American Supreme Court, for instance, was echoed by growing attention to its physical surroundings. During its first 145 years, the “Court led

76. Id.
77. For example, in 1215 the Magna Carta provided that proceedings should not follow the King but should be held “in some fixed place” (“in aliquo loco certo”); for ages, this fixed place was Westminster Hall. See Dorian Gerhold, Westminster Hall: Nine Hundred Years of History 42 (1999).
a truly nomadic existence." At the turn of the nineteenth century, a first building was erected in Washington, D.C. for governmental offices, but no separate plans were made for the Supreme Court; it was moved from one room to another within the Capitol, including a basement chamber. In 1859 the following declaration, sternly acknowledging the power of the visual, was issued: "[T]his Congress will not allow the Supreme Court of a Government like ours to sit in the cellar of the Capitol, and have strangers, when they come here and ask to be shown the greatest judicial tribunal of the country, to be taken down [into the] cellar." 

Several residential upgrades followed, until October 1935, when the Court opened its "first term in its new home," the last major project of the architect Cass Gilbert. Gilbert chose a classical temple style, following a "Roman adaptation of the Greek building form." In western society generally, a similar grand style had traditionally characterized courts, sustaining a perception of law as stable, independent, and elevated.

This characteristic classical style has lately become less popular. Some recently built courthouses in Europe look strikingly contemporary, suggesting cutting-edge technology. Israel’s new Supreme Court in Jerusalem uses native Jerusalem limestone, bold geometric shapes and running water in the courtyards to create a site combining modern and traditional architecture. In the United States, the new courthouse architecture apparently implies a

80. Id. at 9.
81. Id.
82. Id. at 10.
83. Id.
corporate style. But innovative as it may be, the modern architectural language still aims to achieve the age-old purpose—presenting the courts so as to evoke images of justice, authority and distinctiveness.

Similar purposefulness characterizes the typical court interior. Within the American Supreme Court, signs of institutional power abound. The “Great Hall,” also designed by Gilbert, dramatizes the perception of the court as “the highest tribunal in the land.” With its marble columns and carved friezes, it creates an impressive background for the appearance of the judges from behind velvet curtains and their collective ascent to the bench to administer justice in their public sessions.

Visual imagery is accentuated in the higher institutions, but certain elements of emblematic legal imagery can be easily identified even in the humblest courts. Jill Tomasson Goodwin describes the basic visual pattern that characterizes courtrooms all over the world:

The physical layout of the court, for instance, informs even the casual observer that a hierarchy of social relationships operates, from most powerful to least powerful. Segregated seating signals this hierarchy: the non-participating public is separated from witnesses, who are separated from jurors, who are separated from lawyers, who are all separated from the judge, who is further removed from everyone by height and an often commodious bench.

Those standard components of the legal space have their distinctive poetic logic. The judges’ elevated podium reflects

86. Rosenbloom, supra note 78, at 522.
87. A recent academic courthouse planning project, presented in the Georgia Tech School of Architecture, elaborated on the aesthetics of courts, which is in fact a poetic scheme: “Architecture of courthouses must promote respect for the tradition and purpose of the American and state judicial process. The building must express solemnity, stability, integrity, rigor and fairness...Interior finishes should reflect seriousness [and] promote the dignity of proceedings.” See Georgia Tech School of Architecture, Programming and Building Evaluation, Courthouse Standards, http://herring.cc.gatech.edu/arch4303-fall2003/373 (last visited Feb. 27, 2006) (on file with the Rutgers Computer and Technology Law Journal).
88. PERRY, supra note 79, at 11.
89. See id. at 11-12.
notions of judicial independence, separation, power and authority. The isolated setting visually implies the impartiality of the adjudication. The placement of the adversaries equidistant from the bench denotes objectivity and evenhandedness. The distinctive judicial attire is another effective symbol for supremacy, impartiality and abstraction, serving to enhance the judges’ legitimacy. Many societies use similar legal iconography, and, as a result, visual representations of concepts such as “law” or “court” are easily identifiable across cultural, geographical, and temporal boundaries.

The trial itself is another product of meticulous poetics. Imagine the effect of the following scene: “At exactly the appointed hour, the silence is broken by the crack of the marshal’s gavel, and he utters the famous incantation calling the room to order: ‘The honorable, the chief justice and associate justices, of the Supreme Court of the United States! Oyez, oyez, oyez!’”

Similar solemn entries of judges into courtrooms, preceded by the calling of the bailiff and the rising of the public to its feet, even if less majestic, take place in almost every courtroom. Throughout the legal domain, litigants, attorneys, witnesses, and judges participate in performances that are produced with firm conformance to legal poetics in order to transmit the message that here and now justice is being done.

The importance of accurate and skilled use of poetic instruments during the trial scene is obvious for those lawyers who practice law in courthouses. Expertise in litigation and in argument before a jury is among a lawyer’s most desired professional assets. Certain entrepreneurs offer consulting services promising optimal preparation for trial and jury litigation. Such services help

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91. Legal poetics also determines the positioning of the jury: “It is immediately apparent from the placement of the jury that the jury has a unique role in the judicial process because it occupies a unique place in the courtroom.” Rosenbloom, supra note 78, at 496.

92. PERRY, supra note 79, at 12.

93. A simple Internet search reveals several consulting companies that offer services helping litigators to hone their skills prior to trial. One company specializes in constructing a mock jury that allows the attorney to examine the efficiency of her arguments and the impact of her appearance. ExpertPages.com, The Mock Jury Graduates from Law School, http://expertpages.com/
lawyers to perfect their skills in using visual and linguistic tools.

It is worth noting at this point that the trial is merely the last stage in a long sequence of events that begins long before. Criminal cases begin when the police or other authority collects relevant data. The next stage is a decision by the authorities whether to press charges in court. In civil cases as well, a long process of fact gathering and negotiations precedes the trial (and often obviates it if settlement is reached). Most of the stages that pave the way to the trial are less visible than the trial, and the trial, itself, the "day in court," accordingly serves as a concrete and symbolic representation for the whole range of activities that led up to it. Its highlighted visual quality stands for that entire endeavor, and is also meant to seal it. The trial must have a quality of finality, of being the peak of the proceedings—the stage that finally terminates the conflict through the court's judgment. Visual poetics enhances the capacity of trials to achieve this aim.

VI. LINGUISTIC LEGAL POETICS

"What do you know about this business?" the King said to Alice.

"Nothing," said Alice.

"Nothing whatever?" persisted the King.

"Nothing whatever," said Alice.

"That's very important," the King said, turning to the jury. They were just beginning to write this down on their slates, when the White Rabbit interrupted: "Unimportant, your Majesty means, of course," he said in a respectful tone, but frowning and making faces at him as he spoke.

"Unimportant, of course, I meant," the King hastily said, and went on to himself in an undertone, "important—unimportant—"
unimportant—important——” as if he were trying which word sounded best.4

The practice of law makes things with words, and understanding how things are done with words (to borrow from J. L. Austin’s famous title)5 inevitably requires an encounter with poetics.

The verbal landscape of the law is shaped by formal and informal rules that determine which expressions are allowed and what shape they may take. Like the visual poetics of law, the verbal poetics embodied in legal procedure is highly instrumental. Through the rules of procedure, a certain event is isolated from the temporal stream and a defined group of facts “relevant” to that event is selected. The application of this process can be seen, for example, in the Federal Rules of Evidence, which state that relevant evidence is only “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”6 Evidence that does not satisfy these criteria will not be admissible in court.7 Procedural and evidentiary rules allow only certain speakers to refer to the selected facts and only in ways that are determined legally “relevant.”8 According to the Federal Rules of Evidence, “A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”9 Consequently, procedural boundaries shape the textual manifestations of each stage of the legal performance. The written versions of the complaint or statement of claim, the protocol of the proceedings, the summations by the parties, and the written judgments are all molded by the rules of legal procedure.

Together with the formal procedures, numerous informal linguistic practices contribute to the formulation and substance of

4. CARROLL, supra note 68, at 113 (emphasis in original).
5. J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (Harvard Univ. Press 1962).
7. FED. R. EVID. 402.
8. FED. R. EVID. 602 (requiring a testifying witness to have personal knowledge of the matter); FED. R. EVID. 702 (expert testimony).
the legal articulations. The main tools in this context are narrative and rhetoric. The legal employment of narrative deserves particular attention and will be discussed later, but at this point it is enough to note that the legally customized use of narrative is an essential component of legal poetics.

The same can be said of rhetoric, the art of using language for persuasion, whether orally or in writing. Classical theoreticians, who specified and explicated the rules for oral and written compositions, extensively dealt with the practice of rhetoric. One of the major classic works is Aristotle’s *Rhetoric*, a considerable part of which is dedicated to the distinctive nature of forensic oratory. Contemporary scholars carry on the ancient project, offering legal practitioners guidance in writing, punctuation, choice of words, and in-court oral expression.

The juxtaposition of legal practice with rhetoric is indeed called for. As Amsterdam and Bruner succinctly put it, effective “law-talk” is a language fit for selling, not just telling, and adequate rhetoric can promote a successful sale, just as flawed rhetoric can impede the bargain. Rhetorical devices are used, for instance, to


102. See ARISTOTLE, supra note 101, at 151-67. Aristotle recognizes some “inartificial” means of persuasion that are unique to legal rhetoric: the use of written law, the interrogation of witnesses, the interpretation of contracts, and oaths. See id. at 151-53. Numerous commentaries on Aristotle link rhetoric with poetics. See, e.g., ABRAHAM EDEL, ARISTOTLE AND HIS PHILOSOPHY (1982).

103. See, e.g., BRYAN A. GARNER, THE ELEMENTS OF LEGAL STYLE (2d ed. 2002). For a contemporary treatment of the practicalities of language usage in the legal world, see generally HELENE S. SHAP, MARILYN R. WALTER & ELIZABETH FAJANS, WRITING AND ANALYSIS IN THE LAW (4th ed. 2003). The writers assert that the “book is devoted…to taking control over the writing process away from chance and investing it in ourselves. [The writers] have tried to break the legal reasoning and writing process into manageable components to enable [the reader] to be conscious of that process and to be master of [his or her] thoughts and their expression.” Id. at v.

stabilize or destabilize facts or the degree to which we know them. The option of describing things with or without modifiers like “alleged,” “asserted,” or “presumed” is activated according to specific needs. The use of one grammatical form rather than another can also help to achieve the desired outcome. As Amsterdam and Bruner put it, “[i]n legal jargon, the option of describing things with or without procedural modifiers (like ‘alleged’ or ‘asserted’ or ‘presumed’ or ‘concerned’) adds a dimension to the ordinary narrative device of stabilizing or destabilizing facts.”

To minimize the dangers of being discredited, legal speakers often choose verbal combinations that are ambiguous or fuzzy. Such rhetorical choices endow the legal language with its familiar, perhaps notorious, quality sometimes referred to as “legalese.” It is characterized by extremely long sentences with many carefully phrased clauses, chosen to minimize the risk of unintended reinterpretation.

Selecting the optimal linguistic option, as part of the overall poetic formation, is surely not a simple task. Expertise in legal poetics is manifested in the counterbalancing of the visual and the textual, of form and of substance, and of contradicting images. First and foremost, it involves constant engagement with poetic choices. Poetics thus cannot be ignored. It has to be observed in order to create meaningful and effective legal representations. All but most trivial legal acts and statements are products of poetic

105. Id. at 184.
106. Id.
107. See id. at 296 (analyzing the use of passive forms in regard to African-American persons in the opinions of the U.S. Supreme Court).
108. Id. at 175.
110. For a review of the characteristics of the legal language, see generally PHILLIPS, supra note 63.
selection. Litigants, lawyers, judges, legislators, and legal interpreters constantly decide "which word[s] sound[ ] best," to use Lewis Carroll's characterization of the internal conflict troubling the King of Hearts.\textsuperscript{111}

Artists may engage in elaborate poetic systems that produce representations intentionally at odds with the conventional perceptions of reality. Since the law's legitimate province is the efficient transmission of norms, legal representations must adhere to certain restraints and avoid undue experimental innovation that artistic articulations can afford. Most legal representations are characterized by a degree of verisimilitude—that is, the quality of seeming to be true, or of closely matching the audience's expectations of reality—and that verisimilitude is a distinctive goal of legal poetics.

Poetic devices facilitate an effect that can be described as \textit{cohesive distinctiveness}. It creates representations that are idiosyncratic, as they apply to the resolution of a conflict between specific opposing sides, but at the same time function as an emblem representing the general experience of law. In this sense, each individual case dealt with by the legal system can be described as a \textit{synecdoche}, a part that exemplifies the full meaning of the whole.\textsuperscript{112} This effect bolsters the verisimilitude of the particular legal proceedings, making it easier for the losing party to accept the unsatisfactory (to him or her) outcome as the product of due process of law and, as such, tolerable.

It is legal poetics that facilitate the formation of such multifaceted representations. Poetics, both formal and informal, functions in several dimensions. It sets the legal images in temporal and spatial contexts, and, with the aid of visual and linguistic tools, it provides the legal representations with exclusive and distinctive character. As a result, the addressee of these representations identifies them immediately as bearing some distinctive law-related meaning. The main endeavor of the legal poetic tools is to create the distinctive quality that distinguishes the legal experience from the flow of other experiences and

\textsuperscript{111} CARROLL, supra note 68, at 113.

\textsuperscript{112} For a literary definition of \textit{synecdoche}, see CUDDON, supra note 100, at 945.
representations that abound in everyday life.

VII. "Sentence First – Verdict Afterwards": Failure in the Poetic Mechanism

"Let the jury consider their verdict," the King said, for about the twentieth time that day.

"No, no!" said the Queen, "Sentence first—verdict afterwards."

"Stuff and nonsense!" said Alice loudly. "The idea of having the sentence first!"  

The poetic notion supposes complementary activities taking place at two loci. At the first site are those who wish to create an expression that will convey a certain meaning and evoke a certain effect. At the second site is the audience whose members grasp the meaning and experience the intended effect. An expression becomes meaningful only if it is given over to consignees who are able to make sense of it.

Poetic failure occurs when an expression fails to convey its intended meaning. It is an expression that does not make sense or that makes sense in a way other than the one intended. Poetic failure can take place at either of the loci that define the poetic journey.

At the initiating site, the speaker or writer’s inappropriate selections may result in expressions that fail to evoke the desired effect. Horace offers an example of poetic failure of this kind:

Should a painter take upon him to join a horse’s neck on to a human head, and to add plumage of diverse colours, limbs from every kind of animal, so that what in its upper parts was a fair woman ended in a fouly hideous fish, should you, when admitted as friends to a private view, be able to contain your laughter?  

The poetic failure here results from a lack of coherence and consistency. The painting of a human head, horse’s neck, and the body of a fish is flawed not because it is "unrealistic" but because it pretends to link non-linkable parts. An expression may engage in depiction of all sorts of imaginary visions, but it must do so in a

113. CARROLL, supra note 68, at 117.
114. HORACE, supra note 73, at 49.
manner that "makes sense." Its parts should go together, according to some planned order. But the conventions regarding tolerable and intolerable inconsistencies may evidently shift, and Horace himself is aware of the changes over time in the meaning of words: "As the woods change their leaves each swiftly moving year, and the first fall, so the older generation of words die out, and, like young men, the newly-born are fresh and strong."\textsuperscript{115}

The meanings of words evolve, and our perceptions as to the meaningful ordering of parts may likewise evolve. However, it is precisely because of those changes in worldview as the centuries go by that the basic principles of poetics—such as the need to consider coherence and consistency when assembling expressions—provide the stable and continuous underpinning that preserves our ability to find meaning in verbal expressions and instill it.

At the second site, where the expressions encounter their addressees, a different sort of poetic failure may come about. Even a poetically flawless articulation might fail to convey its intended meaning because of the addressee's inability to receive it. Aristotle describes such a situation:

\begin{quote}
[B]eauty depends on magnitude and order. Hence a very small animal organism cannot be beautiful; for the view of it is confused, the object being seen in an almost imperceptible moment of time. Nor, again, can one of vast size be beautiful; for as the eye cannot take it all in at once, the unity and sense of the whole is lost for the spectator....[A] certain length is necessary, and a length which can be easily embraced by the memory.\textsuperscript{116}
\end{quote}

The addressees' capacity to grasp and comprehend the representation is as important as the skills of its creator. These two factors must work in tandem in order to produce expressions that convey intended meanings and effects.

To summarize, the generation of poetic structures, patterns and processes is an important mode of perceiving and making sense of things. Poetic failure can occur when poetics is unused, overused or misused, and when it is properly used but presented to an audience unable to appreciate it. The trial in Lewis Carroll's

\textsuperscript{115} ld. at 51.
\textsuperscript{116} ARISTOTLE, \textit{supra} note 28, at 31-33.
Alice’s Adventures in Wonderland is an illuminating (as well as hilarious) illustration of how such failure develops. As Alice’s attempts to find “an atom of meaning in it” fall short, her disorientation and consequent frustration escalate.\(^{117}\)

Let us note some of Alice’s confusions. The jurors busily write their own names on their slates even before the trial begins.\(^{118}\) They likewise carefully record Alice’s indignant proclamation, “Stupid things!”\(^{119}\) The senseless, erratic accumulation of surplus data on the jury slates results from their inability to differentiate between what is and is not worth recording, and, as Alice sensibly predicts, it can produce only “muddle.”\(^{120}\) That “muddle” could be avoided only by the use of information filters that carefully sift through the information and control the details and facts admitted into the judicial arena.

The proceedings continue, again manifesting a total failure to follow any structural logic. The King orders the jury to consider the verdict right after the accusation is read.\(^{121}\) Considering their totally deficient poetic cognizance, the jury is in no position to object, but the White Rabbit’s partial expertise in the normal course of such proceedings apparently restores sense and order, though only briefly.\(^{122}\) Witnesses are summoned, but their testimonies are bizarrely collected and interpreted.\(^{123}\) Alice herself is summoned only to declare that she knows “nothing whatever” and to be told that this is very important.\(^{124}\) Things go more and more awry until the peak moment, when the Queen’s declaration, “Sentence first — verdict afterwards,” enrages Alice to such an extent that she is torn away from the trial and carried back to the “real” world, where she finds herself at the bank of the river with her head in her sister’s lap.\(^{125}\)

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117. See Carroll, supra note 68, at 115.
118. Id. at 105.
119. Id.
120. Id.
121. Id. at 106.
122. See id.
123. See Carroll, supra note 68, at 106-11.
124. Id. at 111-13.
125. Id. at 117.
The disorientation that Alice experiences is a result of multilevel poetic failure. Some components of formal and informal poetics were activated in the court, but instead of generating potent representations of justice being done, they spread a sense of confusion, disorientation and dismay.

Each step in a trial must proceed in due course, and the gradual, structured build-up of phase upon preceding phase validates the closure—the final judgment. The successful conclusion depends on the cooperation of several participants acting in accordance with a preexisting pattern. The account of the trial in Alice’s Adventures in Wonderland reports on the failure of all participants to follow such patterns. The executer behind the proceeding (whether it is the King, the White Rabbit, the Queen, or some unplanned collaboration among any or all of them) is unable to maintain the balance of temporal dimensions that any legal proceeding requires. Consequently, the course of the trial is muddled, frenzied and, of course, amusing. Alice is the only one present who can understand that something is wrong. The rest of the participants do not sense the inadequacy or the absurdity of the proceedings; their poetic awareness is too poor to allow them to do so. The poetic failure manifested in the trial is complete; the failure to act according to poetic patterns intertwines with the incapacity of the judge, the jury, the witnesses and all the other characters to properly “read” poetic messages. Under such circumstances, a failure to create meaning is inevitable.

VIII. ANALOG POETICS IN CYBERSPACE

Cyberspace. A consensual hallucination experienced daily by billions of legitimate operators, in every nation, by children being taught mathematical concepts....A graphic representation of data abstracted from the banks of every computer in the human system. Unthinkable complexity. Lines of light ranged in the nonspace of the mind, clusters and constellations of data. Like city lights receding.\textsuperscript{126}

The legal process advances linearly, utilizing visual and verbal language that assiduously systematizes perceptions of time and place. Figuratively speaking, the orientation of the legal process as

\textsuperscript{126} William Gibson, Neuromancer 51 (Berkley Publ’g Group 1984).
we have hitherto known it is analog: Each trial resembles the display on the face of an analog clock, which offers a concurrent representation of what is perceived to be the present time and of the location of that present time in the context of a wide scale that delineates past and future time. Each moment creates a representation that is distinct and finite but still linked to a broader surrounding context. The display reflects the continuity of time, or of the fuller temporal context, together with the exceptionality of the passing moment. It is a representation that indicates cohesive distinctiveness, which is the distinguishing effect of legal representations. The digital condition calls into question the attainment of this effect through analog poetic mechanisms.

The encounter between legal poetics and digital times can be illustrated with reference to the two dimensions on which any poetic undertaking is charted: the spatial and the temporal. At the outset, it should be stressed that the revolutionary quality of digital technology lies not in its ability to draw us nearer to distant times and places but, on the contrary, in its effect on our existing conceptions of time and space. Joshua Feinstein thoughtfully expresses this point, in a critique included in a compilation of writings\textsuperscript{127} on the current relevance of Walter Benjamin’s seminal essay \textit{The Work of Art in the Age of Mechanical Reproduction}.\textsuperscript{128} As the editors of that compilation point out, Benjamin’s essay, which has become a central point of reference in cultural studies, is forceful enough “to complexify our thinking about culture even today—despite our ‘full immersion’ in the data streams of digital age.”\textsuperscript{129} Feinstein observes:

New media present themselves differently than the forms of communication discussed by Benjamin. Those older forms provided a means for accessing a remote time or place: radio, for example, made it possible to follow a sporting event or political rally without being physically present. Epic film extravaganzas lured viewers with the promise of re-creating history, or making the past breathe again. By contrast, the claims made by today’s technologies of digital communications

\textsuperscript{127} Feinstein, \textit{supra} note 20, at 274–80.

\textsuperscript{128} Benjamin, \textit{supra} note 20.

\textsuperscript{129} See TIMOTHY LENOIR & HANS ULRICH GUMBRECHT, \textit{Preface} to \textit{MAPPING BENJAMIN: THE WORK OF ART IN THE DIGITAL AGE}, \textit{supra} note 20, at xvi.
are far bolder: cyberspace, interactive television, and virtual reality do not merely provide access to a distant time or place, but are themselves a form of authentic experience. An electronic universe displaces the prosaic world of direct sensation. Digital technology allows the imagination and spirit to run riot.  

The “running riot” of imagination in cyberspace is embodied in the new kind of all-encompassing interactivity that digital technology enables and promotes. It is the digital interactivity that creates the new form of “authentic experience” that complements the exposure to digital content. It should be noted here, and I will expand on it later, that it is not interactivity as such that energizes the change entailed by digital technology. Even ancient representations involved a certain amount of action that may be described as “interactivity.” Any acceptance, acknowledgment or attentiveness on the part of the addressee of an articulation has an element of interactivity, as does the act of interpreting a representation. The innovation that the digital condition brings about is neither virtualness nor interactivity as such; it is the new status of both representations and addressees.

Two supplementary elements make up this new status: the sheer volume of the digital content, and the ubiquitous ability to effortlessly alter and modify it. Spectators, viewers, and listeners, all those who were simply “audiences,” are metamorphosed into “users” when they enter the digital domain. To “use” the cyberspace is at the same time to actively widen and alter it. As a result, the reservoir of digital data is always volatile.  

If in the past an image was a relatively stable expression, the digital version of the same image is raw material for modifications,
adaptations and conversions that may come about either randomly or intentionally. Very few images attain the stage of stability needed for them to evolve into valid representations. As a result, it becomes difficult today to identify a collective stock of representations capable of serving as a uniform point of departure and common reference. The existence in the past of a stable set of such representations permitted interactivity and public reaction to proceed in a sort of analog manner, adding additional layers to the discourse without obscuring its solid underpinnings. Digital interactivity, in contrast, by its very nature entails a blurring of the uniform points of departure or of the collective common denominator. In what follows, I expand on this idea, directing particular attention to how the influences of the digital condition have changed our perceptions of time and space in a manner that affects the taken-for-granted ability to draw coherent legal distinctions.

A. “Any Good Thing Must Have a Grip in Time”¹³³

Poetics and temporality are reciprocally interrelated. Christian Metz explained how this intricate association operates in regard to the narrative, which is one of the main poetic instruments:

[the narrative is a temporal sequence. A doubly temporal sequence[...there is the time of the thing told and the time of the telling....[T]hat is what distinguishes narrative from simple description (which creates space in time), as well as from the image (which creates one space in another space).]¹³⁴

The synchronization of the temporal levels is a sophisticated task. Aristotle wrote about the ideal length and rhythm of what might be called the “time of telling:” “But at the present day it is absurdly laid down that the narrative should be rapid. And yet, as the man said to the baker when he asked whether he was to knead bread hard or soft, ‘What! is it impossible to knead it well?’”¹³⁵

In the legal context, a “well kneaded” expression is one that “will make the facts clear, or create the belief that they have

¹³⁴ Christain Metz, Notes Toward a Phenomenology of the Narrative, in THE NARRATIVE READER 86, 87 (Martin McQuillan ed., 2000).
¹³⁵ ARISTOTLE, supra note 101, at 445.
happened or have done injury or wrong, or that they are as important as you wish to make them.”136 The achievement of such adequate “kneading” requires an optimal synchronization along the temporal dimension. Indeed, the adversary trial is centered upon careful synchronization between the “time of the thing told” and the “time of the telling.”

The trial, like narrative, is an attempt to translate the elapsing, ever-widening circles of time into linear sequences. More precisely, however, what is involved here is not so much a translation as the creation of a specific representation of the concept of time, suited to the purposes of the trial. The judicial process is a means for isolating segments of the temporal gamut and representing them as a linear continuum that can be comprehended and assessed in terms that lend themselves to being adjudicated, such as causation, volition, and liability.

The trial remains commonly perceived as a continuous affair that builds to a climax. Modern proceedings retain the imprints of the ancient day-in-court, which is, in essence, to use Metz’s term, “a system of temporal transformations.”137 It juxtaposes representations of past events (this happened) with a present occurrence (the court is now in session) and representations of future outcomes (a resolution will be reached, and accordingly, one litigant will compensate the other one). Such intricate juxtaposition must be deliberate and goal-oriented in order to work. It typically advances in linear course and consumes a certain amount of time until it culminates with satisfying closure.

Each trial is a “time of telling.” It must “take its time,” in proportion to its scope and range.138 Simultaneously, the trial is also the “time of the thing told.” The “time of the thing told,” subject to rules governing limitation and relevance, is transformed into carefully edited consecutive segments of time. The precise

136. Id.
137. Metz, supra note 134, at 87.
138. Nevertheless, legal proceedings are inherently a time-limited construct. See, e.g., Fed. R. Civ. P. 4(m) (stating “If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court...shall dismiss the action without prejudice”). In poetic terms, this limitation strengthens the links between legal representations and perceptions of justice, and, consequently, the verisimilitude of the legal representation.
combination of temporal levels is one of the elements that provide adjudications cogency, coherence and authoritative finality.

The ultimate and conclusive quality of the adjudications is embedded in another aspect that used to characterize legal representation: the trial was strictly a one-time production. It belonged to a genre of performative representations. Each trial was an idiosyncratic performance, and experiencing the actual time of telling therefore required physical presence in the courthouse. One could read or hear reports relating to the trial or examine the various texts produced during and after the proceedings (such as statements of claim and appeal, protocol, and the judgment), but the full weight, substance, and meaning of the legal performance could be experienced only through actual attendance in the courthouse. This one-time quality provided each trial with intricate duality; it was an actual specific event and, simultaneously, an emblematic, iconic representation.

This legal temporality did not exist in a vacuum; it was part and parcel of the societal perception of temporality. The digital condition, however, has brought about a significant cognitive shift in the way we perceive representations of time.

Computers, when linked to a network, enable access to most representational systems, and offer users the opportunity to retrieve, consume, store, distribute, and manipulate any audiovisual content. This practically boundless potential of creating new images by upsetting any given representation did not exist in the analog age. Peter Lunenfeld perceptively notes:

The aesthetic effect of the movement toward the digitization of everything from telephony to photography to text delivery systems to the cinema goes far beyond a taste for either the curved or the crisp. It is the capacity of the electronic computer to encode a vast variety of information digitally that has given it such a central place within contemporary culture. As all the manner of representational systems are recast as digital information, then all can be stored, accessed, and controlled by the same equipment. This is the true basis of the “multi-media” revolution.\footnote{139. Peter Lunenfeld, Introduction to The Digital Dialectic: New Essays on New Media, supra note 25, at xvi.}
This array of functions is available at all times and for all participants, at least with regard to parts of the digital content. The digital technology makes possible the simultaneous production and transmission of information, along with all sorts of active responses to it. To a large extent the distinctions between senders and receivers, authors and readers, and creators and audiences—distinctions that assumed temporal separations—have become obsolete. As never before, this digital technology enables an individual to engage in the roles of author, editor, distributor, and interpreter simultaneously.

To put it in temporal terms, digital technology enables addressees to influence both the “time of telling” and the “time of the thing being told.” More than that, it enables them to do so with unprecedented speed. Procedures that took long periods of time to be accomplished are now completed within seconds. In his essay Cybernetics and Society, Paul Virilio associates this “temporal compression” with Shakespeare’s haunting line in Hamlet: “The time is out of joint.”140 Time is “out of joint” for Hamlet because of the indigestible muddles of temporal sequences, of images of past and present.141 The distorted days and nights of his murdered father are revealed to Hamlet by the ghost.142 Sights of his uncle’s criminal actions and his mother’s unfaithfulness merge with scenes of the present and mundane demands of daily existence.143 Since Hamlet is unable to contain the temporal havoc, his only hope to deal with the time that went out of joint is “to set it right.”144 The impossibility of setting the time right within the ever-escalating simulacra that encompasses him is one of Hamlet’s main problems, and it is perhaps the core of contemporary bewilderment. As Virilio puts it:

[the] “message” is not exactly the MEDIUM, as Marshall McLuhan claimed, but above all the ultimate SPEED of its propagation. A speed that has reached its limits in the realms of

141. Id.
142. See Shakespeare, supra note 140, at act 1, sc. 5.
143. See id.
144. Virilio, supra note 140, at 19 (quoting Shakespeare, supra note 140, at act 1, sc. 5).
hearing, vision, and interaction reduces both the extension of the space of the world and the duration of any serious reflection in favor of a genuine conditioned reflex.\textsuperscript{145}

The extreme temporal swiftness that distinguishes the digital condition has without doubt reached the legal domain. Legal materials are transformed into digital bytes before they have the time to reach closure and be loaded with the meaning they are intended to represent. They do achieve the status of “legal representations” because they remain images, merging with all the other images that constitute the digital storm. Within this storm each image can be devoured by another one or effortlessly reproduced and repeated anytime and anyplace, regardless of its original context.

The famous Rodney King police brutality affair in Los Angeles some years back offers a thought-provoking example of the concerns raised by this new representational environment. In the first trial, a straightforward visual recording—George Holliday’s videotape showing Los Angeles police officers beating King—failed to be regarded as trustworthy evidence.\textsuperscript{146} The defense lawyers’ in-court digital fragmentation, reordering, and reconstruction of the images in the videotape convinced the jurors that King’s movements “caused” the officers to strike King.\textsuperscript{147}

In an essay analyzing the shifts in visual perceptions as demonstrated in the Rodney King trial, Hamid Naficy describes how fragmentation of images works: “the repeated screening of

\textsuperscript{145} Id. Jeremy Rifkin notes the impact of digital time acceleration:
The computer is a form of communication like script, print, and the telephone, but it is also a time tool, like the clock on the wall...as a timepiece, the computer...establishes a new set of accelerated temporal demands on human behavior....The ability to intuit the proper sequences of behavior, knowing how long things should take...becomes difficult and strained.


\textsuperscript{147} See id. The outcome was different in the ensuing federal proceeding, where the jury found two of the police officers guilty. United States v. Koon, 34 F.3d 1416, 1425 (9th Cir. 1994). For an overview of the King trials, see generally Lawrence Vogelman, The Big Black Man Syndrome: The Rodney King Trial and the Use of Racial Stereotypes in the Courtroom, 20 FORDHAM URB. L.J. 571 (1993).
dissected images turns them into abstractions, into images without referent, into simulacrum. The spatial and temporal integrity that informed the images is vitiated.”

Surely, the defense lawyers in the King affair skillfully employed narrative strategy, but they succeeded because they deployed an additional tool—intervening with the temporal logic of the recorded event. Such intervention becomes more attainable and accessible each passing day, as editing technologies that manipulate images and sounds, space and time capture our logic as well as our imagination.

Dislocation of conventional temporal boundaries is no longer the prerogative of artistic endeavors that take advantage of idiosyncratic poetic license. As Steven G. Jones posited with respect to the digital condition, “[t]he point is not that art imitates life, life imitates art, and so on, but that life itself can be edited.” When life itself can be edited in “real time,” old mimetic and poetic notions lose their logic as well as their applicability. When the normative processes of perception and cognition can be easily challenged or undermined by new forms of digital representations, how can legal rulings rely upon such representations? Can visual imitations of reality sustain their validity and authority? Such questions are now emerging in the legal sphere.

B. From Walls to Screens

Program a map to display frequency of data exchange, every thousand megabytes a single pixel on a very large screen.

“The true method of making things present is to represent them in our space,” writes Walter Benjamin in *The Arcades Project.*

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150. Steve Jones, *Hyper-Punk: Cyberpunk and Information Technology,* J. POPULAR CULTURE, Fall 1994, at 81, 86.

151. GIBSON, *supra* note 126, at 43.

152. WALTER BENJAMIN, *The Arcades Project* 206 (Howard Eiland & Kevin
One main medium for making law present is representing it through legal proceedings that take place in pre-designated locations. Assigning a specific physical space for its courts has always been prelude to the activation of any legal system. In one of the oldest generative legal narratives, the *Orestia*, Athena assents to resolve the conflict between Orestes and the Furies and founds the first court in the classical world, thus causing the rendering of justice to become a human responsibility. From that moment, the activation of justice requires an easily identifiable physical setting within the human environment, in contrast to an Olympian or celestial setting that cannot be located by terrestrial geographic coordinates. The first court is situated at an identifiable geographic spot, the Areopagus, Ares’ rocky hill. From then on, justice is formally represented and, thus, presented in space.

Legal proceedings, whether carried out at the city gate, as in the distant past, or within the walls of domineering courthouses, as is now conventional, have been conducted in predestined geographical enclaves. Those enclaves are isolated and elevated, but generate within their confined borders representations that depict, with considerable verisimilitude, events that occurred in the vast spatial and temporal landscapes that envelop them.

The visual design of spaces designated for legal proceedings has always been an inseparable part of society’s general visual culture. The external characteristics and the unique internal settings of courthouses are an integral element of a comprehensive architectural visual system. Its main products are buildings located in specific spaces, surrounded by carefully organized landscapes. These buildings constitute a solid cultural image that conveys a


153. See AESCHYLUS, ORESTEIA 100 (Christopher Collard trans., Oxford Univ. Press 2003).

154. Id. Stage directions elaborate on the specific look of the space, “Athena re-enters from the side, accompanied by a herald and trumpeter and followed by the citizens chosen to act as jurors; seats for the jurors, and two voting urns, are brought on.” Id.

155. For elaboration on the notion of legal enclaves see generally, e.g., Shulamit Almog & Amnon Reichman, *Casablanca: Judgment and Dynamic Enclaves in Law and Cinema*, 42 OSGOODE HALL L.J 201 (2004) (recognizing the enclitic nature of law allows us a better grasp of the ethical dimensions of legal practices).
clear message. Lev Manovich typified such architecture as “visual atomism,” which is the message sent through simple and basic visual elements having pre-determined and anticipated impacts.156

The digital condition profoundly changes the landscape that surrounds us. In contrast to physical space, which is formed and shaped through the organizing of atoms, digital “space” is formed and shaped through the organizing of data.157

The shift from physical architecture situated in tangible physical spaces to a new architecture formed through images has already drawn the attention of many writers. An important milestone in this respect is Frederic Jameson’s analysis of the Westin Bonaventura Hotel in Los Angeles.158 Jameson’s prescient study puts together postmodern aesthetics with the shift in visual culture and contends that the hotel’s eclectic and dialectic visual language creates a “mutation in space.”159 The Bonaventura succeeds in “transcending the capacities of the individual human body to locate itself, to organize its immediate surroundings perceptually, and cognitively to map its position in a mappable external world.”160

Jameson’s analysis, dating from the early eighties, referred to the architectural language of the hotel, which produced, despite the new images and symbols it created, a distinct, permanent and enduring representation. It is a visual language that requires a specific physical setting as a primary anchor, and still basically depends upon conventional perception of space and upon stability and consistency. In fact, it was within the traditional architectural paradigms that the Bonaventura project raised popular excitement at the time of its construction; such paradigms were the yardsticks by which the hotel’s innovative visual rhetoric was measured. Today, when the old yardsticks become barely relevant to the measure of digital data or interface architecture, the condition described by Jameson turns out to be blatant—the effacement, even

157. See id.
158 See JAMESON, supra note 34, at 44.
159. Id.
160. Id.
erasure, of the borders that defined segments and sequences of time and space, and the consequent loss of ability to adequately map ourselves temporally and spatially.\textsuperscript{161}

Old poetic languages, like the language of linear physical architecture, lose their power to produce meaningful representations, though the urge to make sense of the digital environment through conventional spatial logic lingers on. Think about the screens of all sizes that have proliferated in public and private spaces.\textsuperscript{162} Vast urban spaces are now characterized by a congestion of continuously changing digital images. New York’s Times Square, Tokyo’s commercial quarter and many other urban sites bring to mind William Gibson’s fantastic depiction of Cyberspace’s “Boston Atlanta Metropolitan Axis”\textsuperscript{163} or the futuristic look of \textit{Blade Runner}.\textsuperscript{164} Computer, television and cellular phone screens demand ever-growing shares of attention and concentration at home and at work. The actual physical location where we happen to be becomes marginal. Access to digital data sources and contact with screens is what counts. It is only to be expected that the winds of change will reach the gates of law’s empire, and affect its main creation—the legal process.

The primary question that the digital condition compels us to

\textsuperscript{161} See id. In Jameson’s words: “[T]he incapacity of our minds, at least at present, to map the great global multinational and decentered communicational network in which we find ourselves caught as individual subjects.” \textit{Id.}

\textsuperscript{162} SCOTT BUKATMAN, TERMINAL IDENTITY: THE VIRTUAL SUBJECT IN POSTMODERN SCIENCE FICTION 132 (1993). As Bukatman puts it, “The new monument is no longer the substantial spatiality of the building, but the depthless surface of the screen. This is a transformation literalized in \textit{Blade Runner} by the proliferation of walls which are screens, sites of projection now rather than inhabitation.” \textit{Id.} (emphasis in original).

\textsuperscript{163} See GIBSON, supra note 126, at 43. Gibson provides the following description:

Program a map to display frequency of data exchange, every thousand megabytes a single pixel on a very large screen. Manhattan and Atlanta burn solid white. Then they start to pulse, the rate of traffic threatening to overload your simulation. Your map is about to go nova. Cool it down. Up your scale. Each pixel a million megabytes. At a hundred million megabytes per second, you begin to make out certain blocks in midtown Manhattan, outlines of hundred-year-old industrial parks ringing the old core of Atlanta....

\textit{Id.}

\textsuperscript{164} BLADE RUNNER (Warner Bros. Pictures 1982).
face for the first time in history is this: Do we really need law’s spatial, physical performances? Does the designated law-making space maintain its relevance? Does it offer indispensable benefits?

In a recent study, Aaron Ben-Ze’ev describes the profound influence of cyberspace and the Internet upon the extent and nature of romantic and sexual relationships.\(^{165}\) Millions across the globe are involved in digital romantic affairs, engaging in cyber flirting, cyber love, and cyber sex.\(^{166}\) Exchanging digital communications manages to replace what, for many, used to be the most intimate of human encounters, which until now have required live contact between participants and physical space able to accommodate such contacts.\(^{167}\) If that is the case, why can’t the new digital forms replace the need for direct physical encounters between the parties, witnesses, judges and other participants in the legal process? If romantic interactions can take place through digital correspondence, why cannot legal communications go entirely digital?

Such questions drift from the realm of theoretical speculation to actuality as technological developments call for addressing them in “real” legal life. In particular, two such developments—wireless courts\(^{168}\) and virtual courts\(^{169}\)—have the potential to radically change the old and familiar patterns of visual and verbal legal poetics.

A “wireless court” is a courthouse equipped with special technology that allows every person in the premises to be connected to the Internet at all time, at every location within the reticulate space.\(^{170}\) This technology, also known as “Wi-Fi” or

\(^{165}\) See generally Aaron Ben-Ze’Ev, Love Online: Emotions on The Internet (2004).

\(^{166}\) Matthew Green, Comment, Sex on the Internet: A Legal Click or an Illicit Trick?, 38 CAL. W. L. REV. 527, 533 (2002).

\(^{167}\) See Ben-Ze’Ev, supra note 165, at 4-7.


\(^{170}\) See Kornowski, supra note 168.
"WLAN," is based on radio transmitters that are installed at various points, creating a web of radio waves that covers the entire space.\(^{171}\) Anyone equipped with an appropriate wireless receiver can become connected immediately upon entering the web-enabled area, without the need for wired connection.\(^{172}\) The technology is already in use on many campuses and in other public spaces such as coffee shops, airport terminals, and central train and bus stations.\(^{173}\) Recently, the WLAN technology has been installed in several courthouses, where it is being utilized in a variety of ways.\(^{174}\) Some courthouses offer limited WLAN-based Internet services, while others offer a full wireless environment for all users inside the courthouse, including lawyers, jurors, and the administrative staff.\(^{175}\) One example of a fully wireless court is the West Palm Beach courthouse in Florida.\(^{176}\)

In terms of spatial perception, a wireless court is a place appropriated by cyberspace. Consequently, the distinct characteristics that render legal spaces discernable as such fade away or at least become distorted. The wireless area merges into cyberspace, subordinating the participants’ attentiveness and communicative competence to the regime that rules supreme in the web.

A promoter of the wireless court in West Palm Beach explains that the main problem the project aimed to solve was “the disconnection that lawyers go through when in trial.”\(^{177}\) Using the new technology would allow lawyers to, among other things, “perform research right in the courtroom during trial.”\(^{178}\) But

\(^{171}\) See id.


\(^{173}\) See Kornowski, supra note 168.

\(^{174}\) See id.

\(^{175}\) See id.

\(^{176}\) Id.


\(^{178}\) Id.
controlled "disconnection" from the outside world is precisely what the dedicated area of the courthouse was intended to achieve in the first place. Such "disconnection," accomplished by poetic tools, among others, guaranteed the focused, alert attentiveness that the legal process entailed and elevated its cohesive distinctiveness.\textsuperscript{179} Such an environment is hardly attainable in a courtroom that is in actual fact a portal into cyberspace. Technology that allows boundless data to stream into a trial while it is in progress clashes with, and may even contradict, the poetic principle whose main aims are to reduce and restrain the relevant data that may be taken into account in the trial and to present those data in a bounded and organized form.

Despite their use of innovative technology, wireless courts maintain some of the basics of legal poetics, since corporeal presence in a certain place at a certain time remains necessary. The proceedings go forward in physical courtrooms, where judges encounter adversary litigants and carry out a process that continues to be performed, in a fundamental sense, in accord with recognizable patterns. But the next development—the virtual court—goes much further. At its extreme, it renders both corporeal presence and physical spaces superfluous. All it requires is access to screens and to digital communication channels.

"Virtual courtroom" is no longer a term that engenders wild speculation. It now denotes real options that are being experimented with and experienced.\textsuperscript{180} The use of certain digital technologies to present some kinds of evidence or to facilitate long-distance testimony has become common in legal proceedings today.\textsuperscript{181} But the term "virtual courthouse" refers to a much

\textsuperscript{179} Interestingly enough, one of the main problems that impeded communication via radio transmission within courthouses was the fact that the "bunker-like" architecture of their buildings created a "dead-zone" for radio communication. Kornowski, supra note 168. As Kornowski explains, "most courthouses of modern vintage have been built of concrete and steel, like bunkers, for security purposes, and they manage effectively to block out a high proportion of radio frequencies that carry wireless voice and data from remote locations." \textit{Id.}

\textsuperscript{180} See generally Lederer, supra note 169.

\textsuperscript{181} For a comprehensive review of the use of technological measures in courtrooms, see Susan Nauss Exon, \textit{The Internet Meets Obi-Wan Kenobi in the Court of Next Resort}, 8 B.U. J. SCI. & TECH. L. 1, 5-9 (2002).
broader concept of the digital project. The idea of a virtual courthouse heavily emphasizes the centrality of information management in legal practice and the new technological possibilities in this regard. Virtual courtrooms are replete with screens. Judges, jurors, and audience watch video depositions and video documentation, evidentiary presentations, and computerized graphics. In an article examining the present and future of “technology augmented litigation,” Fredric I. Lederer explains:

The courtroom is a place of adjudication, but it is also an information hub. Outside information is assembled, sorted and brought into the courtroom for presentation. Once presented, various theories of interpretation are argued to the fact finder who then analyzes the data according to prescribed rules...and determines a verdict and result. That result...is then transmitted throughout the legal system as necessary. The courtroom is thus the centre of a complex system of information exchange and management. 182

In this spirit, one can readily envisage new software, like the thriving BPM (Business Process Management) 183 that promises to automate the entire process of judicial decision making to

182. Lederer, supra note 169, at 803 (quoting Frederick I. Lederer, The Courtroom as a Stop on the Information Superhighway, REFORM, Spring 1997, at 4, 4) (emphasis added). See also M. ETHAN KATSH, LAW IN A DIGITAL WORLD 7 (1995) (“[O]ne way of understanding the legal process is to view information as being at its core and to see much of the work of participants as involving communication. In this process, information is always moving—from client to lawyer, from lawyer to jury, from judge to the public, from the public to the government, and so on.”).

183. BPM is software that automates, monitors, controls, and optimizes processes in organizations, thus rendering some of the direct human interactions or decision-making redundant. See BPM.com, About Us, http://www.bpm.com/AboutUs.asp (lasted visited Mar. 29, 2006) (on file with the Rutgers Computer and Technology Law Journal). As described in the BMP website:

Never before have business and information technology converged to such a far-reaching extent. Properly implemented, BPM technology becomes part of the fabric of the corporation, the beating electronic heart of its operations. We believe that over the next few years BPM will be recognized as a genuine source of sustainable competitive advantage for almost every medium to large enterprise.

Id. There is no reason to assume that the legal “enterprise” will escape the range of intentions expressed here. It remains to be seen whether the new kind of mediation embedded in the BPM will live in concert with both formal and informal legal poetics.
“control[]...how people and technology interact to get things done,” to quote the succinct phrasing of one BMP entrepreneur. 184

However, from a poetic perspective, the emerging prevalence of the information-management-oriented approach over the adjudication-oriented approach means that poetic tools that had been essential to the adequate management of the proceeding until now turn out to be outmoded. They tend to be replaced by other tools, some of them now readily available, that pertain to digital data and process management. 185

As a practical matter, the new technology has rendered the conditions previously needed for the conduct of the proceeding nearly obsolete. The transfer of visual pictures and text files allows all participants to be present and view the proceedings through their computers. Trials can be managed, presented, and decided with the litigants, jury, and witnesses located in different points around the globe. 186

Furthermore, a growing portion of the material presented to the court in the course of the proceedings is digital in nature, requiring digital means for its presentation and processing. 187 Lederer concludes:

[A] virtual court based upon exchange of text and audio is now possible....The virtual courtroom would be a courtroom in which participants, all of whom might be located physically elsewhere, would appear together electronically with each one

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185. See Frederic I. Lederer, Courtroom 21: A Model Courtroom of the 21st Century, COURT TECHNOLOGY BULLETIN (NAT'L CTR. FOR STATE COURTS), Jan.-Feb. 1994, at http://www.ncsolnline.org/D_Tech/archive/bulletin/v06n01.htm (on file with the Rutgers Computer and Technology Law Journal). Indeed, the Courthouse 21 project, a combined project initiated by academic institutes and governmental bodies, makes use of automatic video recordings of proceedings, real-time or recorded televised evidence displays, LEXIS legal research at the bench and counsel tables, and built-in video deposition playback facilities, as well as other state-of-the-art technologies. See id. As part of the implementation of the project, the United States Court of Appeals for the Armed Forces heard a case in one of the project's courtrooms, with two of the court's judges appearing via videoconference. Lederer, supra note 169, at 802.

186. See Lederer, supra note 169, at 837.

187. See id. at 836.
perceiving the others, and the courtroom as if they were all in the same physical location.\textsuperscript{188}

Soon enough, holographic images could replace the two-dimensional images that are available through the computer screen, in the manner of the fictional “holodeck” on the Starship Enterprise of StarTrek.\textsuperscript{189}

Will the entire architectural legal façade as we have known it for ages eventually collapse into digital bytes that will also replace the actual legal process? Will such a shift entail a full or partial poetic failure? Lederer appropriately phrases the question: “Virtual courtrooms and virtual trials threaten that sense of place and solemnity. What might virtual courtroom justice \textit{mean} to people?”\textsuperscript{190}

This great uncertainty with respect to the construction of meaning is to some extent a poetic issue. Will the virtual trials manage to produce those potent representations that until now served as valid presentations of justice? Will the rhetorical devices that took centuries to perfect be of any use in a digital environment?

At this point, with no apparent answers in sight, all that can be said for certain is that the digital storm is producing currents of change with respect to the production and effectiveness of conventional legal representations. Those currents are intensely felt, as is the need for new poetic notions that will address the changes.

\textbf{IX. THE ANALOG-DIGITAL RIFT AS DISTORTION OF LEGAL POETICS}

TURN BACK, TURN BACK, FOR NEVER SHALL

\textsuperscript{188} Id. at 836-37.

\textsuperscript{189} \textit{See} JANET H. MURRAY, \textsc{Hamlet on the Holodeck: The Future of Narrative in Cyberspace} 15 (1997). For a futuristic description of a cybercourt that will utilize holographic images, see Exon, \textit{supra} note 181, at 10-11. Innovative as it may seem, the use of holographic images for presentation of images from the court scene can be perceived as an attempt to reproduce analogous poetic tools with digital means. Three-dimensional pictures offer the opportunity to experience the traditional “day in court,” even without the actual existence of the physical courtroom.

\textsuperscript{190} Lederer, \textit{supra} note 169, at 841 (emphasis added).
BEGINNING SEEK THE END OF ALL.
THE CONSEQUENCE OF YOUR INTRUSION
CAN ONLY BE EXTREME CONFUSION. 191

A. Legalizing Cyberspace

Two kinds of incompatibility between established legal poetics and digital reality can already be discerned. The first kind of incompatibility occurs when attempts are made to apply ingrained legal poetics onto cyberspace. The second kind of incompatibility becomes apparent when digital possibilities and orientations proliferate into what used to be the autonomous domain of legal poetics. To put it differently, difficulties are experienced along two tracks, one leading toward legal appropriation of the digital empire and the other advancing toward transforming the law into another fully digital province within cyberspace. In both cases a similar difficulty emerges—the inaptness of analog poetics to produce representations that will function effectively in a digital environment. The result is a failure in the poetic mechanism at both previously mentioned sites—the production of meaningful representations and the reception of certain representations as meaningful.

Let me begin by looking at the kind of poetic disruptions that occur in the course of attempting to subsume cyberspace within the existing legal domain. As discussed earlier, legal poetics heavily depends upon linear, analog-like perceptions of time and space. "Old-time" intellectual property laws inevitably stemmed from the ability to perceive the differentiation among singular temporal and spatial zones and among the different roles played by identifiable persons. There was the time of authoring, and there were people who were easily identifiable as authors. The time of exposure to the expressions that were authored inescapably came after the creation process had reached its irrevocable and permanent conclusion. The spaces in which the completed expressions were disclosed and consumed were mostly identifiable and controllable. All of this facilitated legal control over the use of the intellectual

creation. Legal mechanisms, easily enough, could process and understand such matters as the identity of the creator, the time of the creation, and the boundaries of time and place within which the creator’s right over the creation should be acknowledged. This is hardly valid any longer, in an environment in which sounds, images and texts are being created, copied and modified. This practically endless content is subject to editing technologies that allow anyone, at any time, to manipulate words and sounds, space and time. The breakdown of doctrines that are conceptually based on the absence of such editing mechanisms is unpreventable. The practical difficulties and robust discourse regarding future developments in this field are beyond the scope of this work, but it is interesting to note that in order to prevail over these conceptual difficulties, the traditional poetic mechanism—which contributed to the conceptual confusion in the first place—is not being abandoned but is being clung to even more vigorously. An illuminating example is the firm adherence to the poetic metaphors of space in order to conceptualize the digital environment.

Metaphors are a powerful poetic tool. In the realm of literature they hold an important place as one of the most common and effective forms of representation. However, metaphors have a special role in the poetics of law. More than a mere rhetorical instrument used by expert advocates to pass their message to their addressees, judges or jurors, metaphors shape our command of abstract notions and ideas and aid in translating those abstract notions, first into graspable concepts and then into norms. Accordingly, some scholars believe that “our everyday concepts are structured and molded by a series of cognitive metaphors that all human beings share.” These fundamental conceptual metaphors determine the way we think of things, the way we talk about them and, in the legal field, the way we implement the law.

193. Id.
194. Id. at 459, 470.
195. Id. at 469.
196. Id.
with respect to them.197

Among such conceptual tools is the metaphor of space, one of the basic notions that constitute the structure of any legal system.198 Ascription to space subordinates occurrence to an identifiable, normative regime—the item can be fenced off and privatized, and property rules can be set and applied.199

The cybernetic web was linked from its early days to the concept of space, thus creating a cognitive metaphor of cyberspace as place.200 The term “cyberspace” itself is grounded in this metaphor. “Cyber” comes from the Greek word “kubernan,” meaning helmsman, who expertly navigates in, even now, the most uncontrollable of all spaces—the open sea.201

Although credit for coining the term is justly given to William Gibson, Gibson himself did not use the term very often and preferred the term “matrix” for describing the digital web.202 “Matrix” is indeed a term that captures not so much the location of things as their substance, but “cyberspace,” after passing through the digital gateway, rapidly gained a life of its own. Its widespread use203 shows how impossible it was to resist the cognitive power the term epitomized. In a culture desperately seeking adequate conceptualization, the term “cyberspace” gained an organizing and reassuring force, like other geographic metaphors.

Nevertheless, applying the metaphor of space to the cybernetic

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197. Id. at 470. For a convincing demonstration of actual uses of metaphors in law, see also AMSTERDAM & BRUNER, supra note 104, at 191.

198. Hunter, supra note 192, at 472.

199. Id. at 475.

200. Id. at 472.

201. See MIRELA ROZNOVSCHI, TOWARD A CYBERLEGAL CULTURE 6 (2001).

202. Michael Heim refers to the metaphors of “net” and “web” as “metaphors [that] reflect the artifice of engineers who build computer systems.” MICHAEL HEIM, VIRTUAL REALISM 144 (1998). Heim indicates that the “poetics of engineering...can trap us into believing that computers constitute a realm apart...Like the chessboard, the computer delivers a self-contained system of meaning.” Id.

203. See id.
phenomenon exemplifies the difficulties that arise when traditional poetic tools are applied to digital reality. Conceptualization of the digital condition through the space metaphor leads to the implementation on it of rules and norms drawn from traditional concepts of property. As Rob Shields puts it, “[g]eographical metaphors...spatialize webpages as places, implying territories defined by geopolitical borderlines that separate space into areas. These images are also joined by legal and illegal practices of crossing and communication.”

Still, concepts such as these disregard the distinctive characteristics of the digital condition, which makes applying traditional ontology, with its usual linguistic metaphors, difficult. An example offered by Hunter is the primary mechanism related to the spatial concept—the authorities’ “zoning” of certain spaces for the public, societal use. The conception of cyberspace as place led to attempts at “cyber-zoning”—just as we zone certain physical areas and declare them adult entertainment establishments, from which children under a certain age are excluded, we can also zone certain areas in cyberspace and deny access to those areas to children, for whom the content presented in those zones may be inappropriate. But practical and conceptual difficulties force us to realize again and again that cyberspace does not readily lend itself to efficient zoning regulation. As Hunter explains, there are numerous factors that contribute to the difficulties, but it seems that their primary source is the basic incompatibility between the nature of the Internet as something that might be referred to as spaceless and the paradoxical attempt to nevertheless conceive of it as space. In fact, systematic border crossing occurs to such an extent that it may be viewed as a constituting attribute of the digital condition. A similar incompatibility emerges when trying to implement time-zoning conceptions in cyberspace. While physical

205. See Hunter, supra note 192, at 497.
206. See id. at 498.
207. See id.
208. See id.
209. See Shields, supra note 204, at 149.
spheres are basically dependent on legal time-zoning, it is a most demanding task to impose such concepts on the digital sphere, which is, in a way, timeless.

Another example is Lessig’s well-known suggestion that “code” (computer software) resembles physical architecture, and thus when software regulates behavior online, it does so in a manner that resembles the way that physical architecture regulates behavior in reality. In a recent critique, the use of the architectural metaphor is forcefully challenged as incomplete because “[t]he structures that can be built out of software are so much more intricate and fragile than the structures that can be built out of concrete that there is a qualitative difference between them.” The writer argues that the imprecise metaphor obscures the inadequacy of computer software to manage certain issues, such as digital rights management (DRM).

Some cyber-related metaphors that once seemed useful, even brilliant, do appear to lose, after deeper examinations, part of their initial appeal. Steven Johnson writes, “It is conceivable that...we will arrive at a consensus that larger virtual communities...may simply exceed the representational capacity of any spatial metaphor.”

It seems that some of the metaphors used to legalize the digital domain are problematic because they imply a high degree of

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210. Todd Rakoff elaborates on the function of time in the modern culture: [W]e need to be able to ‘tell time’—that is, we need to place people and events in temporal relation with each other, so that we can coordinate what they do. Indeed, the careful coordination of the time of many individuals, so that their efforts are either synchronous or carefully sequenced, is a hallmark of production in modern societies. 


213. See id. at 1751-58. The article also scans some of problems recognized by scholars in regard to the use of spatial metaphor in order to comprehend and describe the digital activities. Id. at 1727-28.

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resemblance between two poles of an equation—the original “thing,” and the new “thing” that resembles the original. Metaphors, however, derive their force from a careful balance between the gap between the two poles of the metaphor, and the partial resemblance between them. A good metaphor acknowledges the resemblance as well as the gap. Thus, the use of the term “desktop” in interface design resonates surface resemblance to “real” desktops we use in our “real” room, but the metaphor works also because it almost humorously acknowledges the differences and the fact that an interface desktop is fundamentally different from a real one. Similarly, we all realize that “real” windows do not layer atop one another, and we cannot scroll through the initial landscape. Yet the metaphor of the interface window works; it is the gap between the real and the digital, together with the initial resemblance that renders some metaphor useful.

This is not to say that metaphors are not useful in the digital condition. The desire to find useful, “friendly” analogies between the digital and the pre-digital existence is understandable, perhaps unavoidable. Good metaphors and analogies can be valuable. However, novel realities do not easily comply with vast and conclusive spatial and temporal metaphors.

An acute need is felt for imaginative, evocative metaphors and analogies that will, among other tasks, assist in legalizing at least some parts of the digital environment, but it seems that such metaphors, in order to work, should not aspire to be all-encompassing, to cover the whole range of the digital condition. Our poetic tools should be modified and fine-tuned to produce a new generation of metaphors, possibly more graphic and visual than textual. Maybe such metaphors should be more modest, pointed and specific, or perhaps more flexible and loose-fitting than some of the “grand-metaphors” used today. This is one facet of the intricate challenge the old poetic instrument is facing when demanded to represent the fluid, spaceless and timeless (or, perhaps, multi-spaced and multi-timed) world of bits in the domain of law.

B. Digitalizing Law

The second kind of incongruity transpires when legal practice
aims to go digital. I will start with the threat posed by the digital condition to one of the primary notions upon which legal poetics (and probably any poetic system) is based—the notion of finality.

The notion of finality sustains, to borrow Frank Kermode’s famous title, the “sense of an ending.” 215 Having a “sense of an ending” enables us to acknowledge that any expression, intricate and difficult to create as it may have been, reached a point of closure that rendered it a sealed and final articulation. Mirjan Damaška notes the poetic value of reaching finality: “The dramatic courtroom atmosphere is enhanced by the possible finality of the trial court’s judgment: no punches can be pulled in reliance on a next procedural round before a higher authority.” 216

The ability to identify the status of finality serves an important interpretive need. Acknowledging an expression’s finite nature enables the expression to become a communal reference point, identifiable and recognizable by all interested parties and thus a starting point to interpretation and further reference. In this way, the unity of discourse is fostered by the formation of recognized closures.

One of the tasks of legal procedure is to define and entrench the status of finality. The trial advances through the accretion of several sequences, each of which has reached the point of no return. 217

The notion of finality rests on the linear-analog perception of time: there is an identifiable moment at which an expression departs from the creator’s hands and moves to the domain of the recipient. The creator has the prerogative of giving the expression the seal of irreversible finality. The digital condition blurs this previously clear temporal line, empowering every user to abrogate the finality of any expression. Authors are thus denied their prerogative to choose the endpoint for creation, and the sense of ending gradually wears away.

217. The principle of finality in the legal process is demonstrated, for instance, in the procedural rules that allow a claim, once presented to the court, to be amended only with the court’s permission. See FED. R. CIV. P. 13(f).
Digital technology often makes it possible to retrieve earlier versions of expressions, thereby posing yet another threat to the notion of finality. The capacity to view premature versions of documents and identify how, when, and by whom items were modified or edited creates a distortion of the temporal dimension, and leads to confusion between the creator and the recipient audience. Every addressee can become a spectator (or, perhaps, a voyeur) and experience the expression’s past and present simultaneously. To these factors one may add the speed at which digital images are transferred, as well as their uncontrollable volume. The cumulative effect is a strikingly new experience of the sense of ending, which, in turn, brings about shifts in the conventional poetics that have structured legal proceedings until now.

Let me examine such shifts from another vantage point—the opportunities that digital tools offer with respect to the production, presentation, and transmission of documents. Producing a computerized document is considered today to be one of the simplest and most trivial everyday tasks. The capacity to transmit these documents through the Internet to any recipient in any place has brought to the legal process a wave of renewal and increasing efficiency. Many courthouses offer litigants the ability to send and receive documents through the Internet, follow the progress of the proceedings, and eventually receive the outcome of the trial through the court’s web site. This “electronic filing” capability has greatly increased the efficiency of proceedings and shortened their duration.

In poetic terms, however, the lengthy duration of the legal

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218. The use of “meta-data”—the analysis of data that exist in computer files and documents but are not presented directly to the viewer—has already caught the attention of legal and business practitioners, since it involves questions of professional negligence and admissibility of meta-data based evidence. See, e.g., David A. Karp, Revealing Codes, PCMag.COM, June 8, 2004, http://www.pcmag.com/article2/0,1759,1585411,00.asp (on file with the Rutgers Computer and Technology Law Journal).

219. Lederer, supra note 169, at 804.

process is pragmatic. It creates a representation of a balanced and reasonable proceeding. Every phase in a trial proceeds in due course, and the gradual, structured building-up of one phase on top of the preceding one validates the closure, which is the final judgment. Each step in the process, including the time it takes to complete it, is necessary to create the impression of justice. The interval between the steps in the process creates a “poetic pause,” which allows the ripening of the completed stage. The pause allows time for the events to make their impression, and the players to fully grasp their meaning. The gradual, logically ordered and structured proceeding, including the adequate intermissions between the stages, is part of the representation of the law-making process and enhances this representation’s verisimilitude.

Computerization of the proceeding and the use of other digital time-saving tools significantly change this regularity and rhythm. As Virilio describes, the essence of the digital condition is speed. As the potential for high efficiency grows, so does the pressure on all participants in the process to put efficiency first. Judges find themselves under pressure to submit their decisions as fast as possible. Allowing time for the judicial creation to evolve is no longer considered as important as before. But can we really rush things up without influencing the impression of justice? Perhaps we can; but doing so will require the development of new representational tools that will complement the velocity, swiftness, and pace of the digital condition.

Together with its unprecedented speed, the digital condition introduces a new “aesthetic of delay,” often characterized by “patterning of time lags indicating connection and interaction with a remote document, image, or program.” The frequently encountered delays in the transfer and retrieval of digital data generate segments of time in which neither the creator of the image nor its addressee can control the progress or duration of the process. During such delays, control over the poetic transaction is taken out of the actors’ hands.

Traditional legal poetics often uses various kinds of delays as

221. Virilio, supra note 140, at 6.
222. See Shields, supra note 204, at 157.
representational tools. These include, for example, the short but pregnant pause between the announcement by the bailiff and the entrance of the judges, or the tense segment of time between the moment at which the bailiff hands the judge the jury’s decision and the moment it is returned to the jury for announcement of the verdict. Such moments are indeed segments of delay that have their own aesthetics. Unlike digital delays, however, such segments represent control rather than its absence: the delay’s duration is determined by the presentation’s producers. Against the background of a poetic system skilled in deploying delay to exercise control, the digital delay poses new challenges.

Another facet of digital opportunities worth noticing here is the effect of digital technologies upon the careful, meticulous and overt process of accumulating relevant evidence in legal proceedings. The legal process is the climax of a multilayered structure, from the first gathering of findings to the time of the verdict. 223 The insertion of digital means as admissible evidence alters the traditional conception.

The evidentiary stage of a trial used to derive its force from its occurrence on one occasion—the dramatic, highly symbolic “day in court.” 224 When the presentation of evidence turns digital, the importance of the day in court diminishes. Digital films, files or recordings can be presented repeatedly, regardless of the proceeding’s status. Digital content is, by nature, subject to re-editing and re-presentation, and it differs thereby from the traditional evidentiary tools such as oral testimony or physical exhibits. 225 The digital condition thus wears away the idiosyncratic representational nature of legal evidentiary performance.

As early as the 1980’s, in light of the dynamic changes in evidence rules and the shift from traditional forms of evidence to hybrid forms, Mirjan Damaška described the rules of evidence as a “unique pastiche[].” 226 Like Jameson’s description of the

223. See DAMAŠKA, supra note 216, at 47-48.
224. Id. at 62.
226. DAMAŠKA, supra note 216, at 237.
overwhelming architecture of the Bonaventura hotel, Damaska's description of the evidence rules proved to be predictive; it anticipates the current efforts of evidence law to contain the flow of digital innovations.

Taken together, digital innovations such as these are profoundly affecting the production and reception of legal representations. Many components of formal and informal legal poetics have been superseded, and correspondingly significant changes in legal practices may ensue.

The various phenomena described above, including the waning of the notion of finality, the displacement of traditional roles, and the fading of temporal and spatial conceptions, can be attributed to numerous factors. Changes in the poetic conceptions due to the digital revolution are only a part of a much wider, complicated system of social and cultural shifts, which affect the practice of law in various ways. Still, an awareness of how poetic mechanisms function or malfunction may contribute significant insight regarding the nature and directions of the formative trends.

Society is currently in the midst of a shift from analog-like perceptions of time and space towards substituting perceptions that will more readily reflect the digital environment. The shift may produce important benefits, but it entails, as well, a variety of difficult and complex situations that must be addressed. Again, my intent here is not to pass judgment on this shift; it is to present, in the legal context, the areas of incompatibility and discrepancy between the "analog" poetic tools and the digital environment.

Will the cohesive distinctiveness of legal representations be maintained when those representations are digitally oriented? Will the legal proceeding preserve its stature? If digital reality leads towards the relinquishing of old representations, will new ones emerge, and will they be effective enough within the simulacra-saturated environment? Will justice become less tangible, less graspable as "real," or will the shortened, technology-supported proceedings be perceived as more just than ever?

227. See supra notes 158-61 and accompanying text.

228. For elaboration on the issues facing evidence law, see generally Christopher J. Buccafusco, Gaining/Losing Perspective on the Law, or Keeping Visual Evidence in Perspective, 58 U. MIAMI L. REV. 609 (2004).
These are the sorts of issues that poetic cognizance can help us better address.

X. CONCLUSION

The expansion of the digital condition and its penetration into vast areas of modern life are shaping the conceptions and cognitions of those exposed to it just as past societies were shaped by the then-dominant technologies and media that governed the transfer of data and knowledge through time and space. In our new environment, where the sense of ending, sense of place and the sense of time are being shaken by the digital condition, legal poetics will have to adjust itself.

Several thinkers have noted the acute need to adjust old patterns of constructing meaning in light of the conditions of a new era. They forecast the emergence of a new representational world, one constructed not by conceptions of bordered and discernable spatial and temporal distinctions, but by parameters of data accessibility. Such forecasts make sense, but I believe that while we resolve issues of access, economic control and costs, we must also seek out new methods of constructing meaning and describing experience. New borders will have to be delineated. Clear differentiations between different sorts of digital articulations will have to be made. A new sense of ending will have to be established. A close acquaintance and familiarity with old poetic notions will prove useful in this effort.

The underlying assumption here is that producing powerful representations will remain an essential objective of the law even in a highly digital environment.

The issue involves not the virtues or the vices of the digital


230. A typical remark in this regard: “So a new logic has emerged. The great power struggles of cyberspace will be over network topology, connectivity and access—not the geographic borders and chunks of territory that have been fought over in the past.” William J. Mitchell, City of Bits: Space, Place, and the Infobahn 151 (1995).
condition as such, but its supposed effect upon the ability of law to match the representations it produces to its tasks. A cardinal concern, therefore, is the definition of those tasks. If law is to remain a hierarchical system, charged with systematically constructing and presenting information in a way that will reflect the authority of finality, it must retain its capacity to produce singular, distinct articulations. But how can such abstract, intangible capacities be maintained? As suggested here, familiarity with the past, and perpetuation of essential poetic principles, can play a major role in preserving the standing of the legal event as a "real" event, even as the construct-defying digital condition undercuts the meaning that the legal event formerly evoked.

This paper does not presume to chart a sure way to safe shores. It aims only to understand the poetic consequences of the digital storm, to describe the changing circumstances in which we find ourselves, and to depict the principal conflicts that arise as the familiar, traditional rules are buffeted by the strong winds of digital change that rage around. It described those conflicts so we might better understand the current workings of the mechanisms through which meaning is generated.

My analyses of the situation suggest in general terms how law might respond in order to "ride out the storm." It must wisely adapt itself to changing circumstances, by digitizing law or legalizing the digital space; but in doing so, it must preserve the core virtues associated with long-established poetic mechanisms and apparatus. The legal enterprise must allow entry to digitalization but must not allow it to penetrate beyond the point at which it begins to subvert the law's essential poetic mechanism or undermine its very foundations. For example, an effort to institute a virtual courthouse would appear to go too far in challenging the poetic tools used in creating traditional visual representations of justice. The line between the wireless courtroom, based on digital technology, and the courtroom that exists entirely in virtual space may be the line that the law should not cross. But to make that judgment—or to decide where, if not there, the line should be drawn—one must realize the importance of poetic tools to facilitate law's ability to carry out its functions.

A novel agenda, then, should focus on reenergizing old poetic
structures while incorporating specific, circumspectly chosen modifications generated by the digital condition. Those are the tasks that lie ahead.