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Why can't Law keep up with Journalism?

Media Law

Class 1, Sept. 2, 2014

UBC Graduate School of Journalism

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The Problem



ELECTRONIC FRONTIER FOUNDATION
DEFENDING YOUR RIGHTS IN THE DIGITAL WORLD

HOME

ABOUT

OUR WORK

DEEPLINKS BLOG

PRESS ROOM

AUGUST 9, 2013 | BY MORGAN WEILAND



Why Sen. Feinstein Is Wrong About Who's a "Real Reporter"

During the Senate Judiciary Committee's August 1 mark-up of the shield law bill aimed at protecting journalists' sources, Sen. [Dianne Feinstein](#) (D-CA) reportedly objected to the definition of journalist provided in the bill as introduced, seeking to restrict the definition's scope to apply only to "real reporters." To achieve her misguided goal, Sen. Feinstein has put forward an amendment to S. 987 that would greatly exacerbate the problems with the definition of who's a journalist that existed in the bill as introduced.

Her amendment, to be submitted for Sen. [Dick Durbin](#) (D-II.) as well, not only retains the **problematic requirement** that a person "regularly" engage in journalism to enjoy shield law protections, but moreover adds new requirements that would make it especially difficult for self-publishers such as independent bloggers and citizen journalists to be protected under the law. Indeed, her new requirements for being either salaried or at least affiliated with a news "entity" seem to purposefully target these self-publishers.

<https://www.eff.org/deeplinks/2013/08/why-sen-feinstein-wrong-about-whos-real-reporter>

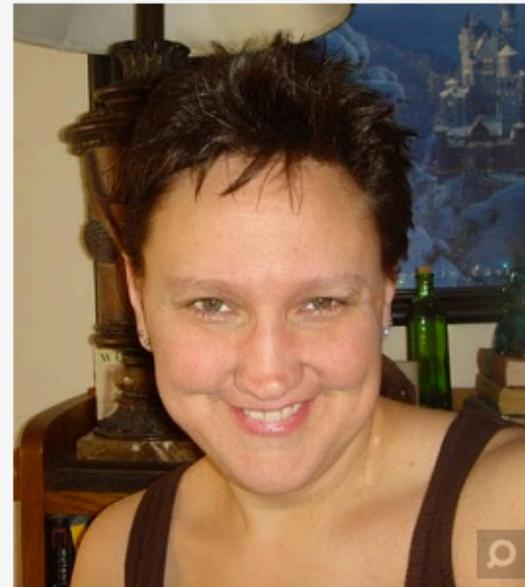


FEDERAL COURT RULES INVESTIGATIVE BLOGGER IS NOT A JOURNALIST, ORDERS HER TO PAY \$2.5 MILLION IN DEFAMATION LAWSUIT

By Molly McHugh — December 7, 2011

The company had issued a cease and desist letter, which Cox did not comply with, and as a response sued her for defamation. “Yes I am a Self-Proclaimed Investigative Blogger and under Supreme Court Decisions, under the law as making a living as an Investigative Blogger, Gathering News, Taking Interviews, and Reporting on these Stories I am Media [sic],” she has [argued](#). “I am an Independent News Media. I am a Public Forum, my blogs do go out in news feeds and I am Legally Media [sic].”

But Judge Marco Hernandez , who presided over the case, disagrees. He [wrote](#) that, among other things, Cox’s lack of “any education in journalism...any credentials or proof of any affiliation with any recognized news entity...” and alleged failure to contact “‘the other side’ to get both sides of the story” do not qualify her as a member of the media. Hernandez also noted that journalistic shield laws don’t cover the alleged defamation statements attributed to Cox. She has been ordered to pay Obsidian Finance \$2.5 million in damages.





Appellate Decision in *Obisdian v. Cox*

"The panel held that *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (holding that the First Amendment required only a "negligence standard for private defamation actions"), is not limited to cases with institutional media defendants.

The panel further held that the blog post at issue addressed a matter of public concern, and the district court should have instructed the jury that it could not find the blogger liable for defamation unless it found that she acted negligently...The panel remanded for a new trial on the blog post at issue, and affirmed the district court's summary judgment on the other blog posts that were deemed constitutionally protected opinions."

(From "SUMMARY" USCA 9th Cir. decision January 17, 2014)



THE ACTUAL MALICE RULE: WHY CANADA REJECTED THE AMERICAN APPROACH TO LIBEL

Thomas A. Hughes*

This article is a comparative study of Canadian and American libel law. The focus is Hill v. Church of Scientology of Toronto, a 1995 Supreme Court of Canada decision that specifically rejected the argument that Canada should adopt the standard established by the United States Supreme Court for deciding libel cases brought by public officials, i.e., the “actual malice” rule, as set forth in New York Times Co. v. Sullivan. The reasoning of Hill v. Church of Scientology is compared and contrasted to that in New York Times and its progeny. The Canadian court’s rationale, which drew from the works of American critics of actual malice, contributes a new perspective to the libel reform discussion in the United States. As this article notes, Canadian courts put greater emphasis on protecting reputation than on the press’ free speech. This approach deserves close attention by American legal scholars.



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In the coming of the Digital world the Law often seems **behind, disconnected and confused, incapable or too slow to do Justice..**

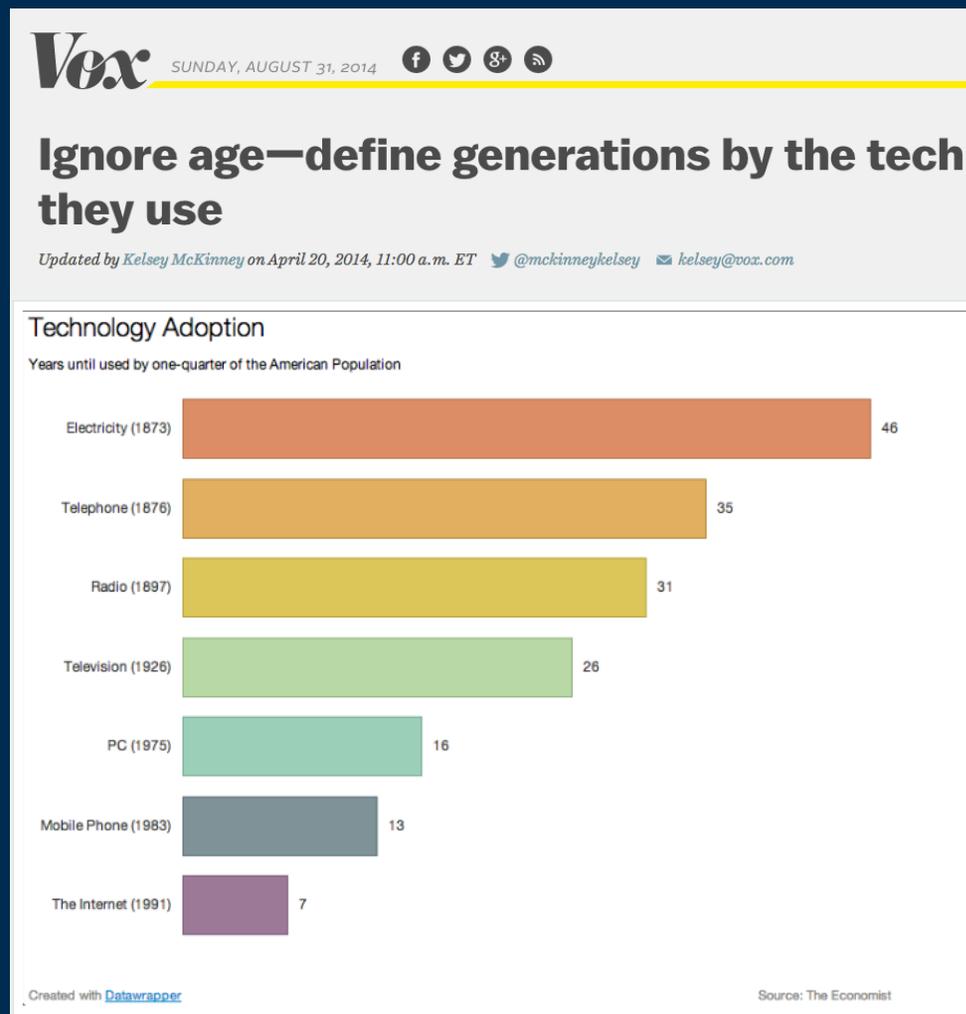
“[s]tealing is stealing whether you use a computer command or a crowbar, and whether you take documents, data or dollars. It is equally harmful to the victim whether you sell what you have stolen or give it away.”*



*The United States Attorney's Office, District of Massachusetts, Press Release, "Alleged Hacker Charged with Stealing over Four Million Documents from MIT Network" (19 July 2011), online: <http://www.justice.gov/usao/ma/news/2011/July/SwartzAaronPR.html>>



A Clue (& metaphor)...





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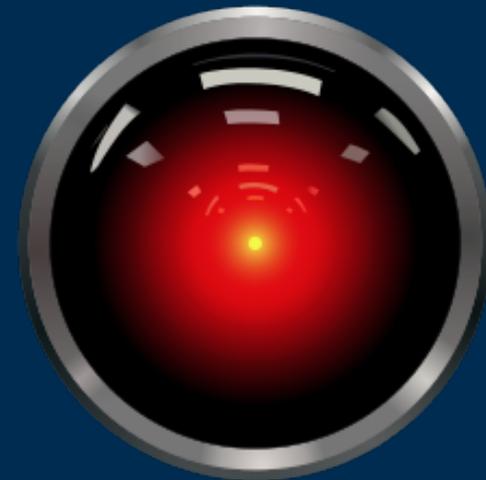
“When Does Technology Change Enough That the Law Should Too?”

Today's lower court ruling deferred to the Supreme Court's 1979 decision, *Smith v. Maryland*. Should that case still matter?

REBECCA J. ROSEN

DEC 27 2013, 5:39 PM ET”

“The Atlantic” on the constitutionality of NSA surveillance





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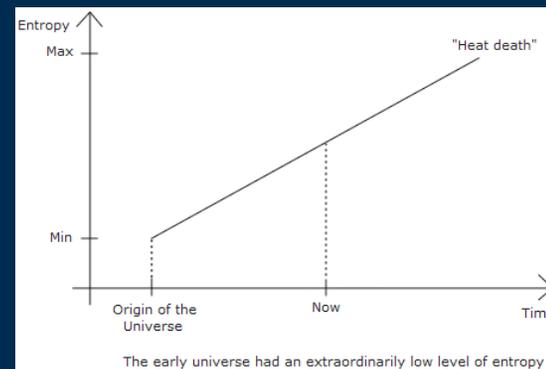
**Should we be disappointed
by this disconnect?**

**Or is it perhaps the
inevitable effect of a less
than obvious *cause*?**



Consider the possibility...

...that concepts of Law & Justice
**can never adequately resolve
issues related to communications
because...**communications memes
proactively define the future
meanings of Justice & the forms
Law will take.





In other words...

Concepts of law & justice do not shape communications technologies nearly as much as they are shaped by the concepts and meanings arising from communications technologies.

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**Over the long term,
Journalism and its
technologies shape law
more than the other way
around?**



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Freedom Riders / *NY Times* v. *Sullivan*



50 Years Later, New York Times v. Sullivan Remains A Cornerstone Of A Free Press

AP | By JESSICA GRESKO

Posted: 03/08/2014 9:50 am EST | Updated: 03/08/2014 9:59 am EST



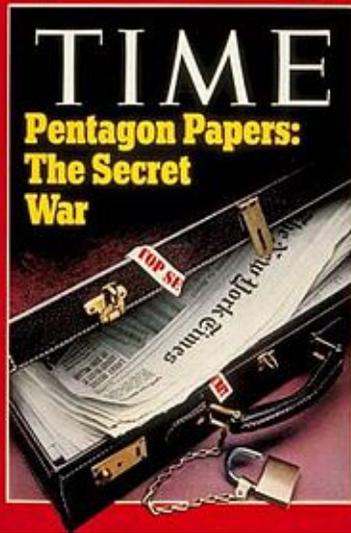
Flickr: WallyG



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Vietnam/Ellsberg/Pentagon Papers



NEW YORK TIMES v. UNITED STATES

Term: 1970-1979 › 1970

Location: Former New York Times Headquarters

Facts of the Case

In what became known as the "Pentagon Papers Case," the Nixon Administration attempted to prevent the New York Times and Washington Post from publishing materials belonging to a classified Defense Department study regarding the history of United States activities in Vietnam. The President argued that prior restraint was necessary to protect national security. This case was decided together with United States v. Washington Post Co.

Question

Did the Nixon administration's efforts to prevent the publication of what it termed "classified information" violate the First Amendment?

Argument

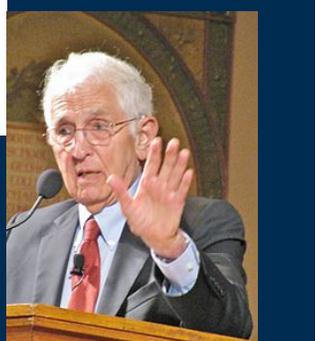
[New York Times v. United States - Oral Argument](#)

Conclusion

Decision: 6 votes for New York Times, 3 vote(s) against

Legal provision: Amendment 1: Speech, Press, and Assembly

Yes. In its per curiam opinion the Court held that the government did not overcome the "heavy presumption against" prior restraint of the press in this case. Justices Black and Douglas argued that the vague word "security" should not be used "to abrogate the fundamental law embodied in the First Amendment." Justice Brennan reasoned that since publication would not cause an inevitable, direct, and immediate event imperiling the safety of American forces, prior restraint was unjustified.



"All the News That's Fit to Print"

The New York Times

LATE CITY EDITION

NEW YORK, SATURDAY, MAY 12, 1971

11 CENTS

**PENTAGON PAPERS CHARGES ARE DISMISSED;
JUDGE BYRNE FREES ELLSBERG AND RUSSO,
ASSAILS 'IMPROPER GOVERNMENT CONDUCT'**



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“News of the Week” / Rupert Murdoch Phone Hacking Scandal

August 2, 2014

thestar.com

INSIGHT

90% off thestar.com digital access for the first time

News / Insight

Murdoch phone-hacking scandal all about power

Facebook | Tweet 6 | +1 0 | reddit this! | + save to my star

VIEW 2 PHOTOS

By: Jennifer Hunter The Reader, Published on Fri Aug 29 2014

We are sorry.

The News of the World was in the business of holding others to account. It failed when it came to itself.

We are sorry for the serious wrongdoing that occurred.

We are deeply sorry for the hurt inflicted by the individuals affected.

We regret not acting faster to sort things out.

I realise that simply apologising is not enough.

Our business was founded on the idea that a free and open press should be a positive force in society. We need to live up to this.

In the coming days, as we take further concrete steps to resolve these issues and make amends for the damage they have caused, you will hear more from us.

Sincerely,

Rupert Murdoch

For more information please visit www.newsinternational.co.uk

News International

- 6 Fallout from scandal
 - 6.1 David Cameron
 - 6.2 Closure of the News of the World
 - 6.3 BSkyB takeover bid withdrawn
 - 6.4 New York State contract lost by subsidiary of News Corporation
 - 6.5 Resignations
 - 6.6 Dismissals
 - 6.7 Leaves/Suspensions
 - 6.8 Cautions
 - 6.9 Apologies
 - 6.10 Further arrests
 - 6.10.1 Andy Coulson
 - 6.10.2 Neil Wallis
 - 6.10.3 Rebekah Brooks
 - 6.10.4 Stuart Kuttner, Greg Miskiw, James Desborough, Dan Evans and others
 - 6.10.5 Jonathan Rees and Alex Marunchak
 - 6.11 Murdochs and Brooks summonsed to Parliament
 - 6.12 News Corporation's management standards committee
 - 6.13 Death of Sean Hoare
 - 6.14 Daily Mirror allegations
 - 6.15 Harbottle and Lewis
 - 6.16 Criminal charges and convictions
- 7 Further UK investigations
 - 7.1 Leveson inquiry
 - 7.2 Home Affairs Select Committee
 - 7.3 Mark Lewis
 - 7.4 Media, Culture and Sport Select Committee
 - 7.5 Independent Police Complaints Commission
 - 7.6 Elizabeth Filkin
 - 7.7 Clive Goodman's 2007 letter
- 8 Ethical concerns, legal concerns and possible implications
 - 8.1 Criticism of News International culture
 - 8.2 Ethical backlash
- 9 Impact in other countries
 - 9.1 Australia
 - 9.1.1 News Limited announces review
 - 9.1.2 Australian Government announces formal review
 - 9.2 United States

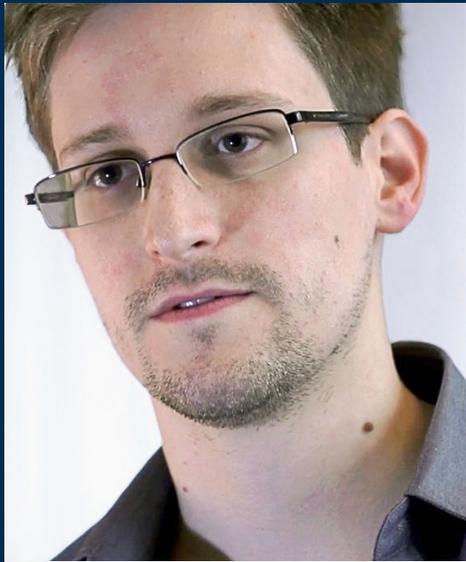




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The Guardian/Edward Snowden/EFF Etc.



the guardian

News | Sport | Comment | Culture | Business | Money | Life & style | Travel | Environment | Tech | TV | Video | Dating | Offers | Jobs

News > World news > The NSA files

THE NSA FILES

click to launch **DECODED**

How the story unfolded

- Spiking rates
- Leaked classified documents
- Revealed: Prism program taps in to user data of tech companies
- UK gathering secret intelligence via covert NSA
- Obama's request for a target list for cyber attacks
- The NSA's secret tool to track global surveillance data
- Whis Edwi reve in vir

The key exclusives

NSA collects customers' records daily

Top secret court order requiring Verizon to hand over all call data shows scale of surveillance under Obama

2511 comments

GCHQ covertly using NSA tools

GCHQ gaining information from world's biggest internet firms through US-run Prism programme

Essential guide

1. Background

The NSA, founded in 1952, is the USA's signals intelligence agency, and the biggest of the country's myriad intelligence organisations. It has a strict focus on overseas, rather than domestic, surveillance. It is the phone and internet interception specialist of the USA, and is also responsible for codebreaking.

Latest

Australia culture blog

Edward Snowden story to be told at Museum of Sydney

21 Aug 2014: Guardian Australia and Brisbane Writers Festival invite you to hear journalist Luke Harding in conversation with David Marr about The Snowden Files on 3 September 2014

EFF ELECTRONIC FRONTIER FOUNDATION
DEFENDING YOUR RIGHTS IN THE DIGITAL WORLD

HOME ABOUT OUR WORK DEEPLINKS BLOG PRESS ROOM

EFF v. NSA, ODNI - Vulnerabilities FOIA
EFF v. NSA, ODNI - Complaint

Case3:14-cv-03010 Document1 Filed07/01/14 Page1 of 7

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7 Attorneys for Plaintiff
ELECTRONIC FRONTIER FOUNDATION

8

9 UNITED STATES DISTRICT COURT

10 FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 SAN FRANCISCO DIVISION

12 ELECTRONIC FRONTIER FOUNDATION,)
Plaintiff,)

13 v.) **COMPLAINT FOR INJUNCTIVE**
14 NATIONAL SECURITY AGENCY, OFFICE) **RELIEF FOR VIOLATION OF THE**
15) **FREEDOM OF INFORMATION ACT,**
) **5 U.S.C. § 552**

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FEATURED Guide to Taiwanfest 2014 • Vancouver Latin American Film Festival • Best of Var

news / straight talk

Civil liberties group sues over metadata snooping by Communications Security Establishment Canada

by CHARLIE SMITH on OCT 22, 2013 at 9:54 AM

ACLU BECAUSE FREEDOM
AMERICAN CIVIL LIBERTIES UNION KEY ISSUES ACTION

HOME • KEEP AMERICA SAFE AND FREE • SURVEILLANCE & PRIVACY

ACLU v. Clapper – Challenge to NSA Mass Call-Tracking Program

Share

The ACLU has filed a lawsuit challenging the constitutionality of the National Security Agency's mass collection of Americans' phone records. The complaint argues that the dragnet, justified by the Patriot Act's Section 215, violates the right of privacy protected by the Fourth Amendment as well as the First Amendment rights of free speech and association. The complaint also charges that the program exceeds the authority that Congress provided through the Patriot Act. The lawsuit seeks to end the mass domestic spying and have all of the collected data deleted. In December 2013, a federal judge denied the ACLU's motion for a preliminary injunction and granted the government's motion to dismiss, and we appealed. Oral argument is scheduled for September 2, 2014, at the Second Circuit Court of Appeals in Manhattan.



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**Each new generation of
storytelling/technology
poses the questions which
Justice must define and
Law must resolve.**

WHY IS THAT (AGAIN)?



Technology /Justice (Parallels)?

Before Justice was Revenge

1. Pre-literate => Justice as Retribution
2. Writing Instruments => Justice as Compensation
3. Printing Press => Justice as Rights
4. Mass Media => Justice as Truth
5. Digital => Justice as Resolution
6. Big Data => Justice as Boundaries

-----FUTURE-----

7. Virtual reality => ???



Not Mutually Exclusive Phases...

Might work as suggested in:
D.L Shaw, "The Rise and Fall of American Mass Media: Roles of Technology and Leadership", April 1991 "Roy W. Howard Lecture" Indiana University.

"No medium, once it has lost it's dominant position has ever returned to the top"

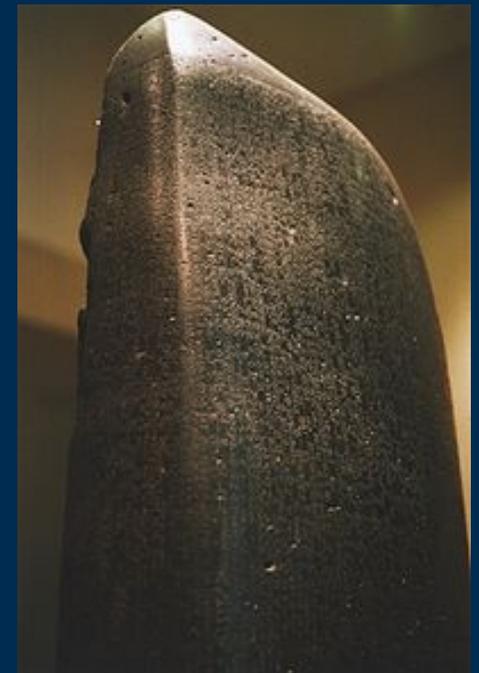
Accordingly all forms of justice are present in some form even if superseded.



1. Pre-literate => Justice as Retribution

Speculation that Code of Hammurabi (Babylonia 1172 B.C.) imposed “eye for an eye” punishments to limit uncontrolled revenge as the prevailing principle.

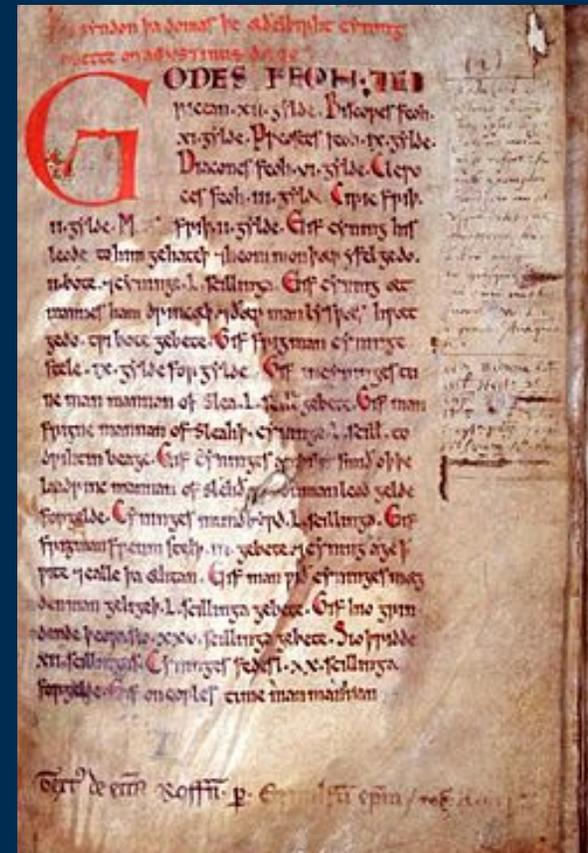
- * “Let the punishment fit the crime”
- * **Actually a limitation** on unlimited revenge though we see it as barbaric today.
- * Code of Hammurabi (1900 B.C.) was **a non-binding restatement of Principles***
- * Related to trial by ordeal?



* Driver and Miles via L. Festinger @ p.156 “The Human Legacy”

2. Writing Instruments => Justice as Compensation

Law of Æthelberht
(early 7th century) first
Germanic-language
law code sets out
compensations for
loss caused by
others.



3. Printing Press => Justice as Rights

Fascinating transition from
Justice as a privileged right...
To Justice as egalitarian
right.

From “Declaration of the
Rights of Man and of the
Citizen” 1789...
to “Declaration of the
Rights of Man and Citizen”
1793.





4. Mass Media => Justice as (search for) Truth

Symptom: Huge increase in size of trials, discovery, documents & process.

Motivation: Evidence/facts as truth/justice (as opposed to reason, argument & persuasion yielding justice).

Result: 1. What could be "seen" more important than what is believed
2. Bigger became "better"

Observation: All of the above happened first in media, then in law.

Big Media/Big Law?



5. Digital => Justice as Resolution

- Mediation/Arbitration
- Truth & Reconciliation Commissions
- “Peace is Justice”???





6. Big Data => Justice as Boundaries

- Harassment test
- **User's rights in SCC pentalogy** - Abella J. for the majority in *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)* 2012 SCC 37
“...fair dealing is a “user’s right”, and the relevant perspective when considering whether the dealing is for an allowable purpose...**is that of the user...**”

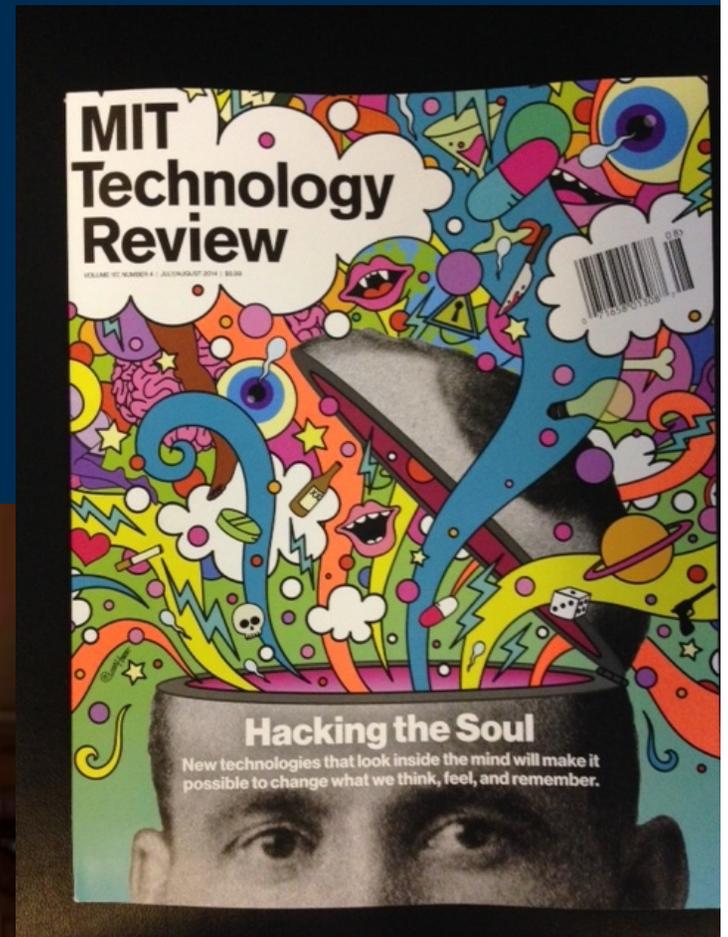
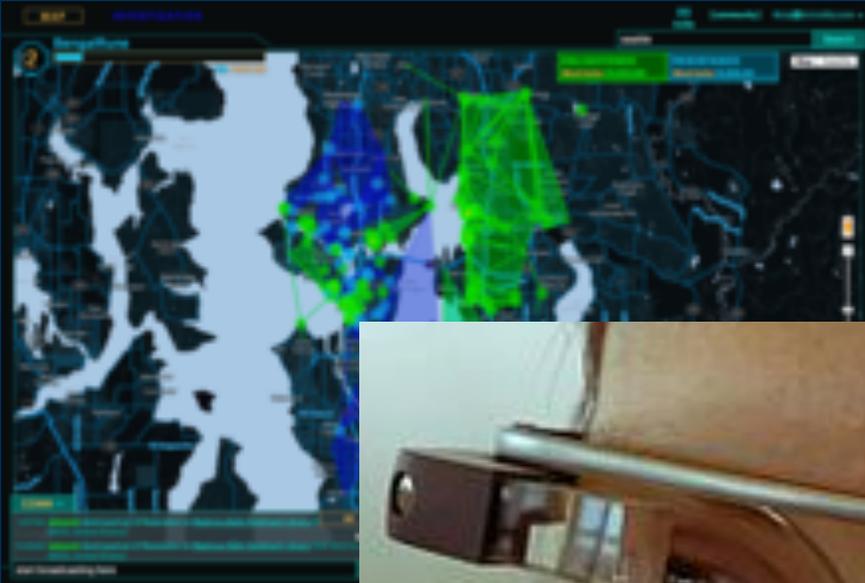


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7. Virtual reality => ???

The Future is
immersive, even
“telepathic”





So: Virtual reality => ???

What is the *future meme of Justice*?

The nominees are:

a. ? *Reciprocity (get what you give)*

b. ? *Reinventing 'Freedom of Thought'*

c. ?





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“Oculus Rift Journalism”?

What will that look like?

What legal challenges will that create?



THE VERGE  

TRENDING NOW
Reported iCloud hack leaks hundreds of nude celebrity photos

LONGFORM VIDEO REVIEWS TECH SCIENCE CULTURE DESIGN BUSINESS US & WORLD FORUMS

PREVIOUS STORY
Linkin Park releases customizable music video powered by Xbox's Project Spark

NEXT STORY
NASA's Spitzer telescope completes 360-degree panorama of the Milky Way

BUSINESS CULTURE **GAMING** TECH WEB BREAKING

Facebook buying Oculus VR for \$2 billion

Mark Zuckerberg has big plans for virtual reality

By **Chris Welch** on March 25, 2014 05:34 pm [Email](#) [@chriswelch](#)



“It used to be said that the judges did not make law but merely declared what the law has always been. This is a view that has few, if any, adherents today... **But cases are brought raising novel questions, and the judges have to answer them. Their answers will often make law,** whatever answer they give, one way or another. So the judges do have a role in developing the law...”

Tom Bingham “The Rule of Law’ (Allen Lane 2010)



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A MATTER OF PERSPECTIVE





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Thanks for Listening



Always include a cat picture



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