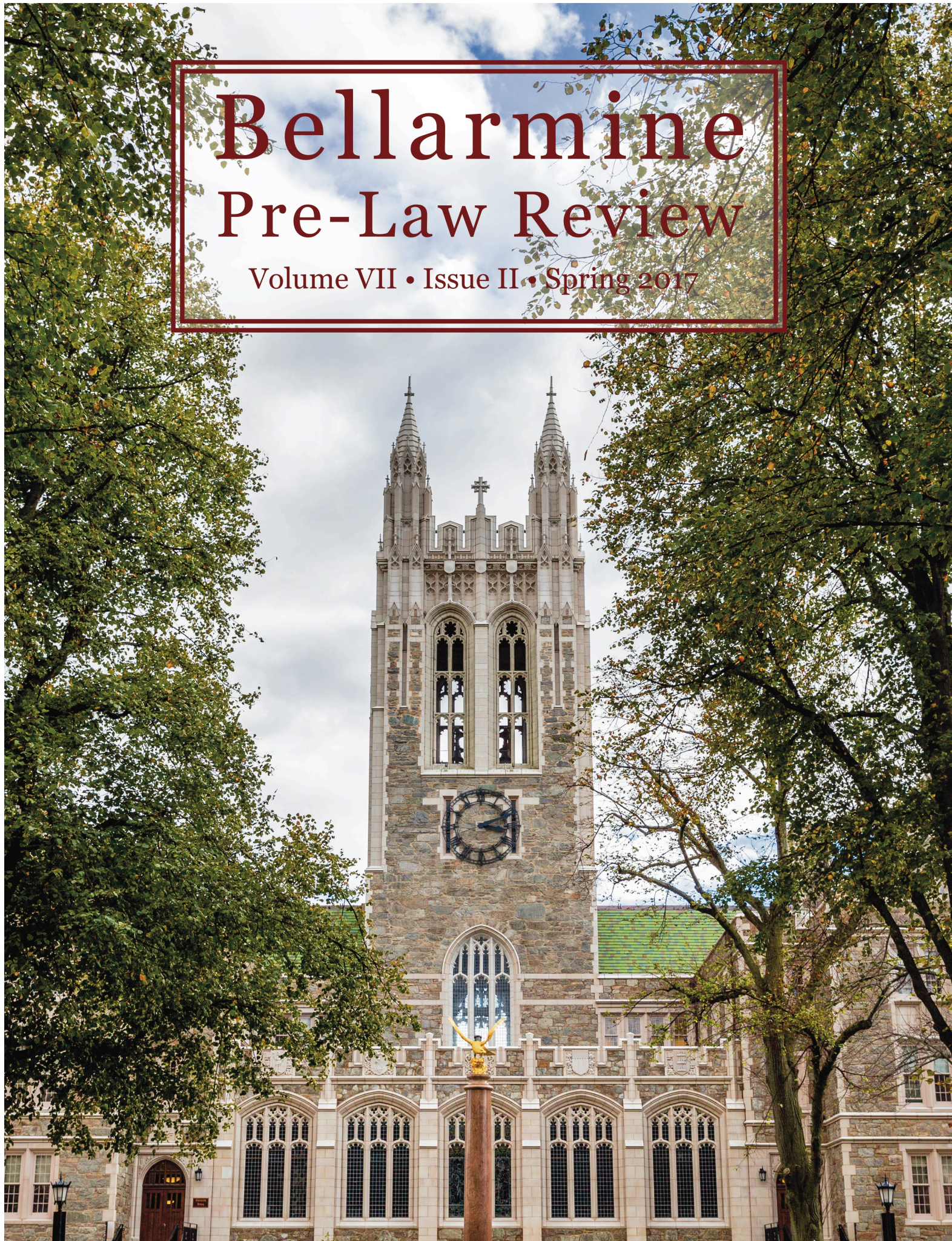


Bellarmino Pre-Law Review

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Summaries of Submissions

- 1) In “It’s All in the Words: An Analysis of the *Samsung Electronics Co. v. Apple*” Patent Dispute, Nicholas Redmond explores the Supreme Court case concerning patent infringement between the two companies. The Court reversed the federal court’s ruling, eliminating the \$399 million Samsung had been ordered to pay Apple.
- 2) Chris Mtanos examines important details of the refugee crisis that are often overlooked in the media. “Refugee Protection and National Security: Non-Refoulement and Exclusion Clauses” offers a deep dive into the specific legalities that are shaping the global phenomenon.
- 3) In her paper on the Second Circuit decision *ACLU v. Clapper*, Caleigh Wozniak assesses the impact of the Patriot Act’s provision that allows the government to collect phone and email data from the public. She argues that the court made the just decision to protect civil liberties by ruling in favor of the ACLU.
- 4) Erin Speich analyzes the issue of whether robots with artificial intelligence should receive the same legal rights and protections as humans. After looking at arguments for both sides, she opines that our society is not yet advanced enough to give robots the same status as human beings.
- 5) In his paper on the First Amendment, George Skostrom examines what rights individuals and corporations have under the United States Constitution in light of the Supreme Court case *Bartnicki v. Vopper*. He applies the court’s precedent to the current First Amendment issues concerning *CNN* and stolen emails from Hillary Clinton’s presidential campaign.

It's All in the Words: An Analysis of the *Samsung Electronics Co. v. Apple* Patent Dispute

By Nick Redmond

Introduction

Over the past 25 years, the number of design patents granted annually in the United States has increased dramatically (Statista).¹ As a result of this increase, these patents, which protect the appearance of particular inventions, will have a significant impact on many industries for years to come. This is especially true in the technology industry and is exemplified by a well-publicized legal battle between smartphone competitors Apple and Samsung. This fight resulted in the *Samsung Electronics Co. v. Apple* case, which is currently before the Supreme Court. This case deals with Samsung's infringement upon three design patents that Apple holds on certain ornamental features of the iPhone.² Neither company disputes the fact that Samsung infringed upon Apple's patents. However, the two parties have become embroiled in a series of lawsuits over the proper way to calculate damages (JPTOS). Samsung is appealing the decision of the U.S. Court of Appeals for the Federal Circuit, which awarded Apple about \$400 million (SCOTUSblog).

Damages for design patent infringement are calculated according to a statute within the United States Code, which states that anyone who "applies the patented design ... to any article of manufacture ... shall be liable to the owner to the extent of his total profit" (35 U.S.C. § 289). The interpretation and application of the wording of this statute lie at the heart of the dispute between Samsung and Apple. Samsung argues that the Federal Circuit erred in defining the entire phone as the article of manufacture. According to Samsung, the three patented features are the articles of manufacture at hand in this case. Therefore, damages should be calculated based

¹ See Figure 1.

² The three design patents at hand in this case are D604,305 (D'305), D593,087 (D'087), and D618,677 (D'677). The D'305 patent protects the graphical user interface (GUI) with icons shown on the screen, while the D'087 and D'677 patents protect aspects of the appearance and shape of the iPhone (Wisconsin International Law Journal).

only on the profits earned due to these features, rather than on the total profits from sales of the phone as a whole (Brief for Petitioners). Apple contends that the Federal Circuit interpreted the statute correctly and that the phone as a whole is the article of manufacture. Therefore, the \$400 million in damages calculated based on sales of the phone as a whole should not be reduced (Brief for Respondent). This paper will analyze the interpretations put forth by each party of 35 U.S.C. § 289 regarding the calculation of damages, as well as the consequences of the decision in this case for the technology industry and patent law.³

History

Patent law in the United States originated in late eighteenth century, when Congress passed the Patent Act of 1790 (Wisconsin International Law Journal). This act laid the groundwork for what has now become a highly complex and important legal field. Over the years, as this body of law has developed, two distinct types of patents have been established and codified: utility patents and design patents. According to the United States Patent and Trademark Office (USPTO) website, a utility patent protects an object's function for 20 years, while a design patent protects its "ornamental appearance" for 15 years.⁴ It is possible to hold both design and utility patents for a particular invention.

Just as the types of patents are described by law, methods for the recovery of damages in the event of infringement have been defined over the years, as well. The evolution of the current remedies for design patent infringement began with an 1886 Supreme Court decision in the *Dobson v. Dornan* case. This case dealt with infringement upon a design patent for the pattern on an ornamental rug. While the court ruled that the defendant's product did infringe upon the

³ Due to page constraints, this paper will focus only on the different ways to interpret and apply the statute. Alternative solutions presented by each party to decide the case while avoiding statutory interpretation will not be covered.

⁴ Prior to May 13, 2015, design patents only provided protection for 14 years (USPTO).

design patent, damages calculated under the law at the time amounted to a mere six cents (Brief for Petitioners). In response to this decision, Congress passed the Patent Act of 1887, the predecessor of 35 U.S.C. § 289, which stated that damages should not be apportioned to the patented feature. Rather, damages should be calculated with regard to the entire article of manufacture (JPTOS).⁵

In the hundred and some odd years between *Dobson* and *Samsung Electronics Co.*, the Supreme Court never heard argument in a design patent dispute (SCOTUSblog).⁶ However, numerous cases of this type have made their way through the lower courts, yielding a variety of results. The main point of contention in these cases has been the definition of the “article of manufacture” referenced in the statute. For example, the Second Circuit defined it broadly⁷ in the 1915 *Bush & Lane Piano Co. v. Becker Brothers* case, determining that a piano *case* was the article of manufacture, as opposed to the entire piano. Therefore, damages were based only on profits from the infringing case (Brief for Petitioners). Other courts, such as the Federal Circuit, have defined the article of manufacture more narrowly⁸ (JPTOS).⁹ The different interpretations and applications of 35 U.S.C. § 289 over the years have led to inconsistency and uncertainty within the court system.

Analysis

⁵ The Patent Act of 1887 and the circumstances surrounding its creation have proven to be a key facet of Apple’s argument in its legal battle against Samsung.

⁶ Although the Supreme Court did not consider design patents for more than a century, it routinely decides several utility patent cases each year (SCOTUSblog).

⁷ When defined broadly, an “article of manufacture” can be either an entire product, *or* a component of the product.

⁸ When defined narrowly, an “article of manufacture” can only be the entire product, not a component.

⁹ In the 1998 *Nike, Inc. v. Wal-Mart Stores, Inc.* case, the Federal Circuit ruled that the article of manufacture was an entire shoe, although the design patent covered only the ornamental appearance of the upper portion of the shoe. Therefore, damages were calculated based on total profit from sales of the shoe as a whole (JPTOS).

As pointed out by Brian H. Fletcher, who represented the U.S. Government during argument before the Supreme Court, there are two major points upon which both parties agree.¹⁰ Samsung and Apple agree “that Section 289’s provision for an award of total profits means that the patent-holder can recover all of the profits from the sale of the infringing articles (of manufacture and not just the portion of the profits ... attributable to the design” (Argument Transcript 21). Both parties also agree that in some situations, the article of manufacture can be a part of a larger product. In other words, a product can be a single, unitary article, *or* it can be composed of multiple articles of manufacture (Argument Transcript). In this case, Samsung argues that the three patented features are the articles of manufacture, while Apple contends that the phone as a whole is the sole article at hand (SCOTUSblog).

Apple turns to the circumstances surrounding the creation of the Patent Act of 1887, as evidence for its argument (Brief for Respondent). As stated earlier, the Patent Act of 1887 was enacted following the Supreme Court’s decision in *Dobson* (Brief for Petitioners).¹¹ Apple points to the actions of Congress to ban apportionment of damages in the aftermath of the decision as an indication of the meaning of the statute. Apple states that Congress intended “to allow design patentees to recover the entirety, not merely a portion, of the defendant’s profit on the infringing article” (Brief for Respondent 25).¹² Therefore, if the statute is interpreted and applied as intended by Congress, the *entire* phone should be found to be the article of manufacture and damages should be calculated accordingly (Brief for Respondent).

¹⁰ The U.S. Government served as *amicus curiae*, or a “friend of the court” in this case. Therefore, Mr. Fletcher did not argue in favor of either party (SCOTUSblog).

¹¹ As stated earlier, the *Dobson* decision awarded just six cents in damages to a carpet manufacturer whose design patent for the pattern on an ornamental rug was infringed (Brief for Petitioners).

¹² Had the Patent Act of 1887 existed at the time of the *Dobson* case, the infringer would have paid in damages total profits from sales of the rug, not just profits attributable to the pattern protected by the design patent.

Samsung contends that Apple’s argument about the intended meaning of the statute is flawed and inapplicable to the current dispute. Samsung points out that advocates of the Patent Act of 1887 “viewed the new statute as applying to decorative items” and that they “expressly assumed that designs drove consumer demand for those goods” (Brief for Petitioners 14). This is not the case when it comes to smartphones, which are much more complex than rugs. As explained by Kathleen M. Sullivan, who represented Samsung at argument, “a smartphone is smart because it contains hundreds of thousands of the technologies that make it work” (Argument Transcript 3). Samsung argues that a smartphone contains multiple articles of manufacture. Each patented feature of the phone is an article of manufacture and the three infringing ornamental features make up just a small portion of the product (Brief for Petitioners). Although there are many unitary articles, like the Dobson rugs, in existence today, a smartphone is not one of them (Argument Transcript). Therefore, it is simply not logical for Samsung to owe Apple total profits from sales of the phone as a whole.

Samsung argues that “Section 289 limits recoverable total profit to that attributable to the ‘article of manufacture’ to which an infringing design is ‘applied’” (Brief for Petitioners 24). To support this interpretation of 35 U.S.C. § 289, Samsung turns to the *Bush & Lane Piano* case. In this case, Becker Brothers sold a piano with a case that was found to infringe upon a design patent held by Bush & Lane Piano Co. (JPTOS). As stated earlier, the Second Circuit ruled that the case was the article of manufacture, rather than the whole piano, and damages were calculated based only on profits from the sales of the case. Samsung emphasizes that “the patented design claimed only a piano’s external casing as depicted in the patent drawing, not a piano’s internal structures or an entire piano” (Brief for Petitioners 32). Samsung compares *Bush & Lane Piano* to the current dispute with Apple: Apple’s design patents refer only to certain

features of the phone, not to the phone as a whole (JPTOS). The Supreme Court should adhere to the *Bush & Lane Piano* precedent and define the patented features as the articles of manufacture.

Apple disagrees with the applicability of *Bush & Lane Piano* to the current situation, contending that the piano and piano case are not comparable to a smartphone. Seth P. Waxman, who represented Apple at argument, pointed out that “the physical relationship between the patented design and the rest of the product” is key to determining whether there are multiple articles of manufacture (Argument Transcript 48). Apple does not dispute the *Bush & Lane Piano* decision because the piano and case could be physically separated and sold independently of one another (Brief for Respondent). In the case of the Samsung phone, however, the exterior portion, which includes the infringing ornamental features, cannot be detached from the interior components that do not infringe. The Federal Circuit accepted this distinction between the *Bush & Lane Piano* and *Samsung Electronics Co.* cases (Brief for Petitioners).

Consideration of the consequences of a precedent set by a decision in this case provides another way to evaluate the arguments. A decision in favor of Samsung would set a precedent that the “article of manufacture” is defined broadly and often refers to a portion of a given product, rather than the product as a whole. This ruling would ensure that patent-holders are not overcompensated and, perhaps more importantly, that infringers are not excessively punished (JPTOS). However, this precedent could ultimately lead to confusion. Mr. Fletcher explained during argument that if the article of manufacture is broadly defined, it would be necessary to determine the degree to which “the various components of a smartphone drive consumer demand and contribute to the value of the phone” (Argument Transcript 25). Only by placing a monetary value on each article of manufacture could damages be properly calculated. As Justice Anthony

M. Kennedy pointed out, in the case of smartphones and other of electronic devices, it would be quite difficult to instruct a jury on the proper way to do this (Argument Transcript).

A ruling in favor of Apple, on the other hand, would establish a precedent that the “article of manufacture” is defined narrowly and, even with regard to complex electronic devices, typically refers to a product as a whole, rather than a portion of the product. As a result of this decision, infringers would pay considerably large sums of money in damages, even for seemingly minor offenses. This would likely incentivize companies to be mindful of avoiding infringement (JPTOS). However, in the event of infringement, there is the strong possibility that the patent-holder would be overcompensated and the infringer excessively punished. As Samsung points out, this fear of punishment could “stifle innovation” and cause companies to be overcautious (Brief for Petitioners 50). Because the patent system is intended to encourage innovation and creativity, this would be a significant problem.

Conclusion

After more than a century of inconsistency throughout the lower courts, the decision in *Samsung Electronics Co. v. Apple* will establish a national precedent for interpreting and applying 35 U.S.C. § 289 in cases of design patent infringement. Both Samsung and Apple provide strong evidence for their claims regarding the definition of the “article of manufacture” based on precedent and the history of the statute. Samsung’s case that a smartphone is more complex than one of the Dobson rugs and, therefore, must be treated as such in legal matters is compelling. However, Apple’s argument about the inseparability of a phone’s exterior and interior components deserves consideration, as well.

This case is significant because of the meaningful precedent it will set. The decision will affect not only Samsung and Apple, but also the technology industry as a whole. Despite the

potential for confusion that could result from a broad definition of an article of manufacture as either a component of a product, or a product in its entirety, it seems likely that the case will be decided in favor of Samsung. Although the precedent that the article of manufacture is typically the product as a whole might be easier to administer throughout the lower courts, the Supreme Court may find that the unintended consequences of companies choosing caution over innovation are too large to risk.

Refugee Protection and National Security: Non-Refoulement and Exclusion Clauses

By Chris Mtanos

In 2015, the number of refugees worldwide reached a historic 21.3 million people. Warfare, political instability, famine, and religious persecution are among the many factors contributing to the current increase in the international refugee population.¹³ Over 50% of refugees originate from Syria, Afghanistan, and Somalia, and it is predicted that this number will continue to rise should the international community fail to provide humanitarian relief in the face of war and starvation.

Paralleling the increase in the number of refugees is the rise in fear regarding national security threats perpetrated by this population. These sentiments are exacerbated by nationalist movements across the globe, as well as terror attacks attributed to radical extremists. Many individuals from the Western world have accepted that there is a direct link between refugees and terrorism, despite extensive research disproving this theory. Such assumptions have led to support for more restrictive policies regarding the treatment of refugees and asylum seekers, and many countries wish to return refugees to their home countries without consideration of current instability and danger. What reactive policies such as these fail to acknowledge is the fundamental principle of non-refoulement, a contributing component to refugee and international law, which prohibits countries from returning refugees to unsafe conditions.

Additionally, policy makers often neglect exclusion clauses and the screening processes included in refugee law, and instead call for more secure borders to protect national security. Heightened security measures do nothing more than depict the refugee population as criminals, which further deteriorates the situations in refugee camps and leads to an increase in radicalization. However, by acting in accordance with international laws relating to the status of

¹³ United Nations High Commissioner for Refugees, "Figures at a Glance," UNHCR, accessed March 25, 2017.

refugees, it is possible to de-stigmatize these victims, and implement more effective national security policies to address the refugee crisis.

Critical to understanding the relationship between refugee protection and national security is first understanding the definition of a refugee. According to Article 1 of the 1951 United Nations Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees, a refugee is a person who has a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”¹⁴

It is important to note the clear distinction between refugees and asylum-seekers. The UNHCR asserts that, “an asylum-seeker is someone who says he or she is a refugee, but whose claim has not yet been definitively evaluated.”¹⁵ Although the 1951 Refugee Convention details the rights of refugees and not asylum-seekers, it makes reference to those who have unlawfully taken refuge in another country. Under Article 31(1) of the Convention, “The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”¹⁶ This article is designed to protect those waiting for their refugee applications to be authorized, and does not

¹⁴ Proceedings of 1951 Convention Relating to the Status of Refugees, United Nations, Geneva, 14.

¹⁵ Ionel Zamfir, "Refugee Status under International Law," European Parliamentary Research Service Blog, October 27, 2015, Definition of refugees under international law, accessed March 25, 2017.

¹⁶ Proceedings of 1951 Convention, 29.

permit states to return asylum-seekers to their countries. If this situation occurs, it is a breach of non-refoulement.

Article 33(1) of the Convention codifies the principle of non-refoulement and states, “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”¹⁷

Additionally, this principle was included in Article 3 of the 1984 Convention against Torture by maintaining that, “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”¹⁸ The inclusion of non-refoulement into both refugee and international law illustrates without doubt that refugee protection is superior to expulsion, and that the international community must act accordingly.

Despite the clarity of this principle, there are many examples of breaches of non-refoulement. Bangladeshi border guards continue to push Rohingya Muslims back into Myanmar without consideration of the religious persecution and ethnic cleansing taking place in their origin country. Additionally, on July 21, 1979, the Thai government forced approximately 45,000 Cambodian refugees to return, despite the political persecution victims were subjected to during the Vietnam War. The refugees were forced at gunpoint to cross the border through a minefield, and those who disobeyed were shot and killed. In total, this horrific instance of refoulement led to the death of nearly 3,000 refugees.¹⁹ Today, one of the most prominent breaches of non-refoulement is the international community’s attempt to repatriate Afghan

¹⁷ Ibid., 30.

¹⁸ “Article 3,” proceedings of 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations, New York City.

¹⁹ Marjoleine Zieck, *UNHCR and Voluntary Repatriation of Refugees: A Legal Analysis* (S.I.: S.n., 1997), 147.

refugees despite deteriorating, war torn conditions. In November of 2016, Pakistani security officials enacted a campaign of terror to intimidate Afghan refugees to return home²⁰, and the EU recently signed a deal with the Afghan government to send thousands of Afghans back to an increasingly dangerous warzone.²¹ Each of these countries have cited protection of national security as their justification for breaching non-refoulement, but fail to acknowledge the specific exclusion clauses in the 1951 Convention.

According to Article 33(2) of 1951 Convention and the 1967 Protocol, “The benefit of [Article 33(1)] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”²² This article makes it clear that while states have an international obligation to protect refugees and asylum seekers, countries are not obligated to do so if protection poses a threat to national security. Additionally, Articles 1(F) and 32(1) of the 1951 Convention outline the circumstances under which an individual can be denied refugee status or protection. These articles exclude the right to refugee status for individuals who: (1) have committed a crime against peace, a war crime or a crime against humanity; (2) have committed a serious nonpolitical crime outside the country of refuge prior to his admission to that country as a refugee; (3) have been guilty of acts contrary to the purposes and principles of the United Nations; or (4) are a threat to national security or public order.²³ Effectively, these exclusion clauses are designed to safeguard the rights of genuine refugees and asylum-seekers, while

²⁰ Jarred Ferrie, "Will the UN Become Complicit in Pakistan's Illegal Return of Afghan Refugees?" IRIN, November 20, 2016, accessed March 26, 2017.

²¹ Rod Nordland and Mujib Mashal, "Europe Makes Deal to Send Afghans Home, Where War Awaits Them," The New York Times, October 05, 2016, accessed March 26, 2017.

²² Proceedings of 1951 Convention.

²³ *Ibid.*, 16.

simultaneously protecting states' national security. Without these measures, host countries could rightfully fear an influx of refugees, however because of the inclusion of these principles, this fear is unfounded.

As the refugee crisis continues to escalate, the international community has an obligation to respond more adequately to the situation. By citing national security as an excuse to alienate refugee victims, countries are depicting refugees as terrorists and disregarding international refugee law. Breaches of non-refoulement and a refusal to adopt comprehensive refugee policies have placed a disproportionate burden on host communities, and intensifies instances of radicalization. The refugee crisis will continue to worsen if countries refuse to recognize their obligations under law and fail to develop peaceful measures of refugee resettlement.

There are three solutions available to refugees during a time of crisis. These are referred to as durable solutions, and can include voluntary repatriation to their home country, integration into the country of asylum or resettlement to a third country. Today, the most needed solution is resettlement, however the number of third country options available account for only 1% of the entire refugee population.²⁴ In order to be subjected to the UNHCR screening process, an asylum seeker must first meet the UNHCR refugee criteria which is as follows: (1) legal and physical protection needs, (2) survivors of violence and torture, (3) medical needs, (4) women at risk, (5) family reunification, (6) children and adolescents, (7) elderly refugees and (8) lack of local integration measures.²⁵ After an asylum seeker has been determined to fall under one or more of these categories, he or she is subjected to the UNHCR security screening process.

To begin the security check, a UNHCR staff member collects all required identity documents from the refugee. After, biographical information is collected, and each applicant is

²⁴ The 10-Point Plan, *Solutions for Refugees*.

²⁵ United Nations High Commissioner for Refugees, "Resettlement Criteria," UNHCR, accessed March 26, 2017.

required to undergo an iris scan. To conclude, applicants are thoroughly interviewed by a UNHCR staff member, and his or her answers are verified by reputable sources in the refugee's home region. The interview process is extensive, and lasts hours each day. On average, a refugee's application takes 18-24 months to process.²⁶

Despite the scrutinizing refugee screening process, refugees are required to undergo further security checks after being referred to a third country for resettlement. Over the past 10 years, the number of countries that offer resettlement programs has increased from 14 to 37, and the United States currently has the largest refugee resettlement program in the world.²⁷ Each country's screening process is similar, as government officials interview each refugee before arriving, processes his or her information through an extensive list of databases and then decides whether to accept or reject the refugee's case. Because the United States has the largest refugee resettlement program, the screening procedure is by far the most comprehensive and information regarding the process is widely available.

To begin, the Resettlement Support Center (RSC) collects the information prepared by the UNHCR. An RSC staff member then conducts another interview with the refugee, and customizes the questions according to his or her home country. After the information is verified, it is recorded in the US Worldwide Refugee Admission Processing System (WRAPS), which is then distributed to the following national security departments: National Counterterrorism Center, Federal Bureau of Investigation, Department of Homeland Security, Department of Defense and Department of State. Each of these agencies conducts individual, unique background checks using the information from the RSC, and screens for security threats, connections to known bad actors and past immigration or criminal violations. Today, Syrian

²⁶ Alex Altman, "Syrian Refugees: Here's How the Screening Process Works," Time, accessed March 26, 2017.

²⁷ United Nations High Commissioner for Refugees, "Information on UNHCR Resettlement," UNHCR, accessed March 26, 2017.

refugees are subjected to a more robust round of background checks, and are screened more extensively than refugees from other parts of the world. According to the Department of State, US refugees are the most thoroughly screened population that is permitted to enter the country.²⁸

If a refugee successfully passes all background checks, DHS officers travel to the host country to interview applicants and collect biometric information for the third time. The purpose of the DHS interview is to confirm the information gathered during the RSC screening, and if new information arises an applicant is required to begin the background check process once more. Often, if inconsistencies are discovered, the refugee's application is rejected. However, if a refugee successfully completes both the background checks and screening processes, he or she is required to submit his or her fingerprints, which are recorded and stored in a DHS database. This biometric information is distributed to the FBI database, the DHS database, which includes watch list information and previous immigration encounters in the US and overseas, and the DoD database, which includes fingerprints obtained from around the world.²⁹ The last step of the security process includes a medical screening, and if an applicant is found to carry infectious diseases that are perceived as a security threat, his or her application is denied. Only after successfully completing these security steps is a refugee allowed to enter the United States, where he or she is required to participate in a Cultural Orientation and enroll in other services to assist him or her adjust to US culture.³⁰

There is no doubt the refugee screening process at both the international and domestic level thoroughly scrutinizes each applicant. However, despite these examinations and exhaustive security checks, fear and misinformation continue to plague refugee resettlement policies. Xenophobia is evidently perpetuated by host populations, which is fueled by policymakers eager

²⁸ "US Refugee Admissions Process," U.S. Department of State, accessed March 26, 2017.

²⁹ Ibid.

³⁰ Ibid.

to marginalize this vulnerable population. While there are currently over 21 million refugees in need of resettlement services worldwide, the United States accepted approximately 85,000 refugees³¹, Canada resettled 21,876³², Australia resettled 13,750³³ and New Zealand accepted approximately 750³⁴ refugees in 2016. In contrast, Turkey, Pakistan, Lebanon, Iran, Ethiopia and Jordan are forced to bear the burden of the crisis, and are currently hosting approximately 7,579,600 refugees, or one third of the international refugee population.³⁵ As the refugee crisis in Europe escalates, it is difficult to gather data regarding the number of refugees who have been resettled in Europe, but it is clear the international community is lacking in its response.

Despite the call to action issued by the UNHCR to the international community, countries around the world continue to turn their backs on the refugee population. For example, at the beginning of 2017, the Bangladeshi government issued an order to relocate Rohingya refugees to the remote island of Thengar Char after approximately 65,000 asylum-seekers arrived in Bangladesh between October to November of 2016. The UNHCR has repeatedly labeled the Rohingya, a Muslim minority group in Myanmar denied of citizenship, the most persecuted population in the entire world. According to the head of UNHCR in Bangladesh, John McKissick, the Myanmar government is currently attempting to ethnically cleanse the country of its Muslim population. There are approximately 32,000 registered Rohingya refugees living in

³¹ Phillip Connor, "U.S. Admits Record Number of Muslim Refugees in 2016," Pew Research Center, October 05, 2016, accessed March 26, 2017.

³² Government of Canada, Immigration, Refugees and Citizenship Canada, Communications Branch, "#WelcomeRefugees: Key Figures," Government of Canada, Immigration, Refugees and Citizenship Canada, Communications Branch, February 09, 2017, accessed March 26, 2017.

³³ "Fact Check: Will Australia's Refugee Intake in 2015-16 Be the Highest since WWII?" ABC News, September 28, 2015, accessed March 26, 2017.

³⁴ "New Zealand Refugee Quota Programme," New Zealand Refugee Quota Programme | Immigration New Zealand, accessed March 26, 2017.

³⁵ United Nations High Commissioner for Refugees, "Figures at a Glance," UNHCR, accessed March 26, 2017.

camps in Bangladesh, and the UNHCR estimates there are anywhere between 200,000-500,000 unregistered refugees living in the border town of Cox's Bazar.³⁶

Although Bangladesh is not a signatory to the 1951 Convention Relating to the Status of Refugees nor the 1967 Protocol Relating to the Status of Refugees, the government's mistreatment of the asylum seeking and registered refugee populations contradicts the country's domestic and international law. According to the Bangladeshi Constitution Article 25, the country vows to honor its commitments under the UN Charter and relevant UN Treaties.³⁷ In total, the UN treaties relating to the protection of refugees to which Bangladesh is currently a signatory are: Universal Declaration of Human Rights (UDHR), Four Geneva Convention, International Covenant on Civil and Political Rights (ICCPR), Convention on the Rights of the Child (CRC), Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention Against Torture (CAT). Each of these conventions pertain to the current refugee situation, and there is no doubt Bangladesh has an international responsibility to treat refugees accordingly. For example, Article 2 of the ICCPR states, "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."³⁸ Additionally, the CRC affirms that state parties must take responsibility for refugee children, including their birth registration.³⁹

³⁶ Maher Sattar, "Rohingya Refugees in Bangladesh to Be Relocated to Remote Island," *The New York Times*, January 31, 2017, accessed March 26, 2017.

³⁷ "Bangladesh," *Bangladesh: Constitution of Bangladesh (as Amended up to May 17, 2004)*, accessed March 26, 2017.

³⁸ "International Covenant on Civil and Political Rights," *International Covenant on Civil and Political Rights*, accessed March 26, 2017.

³⁹ "Convention on the Rights of the Child," *Convention on the Rights of the Child*, accessed March 26, 2017.

It is clear that Bangladesh's refugee policies violate numerous international laws, as the country intentionally creates an inhospitable place for Rohingya refugees. As the government continues to force the Rohingya to reside in other countries such as Indonesia, Malaysia and Thailand, Bangladesh is failing to live up to its international responsibilities, and is forcing other countries to bear the burden of the worsening crisis.

As Bangladesh continues to strengthen its national security measures by citing physical risks for local people socially and economically, other countries around the world are beginning to do the same. For example, at the beginning of 2017 the United States signed a travel ban directly impacting the country's refugee resettlement program. The executive order suspended the refugee resettlement program for 120 days and the Syrian refugee program indefinitely, banned entry from 7 majority Muslim countries, prioritized refugees claiming religious persecution which allowed the US to favor Christians fleeing the Middle East, and lowered the US quota of accepted refugees in 2017 from 110,000 to 50,000.⁴⁰ In a statement, President Trump rejected claims of religious intolerance, and stated that the travel ban was necessary to protect the US from terror and to keep citizens safe.⁴¹ Despite the New York Appeals Court decision stating the executive order to be unconstitutional, President Trump has issued another, more refined travel ban with a similar goal of suspending the refugee resettlement program and closing US borders to refugees in the name of national security. As a signatory to the 1967 Protocol, the US is currently in breach of its international obligations.

As countries continue to perpetuate a false narrative regarding refugee resettlement, and close their borders to victims for the sake of national security, situations in host country refugee

⁴⁰ Alan Yuhas and Mazin Sidahmed, "Is This a Muslim Ban? Trump's Executive Order Explained," *The Guardian*, January 31, 2017, accessed March 26, 2017.

⁴¹ "President Donald J. Trump Statement Regarding Recent Executive Order Concerning Extreme Vetting," *The White House*, January 30, 2017, accessed March 26, 2017.

camps deteriorate, creating a perpetual cycle ending in an increase in radicalization. The Bangladeshi government's response towards Rohingya refugees has placed a disproportionate burden on refugee camps in neighboring countries such as Thailand, where food and education resources are diminishing as the refugee population grows.⁴² The Mai La refugee camp in Thailand is home to approximately 40,000 registered Rohingya refugees waiting to be resettled in third countries. As the number of refugees and asylum-seekers increase, so do reports of sexual and gender based violence, while food rations and housing materials decrease.⁴³

Similarly in Zaatari, Jordan's largest refugee camp home to approximately 81,000 Syrian refugees, inter-camp violence plagues the area, and girls as young as 14 are married to men in order to secure a dowry for their families to continue living in the camp.⁴⁴ In Uganda, the increase in malaria and diarrhea has resulted in a disproportionate number of childhood deaths, as refugees from South Sudan continue to seek refuge in overcrowded, inhospitable environments.⁴⁵ On average, a refugee is forced to live in a refugee camp for approximately 17 years, meaning people are subjected to continued violence, poverty, starvation as well as other horrors as they struggle to survive.⁴⁶

As the quality of life in refugee camps deteriorates, the rate of radicalization among refugee populations increases. In a study conducted by Huma Haider from Applied Knowledge Services regarding Refugees, Internally Displaced Persons and Radicalization, she found that as refugee situations become protracted, the chances of a refugee turning towards radicalized

⁴² "What's Life Like in Thailand's Largest Burmese Refugee Camp?" Iguacu - Effective Global Giving, February 04, 2016, accessed March 26, 2017.

⁴³ Ibid.

⁴⁴ Phoebe Weston, "Inside Zaatari Refugee Camp: The Fourth Largest City in Jordan," The Telegraph, August 05, 2015, accessed March 26, 2017.

⁴⁵ Tito Justin, "South Sudanese Say Refugees Dying in Ugandan Camps," VOA, October 04, 2016, accessed March 26, 2017.

⁴⁶ John Vibes, "Average Stay in a Refugee Camp Is 17 Years, UN Expert Says Camps Are 'The Cities Of Tomorrow,'" The Free Thought Project, February 12, 2016, accessed March 26, 2017.

militant pathways increases.⁴⁷ Protracted situations result in a loss of hope for the foreseeable future, which increases feelings of desperation among refugee communities. For example, Palestinian refugees living in deteriorated conditions in Lebanon are far more likely to become radicalized than refugees living in integrated situations outside of the camp.⁴⁸ In a similar study conducted by the RAND Corporation, overcrowding, poverty and hunger in refugee camps often lead to an uptick in radicalization, which is exacerbated by the negative response of the international community.⁴⁹ The study makes it clear that refugees themselves do not automatically turn towards extremist measures, but instead the combination of the aforementioned conditions push them in that direction.⁵⁰ As countries increase hostilities towards refugees and victims continue to feel a sense of hopelessness, opportunities for radicalization increase, thus prompting the global community to strengthen its national security.

The cycle linking national security, protracted refugee systems and radicalization must be broken. As the global community closes its borders to refugee victims and distributes false information regarding security checks and resettlement processes, the resulting xenophobic policies fuel situations leading to radicalization. Despite studies from the US and Germany to dispel myths regarding the international refugee population, a false narrative is still widely promulgated.⁵¹ It is clear that in order to end the cycle of radicalization, the international community must honor its legal and moral obligations to refugees, and work towards integrating this vulnerable population into their communities. Without adequate compassion, the lives of

⁴⁷ Huma Haider, Refugee, IDP and Host Community Radicalisation, October 31, 2014, accessed March 26, 2017.

⁴⁸ Ibid.

⁴⁹ Barbara Sude, David Stebbins, and Sarah Weiland, "Lessening the Risk of Refugee Radicalization: Lessons from the Past," RAND Corporation, December 28, 2015, accessed March 26, 2017.

⁵⁰ Ibid.

⁵¹ Tanvi Misra, "The Real Link Between Crime and Refugees," CityLab, February 14, 2017, accessed March 26, 2017.

refugees will continue to deteriorate, resulting in a perpetual yet evident cycle leading to terrorism.

Counterterrorism or Counterclockwise: The Implications of National Security Measures on Civil Liberties

By Caleigh Wozniak

Introduction

After the terrorist attacks of September 11th, 2001, Americans recognized the need to implement domestic counterterrorism measures that would prevent future attacks against the United States. The Patriot Act, which permits the surveillance of phone calls, web traffic, and emails of suspected terrorists, was one such measure that was swiftly enacted into law in October 2001. However, in the wake of Edward Snowden's release of classified documents of the National Security Agency (NSA), the debate as to whether the government's actions were protecting public safety or infringing on civil liberties escalated to a highly disputed controversy and remains to be an contentious issue in American society.

Background

Section 215 of the Patriot Act contains a provision that enables the government to collect "metadata" about the telephone communication of residents of the United States. One of the documents that Snowden released in early June of 2013 additionally revealed a government order directing Verizon to produce to the NSA "on an ongoing daily basis... all call detail records or 'telephony metadata' created by Verizon for communications (i) between the United States and abroad; or (ii) wholly within the United States, including local telephone calls."⁵² This bulk collection of information of Verizon customers, or Mass Call Tracking, had existed for almost a decade and shocked many Americans. It prompted many questions regarding the constitutionality of Section 215 and of the Patriot Act. On June 11th, 2013, the American Civil Liberties Union (ACLU) filed a lawsuit against the Director of National Security James Clapper

⁵² *ACLU v. Clapper*, No. 14-42-cv, 2015 (US 2nd Circuit Court of Appeals)

(*ACLU v. Clapper*) challenging the government’s Mass Call Tracking program, which they claimed was unconstitutional and violated the First and Fourth Amendments.

Contentions of the Parties

ACLU’s complaint described the government’s Mass Call Tracking program as “snatching every American’s address book – with annotations detailing whom we spoke to, when we talked, for how long, and from where.”⁵³ The government, ACLU alleged, had crossed the line of protecting public safety and had trespassed into the business of unlawfully obtaining private details of the lives of the American public, a power that the Constitution and the Patriot Act did not authorize the government to hold. Such action constituted an “invasion of privacy and an unreasonable search,”⁵⁴ which was a violation of the Fourth Amendment. Since the program collected “sensitive information about associational and expressive activity,”³ it also was a violation of the First Amendment, as the collected data had the potential to reveal an individual’s religious beliefs, social status, or political affiliations. As a result of the unconstitutionality of the Mass Call Tracking program, ACLU brought suit against Clapper in order “to obtain a declaration that the Mass Call Tracking is unlawful; to enjoin the government from continuing the Mass Call Tracking... and to require the government purge from its databases all of the call records related to plaintiffs’ communications collected pursuant to the Mass Call Tracking.”² They called for the program’s suspension or for a reform of Section 215 to prohibit the Mass Call Tracking program.

The defendants responded to the plaintiffs’ claim by filing a motion to dismiss. Although they contended that the collection of records under the Mass Call Tracking program had been “repeatedly authorized by the Foreign Intelligence Surveillance Court” and was regulated “under

⁵³ Complaint, *ACLU v. Clapper*, No. 13-cv-03994 (S.D.N.Y.)

⁵⁴ *ACLU v. Clapper* – Challenge to NSA Mass Call-Tracking Program.” American Civil Liberties Union. October 29, 2015.

strict controls imposed by FISC orders to detect communications between foreign terrorists and any of their contacts,”⁵⁵ they believed that based on the plaintiffs’ claims, the Court lacked jurisdiction to hear the case and that the plaintiffs lacked standing to sue; therefore, the case should be dismissed. While the motion to dismiss was reviewed, the defendants felt the need to defend the Mass Call Tracking program since they desired to renew it when Section 215 would expire in June of 2015. The program, they argued, was constitutional, since the “Constitution vest[ed] authority to collect foreign-intelligence information (including counter-terrorism intelligence) directly in the President,”⁵⁶ and they stressed the need for the program to be preserved as it was “an important element of the Government’s efforts to protect the Nation from the very real and unrelenting threat of terrorist attack.”⁴ The defendants contended that only the dialed numbers were revealed in the collected data, so the public shouldn’t fear that the government was brooding over their personal information. The program also “contained elaborate safeguards against abuse,” since, for example, agents needed to “get a judge’s permission... [and] demonstrate that the suspect is a terrorist” before obtaining any information.⁵⁷ Republican senators who agreed with the Defendants even claimed that “the United States could have prevented 9/11 if the NSA programs had been in place before the terrorist attacks,”⁵⁸ stressing the potential of the value of information that the government received. Shutting down the program would “leave the country far more vulnerable to foreign terrorist attacks”⁵ and would inhibit a successful fight against terrorism.

The United States Court of the Southern District of New York acknowledged in their decision on December 12th, 2013 that the Mass Call Tracking program, “if unchecked, imperils

⁵⁵ Motion to Dismiss, *ACLU v. Clapper*, No. 13-cv-03994 (S.D.N.Y.)

⁵⁶ Turner, Robert F. "Reassessing *ACLU v. Clapper*: The Missing Constitutional Analysis." Constitution Daily. May 20, 2015.

⁵⁷ Sales, Nathan A. "The Patriot Act Is a Vital Weapon in Fighting Terrorism." New York Times. May 23, 2014.

⁵⁸ Diamond, Jeremy. "Patriot Act Debate: Everything You Need to Know." CNN. May 23, 2015.

the civil liberties of every citizen,”⁵⁹ however, they found the program to be lawful and granted the defense’s motion to dismiss the case. They claimed that the matter of deciding whether the program should continue to be conducted was a responsibility of Congress. Unsatisfied with the outcome, ACLU appealed the decision to the US Court of Appeals.

In a monumental decision on May 7th, 2015, the U.S. Second Circuit Court of Appeals vacated and remanded the district court’s judgment. In their written opinion, the court held that the the Mass Call Tracking “program exceed[ed] the scope of what Congress had authorized” and that the collection of metadata had the “capacity... to reveal ever more private and previously unascertainable information about individuals.”¹ This decision sided with the ACLU and was a win for those who strove to secure civil liberties. The decision, by being the “first to find that the government’s mass collection of telephone data...[went] beyond the scope of Section 215,”⁶⁰ set the precedent to check and review federal legislation in order to ensure that civil liberties are not violated.

Discussion and Findings

The *ACLU v. Clapper* decision was a significant achievement for the ACLU and other groups who aspire to secure the legal protection of civil liberties. The government’s telephone metadata program, as the court interpreted, collected an alarming amount of detailed information, and it was successfully declared as unconstitutional. Section 215 of the Patriot Act was subsequently reformed as a result of this decision, when it expired in June of 2015. The reformed bill, entitled the Freedom Act, maintained the collection of numbers dialed; however, the bill explicitly prohibited the transfer of these records to other authorities and agencies, thereby establishing a check on the government’s power. By ratifying the Freedom Act, Jameel

⁵⁹ *ACLU v. Clapper*, No. 13-cv-03994 (S.D.N.Y.)

⁶⁰ "*American Civil Liberties Union v. Clapper* - Global Freedom of Expression." Global Freedom of Expression. Columbia University.

Jaffer, American Civil Liberties Union deputy legal director, pointed out that “Americans [were] no longer willing to give the intelligence agencies a blank check”⁶¹ to cite counterterrorism as a justification for their collection of private information.

Although I recognize the need for the government to enact counterterrorism measures that serve as a safeguard for national security, I believe that their actions need to continuously be reviewed by the branches of government in order to ensure that we as a society do not turn counterclockwise and undo the civil liberties that our predecessors fought so hard to secure. Our civil liberties are the foundation of our society, and it is the government’s job to protect them. The Patriot Act, although passed with good intentions, gave the government leeway to overstep its boundaries and infringe on our civil liberties. The Court, which always refers to the written language a document when interpreting it’s intent, was able to read the Act’s Mass Call Tracking program and see how the vagueness of Section 215 needed to be corrected in order to ensure that a violation of the ordinary person’s privacy would not occur. ACLU was justified in bringing suit against Clapper and the government security agencies and they had standing to sue based on their claims that the First and Fourth Amendment rights had been violated. The government is entitled to enforcing future legislation that aims to combat counterterrorism, however, it is imperative that the judicial system reviews these programs to determine whether the programs are serving their purpose by protecting public safety and are within the scope of the Constitution.

⁶¹ Nelson, Steven. "Senate Passes Freedom Act, Ending Patriot Act Provision Lapse." U.S. News & World Report. June 2, 2015.

Should Robots Be Entitled to Life, Liberty, and the Pursuit of Happiness?

By Erin Speich

The world of science fiction has always been fascinated with the idea of robots and artificial intelligence. Even Homer was intrigued by the idea of autonomous machines when he first mentioned them in *The Illiad*. Since Homer, hundreds of inventors, authors, and directors have all taken their shot at artificial intelligence over the years, but society is closer to the fantasies of science fiction now than ever before. Self-driving cars are available on the market and a human landing on Mars is only a handful of years away. With the emergence of these new technologies and smarter artificial intelligence, there is pressure on society to figure out the best methods of handling them, especially when they are used for the wrong reasons. In April of 2015, a Swiss robot was arrested for buying drugs and other illegal items online. This incident struck a chord with the legal world—raising concern over who should be held reliable for a robot’s doings. There are many scientist and experts who believe that artificial intelligence should be given all the same legal rights and responsibilities that humans are given, while others—myself included—argue the consequences fall into the hands of whoever created or claims ownership of the robots.

Should society hold robots to the same legal standards that human beings are held to? Protecting them when innocent and condemning them when guilty? Many scholars and scientists believe so. Gabriel Hallevy, a law professor at the Ono Academic College in Israel reminds society that under existing criminal law, any offender with knowledge and awareness of their actions should be held criminally accountable.⁶² As the famous quote applies to Spider-man—“with great power comes great responsibility”—the same can apply to artificial

⁶² Neyfakh, Leon. "Robots on Trial ; as Machines Get Smarter-And Sometimes Cause Harm-We're Going to Need a Legal System That Can Handle Them." *The Boston Globe (Boston, MA)*, March 3, 2013. Accessed December 6, 2016. http://www.highbeam.com/doc/1P2-34337142.html?refid=easy_hf.

intelligence. The more powerful, intelligent and aware these machines become, the more they should be held responsible for their actions. There are also some who believe that not only should artificial intelligence be protected by legal rights, but by basic human rights as well. Marcus du Sautoy, from the University of Oxford, argues that as “the sophistication of computer thinking reaches a level basically akin to human consciousness, it’s our duty to look after the welfare of machines, much as we do that of people.”⁶³ This logic essentially equates the life of a robot to the life of a human and lets the differences between the two go unnoticed. Once a machine becomes completely self-aware, the creator or owner no longer has complete control over it, allowing the creator to be free of blame from their robot’s wrongdoings. Alain Bensoussan, a lawyer in France known for defending the rights of artificial intelligence, explains that as an owner of artificial intelligence, he does not have to claim responsibility for his machine’s mistakes: “I’m not responsible for my car, which can drive itself to Toulouse in the same way I’m responsible for my toaster.”⁶⁴ If a robot advances beyond the scope of control, the owner should not be held responsible for the misdeeds of its property. When artificial intelligence develops the ability to be self-aware and to make their own decisions, many individuals strongly believe they should be given the same responsibilities and protections under the law that humans are given.

Where there is a strong argument for the legal rights and duties for artificial intelligence, there is an equally strong argument against them. Interestingly enough, many people like to compare artificial intelligence and toasters; however, Wesley J. Smith uses this comparison to

⁶³Dockrill, Peter. "Artificial Intelligence Should Be Protected by Human Rights, Says Oxford Mathematician." ScienceAlert. May 31, 2016. Accessed December 07, 2016. <http://www.sciencealert.com/artificial-intelligence-should-be-protected-by-human-rights-says-oxford-mathematician>.

⁶⁴ Puyhardy, Cecile. "What Rights Should Robots Have?" L'Atelier : Accelerating Innovation. June 27, 2016. Accessed December 07, 2016. http://www.atelier.net/en/trends/articles/what-rights-should-robots-have_442195.

argue against the legal and civil rights of robots. He believes that these robots of the future “would only be computers with very sophisticated software” making them “no more entitled to rights [...] than a toaster.”⁶⁵ Smith continues to argue throughout his article that the most obvious difference between humans and robots is life. There is so much more to life than intelligence; a robot will never have a naturally beating heart, will never be able to reproduce, and most importantly, will never be able to experience true and deep human emotions. It’s very existence and every action it takes is the result of clever programming. Therefore, if a robot’s intelligence advances beyond what the programmer intended and it commits a crime, the programmer should be held responsible. Many scientists, Nell Watson included, have predicted that, “people are very soon going to have a similar relationship with machines as they now have with their pet animals.”⁶⁶ If humans treat their machines as they would treat their pet, then evidently humans should be held responsible for the actions of their machines. If a dog were to bite a kid playing in the street, the dog owner would be held liable even if they had no idea what the dog was planning to do. This same logic should apply to robots.

While I understand that this issue is so much more than a simple black or white solution, my tendencies and ethics pull me towards the argument that robots should not be given legal rights and responsibilities. I cannot bring myself to believe that one day scientists will be able to mimic every single aspect of human life perfectly within a machine. After my research on this topic, it seemed to me that giving legal responsibility to robots provided an escape route for the creators in case their machines became destructions to society. When something unintentionally

⁶⁵ Smith, Wesley J., J.D. "Robots Will Never Be People and Should Never Have Rights." The Center for Bioethics and Culture. December 30, 2009. Accessed December 07, 2016. <http://www.cbc-network.org/2009/12/robots-will-never-be-people-and-should-never-have-rights/>.

⁶⁶ Puyhardy, Cecile. "What Rights Should Robots Have?" L'Atelier : Accelerating Innovation. June 27, 2016. Accessed December 07, 2016. http://www.atelier.net/en/trends/articles/what-rights-should-robots-have_442195.

goes wrong, they wouldn't have to worry about dealing with the consequences—the robots would. The person who created the robot and owns it primarily should be held liable for the actions of their creations. If the creators are not held liable for their machines, what will prevent evil individuals from creating robots that could cause societal destruction? Robots and artificial intelligence can have a positive impact on the world, but there has to be a solid legal system in place for scientists who wish to advance this technology. In my opinion, the simplest way to do that is to place the liability on the creators of the machines in order to keep the rapid improvement of robot technology in check.

In this lifetime, there will be a need for a legal system that addresses the legal rights and responsibilities surrounding artificial intelligence, but whether robots will be granted those rights or not has yet to be decided. Until the first self-aware and conscious artificial intelligence appears, all society can do is learn the facts and ponder the issue so that an educated decision can be made. Of course, continuing to enjoy the beloved science fiction genre doesn't hurt either. Someday soon, the world might be full of playful robots in the likenesses of BB-8, R2-D2, and Wall-E for people to enjoy and love. Hopefully, society will prevent situations like the *Terminator* and *Westworld* from happening, but we will just have to wait and see what the far future has in store for our lifetime.

First Amendment Rights and The Press

By George Skogstrom

The First Amendment to the United States Constitution has never been more important than it is now, in a modern era of information technology and electronic communication. Nearly instantaneous and easily traceable means of speech provide new and unique challenges to lawmakers, judges, and attorneys, challenges that could not have been foreseen by the original writers of the Constitution. What is free speech, and thus protected under the First Amendment, and what is illegally obtained information? The lines become increasingly blurred every year.

This question specifically was thrust to the forefront of national discussion when CNN declared on-air that it was illegal for non-members of the press to download and view the emails that had been hacked and stolen from the Hillary Clinton presidential campaign. While constitutional law scholars scoffed at the ridiculousness of such an idea, the issues that were raised were of interest to many people around the country, and conversations and debates on the right of the people to freedom of speech, particularly as it pertains to the press, were sparked. Is it illegal for the press to download and view information that has been obtained illegally, and to subsequently disseminate this information to their readers and/or viewers? Then, is it illegal, as CNN claims, for individuals to acquire and view the same illegally obtained information of their own volition (that is, outside of established news media channels)? Finally, and more generally, just how important is it to protect the rights of the press and ordinary citizens as they relate to freedom of speech and the free expression of political opinions and controversial facts?

This paper will analyze and respond to these questions, particularly as they are answered, or left unanswered, by the 2001 Supreme Court case *Bartnicki v. Vopper*. It will draw upon the judgment presented in that case, as well as other relevant case law and legal analysis, in an attempt to examine the importance of protecting free speech in a modern, information-driven,

age, and the far-reaching ramifications if the government and the people do not protect such free speech.

The issue of free speech is one that may appear clear-cut and simple: if the speech is not obscene,⁶⁷ an incitement to violence,⁶⁸ or considered “fighting words,”⁶⁹ it is almost certainly protected under the First Amendment. However, with the introduction of various technologies and means of electronic communication in the 20th and 21st centuries, things have become increasingly muddled. For example, is information obtained illegally via wiretap protected under the First Amendment? According to the Omnibus Crime Control and Safe Streets Act of 1968, it is not: “Except as otherwise specifically provided in this chapter, any person who... (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection... shall be punished...”⁷⁰

However, later cases, most significantly *Bartnicki v. Vopper*, have demonstrated that this is not always the case. In this Supreme Court case, a radio broadcaster had broadcasted an illegally obtained recording of a conversation between a teacher’s union negotiator and the president of the same union. In this finding, the court determined that in cases where matters of public interest and privacy conflict, matters of public importance must prevail: “In this case, privacy concerns give way when balanced against the interest in publishing matters of public importance.”⁷¹ Here, the Supreme Court was attempting the difficult task of what Eric B. Easton

⁶⁷ *Miller v. California*, 413 U.S. 15, 24-25 (1973)

⁶⁸ *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969)

⁶⁹ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572-573 (1942)

⁷⁰ Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2511(1) (2010)

⁷¹ *Bartnicki v. Vopper*, 532 U.S. 514 (2001)

of the University of Louisville Law Review calls “an ‘ad hoc balancing’ of interests in personal privacy versus publicly significant information, ultimately ruling in favor of the latter.”⁷²

They also stated that since the recording had not been obtained illegally by the defendant himself, the defendant was not liable for the dissemination of the recording: “a stranger’s illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.”⁷³ Of course, this was a landmark decision for the protection of First Amendment rights, particularly as they relate to the media and its ability to publish information in the public interest.

Thus, applying the *Bartnicki v. Vopper* ruling to the Clinton emails, it is not unreasonable to assume that it is entirely legal for the media to acquire and read copies of the illegally obtained emails, so long as the media channels themselves were not the ones who committed an illegal act to obtain the documents. The question then becomes: is it permissible for individual citizens, outside the protection of media channels, to do the same? Or, is the downloading of documents from WikiLeaks and other similar sources illegal?

An important distinction to be made in an instance like this is the difference between stolen property, and copies—digital or physical—of stolen property. So, using the case of the stolen Clinton campaign emails specifically, if one were to somehow possess the original emails themselves, for example, on a backup external hard drive stolen from the campaign headquarters, the possession of such property would almost certainly be illegal under the fairly straightforward federal laws surrounding the possession of stolen property.⁷⁴ If, however, the “hacker” or thief were to make copies of the aforementioned emails, and then distribute the copies of the illegally

⁷² Eric B. Easton, “TEN YEARS AFTER: BARTNICKI V. VOPPER AS A LABORATORY FOR FIRST AMENDMENT ADVOCACY AND ANALYSIS”, 50 *University of Louisville L.Rev.* 287, 288 (2011)

⁷³ *Bartnicki v. Vopper*, 532 U.S. 514 (2001)

⁷⁴ 18 U.S.C. § 2315

acquired emails, the individuals who then came into possession of the emails would not technically be in possession of stolen property. This is especially true when the copies are both widely distributed and, just as determined in the final SCOTUS decision on *Bartnicki v. Vopper*, of significant public interest.⁷⁵

Another important distinction between the issues raised by *Bartnicki v. Vopper* and the issues created by the possession of the WikiLeaks documents is the fact that the primary argument of the plaintiff in *Bartnicki v. Vopper* was based almost entirely on anti-wiretapping statutes which would make it illegal for anyone—even those not directly involved in the illegal acquisition of the information—to possess and distribute illegally acquired information *if* that information was acquired via wiretap.⁷⁶ In the case of the Clinton emails, it is not necessarily accurate to say that the information was acquired via wiretap. This is a difficult situation, and although typically email communication is protected under the Wiretap Act,⁷⁷ there is little precedent dealing with the hacking of emails after being sent and received, and there is even less precedent in cases where the information contained in the emails is of significant public interest. However, if the SCOTUS decision on *Bartnicki v. Vopper* continues to hold as the ruling precedent, it is likely that the possession and dissemination of such information, particularly by the media, will remain protected under federal law.

Of course, whenever there are controversial decisions regarding legality, there is dissent and disagreement and *Bartnicki v. Vopper* is no different. In the dissenting statement, written by Chief Justice Rehnquist, joined by Justices Scalia and Thomas, the potential danger to personal privacy created by protecting such activity (the dissemination of illegally obtained information)

⁷⁵ *Bartnicki v. Vopper*, 532 U.S. 514 (2001)

⁷⁶ 18 U.S.C. § 2511 (2001); 18 PA. CONS. STAT. § 5703 (2001)

⁷⁷ 18 U.S. Code § 2510

is laid out, with the justices defending previous anti-wiretapping statutes by stating that their motive, namely, a concern for the privacy of private individuals, was “inseparably bound up with the desire that personal conversations be frank and uninhibited, not cramped by fears of clandestine surveillance and purposeful disclosure.”⁷⁸ The dissent goes on to indicate that the defense that those who receive illegally obtained information are not themselves liable for the crime committed is a flimsy one: “the Court places an inordinate amount of weight upon the fact that the receipt of an illegally intercepted communication has not been criminalized... this hardly renders those who knowingly receive and disclose such communications “law-abiding.”⁷⁹ It is clear that the dissenting justices view the protection of those who would distribute stolen information as a slippery slope, a dangerous precedent that serves only to protect those who would violate the privacy rights of private individuals while doing minimal public good.

So, in review of CNN’s statement regarding the legality of possession of the WikiLeaks documents by the general public, it was almost certainly incorrect, or at the very least, misleading. Not only is CNN’s possession and dissemination of the WikiLeaks emails and the information contained therein protected by the *Bartnicki v. Vopper* decision, a decision that “is consistent with the substantial First Amendment protection that the Court has historically allowed publishers of truthful information,”⁸⁰ but individual possession and distribution should be protected as well, if only for the simple fact that there are no laws directly prohibiting it, and the creation of such laws would be difficult, even unconstitutional.

This is an extremely important issue going forward, as the more connected the world becomes, the more communication takes place via various technologies, the more privacy rights and the First Amendment protection of free speech will come into conflict. It is likely that the

⁷⁸ *Bartnicki v. Vopper*, 532 U.S. 514 (2001)

⁷⁹ *Bartnicki v. Vopper*, 532 U.S. 514 (2001)

⁸⁰ Richard D. Schoop, “*Bartnicki v. Vopper*,” 17 *Berkeley Technology Law Journal*, 449, 450 (2002)

majority decision of *Bartnicki v. Vopper* will remain as the ruling precedent in cases involving the media's publication of illegally obtained private information. However, it is equally likely that there will be future cases—potentially Supreme Court cases—that will further modify the protections and limitations created by *Bartnicki v. Vopper*. It is also extremely likely that future cases will emerge that will fill the current void in regards to the rights of non-media individuals who possess and view stolen or illegally obtained information. As the First Amendment rights of the people are some of the most fundamental, foundational principles of our democracy, it is extremely unlikely that these cases will deprive individuals of the right to view this type of information, and far more probable that any precedent set will be one continuing to protect the First Amendment rights of the individuals in question.

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Figure 1: Design Patent Grants Over the Last 25 Years

