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EDITORIAL TEAM

MISSION STATEMENT

The Undergraduate Law Review at The Ohio State University was created with the intent of giving undergraduate students the opportunity to have their work published in a journal edited by fellow undergraduate students. We hope to give college students an outlet through which they can discuss and consider a variety of important legal issues. In addition, it is our hope that we can publish articles that are accessible to a wide audience and that encourage critical thinking, so as to reach many and inspire change.

NOT WHAT IT SEEMS: MEDIA DISTORTION OF THE INTERNATIONAL RIGHT AGAINST TORTURE

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Abstract

International legal doctrine as well as case law are very clear on the issue of torture—it is not permissible under any circumstances. Despite the fact that a right against torture is a universally agreed upon concept, torture continues to be used by governments and military organizations alike. Various media sources, particularly American media, distort the public's perception of torture's effectiveness and its moral implications. The movie *Zero Dark Thirty* and the show *24* exemplify this tendency of American media to skew reality and portray torture as justifiable and even necessary in some circumstances. Even more concerning is evidence that such misrepresentations have had a noticeable effect on Americans' opinions about torture and inhumane interrogation. Furthermore, the right against torture is not the only international human right that has been subject to misrepresentation in American media; the right against genocide is another international right that has been distorted for entertainment in American film. Unfortunately, such problems are ultimately difficult to solve due to the conflict between freedom of speech and accurate portrayals of information.

Introduction

With the pictures, testimonies, and accusations regarding Guantanamo Bay and Abu Ghraib arising over the past several years, the issue of torture has been a prevalent topic in recent American political discourse. The topic regained attention in 2008 when President Obama announced that closing Guantanamo Bay would be one of his first priorities. However, over six years later, this has remained a false promise. This is despite the fact that customary and codified international law, as well as the laws of other nations, have deemed the actions that have occurred in such detention camps illegal and immoral. However, torture not only continues to remain a part of American foreign policy, but the public is still divided on an issue that is, for the most part, decided almost everywhere else in the first world. This may in part be due to the media representation (or rather misrepresentation) of torture and other violations of human rights in American shows, movies, and other forms of media. This paper will first outline the fact that a right against torture is a key part of international law that is laid out explicitly and in a detailed fashion. It will then go on to discuss the misrepresentation of violations of this right in American popular media, particularly film and television, and will provide analysis of how this has influenced the public's perception of such issues. A brief analysis of other issues in addition to torture that are misrepresented will be made and finally, a policy proposal regarding how to mitigate this effect will be examined. While the right against torture is an established rule of customary international law, American media, through the avenues of movies and television shows such as *Zero Dark Thirty* and *24*, have played on the idea of American Exceptionalism and duty to portray torture as both effective and justified, which has shaped American public perception on the issue. Other rights, such as the right to trial and the right against genocide have

also been distorted in American film. While there might be some policies which are able to help mitigate this effect, this is largely a cultural problem that is very difficult for policy to solve.

I. Status of Torture in International Law

In order to understand the full scope of torture and inhumane treatment, it is necessary to turn first to codifications of customary international law regarding this topic. An investigation and summary of the various conventions, covenants, and declarations demonstrates the clarity of international law on the issue of torture. One of the first outlines of this right is manifest in the Universal Declaration of Human Rights, Article 5, which states, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".[1] This declaration, written and voted on in 1948, was widely supported by the General Assembly with 48 countries in favor (including the United States) and only a handful of countries abstaining from or failing to vote. Interestingly, none of these countries maintained an abstention due to Article 5[2]. Other countries have voted in favor after the initial vote occurred.

The International Covenant on Civil and Political Rights, which was adopted in 1966 and went into effect ten years later, had a similar genesis to the Universal Declaration of Human Rights. It reiterates Article 5 of the Declaration with its own Article 7, stating, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific

[1] Universal Declaration of Human Rights (UDHR), Dec. 10 1948, http://www.un.org/en/universal-declaration-human-rights/
[2] *Id.*

experimentation."[3] The Covenant included this last clause regarding involuntary medical and scientific experimentation in response to WWII. The right against torture in this Covenant is not able to be derogated. The United States has also ratified this Covenant. While several countries made reservations about the Covenant, none of these reservations were in relation to Article 7 on torture[4]. The fact that no countries abstained from voting on the Universal Declaration of Human Rights nor did any countries have reservations about the International Covenant on Civil and Political Rights due to the articles on torture supports the notion that the right against torture is a universal notion that is deeply embedded in customary international law and human morality.

Both of these documents are then cited at the beginning of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in 1984 which went into effect in 1987.[5] The United Nations Convention Against Torture [UNCAT] provides several important pieces of information regarding the right against torture—the first is a definition. While the Universal Declaration and the International Covenant have outlined a prohibition against torture, but have not provided a clear definition for it, the United Nations Convention Against Torture has done so. The United Nations Convention is divided into three parts with the first part outlining a definition of torture. This begins up front in Article 1, which defines it as, "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person…" Article 1 more clearly defines torture by adding that it might be done for the purpose of eliciting a confession

[3] International Covenant on Civil and Political Rights, Dec. 16 1966, http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx
[4] *Id.*
[5] United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx

or information, intimidation, punishment, or some type of discrimination. The scope of the right against torture is further outlined in Article 2, which states that countries cannot have any exception to this rule, and in Article 3, which states that countries cannot "refoul" a person to another country where they believe a person might be tortured. Article 4 attaches criminal liability to torturers, Article 8 designates it as an extraditable offense, and Article 5 declares universal jurisdiction to try torture. Other rights include the notion that victims of torture are deserving of compensation, and banning information obtained through torture in a court. Part two of the United Nations Convention Against Torture also creates the Committee Against Torture in Article 17 and allows it to investigate accusations of torture in Article 20.[6] This Convention makes it easy to see that the scope of the individual right against torture is quite broad and explicit, and taken very seriously in international law.

In addition to looking at codifications of customary law, it is important to briefly analyze the international case law that has dealt with torture to paint a picture of the scope of this right. One famous case is Filartiga v. Peña-Irala, which was heard in the United States Second Circuit Court of Appeals. In this case, Joelito Filartiga, son of Joel Filartiga, was captured by Paraguayan police (including Peña-Irala) in Paraguay and tortured to death for his father's political activities and involvements. After unsuccessfully attempting to press charges against the police in their native Paraguay, Joelito's family learned that Peña-Irala was in the United States and searched for him in order to file civil charges. In order to decide whether or not the Filartiga family was entitled to compensation, the Court had to decide whether torture was an act that was such a clear violation of the law of nations that it required private action.[7] The Court used the Nuremberg ideal as well as a wide variety of international documents

[6] *Id.*
[7] *Filartiga v. Peña-Irala*. 630 F.2d 876 (2d Cir. 1980).

including conventions and declarations, reasoning that a right against torture is so fundamental in international law that issuing private enforcement would harm the United States' credibility.[8] While Peña-Irala did not get charged with criminal liability, which would have been more appropriate, this case was still important because it showed that United States courts could be instruments of private justice for human rights violations even for foreigners, and established the right against torture as a right that is important in United States domestic law because it is a part of international law.

While the United Nations Convention Against Torture set out a general definition of torturous acts, the case Public Committee Against Torture v. Israel is important because it provided some specific interrogation tactics which were deemed unusable. In this case, the petitioners were alleged terrorists from Hamas and other Palestinian groups who were accused of carrying out various attacks in Israel. They were interrogated by Israel's General Security Service, which used means such as shaking, sleep deprivation, forcing the petitioners into uncomfortable positions, playing loud music, and having them in tight handcuffs. The Supreme Court of Israel ruled that torture is not a method of interrogation which is allowed, but acknowledged a "necessity defense" for interrogators accused of torturous acts.[9] This ruling is paradoxical as an obvious objection is that it might be possible for torturers to always invoke this excuse[10]. However, it still established that specific tactics are not to be used, even in Israel where terrorist attacks are a genuine threat.

[8] *Id. supra* at 4
[9] Public Committee on Torture v. State of Israel. H.C. 5100/94 (Israel 1999).
[10] *Id. supra* at 4

II. Distortion and Misrepresentation of Torture in American Media

In order to illustrate the extent to which media have misrepresented the right against torture, the movie *Zero Dark Thirty* and the TV show *24* will be analyzed.

The 2013 film *Zero Dark Thirty* bases itself on the "true" story of the search and eventual killing of Osama bin Laden. The movie follows the story of Maya, a CIA officer stationed at the American embassy in Pakistan, and her hunt for a man using the name "Abu Ahmed", who is supposedly close to bin Laden. The story progresses with Maya's search and eventual finding of Ahmed, which leads the Americans to the compound where bin Laden is eventually found and killed.[11]

Maya and other US officials use vast amounts of torture including waterboarding, sexual humiliation, and other tactics to extract information from various prisoners, including Ammar al-Baluchi, who they claim is tied to the 9/11 hijackers. Maya gets her initial lead about Abu Ahmed from al-Baluchi, which begins the main part of the storyline. Based on the aforementioned discussion about the scope of the right against torture, it is obvious that what the CIA is doing is blatantly in violation of international law. In fact, at one point in the movie, Maya and some of the other characters become afraid that the new administration will prosecute intelligence officials involved in torture.[12] There are disturbing subtleties throughout the movie that are in clear opposition to what international law dictates—particularly regarding the notion that information obtained from torture is at all reliable, contrary to Article 1 of the United Nations Convention Against Torture. First, although it is shown that information obtained from torture is not always true, the film as a whole certainly leaves the impression that intelligence gathered from torture was crucial to the finding and killing of bin

[11] *Zero Dark Thirty* (Columbia Pictures 2012)
[12] *Id. supra* at 0:38

Laden.[13] One example of this is toward the beginning of the movie when Maya and another agent, Dan, are waterboarding al-Baluchi. He is shown as being unable to give a concrete prediction of when another attack will occur, repeatedly muttering all seven days of the week in a dazed state. However, later on, Maya tricks al-Baluchi into giving her information about Abu Ahmed after he has just been tortured and is starving and mentally beaten down.[14] Defenders of the film claim that it was not the torture that produced the correct lead on Ahmed, but the gentle discussion following that. [15] This is obviously a ridiculous claim; al-Baluchi would never have been in such a mental state if not for the torture, so the film is tacitly implying that even if answers directly in response to torture are not reliable, its ability to break people mentally and physically will yield correct information eventually. Another example of this is shown with another character, Abu Faraj, another stepping stone in the protagonist's search for Abu Ahmed (information about Abu Faraj was also obtained through tortured prisoners). Abu Faraj is also tortured by Maya and the CIA, but claims he does not know the name Abu Ahmed.[16] Various data sources show that at least half[17] of detainees who are tortured in US prisons are captured by mistake and actually know nothing about what they are being interrogated about (Lasseter 2008).[18] However, instead of concluding the more realistic explanation that Faraj actually does not know anything, Maya comes to the wild conclusion that his silence in fact proves the importance of Abu Ahmed, which makes the efficacy of torture impossible to argue against. Of course, in the film, she is right, which only

[13] Jared Del Rosso, *Film Review: Torture in Zero Dark Thirty*, 37 Humanity & Society 348, 350 (2013).
[14] *Zero Dark Thirty supra* at 0:54
[15] Defenders of the film also point to the fact that Maya looks "pained" at times when torture is being used. However, this is the extent of her objection; she still continues to use it as part of her tactics and does nothing to help the victims. She also seems to become hardened to it as the film goes on.
[16] *Zero Dark Thirty supra* at 1:24
[17] This is of course a very difficult statistic to calculate. Some estimates claim this number to be much higher.
[18] Tom Lasseter, *Day 1: America's Prison for Terrorists Often Held the Wrong Men* (2008), McClatchy DC, http://www.mcclatchydc.com/news/special-reports/article24484918.html

further perpetuates the myth that torture yields important and correct information. In blatant contrast to Article 4 of the United Nations Convention Against Torture, neither Maya nor any of the other CIA officials are held criminally liable for their actions. Portraying United States government torture in a reluctant but tacitly accepting way so openly and acknowledging that no criminal charges were ever filed simply shows the extent of America's conception of its own exceptionalism.

The show *24*, although based on complete fiction, serves some of the same functions as *Zero Dark Thirty* in its tacit approval, acceptance, and justification for torture. The show, which ran from 2001-2010[19] with each season covering twenty-four hours, centers around Jack Bauer, a Counter Terrorist Unit agent who prevents terrorist attacks.[20] The issue that is particularly troubling in *24* is not only the notion that torture produces reliable information, but that it is completely justifiable, which directly contradicts both Article 2 of the United Nations Convention Against Torture as well as the International Covenant on Civil and Political Rights, both of which clearly delineate that there can be no exceptions for the use of torture.

The show repeatedly uses the "ticking time bomb" scenario in which an attack or catastrophe is about to happen and Bauer must use any means necessary to get the information he needs to keep the attack from happening. This, of course, leads to his use of torture, which provides him with the information he needs and he is then able to be the hero of the day. Painting Bauer as the hero despite his egregious actions creates the idea that torture is

[19] While I understand that production of 24 would have come before 9/11, I do find it quite eerie that the show was released only a month and a half after the attacks on the World Trade Center. The running of the show coincides greatly with the real life "war on terror" and widespread surfacing of information about Guantanamo Bay, even ending when the Iraq War was coming to a close.
[20] Bev Clucas, et al., *Torture: Moral Absolutes and Ambiguities* 1-28 (2d ed. 2009).

justifiable under a utilitarian conception.[21] The show has come under much criticism, especially for one episode in which Jack Bauer tortures Pavel Tokarev, a Russian character who has killed Bauer's significant other. Bauer tries to get Tokarev to give him the name of Tokarev's boss, but Tokarev does not relent. So, Bauer of course resorts to torturing him. Bauer uses pliers to pull Tokarev's skin, beats him, cuts him with a knife, uses a stinging liquid, burns him with a blowtorch, and finally disembowels him—all in one scene.[22] The torture tactics used in the show are beyond anything that the United States government even uses on prisoners (at least to the extent we know). However, in the end, Bauer gets what he wants and is depicted as the hero in the episode, not the villain.

III. Effects of Misrepresentations on the Public

The question of the effects such media have on the public is difficult to answer, especially because it is hard to prove whether what is displayed on television is affecting the public, or whether the public's sentiments and demand are dictating what plays on television. However, there is some interesting data as well as anecdotes that can be analyzed to delve into this discussion, particularly with regard to *24.* It is more difficult to do so with *Zero Dark Thirty* because the film is relatively new. In addition, the success and popularity of such media provide an intrinsic answer about their effects on public perception.

The fact that *Zero Dark Thirty* and *24* have been so popular provides inherent support for the fact that such media depictions do desensitize people, in that they see it as wildly entertaining and not disturbing. *24* won "Best Drama Series" at the 2003 Golden Globes

[21] Henry Shue, *Torture in Dreamland: Disposing of the Ticking Bomb*, 37 Case W. Res. J. Int'l L. 231 (2006)
[22] *24: Episode 21* (Warner Bros. 2010).

Awards and "Outstanding Drama Series" at the 2006 Primetime Emmy Awards, amongst many other accolades and nominations. *Zero Dark Thirty* was nominated for five different Academy Awards at the 2013 Academy Awards, including best motion picture. Both pieces have received rave reviews from critics and audiences alike. While not scholarly, viewers' comments of such media are remarkably telling about the negative effects of such depictions of torture. One article from a blog critic in May of 2013 is titled, "Torture Scenes on TV are Worse than Icky—They're Boring," which is indicative of the desensitization factor of torture on television that will be discussed in more detail later on. Equally disturbing in a very different way are some other comments about the torture scenes in *24* specifically. Fans of the show wrote extensively online in response to the aforementioned scene with the Russian character, describing it as the, "Best show ever," and admitting that this scene made them beg to bring the series back the following year. Millions of fans took to Twitter after the airing of this episode to, "proclai(m) Bauer God,".[23] It is certainly up for debate as to which reaction is more terrifying—complete desensitization and apathy to torture, or outright ecstasy and worship.

There is strong evidence that the torture scenes in *24* specifically have influenced Americans' psyches. In fact, Brigadier General Patrick Finnegan of the United States Army convened a meeting with the producers of *24* in 2006 because it was clear to him that the, "immoral and illegal behaviour endorsed by the show had already had a negative effect on real American soldiers in training".[24] While he did not elaborate on the extent of the problem, probably for confidentiality reasons, this testimony is particularly problematic because it is

[23] Robbie Woliver, *TV Review: 24* (2010), Examiner, http://www.examiner.com/article/jack-bauer-s-six-degrees-of-torture-sickest-episode-of-24-yet
[24] Clucas, *supra* at 13

affecting people who deal with prisoners and enemies. It is one thing for shows to affect the general public's perception of interrogation tactics—few citizens will ever interrogate someone. However, it is perhaps off-putting to think that actual soldiers are affected by a work of complete fiction and may apply such ideas and tactics in their duties.

24 features a torture scene an average of 1.8 times per show.[25] It is logical that this constant barrage of torture on the screen will desensitize people to the issue and its openness and pervasiveness on television makes it seem acceptable.[26] By depicting such graphic scenes over and over again, especially on cable television, which children could be watching in the case of *24*, media such as this makes people more comfortable with the issue of torture and they are thus less inclined to be opposed to it when it comes up in real-life political discourse. It also seems plausible that, by depicting horrifically graphic scenes of torture on television, the idea of waterboarding as method of torture seems relatively tame to the public and numbs them into becoming apathetic on the issue. This is especially true when torture is only depicted as being used on evil people who are surely guilty and will give up their secret, when reality shows that it is often used mistakenly on innocents and rarely, if ever, works. However, the frequency of torture in the show does more than that—its repeated successful use in life-or-death scenarios makes torture seem *necessary*. Poll data by scholars at Reed College from 2001-2009 shows that "opposition to torture has declined in the past few years," with an equalization of those for and against in 2007 and an increase of those in favor since then.[27] While it would be difficult to tie this trend directly to the years that *24* was run, the timing of

[25] Clucas, *supra* at 5
[26] Michael Flynn & Fabiola F. Salek, *Screening Torture: Media Representations of State Terror and Political Domination* (2012).
[27] Symposium, *U.S. Public Opinion on Torture,* 43 PS: Poli-Sci & Politics 437, 444 (2010).

the shift in public opinion does coincide remarkably well with when *24* started being criticized for its depictions of torture after the first few seasons.

Relating to both the film and the show is that the vast majority of respondents to polls regarding whether or not they are opposed to torture elaborated in subsequent questions that their belief was only in the case of a terrorist threat.[28] This is of course exactly the justification given for torture in both *Zero Dark Thirty* and *24.* While it is always difficult to prove causation rather than correlation in such cases, it is important to note that such forms of mass media do affect culture and people's opinions on discussions such as torture.

IV. Other International Guarantees Subject to Misrepresentation

There are certainly other rights protected by international law which are subject to media distortion and misrepresentation. The first of these that will be discussed here is the right to a trial. This right, like torture, is also made explicit in the Universal Declaration of Human Rights in Article 11, which includes the notion of a presumption of innocence.[29] However, as depicted in the same movies and shows mentioned above, the alleged terrorists are never given a trial or a chance to prove that they are innocent or uninvolved in the crimes of which they are accused. As previously discussed, while around half to a large majority of detainees in American prison camps are unrelated to any crime, they are indefinitely detained without counsel or trial.[30] However, this same right is justified, first because the notion that torture can lead to important information is then necessarily presupposed by the idea that holding someone without a trial can yield important information. Second, it is justified with

[28] Symposium, *supra* at 438.
[29] *See* Universal Declaration.
[30] Lasseter.

the teleological explanation that violating one person's right to a trial is a small price to pay for saving lives.[31] Thus, the importance and value of this right as a matter of international law is significantly reduced in media such as *Zero Dark Thirty* and *24*.

In addition, there are, and have been, other internationally guaranteed rights which have been misrepresented in the media. One of these is the right against genocide, which has been historically, more than recently, distorted. An example of this is the American Western film, depicting Indians as savages who are hunted in very similar ways to animals. A quintessential depiction of this is shown in the movie *The Searcher*s, from 1956. In it, John Wayne plays a veteran searching for his niece abducted by the Comanche tribe. The Comanche are depicted in such a way that their brutality and behavior fit the white stereotype of them and justify their genocide, even applaud it perhaps.[32] One movie critic expressed this sentiment explicitly, claiming that he thought, "Ford was trying…to depict racism that justified genocide".[33] An example of this depiction of Indians as ruthless, violent beasts is when the character Scar, an Indian chief, says, "Two sons killed by white men, for each son…I take many scalps".[34] This quote paints scalping as a barbaric Indian practice, even though scalping was in large part a colonial practice used to pay colonists for Indian killing.[35] However, this distortion was intended to make the demonization and genocide of Indians

[31] Shue, *supra* at 431.
[32] *The Searchers* (Warner Bros. 1956)
[33] Roger Ebert. *The Searchers*, 2001, http://www.rogerebert.com/reviews/great-movie-the-searchers-1956 (last visited Oct. 28, 2015).
[34] *The Searchers supra* at 0:44
[35] James Axtell & William C. Sturtevant, *The Unkindest Cut, or Who Invented Scalping*, 37 W. & M. Quart. 451, 472 (1980) *supra* at 453

acceptable. It connotes the idea that Indians are so inherently evil that they should be killed as a matter of morality.[36]

V. Policies to Minimize Distortion

The topic of potential policies to limit media distortion of international human rights is difficult and one that must be navigated cautiously. While there may be policies which will have some effectiveness in mitigating pervasive media misrepresentation, this is largely a problem unsolvable by policy.

One potential policy on the domestic level would be for an independent (perhaps non-profit) governing body to review media such as television and film and require a disclaimer at the beginning of a piece of film to disclose to the audience that the depictions of torture, for example, in the piece do not reflect the reality of torture's efficacy or validity as a means of interrogation and are overwhelmingly factually incorrect. Such a policy would be a minimal infringement on the right to free speech. The body that governs such a review organization would have to be non-governmental, so as to prevent governments from overstepping their bounds and preventing the media from being free and independent. At the international legal level, such a policy seems almost impossible to implement as it is difficult enough to enforce the actual violations of international human rights, let alone their depictions in the media. At most, an agreement between nations might be made to institute such a policy at their respective domestic levels.

[36] Having had discussions with people from older generations from countries outside the US, it is clear the American western film has had a profound impact all over the world, making people believe that Indians are a barbaric group when people outside the US have had absolutely no contact with them or education about them.

Ultimately, it is very difficult to use policy to mitigate a problem such as media misrepresentation for a few reasons. First, as mentioned previously, it is a fine line between reviewing what is or what is not factually correct, and overstepping boundaries into limiting free speech. Societies tend to hold rights in a hierarchy and most would agree that the right to free speech is more important than protecting citizens from wrongful depictions of international human rights. Second, history and commentary on current events are much less objective narratives of occurrences than they are subjective interpretations. While some issues like whether torture produces accurate information may be relatively clear cut, many instances are not so black and white, and "facts" differ depending on who one asks. Thus, it would be difficult to pick the body that would govern such a disclaimer requirement, as opinions would differ and interpretations of the facts may be inherently biased by personal views or experiences. This leads to the final reason, which is that it seems very plausible for even a non-governmental body to be corrupted or influenced by government or other special interests into designating material as factually incorrect when the material in question may be subject to interpretation. Thus, overall, policies to limit media distortion are difficult. What is required is more of a cultural change in television and film media to value truth rather than sensationalism, high ratings, and thrill.

Conclusion

The right against torture is a human right explicitly laid out in international law. The Universal Declaration of Human Rights and International Covenant on Civil and Political Rights codify this right, which was already a jus cogens norm. The scope of the right against torture has been delineated by the United Nations Convention Against Torture, as well as case

law such as Filartiga v. Peña-Irala and Public Committee on Torture v. Israel. However, despite international law's blatant stance on this right, film and television media have distorted the image of this right. Films like *Zero Dark Thirty* and shows like *24* have not only depicted the false notion that torture produces reliable results, but also that torture is justifiable under some circumstances. The popularity of such media seems to have an effect on public perceptions of torture, especially considering the fact that they coincide temporally with the war on terror and the continuance of Guantanamo Bay. This effect is not only specific to the right against torture, it is also apparent with other issues such as the right to a trial and the right against genocide. While there are some policies at the domestic level through which this problem may be helped, it is largely an issue of culture that policy can do little to help. However, because this issue is more of a cultural problem, it is important for the topic of media distortions to be a major part of public discourse. Because it is difficult to change the media, it might be more worthwhile to focus efforts toward public education on issues such as torture in order to mitigate the problem of false public perceptions. Perhaps if more people are aware that the media distorts issues of international human rights so blatantly, demand for storylines like *Zero Dark Thirty* and *24* will decrease.

References

24: Episode 21 (Warner Bros. 2010).

Bev Clucas, et al., *Torture: Moral Absolutes and Ambiguities* 1-28 (2d ed. 2009).

Filartiga v. Peña-Irala. 630 F.2d 876 (2d Cir. 1980).

Henry Shue, *Torture in Dreamland: Disposing of the Ticking Bomb*, 37 Case W. Res. J. Int'l L. 231 (2006).

International Covenant on Civil and Political Rights, Dec. 16 1966, http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

James Axtell & William C. Sturtevant, *The Unkindest Cut, or Who Invented Scalping*, 37 W. & M. Quart. 451, 472 (1980).

Jared Del Rosso, *Film Review: Torture in Zero Dark Thirty*, 37 Humanity & Society 348, 350 (2013).

Michael Flynn & Fabiola F. Salek, *Screening Torture: Media Representations of State Terror and Political Domination* (2012).

Public Committee on Torture v. State of Israel. H.C. 5100/94 (Israel 1999).

Robbie Woliver, *TV Review: 24* (2010), Examiner, http://www.examiner.com/article/jack-bauer-s-six-degrees-of-torture-sickest-episode-of-24-yet

Roger Ebert. *The Searchers,* 2001, http://www.rogerebert.com/reviews/great-movie-the-searchers-1956 (last visited Oct. 28, 2015).

Symposium, *U.S. Public Opinion on Torture*, 43 PS: Poli-Sci & Politics 437, 444 (2010).

Tom Lasseter, *Day 1: America's Prison for Terrorists Often Held the Wrong Men* (2008), McClatchy DC, http://www.mcclatchydc.com/news/special-reports/article24484918.html

United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10 1984, http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx

Universal Declaration of Human Rights (UDHR), Dec. 10 1948, http://www.un.org/en/universal-declaration-human-rights/

Zero Dark Thirty (Columbia Pictures 2012).

THE RELATIONSHIP BETWEEN LEGAL SYSTEMS AND ECONOMIC GROWTH

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CONTENTS

Abstract

Many researchers assert that whether a country uses a common or civil law system has a significant impact on its economic growth, which is often measured by indicators associated with investor protection. This review of the literature will examine the relationship between common and civil law systems and economic growth, and this review will determine if a strong correlational relationship exists. Studies conducted by La Porta, Lopez-de-Silanes, Shleifer, and Vishny (1998), Sarkar and Singh (2010), Joireman (2001), and Siems (2007) examined whether the common or civil law system allows for the most economic growth, and they examined law systems and investor protection through data sets. Analyzing the research holistically, it is unclear if a particular type of law system is the most conducive to economic growth or if the current classifications of law systems are sufficient enough to evaluate the relationship between law systems and economies. Future research should focus on whether the current classifications of law systems are too general, and, if so, which classifications would be sufficiently specific. Due to the inconclusive nature of the research, it is recommended that policy makers consider cultural, economic, and current political situations when deciding if changes to current law systems will lead to economic growth.

Introduction

In the past twenty years, much research has investigated the influence that a country's legal code has on economic growth.[37] One theory that has emerged is the law and finance theory that asserts a country's law system is of the most important factors in encouraging or challenging economic development.[38] Some researchers suggest that countries with common law systems experience better economic growth than countries with civil law systems[39]. While these researchers assert that countries with common law systems are more conducive to economic growth, not all researchers support this claim. Joireman (2004) is part of a growing movement of researchers that believe the theory of common law systems being the best type of law system for economic growth has faults. Many of these researchers suggest that certain variables can affect the relationship between a law system and economic growth and, therefore, it's difficult to establish general theories about which law system is the best for economic growth.[40]

Given that many countries are in the process of changing their law systems, awareness of whether civil or common law systems are more supportive of economic growth is important.[41] Being aware of the effects of a law system on national economies, policy makers can be cognizant of what the ramifications of their legal reform actions are and they can make policy decisions that are in the best interest of their countries' economic development. The purpose of this review of the literature is to determine whether a country's law system has a strong correlational relationship with economic growth.

[37] Beck, T., Demirgüç-Kunt, A., & Levine, R. (2003). Law, endowments, and finance. *Journal of Financial Economics, 70,* 137-181.
[38] Graff, M. (2008). Law and finance: Common law and civil law countries compared: An empirical critique. *Economica, 75,* 60-83.
[39] Joireman, S. F. (2004). Colonization and the rule of law: Comparing the effectiveness of common law and civil law countries. Constitutional Political Economy, 15, 315-338.
[40] *Id.*
[41] Koch, C. H. (2004). The advantages of the civil law judicial design as the model for emerging legal systems. Indiana Journal of Global Legal Studies, 11, 139-160.

I. Common and Civil Law Systems

The common law system was formed in thirteenth century England, based upon the notion of protecting the rights of the individual from corrupt justice.[42] In order to protect these rights, a legal system that emphasizes investigation, decision, and the legal process was developed.[43] Stemming from the importance placed on the legal process, legal precedence and adaptability are very important, and judges have the ability to largely interpret the law based on their opinions and precedence when deciding the outcome of legal cases.[44] To influence judges' interpretations, lawyers, who represent both the prosecuting and defending parties in legal disputes, argue against each other in hope of finding the truth to present to the judge and jury.[45]

Civil law systems, or the other predominant type of law system, developed during the same time period in France.[46] In the civil law system, strict limitations are placed on the flexibility that judges have in interpreting the law.[47] Additionally, judges are responsible for simply discovering the facts of a case and relying strictly on written legal codes.[48] Lawyers in the civil law system usually act as legal advisor to their clients, instead of arguing for clients in court, and most of the time cases are decided upon outside of court.[49] Cases only reach court if the judge sees the accused party as guilty, and there is enough evidence to convict the accused.[50] Therefore, civil law judges have less personal discretion in their legal rulings than common law judges.[51]

[42] Joireman, S. F. (2001). Inherited legal systems and effective rule of law: Africa and the colonial legacy. The Journal of Modern African Studies, 39, 571-596.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] Siems, M. M. (2007). Legal origins: Reconciling law & finance and comparative law. McGill LJ, 52, 55-81.
[47] *Id.*
[48] *Id.*
[49] Joireman (2001), *supra.*
[50] *Id.*
[51] Siems, *supra*.

II. Economic Growth

Economic growth is a broad category that can encompass many financial indicators. In analyzing economic growth in a country, the level of financial development often strongly correlates with the strength of the economy.[52] Mahoney (2001) asserted that one of the main financial development indicators that should be considered in analyzing economies is the level protection of property and contract rights, which he said had a strong correlational relationship with economic prosperity. Lerner and Schoar (2005) asserted that other indicators that should be assessed in measuring financial development in economies are a country's ability to enforce business contracts, the broadness and strength of capital markets, the amount of stocks and other investments, and the concentration of ownership in public companies. Regardless of what metrics are used in measuring financial development in economies, the overarching relation of these measurements is the degree to which financial investors are protected in their investments.[53] In a global economy where countries have a variety of investment opportunities, investors strongly consider the strength of the financial development a country has before investments are made.[54] The higher degree to which investors know their investments will be protected, the more willing investors are to finance companies and the more global economies grow.[55]

III. Law Systems and Economic Development

In a study done by La Porta et al. (1998), the relationship between different types of law systems and investor protection was examined. In order to have a large sample and higher statistical significance in the data set examined, a sample of forty-nine countries was chosen. These countries did not include economies that were socialist or were in transition to a capitalist economy, and the sample consisted of countries from all continents but Antarctica. Additionally, the countries selected for the data set had at

[52] Graff, *supra*.
[53] *Id.*
[54] La Porta, R., Lopez-de-Silanes, F., Shleifer, A., & Vishny, R. W. (1998). Law and finance. Journal of Political Economy, 106, 1113-1155.
[55] Graff, supra.

least five domestically based companies that were publicly traded and had no government ownership. Twenty-one countries had French-based civil law systems, six countries had German-based civil law systems, four countries had Scandinavian-based civil law systems, and eighteen countries had English-based common law systems. By noting the historical origin of the law systems, minor changes to the common or civil law systems due to origin could be considered.

To measure investor rights, four categories associated with investor rights were examined in the forty-nine countries during 1993. The categories examined were shareholder rights, creditor rights, the strength of legal enforcement, and the concentration of ownership of company shares. For the first three categories eighteen measures of investor rights were used. To measure the concentration of ownership, the combined ownership percentage of the three largest shareholders in each of the forty-nine countries' ten largest companies was measured. For the investor rights categories of shareholder and creditor rights, each country received a score of zero, if the particular investor right was not protected, or a score of one, if the particular investor right was protected. The scores for each country in all four categories were then added up to an aggregate score that was compiled into data sets by category of investor rights and was organized by type of law system. One problem with the measurements used was legal enforcement was measured and rated by private credit risk agencies, which had the possibility of being biased by business ties or non-internally valid ranking systems. Also, ownership concentration measurements did not account for familial or business affiliations among shareholders, which could, in practice, increase the percentages of ownership concentration. These possible faults with measuring legal enforcement and ownership of concentration reduce the validity of this study.

Results from this study showed that common law countries had the highest shareholder and creditor rights scores with averages of 4 and 3.11 respectively. For these investor rights, civil law countries had scores averaging from around 1.5 to 3. However, Scandinavian and German civil law countries had better legal enforcement than common law countries. Also, common law countries had higher ownership concentration percentages than Scandinavian or German civil law countries. Based on these results, the researchers asserted that common law countries give investors the most rights and allow

for the highest potential for economic growth. By using these rating systems, the researchers showed statistically significant differences in some investor rights categories, such a creditor and investor rights. However, some categories did not appear to have high statistical differences among the law systems, which reduced the credence of the researchers' assertion. Additionally, the researchers grouped countries of all three civil law origins together in their conclusion, even though some of the results for certain civil law origins contradicted the researchers' claim. Finally, since the study was cross-sectional and only assessed countries in 1993, it is unknown if these assessments remained constant over time.

Sarkar and Singh (2010) conducted a follow-up study to assess the correlation between types of law systems and shareholder protection, in addition to assessing whether high levels of shareholder protection affect stock market growth. The study used a longitudinal dataset covering 1970-2005 in its analysis and it examined two common law countries, the U.K. and U.S., and two civil law countries, France and Germany. Incorporating input from a team of economists and lawyers, sixty variables indicating shareholder protection were assessed in each country during the thirty-six-year span. Additionally, the study noted the functional equivalence laws in different countries had, which increased the validity of the study. Finally, this study did not rely solely on binary variables in analyzing shareholder protection. Instead, the values for the variables could take any value between 0 and 1. This scoring system reduced some of the arbitrariness that accompanies having to describe a variable on a binary scale. To measure the relationship between shareholder protection and stock market growth in these countries, four indicators of growth were used through a VAR Granger causality test. The value of the listed stock market shares in comparison to GDP, the value of total stock market shares traded in comparison to GDP, the ratio relating the value of the total stock market shares traded to the total stock market value, and the number of companies per million of country population were used to assess the relationship.

Sarkar and Singh (2010) concluded that over the thirty-six years assessed, about thirty-three percent of the sixty variables assessing shareholder protection changed. In 1970, the U.K. had the lowest ranking for shareholder protection and Germany had the highest. In 2005, the U.S. had the lowest

ranking for shareholder protection and France had the highest. Analyzing the results, the researchers observed that both civil law countries had higher protection of shareholders than common law countries did throughout all thirty-six years. If accurate this would suggest civil law countries have the highest potential for economic growth. The t-test mean comparison between shareholder protection in common and civil law systems had a value of 4.0148, which indicated a high statistically significant difference in civil law countries having better protection. By providing statistically significant differences in values, the validity of this study increased. Also, the researchers asserted, "shareholder protection does not influence stock market development."[56] However, the researchers admitted that exceptions existed. These exceptions were numerous and reduced the validity of the claim that shareholder protection does not influence stock market growth and that countries with civil law systems have the highest economic potential.

Recent studies have suggested that the quality of rule of law and legal institutions of a country have a significant impact on its economic growth.[57] Therefore, investigating whether common or civil law systems have a more effective rule of law, is useful in determining whether a common or civil law system has the most economic potential. To test whether common or civil law countries have better rule of law, Joireman (2001) examined two cross-national data sets from Freedom House and Political Risk Services to examine whether formerly European-colonized African countries with common or civil law systems had more effective rule of law from the early 1980s to the late 1990s. Freedom House measures civil liberties and political rights, and Political Risk Services measures political, financial, and economic risk, so Joireman argued that by using both data sets she got stronger results and combatted possible bias resulting from relying on just one data set. In her results, Joireman asserted that common law systems provide better rule of law than civil law countries. This study is limited, however, by both data sets being

[56] Sarkar, P., & Singh, A. (2010). Law, finance and development: Further analyses of longitudinal data. Cambridge Journal of Economics, 34, 325-346.
[57] Joireman (2001), *supra*.

compiled by American organizations, which may have caused bias, and some of the results were not consistent enough to make as definitive of an assertion as Joireman made.

Siems (2007) challenged the commonly held assertion among researchers that law systems can be classified as either common or civil. He argued that these classifications are often arbitrary and overly general, since many countries mix aspects of both law systems and have differences in their law practices and cultures. Siems argued that instead, researchers should classify the particular law systems of a country based off of if the country was colonized by Europeans in the 1500s to 1900s, what language the country uses, the importance of codified law and courts in the law system, and the formality and flexibility of the law system. To test whether these classifications are more effective in grouping legal systems than the standard common and civil law method, Siems evaluated creditor rights among countries, grouped by his suggested categories, and he assessed whether statistically significant differences existed for creditor rights among his suggested classifications. He concluded that while the importance of codified law and the flexibility of the legal system classifications did not have any statistically significant differences, he found the colonization and language classifications had a large statistically significant difference of one percent. This study was limited in that it based its scores for creditor rights on previous studies, so the results were limited by the strength of the previous studies. However, Siems used a large sample size of 129 countries in his analysis, which increased the study's statistical significance. The study's results effectively challenged the theory that law systems can be classified as simply common or civil, thus decreasing the strength of the assertion that a particular type of law system leads economic growth.

Conclusion

A review of literature focused on the effects of common or civil law systems on economic growth determines current research to be inconclusive. The current research is divided on whether the common or civil law system has the most potential for economic growth. Additionally, much of this research has exceptions and possible biases that weaken both claims. Some research even reveals that the current law

system classifications are insufficient, due to discrepancies in law systems among countries classified as having the same law system. Future research should focus on whether Siems's assertion that classifying a law system as common or civil is too broad and whether his suggested classifications are more appropriate for differentiating law systems. Since the current research on the effects of common and civil law systems on economic growth is contradictory, classifying law systems differently may lead to more conclusive results on the correlation between a type of law system and economic growth. It is recommended that policy makers consider a country's cultural, economic, and political history when deciding if changes to current law systems will lead to economic growth. Due to the contradictory and inconclusive findings on a correlation with types of law systems and economic growth, it is currently impossible to assert whether law systems, as they are currently classified, have significant correlations with economic growth.

References

Beck, T., Demirgüç-Kunt, A., & Levine, R. (2003). Law, endowments, and finance. *Journal of Financial Economics, 70,* 137-181.

Graff, M. (2008). Law and finance: Common law and civil law countries compared: An empirical critique. *Economica, 75,* 60-83.

Joireman, S. F. (2001). Inherited legal systems and effective rule of law: Africa and the colonial legacy. *The Journal of Modern African Studies, 39,* 571-596.

Joireman, S. F. (2004). Colonization and the rule of law: Comparing the effectiveness of common law and civil law countries. *Constitutional Political Economy, 15,* 315-338.

Koch, C. H. (2004). The advantages of the civil law judicial design as the model for emerging legal systems. *Indiana Journal of Global Legal Studies, 11,* 139-160.

La Porta, R., Lopez-de-Silanes, F., Shleifer, A., & Vishny, R. W. (1998). Law and finance. *Journal of Political Economy, 106,* 1113-1155.

Lerner, J. & Schoar, A. (2005). Does legal enforcement affect financial transactions? The contractual channel in private equity. *The Quarterly Journal of Economics, 120,* 223-246.

Mahoney, P. G. (2001). The common law and economic growth: Hayek might be right. *The Journal of Legal Studies, 30,* 503-525.

Sarkar, P., & Singh, A. (2010). Law, finance and development: Further analyses of longitudinal data. *Cambridge Journal of Economics, 34,* 325-346.

Siems, M. M. (2007). Legal origins: Reconciling law & finance and comparative law. *McGill LJ, 52,* 55-81.

PROSECUTORIAL DISCRETION IN U.S. CRIMINAL LAW

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CONTENTS

Abstract

The American criminal justice system has evolved into one that reflects power of attorneys more than justice. It has evolved into a system of over criminalization, and one that institutionally allows prosecutors to abuse the power granted to them by the people. One of the most influential tactics prosecutors have within the criminal justice system is the process of *stacking* charges for the purpose of coercing plea bargains. Although plea bargains were initially meant to benefit both parties, too often stacking allows prosecutors to exploit defense attorneys and their clients. The following paper will discuss how reformed prosecutorial oversight, the judicial branch's cooperation, and a people's social movement can change the United States' criminal justice system to better reflect justice through restoring the originally intended balance of power.

Introduction

An Economist article once argued that the American criminal justice system was one of too many laws, too many prisoners, and an imbalance of power. Particularly, it was noted that "rigid sentencing laws have shifted power from judges to prosecutors."[58] Further analysis noted that the structure of the justice system allowed prosecutors to abuse the powers given to them by the people. One of the most influential powers granted to prosecutors is the power to plea bargain with defendants. Although plea bargaining was initially meant to benefit both defending as well as prosecuting parties, it has since transformed into a scare tactic for prosecutors to use at their discretion due to an influx in criminal code and systematic abuses of power. Despite its flaws, though, plea bargaining is currently necessary and it would be impractical to completely eradicate the ability of criminal attorneys to negotiate pleas altogether.[59] In the analysis of the disproportionate power distribution created by the plea bargaining system, some have raised the question as to how plea bargain negotiations can be retained without having an abuse of prosecutorial power. The answer to this, as with most problems of this importance, is complex in its implementation. However, despite its complexities there is an answer. If the United States is to subdue the imbalance of power that has been created between prosecutors and defendants through plea bargaining, then we must take measures to ensure that prosecutors will have appropriate oversight and checks of power from the legislature through public and judicial avenues. To elaborate, in order to control prosecutorial power, we must make prosecutors accountable to higher offices. Ideally these offices will be specialized oversight committees from state and federal legislative branches. Increasing prosecutorial accountability will not be possible, however, unless there is also both a push from the public and reinforcement of

[58] The Economist. (2010, July 24). Too many laws, too many prisoners.
[59] Devers, L. (2011). Research Summary. *Plea and Charge Bargaining*, 1,2-1,2.

accountability by the judicial branch of government. If these three measures to increase prosecutorial accountability are taken, the plea bargaining system will operate fairly and more justly in the American criminal justice system.

I. Explaining the Plea Bargain

To first understand how we are to limit prosecutors from abusing their power through the plea bargaining system, one must first understand what a plea bargain is, what it was meant to do, and how that initial goal has changed over time. One will note that the power imbalance created by plea bargaining has been facilitated through legal, political, and social realms of society. Those facilitating this power imbalance include courts and the legislature. Because of this, both courts and the legislature will be vital in restoring the balance of power between prosecutors and defendants.

According to the Cornell University Law School definition, plea bargains are agreements between defendants and prosecutors where defendants agree to plead guilty to some or all charges against them in exchange for concessions from prosecutors.[60] According to this definition, it can be implied that plea bargaining is meant to be an agreement between opposing parties where defendants are given concessions of shorter sentences, withdrawal of charges, or prosecutor promissory agreements to not pursue certain charges. In return for this plea, prosecutors usually receive a favoring conviction without having to go to trial. In short, plea bargains are mechanisms used as attempts to avoid the uncertainties of trial by both parties. The plea bargain strategy is used quite often in the United States criminal justice system. In fact, 90

[60] Cornell Law. (2010, May 7). Plea bargain. *Cornell Law Journal*, n/a, 1-1

to 95 percent of all criminal cases in the United States are settled through plea bargains.[61] However, unchecked prosecutorial power has altered the plea bargain system to one that reflects neither the Cornell Law School definition, nor the implications that are drawn from that definition.

For instance, to increase the chances of plea bargaining working successfully, some suggest that prosecutors have made it a common practice to stack charges. Stacking charges entails finding as many possible criminal counts, or laws, to "stack" against the defendant in order to strengthen the core case of the prosecution. A common example of stacking as means of coercion would be if an individual committed a single act that violated three different laws and was later caught by the police. Once a police report was submitted to the prosecutor's office, the prosecutor would subsequently scan the criminal code to find each relevant law that was violated. The prosecutor would then decide whether or not to pursue these charges. If the prosecutor determines there is a case to be made against the defendant, then the three charges are brought forth. Once charges have been brought against the defendant, prosecution would threaten that because there were three laws violated by the single act, there would be the possibility of the defendant facing penalties for each of the three charges consecutively. That is, for the first charge, the defendant would serve the set amount of time. After that time was served, the defendant would then additionally serve the time established for charge two. After the time for charges one and two were served, the defendant would then serve additional time for the third and final charge. This tactic, as structured, could easily turn a violation of law that should only permit two years in prison to one that permits six years or more. Bringing more charges against a defendant also raises the uncertainties of the defendant being able to successfully defend

[61] Devers, *supra*.

themselves from each charge, as defense attorneys would have to prove innocence for each charge individually during trial. More charges brought forth would also mean more time spent in court, more time for defense attorneys to make a mistake, and more of a physical and psychological strain on the defendant. With such unnecessarily exaggerated pressures and uncertainties, there is usually a strong incentive to take the coerced plea.

The above example makes numerous assumptions. The latter part of the example assumes that there are roughly two year penalties associated with each charge. There could be less and there could be more time associated with any given charge. Often there is a range of time associated with given charges. The most coerced pleas will likely threaten to add numerous years as penalty rather than miniscule amounts of time. Time is valuable, though, so even the threat of 60 days could make a significant difference. Most notably the example assumes that there would be three charges brought against a defendant. Again, there could be less charges brought forth. However, with more criminal statutes being added to federal and state codes every year, there is an increasing risk of there being much more than three charges brought forth to any given defendant.

In 2013, a panel of defense attorneys informed Congress of their concerns with the "rapid rate" of growth in criminal codes. They reported that codes gaining criminal status were growing at about 500 codes per decade.[62] In a Harvard Law Review article, Paul Larkin argues that "If they *[the government]* outlaw the same conduct but multiply the penalties, the punishments become grossly disproportionate to the harm they seek to avoid and empower prosecutors to stack charges against a defendant in order to coerce a guilty plea. And, for those reasons, having

[62] George Terwilliger to United States Congress (2013, July 14), Way Too Many Criminal Laws, Lawyers Tell Congress [Interview]. (n.d.).

too many criminal laws damages the respectability of the process that enforces them."[63] As seen above, charge stacking makes it less likely for the defendant to fight a case due to the federal and state codes allowing seemingly disproportionate sentences in relations to alleged crimes. The rapid influx of criminal codes has consequently given prosecutors more fire power within their legal arsenal. The influx of passing criminal laws makes it easier for prosecutors to label certain actions as criminal while making it increasingly more difficult for a defendant or defense attorney to fight numerous allegations from prosecuting parties. This structure grants disproportionate power to prosecutors compared to defendants and defense attorneys.

Not only have prosecutors been given the means to be coerce defendants through an influx in criminal codes over time, they have also adopted a *tough on crime* mentality. The tough on crime mentality has become more and more prevalent as time continuously evolves the criminal justice system. For instance, in 1974, the FBI announced a spike in reported crime during the first quarter of that year, and then Attorney General William Saxbe began to speak out sharply against lenient judges, and against the concept of rehabilitation.[64] Arrests and prosecutions for drug offenses also shot up during this period, a result of the "War on Drugs" during the 1980s. From 1986 to 1991 the number of adults sentenced to prison for drug offenses more than tripled (BJS, 1992). It could be implied, then, that prosecutors adopted the mentality to be tough on crime in the effort to control crime.

Prosecutors are also given professional and political incentives to get convictions due to the tough on crime mentality. Prosecutors who are elected or who are seeking an elected office

[63] Larkin, P. (2013). Public Choice Theory and Overcriminalization. *Harvard Journal of Law and Public Policy, 36*(2), 720-720.

[64] Greene, J. (2002). Getting Tough on Crime: The History and Political Context of Sentencing Reform Developments Leading to the Passage of the 1994 Crime Act. *Sentencing and Society: International Perspectives*.

are tasked with creating a political platform to run on. Since the role of a prosecutor has been perceived by some to be an individual that should be tough on crime, how tough you are on crime becomes indicative of how good you are at your job. Therefore, it is likely for a prosecutor who is looking for professional or political recognition to seek more convictions as means to do so. Mike Cox, former Attorney General for the State of Michigan, is a textbook example of being tough on crime to achieve a political goal even despite obvious inefficiencies in the strategy implementation. Cox, seeking to be elected to the Attorney General's office in 2003, ran on the platform of "pay child support on time or do time" (Clark, 2003). This platform would ultimately get Cox elected, however the prosecutor's strategy was not the most fiscally responsible one. From April 2003 to September of 2005, the State of Michigan had collected $17.4 million for 1,827 Michigan Children, or roughly $8.75 million per year in a generous estimation. In total, 1,886 warrants had been issued for the arrest of non-custodial parents looking to collect $88.2 million.[65] Although this strategy may seem reasonably sound, the state would not actually be collecting as much money as it would potentially spend on incarcerating delinquent non-custodial parents. Collecting $17.4 million for 1,827 Michigan children equates to roughly $4,761 per family per year. Incarcerating inmates, however, has a nationwide annual expenditure of roughly $31,286 per inmate (Santora, 2012). If the 1,886 warrants calling for the arrests of those non-custodial parents were actually executed, it would cost the state over $59 million annually. This estimate doesn't include utilizing resources to conduct investigations or the police force that could be used elsewhere in a state with relatively high crime at the time. This estimate also does not provide the economic impact of the incarcerated parent being unable

[65] Pierce, A. (2005, September 1). Attorney General Mike Cox Announces Success of Child Support Summer Sweep.

to hold employment while serving their time and potentially having an even harder time finding employment once their time was served due to now having a felony record. There was a statewide consensus that the child support should be paid, however, incarcerating the non-custodial parent and inhibiting them from being able to provide the funding for that child support while doing so on the taxpayers' dollar may not be the most responsible way to go about the situation. Seemingly none of this was considered, though, as Cox came across as a strong Attorney General for his strategy and was consecutively elected to the Attorney General's Office until 2011.

One should note two things from this section; an influx in the amount of criminal code has given prosecutors more power and the tough on crime mentality makes it more likely for prosecutors to seek convictions, especially in drug or other trivial cases. With the current adoption of a tough on crime mentality and means to get more convictions through an influx of criminal codes, prosecutors have used stacking charges in the plea bargain as a mechanism to get convictions. This imbalance of power, however, has created a rift in the legal field between prosecutors and defendants.

II. The Harm from the Problem

Now that we have seen how the plea bargaining system has evolved over time and the prosecutor's role in this system, we must analyze the inherent problems associated with the current plea bargaining system. The harm of the current structure has both legal and social ramifications. Legally, we have seen that prosecutors have been empowered at a disproportionate level to defendants and defense attorneys. Not only has the current plea bargaining system been allowed to be abused due to an imbalance of power, that power imbalance is also institutionally

protected through precedent that has been set by the court system. Socially, this power imbalance most dramatically affects the Latino and African American communities.

Prosecutors are protected by the court system in a number of ways; one way being absolute prosecutorial immunity. Absolute prosecutorial immunity eliminates any civil liability of prosecutors while acting in an official capacity. For those prosecutors who do not qualify for absolute immunity, most will receive qualified immunity. Qualified immunity protects all actions of government officials with exception to those who are plainly incompetent and those who knowingly violate the law (McKenna, 1988, pg. 667). Since prosecutors are government officials, they are usually entitled to qualified immunity. Both qualified and absolute immunity has been upheld by the Supreme Court of the United States on several occasions. In 1976 the case *Imbler v. Pachtman* went before the Supreme Court. Paul Imbler had previously been the defendant of a murder trial in which Deputy District Attorney, Richard Pachtman, successfully convicted Imbler of the alleged crime. Consequently, Imbler was sentenced to death. Following the trial, the District Attorney Pachtman, brought forth evidence that would exonerate Imbler. The District Attorney noted that leads to this evidence had been available prior to the trial, however had not been thoroughly pursued. Imbler's counsel petitioned that the prosecuting attorney had knowingly used the false testimony of a witness, as well as misconduct violations. The federal circuit court found eight acts of misconduct during the trial by the prosecuting party. Imbler was later exonerated and freed from prison. After being freed Imbler sued Pachtman, seeking financial reparations in the amount of $2.7 million from the State of California. In hearing both parties, though, the Supreme Court ruled that under federal civil rights law, prosecutors are entitled to absolute immunity from lawsuits over actions undertaken as a prosecutor, therefore Richard Pachtman would not be held financially liable for any actions taken

in his duties as prosecuting attorney. The court later extended this immunity to cover supervisory prosecutors who fail to properly train their subordinates.[66] Criminally, it is rare that any prosecutor face charges for conducting their work. For instance, in the Supreme Court case *Connick v.Thomspson* Justice Clarence Thomas stated that professional sanctions were sufficient to govern the conduct of prosecutors.[67]

American Bar Association professional sanctions regulate prosecutorial conduct in instances where prosecutors are acting within their official capacity as a prosecutor in place of actual legal consequences, such as criminal trials and lawsuits, regulating the misconduct of prosecutors. This method of oversight for prosecutors is insufficient, and its evidence lies in an example from the Obama Administration. One can note from the Obama administration example that prosecutors are, in some cases, allowed to investigate themselves due to a lack of sufficient oversight from the ABA. In 2013, President Obama requested that Eric Holder investigate the Department of Justice's review of the national security leak investigations.[68] In essence, the president requested that Attorney General Eric Holder investigate the very office Holder was the head of; consequently, leaving the Attorney General to investigate himself. This example implicates that prosecutors should, somehow, be allowed to unilaterally govern themselves. This method, however, breeds social and legal inequality as there are numerous consequences to such structures of unilateral power.

One of those consequences is seen in the disproportionate effect of prosecutorial power over African Americans and the poor. We have already noted that the tough on crime mentality has influenced prosecutors to seek more convictions. In this context we must note that blacks are

[66] Imbler v. Pachtman 424 U.S. 409, U.S. Court of Appeals 1976
[67] District Attorney et al Connick v. Thompson 131 S. Ct. 1350, Supreme Court 2011
[68] Karl, J. (2013, May 23). Obama Orders DOJ Review of Leak Investigations.

disproportionately more likely to be those defendants. President Nixon's Chief of Staff, H.R. Halderman, was quoted stating that "*[President Nixon]* emphasized that you have to face the fact that the whole problem is really the blacks. The key is to devise a system that recognizes this while not appearing to." President Nixon's solution to the perceived problem was to "steer state policy towards social control and away from social welfare". We notice his plan through Nixon's comments that "Doubling the conviction rate in this country would do more to cure crime in America than quadrupling the funds for *[Hubert]* Humphrey's war on poverty."[69]

Many rights and protections were undermined during the Nixon administration through legislation and executive appointments. President Nixon appointed two conservative Justices to the United States Supreme Court, Warren Burger and William Rehnquist, ensuring that defendants' rights were further weakened. An example of this lies in the 1973 case *United States v. Robinson*. In this case the Supreme Court undermined a lower court's interpretation of the Fourth Amendment's prohibition against unwarranted searches and seizures by ruling that if an arrest is lawful, "a search incident to the arrest requires no additional justification" (United States v. Brown, 1973). These efforts to undermine criminal defendants' rights were rooted in the notion that the excessive lenience of the criminal justice system was an important cause of crime, therefore it was necessary to be tough on crime.

The relinquishment of defendant's rights would prove to be detrimental in the long run, especially for blacks and minorities. The defendant's rate of success at plea bargaining, according to their race, would end up reflecting President Nixon's words. "A 1990 study of about 1,000 cases by the U.S. Sentencing Commission found that whites did better in plea bargains. Twenty-five percent of whites, 18 percent of blacks, and 12 percent of Latinos got their

[69] Political Research Associates. (2013, April 9). The Rise of the Modern "Tough on Crime" Movement

sentences reduced through bargaining. The reason for the disparity was not determined. The San Jose Mercury News conducted a massive study of 700,000 California legal cases over a 10-year period. The paper reported in December 1991 that a third of the white adults who were arrested, but had no prior record, were able to get felony charges against them reduced. Only a quarter of the African-Americans and Latinos with no prior records were as successful in plea bargaining." (Noisette, 2000).

In analyzing these comments from President Nixon and his staff, along with analyzing unequal effects of plea bargaining on African Americans and Latinos, one can note that there are obvious power imbalances in which the tough on crime mentality has facilitated. Not only do these comments and studies indicate that African Americans and Latino people are unfairly targeted, yet, it is further complicated due to the fact that these demographics are less likely to be able to fund a defense for themselves in the first place. For instance, census reports note that it is more likely for African Americans and Latinos to be impoverished when compared to their Caucasian counterparts. Those of lower income levels, in turn, have fewer resources to defend potential criminal charges. So, African Americans and Latinos who are poor are more likely to be targeted by law enforcement, and are less likely to have the resources to adequately defend themselves from law enforcement. For these individuals who rely primarily on public defense attorneys who are overworked and underpaid, the gap of power between prosecutors grows exponentially. Consequently, these are the individuals who are most vulnerable to prosecutorial power abuse of charge stacking when plea bargaining.

III. Resolution

In consideration of the Cornell University Law School definition of what plea bargains are, what they were structured to do, and how this system evolved over time, we can see that the current plea bargain system does not reflect an *agreement* between prosecutors and defendants. Despite the definition, the current plea bargaining system reflects prosecutorial coercion through charge stacking. Tough on crime mentalities and court protections of prosecutors have evolved into social and legal power imbalances between prosecutors and defending parties. This imbalance of power has disallowed the plea bargaining system to do what it was initially meant to do. If the plea bargaining system is to be retained without prosecutors abusing their given power, it must first be reformed to better balance power between prosecutors and defendants. To accomplish this reform, the criminal justice system must do two things. There must be the implementation of a sterner mechanism for prosecutorial oversight and the push to combat the institutional mechanisms through which prosecutorial abuse of power is currently protected; court systems and social mentalities. My concluding recommendation is to take measures to close the gap in power between prosecutors and defendants through federal and state implemented prosecutorial oversight committees. These committees would be empowered through the United States Congress and state legislatures. If this measure is to be effective, though, there must be action taken by the public and judiciary as well. Therefore, there is also a need for social movements to raise awareness and education regarding plea bargaining and judicial acknowledgment of flawed previous precedent. Just as the power of prosecutors has been reinforced through multiple routes, we must challenge this power utilizing the same tactics. Without a multiple front approach, there is a risk that efforts made by a few will be undermined.

First, one can turn to the primary recommendation of reducing the power gap through legislative oversight. Internal professional sanctions and the ABA are currently the authority in penalizing prosecutorial misconduct (ABA Opinion Says, 2014). The previously discussed cases Connick v. Thompson and Imbler v. Pachtman have set the precedent that professionally internal oversight is sufficient enough to handle the misconduct of prosecutors. However, there are a few problematic features with this structure of oversight. Firstly, it is true that lawyers may be fired or disbarred for conducting illegal practices to carry out their jobs through the current structure, however plea bargaining is not illegal activity. In fact, prosecuting attorneys may actually have incentive to be more aggressive in plea bargains in order to raise their conviction rates. This incentive can be for promotions, raises, political ambitions, or to keep their jobs. The abuse of power when considering charge stacking in a plea bargaining system is contingent of the circumstances of the case. A specialized prosecutorial oversight board would be better equipped to empirically calculate such violations. The second problem is that the ABA does not have legal jurisdiction to criminally prosecute prosecuting attorneys for misconduct. This is an issue because it is already rare for prosecuting attorneys to face any civil liability due to absolute prosecutorial immunity and qualified immunity. This is not to suggest that prosecutors should be jailed and sued for all their mishandlings of plea bargains. This aspect of the current prosecutorial oversight structure was merely raised to suggest that the institution should incorporate features through which prosecutors may face more severe repercussions for their actions instead of institutionally protecting them.

These Boards would be dedicated to checking the legal and ethical practices of prosecutors, specifically auditing plea bargains. The prosecutorial oversight board would act as an overarching disciplinary authority to hold real consequences, both criminal and civil, for the

misconduct of prosecutorial practices. In terms of plea bargaining specifically, the committee will review claims of prosecutorial abuse as well as audit plea bargains quarterly. Not financial auditing, obviously, however reviewing the consistency of plea bargains and placing a control on the number of charges stacked prior to the agreement between prosecution and defendants. If it is found that prosecutors are over reaching in utilizing their powers, then the prosecutorial oversight committee should have the power to bring charges against prosecutors to be held in a court of law. This would happen at both state and federal levels. Specific structures and composition of the board would be contingent on individual state law. However, it is suggested that the board be composed both of those elected to the position and those who are appointed. Appointment power would also be contingent on state laws, however it is most likely that this appointment will come under the purview President of the United States for federal boards and governors for state boards. It is also suggested that the board be composed of both professional attorneys as well as those from the general public. This is a board composition similar to many state oversight boards for real estate, specifically the Michigan Board of Real Estate Brokers and Salespersons. (Snyder, 2014).

The oversight board must be reinforced through the judicial branch of government. As previously mentioned, the Supreme Court of the United States upheld that the current professional oversight of prosecuting attorneys is sufficient. This view from the courts could lead to the implication that prosecutors are not, and should not be, held to the same accountability standards as other citizens. If the challenge of prosecutorial power through an oversight committee is to be reinforced, the judiciary must also chip away at the power prosecutors have gained through charge stacking, absolute immunity, and qualified immunity. The Supreme Court of the United States and all other lower courts must be willing reevaluate this precedent and pass

judgment on cases where the misconduct of prosecuting attorneys are of issue. The recommendation to the judiciary is to hear such cases with a critical ear, and re-evaluating the consequences of not hearing such cases. If these actions were allowed to be criminally coded and/or challenged through civil suits, the accountability of prosecutor's actions would be increased. This higher accountability, in turn, checks the power of prosecutors. The Economist argued that sentencing laws allow prosecutors power that rivals even the power given to judges.[70] If for no other reason, it is essential that judges challenge the power of prosecuting attorneys to uphold the legitimacy of their own power,

Finally, we must analyze how the public can influence limiting prosecutorial power. The public is generally effective when social movements raise the awareness of issues and lobby the legislative branch to pass binding legislation. In *Social Movements as Catalysts for Policy Change: The Case of Smoking and Guns*, Constance Nathanson attributes the success of the social movements with regard to the tobacco industry and gun control laws to the direct success of effective legislation being passed in favor of each movement (Nathanson, 1999). This type of social movement would be needed to urge legislators to pass real reform for the plea bargaining and criminal justice systems. Specifically, the public could be used to reform the influx of criminal codes. Social movements have additional, positive, consequences as well. In addition to pushing for the passage of legislation, social movements also raise the awareness of the general public. The reputation of social movements is often contingent on their success, though. Consequently, there will be a need for wide acceptance of this movement.

[70] Too Many Laws, *supra.*

IV. Opposition

The challenge of prosecutorial power will inevitably meet wide opposition from legal conservatives. Among the many positions that could be taken, the opposition will undoubtedly argue that continuing plea bargaining as already structured is necessary. They will argue that the suggested reform is unrealistic, because a challenge to prosecutorial power will lead to an inefficiency of the criminal justice system due to an increase in the number of cases going to trial. To elaborate, opponents to the recommended strategy will note that the number of cases currently filtering through the criminal justice system would be overwhelming for prosecuting and defense attorneys to settle through trials. The Bureau of Justice Assistance states that some scholars deem the plea bargain system as "more cost efficient than having all cases go to trial". The report goes on to note that "researchers and legal scholars have reiterated that the practice is fair, just, and procedurally sound" (BJA, 2011).

While this argument holds merit; it overlooks the inherent power imbalance created by the current plea bargaining. In the same BJA report as mentioned by the opposition, the Bureau states that "the plea bargaining process has been criticized for allowing prosecutors too much discretion compared with judges, who are held to concise sentencing guidelines". A system that allows prosecutors to wield power that rivals the power of judges while defendants are unequally targeted and prosecuted is not a *just* system. That system that allows prosecution to manipulate sentencing potential in a way that could be used to coerce the vulnerable and manipulate those who may be ignorant of the law is neither fair nor procedurally sound. One has already analyzed that the current plea bargaining system disproportionately disfavors Blacks and Latinos. In fact, the current system is a system that is flawed and that should be reformed. It is because there is such an immense amount of cases that oversight boards are needed to audit any potential

discrepancies in the plea bargaining system. A system that is used to settle 90 to 95 percent of criminal cases should have a specialized board as oversight in order to make sure that it is functioning correctly.

In turn, the opposition will argue that through the recommended course of action, the authority of prosecuting attorneys will be undermined. Those individuals will note that removing prosecutorial immunity prevents prosecutors from effectively doing their job. They will argue that such checks on prosecutorial power undermines the ability of the prosecutor to fulfil his duties as an attorney because, without stacking, there will not be enough incentive for defendants to take the recommended pleas. The suggestion is that this lack of incentive will drastically increase the number of tried cases in the criminal justice system, leaving prosecutors to crumple under their workload.

This argument also raises valid concerns, however the principle behind this argument does not reflect the values of the intended purpose of the plea bargain. The plea bargaining system is meant to be a bargain for both parties, not just prosecutors. The power imbalance in favor of prosecution actually undermines the legitimacy of the plea bargaining system as a whole, as many defendants believe that they must take pleas in order to receive fair sentencing. The practice of prosecutors stacking charges merely makes the plea bargain system a symbolic gesture of the prosecution. If the workload is of concern, then more prosecutors should be hired.

Despite the opposition's argument against the recommended strategy to reform the plea bargaining system, there must be *some* form of reform to ensure the longevity of the plea bargain is one equal to all, both in terms of race and economic stature. The Supreme Court of the United States has stated that the plea bargain would not exist in an "ideal world."[71] If this trend of

[71] Bordenkircher v. Hayes, 434 U.S. 357, 361-62 (1978); Blackledge v. Allison, 431 U.S. 63, 71 (1977)

thinking is allowed to gain traction in the legal field, it could ultimately lead to the overall demise of the plea bargaining system. A way to take some of the legal discussion away from dismantling plea bargaining is to reform the system to one that operates more efficiently and more justly. The oversight board would be a step in the right direction.

Conclusion

Prosecutors have been empowered to potentially coerce defendants and defense attorneys into convictions through plea bargaining. This is part of a larger issue of an imbalance of power within the criminal justice system. The power imbalance between prosecutors and defendants is initiated, partly, from a tough on crime mentality, facilitated through an influx of criminal code, and is protected by the highest courts of the United States. If the plea bargain is to remain as an option without allowing prosecutors to abuse their power, then the criminal justice system must close the gap in power between prosecutors and defendants. Closing the power gap can be handled in a number of ways; through legislative measures, judicial measures and public advocacy. Specifically, legislation creating a prosecutorial oversight board at federal and state levels would be a large step towards eliminating the power gap, and ensuring the longevity of the plea bargaining system. In order for this to be effective, though, courts have to change the precedent that professional oversight of prosecutors is sufficient. Lastly, these changes cannot come to pass without a significant push from the public. Citizens of the United States must mobilize to lobby Congress and their state legislatures. With these steps taken, we can still utilize the plea bargaining system without allowing prosecutors to abuse their power, and we will have taken the criminal justice system in a step that reflects equal power distribution between legal parties despite differences in color, heritage, or economics.

References

District Attorney et al Connick v. Thompson 131 S. Ct. 1350, Supreme Court 2011

Imbler v. Pachtman 424 U.S. 409, U.S. Court of Appeals 1976

Dennist, A. (2007). Reining in the Minister of Justice: Prosecutorial Oversight and the Superseder Power. *Duke Law Journal, 57:131*, 132, 144-132, 144.

Devers, L. (2011). Research Summary. *Plea and Charge Bargaining*, 1,2-1,2.

The Economist. (2010, July 24). Too many laws, too many prisoners.

Cornel Law. (2010, May 7). Plea bargain. *Cornell Law Journal*, n/a, 1-1

Political Research Associates. (2013, April 9). The Rise of the Modern "Tough on Crime" Movement

Balk,R. (2013, August 1). The Untouchables: America's Misbehaving Prosecutors, And The System That Protects Them.

Karl, J. (2013, May 23). Obama Orders DOJ Review of Leak Investigations.

George Terwilliger to United States Congress (2013, July 14), Way Too Many Criminal Laws, Lawyers Tell Congress [Interview]. (n.d.).

Bordenkircher v. Hayes, 434 U.S. 357, 361-62 (1978); Blackledge v. Allison, 431 U.S. 63, 71 (1977)

Larkin P. (2013). Public Choice Theory and Overcriminalization. *Harvard Journal of Law and Public Policy*, *36*(2), 720-720.

Green, J. (2002). Getting Tough on Crime: The History and Political Context of Sentencing Reform Developments Leading to the Passage of the 1994 Crime Act. *Sentencing and Society: International Perspectives*.

Pierce, A. (2005, September 1). Attorney General Mike Cox Announces Success of Child Support Summer Sweep.

TOUR GUIDE SPEECH: A TALE OF TWO CITIES

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CONTENTS

Introduction

Could you imagine having to pay for a permit to speak in public? Clearly, that would violate your fundamental rights- wouldn't it? The First Amendment states explicitly that individuals have the right to free speech. The types of speech that are protected under the First Amendment however, have been a source of controversy for decades.

The Supreme Court has attempted to define the scope of the First Amendment by establishing the bounds by which speech can be regulated by the states or federal government. The Supreme Court has established that speech can be regulated in certain cases that pose a threat to the wellbeing of society. For example, the Court, in cases like *Miller v. California*, has ruled that the government can regulate speech if it is seen to be obscene and or indecent therefore posing a threat to the wellbeing of individuals.[72] Speech, however, cannot be regulated on the sole basis of its content without passing through what is known as strict scrutiny. The strict scrutiny test holds that in order to lawfully regulate speech due to content, there has to be a compelling governmental interest, the law must be narrowly tailored as to not restrict too much expression and finally, there has to be no less restrictive methods of regulation possible. What happens to the First Amendment, then, when specific city governments enact laws that restrict the speech rights of tour guides?

In two cities, two different courts of law analyzed cases in which the city established laws preventing tour guides from speaking without their compliance with licensing protocols. These protocols held that tour guides needed to obtain permits specifically for their speech. To obtain the permits, tour guides were required to pay fees for permits and achieve certain scores on

[72] *Miller v. California*, Oyez, https://www.oyez.org/cases/1971/70-73

competency exams. Furthermore, both cities made the failure to comply with city protocols criminal defenses which yielded consequences of fines, and even potential imprisonment.

Two cases, *Kagan v. The City of New Orleans* and *Edwards v. District of Columbia*, were filed in federal court to answer the question: Do state mandated requirements for tour guides to obtain permits and pass competency exams in order to speak violate the 1st Amendment right to free speech? Appellants in *Kagan* and *Edwards* argued that the regulation of tour guide speech is unconstitutional, as it is a ban on content-based speech. Further, appellants argued that there was no valid governmental interest (rational basis) in regulating tour speech even if the courts held it to be content-neutral.

In June 2014, the United States Court of Appeals for the Fifth Circuit in *Kagan* released a three-page opinion and held that the restriction of tour guides was not a content-based restriction on speech. Further, the Fifth Circuit held that the New Orleans regulations had "effectively promoted the government interests, and without these protections [the legal statutes] for the city and its visitors, the government interested would be unserved."[73]

On June 27, 2014, only three weeks after the *Kagan* decision was released, the United States Court of Appeals for the District of Columbia Circuit released a 25-page decision that completely rejected the ruling in New Orleans. The DC Circuit held that the licensing requirements for tour guides were unconstitutional, and further, not a rational governmental interest. In light of the DC appellate ruling, *Kagan* was appealed to the Supreme Court in February 2015 where it was denied a writ of certiorari.

This paper explores these two cases and how two different appellate courts reached conflicting conclusions by carefully analyzing (a) the initial factors that led to the suits being

[73] *Kagan et. al v. City of New Orleans*. No. 13-30801 (2014).

filed in federal court, (b) their procedural posture, (c) the legal issues described in both *Kagan* and *Edwards*, (d) the rulings and cited case law behind both, and finally, (e) how the Supreme Court handled the appeal for the writ of certiorari in the case of *Kagan* and what this means for the ongoing rights of American tour guides.

I. Storms are Brewing in New Orleans and DC

The law in New Orleans, Louisiana, requires every tour guide to pass a history exam, undergo a drug test, and be put through an FBI criminal background check every two years. People who give tours without a license face fines up to $300 per occurrence and five months in jail. New Orleans defines a "tour guide" as anyone who "conduct[s] one or more persons to any of the city's points of interest and/or historic buildings, parks or sites, for the purpose of explaining, describing or generally relating the facts of importance thereto."[74] This law applies to every kind of tour—including ghost or history tours. In order to obtain a tour-guide license in New Orleans, an individual must pass—with a 70 percent score or higher, a written examination of "the applicant's knowledge of the historical, cultural, and sociological developments and points of interest of the city." The person may not have been convicted of a felony within five years of applying for a license. This license must be renewed every two years. The fee is $50 for a license and $20 for renewal.[75]

The city's application materials further require permit applicants to pass a federal criminal background check and take a drug test. All tour guides must pass the test every time they renew their license. Renewal of this permit is required every two years. Individuals who conduct tours without a license or with an expired license are subject to up to five months in jail,

[74] New Orleans Mun. Code Part II, Chap. 30, Art. XXI, § 30-1551.
[75] *Id.*

$300 fines, and/or suspension or revocation of their tour-guide license.[76] In this, the city of New Orleans considers it a criminal offense to violate any of the tour guide regulations. In order to speak, then, individuals must essentially be granted the permission to do so by the government. In *Edwards*, the statutes at issue claimed that, ""No one may "describe, explain, or lecture concerning any place or point of interest in the District to any person" in connection with any paid tour without first obtaining a special license. The prohibition on unauthorized talking covers all of the public spaces in D.C.—including roads and sidewalks."[77] An additional part of the DC law was descriptive in detailing the various fees that must be paid, in full, to the District before a tour guide's permit could be processed and or renewed. Specifically, "In order to obtain a license to describe, a person must pay three separate fees—an application fee, a license fee, and an exam fee—totaling $200 and submit an application. Then, she must take and pass (with a score of at least 70 percent) the District's "Professional Licensing Examination," a test covering 14 different topics and information drawn from nine separate publications." The categories ranged from Architecture to Regulations, and material for the exam covered material for example, about famous places, universities, and parks.[78]

Representing both appellants in New Orleans and DC were attorneys from The Institute for Justice, a public interest law firm. Four tour guides working in the City of New Orleans filed suit in district court: Candace Kagan, Mary Lacoste, Joycelyn M. Cole, and Annette Watt. The Institute for Justice, on behalf of the appellants, sought a declaratory judgment and injunction for relief which would, in effect, allow appellants to continue conducting their tour guide businesses

[76] New Orleans Mun. Code Part II, Chap. 30, Art. XXI, § 30-78, *incorporating* New Orleans Mun. Code Part II, Chap. 1, § 1.13.
[77] D.C. Code § 47-2836.
[78] *Edwards et.al v. The District of Columbia*. No. 1:10-cv-01557. (2014).

without exposure of the burdensome regulations. The City of New Orleans, however, filed a motion for Summary Judgement, which was granted by the district court in New Orleans. The declaratory judgment and injunction was denied at the trial level. The case then found its way to the U.S. Court of Appeals for the Fifth Circuit.

In the case of *Edwards* in DC, Appellants Tonia Edwards and Bill Main refused to comply with the DC regulations and filed their suit in district court. Like the appeals decision in New Orleans, the district court used a rational-basis review and established that the District of Columbia was serving a rational governmental interest in requiring all tour guides to be licensed and subject to fees and examinations of knowledge. The district court ruled that DC's tour guide requirements both promoted the tourism industry and protected consumers from potentially unqualified tour guides.[79]

Both appellants in *Kagan* and *Edwards* filed their suits in district court arguing that the statute as written in both New Orleans and DC law were unconstitutional for four distinct reasons. First, appellants argued that the statutes were not content-neutral because they were provisions directed specifically at tour guides that required them to act in specific ways in order to be able to speak in public. Further, appellants argued that their 1st Amendment rights were violated as they argued that the provisions in effect restricted their speech by requiring them to be tested and obtain a state granted label of proficiency to speak. Appellants also argued that the regulations for tour guides were in no sense compelling interests of the state. The 'state' in both the New Orleans and DC cases claimed that knowledge exams and fees to grant tour guide permits were established in the interest of the state protecting consumer wellbeing and promoting tourism. Appellants instead argued that placing the burden on individuals who are trying to make

[79] *Id.*

an honest living was unconstitutional because their ability to speak freely was prevented through burdensome licensing exams and fees which served merely as a revenue generator for the city. Lastly, the appellants argued that the licensing regulation of tour guide speech regulations was overbroad in application. In this, appellants point out that the licensing requirements targeted all speech of tour guides, and therefore was not narrowly tailored enough to avoid chilling 1st Amendment protection. In the reaction of both cases, the State governments filed motions for summary judgments arguing that there were no federal violations of constitutional rights found in the statutes. In this next section, which serves as the bulk of this paper's analytical segments, I will describe and analyze how two different circuit courts came to polar conclusions and ultimately granted summary judgment in New Orleans while in DC, the motion for Summary judgement on behalf of the state was denied, the decision of the trial court was reversed and remanded.

II. The Decisions and Important Case Law: New Orleans

In affirming the trial court's decision to grant summary judgment for the City of New Orleans, the Fifth Circuit Court was very confident in its legal rationale. Explicitly, the holding said, "*when a city exercising its police power has a law only to serve an important governmental purpose without affecting what people say as they act consistently with that purpose, how is there any claim to be made about speech being offended?*"[80] In other words, the Fifth Circuit held that a rational-basis review was sufficient and the government had not infringed upon any First Amendment protections. The Fifth Circuit held that the government interest in regulating

[80] *Kagan*, No. 13-30801.

tour guides involved in the tourism industry was valid and compelling to satisfy the rational-basis threshold.

The Fifth circuit decision focused heavily on critiquing the appellant's use of *Holder v. Humanitarian Law Project* (2010). *Holder* concerned the Antiterrorism and Effective Death Penalty Act, or AEDPA. Section 303 of the Act made it a crime for anyone to provide "material support or resources" to even the nonviolent activities of a designated 'terrorist' organization. In previous cases, Section 303 was held to be unconstitutionally vague. In reaction, Congress then passed the Intelligence Reform and Terrorism Prevention Act ("IRTPA") which added a requirement that individuals needed to "knowingly" provide "material support or resources" in order to violate AEDPA.[81]

When evaluated by the Supreme Court, in a 6-3 decision, the Court held that the statute was narrowly tailored enough to avoid being overly broad and vague. This being said however, Justice Breyer, in dissent, argued that even though he found the statute as applied to be narrowly tailored enough to avoid a constitutional violation, he did not believe that the government could "lawfully prosecute plaintiffs for engaging in coordinated teaching and advocacy furthering the organization's designated lawful political objectives."[82] Appellants used *Holder* to argue that Breyer's dissent applied to tour guides because they engage in coordinated teaching by trade. The "designated lawfulness" of the tour guide practice is their right to earn an honest living and by teaching tourists that through guided tours that end in compensation they are accomplishing their purpose.

The Fifth Circuit disagreed with the appellant's usage of *Holder* as they held, "but that decision (Holder) held that the law applied to conduct that triggered a message that provided

[81] *Holder v. Humanitarian Law Project*. 561 U.S. 1 (2010).
[82] *Id.* at 43.

material support to the terrorists in the form of speech. Whereas the New Orleans requirements for a license has no effect whatsoever on the content of what tour guides say."[83] In essence, the Fifth Circuit rejected the rationale that the provisions prohibited tour guides from speaking or even altered what they could say. Merely, the Fifth Circuit held that the burden placed on the tour guides was in no way infringing upon the right to speak; rather, the burdens placed furthered the interest of the state in promoting tourism. The Fifth Circuit interpreted the law as a means to ensure that tour guides had ample knowledge to do their jobs.

III. Rejection of the Fifth Circuit

The DC Appellate decision in particular focused heavily on the assumed validity of the intermediate scrutiny test as opposed to rational-basis analysis. In the trial court stage the notion of intermediate scrutiny was applied and satisfied by being found to further at least two "substantial and legitimate regulatory interests: (1) providing for the 'general welfare of society by attempting to ensure that those with the serious felonies on their records are not guiding or directing tourists and residents around the District, and (2) promoting the tourism industry by attempting to ensure that those who guide or direct people around the District have, at least, some minimum knowledge about what and where they are guiding or directing people to."[84] In this, the trial court argued that the permitting requirements of tour guides help ensure public safety and consumer protection.

In response, the DC Court of Appeals reviewed de novo the district court's grant of summary judgment. Appellants argued on appeal that the trial court erred in not finding the

[83] *Kagan*, No. 13-30801.
[84] *Edwards*, No. 1:10-cv-01557.

provisions to be content-based restrictions on speech. In addition, they argued that the intermediate scrutiny test should have been replaced with a strict scrutiny test due to the lack of the District's rational interest in addressing actual problems to the general welfare. The Court agreed and concluded, "we need not determine whether strict scrutiny applies, however, because assuming the regulations are content-neutral, we hold they fail even under the more lenient standard of intermediate scrutiny."[85]

In complete rejection of the Fifth Circuit, the DC Court of Appeals used case law from several Supreme Court cases to arrive at the opposite conclusion: "Finding the record wholly devoid of evidence supporting the burdens the challenged regulations impose of Appellant's speech, we reverse and remand."[86] Here, in the case of *Edwards,* appellants succeeded in the Court of Appeals in filing the case as a facial and as-applied challenge to the tour guide regulations. In other words, appellants argued that the regulations as they were written directly and established into law were (facially) unconstitutional and needed no additional interpretation to have violated the 1st Amendment as when tour guides were forced to comply with the regulations their speech was unlawfully restricted (as applied).

The Court's response begins with the citation of *Wash. State Grange v. Wash. State Republican Party*. In *Grange,* the Supreme Court held that on its face, a ballot initiative (872) that called for all candidates to be labeled on election ballots based on their party preference did not violate the free speech rights of voters in Washington State. The appellants, The Washington State Republican Party, argued for a facial challenge of Proposition 287 because identifying candidates on the ballot based on party ideology violated their First Amendment rights by forcing the party itself to endorse candidates that they perhaps did not support instead of having

[85] *Id.*
[86] *Id.*

the right to nominate and endorse their own candidates.[87] By compelling candidates to be labeled on the ballot by their proclaimed political affiliation, the Washington State Republican Party was afraid of "fringe" candidates running for office that were too radical to attract support of more moderate republicans. As a party, the Washington State Republicans fought the initiative in federal court. The Ninth Circuit Court of Appeals ruled in favor of the Washington State Republican Party and the Supreme Court reversed.

As *Grange* is cited in the *Edwards* opinion, "in the First Amendment context. The Supreme Court recognizes 'a second type of facial challenge,' under which a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."[88] In other words, even though the wording of the provision as written did not contain language that led it to be unconstitutional, in the case of *Grange*, the opportunity existed for the manner in which the law was enforced that would be unconstitutional. Even though the Supreme Court held that the Proposition 287 did not violate the 1st Amendment, the DC opinion uses *Grange* to lay out the possibility that the Court laid out for facial challenges to be valid. In the case of the tour guide regulations, appellants argued that the type of facial challenge in *Grange* applied because the mandatory licensing requirements that are embodied by competence exams and fees to obtain permits are overbroad in their application by forcing tour guides to follow the protocols.

In conjunction with *Grange*, the DC Circuit employs the usage of *Broadrick v. Oklahoma*. In this case, appellants sought to have Section 818 of Oklahoma's Merit System of Personnel Administration ruled unconstitutional because it restricted the political activities of the State's classified civil servants. Justice White, writing for the majority said,

[87] *Wash State Grange v. Washington State Republican Party*. 552 U.S. 06-730. (2007).
[88] *Edwards*, No. 1:10-cv-01557.

> "Appellants do not question Oklahoma's right to place even-handed restrictions on the partisan political conduct of state employees... Rather, appellants maintain that however permissible, even commendable, the goals of § 818 may be, its language is unconstitutionally vague and its prohibitions too broad in their sweep, failing to distinguish between conduct that may be prescribed and conduct that must be permitted."[89]

In this, three employees of the Oklahoma Corporation Commission who were subject to the proscriptions of § 818 filed suit to have two of its paragraphs declared unconstitutional on their face and enjoined because of asserted vagueness and overbreadth.[90]

The DC Court of Appeals specifically uses *Broadrick* to establish that, "facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigants, but for the benefit of society- to prevent the statute from chilling the First Amendment rights of other parties not before the court."[91] This citation by the DC Court is not only indicative of explaining facial challenges but also addresses any concerns of standing that could arise from the suit. In the case of Edwards, appellants sought to defend the rights of all tour guides and claimed the regulations not only infringed upon their rights, but the rights of all tour guides as well.

IV. The Core of the Decision: The Application of O'Brien

United States v. O'Brien is an iconic First Amendment case because it established the protection of speech that dealt with symbolism as opposed to the spoken word. O'Brien was convicted of a crime after burning his draft card to demonstrate his opposition of the Vietnam War. In burning his draft card, O'Brien violated a federal statute, Section:462(b)(3) of the Universal Military Training and Service Act (UMTSA) of 1948, which was amended in 1965 to include the applicable provision that made it an offense to "alter, knowingly destroy, knowingly

[89] *Broadrick v. Oklahoma*. 413 U.S. 601 (1973).
[90] *Id.*
[91] *Edwards*, No. 1:10-cv-01557.

mutilate" a Selective Service registration certification.[92] The Court held that O'Brien's usage of symbolic speech was not constitutionally protected under the First Amendment because the federal statute aimed to protect the draft card because for its documentary value. In destroying the card itself, the purpose of the cards would be nonexistent therefore the governmental interest in protecting the existence of the cards was valid. Further, the Court held that there were numerous other ways to express dissent of the draft card and the war without destroying the physicality of the card.

In determining whether the tour guide regulations in the District of Columbia are constitutional, the DC Circuit used the case *United States v. O'Brien* to determine whether they survived an intermediate scrutiny test. In this, the Circuit court applied *O'Brien* by first assuming "the validity of the District's argument that the regulations are content-neutral and place only incidental burdens on speech."[93] *O'Brien* set five standards in the form of a "prong test" to be used in subsequent cases to determine constitutionality of restrictions on speech.
Under the *O'Brien* standard, a regulation passes intermediate scrutiny if: "(1) it is within the constitutional power of the Government; (2) it furthers an important or substantial government interest; (3) the governmental interest is unrelated to the suppression of free expression; (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[94] When using the prong test, if any of the prongs are not satisfied, the regulation is held as invalid.

The Court held that prongs one and three were immediately satisfied. Prong 1 was satisfied as the court held that as licensing regulations are within DC's constitutional power.

[92] *United States v. O'Brien*, 391 U.S. 367, 377 (1968).
[93] *Edwards*, No. 1:10-cv-01557.
[94] *O'Brien, 391 U.S.* at *367, 377*

Prong 3 was also held to be satisfied as the licensing scheme was assumed to be content-neutral. This being said however, the appellants argued that the DC licensing scheme violated Prongs two and four. The court held:

> "Appellants present two arguments. First, they contend the record is utterly devoid of evidence that the burdens of studying for and passing the 100-question multiple choice exam 'do anything at all to advance a legitimate government objective.' Second, they argue that there is no evidence in the record the District's interests would be achieved less effectively absent the exam requirement. We agree."[95]

In this, the argument that prongs two and four are violated by the DC tour guide licensing scheme was centered on whether or not the requirements are narrowly tailored to support a valid government interest. The appellants' argument here combines also with the notion that the regulations on speech in conjunction with the multiple-choice exam are overbroad and therefore violate their First Amendment rights.

V. Cited in Both- Applied Differently: Ward v. Rock Against Racism

To follow up their interpretation that the licensing scheme violated Prongs two and four of the *O'Brien* test, the court cites *Ward v. Rock Against Racism*. In this 1989 case, the Supreme Court held that regulations are considered to be narrowly tailored when they do not place a burden on speech that is more than necessary to further a substantial government interest. In the case of *Rock Against Racism*, the respondent, the Court held that the government's interest of limiting the volume of performances held in Central Park was a content-neutral and a reasonably burdensome regulation without violating any Constitutional First Amendment protections.[96] In using the precedent of *Ward*, the DC Circuit solidified its support for its consideration that the

[95] Appellants' brief at 43. *Edwards et.al v. The District of Columbia*. No. 1:10-cv-01557. (2014).
[96] *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

DC tour guide licensing scheme did not satisfy the balancing test between the burden on speech and governmental interests and in failing the balancing test, placed unconstitutional burdens on tour guides who use speech to make an honest-living.

The Fifth Circuit in New Orleans cited *Ward* and came to an entirely different conclusion. Calling the holding "instructive," the Fifth Circuit claimed that, "*the government had regulated sound, and the Court said that even with messages conveyed, the regulation in content-neutral so long as the regulation is justified without reference to content of speech…Because that regulation was content-neutral and only reviewed with intermediate scrutiny, it satisfied the requirement of narrow tailoring."*[97] In this, the Fifth Circuit agreed with the majority Supreme Court ruling in Ward and applied it to the tour guide licensing scheme by holding that the regulations were not content-specific and served to further the City's governmental interest in protecting and promoting its tourism industry.

VI. Does Licensing Speech Really Further Governmental Promotion of Tourism?

While New Orleans' Fifth Circuit quickly dismissed the appellant's concern with a valid governmental interest in promoting tourism, the Circuit Court in DC gave a lot more in-depth analysis to the government's alleged concern before arriving at the opposite conclusion. DC cites *United States v. Alvarez* to explore whether the regulations on tour guides directly advance the government's interest in promoting and protecting tourism.

In *Alvarez*, Mr. Alvarez violated the Stolen Valor Act of 2005 which made it a crime to falsely claim receipt of military decorations or medals. On September 26, 2007, Mr. Alvarez was charged in federal court with two counts of falsely representing that he had been awarded the

[97] *Id.* at 2754.

Congressional Medal of Honor. Mr. Alvarez moved to dismiss on the grounds that the statute violated his first amendment right to free speech. The Court held that the restrictions on false claims were content-specific prohibitions on speech and therefore subject to evaluation under strict scrutiny, under which they failed to survive the intermediate and strict scrutiny tests. Specifically, Justice Kennedy, writing for the 6-3 majority claimed, "there must be a direct causal link between the restriction imposed and the injury to be prevented. This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on…speech must demonstrate that the harms its recites are real and that its restriction will in fact alleviate them to a material degree."[98] In *Alvarez*, Justice Kennedy along with five other Justices concluded that the interest in promoting the honor of those who served in the United States Military through ensuring that only those who truly earned war medals were displayed as doing so was not enough to chill the right for an individual to say what he wishes about himself even if the notion is false. The Act of 2005 unconstitutionally chilled First Amendment protections.

In further application of the Alvarez holding, the DC Circuit Court examined the "plethora of harms the District claims to forestall with the tour guide exam requirement."[99] Those harms outlined are:

> (1) Unscrupulous businesses
> (2) Tourists whose welfare is jeopardized by tour guides lacking a minimal level of competence and knowledge
> (3) Tour guides lacking minimal knowledge about what and where they are guiding or directing people to
> (4) Consumer unprotected from unknowledgeable, untrustworthy, unqualified tour guides
> (5) Tour guides lacking at least a minimal grasp of the history and geography of Washington D.C.
> (6) Visitors vulnerable to unethical or uninformed guides

[98] *United States v. Alvarez*, 132 S. Ct. 2537, 2549 (2012).
[99] *Edwards*, No. 1:10-cv-01557.

(7) Tourists treated unfairly or unsafely
(8) Tourists who are swindled or harassed by charlatans
(9) Degradation of the quality of the consumer experience
(10) Tour guides who are too unserious to be willing to study for a single exam
(11) Tour guides abandoning tourists in some far-flung spot and charging them extra to take them back to the start point.[100]

With all 11 of these combined, the District of Columbia argued that the District could regulate tour guides through the permit fees and exam requirement to promote and protect the tourism industry.

Paul Ryan, former Wisconsin Representative and current Speaker of the House has released numerous economic reports denouncing the expanding occurrences of occupational licensing regulations in America's cities. In a report released in August of 2014, research cited that in the 1950s approximately 5% of workers were licensed; by the 1980s that number tripled to just under 18%; in 2014 roughly 33% of workers must be licensed.[101] Over the past few years the number of individuals in business who have been subjected to various forms of occupational licensing regulations has expanded rapidly. It is, in this the Institute for Justice filed their lawsuits in order to push reform of these regulations.

VII. Holding in the Opposite: DC Circuit Departs from the NOLA Circuit Decision

In looking at the 11 areas that the City of DC has argued they are protecting, the Circuit Court concludes sharply, "despite the District's seemingly talismanic reliance on these asserted problems, the record contains no evidence ill-informed guides are indeed a problem for the

[100] *Id.* at 19
[101] Johnson, Bethan. "Paul Ryan's Regulatory Reform Proposals." Web log post. NETWORK Blog. Network, 7 Aug. 2014. Web.

District's tourism industry... Nor are the District's suppositions validated by studies, anecdotal evidence, history, consensus, or common sense"[102]

As the opinion came to a close, the DC Circuit made it even more clear what they thought of the District's claims that the regulations were validly promoting a reasonable interest. In conclusion, Judge Brown, writing the majority opinion for the DC Circuit asks rhetorically,

> "what, prey tell, does passing the exam have to do with regulating unscrupulous tour businesses and unethical guides?...Why would a licensed tour guide be any less likely to treat tourists unfairly and unsafely by abandoning them in some far-flung spot or charging additional amounts of money for return passage?- Surely, success on the District's history exam cannot be thought to impart both knowledge and virtue."[103]

Without evidence to support its argument, the DC Circuit court ruled in favor of the Appellants and remanded and reversed the holding of the District Court.

In addition to slamming the District of Columbia, the Court of Appeals also had an additional comment about the ruling on *Kagan* from the Fifth Circuit. As inscribed on Footnote 15, Judge Brown, representing the DC Circuit wrote, "we are of course aware of the Fifth Circuit's contrary conclusion in Kagan v. New Orleans…which affirmed the constitutionality of a similar tour guide licensing scheme. We decline to follow that decision, however, because the opinion either did not discuss, or gave cursory treatment to, significant legal issues."

VIII. An Appeal to the Supreme Court: Kagan v. City of New Orleans

In light of the sweeping decision in *Edwards v. District of Columbia*, the Institute for Justice filed a writ of certiorari to the United States Supreme Court. This case had arguable promise to be granted certiorari because of the drastic circuit split and arguable complete

[102] *Edwards*, No. 1:10-cv-01557.
[103] *Id.*

condemnation of the opinion of the Fifth Circuit by the DC Circuit Court. Another promising factor was the nature of the case as occupational speech has not been thoroughly investigated and ruled on by the Court like in other areas such as cases stemming from and affected by, *Roe v. Wade*.

The Court had conference on Kagan on February 20, 2015, but on February 23, 2015, the Court issued a denial of certiorari. No dissents on the denial of certiorari were written by any of the nine Justices. In light of this, the regulations for tour guides in New Orleans remain in place. In the case of *Edwards*, the District of Columbia has yet to file an appeal on the ruling issued in June of 2014. While the regulations for tour guides in one city were altered, similar regulations in the other remain static.

Conclusion

The Fifth Circuit makes the basic argument that the City of New York was justified to regulate the levels of sound coming from concerts and other public events in Central Park because it had a rational basis to do so combined with the furthering of a valid governmental concern. In *Ward*, the concerns were clearly foreseeable as excruciatingly loud concerts would easily and seriously disrupt many people on public, government owned property- either those walking through the park or those living in apartment buildings near it.

In *Kagan and Edwards*, the "stakes" of disruption are significantly lower. A tour guide directing people around the city does not merely hold the same amount of impact as a blaringly loud, disruptive concert that if, regulated for the decibel limit, would promote safety and well being for millions of people. The governmental argument in terms of the "stakes" in the tour guide cases cannot be said to be alleviated by requiring tour guides to pass an arbitrary exam and pay for additional permits that say they are allowed to lawfully speak. As recognized by the D.C.

Circuit, a tour guide could easily give the same tour, quality and all, without having a specific permit that gives him or her the "governmental go-ahead" to speak to people. To say that *Ward* is "instructive" is a gross understatement of the applicable legal issues and law.

In concordance with the ruling in *Edwards*, not only are the regulations repetitive and as the DC Circuit noted, claimed without empirical evidence to prove them, they also do correlate to any rational or practical outcomes. Even if the lack of taking an exam causes some tour guides to give bad tours due to a lack of information, it is up to the individual to decide if they liked the tour they went on. The Fifth Circuit too easily forgets that tours can be considered "unsatisfactory" for a variety of reasons, many of them having nothing at all to do with the knowledge of the tour guide(s) themselves. A much more logical reason for dissatisfaction of an individual on a paid tour could be the clarity of the tour guide's voice- perhaps the guide spoke too loudly or too softly or too quickly, rather than a lack of permit.

The government, in the case of *Edwards*, wrote its regulations as if DC was in charge of regulating satisfaction. I argue, quite confidently that there is no Supreme Court precedent that argues that the Constitution gives the government the power and the responsibility to protect individual satisfaction. In addition, since the issues at hand are not about health and safety regulations and all appellants have the proper certifications to conduct their business, it is likely that those tour guide businesses who provide the best services will present themselves in ways that attract consumers to them. Each individual uses their own cognition to purchase tickets for a tour. It is not the job of the government to try to "shield" the consumer from what it thinks the consumer should purchase or what tours they should go on.

The Fifth Circuit answered the content-based question by saying that the regulations did not license speech directly because they did not tell tour guides what to say or not to say and

merely at best, the exam gave tour guides a general suggestion of what to say in their tours. It is the fact the exam exists in itself that is the content-based speech violation of First Amendment protection for tour guides. No one should have to pass an exam in order to speak. In application to the tour guides of New Orleans, DC, and any other city, the requirement to get a permit to speak relies on a score on the multiple choice exam to obtain the permit. As mentioned in earlier sections of this paper, the burden of the licensing schemes extends so far that if a tour guide is caught speaking without having obtained the permit, that individual is subject to heavy fines and months of imprisonment for violating state and even federal law. In this, the exams violate the individual right to speak, whether it be to make an honest living generally or to give guided tours as a hobby.

The Supreme Court has ruled that protection of speech must be treated delicately. In cases like *United States v. Miller*, the Supreme Court ruled that speech could be regulated if it was obscene in content and lacked any aesthetic value. Cases like *United States v. O'Brien* however, further conclusions by the Court argued that speech can only be regulated if such regulations did not place a disproportionate burden on an individual in comparison to a substantial governmental interest.

In the two cases of *Kagan v. The City of New Orleans* and *Edwards v. The District of Columbia*, arguments were brought to each city's respective circuit court of appeals on the constitutionality of licensing schemes that forced tour guides to pay fees to obtain permits that permitted them to speak. In addition to paying the appropriate fees to obtain the permit, all tour guides under the city statutes were forced to take a multiple-choice competency exam in order to use speech to give guided tours. If the regulations were not followed, tour guides faced

punishments including and not limited to hundreds of dollars in fees and even possible imprisonment.

On appeal, the Fifth Circuit in New Orleans held that the regulations were clearly constitutional as explained by the city government's argument that the regulations promoted the interest in protecting the tourism industry from the negative effects that uninformed tour guides would have from an economic perspective. The Circuit Court of DC however rejected the New Orleans holding and instead held that the government interest claimed by DC was unsatisfactory in the argument to regulate speech. With the two polar opinions creating an intriguing circuit split, the New Orleans case was appealed to the Supreme Court where it was denied certiorari in February 2015. The power of judicial review in these two cases has proven powerful as two different circuit courts evaluated nearly identical statutes and came to vastly different conclusions. Tour guides use speech to conduct their business. How they are able to do that- as seen here, that is for the courts to decide.

References

Appellants' brief at 43. *Edwards et.al v. The District of Columbia*. No. 1:10-cv-01557. (2014).

Broadrick v. Oklahoma. 413 U.S. 601 (1973).

D.C. Code § 47-2836.

Edwards et.al v. The District of Columbia. No. 1:10-cv-01557. (2014).

Holder v. Humanitarian Law Project. 561 U.S. 1 (2010).

Johnson, Bethan. "Paul Ryan's Regulatory Reform Proposals." Web log post. NETWORK Blog. Network, 7 Aug. 2014. Web.

Kagan et. al v. City of New Orleans. No. 13-30801 (2014).

Miller v. California, Oyez, https://www.oyez.org/cases/1971/70-73

New Orleans Mun. Code Part II, Chap. 30, Art. XXI

United States v. Alvarez, 132 S. Ct. 2537, 2549 (2012).

United States v. O'Brien, 391 U.S. 367, 377 (1968).

Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989).

Wash State Grange v. Washington State Republican Party. 552 U.S. 06-730. (2007).

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