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The California Legal Studies Journal was founded in 1981 as a forum for high-quality undergraduate legal research. The Berkeley Legal Studies Association publishes the journal annually.

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We welcome contributions from undergraduate students, as well as recent graduates, from any University of California campus. Students may submit any upper division coursework, independent research, or theses that pertain to legal matters. For more information, please refer to the submission guidelines for contributions at the end of this issue.

Review Process

We follow a double-blind review process. To ensure a fair and objective review, we remove identifying information from all submissions, and submissions are rated along predetermined guidelines by multiple editors.

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Letter from the Editor

Dear Reader,

We are thrilled to present the 2022 edition of the California Legal Studies Journal, which is centered around our selected theme of “liberty”.

Last winter, as the other editors and I met to reflect on the year and decide a journal theme, we were all keen to discuss the uneven impacts of the COVID pandemic, mask and vaccine mandates, access to healthcare, continued police brutality, and efforts to restrict voting, reproductive, and other fundamental rights. “Liberty” quickly stood out to us as a common thread connecting all these events and topics, and we circulated a call for submissions exploring the ways in which freedoms are unevenly allocated and enjoyed by different groups and people, the ways in which exercising one’s personal liberties can restrict other’s capacity to do the same, and the ways in which the COVID pandemic has affected, or shaped our notion of, liberty. Since making our call for submissions, the war in Ukraine has been an especially pertinent reminder that liberty is never guaranteed but instead must be continually defended.

The quality and diversity of submissions exploring various tenets of liberty was extraordinary. We are delighted to share papers from all across the University of California system examining privacy rights in the digital age, race and access to national parks, disparities in the treatment of criminalized street gangs versus college fraternities, and the impacts of increased police presence and zero-tolerance discipline policies in schools. We hope these papers stimulate discussion and debate.

It has been a pleasure to produce this year’s edition of the California Legal Studies Journal. Publication is a true team effort, and I’d like to extend a special thanks to all the editors and contributors, as well as Legal Studies advisor Lauri La Pointe, for their commitment to the journal. Please enjoy reading the 2022 California Legal Studies Journal!

Best wishes,

Rosie Alexandra Ward
Editor-in-Chief, California Legal Studies Journal

The Gang of Privilege: How Predominantly White Fraternities Exploit Liberties Afforded to White Elites

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Abstract

Often the disparities in prosecution and stigmatization of crime are hidden in plain sight. Such is the case with college fraternities, which use their social prowess and elite privilege to gain impunity from the persecution of legitimate, premeditated, organized, and coercive crimes. On the other hand, similar forms of organized crime such as street gangs, and even culturally and socially enriching and inclusive organizations such as Black fraternities, are typically labeled as violent, disruptive, and most of all, criminal. This serves as a good example of the ways in which labels are given power and material consequence in the judicial world. The ways in which different labels protect fraternities, yet are weaponized against gangs and Black Greek Letter Organizations, accurately demonstrates the discrepancies of privilege and elitism within the criminal justice system. It also serves to demonstrate the ways in which liberty occupies a fragile and volatile role in the carceral system. Thus, in order to get a more accurate understanding of how labels are used to define liberties in the context of Greek life, an analysis into the criminal status of fraternities was investigated.

Introduction

The research discussed here analyzes the aspects of fraternity culture that justifies its classification as organized crime. First, analysis of literature comparing fraternities to street gangs will depict how the similar nature of both organizations still leaves room for disparities in social classification and criminal prosecution. In addition, the history of organized sexual violence in fraternities will be explored to understand how institutions of power are leveraged towards the advantage of fraternities. Finally, a look at gang crime legislation will better define which characteristics discussed best legally apply to fraternity transgressions. Organized crime is defined as crime that provides illegal goods and services to the public with a profit incentive. It involves a group of people who are organized into a hierarchy and conspire to commit crime together (Numan). Sometimes, this type of crime relies on violence, coercion, and political corruption to continue to operate and garner safety from accountability and prosecution.

Fraternity and Street Gang Labeling

College fraternities and street level gangs share many characteristics, including initiation rituals, drug and alcohol distribution, and violence. That being said, the guise of “academic brotherhood” often allows fraternities to escape the classification and treatment assigned to street gangs (Ouellette 1). Fraternities are advertised as positive social institutions, boasting benefits of leadership, academic excellence, and networking, among other things. The first similarity is a strenuous hazing or initiation process. In both street gangs and fraternities, new members are expected to endure incredibly violent and painful practices in order to prove themselves to the rest of the group. Fraternity hazing also often involves physical and mental stress brought on by deliberate humiliation and degradation (Ouellette 4). The motivation behind these rituals is the same across gangs and fraternities; they are intended to engender group bonding over shared trauma, test the commitment of new members, and provide an opportunity to prove the members’ masculinity (Ouellette 4). In this way, both fraternities and street gangs are organized into hierarchies based on seniority. Returning members of a fraternity are given the power and influence to perpetrate physical and emotional violence against the pledges who land at the bottom of the social pyramid. Given all of these similarities, initiation into a street gang is still classified as criminal, while hazing is dismissed as mere academic misconduct.

The prevalence of drugs and alcohol in gangs is well-known, as is the culture of binge-drinking and recreational drug use in fraternities. A study on adolescent gang members found that they were more inclined to participate in childhood alcohol drinking and drug selling than non-gang affiliated students (Swahn et al.). Similarly, students involved in Greek life were shown to abuse alcohol more than students unaffiliated with a Greek organization (Hughey). When analyzing one of the most notorious fraternity functions, at least to the public, it is imperative to acknowledge their role in teenage binge-drinking antics. The Inter-Fraternity Council (IFC) requires that a house is available for the fraternities to charter in order for the fraternity chapter to exist. The house is largely unregulated, without outside supervision, giving opportunity for the organized crime that often occurs within fraternity house walls. Drug use and alcohol consumption are not just high among fraternity members; drugs and alcohol are also distributed to all students on campus that attend frat parties. Fraternities are seldom held culpable for these blatant and well-known infractions of the law, yet they operate much the same as typical gangs involved in drug trafficking. Also, in order to maintain the house, fraternities charge incredibly high dues, and the IFC profits off of these members. Thus, the illegal goods and services provided to the public by fraternities are also driven by the profit incentive procured by the IFC from fraternity dues.

The double standard between fraternities and gangs exhibits clear signs of elitism, classism, and racism. Hispanic and black low-income youth are overrepresented in street gangs; only 11.5% of gang members identify as white. Thus, street gangs are not afforded the luxury of being positively viewed or promoted (Ouellette). Conversely, the stereotypical fraternity member is white, wealthy, and elite. The North American Interfraternity Conference (NIC) does not publish statistics regarding their fraternities' racial makeup, making it difficult to statistically compare these results to that of the National Gang Center's survey on youth gangs (Ouellette 3), yet a scroll through fraternities' media pages reveals their overwhelmingly white membership. Additionally, the exorbitant price of fraternity dues makes it possible to surmise the financial status of fraternity members. According to interviews with members of fraternities, semester fraternity dues range from \$400 to \$600 but can often be even higher, especially for new members (Duffy).

When fraternities do not conform to the white, wealthy, and elite stereotypes, there is a dramatic difference in the way they are labeled. While all fraternities model the hierarchy and behavior of traditional street gangs, the only Greek organizations that have received scrutiny over this comparison have been Black Greek Letter Organizations (BGLOS) (Ouellette 6). The narrative that BGLOS are simply "educated gangs" reinforces harmful stereotypes about the black community and criminality and serves to equate organized blackness with deviance (Hughey). That being said, research suggests that predominantly white fraternities participate in risky and illegal behavior to a greater extent than BGLOS. Because of disparities in funding, BGLOS were less likely to have privatized campus housing, forcing the use of supervised and sanctioned public spaces for social events. This resulted in BGLOS facing punitive measures for conduct prevalent and unpunished in predominantly white fraternities (Ouellette 2020).

Greek Life and Rape Culture

Another aspect of fraternity life that is often overlooked or granted impunity is its frequent perpetration of rape and promotion of rape culture. Research proves that sexual assault is far more likely to occur at fraternity functions or in fraternity houses than in other campus housing and social contexts (Jozkowski). What this suggests is that, generally, fraternities have a culture that is conducive to committing acts of sexual violence against women. The enabled continuation of this harmful status quo is directly linked to questions of power and control. People involved in Greek life have increased levels of status, power, and control on college campuses (Jozkowski et al.). Fraternities are granted special powers that allow them to dominate the college campus social scene because of their ability to throw parties (Jozkowski et al.). Sororities, in comparison, are not allowed to host mix-gendered parties or provide alcohol, making most Greek social events monopolized by fraternities. In addition to this power

disparity, there is also a perpetuation of rape culture within these male-dominated spaces. An example of these threatening statements are chants made by a Yale University fraternity in 2010 that marched around school declaring, “No Means Yes; Yes Means Anal” (Jozkowski et al.). Undoubtedly, fraternities create an opportunity and culture conducive to perpetuating and participating in sexual offenses.

Ultimately, what these groups demonstrate are organized and conspired modes of participation in crime. The crimes being committed by fraternity members aren’t likened to those of traditional gangs but are often worse by most metrics. The sale and distribution of illicit substances is often the primary *modus operandi* of most street gangs with the intention of generating profits. On the other hand, the profits generated by fraternity dues seem to be going towards a much more disturbing type of crime. With sexual violence so common among fraternities, obliging members to pay dues seems to be indirect commodification of the involuntary abuse of women’s bodies.

Rape culture in fraternities is more than just an unintended consequence of the organization; it is an essential aspect of fraternities’ ability to generate profits. A fraternity’s control of the party extends to its entrance, where fraternity members decide who is, and is not, granted event access (Jozkowski et al.). This makes women an easier target as well as a selling point where fraternities try to maintain a ratio that highly increases the density of females, using women to promote and sell their party. Relatedly, a multiple-year study performed by DeSantis found that women were often used as bait to allure new members into joining fraternities under the assumption that women would serve and perform for them. Specifically, he mentioned the use of fundraisers promoted and funded by the fraternities aimed at encouraging sexual performance from women (DeSantis 69). Examples of this include talent shows, cheerleading competitions, beauty pageants, and other such activities that were inherently sexist and were often judged by men. Not only are hyper-sexualized female performances used for fraternities’ monetary gain, they are also labeled as “fundraisers” and allowed under the guise of being positive contributions to the community at large.

Elitism in Greek Life

When addressing this disparity in the way that fraternities are labeled and given a platform for their misconduct, support from outsiders is a major factor rarely addressed. Even though only 2% of the overall US population have been involved in sorority and fraternity life, “80 percent of Fortune 500 executives, 76 percent of US senators and congressmen, 85 percent of Supreme Court justices, and all but two presidents since 1825 have been in fraternities” (Chang). The fact that the majority of individuals holding economic and political power are

members or alumni of the Greek system places substantial external power in Greek life. In fact, fraternity and sorority alumni have a four times larger sector in lifetime donors to colleges than do non-affiliated graduates (Jozkowski et al.). This means that Greek affiliated students and alumni are among the most significant group of financial donors to universities. In addition, politically, fraternities are also protected by the corruption of their former members. A representative from Texas and former Pi Kappa Alpha, Pete Sessions, authored the Safe Campus Act, legislation intended to protect students accused of sexual assault and to prohibit colleges from further investigating allegations of rape not formally reported to the police (Jozkowski et al. 2017). The disproportionate access to external power given to those in Greek life allows for the special privilege and power afforded to fraternities on campus. It is because of this power that fraternities are able to enjoy favorable reputations in society, as well as elite social statuses on campus, despite their history of sexual violence.

How Fraternities and Gangs are Prosecuted

The Street Terrorism Enforcement and Prevention (STEP) Act was implemented to increase punitive measures for gang members. The STEP Act has since greatly changed the way that gang crime is prosecuted, making gang crimes subject to longer and/or more severe sentencing (Spears). Under the legislation, a “gang” is defined as any group with a specified sign or symbol that engages in a pattern of criminal activity with the primary purpose of committing a specified crime (Spears). Under this definition, fraternities are gangs. As demonstrated above, fraternities have a pattern and culture of crime, with distribution of illicit substances and sexual assault being the two primary types of criminal activities associated with fraternity life. In addition, many fraternities are heavily associated with their symbolic Greek letters, making them fit the second criteria for being legally prosecuted as a gang. In the development of her theses, Courtney Lee Spears analyzes different recorded reports of fraternity crimes and measures their aptitude within the judicial confines of the California STEP Act. The fraternities’ crimes ranged from sale and distribution of illegal drugs to illegal possession of firearms (Spears). Overall, the research suggests that, despite having all of the technical classifications necessary to be encompassed in the STEP Act’s crime legislation, fraternities were once again granted impunity from these harsher prosecutions.

Recommendations for Future Research

While it is possible to analyze the similarities in general conduct between fraternities and conventional street level gangs, comparing statistics may give an inaccurate image of a much more nuanced issue. Accurately comparing fraternities to street gangs would require that

their crimes are recorded and reported at the same frequency. It is unlikely this is the case, as often crimes committed by members of a fraternity are brushed aside instead of reported, and when predominantly white fraternities were reported for their behavior, they were often able to leverage their social and financial significance on campus to avoid disciplinary measures (Ouellette 7). Specifically, members of white fraternities were able to deal with their crimes through academic judicial boards and civil lawsuits, allowing them to avoid formal sanctioning in criminal court (Schaefer 187). This opportunity to be granted impunity owing to wealthy donors and political support is simply not an option for Black Greek Letter Organizations or members of street gangs, and predominantly black neighborhoods are heavily over-policed and over-surveilled, which contributes to higher recorded instances of crime (Smyton 2020). In order to get a more accurate picture of why disparities in policing and prosecution exist between fraternities and gangs, the responses to crime must be studied more closely.

Conclusion

It is likely that the differing attitudes towards Greek life and street gangs account for the gaps in prosecution, accountability, and social stigma between Greek life members and street gangs. Ultimately, what this demonstrates is the way liberty is predicated on fragile and flawed perceptions of the social world. The freedoms available to different groups are distinguished in part by the biases of the criminal legal system: the liberties enjoyed by predominantly white fraternities are incomparable to those enjoyed by Black Greek Letter Organizations and street level gangs. The public's perception of fraternities versus gangs has tangible judicial consequences and demonstrates the inextricable links between law and social life.

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The Harms Caused By Police Presence and Zero Tolerance Policies in US Schools

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Abstract

All children deserve the freedom to feel safe in their learning environment. In 1989, the first federal zero-tolerance school policies were enacted, and in the following decade, there was a subsequent surge in the number of School Resource Officers (SROs) placed in schools to enforce these policies. SROs are an attempt to make children feel safer in their learning environments. However, there are many harmful effects to this approach. Studies show that the harsh policies enforced by SROs perpetuate the school-to-prison pipeline in which students are funneled out of educational institutions and into the criminal justice system. Black students and students with disabilities are at a much higher risk of referrals from the law enforcement placed in their schools to keep them safe. There are also many instances of SROs infringing upon students' rights, as examined in *People v. Dilworth*. Past efforts to reform SROs and zero-tolerance policies have failed to rectify these issues, so it is time to try something new. Solutions could include behavior monitoring, limiting zero-tolerance policies to only the most serious of offenses, and increasing funding for counselors trained specifically in child development.

Introduction

Children are the future. We must foster their development and help them as they grow to become their own individuals. School is one of the primary places where this development occurs, and students should feel safe in that environment. In an effort to mold children into obedient citizens, many schools utilize "School Resource Officers" (SROs), sworn law enforcement officers who work closely with local police and who are often armed. SROs were originally intended to prevent juvenile crime in schools; however, their jobs have morphed into providing disciplinary action typically delegated to guidance counselors, which has increased the number of students designated as "criminals" for minor offenses (Vitale 67). SROs are supported by zero tolerance policies, which impose predetermined penalties for infractions such as bringing drugs or weapons into schools. These policies have been stretched to criminalize minor acts of misbehavior in the classroom and the possession of toy weapons. The argument in favor of this

level of enforcement is that it protects students. Nevertheless, considerable evidence suggests it has the opposite effect on educational communities. In order to create a more effective learning environment and end the school-to-prison pipeline, School Resource Officers and zero tolerance policies must be removed from US schools.

Background

School Resource Officers are sworn law enforcement officers, usually armed and in uniform, who are typically “employed by local law enforcement agencies and assigned or contracted to work in a school or schools” (Theriot and Cuellar 365). The history of SROs can be traced back to the 1950s, but their presence remained limited until the late 1990s. This increase is largely attributed to the COPS in Schools grant, issued through the Justice Department's Community Oriented Policing Services (COPS) program. A 1998 amendment to the Omnibus Crime Control and Safe Streets Act of 1968 allocated the federal funding for the COPS in Schools program, which ran from 1999 to 2005 and awarded approximately \$823 million in grants for hiring SROs in that time. Though the COPS in Schools program ended in 2005, law enforcement agencies can still use other COPS grants for the purpose of hiring SROs, though this change has made identifying the funds used exclusively for SROs more difficult to track (Connery).

There were a number of factors that, when combined, led the government to fund this massive increase in school-based police. One was the growing fear of school violence. A number of high-profile school shootings, ranging from the 1997 Pearl High School shooting, and culminating with the Columbine High School Massacre in 1999, led to a moral panic despite data suggesting school safety remained relatively unchanged (Burns and Crawford 151). Media discussion spurred politicians to take action on the hot topic of school safety by increasing funding for sworn police officers assigned to school grounds.

Another factor was an increased emphasis on standardized tests as a way of judging a school's effectiveness. According to Alex Vitale in *The End of Policing*, “teacher pay, discretionary spending, and even the survival of the school are tied to these tests” (Vitale 57). These high-stakes tests were introduced nationwide through the No Child Left Behind Act of 2001. Many studies conducted shortly thereafter found a connection between this new standardized testing model and the actions schools took to discipline their students. One of these studies used data from the administrative records of a subset of Florida school districts during the four years following the passage of No Child Left Behind. The study found that “schools have an incentive to keep high-performing students in school and low-performing students out of school during the testing window in order to maximize aggregate test scores”, as the patterns of

increased suspensions were only observed in grades receiving the high-stakes tests (Figlio 850). The increase in disciplinary measures resulting from these tests led to a need for a more efficient means of rolling out the punishments, and ultimately presented yet another reason to increase the number of SROs.

A final factor causing increased numbers of SROs was the implementation of zero tolerance policies. Zero tolerance is defined by the American Heritage Dictionary as “a law, policy, or practice that provides for the imposition of severe penalties for a proscribed offense or behavior without making exceptions for extenuating circumstances”. Zero tolerance policies first began as federal policies against drugs and weapons and were implemented in schools in 1989 (Price 543). These policies spread nationwide following the Gun-Free Schools Act of 1994 that required students be expelled for one year for the possession of a firearm (Nicholas 353). With the inclusion of policies that harshly distributed punishment came a need for SROs to dole it out. Hence, as the number of zero tolerance policies increased, so did the number of SROs needed to enforce them.

The Changing Role of Zero Tolerance Policies and SROs

Both zero tolerance policies and SROs were implemented with the goal of protecting students and creating a safer learning environment. Their jurisdiction has expanded, however, in the years since their initial proliferation in the late 1990s. The use of zero tolerance policies has become a catch-all way of disciplining students without consideration of the trivial circumstances: “‘Zero tolerance’ policies have led to severe disciplinary consequences for behavior such as bringing cough drops, fingernail clippers, scissors, squirt guns, and pocketknives to school; drawing a picture of a weapon; authoring a violent story; and pretending to shoot a gun with one’s hands” (Heise and Nance 71-72). These measures, lacking safeguards and consideration for extenuating circumstances, have increasingly broadened in scope since the implementation of the Gun-Free Schools Act. As of 2017, zero tolerance policies still existed; however, “mandatory expulsion” policies “requir[ing] expulsion for an offense even if not explicitly using the term zero tolerance” were more common (Curran 322).

The roles of School Resource Officers have evolved as well. SROs have taken on the services originally provided by guidance counselors, such as mentoring students and teaching drug prevention programs, despite having little to no training in these areas (Vitale 67). This has blurred the lines between SRO's primary role as law enforcement officers and the expectation students have of being able to confide in them. As is true with respect to zero tolerance policies, this demonstrates an expanding overreach of the role law enforcement plays in the classroom, the consequences of which will be further examined below.

Why SRO Programs Do Not Work

The School-to-Prison Pipeline

SROs and zero tolerance policies have a lasting impact on students' lives. The school-to-prison pipeline refers to the flow of students, both directly and indirectly, out of the education system and into the criminal justice system (Heitzeg 1). According to a study that compiled the varying definitions of the pipeline to determine the common themes, "the use of the term 'school-to-prison pipeline' implies that there is a direction of causality—that policies and practices of schools, rather than solely the characteristics of students themselves, are responsible to some degree for those negative outcomes" (Skiba et al. 548). The use of SROs and zero tolerance policies contribute to a cycle of students being funneled towards incarceration in ways that were not observed before the use of this system.

This cycle begins with the introduction of zero tolerance policies that, as previously mentioned, increase the number of acts punished with strict discipline in schools. In order to enforce this new level of discipline, schools contract SROs to take over that responsibility. The criminalization of these behaviors introduces children into the criminal justice system early on, and once they are introduced, the cyclical nature of the criminal justice system takes hold. It is important to note that the school-to-prison pipeline does not exist in a vacuum, but is instead heavily intertwined with the greater issue of mass incarceration. Between 1970 and 2010, the population of US prisons increased tenfold, largely due to the War on Drugs and an increase in mandatory minimum sentencing, such as 'three strikes' laws (Heitzeg 5).

Evidence for the school-to-prison pipeline phenomenon has been illustrated through prospective longitudinal studies of the relationship between exclusionary discipline, such as suspension or expulsion, and introduction into the criminal justice system: "Tracking cohorts of students in the state of Texas from seventh through twelfth grade, Fabelo, Thompson, Plotkin, Carmichael, Marchbanks, and Booth (2011) found that suspension and expulsion for a discretionary school violation nearly tripled a student's likelihood of juvenile justice contact within the subsequent year" (Skiba et al. 555). Additionally, a plethora of studies observing the school-to-prison pipeline have controlled for socioeconomic status, prior achievement levels, attendance rates, and other factors in order to demonstrate that exclusionary school discipline contributes to negative developmental outcomes and subsequent involvement in the criminal justice system (Skiba et al. 556).

Discrimination in the School-to-Prison Pipeline

Not only does the relationship between schools and police lead students to enter the school-to-prison pipeline, but there is also evidence that people of color and people with

disabilities are disproportionately targeted. The Civil Rights Data Collection (CRDC) gathers data from US public schools on key education and civil rights issues for use by the Department of Education's Office for Civil Rights and other federal agencies. The 2011-2012 CRDC included all US public schools and districts that serve students for at least 50% of the school day. The 2011-2012 CRDC found that, despite Black students making up 16% of enrollment, they represented 27% of students referred to law enforcement and 31% of school-related arrests. White students, conversely, represented 51% of students enrolled, 41% of referrals to law enforcement, and 39% of school-related arrests ("Civil Rights Data Collection" 6).

Additionally, racial discrimination in school discipline is not limited to Black students. A study of all Montana schools that reported aggregate school-level data to the US Office for Civil Rights during the 2015–2016 academic year found that "the disproportionate number of referrals to law enforcement is present for Native American (almost 10 times the number of referrals than when an SRO and/or SG are not present), Black (16 times the number), and Latinx (13 times the number) when compared with white students (almost 7 times the number)" (Walker 9). While the presence of SROs increases the rate at which all students are referred to law enforcement, there is a clear discrepancy in this rate based on race. While SROs are intended to increase the safety of schools, the disproportionate rate of referrals for people of color makes it a less safe environment for them. All students, not just white ones, have a right to feel safe in their learning environment.

Students with disabilities are also disproportionately affected by SRO presence on school campuses. The 2011-2012 CRDC found that 75% of students subjected to physical restraint during school were students with disabilities served by the Individuals with Disabilities Education Act (IDEA), despite only representing 12% of students enrolled in public schools ("Civil Rights Data Collection" 9). In 2014, Kayleb Moon-Robinson, an 11-year-old Black autistic child, was repeatedly charged with criminal offenses by his school's SRO. On one occasion, Kayleb kicked a trash can after being scolded, resulting in a disorderly conduct charge. Only weeks later, Kayleb broke a new rule requiring him to wait until after the other kids had left the class before he left. Kayleb resisted when the SRO grabbed him, after which the SRO slammed him to the ground and handcuffed him, charging him with disorderly conduct and a felony charge for assault on a police officer (Ferriss). As the CRDC statistics demonstrate, Kayleb's case is not an isolated occurrence. The recurring and inordinate restraint of students like Kayleb proves that SROs do not receive adequate training on how to behave towards students with disabilities; counselors are far better equipped to handle such situations.

Infringement of Students' Rights

A common debate that arises from the presence of police in schools is the degree of protection students enjoy against unreasonable search and seizure under the Fourth Amendment of the U.S. Constitution. An important case dealing with the Fourth Amendment as it applies to the police operating in schools is the Illinois Supreme Court case *People v. Dilworth*.

In *Dilworth*, the defendant, Kenneth Dilworth, attended an alternative high school for students with behavioral disorders. Detective Ruettiger was a police officer employed by the local police department and was assigned full-time to the school as a member of its staff. Two teachers asked Ruettiger to search a student, Deshawn Weeks, for drugs after overhearing a conversation he had. After the search came up empty, Ruettiger witnessed what he perceived to be Weeks and Dilworth mocking him. Ruettiger noticed a flashlight in Dilworth's hand and seized it, claiming that he suspected it may contain drugs and that a flashlight is a "blunt instrument" that could be "construed as a weapon." Upon opening it, Ruettiger found a bag of cocaine. Dilworth moved to suppress the evidence found by Ruettiger, but the motion was denied. Dilworth was tried as an adult and found guilty. The appellate court reversed the conviction on the grounds that the motion to suppress evidence should have been granted.

To understand the decision in *Dilworth*, a preliminary understanding of the earlier case *New Jersey v. T.L.O.* is necessary, although the case does not deal with SROs. In *T.L.O.*, the court found that "the Fourth Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials and is not limited to searches carried out by law enforcement officers" (325). Additionally, students have a legitimate expectation of privacy for possessions they bring to school, but schools have an equally important need to maintain a proper educational environment. Therefore, school officials do not need a warrant, and searches should be dependent on "reasonableness" rather than the typical "probable cause" requirement.

In *Dilworth*, the Supreme Court of Illinois first addressed the question of what standard should apply to the SRO in the case: the reasonableness standard for teachers established in *T.L.O.* or the probable cause standard for police officers. The court found that, based on precedent, court decisions dealing with police searches in schools fell into three categories: "(1) those where school officials initiate a search or where police involvement is minimal; (2) those involving school police or liaison officers acting on their own authority, and (3) those where outside police officers initiate a search" (*Dilworth* 206). The court found that Ruettiger fell into the second category, and the reasonable suspicion standard applied to the case's facts. The court also found it to be consistent with the three-prong test established in *Vernonia School District 47J v. Acton* (1995), which determined the need to depart from the Fourth Amendment standard of probable cause and a search warrant. Those three prongs are: "(1) the nature of the privacy interest upon which the search intrudes, (2) the character of the search, and (3) the nature and

immediacy of the governmental concern at issue, and the efficacy of the means for meeting it” (*Dilworth* 209).

This case law defines the level of students’ constitutional protection from law enforcement overreach. However, *Dilworth* creates a dangerous standard, which allows SROs, in collaboration with school officials, to circumvent a student’s Fourth Amendment rights. In his dissenting opinion, Justice Nickels wrote, “The majority’s departure from a unanimous line of Federal and State decisions places form over substance and opens the door for widespread abuse and erosion of students’ fourth amendment rights to be free from unreasonable searches and seizures by law enforcement officers” (*Dilworth* 217). Courts previously held that the standard of reasonable suspicion set forth in *T.L.O.* did not apply to searches conducted by a sheriff’s officer serving as an SRO and a police officer on school grounds, respectively. *See, J.M v. State* (1993) and *F.P. v. State* (1988) (Beger 126). *Dilworth* broke with this line of precedent in order to make it easier to maintain order in the school setting; as Nickels predicted, however, the opinion’s actual effect has often run counter to that.

To examine the discrepancies between the law on the books and the way it functions in reality, Nicole L. Bracy conducted a study based on data from two mid-Atlantic public high schools. Her results found that SROs and school officials circumvented the law by “proceed[ing] in ways that are usually legal but that evade some of the legal protections afforded to youth in schools” (Bracy 301). For example, an SRO stated in an interview that most of the SROs he knows let school officials do the searches due to the less restrictive requirements, “so why test the Supreme Court waters when we have a perfectly good administrator that has perfectly good reasonable suspicion to search a student?” He clarified that he would not suggest who the school administrators should search, but added, “you know I mean, I might, you know I could say ‘you might wanna keep an eye out for this student,’ and then they develop their own reasonable suspicion; I don’t give them the reasonable suspicion” (Bracy 304). The difference between these two scenarios is slim, but it is just enough for the SRO to operate within the law and still influence the situation. An SRO’s unique position as both a law enforcement officer and school official allows them to influence which students are searched without directly interacting with them or testing the limits of the law. The leniency granted in *Dilworth* has allowed for the infringement of students’ rights while SROs can operate under a veneer of legality.

Considering Other Perspectives

There would be no SROs in schools if there were no benefit, at least in theory, to their presence. The debate over SROs requires one to weigh the pros and cons and determine which values are most important. Both sides share a desire to keep students safe. As previously

mentioned, SROs are, in part, a response to the highly publicized school shootings in the 1990s that led to concerns over school safety.

Recent events in Santa Cruz County shed light on a possible correlation between school crime and SROs. In July 2020, in response to several community surveys and public comments, the Pajaro Valley Unified School District (PVUSD) board voted to permanently remove SROs from their campuses, including Aptos High School. Just over a year later, a 17-year-old student at Aptos High was fatally stabbed (York). This led the PVUSD board to reopen the issue and reinstate SROs throughout the district.

Research on the topic, though not comprehensive, has demonstrated that the presence of SROs in schools has deterrent effects. A 2019 study utilizing multiple waves of the School Survey on Crime and Safety (SSOCS) found that “[i]mplementing Full Triad SROs who were also engaged in additional roles (e.g., mentoring) predicted a reduction in recording nonserious violent crimes, but an increase in recording property crimes and reporting crime to law enforcement” (Fisher and Devlin 1606).

The same study also suggests that SROs may not be the best approach to school safety after all. While violent crime as a whole may decrease, it is important to remember which students are disproportionately targeted by law enforcement. What creates safety for some can lead to others feeling victimized within the learning environment that is supposed to nurture them. The increased reporting of minor offenses to local police plays directly into the school-to-prison pipeline. The above mentioned study found that “schools that implemented Full Triad SROs [those engaged in other roles such as tutoring] reported 111% more property crimes to the police than schools that did not implement SROs and schools that implemented Reactionary SROs [those engaged primarily in law enforcement] reported 147% more property crimes to the police than schools that did not implement SROs” (Fisher and Devlin 1620). Violent crime may be reduced, but it is at the expense of an increased number of impressionable youths being introduced into the criminal justice system, which has debilitating life-long impacts.

Additionally, the fact that SROs are highly ingrained in the current system does not mean that they are the only method that works. If there is a way to reduce crime in schools without the observed disadvantages of SROs, then it is worth parting with a half-solution in favor of a more comprehensive and equitable one.

Solutions

Problems with Past Attempts at Reform

SROs are not the only option for maintaining an orderly learning environment and disciplining students. It is time to break the cycle and try something new. Some schools have already taken steps towards reform, but their methods have not fully committed to ridding the system of SROs and therefore have not achieved the desired level of success.

A common attempt at reform is to integrate SROs into the school community more by increasing their roles as mentors to the students. The hope is that SROs will be able to adjust their approach if they understand the student body better, and students will feel safer and more willing to confide in SROs if they have a more personal relationship with them. The Department of Education's 2014 "Guiding Principles" report states that SROs can be an important part of maintaining a safe campus and, when acting in the capacity of counselors, they should do so with the goal of supporting a positive school climate through their relationships with the students. The report, additionally, advises that SROs are trained in childhood and adolescent development, disability issues, and de-escalation techniques (U.S. Department of Education 10).

The problem with this approach is that it implies SROs are necessary to run a safe and effective school, but this is not the case. There is no added value to having SROs serve in mentor roles that could be filled by more qualified school counselors and teachers. To be accredited by the Council for Accreditation of Counseling and Related Education Programs (CACREP), potential counselors must complete a minimum of two full academic years of graduate study, including but not limited to core curriculum on human growth and development, social and cultural foundations, helping relationships, and supervised practicum/internship (Coy 6). Additionally, as SROs develop closer relationships with the student body, students are more likely to come to them with sensitive information. This comes with risks, however, when students do not understand how the information they provide can be used as evidence against them (Fisher and Devlin 1625).

Another attempt at redefining the role of SROs was the Obama Task Force on Twenty-First Century Policing, which sought to establish national standards for training. This task force called for the reform of SRO policies and procedures that contribute to the school-to-prison pipeline, but it once again operated with the insufficient mindset of maintaining SROs on school campuses (Vitale 69). Its final report recommended that "law enforcement agencies should work with schools to develop and monitor school discipline policies with input and collaboration from school personnel, students, families, and community members" (President's Task Force 48). Vitale, mirroring the opinions of Lisa Thureau and Johanna Wald of Strategies for Youth, questions why law enforcement should be involved in this process at all

(69). Law enforcement agencies lack adequate knowledge of adolescent development to be determining disciplinary measures. Recommending police be involved in the creation of these policies perpetuates the belief that law enforcement has a place in the education system to begin with and solidifies the stream of communication that has led to the very school-to-prison pipeline the task force is ostensibly trying to eradicate.

Proposed Alternatives

Schools have relied on SROs as a convenient fix to the discipline issues that have plagued them for a long time, and it will require systemic change to remove them. The first step is to target the underlying policies creating hostile learning environments. As previously stated, high-stakes standardized testing not only makes school less engaging for students, causing them to act out, but it has also been linked to increased suspensions during testing windows (Figlio 850). These tests change the purpose of schooling from schools effectively fostering children's development to schools competing to look the best on paper. In the anthology *Pencils Down: Rethinking High-stakes Testing and Accountability in Public Schools*, Bob Peterson and Monty Neill argue, "the biggest drawback to most of these alternatives is that they challenge this country's predominant approach to thinking and learning — that is, that we can only truly know something if it can be statistically and 'objectively' determined and analyzed" (Peterson and Neill 219). Regardless, the effort is worth it, and critics of standardized testing are working to integrate student portfolios, districtwide projects, and outside review teams that evaluate schools as alternate means to inform parents and the community about how well a school is teaching its students. Peterson and Neill claim evidence is growing to prove that these alternatives provide a better measure of a school's performance (219).

Zero tolerance policies also need substantial reform. While safety remains the primary goal and a degree of zero tolerance may still be necessary, much needs to be done to minimize the negative effects such policies currently cause. The American Psychological Association (APA) created a task force to evaluate the evidence and determine appropriate reforms for when zero tolerance policies are necessary and replacements for when alternatives are deemed appropriate. The APA task force recommended that zero tolerance policies only be used for the most serious and severe disruptive behaviors (e.g. possession of weapons on campus) and that the one-size-fits-all strategy be replaced with a graduated system where the consequences are proportionate to the seriousness of the infraction and take into consideration first time offenses. Additionally, all infractions (regardless of severity) should be carefully defined (American Psychological Association 858, 857). For non-severe violations, schools should turn towards alternate means of discipline before resorting to suspension or expulsion. An example of this is

requiring students attend substance abuse classes in lieu of suspension for drug related infractions (Wettach et al. 34).

With these proposed reforms to the policies that perpetuate the systemic need for law enforcement in schools, the final element is the removal of the SROs themselves. SROs are extremely costly. The Justice Department's COPS program has awarded more than \$914 million in grants to hire SROs, while the federally funded "Safe Schools/Healthy Students" program has provided more than \$2.1 billion to various programs, including those that fund SROs, in its first decade (1999-2009) alone (Heise and Nance 74). This does not include the additional funding states provide for SROs. A lot of good could come from those funds being reallocated towards non-punitive disciplinary alternatives, including hiring more counselors, community schools, and behavior monitoring.

The means of discipline need to return to the hands of those professionally trained to work with children. As of 2011, there were more NYPD personnel than counselors of all types in New York City schools (Vitale 70). An ACLU report based on the CRDC 2015-2016 data found that 47 states and D.C. did not meet the recommended students-to-counselors ratio (Whitaker et al. 11). Students need mentors that they can confide in without the risk of self-incrimination. Furthermore, schools that employ more school-based mental health providers (counselors, social workers, psychologists, and nurses) have lower rates of expulsion, suspension, and other disciplinary incidents, as well as improved attendance and graduation rates (6). With the reallocation of SRO funds, these benefits could become a reality for the 1.7 million students that have police but no counselor at their school (4).

With the current low budgets allocated to schools, administrators cannot solve these safety and behavioral issues on their own. This has led to the construction of community schools. In "Community Schools: An Evidence-Based Strategy for Equitable School Improvement," The Coalition for Community Schools defines community schools as "both a place and a set of partnerships between the school and other community resources, [with an] integrated focus on academics, health and social services, youth and community development and community engagement" (Oakes et al. 5). They are typically a response to each particular community's needs, so there is not a standard approach. This can be beneficial, however, in guaranteeing a personalized response to a given community's unique situation. They do share, however, three key aspects: cooperation with external community resources, parental involvement in the education process, and the provision of extracurricular activities. The cooperation and shared contacts between parents and schools has correlated with higher attendance rates and lower chronic absenteeism, critical predictors of student dropout. Many studies have found a positive association between extracurricular activities and student motivation, engagement, and school connectedness (Heers et al. 1021, 1027, 1034). Though literature on community schools is

relatively sparse and more research is necessary, the results from community schools over the last two decades appear promising. As with any alternative to the norm, experimentation is necessary to discover what works best. Given that SROs have proven disadvantageous, it is worth further exploring community schools as a replacement.

A third alternative method for increasing the safety of schools in the absence of law enforcement is behavior monitoring. Behavior monitoring generally means that an adult regularly checks on a student's behavior over a period of time, but it can also mean that a student records and analyzes their own behavior. Some of the behaviors monitored include academic (e.g. grades), social (e.g. following directions), and participation behaviors (e.g. tardiness/absences) (Moss et al. 1). Behavioral Monitoring and Reinforcement is a two-year program aimed at helping students at high-risk of substance abuse, dropping out, or other interactions with the criminal justice system (Vitale 73). The program monitors tardiness/attendance, office referrals, and academic grades, and consists of weekly meetings with staff where they learn to associate behavior and consequences, problem-solve, and receive positive reinforcement (Moss et al. 5). A follow-up inquiry after one year found that students who participated in the program self-reported less juvenile delinquency, drug abuse, tardiness/absenteeism, suspension, and unemployment than the control group. A five-year study reported that students from the program had fewer county court records than the control students (Vitale 74). The follow-up studies suggest that there are lasting positive effects of behavior monitoring, as opposed to the life-altering detriments of introducing children into the school-to-prison pipeline. If more money was dedicated to constructive resources like behavior monitoring, community school strategies, and counselors, then schools could maintain an orderly learning environment without putting students at risk of criminalization.

Conclusions

In the 1990s, in response to high-profile media coverage of school shootings, high stakes standardized testing, and zero tolerance policies, federal funding for School Resource Officers significantly increased. Since then, SROs have been proven to have negative impacts on students despite their intended purpose of maintaining safer school environments. SRO presence on campuses escalates the school-to-prison pipeline, which increases the likelihood of children entering the criminal justice system. Students of color and students with disabilities are disproportionately impacted by this structure. In defending SROs, the courts have established dangerous standards that make it easy for SROs and school administrators to circumvent the law and infringe on students' Fourth Amendment rights. School Resource Officers may lead to a reduction in nonserious violent crimes, but the attendant negative consequences are not worth it.

While SROs are deeply established in the current system, this does not mean they are the only solution capable of achieving the same results. We must do away with reforms that maintain SRO presence, and instead seek radical alternatives. If the excessive funding used to hire SROs was reallocated towards hiring professionally trained counselors, establishing community schools, and implementing behavior monitoring programs, schools could maintain safe environments without constant law enforcement presence that compromises the well-being of minority and disabled students.

The issue of School Resource Officers on school campuses is a crucial one that holds life-altering implications for future generations. Students need to feel safe in school to be able to achieve their full potential and grow into conscientious individuals. The SRO program has been entrenched in our schools for a long time, but we can and must aim to do better.

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National Parks and Different Racial Groups: How and Why Racial Disparities in National Park Visitorship have Developed on a Nation-Wide Scale in the United States

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Abstract

The National Parks system is said to be “America’s Best Idea” (Weber). However, it has been shown over and over again that there are huge disparities between the racial demographics of national park visitorship and the racial demographics of the United States population. This is the result of historical violence and colonialism combined with little to no appropriate policy to address disparities. The United States government currently lacks the capacity to expand the national park visitorship base to racial minorities, but there are several key legal steps that can be taken to ameliorate disparities. Through the National Parks Service and the EPA, introducing an environmental justice framework to the understanding of “wilderness” can begin to decolonize and desegregate national park spaces.

Introduction

The National Parks system is said to be “America’s Best Idea” (Weber). However, it has been shown over and over again that there are huge disparities between the racial demographics of national park visitorship and the racial demographics of the United States population. This report aims to analyze potential causes for said disparities and how one might address them. There are three main questions:

- 1) How do institutions and historical processes create a national parks system with a drastic disparity in racial make-up between park visitors and American citizens?
- 2) Why are there such low numbers of people of color (POC) visiting parks? Is this an issue of environmental justice or environmental racism?
- 3) Are national parks really “America’s Best Idea”?

The main focus of this project will be the historical reasons behind racial disparities in national park visitorship and how, though at face value, it may seem like a voluntary trend, it is actually an example of environmental injustice. A broad and national lens is necessary to present the

problem in its uniquely American form due to our specific racial histories, policies, and environmental racism. Additionally, it is necessary to define environmental racism within the context of this work. Environmental racism is a facet of systematic racial injustice that manifests itself in adverse environmental impacts disproportionately affecting racial minorities. This is a result of discriminatory policy and practices in many different facets of life, from housing and employment to waste treatment and disposal. (“Environmental Racism Collection”) Environmental justice is a means to address this inequality. The United States Environmental Protection Agency defines environmental justice as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies” (US EPA). While the EPA is not responsible for the maintenance of the US National Park Service, which is a subsidiary of the US Department of the Interior, addressing racialized visitorship trends in American national parks is a key way to advance environmental justice.

The national parks service was founded in 1916 and manages all national parks in the United States. It is an agency under the executive branch of the US government that has suffered under the budget cuts of the Trump administration. The National Parks Service’s primary role is to facilitate tourism, as the parks are largely a tourist attraction. There are 421 units under the parks service, 61 of which are designated national parks. Beyond National Parks, the parks service also cares for national monuments, memorials, and more. However, there is no office of environmental justice within the National Parks Service.

Racialized Exclusion in the Parks System

There is a vast racial disparity in national park visitorship. Census data shows that, on average, people of color are far less likely to visit national parks, regardless of other factors such as age and socioeconomic status. However, there are factors beyond race that are socially and historically interconnected with race that can contribute to the visitorship trends of national parks. These factors include (but are not limited to) access to parks, transportation to parks, racial demographics in regions with parks, socioeconomic status, prioritization of certain citizens – whether currently or historically as park visitors – as well as park histories of racialized violence.

Beyond accessibility issues, there are various laws and agency practices that have systematically excluded people of color. Even the founding of the national parks system came from a place of discrimination because wilderness spaces seen as park-eligible were entrenched in the idea of how “pristine” that particular piece of nature was. The social construct of pristineness is characterized as nature removed from human influence. The development of this construct involved both the displacement of Native Americans and the redefinition of human intervention in nature to mean white human influence. This trend is due to the prevailing Social

Darwinism that, at the time of the founding of the national parks system in 1872, was the subcategorization and dehumanization of racial and ethnic minority groups (Weber). Native Americans have only been allowed to remain as residents in two national parks, even though they used to occupy the land that makes up *every* one of them (Weber). Furthermore, disparities in park access were exacerbated by both de facto residential segregation (e.g. homeowners associations, discriminatory mortgages) and de jure segregation (e.g. explicitly racialized housing covenants, redlining) (Garcia).

Another significant piece of policy impacting the national parks system was the Wilderness Act of 1964. Enacted under the presidency of Lyndon B. Johnson, the Wilderness Act created the legal definition of “wilderness” as “an area where the earth and its community of life are left untrammelled by man.” Also, it created a formal system to regulate the land protected by the federal government. The act set aside around 9 million acres of land to be preserved as wilderness spaces, for parks or otherwise. It is important to note that the Wilderness Act was signed into law the same year as the Civil Rights Act of 1964. However, there was complete separation between the two acts; communication between each party of policy makers was unheard of. This is significant because the separation between the two symbolically cemented the separation between racial minorities and wilderness spaces in the American psyche. They were seen as two separate fights, even though land and racism in the United States have always been fundamentally interlinked (Glenn, 53). The Wilderness Act was created to set aside land devoid of almost any form of human interaction. However, this in itself is an act of environmental racism because the conservation movement at the time was heavily dominated by white individuals who systematically excluded people of color via de facto – and until very recently, due to the enactment of the Wilderness Act, de jure – segregation. Hence, conservationists ignored the needs and desires of POC in their fight to preserve pristine areas of nature. Often, critics of the law merely focus on the vague wording left open to interpretation and not that the law systematically disenfranchises POC, especially Native Americans. In conjunction with the Civil Rights Act, the Wilderness Act failed to address the overlap of racism and conservationism in the 60s. This cemented not only the idea of human and nature being separate, but also the separation of the groups protected by the Civil Rights Act and the groups for whom parks are created.

A facet that goes beyond the scope of accessibility issues and governmental action is the history of conservationism. Conservation movements have a long history of environmental racism. For example, the Sierra Club founders were entrenched in ideas of purity of both nature and humanity – and were involved in eugenics. As stated by the current president of the Sierra Club's board of directors, Adam Mair:

Race, population eugenics, and ‘natural order’ were critical features and values of [their] founders and naturalist societies of the late 19th and 20th centuries, which largely blamed environmental degradation on developing and non-European populations. The proverbial ‘wound’ or foundation of environmental racism and exclusion begins with [their] founding naturalists, who were also pioneers in the eugenic classifications of humanity (Mair).

While the Sierra Club is a widely recognized conservation group, it is hardly unique in its foundations of highly racialized purity movements. The idea of nature and “wilderness” as synonymous with purity is something that shows up again and again in ways that prevent POC from accessing parks. Be it the Wilderness Act or conservation movements, park spaces in the United States have been manufactured using a social “ideal” that excludes racial minorities.

Park Visitation Disparities and Environmental Injustice

Park visitation is an environmental justice issue because access to green spaces has various impacts on an individual’s wellbeing. One significant impact of park spaces is on mental and physical health. Mental health is improved by spending time outside in green spaces, and physical health benefits from the exercise spaces and opportunities that parks provide. “Nature deficit disorder” is linked to childhood depression and ADHD (Weber). Access to green spaces is a right, so the stereotypical association of green spaces with one race denies those rights to minorities. However, many proponents of the national parks system don’t make the connection between access disparities and civil rights, even if they recognize the existence of those disparities. This can be seen in the EPA’s statements regarding environmental racism and environmental justice while little changes in the mundane lives of POC in America. Moreover, many national parks are built on native land while those same communities are denied access to their own lands — an even more blatant denial of rights.

This involves the national parks service most directly, as well as various groups both inside and outside environmentalism. Within the National Parks Service, there has been a formal acknowledgment of the racial disparities in visitorship to the national parks; however, that acknowledgment rarely transfers to action. There is, however, funding put towards studying and addressing these disparities, so there is at least the movement towards action, if not a concrete plan currently in place. However, since funding for the parks service has been decreasing in recent years, funding towards addressing and studying disparities in park visitorship has been less of a priority. Another aspect of the parks service taking a budget cut is trail maintenance. The park service spends significant parts of their budget on restoring and preserving the national parks as accessible spaces. However, if the parks are operated in a way that excludes minorities, no amount of trail clearing will make a park truly accessible to all.

As a subsidiary of the federal government, the national parks system operates under federal supervision. National parks require congressional approval (Root) and congress is very white, making the trend towards greater diversity of park inclusion historically less likely to be a priority. The current congress is the most racially diverse in history, but still under 20% of the house and senate members are POC (Bialik).

A History of Exclusion and Violence

However, the national parks service is taking steps to ameliorate trends of racialized exclusion. The national parks service created the Office of Relevancy, Diversity, and Inclusion in 2013 (Root). Many see this office as not doing enough to address the overall culture of the national parks service as a predominantly white organization of predominantly white employees (Root). This culture of the national parks service leads many minorities to see the parks as “unsafe or unpleasant” (Root). Prior to the Civil Rights Act, people of color were legally and systematically barred from interacting with various park spaces (Scott). While that may be illegal now, cultural and communal history still makes those park spaces feel inaccessible. Shelton Johnson, an African American park ranger explains:

When you come out of a history of segregation you don't willy-nilly think that you can just go to a place... This is an extension of the Civil Rights movement. Pure and simple. [Reconnecting with the earth] is basically the last act of what it means to become an American (Root).

A long history of racialized violence in “pristine” park spaces has imposed a deep generational trauma that prevents many African Americans from enjoying National Parks (Root).

In the essay “Tales from a Black Girl on Fire,” Camille Dungy explains her experiences moving to the south and how she, as a traditionally very outdoorsy person, felt immediately unsafe in park spaces because of the racialized violence like lynchings that had occurred there. Although a single experience does not represent an entire demographic, if at least one person feels this way in national parks, then that history is at play in these spaces. Using powerful rhetoric rather than demographic data, one can still see that POC feel unwelcome in parks. Due to the history of violence in America, the constructs of race and wilderness intersect; people of color, particularly African Americans, feel less safe or welcome in “wilderness spaces”. Outdoor spaces exist as spaces of historical trauma for the African American community in the US (Root).

Even removed from physical safety issues in wilderness spaces, there is a relatively pervasive cultural imaginary that usage of outdoor spaces is exclusive to white populations.

However, there are several movements founded on addressing that trend. One example is Brown People Camping, a project to reverse park usage stereotypes through social media. This includes redoing advertising campaigns that paint outdoorsmanship as a predominantly white pursuit (Brown People Camping). However, this cannot undo the fact that childhood access to parks plays a massive role in acquiring the skills to pursue outdoorsmanship later in life. Once you are physically able to afford to get there, access to park spaces includes knowledge of parks, park etiquette, gear, maps, and often a sense of outdoors competency afforded to those who grew up in outdoorsy families – usually white families (Scott). Combining this with socioeconomic factors and the fact that childhood poverty disproportionately affects POC, parks are seen as inaccessible spaces by adult POC regardless of their adult income. Further combining this with assumptions by park managers that most visitors are white leads to them catering to those specific populations instead of expanding their ideas of park access and visitorship (Scott). Moreover, park etiquette in the national parks service is rooted in 19th century white ideals of behavior that exclude POC simply because of how they look, different cultural norms, and the parks as spaces of integration and behavioral education (Scott). This leads to the Ethnicity Hypothesis: variations in cultural norms, socialization, etc. across different ethnic or racial groups may account for the differences in park visitorship (Scott).

Steps Forward

The National Parks Service created the Office of Relevancy, Diversity, and Inclusion to address these trends. Some environmentalist groups, such as the Sierra Club or the City Project, are working to combat environmental injustices, yet others do not acknowledge how their work or founding intersect with environmental racism. One group that does, the City Project, is focused on increasing access to parks for inner-city communities and communities of color. Their leadership is primarily Latino, and they operate primarily out of southern California (particularly Los Angeles), where they work towards greener city planning and healthier cities overall through access to parks and green spaces for POC. They employ educational and outreach strategies to directly target underserved kids and give them access to park spaces. They also run political campaigns in areas like city planning to work towards their goals. Their four main goals are healthy and green city planning, climate justice, education, and health equity. These goals are similar to some of the EPA's "EJ Through 2020" vision – specifically expanding the EPA within minority communities. However, the City Project's tactics are much more focused on education and direct community outreach than the EPA, which focuses on high-level policy and political infrastructure change. The City Project is a more volunteer-based grassroots organization working directly with the negatively impacted communities that the EPA in its mission statement is trying to protect at the federal level. The US Environmental Justice

Executive Order differs from how City Project operates similarly. The EJ Executive Order is primarily focused on analyzing current government structures to address how they have harmed communities to prioritize the overall goal of health. Ultimately, it comes down to a difference between grassroots activist work (City Project) versus grass-roots activist work that got policies like the EJ Executive Order and the EPA EJ vision into the body of the government. However, both are focused on human health. No matter what angle they approach it from, their main goal is to improve the health of overburdened and minority communities through the environment.

Despite its founding racism, the Sierra Club has also begun to work to dismantle its organization's internalized bias and racism to pivot towards a more environmental-justice-based conservation approach. They acknowledge that “the dynamics of race, political power, and wealth have been used to disempower and deny Americans of color from equally sharing, shaping, and benefitting from our country’s environmental heritage” (Mair).

There are also non-environmental groups that work to make governance more accessible to POC through a lens of environmental justice. This also involves specific pieces of policy, most specifically the intersection of the Wilderness Act of 1964 and the Civil Rights Act of 1964. The Civil Rights Act prevents “intentional discrimination, as well as unjustified discriminatory impacts without proof of intent, based on race, color or national origin by recipients of federal funding” (Garcia). Because park funding comes from the standpoint of visitation (Weber), one can point out the discriminatory federal funding of various parks depending on access or proximity to people of color, or one could argue that decreasing funding to the EPA or the national parks association is discriminatory. In accordance with the Wilderness Act, one could argue that which areas are deemed wilderness and receive appropriate protections and funding is discriminatory. Which states have more parks – and thus receive more funding – may change based on POC populations. It may be difficult to prove that this trend results from intentional discrimination, but it certainly connects the Wilderness Act and the Civil Rights Act. It is also important to consider how the Wilderness Act definition of “untrammeled” land erased Native American histories on that land. Discrimination against Native Americans is often not discussed in environmental justice frameworks and isn’t highlighted by any of the bodies of work referenced by this report. Certainly, however, pushing these populations off of lands that were historically theirs and onto significantly less liveable land is an environmental injustice. Beyond Native American population expulsion from park spaces, these spaces were often exclusive of other minority groups. Prior to the Civil Rights Act, people of color were legally and systematically barred from interacting with various park spaces (Scott). While that may be illegal now, cultural and communal history still makes those park spaces feel inaccessible.

Moreover, post-1964 segregation did not immediately dissipate as there was significant backlash against the federal government’s demands that spaces south of the Mason-Dixon line

integrate. Therefore it is highly likely that park spaces remained inaccessible to POC through the rest of the 20th century. Because Jim Crow policy developed almost simultaneously with the founding of many national parks in the American South, many parks explicitly created white-only wilderness spaces from their foundation (Weber). Thus, racialized history is firmly entrenched in national parks, which are considered the epitome of American ideals - or “America’s Best Idea”. However, one may argue that the pinnacle of American ideals is so steeped in racism that it is strongly representative of American history and democracy as a whole.

This racialized history also involves the EPA, which, under the Obama administration and the leadership of Gina McCarthy, had somewhat of a commitment to improving park access (Garcia). However, there is not a very good historical EPA track record. The Trump administration lacked commitment to expanding park access to lower-income communities because they were too busy rolling back environmental regulations and restrictions. Their track record is thus much, much worse, as rolling back clean air regulations will damage national parks. Additionally, putting environmental regulations more in the control of individual states to streamline the EPA leaves national parks in states with a history of bad environmental behavior, such as Texas and Oklahoma, at risk (Kodish).

The bulk of data utilized in this report is various analyses of national park usage by different racial demographics. This data includes access to parks, transportation, proximity, and more. 53% of white US citizens could name a national park they had visited in the last two years, as opposed to 32% of Hispanics and 28% of African Americans (Scott). Less than 7% of national park visitors were people of color (in this case, defined as Asian, Hispanic, and black) (Scott). Overall, POC are more likely to view expense, accessibility, and safety as higher risk factors preventing them from enjoying park spaces than white Americans (Xiao Xiao).

Accessibility to park spaces is a very racialized factor in park visitorship. For example, in Los Angeles, only 15% of the population in the city has a park within walking distance (Garcia). Accessibility has a variety of factors that influence it, a major one of which is park proximity. On the other hand, Washington state has multiple national parks yet is a majority-white state. States in the south with higher populations of African Americans have fewer national parks per capita. Most national parks in the 48 contiguous states are in the western half of the country, and most of those parks are in the Interior West (such as the Grand Canyon, Yosemite, and Yellowstone) (Weber). There is a low population of African Americans in that region of the country (Weber). Higher numbers of Hispanic visitors to parks can be attributed to a Hispanics being a growing proportion of the population (Weber). Native American and Asian American populations are often highly concentrated in specific areas, so it is difficult to link their demographics to park proximity nationwide. Perhaps there would be a more definitive trend on a smaller scale

(Weber). However, distance to parks as a visitorship barrier is a nationwide trend regardless of race. Over one-third of those who don't visit national parks cited distance as the defining obstacle (Weber).

Proximity to parks also affects awareness of the parks system. Awareness of parks increases with park visibility – thus, areas closer to parks are often more aware of the parks system. Awareness of parks varies regionally, with the western half of the contiguous United States more aware of the parks system on average (Weber). Furthermore, parks closer to urban spaces had higher diversities of visitorship than those in very rural areas (Weber). As found by an extensive study of racial demographics and vacation habits, “minorities will travel farther than whites if they live farther from destinations, as many do, yet can still be expected to find distance a constraint to visiting parks” (Weber). However, the efforts of the national parks service to open more historical sites as parks, or parks in urban spaces, are drawing more POC visitors (Root). Unfortunately, this doesn't address the common misconception of national parks as vast and inaccessible wilderness spaces far removed from cities. Therefore, it is essential to address the idea of wilderness as a social construct closely related to proximity. The wilderness is a construct that rose out of American imperialism and settler colonialism and denies the existence of POC in many spaces. This conception of wilderness is deeply ingrained in the American conception of parks. This idea of wilderness leads to a dualism between humanity and nature, a distinctly white and Christian idea not prevalent in many other communities worldwide.

Ultimately, white populations have the highest level of park “accessibility” when defined as a measure of factors that include, but are not limited to, distance, socioeconomic status, or number of children. African Americans have only 19% of the park accessibility of white Americans (Weber). Asian American park accessibility falls to 5% of white accessibility, and Native American park accessibility is just 0.78% of white park accessibility (Weber). However, racial differences in accessibility vary regionally, as regions with higher proportions of minority populations have higher rates of minority park accessibility than other regions (Weber). It is important to note that accessibility patterns often do not reflect the entirety of actual park visitorship trends because of various conflicting factors. Even in areas with high populations of color close to parks, people of color still don't visit those parks. One example is Tucson, Arizona. The city has a very high Latino population and is next to Saguaro national park, yet the people of Tucson don't visit the park and are often unaware of the park right by their homes (Rott).

Beyond the accessibility of parks, another impediment to park access cited by minority groups is the expense. Historically racialized socioeconomic status and the prioritization of specific population demographics over others exacerbates this. For example, in Los Angeles, there are 32 acres of park space per 1000 people in white neighborhoods, but 1.7 and 0.6 acres in

African American and Latino neighborhoods, respectively (Garcia). In terms of socioeconomic status, there are strong trends in park visitorship. Respondents to a 2017 survey stated that the cost of transportation to parks was one of the most defining barriers to park access (Xiao Xiao). Despite being public resources, many national parks have visitation fees that make them more inaccessible. Fee-free days are offered, but this is not always accessible to those who work full-time or multiple jobs. Furthermore, “affluent Americans are three times more likely to visit national parks compared with poor Americans” (Scott). Even while controlling for factors like race, low-income Americans are less likely to feel welcome at parks or have the appropriate skills or information to access the national parks system (Scott). But, it is necessary to factor in the persistent disparities in income based on race, such as the pay gap or household savings continuity (Scott).

Lastly, a significant factor in park visitorship disparities is grounded in parks' history and cultural connotation. The Elitism Hypothesis states that the parks system was founded out of a white American ideal of pristine wilderness that implicitly included only those who would “properly” appreciate it, systematically excluding minority populations with different cultural and behavioral norms (Weber). External, racist perceptions of the minority group by the general American populace emphasize these differences. There is significant anecdotal evidence about how national parks were created as a space exclusive of many minority groups, whether explicitly via policy or implied through stereotypes, implicit language, historical land use, or racial violence. POC often experience discriminatory actions when visiting national parks, making them less likely to engage with that park space in the future (Scott). There have been many recent and heavily publicized cases of people of color attacked by the police simply for existing in park spaces. One example is “BBQ Becky,” a moniker for a white woman who called the cops on an African Americans family enjoying a barbeque in a public green space (Zhao). Because of this discrimination, visiting national parks becomes a hassle that one must prepare themselves for to protect their safety not from the outdoor spaces themselves but the other people who frequent them. The threat of police brutality very effectively becomes another barrier to park access.

Overall, one cannot point to a single one of these factors as the definite piece upon which the racialized disparities in the national parks system rest. The unique combination of these factors leads to the conclusion that the national parks system is not perfectly democratic and racialized visitorship trends are an issue of environmental justice that need to be addressed. But that does not make the parks system unfixable – or anything close to “America’s Worst Idea.” However, racialized visitorship trends are an issue of environmental justice that need to be addressed.

Potential Policy Changes

The most immediate policy change to address racialized visitorship trends would be to expand environmental justice within the national parks service. Beyond the Office of Diversity, there is no branch of the parks system that one could consider solely dedicated to environmental justice. Other policies would likely focus on increased park funding to expand access through transportation, education, and outreach. Since park funding is based on visitation, increased visitorship from minority populations would be massively beneficial to the National Parks Service. In this policy analysis, it is important to note that, beyond a justice framework as an incentive to action, there is also an economic incentive. Also, it is necessary for the parks system's survival to expand the visitorship base to minorities. The national parks system will have to redevelop its ideas of inclusivity and visitorship. The increasing numbers of racial "minority" populations in America mean that white-only park patronage will lead to a failure of the parks system because of the "minority majority" projected to happen by 2050 (Scott). Moreover, with increased park funding, there could be a decrease in visitorship fees that are a barrier to visiting a park.

Conclusion

National Parks are something that should be available to every American. It is essential not to overlook how the parks system was born out of a racialized idea of land use and wilderness. If the government explicitly addresses that, it can partially decolonize the American conception of parks and land, therefore making parks more inviting to people of color. Establishing programs for youth of color in national park spaces will grant a new generation the cultural competency to engage in areas previously historically denied to them. It will also help undo the trends of racism that have deprived people of color access to park spaces by making a new generation view park spaces as more diverse. This also includes making the histories of park spaces more explicitly racially inclusive of minorities because people are more likely to engage in spaces more tied to their personal history. One example of this is that there are more African American visitors to the Booker T. Washington memorial than other parks on average – 17% of the site's visitors despite being 7% of national park visitors nationally (Scott). Thus, including POC narratives is essential to integrate the parks system more fully. An example is the Buffalo soldiers, an all-black faction of the Union Army, dispatched to protect Yellowstone (Root). That would give African Americans a sense of connection to the parks that would likely increase their rates of visitorship.

This cannot be just limited to including POC narratives: it must also include POC input. There is a lack of park spaces honoring Asian Americans beyond one national memorial for

Japanese internment and a total lack of park spaces dedicated to Hispanic Americans (Weber). It is crucial to include POC narratives that go beyond acknowledging the physical existence of people of color in those areas; it must also recognize their positive contributions. A park's history as something to be proud of seems to draw visitors from that demographic (Root). The inclusion of POC in the history of a park unit when it does happen is often a sanitized history of racial violence that includes POC only as props to the exploits of white Americans. An example of this is the commodification of former slave plantations that create tourist attractions centered around a white narrative, which is exclusively appealing as a place to visit for white Americans when framed in a way that erases POC contributions or suffering (Weber). Furthermore, park histories must be rewritten to include current Native American narratives. Park histories that include native narratives often portray them as limited exclusively to the past. This is ahistorical. Native Americans faced systematic genocide at the hands of the nation-building of the United States, but are still very much present in the US and work to have their powerful cultural history and presence preserved. The National Parks system should work with indigenous communities to uplift their histories and enrich the parks experience for everyone.

Beyond rewriting park histories to be more inclusive, it is vital for the whole National Parks System to include race in visitation data and analysis to bolster the work towards inclusion. This means the parks system should include racial data in park visitorship surveys because, as of 2010, only 111 park sites (among upwards of 250) had park visitorship surveys. Of those, only 62 asked for data about race or ethnicity.

Outside of the national parks system, there are several steps that the federal government can take to increase national parks access. One key branch of the government that can address this is the EPA. The EPA can create “objective standards” to park access (Garcia), putting park access as a factor on their EJScreen tool and developing environmental justice frameworks to recognize park access disparities.

While the national parks system may have been founded out of historically ignored racism, that does not mean that today's parks system cannot decolonize park spaces and increase racial diversity in a movement towards outdoors inclusion for all.

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Judges Beating a Dead Horse: The Death of Our Privacy Rights

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Abstract

Privacy in the digital age may be dead or dying. Soon, the government could track an individual's every waking moment. One significant aspect of the death of our privacy rights is infringement upon our electronic privacy by the government during the course of criminal investigations. For some cases, law enforcement requests authorization from the judge to intercept electronic information from the suspect. Some of the authorized intercepts uncover incriminating evidence, and some do not. For this research paper, I analyze whether a case's assignment to either Democratic-appointed judges (DAJs) or Republican-appointed judges (RAJs) impacts the proportion of incriminating intercepts (PII). Do DAJs and RAJs generate unnecessary authorized intercepts in equal proportion? If any, which group tends to generate them at a higher rate? In order to analyze whether there are systematic differences between how DAJs and RAJs authorize searches, and thus how they protect privacy, I analyze the average PIIs issued by DAJs and RAJs. I then conduct a two sample z-test using the average PIIs for DAJs and the average proportion for RAJs in order to determine if there is a statistically significant difference between the two. Ultimately, I do not find a statistically significant difference between the average PII of DAJs and the average PII of RAJs. This implies that there is little room for federal district court judges to interpret evidence standards regarding the authorization of intercepts according to their own ideologies.

Introduction

Privacy in the digital age may be dead or dying. Soon, the government could track an individual's every waking moment. By analyzing when her alarm went off, when the cell-site location information generated by her cell phone tracked her going to work, and when the surveillance footage at her work recorded her walking through the front doors, the government could follow a person's digital footprint from dawn until dusk, day in and day out. It is important, now more than ever, for us to understand what steps we can take to save our privacy rights.

One significant aspect of the death of our privacy rights is infringement upon our electronic privacy by the government during the course of criminal investigations. For some cases, law enforcement requests authorization from the judge to intercept electronic information from the suspect. In order to grant the authorization, the judge must determine whether there is probable cause to believe that the intercept will uncover incriminating evidence relevant to the investigation. Some of the authorized intercepts uncover incriminating evidence, and some do not. For this research paper, I analyze whether a case's assignment to either a Democratic- or Republican-appointed federal district court judge impacts the proportion of incriminating intercepts (PII). Do Democratic- and Republican-appointed judges generate unnecessary authorized intercepts in equal proportion? If any, which group tends to generate them at a higher rate? I expect to find that Republican-appointed judges (RAJs) will have lower average PIIs than Democratic-appointed judges (DAJs).

In order to analyze whether there are systematic differences between how DAJs and RAJs authorize searches, and thus how they protect privacy, I will analyze the searches on a judge-level in order to evaluate the average PIIs issued by DAJs and RAJs. I will then conduct a two sample z-test using the average PIIs for DAJs and the average proportion for RAJs in order to determine if there is a statistically significant difference between the two.

How Judges Can Kill Privacy

Background

As mentioned earlier, law enforcement requires authorization from a judge before they can intercept electronic information. In order for the judge to grant that authorization, the judge must determine whether law enforcement presented sufficient evidence to meet four criteria: 1) there is probable cause for belief that an individual is committing a crime, 2) there is probable cause for belief that communications regarding that crime will be obtained through interception, 3) normal investigative procedures are reasonably unlikely to succeed, and 4) there is probable cause for belief that the individual in question owns or will use the facilities being intercepted (US Code Section 2518).

Unfortunately, probable cause is a notoriously imprecise concept ("Probable Cause", Legal Information Institute). Due to different personal beliefs regarding what strength of evidence meets the standard of probable cause, different judges may come to different conclusions regarding whether to authorize a search when given the same evidence.

Imagine the difference between the hypothetical Judge A, who tends to protect privacy, and Judge B, who does not protect privacy as much. Judge A, who strongly safeguards privacy, may believe that probable cause for belief is roughly equivalent to being 90% certain. The judge

would not only authorize fewer intercepts, but would also only authorize intercepts that are highly likely to reveal incriminating evidence, thus minimizing undue invasions of privacy. As a result, Judge A would likely have a high PII.

On the other hand, Judge B, who does not protect privacy as much, may believe that probable cause for belief is roughly equivalent to being 70% certain. Judge B would authorize more intercepts and would authorize intercepts that are relatively less likely to reveal incriminating evidence. As a result, Judge B would have a lower PII than Judge A. Thus, we can analyze the PIIs for each judge in order to roughly determine how that judge protects privacy relative to other judges.

Similarly, if we compare the entire population of DAJs to the population of RAJs, we could extrapolate whether the two populations protect electronic privacy differently as a consequence of their political appointment.

Significance

The first step to saving our privacy rights is to understand the factors that may be contributing to their downfall. Therefore, we must better understand the importance of political appointments of federal district court judges. As Ryan Hubert and Ryan Copus note in their similarly designed research project, “[i]f judges appointed by Republican presidents resolve cases in systematically different ways than judges appointed by Democratic presidents, then in the aggregate, the battle for appointments has the potential to shape legal and policy outcomes for generations” (Hubert and Copus).

As Americans, we are directly impacted by federal district court judges unduly invading our privacy. We are entering an age in which informational privacy may be disappearing. Rather than giving up, we must ensure that our judges act as a bastion for privacy rights. We cannot allow law enforcement to abuse the now-ubiquitous technology that can reveal our entire lives to anonymous observers. As we turn our eyes towards the 2024 presidential election, we must realize that we have the opportunity to install a president that will appoint judges that will minimize unwarranted invasions of our privacy. When we decide who we will vote for, we must keep in mind which party’s presidents appoint judges that better protect privacy. However, we must first determine whether there is a statistically significant relationship between the party of the appointer and the PII authorized by the appointed. Herein lies the goal of this research paper.

Policies That Affect Electronic Privacy

Precedent from the United States Supreme Court (SCOTUS) affects whether and how federal district court judges authorize intercepts. In *Katz v. United States*, the court adopted the “reasonable expectation of privacy” test to determine the extent to which the Fourth Amendment protects one’s privacy rights. However, as Gabriel Bronshteyn points out in his Note, *Searching the Smart Home*, the Court “has been forced to confront the difficult question of what constitutes a ‘reasonable’ expectation of privacy in different contexts” (Bronshteyn, *Searching the Smart Home*). What is deemed “reasonable” has continued to evolve as technology continues to evolve as well. Consequently, as Justice Sandra Day O’Connor observed, the SCOTUS has “no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable” (*O’Connor v. Ortega*). As a result, SCOTUS precedent regarding the Fourth Amendment is filled with loopholes and exceptions as the court attempts to refine our ever-changing expectations of privacy.

The passage of laws by the United States Congress also affects the authorization of intercepts. Bills such as the “Stored Communications Act” stipulate the steps law enforcement must take to access private electronic information (U.S. Code Chapter 21). It is important to note that laws passed by Congress are ultimately interpreted and applied by the United States courts system. Thus, all privacy laws are ultimately subject to the SCOTUS’ convoluted privacy framework.

Previous Research

In their paper “Political Appointments and Outcomes in Federal District Courts”, Ryan Hubert and Ryan Copus conducted a similar empirical analysis. They analyzed whether civil rights lawsuits end differently depending on their assignment to either a Democratic- or a Republican-appointed judge. Hubert and Copus did find a statistically significant relationship between the assignment of a civil rights case to a DAJ or a RAJ and that case’s outcome.

Hubert and Copus took an important step in highlighting the importance of federal district court appointments, and their methods can also be used to understand appointment effects in relation to the protection of electronic privacy. Thus, I utilized the resources Hubert and Copus provided in order to conduct my analysis of whether proportions of incriminating intercepts differ depending upon their assignment to a DAJ or a RAJ.

There is also a significant amount of debate regarding the legal philosophy behind the right to privacy and whether the Fourth Amendment does or should confer such a right. In their quest to save our right to privacy, many attack specific doctrines set forth by the United States Supreme Court (e.g., Murphy, “The Case Against the Case for Third-Party Doctrine: A Response

to Epstein and Kerr”). Some hope to reclassify the right to privacy as the right to a “zone of refuge” rather than tacitly accept the current implicit definition of informational privacy (e.g., Sklansky, “Too Much Information: How Not to Think About Privacy and the Fourth Amendment”). Others abandon the right to privacy in hopes of preserving the power of the Fourth Amendment to protect us from unreasonable searches and seizures (e.g., Ohm, “The Fourth Amendment in a World Without Privacy”). At the end of the day, these debates surrounding the legal philosophy behind the right to privacy must take into account empirical data regarding that right. My research aims to provide that missing empirical data.

Politically-Correlated Fishing Expeditions

Hypothesis and Proposed Causal Mechanism

My conceptual hypothesis is that RAJs protect privacy less than DAJs. My operational hypothesis is that RAJs will have a statistically significant lower proportion of incriminating authorized searches than DAJs. In this hypothesis, my independent variable will be whether the judge-group is Republican- or Democratic-appointed, and my dependent variable will be each judge-group's average proportion of total authorized intercepts that find incriminating evidence, i.e., the number of incriminating intercepts divided by the total number of intercepts averaged across DAJs or RAJs.

My causal mechanism is that RAJs have a higher tendency to be “tough on crime”. I hypothesize that RAJs being “tough on crime” results in lower standards of evidence necessary to authorize the intercept. This will result in a lower percentage of incriminating authorized intercepts. That is, due to being “tough on crime”, RAJs will be more likely to go on “fishing expeditions” (a fishing expedition is when law enforcement “fishes” through a vast amount of data for incriminating evidence without reasonable basis for the search) to crack down on as much crime as possible, which will result in lower proportions of incriminating authorized intercepts. As they attempt to decrease crime as much as reasonably possible, RAJs necessarily protect privacy less.

Alternative Explanations

There are multiple alternative explanations for differences in proportions of incriminating intercepts. I believe that I successfully control for most of them in my analysis.

The first alternative explanation is changes in precedent or laws pertaining to electronic searches. As mentioned earlier, precedent from the SCOTUS affects how federal district court judges authorize searches. Searches that previously did not require probable cause may now

require authorization from a judge (e.g., *Riley v. California*). Laws passed by the United States Congress may also affect how judges authorize searches. As such, I limit my analysis to authorized intercepts during 2019. This eliminates changes in precedent or laws as an alternative explanation for differences in PII.

The second alternative explanation is that DAJs or RAJs may be more likely to take certain cases. If DAJs only take cases wherein the law enforcement involved have extremely strong evidence then DAJs would likely have higher proportions of incriminating evidence. However, as Hubert and Copus point out, case assignment within the federal district courts is random. Thus, any self-selection bias is controlled for within the data.

The third alternative explanation is, in reality, a misunderstanding regarding the nature of my independent variable. Some may argue that other factors aside from a judge's judicial ideology, such as their gender or ethnicity, may also influence their PII. For example, DAJs are more likely to be non-white or female than RAJs. It is possible that factors such as these are more closely correlated to the proportions of incriminating searches than differing judicial ideologies. This is why, similar to Hubert and Copus, I focus my analysis on the effects of assigning a case to Republican or Democratic *appointees*. I do not analyze the effects of their differing ideologies directly. This is why I refer to my two judge-groups as DAJs and RAJs rather than liberal and conservative justices. Ultimately, I am agnostic to any causal mechanism that may be behind my conclusions. I care only to prove that such a correlation exists.

Research Design and Data

Nature of Dataset

I utilize the resources provided by Hubert and Copus in order to find a database of federal district court cases compiled by the United States Courts website. I then found data on the “Intercepts of Wire, Oral, or Electronic Communications Authorized by US District Courts and Terminated—During the 12-Month Period Ending December 31, 2019”. This data includes every single case in which a federal district court judge authorized intercepts of electronic communications in 2019 (2,544 cases across 321 judges). The dataset is composed of prosecutor reports filed for each case. These specify what district the judge is from, the A.O. number (the case number), the judge's name, the attorney general, the offense, the application date, the total length (in days) of the interceptions, average intercepts per day, number of intercepts, number of incriminating intercepts, and so forth. I focus my research on the judge's name, the number of intercepts, and the number of incriminating intercepts in order to determine each judge's (and each judge-group's) PII.

Variable Construction Methodology

The independent variable is whether the judge is Republican- or Democratic-appointed, as established by the partisanship of the appointing president. I determine this by combining the 2019 database with a judicial registry (Federal Judicial Center, “Biographical Directory of Article III Federal Judges”). The judicial registry contains all active and inactive federal district court judges. It also has information regarding which president appointed the judge in question. I used this to separate the cases in the dataset between those cases assigned to a DAJ and those assigned to a RAJ.

As explained earlier, the dependent variable is the average PII across DAJs or RAJs. I calculate this variable using the following equations:

1. $\frac{\text{Incriminating Intercepts Per Case}}{\text{Total Intercepts Authorized Per Case}} * 100 = \text{PII per case}$
2. $\frac{\Sigma(\text{PII per case(s) assigned to each judge})}{\text{Total cases assigned per judge}} = \text{Average PII per judge}$
3. $\frac{\Sigma(\text{PIIs per judges in each judge-group})}{\text{Total judges per judge-group}} = \text{Average PII per judge - group}$

This allows me to calculate the dependent variable while ensuring that the unit of analysis is the judge level.

Choosing the Unit of Analysis

My dataset is hierarchical. It contains two judge-groups (DAJs and RAJs), each judge-group contains different judges, different judges contain different cases, and different cases contain different authorized intercepts. Therefore, there are three different possible units of analysis.

The first possible unit of analysis is the judge level. A judge-level analysis would entail calculating average PII per judge-group by averaging the PIIs across all of the judges within each group. This is my preferred unit of analysis. I aim to determine any possible effects of a certain judge-group’s assignment to a case. Because I am fundamentally analyzing judge effects, the unit of analysis should be the judge level.

The second possible unit of analysis is the case level. A case-level analysis would involve calculating average PII per judge-group by averaging the PIIs across all of the cases assigned to each judge-group. I prefer a judge-level analysis to a case-level analysis because, as mentioned earlier, I am analyzing possible differences between different types of judges. I am not analyzing possible differences between different types of cases. Thus, my unit of analysis should not be the case level.

The third possible unit of analysis is the intercept level. An intercept-level analysis would involve calculating average PII per judge-group by totaling all of the incriminating intercepts across each judge-group and then dividing that by the total number of intercepts authorized across each judge-group. This is not an appropriate unit of analysis because the intercepts in each case are not independent of each other. For example, Judge Ellen Hollander in A.O. Number 2019-82898 authorized 13,305 intercepts but 0 intercepts were incriminating. On the other hand, Judge Edward Chen in A.O. Number 2019-80370 authorized 7,548 intercepts and all 7,548 intercepts returned incriminating evidence. These cases, and others like them, are strong evidence to suggest that each intercept is not independent of the other intercepts in that case. I therefore avoid aggregating intercepts and incriminating intercepts across cases, as would be the case if the unit of analysis was the intercept level.

Validity of Dependent Variable

PII is a valid proxy for the extent to which a judge protects privacy. Intercepts, by their nature, violate one's privacy. They are only authorized if the judge believes that, for the case in question, there is greater importance in stopping potential criminal activity than in protecting the individual's privacy. A judge whose PII is consistently 0 clearly protects privacy less, likely because she requires less evidence before authorizing a violation of that privacy. A judge whose proportion of incriminating intercepts is 100 clearly does protect privacy, likely because she tries to only authorize searches that are highly probable to reveal incriminating evidence. These examples clearly demonstrate that PII is a valid proxy for how judges protect electronic privacy.

I believe that analyzing proportions is preferable to analyzing the quantity of intercepts or the quantity of incriminating intercepts. A judge may authorize 10,000 intercepts that all uncover incriminating evidence. This, in my opinion, does not mean that the judge unduly violated citizens' privacy rights. The judge in question only authorizes invasions of privacy that are likely to return incriminating evidence. On the other hand, if 0% of a judge's authorizations uncover incriminating evidence, then that judge unduly violates citizens' privacy rights. The judge routinely invades privacy and the investigations gain nothing from it. The judge does not adequately protect privacy. Thus, analyzing PII is the best available indicator for the extent to which DAJs and RAJs protect privacy.

Admittedly, there is one glaring weakness in analyzing PII as a proxy for a judge's tendency to protect privacy. PII reflects how a judge protects electronic privacy, but electronic privacy is only one facet of privacy as a general right. A judge may protect property-based privacy rights while routinely violating electronic privacy rights. However, the goal of this research paper is to analyze whether there is a difference between how DAJs and RAJs protect

electronic privacy specifically. While this weakness limits the scope of my conclusions, it does not dilute them.

Reliability of Measurements

My measuring procedure is routine. The equations I used to calculate the dependent variable and to conduct the z-test will always have the same result. Moreover, the measurement of PII is consistent across all judges in the data set. PII is always measured the same, no matter whether the case is assigned to a DAJ or a RAJ. This further cements our ability to find any differences between how DAJs and RAJs protect privacy.

However, my methodology is only as reliable as the dataset it analyzes. As a result, my research is only as reliable as the prosecutor reports used to create the dataset in the first place. If the prosecutors involved in each case are not reliable in submitting their data to the courts, then my measuring procedure will not be reliable either.

Unfortunately, there is evidence to suggest that the prosecutor reports are not always entirely accurate. The 3 cases in which there were more incriminating intercepts than total intercepts points to this. There are also 40 instances in the dataset that seem as if multiple prosecutor reports were filed for the same case. Admittedly, these worrying cases place the accuracy of the rest of the dataset in question. An unreliable dataset will always return unreliable results.

Cleaning the Dataset

Before I begin my analysis, I have to clean my dataset of bad or missing data. First, I remove the 3 cases with more incriminating intercepts than total intercepts. I feel confident doing this because it is impossible for total intercepts to be fewer than the quantity of intercepts that return incriminating evidence. There is clearly an error in the prosecutor's report in these three cases.

Next, I delete the 1,352 cases in which there were 0 total intercepts. There are two possible explanations for why there are 0 intercepts. Both merit dropping the data in question. First, there may be no prosecutor report, so the dataset may be missing data. I do not want missing data to skew my analysis. Second, the judge may have authorized an intercept but law enforcement decided not to carry it out. In this project, I want to analyze how judges protect privacy. Thus, cases in which law enforcement (and not the judge) prevented the invasion of privacy are not useful to my current research question. I therefore delete these cases with 0 intercepts.

Finally, I delete the 5 cases assigned to a magistrate rather than a federal district court judge. Magistrates are not appointed by the president (Federal Judicial Center, “Magistrate Judgeships”), so they are not material to my research.

After cleaning my dataset, I am left with 681 cases involving DAJs and 503 involving RAJs. This is more than enough data to conduct a large-n study.

Statistical Significance

I use a two-sample z-test to determine if there is a statistically significant difference between the average PII for DAJs and the average PII for RAJs. However, I must first determine the average PII for DAJs and for RAJs. To determine the average PII for DAJs, I average the PIIs across the 175 DAJs. I find that the average PII for DAJs was 31.68%. I then average the PIIs across the 146 RAJs and determine that the average PII for RAJs was 31.36%.

After calculating the average PIIs across each judge-group, I can now conduct a two-sample z-test to determine if there is a statistically significant difference between the two averages. I utilize the equation below to calculate the z-score necessary to find the p-value. The p-value is the probability of obtaining a difference at least as extreme (any difference in PIIs between 0% and .32%) as my observed results assuming that the average PIIs for DAJs and RAJs are, in fact, equivalent.

$$z = \frac{.3168 - .3136}{\sqrt{.3153(1-.3153)(\frac{1}{146} + \frac{1}{175})}} = .0628$$

From here, I determine that the p-value was between .7324 and .7357.

Analyses and Implications

Findings

As mentioned previously, after conducting a z-test to determine if there is a statistically significant difference in the average PII between DAJs and RAJs, I calculated a p-value of approximately .73. This clearly does not meet any generally accepted significance level (.1, .05, .01, etc.). Therefore, I did not find a statistically significant difference between the average PII of DAJs and the average PII of RAJs. As a result, the data did not support my hypothesis (that RAJs would have a lower average PII than DAJs).

Implications

The remarkable similarity between the average PII rates of DAJs and RAJs implies that federal district court judges are more closely bound to past precedent than to their own beliefs. That is, there is little room for federal district court judges to interpret evidence standards regarding the authorization of intercepts according to their own ideologies. This mirrors the generally accepted belief that the ideologies of federal district court judges do not significantly change case outcomes (e.g., Boyd, “The Hierarchical Influence of Courts of Appeals on District Courts”).

Notably, the implication that federal district court judges are more closely bound to past precedent than to their own beliefs may contradict Hubert and Copus’s findings. Hubert and Copus were able to find a statistically significant difference in the outcome of civil rights cases depending on the case’s assignment to a DAJ or a RAJ. This implies that federal district court judges are able to rule according to their own beliefs rather than strictly following past precedent.

The difference in our conclusions can be explained by the differences in the cases we analyze. Hubert and Copus analyzed civil rights cases. In civil rights cases, judges have more discretion regarding when and whether to dismiss a case and settlement details. In contrast, I analyzed cases involving authorizations of electronic intercepts. In these cases, judges merely decide whether evidence presented by law enforcement meets the burden of probable cause to authorize the search. As such, the judge only decides whether or not to authorize the search. The relatively fewer options available to judges in my dataset may contribute to the lack of variation between DAJs and RAJs.

A Persistent Problem

Although there is no statistically significant difference between the average PII rates of DAJs and the average PII rates of RAJs, the overall rates are still poor. The overall average PII across all federal district court judges is 31.53%. I.e., only 31.53% of any given judge’s authorized searches will actually uncover incriminating evidence. Conversely, 68.47% of a federal district court judge’s searches will not uncover incriminating evidence. More than two-thirds of searches will be a fruitless invasion of privacy. That is unacceptable. We should aim to protect our privacy all of the time, not less than one-third of the time.

Policy Suggestions

Clearer Precedent

To increase overall average PIIs, the SCOTUS must establish clearer precedent regarding electronic privacy. Bronshteyn points out one area of confusion: “When the issue is prompted by a new law enforcement tool, the Court assesses the invasiveness of the government’s use of the new technology.” However, when confronting an issue implicated by consumer adoption of a new technology, the Court instead analyzes “the invasiveness of a potential search” and “the role of the technology in modern life”. Both standards of assessment fall under the “reasonable expectation of privacy” test set in *Katz*. Yet neither of these standards of assessment are ever made explicit by the Court. It is entirely possible the Court unintentionally created these differing standards and is still unaware of them. This is just one example of what David Sklansky calls the “doctrinal disarray” surrounding the Fourth Amendment: unclear standards of assessment, loopholes, and exceptions abound in Fourth Amendment precedent. Without precedent clearly defining our electronic privacy rights and how those rights are assessed, federal district court judges are unable to stop law enforcement from routinely violating those rights (as reflected in the low overall average PIIs).

Research Into Average PII Changes

Furthermore, research should be done to determine how overall average PIIs are affected by changes in precedent from the SCOTUS. It may be possible that average PIIs change significantly after a change in precedent as federal district court judges recalibrate their practices to the new ruling. It also may be possible that overall average PIIs steadily decline as the SCOTUS adds more loopholes and exemptions to our already convoluted privacy rights. Further research is needed to determine whether any of these effects exist and, if any do exist, what steps we can take to ensure that our overall average PIIs steadily increase into the future.

Defining Privacy Rights

Lastly, scholars of legal philosophy need to clearly define our evolving privacy rights. Before the SCOTUS can establish clear precedent regarding our privacy rights, scholars need to determine what privacy is in the digital age. Without a relevant and comprehensible definition of modern privacy, precedent will continue to dance around the core issue and fail to pull our privacy from the grave.

Conclusion

In this paper, I sought to uncover whether there is a difference in the extent to which DAJs and RAJs protect electronic privacy. I determined this by studying the average PII across DAJs and across RAJs and then calculating whether the difference between the proportions is statistically significant.

I first separated the cases between those assigned to a DAJ and those assigned to a RAJ. I then found each case's PII. I calculated each judge's average PII by averaging the PIIs of the cases assigned to them. Finally, I averaged the PIIs of the judges belonging to each judge-group to determine the average PII for DAJs and the average PII for RAJs. The average PII for DAJs was 31.68% and the average PII for RAJs was 30.86%.

I performed a z-test in order to determine if there is a statistically significant difference between the average PIIs for each judge-group. I calculated a p-value of approximately .73. I therefore concluded that there is no statistically significant difference between the average PIIs for DAJs and for RAJs. This implies that federal district court judges do not have much room to interpret evidence standards according to their own beliefs.

While the data did not support my hypothesis, the low overall average PIIs across all federal district court judges emphasizes the precarious state of our electronic privacy rights. Consequently, we need a relevant and comprehensible definition of privacy so that the SCOTUS may establish clearer precedent protecting that right. We are left with a choice: either we fight to save our privacy rights or we tacitly accept that our lives will soon be "completely visible and permeable to observers" (Froomkin 1461). The day technology reveals our entire lives to the government is fast approaching, and apathy will only bring it closer. We must revive our privacy rights before they are lost to us.

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Submission Guidelines for Contributions

We welcome contributions from undergraduate students, as well as recent graduates, from any University of California campus. Students may submit any upper division coursework, independent research, or theses that pertain to legal matters. This year, we encouraged submissions relating to the journal theme of liberty. We will decide next year's theme later this year.

For future submissions, please refer to the detailed submission guidelines and instructions below:

Submission Requirements

- Submissions should be selected from your upper-division courses or independent studies
- Papers must be a minimum of 5 pages and should include an abstract
- Submissions must follow the MLA style of formatting
- Ideal papers should relate, at least tangentially, to the journal theme, but we will review papers about any policy / legal subject
- Submissions must have not been published elsewhere

Submission Instructions

- Send your submissions to berkeleylegals@gmail.com by January 31st 2023
 - In the subject line, write "2023 Journal Submission - First Name Last Name"
 - Please attach your paper as a PDF and as a DOCX
- In your email, please also include
 - Your contact information (email, phone number)
 - The term when the paper was written
 - Your graduation year
 - Your program of study