

University of Colorado Law School

Colorado Law Scholarly Commons

Articles

Colorado Law Faculty Scholarship

2019

The Left's Law-and-Order Agenda

Aya Gruber

University of Colorado Law School

Follow this and additional works at: <https://scholar.law.colorado.edu/faculty-articles>



Part of the [Criminal Law Commons](#), [Criminal Procedure Commons](#), [Law and Politics Commons](#), [Law Enforcement and Corrections Commons](#), and the [Privacy Law Commons](#)

Citation Information

Aya Gruber, The Left's Law-and-Order Agenda, JOTWELL, Mar. 8, 2019 (reviewing Kate Levine, Discipline and Policing, 68 Duke L.J. 839 (2019)), <https://crim.jotwell.com/the-lefts-law-and-order-agenda/>, available at <https://scholar.law.colorado.edu/articles/1217/>.

Copyright Statement

Copyright protected. Use of materials from this collection beyond the exceptions provided for in the Fair Use and Educational Use clauses of the U.S. Copyright Law may violate federal law. Permission to publish or reproduce is required.

This Article is brought to you for free and open access by the Colorado Law Faculty Scholarship at Colorado Law Scholarly Commons. It has been accepted for inclusion in Articles by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact lauren.seney@colorado.edu.

The Left's Law-and-Order Agenda

Author : Aya Gruber

Date : March 8, 2019

Kate Levine, [Discipline and Policing](#), 68 **Duke L.J.** 839 (2019).

[Kate Levine](#)'s article *Discipline and Policing* is the embodiment of timeliness. Its argument, in a nutshell, is that the progressive program to reform policing by making police officers' individual disciplinary records (PDRs) transparent is ineffective if not counterproductive, exacerbates racial disparities, and promotes carceral logic. This thesis lies at the intersection of two fascinating criminal justice conversations of the day. The first involves the explosion of scholarly and political exposition on how to reform policing from the bottom up—exposition that has dislodged top-down Fourth Amendment doctrinalism from its stranglehold on academic attention. The second regards the growing trend of powerful political actors, plutocrats, and others in authority to invoke progressive civil libertarian and anti-incarceration arguments when faced with accusations of private and public wrongdoing. In turn, progressives call for swift, summary, and merciless discipline in such cases.

The bedfellows have become very strange, indeed. We live in a world where the most authoritarian U.S. president in decades touts the importance of the presumption of innocence, champions sentence reduction, and critiques police violence. Of course, he does so selectively and calls out the FBI for its raids on his nefarious associates but lauds ICE for raiding the family homes of law-abiding immigrants. We live in a world where liberal talking heads night after night praise federal law enforcement officers and prosecutors for casting wide investigative nets, flipping witnesses by threatening long sentences, and seizing lawyer-client documents. Progressive analysts declare with utmost indignance that Trump should cooperate with Mueller because “innocent people have nothing to hide and nothing to fear from police interrogation.”

Discipline and Policing decries progressives' selective abandonment of civil libertarian, lenient impulses when the stakes involve punishing the left's preferred “bad guys.” The left's instrumental, if not situationally ethical, approach to rights, punishment, and privacy is an understandable response to the trend of powerful politicians, business captains, and abusive cops to manipulate procedural protections to avoid fair accountability. Nevertheless, as Levine points out, we should not be so sanguine about this left law-and-order agenda. In the liberal imaginaire, a system that routinely exposes and summarily punishes bad cops will take down powerful abusers and deter future brutality. However, as Levine argues, the distributional reality is not so neat. “Police brutality is a complex, systemic problem that demands a complex and systemic solution,” she warns. “Scapegoating ‘bad’ officers by outing them as having a ‘bad’ record not only ignores the systemic problems of police violence, but also allows police departments to continue crafting the narrative that the department is a well-functioning organization with just a few bad apples.”

Events including the NYC stop-and-frisk litigation, police killings of unarmed black men, Ferguson, Black Lives Matter, and multiple Obama-era DOJ investigations threw wide open the Overton window on policing reform. Yet, in this moment of radical awareness, the proposals have been disappointingly conservative, and in the case of body cams and other technologies, tinged with capitalist interests. Publishing individual officers' PDRs certainly feels like a drop in the bucket, well short of, for example, New York City's virtual elimination of stop-and-frisk. The extent to which incremental reforms like training, bodycams, and publishing PDRs impede larger de-policing efforts, as Levine contends, is an open empirical question. Nevertheless, Levine's argument that such measures take pressure off police departments under public scrutiny makes intuitive sense.

Perhaps the risk would be worth it if publication of PDRs were relatively effective and cost free. *Discipline and Policing* makes a compelling case that they are not. The article exposes that disciplinary findings are highly

discretionary, often lacking in evidentiary bases, and ultimately racially discriminatory. It provides evidence and anecdotal data that black officers and officers who protest racism are subject to discipline more readily than white officers and officers who are racist. In short, sunlight may be a disinfectant, but it also tends to bleach everything white. Levine further questions whether exposing disciplinary records is effective at deterring police misconduct or boosting community confidence. Levine ruminates that publicizing police wrongdoing might erode police-community relations, increasing the likelihood of violent clashes.

The most fascinating, and no-doubt controversial, moment of the paper comes by way of Levine's equivalence of police officers with public PDRs and marginalized individuals with public criminal records. Here, we can return to the contemporary controversy over right-wing invocations of due process. During the Kavanaugh hearings, for example, supporters of the jurist decried Democrats for declaring a man "guilty" on the basis of forty-year-old "uncorroborated" accusations. Now-justice Kavanaugh was likened to a poor criminal defendant railroaded by a criminal system bent on finding guilt. Liberals rejoined that Kavanaugh's liberty was not at stake and he would be just fine without a Supreme Court appointment. Thus, the level of proof of wrongdoing could be relatively low: The testimony of an apparently credible victim would suffice. In other words, society could afford to put the burden on Kavanaugh to prove his innocence because a job in the nation's High Court is a rare privilege, not a right. Similarly, one might counter Levine's analogy by noting that police officers whose PDRs are exposed do not experience the *civilliter mortuus* of those with criminal records. Levine, in fact, notes that disciplined officers with public PDRs in Miami-Dade County kept their jobs. One might reasonably argue that publicizing police PDRs is a good way to try to curb misconduct and send a message without ruining officers' lives forever, much in the way Kavanaugh remaining on the D.C. Circuit might have struck a balance between concerns over sexual assault and concerns over not ruining the man's life without more proof.

Still, I am sympathetic to Levine's point that the increasing popularity of allegation-equals-truth arguments and judging individuals' current character by their past history portends to disproportionately affect the marginalized. I continue to worry that outrage over the Kavanaugh hearings will translate into policies that burden poor men of color accused of sexual assault and those with sex crimes records. Encouraging the public to obsess over individuals' alleged past wrongdoing, whether in a judicial hearing or through transparent PDRs, feels fully inconsistent with the ban-the-box sentiments currently in vogue with progressives. Moreover, one is left to wonder whether PDR sunshine will pave the way for the widespread exposure of the personnel files of other employees who serve the public (doctors, lawyers, teachers). If police insubordination is ground for summary termination, why not fire faculty who are insubordinate to deans? [Benjamin Levin](#) has written compellingly about this problematic phenomenon in [Criminal Employment Law](#).

In the end, I am not entirely sure that PDR transparency will translate into a reversal of ban-the-box sentiments or a greater rush to judge those accused of past crimes. Nor am I fully convinced that PDR transparency creates minimal deterrent value and maximal harm to police officers' lives. But I am persuaded that the cost of exposing PDRs to sunlight is much greater than meets the eye, and I am grateful to Professor Levine for making me think about it.

Cite as: Aya Gruber, *The Left's Law-and-Order Agenda*, JOTWELL (March 8, 2019) (reviewing Kate Levine, *Discipline and Policing*, 68 *Duke L.J.* 839 (2019)), <https://crim.jotwell.com/the-lefts-law-and-order-agenda/>.