

## Liberalism and Policing: The State We're In

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(Online essay available at *In the Long Run*, University of Cambridge, 11/22/2018)

I was twenty-six when I first drove through the heavily guarded gates of the FBI Academy on Marine Corps Base, Quantico. After four months of training, I was sent into the field to conduct investigations as an FBI Special Agent. This work afforded me valuable, eye-opening experiences, but I ultimately left government service for academic philosophy—in part to try to better make sense of the role of law enforcement in liberal societies.

I was interested in the extent to which executive norms have changed and continue to change. The shift in norms has happened slowly, at many times and for many reasons. The Internet and tech booms—paving the way for new forms of electronic surveillance—predated 9/11 by several years, while the police's vast use of secret informants and sanctioned law-breaking activity began well before that.

In one sense, many of these issues culminated in 2017 when the President of the United States fired the Director of the FBI—raising questions about the rule of law and whether the FBI was a mere instrument of political whim. But our history illuminates a much broader problem in both government generally and policing specifically: From top to bottom, executive authority and discretionary power have grown to such a degree that it has trended toward illiberal practices and policies. This is not a local problem or a party problem. It is a problem about the legal, political, and philosophical norms of democracies in the liberal tradition.

I tried to embrace a principled methodology when I began exploring these problems as a book project [*The Retrieval of Liberalism in Policing* (Oxford, 2019)]. There are of course many fruitful approaches that one might pursue, but I settled upon transitional nonideal theory. This means that one must make assumptions about the minimum requirements of a broad ideal theory of justice, which allows one to address actual problems of injustice (nonideal theory) in a way that transitions toward the ideal.

Of course, “liberalism” and the “liberal tradition” mean different things to different people and it can be difficult to define the liberal ideal neutrally (consider “classical liberalism,” “neoliberalism,” “liberal feminism,” “liberal egalitarianism,” and so on). However, the various ways that people think about the basic tenets of the liberal tradition in political and legal philosophy do have overlapping features—features that make a liberal theory liberal (e.g., equality, freedom, the rule of law).

These features give rise to a basic conception of persons that constrains nonideal theorizing about injustice. My book develops a tripartite conception of liberal personhood, with the first two facets—*reciprocator* (having to do with one's equal legal and social status) and *moral agent* (having to do with one's capacity for certain natural properties that allow one to be treated as free and responsible)—giving rise to the third facet, *human dignity* (which has both a social and moral component).

There are a variety of ways that law enforcement policies and the pursuit of security may count as an affront to the basic tenets of liberalism and liberal personhood. In recent years, much attention has been focused upon police brutality in places such as the United States. Most people agree that brutality is a clear example of police power that has exceeded its moral limits. There is often no difficult moral question to address in such cases because there is simply no legitimate excuse when government agents denigrate one's dignity and break the law.

Other questions about the limits of executive power are not so straightforward. Consider the police's pervasive use of informants, sanctioned law-breaking, and electronic surveillance. It is surprising that so little attention has been given to spelling out just where the moral limits of this sort of power lie.

Some informants are tasked by the police to engage in risky undercover operations when the police have leverage over the informant (e.g., the police have evidence that the informant committed a crime). The bargaining process involved in such agreements resembles the bargaining process associated with (unconscionable) contracts. Procedurally, informants may have no *real* choice about whether to accept the police's terms, nor may they have adequate knowledge of the risks involved in the undercover operation. Substantively, the terms of such agreements may unduly weigh in favor of the police and constitute an affront to the informant's liberal personhood.

Or consider the police's authority to break the law in order to enforce the law (what the FBI calls "otherwise illegal activity," or "OIA"). There are no doubt instances in which OIA is necessary—emergencies in which there is a risk of death or serious bodily harm come to mind. But one might think that we should examine the limits of OIA more closely, lest we slide farther from rule of law principles. John Locke's notion of "prerogative power"—as well as historic case law regarding constraints upon the Executive's authority to break the law—are worth revisiting.

Law enforcement use of electronic surveillance is also a pressing concern today. However, worries about surveillance can lead to amorphous questions about the nature of privacy. The difficulty is in part based upon the fact that personal and societal privacy norms have changed in recent years. The larger problem is that an undue focus upon the idea of *privacy* may distract us from the underlying issue of the police's surveillance *discretion*. For example, if the scope of the police's discretionary power to engage in OIA (noted above) is unjustified, then surveillance associated with that OIA might also be construed as unjustified because it stems from unjustified OIA. Such surveillance can thus be described as an indirect rule of law departure inasmuch as it is fruit of the poisonous OIA tree.

Louis Brandeis's dissent in the case, *Olmstead v. United States* (1928), seems especially prescient today: "In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, omnipresent teacher. For good or ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself." History tells us that security and the rule of law have never been balanced perfectly. But perhaps it is time to more closely examine whether executive power—from presidents to policing—has exceeded its scope given the basic tenets of the liberal tradition.