

THE RETRIEVAL OF  
LIBERALISM IN POLICING

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## Preface

This book has, in a sense, been in progress for well over a decade, though not in the typical way. When I was twenty-six, I first drove through the heavily guarded gates of the FBI Academy on Marine Corp Base, Quantico, where I was to live the next four months while completing New Agent Training to become an FBI Special Agent. My time at Quantico was equal parts thrilling and surreal, and I certainly feel fortunate to have had the experience. At the time, of course, I had no idea that I would eventually leave government service for academia. I had in fact spent three grueling years in law school (followed by a wonderful judicial clerkship with a federal judge) for the sole reason of making myself competitive in the Bureau's application process. After graduating from the Academy, I conducted a variety of investigations while assigned to the FBI's Richmond and Washington, D.C., field offices—followed by a year as a Supervisory Special Agent at FBI Headquarters. Like most FBI agents, I was required to handle a wide range of responsibilities, from executing search warrants and interrogating subjects to debriefing informants and meeting with foreign officials across Europe. As I say, it was an experience for which I am grateful, and this book could not have been written without my first setting foot in Quantico in October 2005.

During the summer of 2012, I left the FBI after being offered a doctoral fellowship at the University of Virginia in Charlottesville, a town that my wife and I had grown to love upon first living there in 2006. This change came about for a variety of reasons, many of which had nothing to do with the FBI. The change was in part about my desire to teach and write, and it was also about pursuing the life that my wife and I believed would be best for our family. It would nevertheless be disingenuous to suggest that those are the only reasons that I left. As with any job, there were certainly aspects of being an FBI agent that I did not enjoy (getting polygraphed comes to mind). But when those dislikes became more pronounced—more of a concern about the nature of the job than a mere annoyance of the job—they also became contributing reasons for my decision to leave. In a way, one might chalk this up to my not being the right person for the job—my not having the right sort of personality for certain aspects of the job, perhaps. On the other hand, my concerns struck me as being reasonable, though it was not always easy to articulate them with nuance.

Upon arriving at the University of Virginia, then, there was little doubt that my work would in some way be an attempt to make sense of my concerns as an FBI agent.



Clearly, it would be inappropriate (and potentially illegal) to write from the perspective of my personal experience as an agent, and I certainly have not done that in this book. This is a work of scholarship, and, without exception, it is based on academic and other public sources that are available to anyone. However, it is important to me that I am candid about my background or else I would feel that I was unjustifiably concealing the perspective from which I wrote. That concludes (mercifully) the biographical portion of the book—though I do want to thank a few people for their help over the years.

This book began as a doctoral dissertation that I started writing on January 20, 2015. I had come to the University of Virginia with the idea of working with John Simmons, enrolling in his seminar at the law school, *Rescue, Charity, and Justice*, during my first semester in 2012. He took me on as a Teaching Assistant for two of his undergraduate courses, *Political Philosophy* and *Philosophical Problems in Law*, which gave me the opportunity to think about the kind of teacher I wanted to become. When I finally got around to sharing my ideas for a dissertation, John supported what I now see was a fairly idiosyncratic topic. I greatly appreciate his agreeing to work with me and his thoughtful comments—both encouraging and frank—as well as his humor and easy manner. It goes without saying that many of the good things that made it from the dissertation to the book are a result of one of his comments or suggestions. I take the blame for the rest.

Early drafts of Chapters 4 and 5 were presented as a colloquium paper and a “Philosophy After Dark” paper, respectively, at the University of Virginia, and drafts of Chapter 5 were presented at the 2017 Annual Meeting of the Academy of Criminal Justice Sciences in Kansas City and the 2018 Central Division Meeting of the American Philosophical Association in Chicago. I thank the faculty and the graduate students for their helpful comments in those settings. I also thank Sahar Akhtar, Colin Bird, Kimberly Kessler Ferzan, and Rebecca Stangl for their helpful comments and encouragement on an early draft of the project. At Oxford University Press, I am indebted to Peter Ohlin for supporting this project from the beginning and for his keen suggestions throughout the publication process (including the early suggestion to write a chapter on surveillance). I thank Oxford’s anonymous referees, whose many thoughtful comments improved the book tremendously (including the addition of an introductory chapter). Finally, I want to acknowledge my colleagues and students at Radford University—my first academic home as a faculty member. Radford sits in the heart of Virginia’s bucolic New River Valley, where it was a pleasure to write Chapters 1 and 6 during the spring of 2017 and revise the book through 2018.

There are three groups outside the academy that deserve recognition. First, I thank those serving in law enforcement generally and the FBI specifically. It is not an easy job (especially the FBI of recent years) and I am grateful to those whose goal is truly the pursuit of justice. There are two such people—Jim and Jane—for whom I am particularly

grateful, both for their mentorship and their friendship. Next, I feel compelled to pay homage to the mountain trails in central and southwest Virginia. Although I am not in the habit of thanking inanimate objects, the number of hours that I spent running and hiking in those woods—and the number of ideas in this book that came to me during that time—is worth acknowledging. I will always associate this book with the trails in the tract of woods called Biscuit Run, adjacent to our old house in Charlottesville; the secluded farm trails on Carter Mountain, near Jefferson's Monticello; the rolling and rugged trails at Walnut Creek in rural Albemarle County; the trails at Sugar Hollow just outside of Charlottesville, which link up to the Appalachian Trail along the Blue Ridge Parkway and through the Shenandoah National Park; and, most recently, the trails at Pandapas Pond in the Jefferson National Forest near Blacksburg.

Finally, I thank my family. Pursuing this book meant leaving what many people would describe as a very good job, and I think a lot of those people viewed my decision as foolish. If my parents ever thought that (and I wouldn't blame them), they never let on. They were rather a source of constant support, and I feel so very fortunate to have them as parents. My brother should surely be noted for his inspiring feats of physical endurance that seem not completely unlike the endurance needed to finish a project such as this. My wife, Melissa, and my two boys, Henry and Oliver, deserve a different sort of gratitude altogether. A talented clinical psychologist, Melissa has joined me on countless adventures and misadventures, which have included—among many other things—moving to a new town every three years or so. She graciously read countless drafts of each chapter, and she gracefully guided me through much of my stress along the way to finishing the book. I am thankful for her patience (and much more), and I am thankful for the love and levity that our boys brought to some of the heavier times. As I write these words in our home on the edge of the Jefferson National Forest, I am deeply aware of my good fortune that made the book possible.

L.W.H.

Blacksburg, Virginia, May 2018



## Introduction

### *The Receding of Liberalism in Policing*

It is not altogether clear when and why things began to change—a change involving shifts in legal and political norms that seemed to be in response to external threats to security. The obvious answer is the terrorist attacks on September 11, 2001, but a single day cannot tell the whole story adequately. The shift in norms very likely happened slowly—at many times and for many reasons. The Internet and tech booms—which paved the way for new forms of electronic surveillance—predated 9/11 by several years, while the police’s vast use of secret informants and deceptive uncover operations began well before that. On the other hand, the recent uptick in reactionary movements—movements in which the rule of law seems expendable—began many years after 9/11 and continues to this day. The one thing that is clear is that norms are changing.

Perhaps emblematic of these changes is the fact that we have entered an era in which the label “fascist” is regularly used to describe the policies and leaders in Western states. Although such pronouncements are often no more than shrill political pandering, one might wonder whether the grab bag of emerging policy trends—from mass surveillance and police militarization to the backlash against ethnic and cultural minorities—suggests that there is something to the label.<sup>1</sup> To put it another way, the recent surge

<sup>1</sup> In January 2017, after a week in office, the President of the United States issued a travel ban targeting several Muslim-majority countries after having displayed animus toward Muslims and Islam; a subsequent iteration of the ban was upheld by the Supreme Court. In the spring of 2018, the President’s administration followed a policy of separating families who attempt to enter the country illegally, including asylum seekers; the policy was suspended after public and political pressure. Also, the president rescinded a directive that limited the transfer of military-grade equipment to local law enforcement, and United States Attorney General Jeff Sessions dramatically changed the direction of criminal justice in 2017. For a succinct (and critical) summary of Sessions’s changes, see David Cole, *Trump’s Inquisitor*, THE NEW YORK REVIEW OF BOOKS 16–18, April 19, 2018 (describing how Sessions (1) “ordered all federal prosecutors across the nation to seek the most extreme charges possible against criminal defendants, regardless of extenuating circumstances,” (2) relaunched the “war on drugs,” (3) retracted a “memo that sought to end the federal government’s reliance on private prisons,” (4) reduced policing





in references to Orwell's *1984* may not always be apt, but neither are those references always overblown. Indeed, emerging movements and shifts in norms have had real and tragic results—even if not tied directly to official policy. To take just one recent example, several white supremacist rallies were held in Charlottesville—including at the University of Virginia, where I did my doctoral work—resulting in the murder of Heather Heyer, who was peacefully counter-protesting when a neo-Nazi drove his car into the crowd in which she was standing.<sup>2</sup> Although the principles that drive this sort of political violence are not new, they are being embraced by leaders and followers anew. Whatever else it might mean, fascism has to do with a particular way of governing people and a particular conception of the people being governed. This is true of almost any worldview and can be said about liberalism: liberalism, too, has to do with a particular way of governing people, as well as a particular conception of those being governed. One of the goals of this book is to show how policing in liberal societies has become illiberal in light of responses to internal and external threats to security. This is done by examining the moral limits on modern police practices that flow from the basic tenets of the liberal tradition in political and legal philosophy.

Of course, the phrase “liberal tradition” means different things to different people and can be difficult to pin down (consider “classical liberalism,” “neoliberalism,” “liberal feminism,” “liberal egalitarianism,” and so on). An entire chapter in this book (Chapter 2) is devoted to the task, but a few brief words here may help lay the groundwork. Wittgenstein was famous for delineating concepts in terms of “family resemblances” based upon the different ways that language is used. To make the point, he described how things like “games” share many overlapping features, yet there is no single feature that all games share. Although it is not a perfect analogy, something similar can be said with respect to describing the liberal tradition: the various ways that people think about the basic tenets of the liberal tradition in political and legal philosophy have overlapping features. To put a Rawlsian spin on it, just as it might be possible to reach an “overlapping consensus” about the principles of justice among those with

oversight and sought to back out of “consent decrees with cities that had demonstrated discriminatory policing practices,” (5) reversed the Justice Department's position on protecting people from discrimination based upon sexual orientation, as well as Justice Department positions on voter suppression).

<sup>2</sup> Heyer was part of large group protesting white supremacists when James Fields drove his car into the group of protesters, killing Heyer. Earlier in the day, Fields was photographed standing with Vanguard America, a white supremacist, neo-Nazi group. Jason Wilson, *Charlottesville: Man Charged with Murder Was Pictured at Neo-Nazi Rally*, THE GUARDIAN, August 13, 2017, <https://www.theguardian.com/us-news/2017/aug/13/charlottesville-james-fields-charged-with-was-pictured-at-neo-nazi-rally-vanguard-america>.



different conceptions of justice, it might be possible to achieve an overlapping consensus about the basic tenets of the liberal tradition among the various options.

For example, most people believe that John Locke's philosophy had an important impact on Western systems of government, including a profound impact on the framers of the US Constitution.<sup>3</sup> Among many other things, Locke is known for his social contract theory that yields a cooperative scheme in which persons reciprocate to produce a morally and prudentially superior human condition. Under the theory, the state's authority is based upon persons voluntarily entering the cooperative scheme. The theory underscores an ideal conception of persons as free and equal (including because of the focus on voluntarism) and governed by the rule of law (rather than arbitrary decisions of political officials). One can glean a few things from this philosophical backdrop. Existing states—such as the United States—are based upon the idea that working together has both prudential and moral benefits. A political community can, say, protect one's rights by collectively providing security and centralizing the right to punish—and this promotes the rule of law by eliminating bias and personal incapacity.

In one sense, this book's description of the liberal tradition has its roots in certain aspects of the Lockean tradition. It does not, however, treat that tradition as exclusive. While recognizing differences, the book draws upon a variety of modern and contemporary sources to illuminate an overlapping conception of the liberal polity. Rawlsian political philosophy is deployed, for instance, to establish a principled methodology—though the book does not rehash (mercifully) every substantive point that Rawls made. One obvious methodological challenge with this sort of project is striking an appropriate balance between abstract normative arguments and engagement with existing institutional legal materials and practices. The book's approach is to holistically address relevant legislation, case law, and legal practice as necessary. The goal is thus to balance theory and practice, drawing out the indispensability of basing any analysis of practical jurisprudential problems upon a solid theoretical foundation.

Achieving this goal—and engaging with concrete legal materials and practices—raises a question of scope: With whose institutional materials should the book engage? The book focuses upon the United States and the US Constitution, but there are, of course, many states and institutional materials that might be described as “liberal.” There are obvious similarities between the United States and the United Kingdom (and

<sup>3</sup> To note just one recent example, see DAVID GRAY, *THE FOURTH AMENDMENT IN AN AGE OF SURVEILLANCE* 146 (2017) (arguing that “history suggests that the best reading of ‘The right’ in the Fourth Amendment is as a reference to and enshrinement of fundamental natural or political rights in the Lockean tradition”). Gray suggests that those who read the Constitution's Preamble at the time of its founding “would have understood . . . [it] as the opening phrases of a social contract in the Lockean tradition between a people and its government [establishing a collective enterprise].” *Id.* at 148.



other states), including the common law and its influence on constitutional law. There are also important differences between these two political cultures—particularly with respect to the details of policing. There is no doubt that the prevailing conception of the police in the United States is not representative of all liberal states. The book’s analysis thus would be different had it focused upon historical British cases and institutional materials. Although Chapter 1 engages in a limited examination of the role of the police in other states—primarily the United Kingdom—a comprehensive comparative analysis of how liberal values manifest themselves in different policing cultures will not be taken up here.

The reason for this is that the deep jurisprudential and political resonances (among other similarities) in each culture connect them philosophically in a very basic way. And the purpose of the book is to focus upon the broad, overlapping features that are fundamental to a multitude of polities and hence the “liberal tradition.” Accordingly, the book’s reliance upon US law might be thought of as providing particularly detailed *examples* from within the liberal polity—examples that are richer than generic thought experiments and more manageable than ongoing comparative analyses with other states. And, more times than not, the book uses examples involving the Federal Bureau of Investigation (FBI). This is primarily because the FBI has such a vast jurisdiction—putting on display the reach and role of executive power—but also because there exists a general familiarity with the FBI. The spotlight has indeed burned brightly on the FBI in recent years. In addition to the typical interest in the FBI’s investigations and investigative tactics, the President of the United States made international news upon firing FBI Director James Comey in 2017. All the commotion stemmed in part from the fact that—at the time Comey was fired—associates of the President’s 2016 presidential campaign were under investigation by the FBI for improper contact with the Russian government: Comey’s firing thus raised questions about the rule of law generally and, specifically, whether the FBI was a mere instrument of political whim.<sup>4</sup> Other

<sup>4</sup> Shortly after three members of the President’s campaign team (Paul Manafort, Richard Gates, and George Papadopoulos) were indicted in Special Counsel (and former FBI Director) Robert Mueller’s investigation, the President expressed frustration about his ability to interfere with on-going investigations (including his ability to order up investigations of his political opponents). WMAL Radio, Interview with Larry O’Connor, November 3, 2017 (stating “the saddest thing is, because I am the President...I am not supposed to be involved with the Justice Department...[and]...the FBI...doing the kind of things I would love to be doing”). Subsequently, the President’s former National Security Advisor, Michael Flynn, pled guilty to lying to the FBI about the nature of his communication with Russian government officials. (Mueller’s investigation later resulted in the indictment of twenty-five Russians for interfering in the 2016 US presidential election; however, the US President publicly sided with Russian President Vladimir Putin over the US intelligence community on July 16, 2018, saying he didn’t see any reason why Russia would have hacked Democratic computer servers.) Flynn’s criminality raised questions (including whether other senior administration officials



examples involving the FBI will appear with some regularity in the coming chapters. And although the role of FBI agents undoubtedly differs from, say, the role of uniformed officers and city detectives, there are, of course, commonalities that make them all law enforcement officers. Much of the book's focus will be upon those concrete commonalities, including the police's reciprocal relationship with citizens, their use of discretion and deception, and so on.

To be sure, it is not obvious how jurisprudential and political history relate to concrete examples of policing, nor how they should be integrated (if at all) into abstract theorizing about liberalism. But that is, again, a question of methodology that will be addressed head-on. Briefly, one motivating factor for the book's approach is this: a great deal of police power in a state such as the United States is *not* governed by the Constitution, meaning that one cannot simply rely upon, say, an analysis of Supreme Court opinions on the Fourth Amendment to determine the extent to which police power is constrained. Moral considerations underlie many of the regulatory rules governing police power, yet many of those considerations have not been spelled out. It is in part for this reason that it seems justified to treat questions about policing as involving both theoretical and practical legal issues that are inextricably intertwined with the larger goals of political society. The broader point is that this book endeavors to provide a general analysis of police in a liberal polity, focusing upon fundamental concepts such as the rule of law, reciprocity, and free and equal persons. So while the concrete examples in the book are set in the United States and draw upon its institutional and historical sources, the fundamental values being addressed are shared by liberal polities generally. The guiding thought is to illuminate how these abstract values are interconnected with practical considerations, namely, the relation between police and the liberal polity and how that relation constrains policing in the liberal polity.

were aware of the criminality) about obstruction of justice in light of the President's firing of FBI Director James Comey because—prior to firing Comey—the President allegedly asked Comey to let Flynn go. Carol D. Leonnig, Adam Entous, Devlin Barrett, and Matt Zapotosky, *Michael Flynn Pleads Guilty to Lying to FBI on Contacts with Russian Ambassador*, WASH. POST, December 1, 2017, [https://www.washingtonpost.com/politics/michael-flynn-charged-with-making-false-statement-to-the-fbi/2017/12/01/e03a6c48-d6a2-11e7-9461-ba77d604373d\\_story.html?utm\\_term=.2a12c6722e16](https://www.washingtonpost.com/politics/michael-flynn-charged-with-making-false-statement-to-the-fbi/2017/12/01/e03a6c48-d6a2-11e7-9461-ba77d604373d_story.html?utm_term=.2a12c6722e16). Unrelated questions about the administration's commitment to the rule of law were raised when the President pardoned former Sheriff Joe Arpaio, who was convicted of willfully defying a court order (regarding his department systematically discriminating against Latinos). The pardon was issued weeks after the court decision and before an appeal (which had been announced) or sentencing. Devlin Barrett and Abby Phillip, *Trump Pardons Former Arizona Sheriff Joe Arpaio*, WASH. POST, August 25, 2017, [https://www.washingtonpost.com/world/national-security/trump-pardons-former-arizona-sheriff-joe-arpaio/2017/08/25/afbf4b6-86b1-11e7-961d-2f373b3977ee\\_story.html?utm\\_term=.cd0272234279](https://www.washingtonpost.com/world/national-security/trump-pardons-former-arizona-sheriff-joe-arpaio/2017/08/25/afbf4b6-86b1-11e7-961d-2f373b3977ee_story.html?utm_term=.cd0272234279).



There is little question about whether the issue of policing is a pressing societal concern today. Since at least 2014, it has been difficult to open a newspaper without seeing a headline about the questionable killing of a person by a police officer. These cases often involved police officers shooting persons in the back who did not have weapons and who were fleeing, and they often involved a white officer and a black victim.<sup>5</sup> Some of these incidents resulted in widespread societal unrest.<sup>6</sup> The headlines were not only about shootings, but also about police officers who allegedly used unnecessary force against persons—such as unauthorized chokeholds—that resulted in death.<sup>7</sup> Some have suggested that this violence stems in part from overly aggressive (and unlawful) “stop and frisk” policies, which seem to give police the discretion to stop and frisk anyone for any reason.<sup>8</sup> Others have reported on the shocking existence of so-called

<sup>5</sup> See, e.g., Michael S. Schmidt and Matt Apuzzo, *South Carolina Officer Is Charged with Murder of Walter Scott*, N.Y. TIMES, April 8, 2015, at A1 (“A white police officer in North Charleston, S.C., was charged with murder on Tuesday after a video surfaced showing him shooting in the back and killing an apparently unarmed black man while the man ran away”); Monica Davey and Mitch Smith, *Chicago Protests Mostly Peaceful After Video of Police Shooting Is Released*, N.Y. TIMES, November 25, 2015, at A1 (describing a video showing a “young man running and then walking past officers in the middle of the street and spinning when bullets suddenly strike him down”). The central point is that these sorts of cases often involve highly questionable encounters, circumstances, and tactics. See John Kleinig, *To Protect & Serve*, THE CRITIQUE, May 24, 2016, <http://www.thecritique.com/articles/to-protect-serve-what-is-wrong-with-the-policing-of-minorities-in-the-u-s/>.

<sup>6</sup> See, e.g., Tanzina Vega, Timothy Williams, and Erik Eckholm, *Emotions Flare in Missouri Amid Police Statements*, N.Y. TIMES, August 16, 2014, at A1; Sheryl Gay Stolberg, *Baltimore Enlists National Guard and a Curfew to Fight Riots and Looting*, N.Y. TIMES, April 28, 2015, at A1 (“Maryland’s governor activated the National Guard on Monday and the city of Baltimore announced a curfew for all residents as a turbulent day that began with the funeral of 25-year-old Freddie Gray, the nation’s latest symbol of police brutality, ended with rioting by rock-throwing youths, arson, looting and at least 15 police officers injured”).

<sup>7</sup> See, e.g., Joseph Goldstein and Nate Schweber, *Man’s Death After Chokehold Raises Old Issue for the Police*, N.Y. TIMES, July 19, 2014, at A1 (describing how Eric Garner died during an arrest that involved what appeared to be a chokehold); Stolberg, *supra* note 6 (regarding the allegation that police used unnecessary force in the arrest and transportation of Freddie Gray, who fell into a coma during police transportation and subsequently died).

<sup>8</sup> See, e.g., GRAY, *supra* note 3, at 278–82 (ultimately arguing that the Fourth Amendment guarantees collective rights and thus “[a]ny member of the people should have standing to challenge [stop and frisk] programs, means, or methods that pose a general threat to the security of the people”). *Id.* Note that a police stop and frisk is constitutional only if the police have *reasonable suspicion* (based upon “specific and articulable facts”) that a person has committed, is committing, or is about to commit a crime and has a reasonable belief that the person “may be armed and presently dangerous.” *Terry v. Ohio*, 392 U.S. 1, 21–30 (1968). But consider, for instance, that the New York Police Department documented 685,724 stops (and 381,704 frisks) in 2011, and, of those frisked, a weapon was found only 1.9% of the time; moreover, more than 70%



black sites—in *America*—in which suspects were routinely denied civil liberties.<sup>9</sup> More generally, in the final days of the Obama Administration, the Department of Justice released a lengthy report regarding the failures of the Chicago Police Department, using the word “unconstitutional” twenty-two times.<sup>10</sup> Perhaps it is naïve to say, but this is not what one expects from a “liberal state.”<sup>11</sup>

To be sure, most people—wherever they live—believe that things like brutality, corruption, and exceeding the parameters of search and seizure law are clear examples of police power that has exceeded its moral limits. The conduct is illegal, but it also seems intuitively unjust. It is in part for this reason that there is often no difficult moral question to address in these sorts of cases: if the facts are as they appear (many of the preceding examples were caught on video), then there is not much “practical philosophy” that needs to be done. Still, it is certainly worth examining *why* the liberal tradition construes brutality as unjust, and the book will begin that conversation in Chapter 1. Other questions about the limits of the police’s power—particularly with respect to the police’s use of “confidential human sources” (CHSs), “sting operations,” and electronic surveillance—are not so straightforward.<sup>12</sup> These aspects of the police’s

of those stopped and frisked in the ten precincts with the lowest Black and Latino populations were Black and Latino. NEW YORK CIVIL LIBERTIES UNION, 2012 STOP AND FRISK REPORT 2 (2012), [https://www.nyclu.org/sites/default/files/publications/NYCLU\\_2011\\_Stop-and-Frisk\\_Report.pdf](https://www.nyclu.org/sites/default/files/publications/NYCLU_2011_Stop-and-Frisk_Report.pdf).

<sup>9</sup> See, e.g., Spencer Ackerman, *The Disappeared: Chicago Police Detain Americans at Abuse-Laden “Black Site,”* THE GUARDIAN, February 24, 2015, <https://www.theguardian.com/us-news/2015/feb/24/chicago-police-detain-americans-black-site> (reporting that the “Chicago police department operates an off-the-books interrogation compound, rendering Americans unable to be found by family or attorneys while locked inside what lawyers say is the domestic equivalent of a CIA black site”).

<sup>10</sup> Benjamin Wallace-Wells, *Crime in Chicago and America’s Policing Crisis,* THE NEW YORKER, January 15, 2017, <http://www.newyorker.com/news/benjamin-wallace-wells/crime-in-chicago-and-americas-policing-crisis>.

<sup>11</sup> Moreover, it is rare for the police to be held accountable for their misconduct. See Kimbriell Kelly, Wesley Lowery, and Steven Rich, *Fired/Rehired,* WASH. POST, August 3, 2017, [https://www.washingtonpost.com/graphics/2017/investigations/police-fired-rehired/?utm\\_term=.9c2fac83021e&wpisrc=nl\\_evening&wpmm=1](https://www.washingtonpost.com/graphics/2017/investigations/police-fired-rehired/?utm_term=.9c2fac83021e&wpisrc=nl_evening&wpmm=1) (describing how “the nation’s largest police departments have fired at least 1,881 officers for misconduct that betrayed the public’s trust, from cheating on overtime to unjustified shootings . . . But . . . that departments have been forced to reinstate more than 450 officers after appeals required by union contracts”).

<sup>12</sup> “Confidential human source” (CHS) is defined as “any individual who is believed to be providing useful and credible information to the FBI for any authorized information collection activity, and from whom the FBI expects or intends to obtain additional useful and credible information in the future, and whose identity, information, or relationship with the FBI warrants confidential handling.” The Attorney General’s Guidelines Regarding the Use of FBI Confidential Human Sources § I.B.7 (2006), <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/>





power raise both complex moral questions and complex practical questions. Given the prevalence of the police's use of CHSs and stings in everything from high-profile national security cases to low-level drug deals, it is surprising that so little attention has been given to spelling out just where the moral limits of this sort of police power lie. Although legal commentators often suggest that these tactics constitute bad policy and raise ethical concerns, they are rarely examined as a normative problem in any meaningful way. And while electronic surveillance has received a great deal of attention since the 2013 revelations about the National Security Agency's (NSA) programs, there has been little attempt to situate mass surveillance within the basic tenets of the liberal tradition in political and legal philosophy.

A key motivation for examining these particular tactics is the extent to which they might be deemed a departure from the rule of law. In contemporary terms, the phrase "law and order" has become emblematic of the sort of policies that are perceived to offer a return to security. Paradoxically, the phrase raises questions about the extent to which the police must follow the rules in pursuit of their duty to establish law and order. Balancing security and rule of law principles is nothing new in liberal states.<sup>13</sup> Consider the Doolittle Committee's conclusion about the Central Intelligence Agency's

ag-guidelines-use-of-fbi-chs.pdf. Generally speaking, by sting operations I mean undercover operations in which law enforcement officers—and CHSs—gather evidence against criminal subjects by engaging in clandestine acts that would otherwise be a violation of substantive criminal law ("otherwise illegal activity" [OIA]). "Otherwise illegal activity" is defined by the FBI as "conduct which constitutes a crime under local, state, or federal law if engaged in by a person acting without authorization." Domestic Investigations and Operations Guide § 17.1. (2013), <https://vault.fbi.gov/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29/fbi-domestic-investigations-and-operations-guide-diog-2013-version/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29%202013%20Version%20Part%201%20of%201/view>. The literature typically does not focus upon OIA (and a "sting" does not require the use of OIA) strictly speaking, but rather something like the more general notion of proactive undercover operations "that exceed infiltration and observation and involve government agents covertly manipulating the appearance of criminal opportunities." Richard H. McAdams, *The Political Economy of Entrapment*, 96 J. CRIM. LAW & CRIMINOLOGY 107, 113 (2005). CHSs and stings will be discussed in Chapters 4 and 5.

<sup>13</sup> Of course, this sort of "balancing" of values involves a great many complexities that require much caution. This book generally embraces the view that we should be loath to give up our commitment to liberties (particularly with respect to minorities, including those who are suspected and accused of wrongdoing) in exchange for greater security (or a symbolic gain in security). This is in part because of the risk that enhanced state power (at the expense of liberty) poses to the basic tenets of liberalism. The book embraces a methodology that includes liberal priority rules from which the state may not depart when pursuing security and other values. See Jeremy Waldron, *Security and Liberty: The Image of Balance*, 11 THE JOURNAL OF POLITICAL PHILOSOPHY 191, 210 (2003), for an overview of the complexities inherent in balancing values and for a call to take this sort of cautious approach.



(CIA) covert activities at the height of the Cold War in 1954: “It is now clear that we are facing an implacable enemy whose avowed objective is world domination by whatever means and at whatever cost. There are no rules in such a game. Hitherto acceptable norms of human conduct do not apply.”<sup>14</sup> It is easy to make the case that this sentiment has been embraced anew in recent years, including the aftermath of the terrorist attacks on September 11, 2001. And this is clearly relevant in the domestic context, where local, state, and federal police officers deal with both criminal and national security matters. The police surely need special powers to keep up with criminals (who are not typically concerned with candor, of course) and protect the citizenry from harm. But the use of the tactics in question often raises a unique issue, namely, the police’s engagement in activity that is (or otherwise would be) a violation of substantive criminal law. In one sense, this implies that wrongdoing is relative, depending upon the identity of the perpetrator and the objective of the wrongdoing, and this seems to depart from basic rule of law principles.<sup>15</sup> Perhaps such departures are justified in certain cases, but the prevalence of the use of CHSs, stings, and surveillance—and the lack of normative analysis of those uses—are good reasons to wonder where the limits of these tactics lie. One way to describe this book, then, is as an account of what it might mean for liberalism to return to basics. The book’s title thus does not refer to some sacrosanct era of police history (which surely never existed), but rather the way that liberalism’s basic tenets constrain the police’s scope and power.<sup>16</sup> To put it succinctly, the question that this project seeks to answer is: What are the moral limits of policing in liberal states?

## **I.1 WHAT SHOULD WE TALK ABOUT WHEN WE TALK ABOUT THE POLICE?**

How should theorizing about the police be reconciled with the practical reality of policing? Robert Jackall memorably illustrated the difficulty of answering this question

<sup>14</sup> Doolittle Committee, *Report on the Covert Activities of the Central Intelligence Agency*, September 30, 1954, [https://www.cia.gov/library/readingroom/docs/doolittle\\_report.pdf](https://www.cia.gov/library/readingroom/docs/doolittle_report.pdf). This brings to mind the phrase, *silent enim legēs inter arma* (roughly, “the law falls silent in times of war”), which is often attributed to Cicero.

<sup>15</sup> Elizabeth E. Joh, *Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62.1 STAN. L. REV. 155, 192 (2009).

<sup>16</sup> Chapter 1 includes a brief (and general) history of policing in the liberal polity. For a succinct overview of the troubling aspects of that history, see Alex S. Vitale, *The Myth of Liberal Policing*, THE NEW INQUIRY, April 5, 2017, <https://thenewinquiry.com/the-myth-of-liberal-policing/>. Although the title of Vitale’s essay might suggest inconsistency with my objective, Vitale’s conclusion invokes themes that are broadly consistent with those in this book: “Movements for police accountability and reform must look not to ‘reform’ police, but to reduce their scope and power.” *Id.*



in *Street Stories*, which documents his years of fieldwork with New York City police detectives.<sup>17</sup> Jackall recounts a symposium related to his work at Williams College, where professors, judges, prosecutors, and detectives came together to discuss problems in the criminal justice system.<sup>18</sup> The symposium is rightly described as at times “resembling a meeting at the Tower of Babel,” particularly in light of the following exchange.<sup>19</sup> After one of the detectives on the panel agreed that the interrogation of suspects is like a serious game involving all manner of subterfuge, a professor on the panel remarked on this startling treatment of people as “texts” to be read again and again—requiring a kind of hermeneutical skill.<sup>20</sup> The police, prosecutors, and judges were perplexed by the use of “hermeneutical,” prompting a professor to explain the following:

[H]ermeneutics comes from the Greek *hermeneuein*: to expound, interpret, translate, and explain. *Hermeneus*, the noun, means herald, interpreter, or expounder. Both, he noted, are derived from the name of Hermes, the son of Zeus and Maia. Hermes was the herald and messenger of the gods, and also the god of science, eloquence, trickery, and theft. Hermeneutics, the professor concluded, is the science (perhaps the art?) of interpretation.<sup>21</sup>

The panelists reacted—naturally—with some uncertainty about the introduction of this concept into the world of policing, with one detective stating: “Blood and sweat smell different from ink.”<sup>22</sup> The conversation eventually turned comic, with a detective again asking for an explanation of “hermanonics” and professors shouting together: “Hermeneutics!” Another detective deadpanned, “Who was Herman then?”<sup>23</sup>

In a lighthearted way, this episode draws out the long-standing tension between theory and practice—particularly with respect to the rough-and-tumble world of police work. It is of course one thing to ponder the justification of, say, deceptive practices from within the confines of the ivory tower and quite another to face that question in an interrogation room with a violent person suspected of a heinous crime. Each side might have the same ends in mind—“truth,” “justice,” and so on—but the often wildly

<sup>17</sup> ROBERT JACKALL, *STREET STORIES* 8 (2005).

<sup>18</sup> *Id.* at 353.

<sup>19</sup> *Id.* at 354.

<sup>20</sup> *Id.* at 364.

<sup>21</sup> *Id.* at 365.

<sup>22</sup> *Id.* at 364.

<sup>23</sup> *Id.* at 366.

diverging perspectives about how the police ought to achieve those ends can result in an impasse. This disconnect was described aptly by a panelist in the symposium just mentioned:

Where I see the two worlds clashing . . . is around precisely these notions we've been talking about: of truth; [the idea that] lying is okay in the service of the truth; [of] fact, evidence, and reality. . . . What counts as evidence in one culture and in one situation may not count as evidence in another culture and another situation. So, there are complicated codes that operate here.<sup>24</sup>

Not only are the codes in play complicated, but the stakes are very high. In the context of theory, we often speak high-mindedly about a commitment to fundamental principles of justice. That said, if theory impacts practice, then one ought to be prepared to deal with the ramifications of that impact—including the potential loss of evidence, failure to obtain an indictment, and reduction of security generally. Although it is not necessarily true that theory will impact practice adversely, it is of course true that a value such as security may compete—and perhaps be incommensurate—with other values, such as liberty. And a theory that is more heavily focused upon one value naturally runs the risk of giving short shrift to other values. This book attempts to mitigate this risk by balancing theory and practice.

The book is divided into two equal parts—the first three chapters focusing upon theory and the second three chapters focusing upon practice—with the goal of drawing out the interdependence of the two. In short, the thesis that is defended is that the police's power in liberal states is limited by a liberal conception of persons coupled with rule of law principles. In defending this thesis, an argument consisting of informal premises that correspond to the book's central chapters will be employed. Part I of the book consists of three chapters on the liberal polity. Chapter 1 provides historical and contemporary context for the role of police in the liberal polity, including a broad sketch of the police's law enforcement role. Chapters 2 and 3 constitute the theoretical backbone of the project, with Chapter 2 setting forth the methodology (ideal and nonideal theory) and Chapter 3 setting forth a development of that methodology (the priority of liberal personhood). Part II of the book consists of three chapters on policing in the liberal polity. Specifically, Chapters 4, 5, and 6 are applications of the theory in Part I, with Chapter 4 illustrating an example of a departure from the methodological constraints (the police's use of confidential human sources), Chapter 5 using the example of sting operations to establish a test for the liberal limits of the

<sup>24</sup> *Id.*

police's power to break the law, and Chapter 6 illustrating the ways that surveillance is and is not consistent with rule of law principles.

Chapter 1 begins with a broad introduction to the police by pursuing the seemingly simple question: What do the police do and why do they have authority to do it? After sketching several aspects of the police's law enforcement role—such as the use of deadly force, deception, surveillance, and discretion—the chapter considers the basis of the police's authority to engage in such acts. Even if everyone agrees that such actions are justified (intrinsically and instrumentally superior to alternative arrangements, for example), that does not necessarily answer the question about authority. One way to answer the question is to say that police have authority in virtue of the state's legitimacy—the moral right to command and be obeyed. After a discussion of reciprocity theories of legitimacy and their relation to the liberal tradition, the chapter closes with a brief examination of alternative approaches that one might take in identifying the limits of the police's power.

Chapter 2 sets forth the project's methodology, beginning with the following claim: if the goal of a state's policies for addressing injustice is to aim for the ideal of justice, then at least a broadly defined ideal theory of justice must first be stipulated. The goal of this chapter is thus twofold: to set forth a principled method for the evaluation and pursuit of nonideal policies that address injustice and to describe the broad outline of an ideal theory of justice for which those nonideal policies might aim. Building upon recent work by A. John Simmons, the chapter first embraces a Rawlsian methodology in which nonideal policies must (1) be morally permissible, (2) be politically possible, (3) be effective, and (4) prioritize grievances based upon severity. The chapter then sets forth some of the central components of a broadly defined ideal theory of justice in the liberal tradition: Such a theory is, first, based upon a pre-political conception of persons as free and equal. Second, it conceives of a political community as a cooperative scheme in which persons reciprocate to produce a morally and prudentially superior condition that construes persons as free and equal. Third, within such communities, there is a commitment to the rule of law in balancing competing claims of liberty where persons do not reciprocate. The chapter concludes by suggesting that the last requirement of a Rawlsian nonideal theory (the grievousness requirement) is a sort of priority rule in that it requires the state to constrain its response to injustice in light of its most important commitments.

Chapter 3 begins with a related claim: if a broadly defined ideal theory of justice in the liberal tradition includes idealized accounts of persons, politics, and the rule of law, then those accounts yield a conception of liberal personhood when viewed in the context of actual nonreciprocity and law-breaking. The last requirement of nonideal theory—discussed in Chapter 2—alluded to a priority rule for the state's response to injustice. The claim is made in this chapter that the state's power to address injustice



is constrained by a priority rule regarding the liberal conception of persons. At its core, the proposed conception of liberal personhood is based upon the broadly defined ideal theory from the prior chapter—including the elusive way that “dignity” relates to the rule of law. Whereas the prior chapter described how a broadly outlined ideal theory includes the pre-political conception of persons as “free and equal,” this chapter describes how a richer conception of liberal personhood is illuminated through the interplay between ideal theory and the reality of law-breaking with which nonideal theory must concern itself. So, for example, the idea of human dignity might become better illuminated by examining it in the context of an actual state of affairs in which ideal theory must be tested against injustice and balanced against competing claims. The upshot is that if the elements of the yielded conception of liberal personhood track naturally the principles of a broadly defined ideal theory of justice in the liberal tradition, then the law’s commitment to that conception of the person is foundational to liberalism itself. Any affront to one would be an affront to the other. The chapter develops a tripartite conception of liberal personhood: *reciprocator* and *moral agent*, which illuminate the third facet of *human dignity*.

Chapter 4 builds upon the theoretical framework from the prior chapters to examine modern police tactics, beginning with a claim about the police’s use of confidential human sources (CHSs): if the police’s use of a person as a CHS is an affront to liberal personhood, then the use is unjustified inasmuch as deviations from the constraints of nonideal theory are unjustified. Specifically, this chapter explores the extent to which agreements between the police and CHSs track the structure of legal contracts. The chapter’s central argument is that the underlying normative principles of the legal doctrine of unconscionability (the doctrine that a contract should not be enforced if it meets certain procedural and substantive accounts of unfairness) provide weight in determining whether these agreements are justified. In the cases in question, the state leverages its bargaining power over a person to facilitate an agreement in which the person will act in a way that the state itself deems (otherwise) illegal, as well as in a way that subjects the person to the risk of substantial harm. If these sorts of institutionally recognized interactions are unconscionable in the sense that they constitute an affront to liberal principles—including liberal personhood—then such interactions cannot be construed as just even if they achieve a competing state end.

Chapter 5 examines another tactic of modern policing to illustrate the limits of the police’s power to break the law, beginning with the following claim: if the police in liberal states must deal with law-breaking by themselves breaking the law, then such sanctioned law-breaking must be consistent with the requirements of a broadly defined ideal theory of justice in the liberal tradition for it to be justified. First, this chapter argues that the subjective test for entrapment is a theoretically and practically untenable method of evaluating sting operations: the test is based



upon a decision procedure that gives rise to questions about the metaphysics of counterfactual conditionals, which raise more pressing epistemological, ethical, and political problems. Accordingly, the second goal of this chapter is to examine the limits of sting operations more broadly by exploring the extent to which the police are justified in using discretionary power to break what would otherwise be the law. The chapter concludes by setting forth a theory regarding the limits of such powers—limits that correspond to the limits of executive national security emergency powers in the liberal tradition. The upshot is that any theory of entrapment and sting operations must exist within the broader constraints upon the police’s power to break the law.

Chapter 6 may be thought of as consisting of three case studies that represent three models of surveillance in the liberal polity: (1) rule of law surveillance, (2) direct rule of law departure surveillance (“direct departure surveillance”), and (3) indirect rule of law departure surveillance (“indirect departure surveillance”). Each of these three models of surveillance is intended to illustrate the extent to which police surveillance is consistent with the basic liberal tenets discussed in the prior chapters—particularly the rule of law and the police’s use of discretion. Although US legal cases are used to help draw out these tenets, the reach of the cases’ underlying principles extends well beyond their local jurisdictions. This chapter is especially attuned to the way that technological developments have enhanced the police’s capability to engage in discretionary surveillance. The goal of this chapter—like the underlying goal of the book—is to identify the limits of the police’s power given the basic tenets of the liberal polity.