

The FBI and the Rule of Law

Luke William Hunt

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Introduction: The Rule of Law

Good afternoon - my goal is to briefly share my understanding of the FBI's important mission, in a way that I hope is free from partisanship.

I had the good fortune of serving my country as an FBI Agent in a variety of settings:

- In a small office, where I worked whatever criminal case that walked through the door—from bank robberies to crimes against children.
- At Washington Field Office, on violations of the Foreign Corrupt Practices Act.
- And finally at FBI Headquarters, where I focused on national security policy.

Now, as a professor, I draw on these experiences in teaching and research related to legal and philosophical issues in policing. But I'm not interested in the ivory tower today.

One of the academic questions in my work is directly related to this committee's work: Is the FBI a liberal or illiberal institution?

By "liberal" I'm not referring to politics, or whether you're a liberal or conservative member of Congress.

I instead mean the philosophical tradition with which I assume everyone in this room agrees: The philosophical tradition—going back to John Locke—on which this country was founded.

At its core, the political morality of liberalism tells us that all persons are free and equal and should be governed by the state in accordance with the rule of law.

Illiberalism and the Erosion of the Rule of Law

What is the alternative? Illiberal regimes govern not by the rule of law, but by arbitrary power and the official whim of state agents who are above the law.

The FBI can and should be an agency that promotes the rule of law. However, I want to raise three concerns about the current state of affairs that could lead to an erosion of the rule of law.

Lack of Predication

First, *lack of predication*: predication is the basis of an investigation—the information or allegation that justifies a case.

While most FBI investigations require predication, so-called “assessments” do not.¹ In other words, the FBI has the discretion to investigate almost anything—without any factual basis to do so.

The FBI is also permitted to use investigative tactics prior to establishing an assessment, including exclusive on-line services the FBI has purchased for official use.

Investigation without predication is contrary to the rule of law because it may be based not on fact, but whim or arbitrary discretion.

It is thus crucial for Bureau leadership to avoid any appearance of impropriety and partisanship in both actions and rhetoric.

Selective Enforcement of Corruption

The second worry I raise is the *selective enforcement of corruption*.

Corruption includes the use of entrusted authority for unethical benefits. This is of course an issue in politics, but corruption also arises in social and economic domains such as business.

It should go without saying that corruption is contrary to the rule of law: It undermines institutional reputation, circumvents fair processes of economic development, and denigrates democracy and justice.

Recent developments suggest that the decision to investigate corruption may be based in part on political and business expedience:

- Prominent cases of political corruption have been dropped suddenly for reasons unrelated to the legal merits of the case.
- Investigation of corruption under the Foreign Corrupt Practices Act (FCPA) has been paused, and the FBI’s Foreign Influence Task Force and DOJ’s Kleptocracy Team have been disbanded.

A lack of transparency into this sort of selective enforcement of corruption could politicize the FBI, undermining the rule of law.

Predication suggests a righteous investigation—regardless of whether the target is a regular citizen, or a powerful politician or corporation.

If we don’t want to slide toward illiberalism, then no one should be above the law.

¹ The FBI conducts four types of investigations: (1) assessments, (2) preliminary investigations, (3) full investigations, and (4) enterprise investigations (see DIOG).

Selective Enforcement of National Security Threats

Finally, I raise a concern about the *selective enforcement of national security threats*.

We are all familiar with the horrific pattern of political and ideological mass killings in recent years:

- The 2015 killing of 9 Black people in a Charleston church by a white supremacist hoping to spark a race war.
- The 2018 killing of 11 in the Pittsburgh Jewish community.
- The 2019 killing of 23 people in El Paso, motivated by claims of a Hispanic “invasion.”
- The 2022 killing of 10 Black people in Buffalo based on a manifesto on racial purity.
- We should add the assassination attempt of President Trump in 2024, even if the motive is less clear.

I have no personal information about the FBI’s plan to stop politically motivated violence.

On one hand, I’ve read reports that the disgusting vandalism and arson directed at Tesla will be prioritized as domestic terrorism (DT).

On the other hand, I’ve read reports that the FBI’s new reorganization will move resources away from the investigation and analysis of other domestic terrorism threats.

My only point is that we should not prioritize DT investigations based on whether they are motivated by the left or the right.

Investigations should be based on predication and follow the evidence—wherever it leads. That is the rule of law.

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My academic work has focused on legal and philosophical issues in policing—issues that are relevant beyond the classroom. I conclude my written testimony with an overview of broader topics that are relevant to the FBI. As with my oral testimony above, it is my hope that these remarks might provide modest insight into policing that is free from politics.

Informants and Otherwise Illegal Activity²

FBI Agents—along with their confidential human sources (CHS)—have the authority to engage in what is called “otherwise illegal activity” (OIA). OIA is conduct that constitutes a crime under local, state, or federal law if engaged in by a person acting without authorization. OIA can be authorized for a CHS to obtain information necessary for the success of an investigation.

The primary limitations on OIA are not based on the harm to which the CHS might be subjected, but rather the harm of exceeding the limits of the CHS’s use of OIA as an investigative technique: A CHS cannot engage in an illegal investigative technique (e.g., an unlawful wiretap), nor can a CHS participate in an act of violence (excluding self-defense and defense of others by the CHS because such acts are not deemed illegal).

Accordingly, FBI policy acknowledges that a CHS’s agreement to engage in OIA could put the CHS in situations in which the CHS might have need to defend herself or others through violent acts. Although those violent defensive acts are legal—inasmuch as self-defense and the defense of others is legal—the need to engage in such acts comes to pass based upon the CHS’s institutionally-endorsed engagement in acts that constitute (otherwise) illegal activity.

To put the point a bit differently, “self-defense” may be unlawful (or does not count as self-defense, properly understood) when one is engaged in unlawful activities (e.g., “self-defense” against an arresting police officer, against a homeowner who objects to your burglary of his home, against someone you provoke with violence, and so on). Accordingly, the justification of the FBI’s policy on CHSs and self-defense is based in part upon the justification of the underlying CHS-police agreements to engage in OIA.

A related concern is the nature of an agreement between a CHS and the FBI (note that many other law enforcement and police agencies refer to CHSs with the more common term “informant,” which I’ll use henceforward). Informants are motivated by all sorts of reasons; for example, some have a strong sense of patriotism and simply want to help the police. But consider the more limited case of informants who 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). These situations highlight the extent to which the police’s discretionary authority can be an affront to basic rule of law principles.

It is illuminating to consider how the bargaining process involved in agreements between the police and informants resembles the bargaining process associated with contracts. Indeed, it is plausible to think the underlying principles of the legal doctrine of unconscionability provide weight in determining the extent to which these informant-police agreements are justified.

Consider first how these agreements are similar to contracts: There is an offer by the police for the informant to provide operational assistance, the informant accepts (or does not accept) the offer, and there is consideration for the agreement (the police consider recommending leniency for the informant in exchange for the informant’s assistance). One need not be committed to the idea that informant-police agreements give rise to legally enforceable contracts. This is because the bargaining process raises other normative principles (e.g., fairness, voluntariness, fraud, duress) that have weight and underpin the doctrine of unconscionability.

² See Hunt, 2019, chapters 4-5.

The modern legal framework includes procedural unconscionability (no real choice and inadequate knowledge of the agreement) and substantive unconscionability (contract terms that are unreasonably favorable to one party). With respect to the procedural component, police hold almost all the power over informants and can implicitly threaten informants with a complete loss of liberty (prison). Moreover, untrained informants are often unable to appreciate the risks and contingences that come with dangerous law enforcement operations.

One might ask the following question with respect to the substantive component: Should untrained citizens conduct the risk-laden, otherwise illegal activity of police, as required by some informant-police agreements? There is good reason to answer this question in the negative to the extent that such agreements are an affront to some facet of the informant's personhood and human dignity—as in undercover operations in which an informant faces the risk of serious harm or even death.³

Are such agreements between the police and informants justified? Did the informant have a meaningful choice about whether to accept the terms of the police's offer? Did the informant have adequate knowledge of the risks involved? If the police's broad discretionary power to engage in law-breaking activity qualifies as a departure from rule of law principles, was subjecting the informant to such risky police duties less like enhancing the informant's options and more like an illegitimate liberty deprivation? Was the informant's harm tied to a disparity in benefits that weighed heavily in favor of the police? These are of course difficult questions, but my sense is that an examination of the procedural and substantive components of informant-police agreements can be illuminating.

Just as all contracts are not unconscionable, it would not be right to say that all informant-police agreements are unconscionable. On the other hand, many of these agreements do seem unconscionable *prima facie* because features of the agreement track the central characteristics of the doctrine of unconscionability and its underlying normative commitments.

Unfortunately, unenforceability is often not a viable remedy in the case of informant-police agreements. Such remedies would come far too late in cases in which an informant is subjected to danger. This lends support to the view that facially unconscionable informant-police agreements should be construed as unjustified from the outset—and our policing policies should be crafted accordingly.

The rule of law is a core commitment of constitutional democracies in the liberal tradition. However, undercover sting operations include sanctioned law-breaking (OIA). There are no doubt instances in which OIA is necessary—emergencies in which there is a risk of death or serious bodily injury come to mind. But protecting the rule of law requires care about the limits of sanctioned law-breaking.

³ See Biba, 2022, for a case study.

Deception and Dishonesty⁴

Suppose the FBI (or any law enforcement or police agency) have a suspect, Jane, in custody. They can either lie to Jane about a material fact or they can be honest with her. If the police lie to Jane, it is probable that they will receive a crucial piece of evidence: her confession. If the police act honestly, they are unlikely to receive the confession. What should the police do?

The question might seem like an easy one. If we care about security and law enforcement, surely the police should be able to deceive people who they believe committed a crime. How else would they do their job? It seems difficult to imagine a world in which the police are required to shoot straight, as it were, with conniving criminals.

On the other hand, the question is not so easy if we care about things such as fraud, consent, voluntariness, the rule of law, trust, and so on. If the police can do anything to obtain a confession (beat the suspect, perhaps), then there is a good chance the suspect's confession will not be voluntary.

You might protest that physical abuse shifts the discussion from deception and dishonesty to brutality. However, similar concerns regarding political morality are relevant in cases of both force and fraud. Similar to the way a confession elicited through physical assault is unjustified, a confession elicited through material misrepresentation is unjustified.

Suppose the police tell Jane she has two choices: Confess and face six years in prison, or don't confess and face forty years in prison. If Jane confesses based on this information and the information is a material misrepresentation of the facts or the law (e.g., she's facing only eight years regardless of whether she confesses), then the police defrauded Jane of her right to remain silent, among other things. This is a fraudulent epistemic environment (FEE).

Although FEEs are permissible under current law and police policy in many states, the pervasive use of FEEs undermines foundational commitments of political morality. If a person's act is based on the police's fraud, then the person's act is not voluntary and consensual. If a person's act is not voluntary and consensual, then the person should not be subject to harm resulting from the person's act. If a person's act is based on the police's fraud, then the person should not be subject to harm resulting from the person's act.

What does this mean at the level of policy? There are cases in which evidence with probative value should be excluded when it is derived from an FEE that opens one to harm and a loss of rights. The upshot is that the police will be less likely to obtain probative evidence in some cases. But if it is right to say that people should only be held responsible for consensual confessions to the police, then excluding some probative evidence is justified when the evidence is derived from a fraudulent epistemic environment.

Some states have acted by pursuing legislation that prohibits the police from lying (or making promises) to minors during interrogation. These laws should be expanded.

⁴ See Hunt, 2024; 2025.

The Police Role and Identity⁵

There is a debate within society and police culture about the very nature of the police role and how police should conceive of themselves.

This raises tension between individuation and collectivity: The way the police are identified through a persona and archetype, distinguished from the rest of the community. We thus see conceptions of the police identity as an individual warrior or guardian on the hero's path, versus the police identity as a component of a collective pursuit of justice.

To be sure, the police have a duty to seek justice by promoting security within society—a duty that can of course involve violence and the use of (deadly) force. However, given other principles and values in society, promoting security is but one facet of justice that the police have a duty to seek. The police are not “warriors” because they are not at “war.” They are civil servants seeking justice for (and alongside) members of their community.

In the struggle to embrace various identities and roles, the police have at times moved away from more comprehensive conceptions of justice—conceptions that include legitimacy, the rule of law, human dignity, and other legal and human rights.

Policing—local, state, and federal—is a vital state function. My hope is that we will support, strengthen, and improve the police institution with nonpartisan policies that promote holistic conceptions of justice.

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