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Police Suspects

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Recent attention to police brutality has brought to the fore how law enforcement, when they become the subject of criminal investigations, receive special procedural protections not available to any other criminal suspect. Prosecutors’ special treatment of police suspects, particularly their perceived use of grand juries to exculpate accused officers, has received the lion’s share of scholarly and media attention. But police suspects also benefit from formal affirmative rights that protect them from interrogation by other officers. Police, in most jurisdictions, have a special shield against interrogation known as the Law Enforcement Officers’ Bill of Rights (LEOBOR). These statutes and negotiated agreements protect police from tactics that are part and parcel of the confession-inducing playbook these same officers use when questioning civilian suspects.

This Article investigates these formal procedural protections for police suspects. It argues that, as criminal justice insiders, police have dealt themselves special protections from police questioning based on their knowledge of what protections a suspect needs most when facing interrogation. Meanwhile, the police continue to argue that failing to use these selfsame tactics on other suspects will hamper their ability to catch and convict dangerous criminals.

The distributive inequality created by special police rights threatens the fairness and legitimacy of the criminal justice system in several ways: It skews the relationship between suspect sophistication and the amount of protection received, it sullies the appearance of justice, and it decreases the normative value of criminal law.

The nascent awareness of these special interrogation protections has led a number of scholars and commentators to call for revoking police officers’ LEOBOR rights in order to achieve accountability and distributive equality. Yet the opposite response may be theoretically and

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practically superior. As criminal justice insiders, the preferences police negotiate for and receive can serve as a model for ways to reform a particularly problematic part of our criminal justice system. Thus, before we strip protections from the police, we should look hard at how these protections might apply to all criminal suspects.

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INTRODUCTION

Over the past couple of years, the visibility of police brutality and criminality has attracted heightened attention from scholars, the media, and the American public.¹ Although police crimes are far from a new phenomenon, our focus has never been more attuned to how often those

entrusted with our security are violating it.\textsuperscript{2} Along with this increasing awareness of police criminality, there has been a round criticism of the way police suspects are investigated (or not), charged (or not), convicted (or not), and punished (or not).\textsuperscript{3} Critics charge that police often appear to be above the laws they are tasked with upholding.\textsuperscript{2} As a result, commentators and scholars have begun to call for eliminating the advantages police suspects enjoy; they want more criminal accountability for police.\textsuperscript{5}


4. Recently, due in part to increased societal attention and the advent of cellphone videos, a number of officers have been charged with assault and homicide crimes. These include, among others, Officer Michael Slager, who shot Walter Scott, an unarmed man, in the back; several officers involved with the fatal fracturing of Freddie Gray’s spine; and Officer Peter Liang, who shot Akai Gurley in a Brooklyn stairwell. See Brandon Ellington Patterson, Here Are All of the Cops Who Were Charged in 2015 for Shooting Suspects, Mother Jones (Dec. 17, 2015, 6:00 AM), http://www.motherjones.com/politics/2015/12/year-police-shootings [http://perma.cc/HU5U-49AY] (describing criminal charges filed against law enforcement officers for shooting suspects in 2015).

Most of the attention to preferential treatment has focused on prosecutors’ decisions not to bring criminal charges against police for acts of brutality or on prosecutors’ use of grand juries to exculpate police. Yet this prosecutorial favoritism is just one of a number of special procedural protections police suspects receive. In fact, a potentially more problematic set of procedural advantages emerges from special interrogatory shields that many local governments and some state legislatures have erected known as Law Enforcement Officers’ Bills of Rights (LEOBORs).

LEOBORs take the form of state statutes or negotiated jurisdictional agreements and provide affirmative interrogation protections for police suspects that go far beyond the Fifth and Fourteenth Amendment protections that other suspects receive. For instance, LEOBORs often provide that police suspects may be questioned only during the day; that they may be questioned only by a limited number of interrogators; that they must be given time to attend to their personal needs; that they may not be threatened, subjected to abusive language, or induced to confess through untrue promises of leniency; and that their choice to inculpate themselves must not be conditioned on losing their job or benefits.

LEOBORs represent the formal procedural protections police demand when they are accused of and questioned about wrongdoing. As such, they are an important and heretofore overlooked tool for better understanding and potentially reforming interrogation law. In combination with other procedural advantages police suspects receive, LEOBORs both tell an ugly story of insider favoritism and present a possible roadmap for reforming critical aspects of our criminal justice system.

Police suspects’ insider status makes LEOBORs both a threat to the criminal justice system’s legitimacy and at the same time an important


7. See infra section II.B (showing ways LEOBORs and other protections skew constitutional justice in favor of police defendants).

8. By “formal,” it refers to the constitutional and statutory protections police opt for in states with LEOBORs. By “informal,” this Article refers to the discretionary decisions prosecutors make about declining to charge police or presenting full cases to grand juries.

9. See Kate Levine, How We Prosecute the Police, 104 Geo. L.J. 745, 755–56 (2016) [hereinafter Levine, How We Prosecute] (arguing prosecutors take more care and conduct more investigation before charging police suspects than any other class of suspects).
lens through which to reconsider confession law. This Article aims to further the nascent awareness of the criminal justice system’s preferential procedural treatment of police suspects by examining LEOBORs and contrasting them with the laws that protect other criminal suspects. In doing so, it adds another dimension to the already rich literature on policing, as well as to the existing literature on bias among criminal justice insiders. It locates police within a small group of criminal justice insiders who understand and drive our increasingly opaque system.

This Article argues first that formal criminal procedure preferences for police suspects threaten the legitimacy of the criminal justice system in several ways. Additional interrogatory process for police threatens the idea that criminal procedures are distributed fairly, sullies the appearance of fairness in the criminal justice system, and by doing so, lessens the system’s ability to encourage cooperation with the law. The criminal justice system’s insider-driven operation, as well as bias on the


15. See infra Part I (establishing importance of disconnect between criminal justice insiders and outsiders).
part of legal authorities, are among the biggest threats to criminal law.\textsuperscript{16} Thus, self-dealing among criminal justice insiders is among the most salient illustrations of how legal authorities undermine the system they enforce.

But what results should flow from this conclusion? This Article’s second argument is that our response to these procedural inequalities should be to extend certain of these formal interrogation protections to all suspects rather than to strip them from the police.\textsuperscript{17} In doing so, this Article upends the dominant response from scholars and politicians that LEOBORs and other procedural preferences for police suspects should be abolished to ensure equally harsh treatment for all suspects.\textsuperscript{18} It argues instead that by examining the systemic favorable treatment of police, we can map out a fairer, more accurate, and more workable system of justice for other defendants.\textsuperscript{19}

In fact, this Article examines LEOBORs with an eye to what the criminal justice system gets right about police suspects that it so often gets wrong in the context of other suspects.\textsuperscript{20} Several criticisms of police-suspect leniency dovetail with scholarship calling for more protective measures for civilian criminal suspects. For example, while many have critiqued prosecutors’ decisions not to charge police, others have called for more systematic decisions not to charge in other categories of cases.\textsuperscript{21} And while some are outraged at the perceived use of grand juries to exculpate police defendants,\textsuperscript{22} others have called for strengthening the

\textsuperscript{16} See infra Part III (arguing formal protections for police suspects, in combination with other procedural advantages, threaten criminal justice system).

\textsuperscript{17} See infra section IVA (arguing some aspects of LEOBORs should be extended to all suspects).

\textsuperscript{18} See infra section IVA (characterizing absolute abolition of LEOBORs as dominant view among scholars covering subject).

\textsuperscript{19} Another option is to limit LEOBORs to noncriminal disciplinary matters. This solution is problematic for a number of reasons. It eschews the promise of reform that LEOBORs represent. Further, a decision about whether an investigation might lead to criminal charges would have to be made before questioning an officer; otherwise, every investigation into misconduct would have to be split into disciplinary and criminal—a difficult and resource-heavy task for busy police departments.

\textsuperscript{20} See infra Parts II, IV (discussing greater protections against interrogation afforded to police suspects from LEOBORs and arguing for extending such protections to other criminal suspects).

\textsuperscript{21} See Josh Bowers, Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute, 110 Colum. L. Rev. 1655, 1661 (2010) (arguing for equitable charging discretion in petty-crime cases while challenging assumption prosecutors are best positioned to exclusively exercise such discretion); Levine, How We Prosecute, supra note 9, at 767 (arguing precharge process given to police suspects could be model for one element of criminal justice reform); Marc L. Miller & Ronald F. Wright, The Black Box, 94 Iowa L. Rev. 125, 131 (2008) (arguing for greater internal regulation of prosecutors’ offices given social norms’ ability to override legal rules).

use of grand juries for all defendants. Similarly, while some may bristle at LEOBORs, these statutory rights mirror or exceed many of the procedural protections that scholars have urged for years be extended to nonpolice defendants. Protections that police receive have the potential to aid the most vulnerable suspects and to reduce the alarming number of false confessions that have recently come to light through studies of exonerations. As the negotiation preferences of those who interrogate daily, these protections for police should not be reduced or repealed without careful consideration of how they might apply more broadly. To do so would be to ignore an important opportunity for criminal justice reform.


24. See Hager, supra note 5 (discussing encumbering nature of LEOBORs); Olson, supra note 3 (discussing how LEOBOR in Maryland made investigation into Freddie Gray’s death “frustrating”).

25. Many scholars have noted that the criminal procedure revolution of the 1960s and 1970s has not only underserved most defendants but might actually work against poor criminal defendants who cannot access their “rights.” See Michelle Alexander, The New Jim Crow 103 (2010) (arguing system maintains official “colorblind” rights-based facade by granting extraordinary discretion to law enforcement and limiting systemic racism claims brought by minority defendants); Stephen B. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 Yale L.J. 1835, 1878 (1994) (“It is unlikely that the promise of Powell and Gideon will ever be fulfilled for most of those accused of criminal violations.”); William J. Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Justice, 107 Yale L.J. 1, 76 (1997) (arguing Miranda’s solution to coerced confessions harmed suspects it aimed to protect).

26. See infra sections II.A, III.A (discussing specific protections afforded police suspects and how not extending some protections to all criminal suspects delegitimizes criminal justice system).
This Article proceeds in four parts. Part I establishes why examining police defendants’ preferential procedural treatment is important. It draws on current scholarship regarding the disconnect between criminal justice insiders and outsiders to show that an inquiry into special procedures given to insiders has much to tell us about the criminal justice system’s problems and its potential. It argues that examining these practices furthers our understanding of how the criminal justice system operates favorably for insiders and creates distrust from outsiders.27

Part II focuses on interrogation protections for most suspects and contrasts them with the added protections police receive from LEOBORs. First, it sketches the constitutional doctrine that aims to protect suspects from interrogation and the problems with these weak, negative rights—including both the favoritism of sophisticated suspects and the use of coercive but legal police tactics that may lead to false confessions in a disturbing number of cases. Next, it identifies the specific affirmative protections that police officers afford themselves when they are the subjects of interrogation. These formal interrogation protections that police negotiate or lobby for in LEOBORs are protections from the very techniques they use to investigate and induce confessions from nonpolice defendants.28

Part III argues that special formal protections for police suspects raise numerous systemic problems, particularly in combination with the other procedural advantages police appear to enjoy. It identifies at least three serious harms. First, these distributional advantages undermine a core goal of constitutional criminal procedure by virtually inverting the relationship between a suspect’s sophistication and the protection she receives. Second, giving special rights to police, who are among the most sophisticated suspects, sullies the appearance of justice, a principle applied mostly to judges,29 but one that should also be considered when thinking about the police because of how important these agents are to the criminal justice system’s legitimacy.30 Finally, it argues that self-dealing by and special treatment for law enforcement suspects are particularly salient examples of how criminal justice insiders negatively affect procedural justice and threaten the normative value of the criminal law.31 Part III also addresses the possible objection that police deserve special

27. See Tyler, Why People Obey, supra note 14, at 73 (noting “procedural justice” matters more to people’s notions of fairness than substantive outcomes of individual cases).

28. See infra Part II (detailing formal protections for police suspects during police investigations).

29. See Levine, Who Shouldn’t Prosecute, supra note 3 (manuscript at 13) (arguing principle should apply to prosecutors).

30. See infra section III.A (characterizing extra police protections as systemic perils to fairness, legitimacy, and appearance of justice).

31. See infra section III.B (discussing how special protections in criminal justice system may undercut respect for rule of law).
procedural protections because of their status as law enforcement officers.

Finally, Part IV wrestles with the issue of whether the procedural rights granted to police should be nullified in order to make the system harsher toward police but more equally distributed or extended to other criminal suspects to increase the fairness and accuracy of the system more generally. 32 Returning to the theme of criminal justice insiders, it argues that examining what procedures police suspects negotiate for in anticipation of becoming potential suspects is an invaluable lens through which to view the criminal justice system. LEOBORs possess features that are uncommon to most criminal lawmaking: They are drafted by insiders who know how the system operates and by insiders who, perhaps more significantly, imagined themselves as criminal suspects.33 This Article selects among the provisions those that should be extended based on two independent (but often interrelated) principles.34 First, certain rights should be extended because they also represent protections against tactics that studies show tend to coerce vulnerable suspects and that exoneration literature tells us lead to false confessions. Second, certain other rights may have little to do with whether or not one falsely confesses but are a floor below which we should not allow any government official to fall in her treatment of another person, particularly one who still retains the presumption of innocence.35 After identifying the provisions that should be extended, this Part proposes two methods for effectuating these changes in confession law. One way to extend rights is through legislative action, and the other is through judicial consideration at the suppression and appellate stages of criminal litigation. Finally, this Article considers the systemic benefits that would flow from such an extension and addresses possible counterarguments to these proposals.

I. INSIDER SUSPECTS

This Part establishes why looking at special protections for police suspects is a particularly salient area of scholarly inquiry. First, it establishes the opacity of our current criminal justice system, locating police as among a small group of insiders who understand and drive a system that is increasingly unknown to those on the outside. Given their special place in the criminal justice system, the preferences police either nego-

32. See, e.g., Capers, supra note 10, at 873 (arguing “policing the police” will increase system’s legitimacy and “instill the belief that the law applies to everyone: rich and poor, black and white, brown and yellow, regardless of whether the individual is wearing a blue uniform”).
33. See infra section II.B (describing additional interrogation protections for police officers, such as protection from economic duress).
34. In other words, a provision’s inclusion within a LEOBOR is a necessary, but not sufficient, condition for extension to all suspects.
35. See infra section IV.B (suggesting protections that should apply to all suspects).
tiate or lobby for are at once problematic examples of inside favoritism and tools for reshaping certain aspects of our criminal justice system. On a larger scale, this Part establishes the idea that studying what those insiders in the criminal justice system want for themselves gives outsiders rare and valuable insight for reforming the system more generally.

The mostly unacknowledged procedural favoritism police suspects receive fits into a larger story about the problematic culture of criminal justice insiders. Recent criminal justice criticism has uncovered several problems that stem from the bureaucratic professionalism of the system.36 Some of these problems include a lack of transparency, lack of participation by ordinary citizens, and lack of accountability for police and prosecutors.37 Due to the immense body of legislated criminal law, an outsized portion of decisionmaking authority has fallen to the discretion of prosecutors and the police.38 Meanwhile, popular participation in criminal justice, through jury participation and accountability measures like elections, has fallen away.39

The criminal justice system is an increasingly opaque, unaccountable machine, known only to those “insiders”—legislators, prosecutors, defense attorneys, and police—who pursue cases based on their own political, moral, and professional preferences.40 This system leaves the rest of us—defendants, victims, members of the public, and legal scholars—out, not only as participants in the system, but even as observers.41

The opacity of the criminal justice machine leads to at least two interrelated problems. First, it allows criminal justice professionals to operate in a largely unknown and therefore unchecked sphere, meting out justice according to their own pressures and incentives and without taking larger social concerns into their arrest, charging, and plea

36. See Bibas, Machinery, supra note 11, at 29–34 (describing criminal justice system “tug-of-war” between insiders and outsiders).
37. See id. (noting existence of insider privileges in criminal justice “clouds the law’s effectiveness and legitimacy and hinders democratic monitoring of government”).
38. See Alexandra Natapoff, Misdemeanors, 85 S. Cal. L. Rev. 1313, 1328 (2012) (noting decision to arrest can lead “inexorably” to conviction); William J. Stuntz, Plea Bargaining and Criminal Law’s Disappearing Shadow, 117 Harv. L. Rev. 2548, 2548 (2004) ("Criminal law[‘s] primary role is . . . to create a menu of options for prosecutors. If the menu is long enough—and it usually is—prosecutors can dictate the terms of plea bargains.").
39. See Stuntz, Collapse, supra note 11, at 7, 159–61 (noting decline of jury trials, rise of suburban-voter influence over prosecutor and judge selection, and other changes to criminal justice system reducing local democratic accountability).
41. See Jocelyn Simonson, The Criminal Court Audience in a Post-Trial World, 127 Harv. L. Rev. 2173, 2194 (2014) (arguing role of audience as observers has been discounted, particularly with decline in trials).
bargaining decisions. Second, the shrouded and seemingly arbitrary way in which criminal justice appears to be distributed undercuts the very purpose of our criminal justice system—to encourage people to obey the law.

Police are central players in this group of unchecked insiders who control power and knowledge in the criminal justice system. In key ways, police control the criminal justice system more than other insiders do. For instance, the rise in misdemeanor arrests and citizen encounters with jails and courts can be traced directly to police policies and discretion. And as the “public face” of the criminal justice “machine,” interactions with police are often the only part of the legal system that an arrestee encounters. Many suspects accused of low-level crimes are issued a ticket by the police and do not see other actors in the system. Such suspects also lose out on the constitutional rights and procedural protections that later stages of the process provide. Therefore, police

42. See Bibas, Transparency, supra note 40, at 945–46 (“Low-visibility procedures such as charge bargaining and declination frustrate outsiders both because they seem procedurally unfair or dishonest and because they seem to produce bad substantive outcomes.”); Josh Bowers, The Normative Case for Normative Grand Juries, 47 Wake Forest L. Rev. 319, 320 (2012) (“From the public’s perspective, process is inaccessible and unassessable. The adjudication (and ultimate summary disposition) of [low-level] cases is a decidedly professional endeavor.”); William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 522 (2001) [hereinafter Stuntz, Pathological Politics] (“[A] signal that cannot be seen is a very poor signal.”).

43. See Tyler, Why People Obey, supra note 14, at 3–5 (examining “connection between normative commitment to legal authorities and law-abiding behavior”); Bibas, Transparency, supra note 40, at 949 (“People respect the law more when it is visibly fair and when they have some voice or control over its procedures. Procedural fairness, process control, and trust in insider’s motives contribute greatly to the criminal justice system’s legitimacy.”).

44. Bibas, Transparency, supra note 40, at 912 (“The[se] insiders—the judges, prosecutors, police, and defense counsel who regularly handle criminal cases—are professional repeat players who dominate criminal justice.”); see also Bibas, Machinery, supra note 11, at 32 (describing extent of police discretion in criminal investigations); Stuntz, Collapse, supra note 11, at 3 (arguing criminal law gives police wide discretion in enforcement).


46. See Bibas, Machinery, supra note 10, at 32 (“Police decide whom, where, and what to investigate; whether and whom to arrest and issue citations; and whether and which charges to file.”).

47. If a suspect is arrested on minor charges, she may be released with a ticket or plead to a violation before arraignment. Yet a number of constitutional protections that expose police misconduct or give a defendant the opportunity to present exculpatory
decisionmaking is the criminal justice system for an increasing number of citizens.\textsuperscript{48}

Police, then, are among a very exclusive group of criminal justice insiders. What it means to be an insider is critical to understanding why police suspects and defendants matter. Being an insider means possessing knowledge about how an opaque system operates. Police “know the kinds of crimes, defendants, and sentences that dominate the justice system. They understand the intricate, technical rules that regulate arrests, searches and seizures, interrogations, discovery, evidence, and sentencing, as well as the going rates in plea bargaining.”\textsuperscript{49} And being an insider means, to some extent, having control over how laws are written and enforced. As such, police officers are “a very powerful lobby on criminal law issues.”\textsuperscript{50} Police do not lose their insider knowledge or status upon becoming criminal suspects. In fact, the knowledge they have and relationships they form as a result of their insider status can appear to make them virtually above the law because their crimes are both so rarely reported\textsuperscript{51} and so rarely prosecuted even when they are reported.\textsuperscript{52}

evidence—the right to an attorney, to confront witnesses, and to challenge arrest procedures, for instance—only come into play after a suspect has been arraigned. See Jordan Blair Woods, Decriminalization, Police Authority, and Routine Traffic Stops, 62 UCLA L. Rev. 672, 681 (2015) (arguing police have too much power and authority in traffic stops, leading to nonreviewable harms to suspects).

\textsuperscript{48} See Natapoff, supra note 38, at 1362 (“Police and prosecutorial selection decisions are often treated as posing this sort of procedural legitimacy problem, raising concerns about process, neutrality and discrimination that are crucial to the legitimacy inquiry but ancillary to substantive questions of guilt.”).

\textsuperscript{49} Bibas, Transparency, supra note 40, at 912.

\textsuperscript{50} Stuntz, Pathological Politics, supra note 42, at 534. Professor William Stuntz notes, however, that the alliance between prosecutors and police is more nuanced than the above quote suggests:

Police differ from prosecutors in (at least) two critical ways. Their focus is on a different stage of criminal proceedings. With some qualifications, prosecutors maximize convictions; police are more likely to maximize arrests. And they are more culturally distinct from the rest of the population than are prosecutors, so that departmental culture is a more powerful force in police conduct than it is in prosecutorial behavior.

Id. at 538 (footnote omitted).

\textsuperscript{51} For instance, a number of scholars have written about the problematic issue of police “testifying.” See, e.g., Capers, supra note 10, at 870 (noting police lies are “pervasive” and undercharged); Jennifer E. Koepeke, The Failure to Breach the Blue Wall of Silence: The Circling of the Wagons to Protect Police Perjury, 39 Washburn L.J. 211, 211 (2000) (asserting an officer is more likely to be “struck by lightning” than charged with perjury); Christopher Slobogin, Testifying: Police Perjury and What to Do About It, 67 U. Colo. L. Rev. 1037, 1040 (1996) (“Lying to convict the innocent is undoubtedly rejected by most police . . . as immoral and unjustifiable. In contrast, lying intended to convict the guilty . . . is so common and so accepted in some jurisdictions that the police themselves have come up with a name for it: ‘testifying.’”).

\textsuperscript{52} See supra note 3 and accompanying text (discussing research and controversy surrounding nonprosecution of police officers).
The following parts of this Article show that police receive formal procedural advantages through negotiated and statutory investigative protections from interrogation tactics. Why does such preferential treatment for police suspects matter? It matters for at least three reasons. First, because it violates one of the core foundations of our criminal justice system: that suspects and defendants receive at least as much procedural equality in treatment as possible. The current state of interrogation protections gives the most rights to among the most sophisticated suspects. Second, this preferential treatment leads those outside the justice system to doubt its legitimacy, which may make them less likely to respect or follow the criminal law. Finally, the menu of preferences police receive may assist criminal justice reform because it shows what those who possess specialized knowledge and power within the system get and demand when they imagine themselves as criminal suspects.

The notion that those with knowledge and control will, without checks, do everything they can to maintain their favored status is an old tale. Indeed, constitutional criminal procedure itself is based in large part on the principle of avoiding this sort of favorable treatment for some. It would not be a stretch to argue that most views of how a fair criminal justice system operates are predicated on the notion that criminal defendants should be treated as equally as possible, at least as to the procedural rules that govern their trek through the system. While the

53. For a discussion of the informal advantages police receive from prosecutors who tend to do more investigation and present more evidence to grand juries for police suspects than other criminal suspects, see Levine, How We Prosecute, supra note 9, at 755 (describing "unusually detailed" grand jury presentations in recent high-profile police arrests).

54. Whether these procedures should be reduced for police or applied more broadly to criminal defendants is a question this Article addresses in Part IV.

55. See infra sections II.A, III.A (discussing procedural protections given to police officers throughout all stages of criminal justice system).

56. See infra section III.B (outlining how insider advantages in criminal justice system harm system’s legitimacy).

57. See infra sections II.A, IV.A (discussing pervasive procedural bias in favor of sophisticated suspects).

58. The animus behind the separation of powers is often linked to this very concept. See Martin H. Redish & Elizabeth J. Cisar, "If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory, 41 Duke L.J. 449, 451 (1991) (“Almost every aspect of [the framers’] ingenious political structure was in some way related to their implicit assumption that, simply put, ‘power corrupts.’”).

59. See Griffin v. Illinois, 351 U.S. 12, 19 (1956) (“There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”).

constitutional criminal procedure revolution has been much maligned in recent years, few would disagree with the concept that equality was the animating principle that motivated the Warren Court, which was responsible for the extension of numerous criminal procedural rights to all suspects.

amendments of the Bill of Rights come to mind.”). Of course, formally attempting to create equal rules does not ensure equal treatment, as there are many discretionary decisions that can be distributed unequally. See, e.g., Levine, How We Prosecute, supra note 9, at 756–57 (describing unequal outcomes resulting from vast discretion prosecutors enjoy in initial charging decision). But just because people are treated unequally does not mean that enshrining unequal treatment in formal law is an acceptable form of criminal procedural practice. For an argument that formal equality is not always the most important value in criminal procedure, see Stephanos Bibas, Forgiveness in Criminal Procedure, 4 Ohio St. J. Crim. L. 329, 347 (2007) (“Treating like cases alike is a value, but not the only one. Equality also requires treating unlike cases unlike, and forgiveness is a factor that makes cases unlike and worthy of different sentences. Moreover, equality should not trump all other values.”).

61. See, e.g., Stuntz, Collapse, supra note 11, at 218 (“[T]he justice system grew less egalitarian through the [Warren] Court’s efforts to make it more so.”).

62. See, e.g., Joseph L. Hoffmann & Nancy J. King, Rethinking the Federal Role in State Criminal Justice, 84 N.Y.U. L. Rev. 791, 801 (2009) (arguing focus of criminal procedure revolution was “to force the states to bring their criminal justice systems into compliance with the fundamental ideals of equality and fairness guaranteed by the United States Constitution.”); Stuntz, Unequal Justice, supra note 60, at 2040 (“Equal justice under law—the phrase resonates because of its seeming redundancy. Unequal justice is an oxymoron; law makes justice both equal and just. Those four words are really a long-winded substitute for one: ‘justice.’”). While the unequal distribution of criminal justice has been the subject of some scholarship, such scholarship tends to focus on wealthy, white-collar defendants and on sentencing disparities. See, e.g., Andrew Weissmann & Joshua A. Block, White-Collar Defendants and White-Collar Crimes, 116 Yale L.J. Pocket Part 286, 288–89 (2007), http://yalelawjournal.org/forum/white-collar-defendants-and-white-collar-crimes [http://perma.cc/UT6E-J7BF] (arguing it is wrong to treat those who commit white collar crimes differently from those who commit other crimes due to correlation with race and class); see also James Q. Whitman, Harsh Justice 47 (2003) (arguing some prosecutors have insisted on harsher white-collar sentences to avoid reputation as unfair toward poor defendants).

But the treatment of these defendants is not an apt comparison to the treatment of police defendants because of the nature of the law and jurisdiction that applies to white-collar defendants. Much white-collar criminalization occurs at the federal level. See Lauren M. Ouziel, Legitimacy and Federal Criminal Enforcement Power, 123 Yale L.J. 2134, 2246 (2014) (“Unlike large-scale white-collar or regulatory crimes, which typically require expertise and resources more available at the federal level, the default forum for street crimes is local.”). Most police crimes, like most other criminal law enforcement, occur at the state and local level. Moreover, unless a white-collar defendant is being charged with a typical state crime, such as theft, the laws themselves are substantively quite different than the laws that govern most “ordinary” crime. Police, on the other hand, are accused of crimes such as murder, assault, robbery, and perjury—crimes that are more closely aligned with traditional state criminal laws and processes. This is not to say that white-collar defendants should get preferential treatment any more than police should. It is only to say that, as far as specially treated defendants go, we can probably learn more from police defendants than from white-collar defendants.
Recently, the notion of the importance of equal distribution of criminal procedures to the legitimacy of the criminal justice system has been strengthened by the empirical work of Professor Tom Tyler and others. These scholars show that when citizens do not trust the justice system, they have less incentive to follow the law. Moreover, they show that the way people are treated by system actors has as much of an impact on the way they feel about the system as the substantive outcomes of their cases. While much of the work focuses on the interactions citizens have with particular criminal justice actors—police and judges—it also shows that people feel that the criminal justice system is more legitimate when procedures are distributed equally and when law enforcement officials appear unmotivated by bias for or against certain groups.

In other words, the preferential procedures that police defendants receive are problematic from the perspective of the way criminal procedure is designed to work. These defendants’ preferential treatment offends the appearance of impartiality, and this has negative effects for the way people view the law and the legitimacy of the legal system.

There are at least two ways to resolve the problem of preferential procedural protections for police. The simpler, perhaps more intuitive, avenue is to take away the systemic favoritism that works in favor of police suspects. In particular, for purposes of this Article, this means abolishing LEOBORS entirely. The second, more conceptually and practically difficult, solution is to extend some of these protective mechanisms to other criminal defendants. This is the path this Article recommends because police officers’ negotiated preferences are a valuable tool for understanding how interrogations work and how they should work.

Police suspects receive the benefits of procedural preferences gained through their intimate knowledge of how the criminal justice system

63. See Tyler, Why People Obey, supra note 14, at 5–7 (describing importance of normative and procedural justice).

64. See id. at 73 (noting “perception of unequal treatment . . . is the single most important source of popular dissatisfaction with the American legal system” (quoting Austin Sarat, Studying American Legal Culture: An Assessment of Survey Evidence, 11 Law & Soc’y Rev. 427, 434 (1977))).

65. See Levine, Who Shouldn’t Prosecute, supra note 3 (manuscript at 9–16) (discussing appearance of bias as threat to legitimacy of legal system).

66. See supra note 19 (presenting third way to deal with these rights outside scope of this Article).

67. See infra Part IV (noting most scholars who have addressed LEOBORS have made this suggestion).

68. See infra Part IV (discussing reasons police-negotiated protections are useful models for improving interrogations). As this Article discusses later, an interrogation protection’s existence in a LEOBOR is not a sufficient condition for extending that protection. The same characteristic that gives LEOBORS their power—they are drafted by experts who imagine themselves as suspects—also raises the important problem that they may be a corrupting overprotection rather than a valuable and necessary protection. Thus, each interrogation protection this Article recommends extending has an independent value.
works and how they can best shield themselves from its operations. Police are the interrogators: They know exactly what tactics are most likely to induce a confession, whether truthful or not. Their LEOBORs reflect this knowledge.69

At first blush, the notion that experts have designed procedures for themselves when they imagine themselves as the object of interrogation may lead to a swift conclusion that these preferences are the product of unfair self-dealing.70 One might well see the appearance and legitimacy problems they create and insist that they be eradicated.71 This Article argues instead that the interrogation rights provided by LEOBORs are a politically feasible and informative starting point to reimagine interrogation protections that are more sophisticated,72 in addition to being more in line with our current notions of humane treatment of those who are suspected of violating the criminal law.73 In fact, the interrogation protections that flow from police suspects’ very “insiderness” are a way to reinvigorate the debate over how to protect criminal suspects, among the least favored groups in our society.74

II. FORMAL PROTECTIONS FOR POLICE FROM POLICE INTERROGATION

Part I established why looking at the way law enforcement officers, as criminal justice insiders, want to be treated when they become criminal suspects can lead to a better understanding of the usually opaque world of criminal justice. This Part focuses more closely on the specific, formal procedural preferences police suspects receive from the Supreme Court,75 as well as from LEOBORs. Recently, criticism has begun to focus on how these protections unfairly skew the criminal justice system in favor of police suspects.76 Yet the umbrella of protections provided by

69. See infra section II.B (discussing protections officers receive when interrogated).
70. See infra section IV.A (characterizing LEOBORs as protecting least vulnerable suspects).
71. See infra section IV.A (suggesting eradicating protections could enhance legitimacy).
72. See infra section III.A (examining how current interrogation practices yield false confessions).
73. See infra section IV.B.2 (arguing enormous costs of unfair treatment of suspects outweigh any minimal benefits from such tactics).
74. See James Vorenberg, Decent Restraint of Prosecutorial Power, 94 Harv. L. Rev. 1521, 1555 (1981) (discussing concern that current operation of criminal law means “least favored members of the community—racial and ethnic minorities, social outcasts, the poor—will be treated most harshly”).
75. See Garrity v. New Jersey, 385 U.S. 493, 497–98 (1967) (protecting police from having to make inculpatory statements under threat of losing their jobs). The rest of the protections this Article discusses are found in LEOBORs.
76. This scrutiny primarily focuses on waiting periods before questioning of police officers. This provision became particularly intense in the wake of the arrest and indictment of the officers accused in Freddie Gray’s death in Baltimore. See Justin Fenton & Justin George, Five Officers in Freddie Gray Case Gave Accounts of Incident, Balt. Sun
most of these formal rights are more detailed and yield far more insight than recent commentary allows. In fact, numerous scholars have argued for decades that criminal suspects’ panoply of rights do not sufficiently protect them from coercive interrogation tactics.77 The tactics they allude to are among the very same ones disallowed by LEOBORs.

This Part argues that the formal interrogation protections police suspects receive protect them from a host of investigatory techniques that are considered part of the “playbook” when it comes to interrogating nonpolice suspects. It first discusses current Fifth Amendment and Fourteenth Amendment protection for nonpolice suspects and notes that police officers, as the most sophisticated suspects in the interrogation context, are already at an advantage over other suspects. It then turns to the added layer of affirmative protections police have negotiated or lobbied for themselves.

The first section in this Part describes the well-trod constitutional rights that are meant to protect criminal suspects from coerced confessions. It then shows how police are already perhaps the most advantaged suspects when it comes to interrogatory protection because they are typically the interrogators. The next subpart will show that their additional affirmative protections further invert the purpose of constitutional protections by giving already sophisticated suspects an extra layer of rights that the rest of us do not receive.

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A. Constitutional Confession Law Favors Sophisticated Suspects

Two strands of Supreme Court doctrine determine whether a confession is admissible. First, any suspect who has been arrested must be given notice of certain constitutional rights. *Miranda* warnings, based on the eponymous and famous case, include the right to remain silent, the right to an attorney, and notice that any statements made to officers can be used against a suspect in later proceedings.78 Both of these doctrines favor sophisticated suspects, usually wealthy, educated or recidivist interrogees, over unsophisticated suspects, often young, mentally ill, or mentally disadvantaged interrogees.

*Miranda* is among the most hotly contested Supreme Court criminal procedure rulings.79 For the purposes of this Article, a couple of the critiques are particularly apt. First, *Miranda* applies only in strictly denominated “formal” interrogations, allowing law enforcement officers to question suspects without advising them of their rights in a host of situations that may lead an unwary suspect to confess.80 Second, and perhaps most relevant, most suspects waive their *Miranda* rights.81 Some, of course, do so because they desire to make a truthful confession to a crime they committed. But many others do so for a host of reasons that do not lead to the conclusion that their confessions are the product of a voluntary waiver of rights.82

The second strand of doctrine is the voluntariness test, which courts use at suppression hearings to determine whether, given the “totality of the circumstances” a confession is admissible.83 This test, according to the Supreme Court, balances “the complex of values implicated in police questioning of a suspect.”84 On one side of the scale is the notion of the “need for police questioning as a tool for the effective enforcement of criminal laws.”85 Without wide latitude for police questioning, “the security of all would be diminished.”86 On the other side are a far more


82. See Ogletree, supra note 77, at 1827–28 (explaining several misunderstandings that lead suspects to waive rights).


84. Id. at 224–25.

85. Id. at 225.

86. Id.
nebulous “set of values” that reflect “society’s deeply felt belief that the criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice.” 87 Thus, ensuring that a statement is voluntary “enforces the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will.” 88

In reality, the voluntariness standard puts almost no restrictions on what police may do to induce a confession. The Court has not held any tactic in and of itself unconstitutional, short of physically beating a confession out of suspects, 89 isolating them for sixteen days before interrogation, 90 or interrogating them for thirty-six hours straight. 91 Importantly, the voluntariness test requires no specific protection from types of questions, the setting of an interrogation, the length of an interrogation, the number of interrogators, or any other specific type of interrogation technique. 92 Indeed, courts have routinely held that eco-

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87. Id.
88. Id. (quoting Blackburn v. Alabama, 361 U.S. 199, 206–07 (1960)).
89. See Brown v. Mississippi, 297 U.S. 278, 286 (1936) (holding confession obtained through physical abuse is not admissible).
90. See Davis v. North Carolina, 384 U.S. 737, 752 (1961) (holding confession was rendered inadmissible when suspect was held for sixteen days without any communication before interrogation).
91. See Ashcraft v. Tennessee, 322 U.S. 143, 154 (1944) (finding nonstop interrogation for thirty-six hours “inherently coercive”).
92. See Dickerson v. United States, 530 U.S. 428, 444 (2000) (“[T]he totality-of-the-circumstances test . . . is more difficult than Miranda for law enforcement officers to conform to, and for courts to apply in a consistent manner.”). As with Miranda, critics of the voluntariness test have argued that it is both over- and underprotective of criminal suspects. Some argue that it is too hard for officers to know ex ante whether they have coerced a suspect who confesses. See, e.g., Mark A. Godsey, Rethinking the Involuntary Confession Rule: Toward A Workable Test for Identifying Compelled Self-Incrimination, 93 Calif. L. Rev. 465, 469–70 (2005) (noting factors about suspect’s particular vulnerability not known to officers at time of interrogation can subsequently invalidate confession); Lawrence Herman, The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation, 48 Ohio St. L.J. 733, 745 (1987) (“Under the ‘totality of the circumstances’ approach, virtually everything is relevant and nothing is determinative. If you place a premium on clarity, this is not a good sign.”). Others believe that the totality of the circumstances test leads to the suppression of important evidence against guilty suspects. See Paul G. Cassell, Protecting the Innocent from False Confessions and Lost Confessions—and from Miranda, 88 J. Crim. L. & Criminology 497, 498 (1998) [hereinafter Cassell, Protecting the Innocent] (arguing “restrictions on interrogations can reduce the number of confessions police obtain”). Those who focus on underprotection argue that it allows the police to do almost anything to a suspect, short of beating a confession out of her. Nor does the reviewing judge need to take into account inherently coercive settings and techniques that produce involuntary and in an alarming number of cases, false confessions. See Herman, supra, at 752 (arguing vague rules will lead unscrupulous officers to “go to the brink” to obtain confession).
nomic duress, lengthy interrogations, sleep deprivation combined with middle-of-the-night questioning, refusal to allow basic physical necessities, lies about the severity of charges or evidence in the case, threats to family members’ welfare, inducements in the form of leniency or other promises, and other forms of psychologically abusive behavior do not render confessions involuntary.

A particularly salient critique of the constitutional protections governing interrogation is that they favor sophisticated suspects over more vulnerable ones. Critics of Miranda have argued for decades that

93. See, e.g., United States ex rel. Sanney v. Montanye, 500 F.2d 411, 415–16 (2d Cir. 1974) (finding threat of discharge from job as “driver’s assistant” not “substantial economic sanction” like loss of police officer position).

94. See Kassin, Inside Interrogation, supra note 81, at 534 (“Among proven false confessions in which time records were kept, the length of interrogation was over sixteen hours.”); Welsh S. White, What Is an Involuntary Confession Now?, 50 Rutgers L. Rev. 2001, 2046–47 (1998) [hereinafter White, Involuntary Confession] (noting courts have upheld interrogation sessions of nine hours or more, finding this did not render confessions involuntary).


96. See id. (upholding statements as voluntary after long interrogation in “absence of evidence that a lack of food and sleep contributed to the statements” (citing State v. Taylor, 537 P.2d 938, 951 (Ariz. 1975))).

97. United States v. Jacques, 744 F.3d 804, 808 (1st Cir. 2014) (holding confession voluntary when federal agents told suspect confessing would lead to softer treatment while not confessing would lead to maximum sentence); see also Johnson v. Pollard, 559 F.3d 746, 749 (7th Cir. 2009) (holding police officer’s lie that suspect failed polygraph test did not make confession involuntary); United States v. Meirovitz, 918 F.2d 1376, 1379 (8th Cir. 1990) (finding threat of long sentence for refusal to confess did not make confession involuntary).

98. See United States v. Hufstetler, 782 F.3d 19, 24–25 (1st Cir. 2015) (finding threat to detain suspect’s girlfriend and comment that “I certainly don’t want to see those kids be without their mother” was not coercive); Brown v. Horell, 644 F.3d 969, 980, 983 (9th Cir. 2011) (holding detective coerced Brown into confessing by conditioning Brown’s ability to be with his child on cooperation with police but also finding state supreme court’s decision under review was not “unreasonable application of clearly established Supreme Court law”).

99. See Jacques, 744 F.3d at 808 (upholding statements as voluntary despite agents repeatedly “inform[ing] Jacques that an honest confession might lead to softer treatment by the prosecutor and the sentencing judge, while a failure to cooperate was likely to result in the maximum sentence”); United States v. Villalpando, 588 F.3d 1124, 1129 (7th Cir. 2009) (finding confession voluntary despite detective indicating she would sit down with Drug Enforcement Administration in exchange for suspect’s cooperation in drug-related investigation and informing suspect “we don’t have to charge you”); see also Miriam S. Gohara, A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques, 33 Fordham Urb. L.J. 791, 792 (2006) (noting one of later-exonerated “Central Park Five” was told he could go home after confessing); White, Involuntary Confession, supra note 94, at 2043 (noting “certain interrogation tactics—especially tactics involving direct or implied promises of leniency . . . are also likely to precipitate untrustworthy confessions”).
the warnings are incomprehensible for a large number of suspects. For instance, former public defender Professor Charles Ogletree wrote that “notwithstanding the warnings, [his clients] believed either that their silence could be used against them as evidence of guilt or, more frequently, that by remaining silent they would forfeit their opportunity to be released on bail.”

Additionally, studies have shown that many defendants lack the reading proficiency to understand Miranda warnings delivered in written form, which requires roughly a tenth-grade reading level.

Very few suspects understand or invoke their Miranda rights, and the voluntariness test rarely leads to suppression. Such a state of affairs results in the unintended inversion of the goal of the Court’s Miranda ruling—encouraging guilty suspects to confess while ensuring that all suspects know their rights. Instead, “sophisticated suspects have a right to be free from questioning altogether—not simply free from coercive questioning—while unsophisticated suspects have very nearly no protection at all. The first group receives more than it deserves, while the second receives less than it needs.”

Even those who believe that the current state of regulation is adequate anticipate that suspects have a sophisticated understanding of the criminal justice system. Arguing that the right to remain silent “helps only the guilty,” Professor Stephanos Bibas posits that suspects confess for several positive reasons: “[M]any . . . know that they will be convicted [and] . . . gain important benefits from early confessions,” including “downgrade[d] or drop[ped] charges,” “mercy at sentencing,” and “speed[ing] up their post-sentence moves to long-term confinement” because “jails . . . are often less pleasant than . . . prisons.”


101. D. Christopher Dearborn, “You Have the Right to an Attorney,” but Not Right Now: Combating Miranda’s Failure by Advancing the Point of Attachment Under Article XII of the Massachusetts Declaration of Rights, 44 Suffolk U. L. Rev. 359, 374–75 (2011) (“Many of the words used in typical Miranda warnings require at least a tenth-grade reading level. In contrast, one 2003 study found that seventy percent of inmates read at a sixth grade level or below.” (footnote omitted)).

102. See Kassin, Inside Interrogation, supra note 81, at 534–35 (noting “misinformation makes people vulnerable to manipulation by a host of influences”).

103. See, e.g., Primus, supra note 77, at 3 (“[T]he voluntariness doctrine . . . almost always arrives at the conclusion that what the police did was, all things considered, acceptable.”).

104. William J. Stuntz, Miranda’s Mistake, 99 Mich. L. Rev. 975, 976–77 (2001) [hereinafter Stuntz, Mistake]; see also Tracey L. Meares, What’s Wrong with Gideon, 70 U. Chi. L. Rev. 215, 228 (2003) (“Miranda’s waiver and invocation system turns the focus of courts toward an assessment of ritual in which suspects sort themselves into groups of those willing to talk to police and those not.”). But see Schulhofer, Reconsidering, supra note 79, at 447–48 (arguing even sophisticated suspect would feel pressure to talk to police).

that a large number of suspects do confess for such reasons, these suspects must be quite sophisticated, at least in their knowledge of the criminal justice system. They must understand the “benefits” they will obtain for confessing early, both from prosecutors in terms of charge reduction and from judges in terms of more lenient sentencing. They must understand the difference between prison and jail and the tradeoffs between asserting their constitutional rights and a quick resolution to their case. The picture painted here is of a sophisticated, repeat-player suspect who makes rational choices unaffected by the inherent coerciveness of arrest and interrogation.

Similarly, more sophisticated suspects are less likely to fall prey to interrogation techniques that might lead to an involuntary or even false confession. This protects “savy suspects . . . defined by either wealth or . . . experience dealing with the system, something that recidivists naturally possess.” 106 By contrast, “vulnerable suspects, which includes those with the least experience dealing with the system, are helped, if at all, only indirectly.” 107 These results have been the basis for much criticism of confession law from a distributive perspective. 108

A large majority of suspects either answer questions in non- Miranda settings or waive their rights. 109 Modern police training teaches detectives how to use psychological techniques, including threats and promises, to induce a suspect to confess. 110 Studies have shown that young, mentally disadvantaged, and mentally ill suspects are far more susceptible to the trickery, inducements, and threats that constitute the interrogation

106. Stuntz, Mistake, supra note 104, at 977.
107. Id.
108. See id. at 977–78 (“In distributive terms, the best system is probably one in which everyone talks—or, at the least, one in which everyone submits to questioning—but where police tactics are effectively regulated. Miranda reversed that outcome, leaving only some suspects exposed to questioning but also leaving police tactics unregulated.”); see also Barry C. Feld, Juveniles’ Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice, 91 Minn. L. Rev. 26, 100 (2006) (arguing current “legal framework is inadequate to protect younger juveniles”); Andrew E. Taslitz, Judging Jena’s D.A.: The Prosecutor and Racial Esteem, 44 Harv. C.R.-C.L. L. Rev. 393, 417–18 (2009) (“Police are also more likely to presume guilt when questioning minorities, thereby eliciting defensive responses, which police interpret as deceptive; this in turn leads to harsher interrogation techniques . . . .”).
109. See Kassin, Inside Interrogation, supra note 81, at 537 (“It turns out, however, that four out of every five people waive these rights, and innocent people in particular are the most likely to do so.”); see also Primus, supra note 77, at 14–22 (discussing how Court has gutted Miranda by limiting situations in which police are required to give warnings and increasing requirements for courts to determine when suspect invoked rights).
110. See infra section IV.B (discussing such techniques); see also Steven A. Drizin & Richard A. Leo, The Problem of False Confessions in the Post-DNA World, 82 N.C. L. Rev. 891, 918–19 (2004) (“Regretfully, most interrogation training manuals . . . give no thought to how the methods they advocate communicate psychologically coercive messages and sometimes lead the innocent to confess.” (footnote omitted)).
playbook than their older, mentally well counterparts.\textsuperscript{111} The number of false confessions that judges have refused to suppress among these vulnerable groups belies the notion that a reviewing court will be able to sort out these suspects from others.\textsuperscript{112} Simply put, trial judges and reviewing courts are loath to suppress damning evidence without a clear showing that a confession was obtained through brutal tactics. Thus, confessions are rarely suppressed based on either the suspect’s susceptibility or the officer’s interrogation techniques, particularly once \textit{Miranda} rights have been provided and waived.\textsuperscript{113}

Even if the truthfulness of a confession is not in question, the tactics police use, particularly on vulnerable suspects, offend many closely held notions of humane treatment in a civilized society. Justice Frankfurter put the matter squarely, stating that “not the least significant test of the quality of a civilization is its treatment of those charged with crime.”\textsuperscript{114} Speaking of threats to a suspect’s family, the Ninth Circuit made a similar point in a case where it could not give the defendant relief for procedural reasons.\textsuperscript{115} Likewise, depriving a suspect of sleep, food, or water, threatening her with the loss of family, making false promises of leniency, or threatening to introduce fabricated evidence may induce confessions, but such tactics also directly contravene the humaneness of American society.\textsuperscript{116}

The confession literature captures some of the distributional problems with interrogation protection for wealthy or “sophisticated”

\textsuperscript{111} See Drizin & Leo, supra note 110, at 970–71 (“The unique vulnerability of the mentally retarded to psychological interrogation techniques and the risk that such techniques when applied to the mentally retarded may produce false confessions is well-documented in the false confession literature.”); id. at 973–74 (discussing prevalence of mental illness among study of exonerations); see also Kassin, Inside Interrogation, supra note 81, at 533–34 (“That juveniles are vulnerable is not particularly surprising . . . . To the adolescent, not fully focused on long-term consequences, confession may serve as an expedient way out of a stressful situation.”).

\textsuperscript{112} See Drizin & Leo, supra note 110, at 944–45, 963–71 (discussing false-confession cases where suspect was young or mentally retarded).

\textsuperscript{113} See Godsey, supra note 92, at 513 (“After \textit{Miranda} warnings have been provided to a suspect and waived, most courts simply presume that any confession that follows was made voluntarily.”).


\textsuperscript{115} United States v. Tingle, 658 F.2d 1332, 1336 (9th Cir. 1981) (“The relationship between parent and child embodies a primordial and fundamental value of our society. When law enforcement officers deliberately prey upon the maternal instinct and inculcate fear in a mother that she will not see her child in order to elicit ‘cooperation,’ they exert . . . ‘improper influence’ . . . .” (quoting Malloy v. Hogan, 278 U.S. 1, 8 (1964))).

\textsuperscript{116} See infra section IV.B (advocating use of only those interrogation techniques that advance “humane treatment of suspects”). This criticism of our criminal justice system most often appears in the death penalty context. See, e.g., William J. Brennan, Jr., In Defense of Dissents, 37 Hastings L.J. 427, 436 (1986) (arguing death penalty has no place in civilized society and “the state, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings”).
recidivist suspects as opposed to their more vulnerable counterparts. Yet it leaves out perhaps the most sophisticated group of suspects: the police. The police are the interrogators. No level of privilege or education makes up for the intimate insider knowledge that police possess through their training and first-hand experience. Few groups are better situated to refuse to talk in informal, non-Miranda interrogations. Few groups are better informed about what it means to invoke, and continue to invoke, their rights to silence and counsel. No group is more aware of the psychological interrogation techniques that police use to encourage confessions. Thus, any critique of confession jurisprudence does well to take this group into account. The police, because of their nearly unique insider status, already skew the relationship between protection and sophistication more than almost any other group. This is problematic both for those who believe there are too many coerced confessions and for those who believe sophisticated suspects are able to pervert the truth-seeking balance the Court strives for in its confession jurisprudence.

Already then, the police are in a particularly privileged position when it comes to asserting their rights to silence and counsel in the face of interrogation. Yet this most sophisticated group of suspects, as described below, enjoys numerous additional positive protections from interrogation. It is hard to imagine a more backward regime from the perspective of distributive justice in criminal law.

B. Additional Formal Protections for the Police

This section looks at the additional formal protections police receive when they are interrogated. Police suspects benefit from a combination of two formal protections not extended to most other suspects. First, Supreme Court jurisprudence protects police from the economic duress inherent in a choice between incriminating themselves and losing their jobs. Second, LEOBORs grant police dozens of additional affirmative protections. When compared with the vague and weak protections for other classes of suspects, the strong protections for police suspects raise a host of systemic problems that threaten the meaning and legitimacy of the criminal law.

LEOBORs first came about in the wake of the Supreme Court’s 1967 decision in Garrity v. New Jersey, which protects police from having to decide between incriminating themselves and losing their employ-

117. See, e.g., Stuntz, Mistake, supra note 104, at 977 (discussing sophisticated suspects).
118. See supra Part I (discussing disconnect between criminal justice insiders and outsiders).
119. See supra note 92 (contrasting scholars who believe voluntariness test in confession jurisprudence is underprotective of criminal suspects with those who believe test is overprotective).
120. See infra section IV.C (acknowledging many believe criminal law should make special exceptions for police but arguing those exceptions should not be procedural).
ment.121 Garrity arose out of an investigation, prosecution, and eventual conviction of a number of New Jersey police officers for a ticket-fixing scheme.122 Officer Garrity and others answered certain questions, and their answers were ultimately used to secure convictions against them. The officers later claimed that the introduction of their inculpating statements violated their Fifth Amendment right against self-incrimination. They asserted that their choice, to speak or lose their jobs, was akin to no choice at all.123 Reversing the convictions, the Court agreed:

The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent . . . . We think the statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary . . . .124

The Court specifically denied that its decision was based on the defendants’ status as police officers. This right “extend[ed] to all, whether they [we]re policemen or other members of our body politic.”125 The opinion’s scope, however, is quite limited in many situations because there are few other suspects who are being questioned about on-the-job wrongdoing and criminal activity by the same authority.126 In other words, the opinion says nothing about what happens if a criminal suspect is given the choice between confession and missing days of work. It does not technically violate Garrity’s rule to indirectly impact a suspect’s work prospects, by for instance, detaining her until she loses her job or

121. 385 U.S. 493, 500 (1983) (“We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office . . . .”). The case, in combination with a number of other Supreme Court decisions, has come to stand for the problematic principle that a prosecutor may not use a compelled statement from a police officer against him in a criminal proceeding. In fact, some courts have read the case to prevent prosecutors from using any evidence that they cannot prove was gathered without any knowledge of the immunized statement. See Steven D. Clymer, Compelled Statements from Police Officers and Garrity Immunity, 76 N.Y.U. L. Rev. 1309, 1312–13 (2001) [hereinafter Clymer, Compelled Statements] (arguing Garrity immunity has been extended too far). While a fascinating issue in its own right, the problem of using immunity is not the focus of this Article.

122. See Garrity, 385 U.S. at 494 (providing background to case).
123. See id. at 495 (summarizing petitioners’ claims).
124. Id. at 497–98.
125. Id. at 500. In a later case, the Court specifically held that Garrity’s rule was applicable to architects threatened with the suspension of their public contracts. See Lefkowitz v. Turley, 414 U.S. 70, 83–84 (1973) (“We fail to see a difference of constitutional magnitude between the threat of job loss to an employee of the State, and a threat of loss of contracts to a contractor.”).
126. Clymer, Compelled Statements, supra note 121, at 1317 (finding rationale for Garrity was that “state’s threat to fire the police officers unless they gave statements was an unconstitutional condition”).
threatening to tell an employer about suspected criminality, though the result may be the same “economic execution” that police officers face.

At the time the Court decided *Garrity*, police unions did not feel that it went far enough to protect their members from intrusive internal and potentially criminal investigations. In fact, *Garrity*, the Warren Court’s other decisions, and the civil rights reform aspirations of the 1960s led both police unions and politicians to believe that police officers had fewer rights than they needed to protect themselves from misconduct investigations. As Professors Kevin Keenan and Samuel Walker note, the police responded by “adopting many of the tactics of their civil rights critics: public protests, assertion of their group rights, and lobbying for legislative protections.”

In hindsight, and particularly at this moment, critics see these bills of rights as a way for police unions to corrupt and elude fair investigation. The comments surrounding the first federal LEOBOR bill suggest, however, that rank-and-file officers sincerely believed they were being treated as “constitutionally inferior” to other citizens. Their political supporters agreed. In 1972, then-future New York City Mayor Ed Koch stated to Congress that a separate bill of rights was needed because “an imbalance has evolved . . . while we have taken steps to insure the rights of defendants and complainants, we have failed to protect the

127. See supra section II.A (discussing totality of circumstances test).
129. Ironically, *Garrity* and its progeny have become the “bulwark” defense mechanism for rank-and-file officers in “police labor relations” and in concert with later decisions, an enormous thorn in the side of police prosecutions. See Porter, supra note 128, at 34–35 (noting irony of how *Garrity* has come to be used given how hostile police were to Warren Court); see also Clymer, Compelled Statements, supra note 121, at 1338–41 (discussing difficulty of obtaining useable evidence against police officers after *Garrity* and other decisions).
130. See Keenan & Walker, supra note 76, at 196 (noting “dissatisfaction with internal police management practices” as motivating factor for police unionization and enactment of LEOBORS after efforts by police unions and “sympathetic public officials”).
131. Id.
132. See infra section IV.A (describing LEOBOR “cooling off” periods as potential opportunity for police suspects to collude).
133. See Byron L. Warnken, The Law Enforcement Officers’ Privilege Against Compelled Self-Incrimination, 16 U. Balt. L. Rev. 452, 488–89 (1987) (“Because the executive and judicial branches were still treating law enforcement officers as constitutionally inferior, Congress, as well as some state legislatures, began to address the problem.”).
rights of policemen.” 134 Introducing another bill the next year, an Illinois congressman insisted that: “Law enforcement officers should be entitled to the same protection of the laws they are required to enforce. Policemen should be as free of intimidation and harassment during the process of a hearing as is the average citizen.” 135 And yet another congressman lamented that “[m]any Americans take [their constitutional] liberties and rights for granted, but for . . . [the police] who have . . . experienced life without them the saga reads very differently.” 136 These statements elucidate two important themes: First, LEOBOR proponents sincerely believed police officers lacked adequate constitutional guarantees. Second, these rights were negotiated with a focus on the rights police suspects should have during criminal investigations, not merely internal misconduct investigations. 137

A federal LEOBOR has never been passed, 138 but at least fourteen state legislatures have passed such bills. 139 Countless other versions are

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137. One potentially legitimate critique of this Article’s comparison between interrogations of police and interrogations of other suspects is that LEOBORs were negotiated because the police are very often questioned about on-the-job infractions that may or may not lead to criminal charges. In other words, LEOBORs are more about an employer questioning an employee than an officer conducting a criminal interrogation. While this may be, the statutes, for the most part, are not clear about whether interrogation protections apply to internal discipline only. See Keenan & Walker, supra note 76, at 205 & n.125 (noting only three LEOBORs—Illinois, California, and Rhode Island—officially do not apply when an investigation is criminal). Moreover, because in many jurisdictions one investigation serves for both criminal charges and internal misconduct charges, these protections apply, for the most part, to all officers suspected of criminal wrongdoing, whether they are being questioned in formal or informal settings. See Hager, supra note 5 (noting internal investigation is often sole investigation of misconduct). Finally, regardless of this question, examining protections police want when they are subjected to either criminal or internal questioning is a valuable tool for thinking about potential reform. See infra section IV.A (using LEOBORs as model for broader confession rights for all criminal defendants).
138. See Keenan & Walker, supra note 76, at 197 (noting since introduction of LEOBOR bill in U.S. House of Representatives in 1970s, similar bills have been introduced nearly every subsequent session and Congress came close to passing federal LEOBOR in 1991).
part of negotiated agreements with counties and municipalities.\footnote{140}{Because these are not statutes and because their content is very similar to their statutory cousins, this Article will not focus on these agreements here.} In the only article to rigorously explore LEOBORs, Keenan and Professor Walker provide a full account of the many and differing provisions contained in the state bills.\footnote{141}{Keenan & Walker, supra note 76.} This section will focus only on those provisions that are germane to protections from police interrogation tactics. While some LEOBORs specify that they apply only to internal investigations,\footnote{142}{See id. at 205–06 & n.125 (noting three LEOBORs—Illinois, California, and Rhode Island—do not apply when investigation is criminal).} most are silent on the interplay between administrative and criminal investigations.\footnote{143}{See id. at 205–06 (noting ten of fourteen LEOBOR statutes analyzed “are silent as to whether they apply to suspected criminal behavior”).}

Most statutory LEOBORs contain very similar language. This includes the following rights for an officer being formally questioned:

1. The interrogation must be conducted at a reasonable hour, preferably when the officer is on duty or during normal waking hours.\footnote{144}{See Cal. Gov’t Code § 3303(a) (West 2010) (requiring interrogation at reasonable hour unless “seriousness of investigation requires otherwise”); Del. Code Ann. tit. 11, § 9200(c)(1) (2015) (requiring interrogation occur at reasonable hour unless “gravity of investigation” makes “immediate questioning” necessary); Fla. Stat. Ann. § 112.532(1)(a) (West 2014) (calling for interrogations at reasonable hour—preferably while officer is on duty—unless immediate action is required); 50 Ill. Comp. Stat. Ann. 725/3.3 (West 2006) (“All interrogations shall be conducted at a reasonable time of day. Whenever the nature of the alleged incident and operational requirements permit, interrogations shall be conducted during the time when the officer is on duty.”); Ky. Rev. Stat. Ann. § 15.520(1)(c) (LexisNexis 2013) (prohibiting interrogation within forty-eight hours of complaint and requiring interrogation take place while officer is on duty); Md. Code Ann., Pub. Safety § 3-104(f) (LexisNexis 2011) (requiring interrogation to take place at reasonable hour and if possible, when officer is on duty); Minn. Stat. Ann. § 626.89(7) (West 2009) (“When practicable, sessions must be held during the officer’s regularly scheduled work shift.”); Nev. Rev. Stat. Ann. § 289.060(3) (LexisNexis 2013) (requiring interrogation occur during officer’s regular shift or rescheduled shift or officer must receive compensation if off duty); N.M. Stat. Ann. § 29-14-4(A) (2013) (“[A]ny interrogation of an officer shall be conducted when the officer is on duty or during his normal working hours, unless the urgency of the investigation requires otherwise.”); 6C R.I. Gen. Laws § 42-28-6-2(1) (2007) (“The interrogation shall be conducted at a reasonable hour, preferably at a time when the law enforcement officer is on duty.”); Va. Code Ann. § 9.1-501(1) (2012) (requiring questioning occur at reasonable time and place); W. Va. Code Ann. § 8-14A-2(1) (LexisNexis 2012) (requiring interrogation occur while officer is on duty if possible and that officer receive compensation if interrogation occurs while officer is off duty).}

3. The officer can be questioned only by one (sometimes two) person(s) during an interrogation session.\textsuperscript{146}

4. The interrogation must be for a reasonable period.\textsuperscript{147}

5. The officer under interrogation must be allowed to attend to personal physical necessities.\textsuperscript{148}

\textsuperscript{146} See Cal. Gov't Code § 3303(b) ("All questions . . . shall be asked by and through no more than two interrogators at one time."); Del. Code Ann. tit. 11, § 9200(c)(3) ("All questions . . . shall be asked by and through no more than 2 investigators."); Fla. Stat. Ann. § 112.532(1)(c) (stating questions must be asked by one interrogator unless officer waives requirement); Md. Code Ann., Pub. Safety § 3-104(h)(1) ("All questions . . . shall be asked by and through one interrogating officer . . ."); N.M. Stat. Ann. § 29-14-4(D)(4) ("[T]here shall not be more than two interrogators at any given time . . ."); 6C R.I. Gen. Laws § 42-28.6-2(3) ("All questions directed to the officer under interrogation shall be asked by and through one interrogator."). But see W. Va. Code Ann. § 8-14A-2(2) (prohibiting use of more than three interrogators at once).


\textsuperscript{148} See Cal. Gov't Code § 3303(d) ("The person under interrogation shall be allowed to attend to his or her own personal physical necessities."); Del. Code Ann. tit. 11, § 9200(c)(5) (requiring police suspect be granted time for "personal necessities and rest periods"); Fla. Stat. Ann. § 112.532(1)(e) (same); 50 Ill. Comp. Stat. Ann. 725/3.5 (requiring interrogations provide reasonable time for personal necessities); La. Stat. Ann. § 40:2531(B)(2) (requiring interrogation "allow for reasonable periods for the rest and personal necessities" of officer); Md. Code Ann., Pub. Safety § 3-104(h)(2)(i) (requiring interrogation "allow for personal necessities and rest periods"); Minn. Stat. Ann. § 626.89(7) (requiring interrogators "must give the officer reasonable periods for rest and personal necessities."); N.M. Stat. Ann. § 29-14-4(D)(1)–(3) (establishing time limitations and requiring "rest periods"); 6C R.I. Gen. Laws § 42-28.6-2(6) ("Interrogating sessions shall be for reasonable periods and shall be timed to allow for such personal necessities and rest periods as are reasonably necessary.").
6. The officer must not be subject to any abusive language.\textsuperscript{149}

7. No promise of reward can be made as an inducement to answering any question.\textsuperscript{150}

8. The officer may not be compelled to submit to a lie detector test, nor may any comment on her refusal be entered into the notes of the investigation.\textsuperscript{151}

9. The officer must not be threatened with punitive action (other than the threat that not answering questions may result in such action) or inducements.\textsuperscript{152}

Taking LEOBOR protections and the Garrit\textit{y} holding in the aggregate, a quite civil investigative picture emerges. The suspected officer is aware of the potential charges against her and is questioned at a time when she is most alert, with time limitations, taking into account her personal needs, and by only one investigator, who may not use abusive language, threats, or promises to encourage her to confess. Should a


\textsuperscript{150} See Cal. Gov’t Code § 3303(e) (“No promise of a reward shall be made . . . .”); Fla. Stat. Ann. § 112.532(1)(f) (“A promise or reward may not be made as an inducement to answer any questions.”); N.M. Stat. Ann. § 29-14-4(D)(6) (stating questioned officer shall not be subjected to illegal “coercion”); W. Va. Code Ann. § 8-14A-2(3) (“No promise of reward shall be made as an inducement to answering questions.”).

\textsuperscript{151} See Cal. Gov’t Code § 3307 (“No public safety officer shall be compelled to submit to a lie detector test against his or her own will.”); 50 Ill. Comp. Stat. Ann. 725/3.11 (“In the course of any interrogation no officer shall be required to submit to a polygraph test, or any other test questioning by means of any chemical substance, except with the officer’s express written consent.”); Nev. Rev. Stat. Ann. §§ 289.050, 289.070(1) (LexisNexis 2013) (prohibiting disciplinary or retaliatory action against officer for refusal to submit to polygraphic examination). But see Md. Code Ann., Pub. Safety § 3-104(1)(1) (stating agency may compel officer to submit to polygraph exam).

\textsuperscript{152} See Cal. Gov’t Code § 3303(e) (stating officers cannot be threatened with punitive action but can be informed of possible punitive action if they do not respond to directly relevant questions); Del. Code Ann. tit. 11, § 9200(c)(6) (“[N]o officer shall be threatened with transfer, dismissal or other disciplinary action.”); Fla. Stat. Ann. § 112.532(1)(f) (prohibiting inducements); Ky. Rev. Stat. Ann. § 15.520(1)(b) (LexisNexis 2013) (prohibiting threats, promises, or coercion when officer is suspect in criminal prosecution or accused of violating law enforcement procedures and stating suspension without pay and reassignment are not coercion); Md. Code Ann., Pub. Safety § 3-104(i) (stating officer cannot be “threatened with transfer, dismissal, or disciplinary action”); Nev. Rev. Stat. Ann. § 289.060(4) (stating officer responses to questions under threat of punitive action are inadmissible in subsequent proceedings); N.M. Stat. Ann. § 29-14-4(D)(6) (stating officer may not be subject to illegal "coercion"); 6C R.I. Gen. Laws § 42-28.6-2(7) (“Any law enforcement officer under interrogation shall not be threatened with transfer, dismissal, or disciplinary action.”); W. Va. Code Ann. § 8-14A-2(3) (prohibiting threats of "punitive action" and "promise[s] of rewards").
police suspect be compelled to make a statement by threat of dismissal, her statement is inadmissible at any criminal trial.

Depending on one’s view of the value of confessions, the meaning of the Fifth and Fourteenth Amendments, and the correct balance to strike between fairness and truth seeking, this may be an ideal or an overprotective and inefficient set of rights.\textsuperscript{153} Regardless, it is a set of rights that, for all intents and purposes, applies only to police officers.

III. THE SYSTEMIC PERILS CREATED BY ADDITIONAL INTERROGATION PROTECTIONS FOR POLICE

LEOBORs that grant protections for law enforcement suspects are systemically harmful in at least three ways. First, they problematically distribute criminal procedures unequally to sophisticated suspects. Second, they threaten the legitimacy of the criminal justice system by showing that the police do not allow the interrogation tactics that police use on ordinary suspects—some of which contribute to false confessions—to be used when they are suspects. Third, they violate a number of values that, according to procedural-justice scholars, lead to cooperation with the criminal law. The unequal distribution of criminal procedure protections to police is an untenable state.

On the one hand, police suspects benefit from a host of specific, statutorily imposed positive protections against interrogation. Meanwhile other potential criminal suspects have only the right to be notified of their constitutional protections and to argue that their confession was the product of interrogation so coercive that it overbore their will to remain silent.\textsuperscript{154} What is wrong with this picture? At first blush, there is the problem that this state of affairs gives significantly more formal protection to one group of criminals than to others. This alone violates our core notion of equality under law, which is the subject of much criminal justice writing in other contexts.\textsuperscript{155}

There is also something particularly problematic with the fact that the privileged group of suspects here is the police. This problem takes a number of forms. If constitutional protections already invert the relationship between sophisticated suspects and the protections they receive, granting additional affirmative rights for police skews the system even further in this direction. Additional rights for arguably the most sophisticated suspects threaten the legitimacy of the criminal justice

\textsuperscript{153} See, e.g., Cassell, Protecting the Innocent, supra note 92, at 498 (arguing there is “lost confession problem” across criminal justice system that “arises because restrictions on interrogations can reduce the number of confessions police obtain, which will in turn prevent police from solving crimes”).

\textsuperscript{154} See supra section II.A (discussing how current constitutional protections of confessions favor sophisticated suspects).

\textsuperscript{155} See supra note 62 and accompanying text (identifying recent scholarship focusing on equality and justice in criminal system).
system by preferencing, or at the very least appearing to preference, insiders over outsiders. Relatedly, suggesting that the criminal justice system is inherently biased in favor of those insiders charged with enforcing the law dilutes the normative legitimacy of the criminal law and the incentives ordinary citizens have to follow it. These are serious systemic harms that threaten our already problematic criminal justice system.\[156\]

A. Fairness, Legitimacy, and the Appearance of Justice

The fact that the most sophisticated suspects get a special layer of protection from interrogation threatens the legitimacy of the criminal justice system. It allows for the inhumane treatment of some suspects while shielding the police from the same tactics. In addition, it violates the central principle of due process that “justice appear just.” By doing so, it further sullies the legitimacy of the criminal justice system.\[157\]

Because investigations, and particularly those aimed at police, are shrouded in so much secrecy, those on the outside do not see whether police are actually granted these extra protections in every criminal investigation or how these additional layers of protection place police in a privileged position. What the public does tend to see, and what has been the subject of much media focus, is police using excessive force and in a number of cases, not being subjected to prosecution or punishment despite using such force.\[158\]

Indeed, LEOBORs have come under fire for just this reason in places where police have been accused of killing unarmed civilians.\[159\]

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156. Many scholars have exposed the criminal justice system’s disparate impact on: minorities, see Alexander, supra note 25, at 96–97 (arguing mass incarceration through War on Drugs disparately and unfairly impacts African Americans and Latinos); the poor, see Paul D. Butler, Poor People Lose: Gideon and the Critique of Rights, 122 Yale L.J. 2176, 2185–87 (2013) (noting poor typically do not receive particularly able defense counsel); Jeffrey Fagan & Tracey L. Meares, Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities, 6 Ohio St. J. Crim. L. 173, 226 (2008) (highlighting legal control of poor through mass incarceration); and other marginalized groups, see William J. Rich, The Path of Mentally Ill Offenders, 36 Fordham Urb. L.J. 89, 90 (2009) (concluding mentally ill are more likely to be imprisoned and go untreated).

157. See Levine, Who Shouldn’t Prosecute, supra note 3 (manuscript at 9–10) (discussing appearance-of-justice principle as applicable to prosecutors).

158. The problem this Article alludes to is exemplified by the nonindictment of the officer who choked Eric Garner to death, the lack of charges in the shooting of twelve-year-old Tamir Rice, and the acquittal of Chicago Officer Brelo, who shot two unarmed people in a car. Recently, several counterexamples have arisen, including the prosecution and conviction of Officer Liang for the shooting death of Akai Gurley in Brooklyn, New York, the very public charging and indictment of six officers in the death of Freddie Gray, and the indictment of Officer Slager for shooting Walter Scott in the back as he ran away. Whether or not these cases represent a trend toward more criminal prosecutions and convictions of police remains to be seen.

159. See infra section IV.A (summarizing recent arguments in favor of abolishing LEOBORs).
These reactions to LEOBORs mirror the more general public sentiment that unpunished police criminality is a threat to the legitimacy of our system. Beyond the fact that these specialized protections for the most sophisticated suspects are unfair, the shroud under which they are meted out to criminal justice insiders offends an important due process principle in our criminal justice system. This is the principle that justice must satisfy the appearance of justice. The Supreme Court has used this principle to disqualify judges in several cases where they appeared biased, regardless of proof that they were.

The “appearance of justice” principle does not formally apply to many of the settings this Article discusses because so little of criminal justice actually happens in these settings. But because police and prosecutors are, for many suspects, the face of criminal justice, it is these actors who are most responsible for whether the public views the system as fairly distributed or as corrupt and unjust. This is part of a much larger problem in our current system: Those we entrust to enforce our laws enjoy almost unchecked discretion and are too often not required to explain the seemingly unfair decisions they make.

This point is at the very core of the problem with LEOBORs and Garrity rights for police. In the judicial context, prominent scholars have noted that “if there exists any reasonable doubt about the adjudicator's impartiality at the outset of a case, provision of the most elaborate pro-


161. See Levine, Who Shouldn’t Prosecute, supra note 3 (manuscript at 9–10) (discussing “appearance of justice” principle as it has been applied).

162. See id. (manuscript at 10–12) (“The Supreme Court has made clear that, even in cases where a judge is accused of an actual conflict, the appearance of bias is of utmost concern.”).

163. See supra Part I (describing how most suspects come into contact with police and prosecutors far more often than with other actors in our system of guilty pleas).

164. See Levine, Who Shouldn’t Prosecute, supra note 3 (manuscript at 34–35, 39) (arguing relationship between prosecutors and police officers negatively colors public perception of fairness of prosecutions of police officers); Natapoff, supra note 38, at 1361–62 (discussing procedural legitimacy problems with police and prosecutorial selection decisions); Woods, supra note 47, at 757–58 (“Improving perceptions of police legitimacy is not only important on its own terms but can have important long-term benefits for compliance with the law.”). While our awareness of LEOBORs is recent, their existence has already drawn criticism from scholars, politicians, and the public. See infra section IV.A (discussing these reactions).

165. See Angela J. Davis, Arbitrary Justice: The Power of the American Prosecutor 40, 166 (2007) (noting prosecutors are unaccountable to public and do not force police to be accountable by scrutinizing their investigations).
cedural safeguards will not avail to create this appearance of justice."\textsuperscript{166} In the case of the police policing themselves, however, the opposite statement could be made. If the police alone are given “the most elaborate procedural safeguards,” no amount of “impartiality” of judges or other public officials will “create the appearance of justice.”\textsuperscript{167}

In order for the criminal justice system to maintain its legitimacy in the eyes of those who do not operate within its borders daily, it cannot appear to favor insiders over outsiders. And there is almost no way to appear more corrupt and unjust than having a specialized set of protections that regulate the police from interrogating other officers while they are free to use almost any tactic, short of physical abuse or extreme deprivation, against all other suspects.\textsuperscript{168}

Adding to the legitimacy problem created by the actual and apparent special treatment of police suspects is a problem specific to interrogations: our growing awareness of how many innocent people have been imprisoned after making false confessions. In 2008, Professor Brandon Garrett conducted a study of exonerees in which he found that “[a]t the trial court level, four types of evidence often supported these 200 erroneous convictions: eyewitness identification evidence, forensic evidence, informant testimony, and confessions.”\textsuperscript{169} Confessions accounted for sixteen percent of the wrongly convicted in his study and “while half of those who falsely confessed raised claims challenging the confession, none received relief.”\textsuperscript{170}

More recently, Professor Garrett examined several more exonerees’ cases, finding numerous false confessors who could have been exonerated by DNA evidence at the time of their confessions.\textsuperscript{171} Of the twenty-six new confession cases he studied, ten involved juveniles, at least two more involved those who had an “intellectual disability,” and at least one involved a suspect who was “mentally ill.”\textsuperscript{172} All twenty-six suspects waived their \textit{Miranda} rights. Professor Garrett found that all but one confession were the product of “lengthy interrogations.”\textsuperscript{173} One man was questioned for twenty-seven hours, another for twelve, and all but one for more than


\textsuperscript{167} Id.

\textsuperscript{168} See supra Part II (describing formal protections for police suspects during interrogations).

\textsuperscript{169} See Garrett, Judging Innocence, supra note 77, at 122.

\textsuperscript{170} Id. at 61.

\textsuperscript{171} See Brandon L. Garrett, Contaminated Confessions Revisited, 101 Va. L. Rev. 395, 396 (2015) [hereinafter Garrett, Contaminated Confessions] (“Other convictions were more recent and are troubling for a different reason: Nearly half of these false confession cases involved convictions despite DNA tests that excluded the defendants at the time of conviction.”).

\textsuperscript{172} Id. at 399–400.

\textsuperscript{173} Id.
three hours. Judges affirmed the voluntariness of the confessions in every one of these cases. Three of these exonerees had been sentenced to death. Professor Garrett concluded that an even greater number of false confessions likely exist but have not come to light due to the lack of scientific evidence in these cases. As discussed above, other studies have shown that particularly vulnerable populations, including children, the mentally disadvantaged, and the mentally ill, are far more likely to confess; unsurprisingly, these groups are also more likely to be among those later exonerated.

Despite this mounting evidence about false confessions, and about how isolation, lengthy interrogations, inducements, threats and other police tactics prevented by LEOBORs contribute to the conviction of innocent defendants, police continue to interrogate suspects with almost no regulation. And prosecutors continue to use confessions, ruled voluntary, to secure plea bargains or convince juries of a defendant’s guilt. In fact, when confessions are available as evidence, police and prosecutors often do little to no further investigation, as they are certain that a confessor is guilty or that they can convince a jury of a defendant’s guilt.

Now we come to find that the police themselves have negotiated for affirmative protections when they are the subjects of investigation, precisely because they are aware of how these tactics can force confessions. As inequitable as these special protections may seem in hindsight, they were not lobbied for in a cynical manner. Indeed, they arose out of a sincere concern that internal-affairs investigators would coerce police

174. Id. at 402.
175. Id. at 400.
176. See id. at 396 (“This second wave of false confessions should cause even greater alarm than the first.”).
177. See supra notes 111–112 and accompanying text (describing particular susceptibility of certain vulnerable classes of suspects to making false confessions).
178. See Garrett, Judging Innocence, supra note 77, at 88–91 (giving evidence of false confessions in criminal convictions); see also Drizin & Leo, supra note 110, at 932–95 (discussing quantitative and qualitative trends in false confessions and case outcomes).
179. See Drizin & Leo, supra note 110, at 907–23, 948 (reviewing common interrogation strategies leading to false confessions, including lengthy interrogation, isolation, inducements, threats, and other psychological tactics).
180. See Stuntz, Mistake, supra note 104, at 977 (arguing Miranda left “police tactics unregulated”).
182. See supra section II.B (describing role of police unions in negotiating affirmative protections against coercive investigation).
officers into speaking against their will. They also represent the basic humane treatment that police officers expect to receive when they are being investigated. The fact that such rights were won sincerely does not lessen the legitimacy problem LEOBORs create. Officers who know what protections they need from each other continue to deny such protections to other criminal suspects. Meanwhile, judges and prosecutors, who should be aware of which techniques coerce confessions, continue to encourage these tactics. They do so by ruling the vast majority of confessions voluntary and using confessions as powerful bargaining and trial chips. Thus, the formal protections that shield police from one another contribute to the appearance of an illegitimate criminal justice system.

B. Procedural Justice and Obeying the Law

The appearance problem created by specialized protections for police may do more than just cause citizen distrust in the system. It may also create an incentive for people to ignore the law.

The criminal law’s purpose is not simply to deter criminal activity but to impart expressive messages about what our democratic society perceives as moral. In order for criminal law to encourage compliance for any reason other than the fear of punishment, those entrusted to enforce it must be seen as motivated by unbiased and just purposes. Indeed, Professor Tyler writes, “[P]eople do not judge the fairness of legal procedures by the degree to which they gained or lost from those procedures . . . the primary direct influence upon . . . judgments of . . . legitimacy comes from judgments about the trustworthiness of authori-

183. See supra section II.B (describing protection from “economic duress inherent in a choice between incriminating themselves and losing their jobs”).
184. See Brandon L. Garrett, The Substance of False Confessions, 62 Stan. L. Rev. 1051, 1118 (2010) [hereinafter Garrett, Substance] (noting, in study of forty exonerees who confessed, “DNA testing excluded eight of these exonerees at the time of trial, but the confession of guilt was powerful enough to overcome the DNA evidence of innocence”); Eugene R. Milhizer, Confessions After Connelly: An Evidentiary Solution for Excluding Unreliable Confessions, 81 Temp. L. Rev. 1, 4 (2008) (“Confessions are uniquely powerful evidence of guilt at a criminal trial.”).
185. See Lisa Kern Griffin, Criminal Lying, Prosecutorial Power, and Social Meaning, 97 Calif. L. Rev. 1515, 1549 (2009) (“Although morality is but one source of the criminal law’s credibility, it functions best when it imposes requirements perceived as just and punishes those deemed deserving.”); see also David Michael Jaros, Perfecting Criminal Markets, 112 Colum. L. Rev. 1947, 1987 (2012) (“[T]he law does not simply extract a price for undesirable conduct; it also regulates the social meaning of such activity.”); Dan M. Kahan, The Secret Ambition of Deterrence, 113 Harv. L. Rev. 413, 435 (1999) (arguing deterrence discourse masks expressive function of criminal law and providing examples of morality-based criminal law and punishment).
186. See Tom R. Tyler & Yuen J. Huo, Trust in the Law 14–15 (2002) (“[D]eference develops . . . when people are treated fairly by legal authorities, and people’s willingness to consent and cooperate with legal authorities is rooted in their judgments about the degree to which those authorities are using fair procedures.”).
ties.” Trust in legal authorities comes from a belief in the “benevolence of motives and intentions of the person with whom one is dealing.” The belief that authorities have “benevolent” motives encourages deference to the criminal law. If this is true, the converse is also likely to be true: Citizen deference to the law is discouraged when the public believes that legal authorities have malevolent or biased motives.

Our criminal justice system is rife with reasons to distrust authorities’ motives. Specialized affirmative procedures for police suspects is a particularly pernicious example because it goes to the very heart of what studies have shown lead people to lose faith in the system. LEOBORs are procedures, designed by police for police, that fly in the face of the very techniques that police, prosecutors, and judges uphold as necessary interrogation techniques for civilians.

On the one hand, confessions are touted as among the most important forms of evidence—one of the best ways to ensure that guilty defendants are punished. On the other hand, we see police shielding themselves from these very techniques, with little or no comment from other system actors. The fact that there are many LEOBORs that are statutory protections suggests that the legislature, entrusted with drafting the criminal law, has acceded to protecting police suspects over other citizens. What trust then can we expect civilians to have in those who write the law, let alone those who enforce it, when a different set of rules has been explicitly laid out for the police?

Police unions continue to argue that LEOBORs are necessary for the police but not others, but this claim has little validity. As has been dis-
cussed, police are already among the most privileged suspects, stemming from their position as criminal justice insiders. Moreover, they receive more protection from the substantive criminal law than other suspects, at least when they are accused of brutality. For instance, unlike regular citizens, police have no duty to retreat should they find themselves in harm’s way.\textsuperscript{194} It makes some sense for the police to be treated differently in kind by the substantive law—they put themselves in harm’s way for the protection of society.\textsuperscript{195} In order to ensure that they have incentives to continue to take such risks, society may prefer to afford them a better affirmative defense when they are suspected of an assault or homicide.\textsuperscript{196} But criminal procedure should not be distributed differently to different classes of offenders, and it certainly should not be enshrined in formal law.\textsuperscript{197} To the extent that one disagrees with this characterization of procedure, as far as interrogations are concerned, police may deserve less procedural protection. Police know interrogation techniques better than anyone else. They are therefore least likely to be tricked, scared, or abused into confessing.\textsuperscript{198} This Article does not argue that police should be afforded less procedural protection in interrogations, but there is no cogent, principled reason why police should have more procedural protection than ordinary citizens.

\textbf{IV. THE REFORMATIVE PROMISE OF EXTENDING SOME LEOBOR PROTECTIONS TO ALL CRIMINAL SUSPECTS}

Two opposite conclusions could follow from the above analysis of formal procedural favoritism in interrogations for police suspects. The first is that such rights are overprotective of police suspects and contribute to the ongoing problem facing law enforcement accountability: that remain-silent/greater-scrutiny-makes-officer-vulnerable-to-false-charges (on file with the Columbia Law Review) (highlighting argument from national president of Fraternal Order of Police that law enforcement officers need extra administrative due process rights because of nature of job).

\textsuperscript{194} See John L. Watts, Tyranny by Proxy: State Action and the Private Use of Deadly Force, 89 Notre Dame L. Rev. 1237, 1238 (2014) (noting while about half of states allow private citizens to claim self-defense without duty to retreat, “all states permit the police to use deadly force in self-defense without imposing a duty to retreat”).

\textsuperscript{195} See Harmon, supra note 10, at 792 (“Regulation of the police should promote harm-efficient policing—that is, policing that imposes harms only when, all things considered, the benefits for law, order, fear reduction, and officer safety outweigh the costs of those harms.”).

\textsuperscript{196} Cf. L. Song Richardson & Phillip Atiba Goff, Self-Defense and the Suspicion Heuristic, 98 Iowa L. Rev. 293, 332 (2012) (noting possibility of police training as another argument against imposing duty to retreat on police officers).

\textsuperscript{197} See, e.g., Griffin v. Illinois, 351 U.S. 12, 19 (1956) (“There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.”).

\textsuperscript{198} See supra section II.B (discussing advantages police officers have when they are suspects and defendants).
police officers should be treated more like the rest of society. Another conclusion, and the one this Article comes to, is that certain provisions of LEOBORs are common-sense protections. They serve the important goals of making potentially false confessions less likely and upholding a basic standard of behavior for public officials toward those suspected, but not yet charged or convicted, of crimes.\textsuperscript{199}

This Part addresses how best to solve the problem of special interrogatory protections for police. First, it considers the suggestion that scholars, commentators, and politicians have made—that we abolish LEOBORs to ensure police accountability and equal procedures for criminal suspects. Certain ancillary features of LEOBORs, in particular the long waiting periods before questioning, should be abolished.\textsuperscript{200} But the core of LEOBORs—the affirmative protections from certain coercive interrogation tactics—should instead be extended to all suspects. Returning to the notion of police as criminal justice insiders, the protections the police negotiate for in the interrogation context are theoretically and practically among the best tools available for mapping out a more accurate and more humane way to conduct interrogations. LEOBORs are the protections selected by those with the most knowledge about interrogations when they imagine themselves to be in the position of criminal suspects. As such, these documents are an almost uniquely suited model for beginning to reimagine what the law should look like.

The next section discusses which LEOBOR provisions should be extended to all suspects. It concedes that, because LEOBORs may represent overprotection rather than optimal interrogation procedures, a protection’s existence in a LEOBOR is not, on its own, a sufficient condition for extension. It then suggests two categories of LEOBOR provisions that have independent value, either because they may impact the likelihood of a false confession or because they represent a floor of humane treatment under which state officials should not be allowed to fall.

The last section suggests two ways in which LEOBORs may be used to change the law on interrogations. First, state legislatures could pass statutes similar to LEOBORs that give all criminal suspects some of the same affirmative interrogation rights currently reserved for police. It

\textsuperscript{199} See, e.g., Drizin & Leo, supra note 110, at 910–12 (noting widespread lack of public awareness of existence of “interrogation-induced false confessions” and extent to which police training encourages and trains police to conduct such confessions); Leo & Ofshe, supra note 181, at 440–41 (“Interrogators sometimes become so committed to closing a case that they improperly use psychological interrogation techniques to coerce or persuade a suspect into giving a statement that allows the interrogator to make an arrest.”).

sketches out roughly what such a statute could look like. Second, both trial and appellate judges should be aware of and consider LEOBORs as a model to determine whether a confession was voluntary when conducting a totality of the circumstances analysis. The Article next proceeds by discussing some positive systemic possibilities that flow from extending LEOBOR interrogation protection to all suspects and addresses some possible counterarguments.

A. **Using LEOBORs as a Starting Point for Reimagining Confession Rights**

Most scholars who have commented on LEOBORs have criticized them. Such a response, while intuitively appealing, misses an important opportunity for real and sustained interrogation reform.

Very few scholars or commentators have addressed LEOBORs. In the wake of certain well-publicized police killings, however, particularly the spine-breaking death of Freddie Gray on a “rough ride” in a Baltimore police van, politicians and scholars have begun to take note. With the exception of police union representatives, the response almost uniformly has been to call for the abolition of LEOBORs. But for the most part, attention has been on a provision of these statutes that is not about interrogation. Many LEOBORs contain a waiting period before an officer may be questioned. The purpose of this waiting period is ostensibly to provide time for an officer to find an attorney. Given that police have well-connected union representatives who can easily and quickly secure them representation, however, these waiting periods offer the opportunity for officers to collude and present an innocent version of events in a case in which their actions may not have been justified.

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201. See Canterbury, supra note 193 (claiming LEOBORs "simply reaffirm the existence of . . . rights in the unique context of the law enforcement community").

202. See Hager, supra note 5 (identifying public officials and experts, including Baltimore Mayor Rawlings-Blake, who spoke out against LEOBORs); Olson, supra note 3 (detailing efforts of Mayor Rawlings-Blake, ACLU, and state legislators to roll back Maryland LEOBOR).


204. See id. § 3-104(j)(1)(i) (“On request, the law enforcement officer under interrogation has the right to be represented by counsel or another responsible representative of the law enforcement officer’s choice who shall be present and available for consultation at all times during the interrogation.”).


206. See Keenan & Walker, supra note 76, at 212 (“Delays in the investigation of possible officer misconduct are intolerable. There is a widespread impression that delays
In Baltimore, this “cooling-off period” is ten days, an all but unjustifiable length of time. The Baltimore mayor, citing this delay, criticized LEOBORs for making the investigation into the officers involved in Gray’s death more difficult. Other politicians and advocacy organizations have called for the repeal or abrogation of LEOBORs. The mayor of Providence, Rhode Island, has called for the elimination of his state’s statute. A California chapter of the AFL-CIO has publicly asked the national federation of unions to cut ties with police unions, citing unfairness of LEOBOR protections as a major reason for the split.

Scholars who have responded to the role of LEOBORs in police brutality cases are similarly critical of the statutes. Professor Paul Butler asserts that the officers in the Gray case had ten days “before they ha[d] to say a mumbling word.” He went further, stating that “the police will take advantage of all the extra due process they get . . . to concoct an alternative version of events.” He also argued that LEOBORs are laws that “thwart transparency and accountability.” His recommendation, unsurprisingly, was to abolish them. Professors Walker and Jeffrey Fagan and well-known innocence lawyer Peter Neufeld have also commented that LEOBORs are unfair extra protections that impede “police accountability.”

in investigations allow officers time to collude to create a consistent, exculpatory story.

Butler, supra note 160 (“It is far from a fanciful concern that the police will take advantage of all the extra due process they get under . . . law to concoct an alternative version of events.”).

207. See Hager, supra note 5 (“Maryland’s LEOBoR includes a provision that the officers cannot be forced to make any statements for 10 days after the incident, during which time they are presumed to be searching for a lawyer.”). The Maryland legislature is poised to consider a bill that, among other reforms, will reduce the LEOBOR waiting period from ten to five days. Erin Cox, Maryland Task Force Recommends 22 Police Reforms, Balt. Sun (Jan. 11, 2016), http://www.baltimoresun.com/news/maryland/politics/bs-md-policing-group-20160111-story.html [http://perma.cc/D7Q4-CXPB]. The Maryland police union has stated that it opposes all suggested reforms. Id.

208. Hager, supra note 5.


211. Butler, supra note 160.

212. Id.

213. Id.

214. See id. (“In a democracy an accused ‘thug’ should not get more rights just because he wears a badge and a gun.”).

215. Hager, supra note 5 (noting agreement among Professor Walker, Professor Fagan, and Neufeld that LEOBORs have negative influence on police accountability). In the same article, however, Professor Steve Drizin, an expert on suspect rights, suggested taking
It is not hard to understand this reaction to LEOBORs. Abolishing LEOBORs has several intuitively appealing features. Doing so would restore the procedural balance between police and the rest of us—it would, in a number of ways, reduce the fairness, legitimacy, and procedural justice problems discussed earlier in this Article by putting police back on the same formal footing as all interrogees. And it might make the police more accountable and even more likely to inculpate themselves, at least on the margins. But as discussed above, the police will still have the informal advantages they receive simply from their roles as insiders in the criminal justice system. They will still be the most sophisticated suspects—the least likely to waive Miranda, to speak to investigators without an attorney, or to sit in jail pretrial. And they will still receive informal advantages from their prosecutorial counterparts.

Those advocating the wholesale abolition of LEOBORs also miss a rare opportunity to look at how those who conduct interrogations understand these proceedings. Scholars have argued for years that neither Miranda nor the voluntary-confession cases adequately protects suspects’ rights. Yet one weakness in these scholars’ writing is that it is mere

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216. Abolishing LEOBORs would still leave the Garrity decision standing. Thus, police would still have an advantage both in being protected from a choice of being fired or inculpating themselves and in the use of the immunity for which Garrity and its progeny have come to stand. While these remain significant problems both for fairness and legitimacy, this Article does not address them in detail here. See supra section II.B (discussing Garrity decision, which protects police from having to decide between incriminating themselves and losing employment).

217. See supra section II.A (noting advantages police have in asserting their Miranda rights due to their legal sophistication).

218. See Levine, How We Prosecute, supra note 9, at 759 (arguing prosecutors take more care and do more investigation before charging police suspects than any other class of suspects).

219. See, e.g., Steven D. Clymer, Are Police Free to Disregard Miranda?, 112 Yale L.J. 447, 450 (2002) (“If police are willing to suffer the exclusionary consequences, they can disregard the Miranda rules without violating the Constitution.”); Drizin & Leo, supra note 110, at 914 (discussing how “modern police interrogation is a two-step process of psychological manipulation”); Godsey, supra note 92, at 470 (“While the theoretical ambiguity inherent in the voluntariness standard leaves police officers with little guidance in the field, in the courtroom this ambiguity most often works in their favor.”); Herman, supra note 92, at 745 (criticizing involuntary-confession rule for lack of clarity); Susan R. Klein, No Time for Silence, 81 Tex. L. Rev. 1337, 1338 (2003) (questioning whether right to silence is meaningful “if peace officers can use harassing and abusive tactics against suspects so long as the resulting statements are not used in a subsequent criminal trial”); Primus, supra note 77, at 2 (“ Constitutional regulation of police interrogation is in a state of collapse.”); Schulhofer, Reconsidering, supra note 79, at 454 (“The notion that police-initiated warnings can ‘dispel’ the compulsion thus seems dubious at best.”); George C. Thomas III, Separated at Birth but Siblings Nonetheless: Miranda and the Due Process Notice Cases, 99 Mich. L. Rev. 1081, 1082 (2001) (“[T]he Miranda version of the Fifth Amendment permits waiver to be made carelessly, inattentively, and without counsel.”); Weisselberg, supra note 77, at 1531–90 (challenging assumptions underlying justification
supposition—they are guessing about what interrogation tactics are too unjust or too unfair and are relying on studies about what leads an innocent suspect to confess or what makes an incriminating statement involuntary. Indeed, most people have never been inside an interrogation room or performed an interrogation. But this is why LEOBORS are such powerful tools. LEOBORS document the protections desired by those who know how interrogations are conducted. Thus, they are an insiders’ guide to protecting suspects from the most coercive police tactics. The only problem is they currently protect only the least vulnerable suspects.

LEOBORS are a script for reform, drafted by the system actors who do the interrogating. But LEOBORS represent more than just the preferences of interrogators. They also represent the preferences of those who imagined themselves as the subject of interrogation. This goes some way toward ameliorating another problem that infects the process of making criminal law and procedure. The legislators tasked with making law and the courts tasked with interpreting constitutional or statutory rights are populated largely by those who are not personally affected by the criminal justice system. And while the media and lobbyists for law enforcement and victims’ groups constantly remind us to put ourselves in the shoes of the police, or in the shoes of potential

of *Miranda* warning and waiver regime); White, Involuntary Confession, supra note 94, at 2042 (noting “standard interrogation methods precipitate a significant number of false confessions”).


221. See Richard A. Leo, Police Interrogation and American Justice 197 (2008) [hereinafter Leo, Interrogation and Justice] (“Most people . . . have not experienced [interrogation] firsthand and do not know anyone who has.”).

222. See supra section II.A (noting advantages police have when under arrest due to their sophistication and knowledge of justice system).

223. Cf. Leo, Interrogation and Justice, supra note 221, at 197 (“Most people . . . [are] not familiar with how police are trained to interrogate suspects or with studies that describe actual interrogation practices.”).

224. See supra section II.B (detailing development of additional protections for police).

225. See Stuntz, Collapse, supra note 11, at 7 (arguing criminal law has become harsher as those who suffer its burdens have become less involved in its processes).

226. See Stuntz, Pathological Politics, supra note 42, at 534 (“[L]egislators have good reason to listen when prosecutors [and police] urge some statutory change. This point is worth emphasizing, for it may be the single most important feature of the existing system
LEOBORs represent rights lobbied for, or negotiated by, police who ex ante imagine themselves in exactly the position that is so often under- or unrepresented in other political contexts. Thus, these statutes and agreements are valuable tools in two key respects. They are the rights that the interrogators want for themselves, opening a window for the rest of us into what tactics those who operate within the world of criminal justice consider potentially abusive. They are also the rights of those who have imagined themselves as criminal suspects before knowing whether or not they will become such suspects. It is rare to find such a combination of knowledge from experts. We should make use of this knowledge rather than hastily disregard it.

Of course, just because police know what tactics are likely to lead to confession and what tactics they do not want used against themselves does not mean that LEOBORs represent an optimal or even a good set of rights for criminal suspects. A skeptic might well say that these rights were hammered out the way any good negotiation is, and thus, they represent the best protections that a politically influential group could get for its members rather than the protections that should apply to all criminal suspects. Yet some LEOBOR provisions also dovetail with protections that have independent value, whether because they represent what social science and studies of exonerated innocents tell us about for defining criminal law.”); Samuel R. Wiseman, Pretrial Detention and the Right to Be Monitored, 123 Yale L.J. 1344, 1397 (2014) (“[T]he existence of a potent law enforcement lobby may lead legislatures to systematically undervalue defendants’ rights . . . .”); see also Eric Blumenson & Eva Nilsen, Policing for Profit: The Drug War’s Hidden Economic Agenda, 65 U. Chi. L. Rev. 35, 81, 108–11 (1998) (noting law enforcement “lobby [was] able to soundly defeat the few congressional efforts to divert some drug law enforcement funding to other uses”); Michael M. O’Hear, Federalism and Drug Control, 57 Vand. L. Rev. 783, 818 (2004) (noting “law enforcement has proven to be a potent lobbying force in resisting changes to drug laws”).

227. See, e.g., Aya Gruber, Rape, Feminism, and the War on Crime, 84 Wash. L. Rev. 581, 622 (2009) (“[T]he victims’ rights movement is a powerful lobby with a critical voice in the justice system.”).


229. See generally Bibas, Machinery, supra note 11, at 34 (noting those who lack experience with criminal justice system do not get to see how it functions).

230. LEOBORs may be the handiwork of powerful union negotiators who are able to insist on rights that are more protective than we as a society might choose for interrogation suspects. Even where LEOBORs are statutes, with legislative history, such history may be affected by the relative weight that union lobbyists have over legislators. For a particularly strong take on this matter, see Kenneth W. Starr, Observations About the Use of Legislative History, 1987 Duke L.J. 371, 377 (“[L]obbyists and attorneys have created a virtual cottage industry in fashioning legislative history so that the Congress will appear to embrace their particular view in a given statute.”).
police tactics that may lead to false confessions, because they represent a
floor of respect that we should seek for criminal suspects, or both.\footnote{231} In
each case, “appearance of justice” principles and procedural justice con-
cerns bolster the extension of certain LEOBOR provisions to all criminal
suspects.\footnote{232}

B. Which Protections to Extend to All Suspects

Not all LEOBOR protections should be extended to all suspects. Nor
is a protection’s appearance in a LEOBOR a justification, in and of itself,
for such extension, no matter how sensible such a position might
appear.\footnote{233} To be sufficient, LEOBOR provisions should also have an inde-
pendent value. Here, this Article makes an initial attempt at suggesting
which provisions in LEOBORs should be extended.\footnote{234}

There are two, often interrelated, values that make a provision
worthy of extension to all suspects. The first is what I call “accuracy”
protecting provisions, and the second is what I call a “floor” for main-
taining the legitimacy of the criminal-interrogation process in the sense
that it provides a standard of treatment below which we should not allow
state officials to fall in their pursuit of criminal confessions. The values
that animate Part III of this Article—that we should seek a justice sys-
 tem that appears just, that maintains legitimacy in the eyes of the public,
and that encourages citizens to obey the law—also favor adopting LEOBOR
provisions that call for humane treatment of suspects.\footnote{235}

1. Accuracy Protections. — Studies of false confessions give us a good,
though incomplete, sense of which police tactics LEOBORs disallow
among those that may coerce an innocent person to make an inculpatory
statement.\footnote{236} For purposes of this Article, the relevant tactics are (a)
lengthy interrogation\footnote{237} and (b) false promises of leniency or threats of

\footnote{231. See infra section IV.B (suggesting which LEOBOR protections should apply to all
suspects).}

\footnote{232. See supra Part III (describing issues created by additional interrogation
protections for police); see also infra section IV.B (suggesting some LEOBOR protections
should be extended to all suspects).

\footnote{233. See infra section IV.C (providing suggestions on how LEOBOR protections can
be extended).

\footnote{234. This section is meant to open a discussion about interrogations, false confessions,
and the treatment of suspects. More study and a more sustained discussion of what
interrogation tactics lead to false confessions and reduced trust in law enforcement would
be an important contribution to the scholarly literature and to advocacy for reform.

\footnote{235. See supra Part III (outlining pillars of justice system and discussing how LEOBOR
protections can undermine them).

\footnote{236. Cf. Leo, Interrogation and Justice, supra note 221, at 197 (“There is no single
cause of false confession . . . ”); id. at 198 (noting experiments are rare because ethics
prohibit researchers from subjecting people to types of pressures that usually lead to false
confessions).

\footnote{237. See Garrett, Substance, supra note 184, at 1063–64 (noting suspect may falsely
confess to bring lengthy interrogation to end).}
harsh treatment. Promises of leniency can range from a statement that a suspect can “go home” or “see her child” if she makes an inculpatory statement\textsuperscript{238} to the more obvious “let’s make a deal” false promise where an officer falsely tells a suspect that, if she confesses, her charges or incarceration term will be reduced.\textsuperscript{239} False threats of harshness toward the suspect include lies about the nature of the charges against her and the resulting harm that will befall her should she refuse to inculpate herself.\textsuperscript{240}

\textbf{a. Length of Interrogation.} — In \textit{Ashcraft v. Tennessee}, the Supreme Court held that interrogating a suspect for thirty-six hours was unconstitutional because it was “inherently coercive.”\textsuperscript{241} Since then, social science and studies of exonerated false confessions have made clear that a person can be coerced to confess in far less time. Scholars have found that interrogations that last more than a few hours are far more likely to produce false confessions.\textsuperscript{242} Professors Drizin and Richard Leo found that of all the exonerated false confessions where “length of interrogation . . . could be determined[,] . . . [m]ore than 80\% of false confessors were interrogated for more than six hours and 50\% . . . for more than twelve hours.” As they conclude, “[t]hese numbers are staggering.”\textsuperscript{243}

The impact that interrogation length has on overbearing the will of an innocent suspect is particularly stark when one considers the average police interrogation length: less than two hours.\textsuperscript{244} Based on these numbers, among other things, Professor Eve Brensike Primus has suggested a constitutional maximum of five hours—in other words, any interrogation lasting longer violates the voluntariness test and is inadmissible per se.\textsuperscript{245} States considering statutory protections for suspects or judges dealing with the voluntariness test as it currently stands should consider setting a

\textsuperscript{238} See Leo, Interrogation and Justice, supra note 221, at 199 (noting studies have shown “promises of leniency” contribute to false confessions).

\textsuperscript{239} Of course, true promises may also lead to confessions, but because lies are a factor in LEOBORs while true promises are not and because a true promise of leniency might lead to a rational choice on the part of the suspect, this Article will only address such tactics when they are false.

\textsuperscript{240} See Leo, Interrogation and Justice, supra note 221, at 199 (noting “threats of harsher punishment” lead to false confessions).

\textsuperscript{241} 322 U.S. 143, 154 (1944).

\textsuperscript{242} See Leo, Interrogations and Justice, supra note 221, at 208 (describing how long interrogations can weaken innocent suspect’s will); Drizin & Leo, supra note 110, at 948 (finding median length of twelve hours for interrogations eliciting false confessions); Kassin, Inside Interrogation, supra note 81, at 534 (noting interrogations of false confessors often last much longer than average interrogation).

\textsuperscript{243} Drizin & Leo, supra note 110, at 948.

\textsuperscript{244} See Kassin, Inside Interrogation, supra note 81, at 534 (“The average police interrogation lasts thirty minutes to an hour; the vast majority . . . are completed within two hours.”).

\textsuperscript{245} See Primus, supra note 77, at 37 (noting “[m]ost scholars who have looked at this problem have suggested that continuous questioning be limited to between four and six hours” and suggesting five hours as constitutional maximum).
maximum length of even less time. One way to help determine an appropriate maximum length of an interrogation is to determine for how long police suspects are interrogated. Setting a time limit on interrogations is likely to reduce false confessions without greatly undermining officers’ ability to get true confessions. As such, it is a provision of LEOBORs that should be extended to all suspects.

b. Inducement Through Promises of Leniency or Threats of Harshness. — A number of LEOBOR provisions prevent interrogators from inducing law enforcement suspects to confess through promises of leniency or through threats. There is good reason to consider extending such rules to interrogations of all suspects. The false-confession literature is rife with examples of suspects, usually young or mentally incapacitated, who report that they confessed so that they could go home to their mothers or other family members. For example, the Central Park Five, teenagers who falsely confessed and spent years in prison for an infamous sexual assault in New York City, were told they could go home if they admitted to the crime. In another case, a teenager was told he could go home if he confessed to a murder he did not commit. After confessing, the police told him they were sending him home; instead, they sent him to jail.

Similarly, threats of harsh treatment are among the tactics police use that reportedly contribute to false inculpatory statements. Such threats are often in the form of a legal response to refusal to inculpate, such as

246. Information about this, like so much about the criminal justice system, is reliant on the will of prosecutors and police to be transparent.

247. See supra notes 150, 152 and accompanying text (discussing prohibitions against promising leniency and threats of punishment).

248. See, e.g., Drizin & Leo, supra note 110, at 982–83 (describing police acquisition of false confession of three black teenagers, with one confessor claiming he confessed because he "believe[d] he would be allowed to go home if he signed the statement").


250. Leo, Interrogations and Justice, supra note 221, at 209.

251. See id. at 201–02 (noting innocent suspects confess “to avoid an anticipated harsh punishment” and because “negative incentives . . . convince the suspect that it is futile to deny the crime”); cf. Primus, supra note 77, at 37–38 (listing police interrogative tactics courts should find impermissible, such as “charging a person with a more serious crime, subjecting him to a greater punishment, punishing his friends or family, administering or withholding medical treatment, taking his children away, or causing him to lose his livelihood” (footnotes omitted)).
heightened charges, a very long prison term, or even the death penalty, or in the form of suggesting potential consequences of not confessing, such as prison and rape or physical abuse by other inmates.

To the extent that such a proposal may strike some as too broad, this Article suggests a middle ground. One way to cabin the use of inducements and threats but not remove them from an officer’s arsenal entirely would be to have a rule prohibiting false inducements and false threats. In other words, a police officer would not be allowed to tell a suspect, falsely, that he could go home to his mother upon confessing to a crime. But a police officer could tell a suspect that a confession would take the death penalty off the table, as long as a prosecutor had blessed such an inducement. Similarly, an officer could not threaten a suspect with the death penalty if she were accused of a crime that could not theoretically carry such a punishment, but the officer could use such a threat if capital charges could be levied.

The benefit of true inducements or explanations of punishment is that a suspect gets real information with which to make a decision while the police can still use such tactics to the extent they are useful. On the other hand, interrogation is already such a coercive situation that such information might be too hard to process to guarantee that a suspect was actually making a rational decision to confess. Another problem with this suggestion is that a rule prohibiting false inducements and false threats would be far harder for a reviewing judge to sort out than a bright-line rule rejecting the use of inducements or threats per se.

It is hard to know whether shortening confession lengths and reducing the types of inducements and threats law enforcement can use will impact the disturbing number of false confessions that have arisen in the past few decades.

252. See Leo, Interrogations and Justice, supra note 221, at 209 (describing situation in which police “threatened [suspect] with harsher treatment and extreme punishment if he did not confess”).


254. See Leo & Ofshe, supra note 181, at 478–79 (summarizing study in which twelve percent of people confessed after threatened with harsher punishment—“typically the death penalty”).

255. See Richard A. Leo, False Confessions: Causes, Consequences, and Implications, 37 J. Am. Acad. Psychiatry & L. 332, 335 (2009) (noting some innocent suspects “comply because they are led to believe that it is the only way to avoid a feared outcome (e.g., homosexual rape in prison”); see also Leo, Interrogations and Justice, supra note 221, at 205 (describing suspect was told if he did not confess he would go to jail where he would “not survive”).

256. See infra section IV.C (describing limits to benefits of extending LEOBOR protections for mitigating coercion).

257. See Garrett, Contaminated Confessions, supra note 171, at 427 (noting lack of adequate empirical data on false confessions, in part because “[r]esearchers cannot ethically test coercive interrogation techniques in a laboratory setting, and in actual cases
believe should not be used against their colleagues when they become suspects and have been identified as contributing to false confessions in numerous cases. Restricting law enforcement’s use of long interrogations, inducements, and threats could be a very good starting point to reforming confession law.

2. **Floor Protections.** — LEOBORs provide that a suspected officer must be allowed to attend to her “basic necessities,” which this Article defines as regular meals, sleep, and access to the bathroom. Such allowances are largely unaddressed in the false-confession literature. This is perhaps because most police detectives already provide such allowances to suspects. Discussion of these deprivations may also be excluded from the false-confession literature because, unless denied in the extreme, they are not likely to contribute to an innocent person inculpating herself. But they are important enough that the police sought to have them enshrined in formal law or negotiated contract. Such inclusion in LEOBORs warrants at least an inference that police feared denial of basic humane treatment when imagining themselves as suspects.

The values that animate an insistence on ensuring that suspects receive basic humane treatment are the same values that led to the abolition of physical abuse and deprivation as a tactic for eliciting confessions. From those cases, it is clear that a floor does exist in terms of what police may do to get a suspect to confess. As the Court stated in

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258. This further definition is a bit of poetic license as LEOBORs are not entirely clear as to what physical necessities are, other than “rest periods.” See supra note 148 (addressing LEOBOR inclusion of “physical necessity” provisions).

259. The Supreme Court has nodded to one factor that may be considered in a voluntariness test: “the use of physical punishment such as the deprivation of food or sleep.” Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973).


262. See, e.g., Brown, 297 U.S. at 286 (finding physical torture of suspect rendered confession inadmissible because treatment by law enforcement was “revolting to [our] sense of justice” regardless of whether confession might have been voluntary or reliable); see also Primus, supra note 77, at 25 (noting some Supreme Court and lower-court cases have suppressed confessions based solely on nature of law enforcement’s behavior). The literature on humane treatment of suspected terrorists and convicted murderers sentenced to death may also lend relevance and legitimacy to a proposal that would require police to treat suspects under interrogation with a certain amount of respect. In
Brown v. Mississippi, physically abusing a suspect is “revolting to the sense of justice,” regardless of whether it produces confessions. At some point, physical deprivation also reaches that floor of revulsion, according to the Court.

It would be easy to argue that the indignities included in the “physical necessity” provisions of LEOBORs are of completely different scale. But if these indignities are so minor, then their corresponding utility is also likely to be minimal. In other words, why bother letting police use hunger, minor sleep deprivation, or the use of the bathroom as a tool for confession when it tells an ugly story about the way law enforcement treats people without much possible benefit to society? And if most police do not treat suspects with this kind of disdain, disallowing it will have little impact on most officers except for a potentially positive impact on the way suspects view law enforcement.

In short, ensuring humane treatment of suspects through rules is a worthy goal. The human and legitimacy costs to our system of having inhumane treatment serve as a possible tool of interrogators outweigh whatever marginal benefit inures to investigators by treating suspects inhumanely in these ways. The next section will address some ways these reforms could be implemented.

the case of torturing suspected terrorists, the treatment discussed is far more violent, but the stakes are also far higher—untold potential lives saved. See, e.g., Jeremy Waldron, Torture and Positive Law: Jurisprudence for the White House, 105 Colum. L. Rev. 1681, 1714 (2005) (arguing against use of torture even in “ticking bomb’ case . . . where we are sure that the detainee we are proposing to torture has information that will save thousands of lives and will give it up only if subjected to excruciating pain”). In the case of the death penalty, we require that the condemned not suffer too extremely, despite already having determined that her life is not worth sparing. While the Supreme Court has “never invalidated a State’s chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment,” Baze v. Rees, 553 U.S. 35, 48 (2008), it has observed that “[p]unishments are cruel when they involve torture or a lingering death.”Id. at 49 (quoting In re Kemmler, 136 U.S. 436, 447 (1890)). Moreover, in dissent Justice Ginsburg noted, “[i]t is undisputed that the second and third drugs used in Kentucky’s three-drug lethal injection protocol, pancuronium bromide and potassium chloride, would cause a conscious inmate to suffer excruciating pain” and that, without a third drug allegedly rendering the condemned unconscious, such treatment would be considered cruel and unusual. Id. at 113–14 (Ginsburg, J., dissenting).

263. 297 U.S. at 286.

264. See Schneckloth, 412 U.S. at 226 (considering “physical punishment such as the deprivation of food or sleep” as relevant factor in determining whether “defendant’s will was overborne”).

265. Cf. Criminal Interrogation and Confessions 190 (Fred E. Inabu, John E. Reid, et al. eds., 2013) (providing example of widely used interrogation training manual making no mention of food, sleep, or meals as interrogation tools).

266. See supra section III.B (discussing how image of law enforcement’s motivations affects citizens’ impressions of value of criminal law); see also infra note 305 (highlighting polls showing citizen distrust of law enforcement).
This section looks at two ways to extend LEOBOR protections. First, they could be extended through legislative action; second, they could be used as a tool for judges who must apply the totality of the circumstances test. This section then considers the positive systemic implications of extending affirmative interrogation rights to all suspects and then considers some possible negative ones.

1. Legislative Action. — Statutory change in favor of criminal suspects and defendants has been very difficult, if not impossible, to implement in the recent past. It has been considered political suicide for a legislator to support this least-favored minority, particularly given the political strength of law enforcement and victims’-rights lobbies. But the culture has changed dramatically in the past few years in two ways: First, awareness of our broken and overburdened criminal justice system has made reforming it a political issue on a national and state level. The Supreme Court has ordered California to reduce its overcrowded prison population. Proposals to lower sentences, remove harsh three-strike laws, and decriminalize low-level possession of narcotics abound. Second, the increased attention to police brutality has made this once politically untouchable group more open to questions from citizens and politicians. In New York, the governor has removed all police-killing prosecutions from the hands of local district attorneys, citing their inherent conflict of interest when tasked with prosecuting their law enforcement allies. California has passed a statute to remove the

267. One solution this Article does not propose is change at the federal constitutional level. The Supreme Court has made clear through its decisions that it is not interested in proscribing law enforcement tactics. See, e.g., Dickerson v. United States, 530 U.S. 428, 428 (reaffirming Miranda as standard for confession law). Change at the state- and lower-court level could happen more swiftly and perhaps could make the best sense, as these are the places where most criminal procedure is actually implemented.

268. See Gruber, supra note 227, at 622 (noting elected officials “have constructed the criminal as an inhuman bogeyman,” propelling “importance of the innocent victim”); see also supra note 228 (acknowledging weakness of criminal defendants’ lobby).


271. See Exec. Order No. 147, A Special Prosecutor to Investigate and Prosecute Matters Relating to the Deaths of Civilians Caused by Law Enforcement Officers, 37 NY. Reg. 73 (July 8, 2015) (requiring Attorney General “to investigate, and if warranted,
option of “secret” grand jury hearings for police suspects.\textsuperscript{272} Thus, the political stage is set for even greater reform. With LEOBORs gaining national attention, interrogation reform seems more possible than ever before.

A state legislature that wished to protect accused citizens from certain interrogation tactics could use LEOBORs both as a model and as a justification for reform. Such a statute could apply at any stage of an investigation. It would not have to be contingent on a formal arrest,\textsuperscript{273} but assuming states would not make such a dramatic change to pre-arrest law enforcement tactics,\textsuperscript{274} a politically feasible statute would likely apply after formal arrest. Such a statute could look something like this:

A suspect who has been formally arrested and has waived her \textit{Miranda} rights is entitled to the following protections during any interrogation that follows:

a. A suspect has a right to know about any and all charges being considered against her that are known to the police.

b. Each interrogation session may not last more than three hours, and a suspect must be given a reasonable amount of time to rest between sessions.

c. Food, water, and other basic necessities must be provided at normal mealtimes.

d. Bathroom breaks must be offered at reasonable intervals or provided upon request.

e. No untrue threats or promises may be made in order to induce a statement, including but not limited to:

   i. Threats of physical harm.
   
   ii. Threats the suspect will lose her employment by missing work.
   
   iii. Threats that her partner/spouse or children will be harmed by her refusal to speak.
   
   iv. Promises of leniency in return for a statement.
   
   v. Promises that a suspect will be able to leave the precinct if she makes a statement.


\textsuperscript{273} LEOBORs apply as soon as an officer is investigated for any infraction. See supra section II.B (discussing mechanics of LEOBORs and other protections for police suspects).

\textsuperscript{274} See generally, Maoz, supra note 80, at 1320–22 (discussing pre-arrest coercive tactics that manipulate \textit{Miranda} restraints).
f. Nothing in this statute should prevent a law enforce-
ment officer from refraining from any tactic that she
would not want used against her should she be the sus-
pect of a police investigation.

For the most part, this proposed statute is taken directly from
LEOBORs. The last section would be included in order to remind an
officer that she should treat the subject of a criminal investigation in the
manner that she would want to be treated. Any state legislature that has a
LEOBOR should be encouraged to pass a statute like the one proposed
above. At the very least, it should be asked to explain why such a statute
exists for police but should not be extended to all suspects. This should
be a hard question for a legislature to answer coherently.275

2. Make Reviewing Judges Aware of LEOBORs. — If legislators would
not or could not pass a statute like the one suggested above, LEOBORs
could still provide judges with powerful tools for assessing whether a
confession is voluntary under a totality of the circumstances test. This is
ture even assuming the constitutional framework does not change.276

As discussed in Part II, the current state of suppression hearings
leaves the decision of whether a suspect’s confession was voluntary
tirely to the discretion of, and on the shoulders of, reviewing judges.
These judges face many systemic and professional obstacles when asked
to suppress a confession. First, because a confession is such powerful
evidence, in many cases it may represent the only evidence the state has
to convict a defendant. Thus, a judge who would suppress a confession is
essentially tanking the prosecutor’s case and freeing a potentially
dangerous suspect, a point no prosecutor will let her forget. Judges have
numerous reasons to avoid doing this. First, they may have a natural bias
in favor of the professional repeat players who come into their court-
rooms.277 They have the confession itself, which once made, is subject to
confirmation bias.278 Even if a judge is able to rise above these powerful

275. See supra section III.B (explaining why there is no coherent reason for police to
have extra criminal procedure advantages).

276. See supra section II.A (noting totality of circumstances test leaves consideration
of factors to individual judges).

277. See Levine, Who Shouldn’t Prosecute, supra note 3 (manuscript at 14–18)
describing explicit and implicit biases in courtroom actors); see also Anthony G.
Amsterdam, The Supreme Court and the Rights of Suspects in Criminal Cases, 45 N.Y.U.
L. Rev. 785, 792 (1970) (noting fact-finders generally find police testimony credible);
Steven W. Becker, When Judges Judge Themselves: The Chicago Police Torture Scandal
and the Continuing Quest for Justice in the Case of People v. Keith Walker, 3 DePaul J. Soc.
Just. 115, 137 (2010) (discussing “marked pro-law-enforcement bias and its fraternity of
former prosecutors [among] the Cook County judiciary”); cf. Charlie Sarosy, Comment,
Parole Denial Habeas Corpus Petitions: Why the California Supreme Court Needs to
(noting law enforcement bias during parole hearings).

278. See Garrett, Contaminated Confessions, supra note 171, at 396 (“The outsized
weight placed on confession evidence may explain why recent DNA exonerations are so
dominated by false confessions. Judges, defense lawyers, prosecutors, and jurors may have
pressures, she then must insert herself into the mind of the suspect—how vulnerable is she? How calculating? How do youth, intelligence, or mental stability affect her ability to consent? And she must question police tactics based primarily on officers’ testimony about what happened. Naturally, the police will remember their actions in the most positive light. Judges may tend to credit professional law enforcement’s account of an event over that of a criminal defendant who has confessed to a crime and is facing imprisonment.

A checklist of interrogation techniques that are prohibited against police suspects, even if not made mandatory in confession law, would immediately do a number of things for a reviewing judge. First, it would give the judge a structure through which she could consider the testimony she hears at a suppression proceeding. Second, the knowledge that this checklist is modeled on LEOBORs could do several things to upend the natural biases she faces: It would remind her that law enforcement officers are not always interrogators—sometimes they too are suspects. It would show her what these knowledgeable criminal justice insiders would consider unfair tactics should they be facing questioning. And it would give her demonstrable reasons to question the credibility of officers who claimed that their tactics did not impact the suspect.

Similarly, at the appellate level, where the likelihood that a conviction will be overturned due to an involuntary concession is even more remote, LEOBORs could be useful tools. Appellate judges should be made aware of these special provisions for police. Despite the temporal disadvantage a suspect faces on appeal from a conviction, appellate judges are insulated from many of the institutional problems that trial judges face. Their credibility judgments are based on a transcript, not live witnesses. They do not have the same daily interaction with prosecutors and police. Thus, they might well be more able to see the objective unfairness of tactics used by police—tactics that LEOBORs prevent from being used against the police.

3. Possible Results. — The systemic benefits to extending affirmative protections to all suspects are numerous and exciting. In short, such an extension presents the possibility of correcting the current state of

a very hard time believing that a person could confess falsely.”); Saul M. Kassin, Why Confessions Trump Innocence, 67 Am. Psychologist 431, 441 (2012) (“[F]alse confessions, once taken, arouse a strong inference of guilt, thereby unleashing a chain of confirmation biases that make the consequences difficult to overcome despite innocence.”).

279. See supra section II.A (discussing how legal standards for confessions privilege sophisticated defendants).

280. See supra note 277 (discussing implicit biases that may benefit repeat players like law enforcement).

281. A defense attorney with a willing judge could also make powerful use of LEOBORs. She could compare each tactic used against her client to what would happen if an officer suspect were being questioned. She could also capitalize on the fact that her client, in most cases, would be significantly less knowledgeable and sophisticated than the officers protected by this extra due process.
inversion that exists between the most sophisticated suspects and the protection from coercive tactics that they receive. Righting this inversion presents the possible benefits of ensuring we treat all suspects with some level of dignity, shoring up the legitimacy of the criminal justice system, suggesting that system actors care about fairness for all suspects, and increasing trust in the law.

It is impossible to calculate how many innocent suspects might not confess if they had extra affirmative rights, but it is clear that false confessions are a serious problem. If research on what compels a vulnerable suspect to confess is correct, changes in police practices could at least reduce the number of innocents who falsely confess. For example, a number of the exonerees in Professor Garrett’s studies confessed after twelve-hour interrogation sessions. If a time limit were statutorily imposed, such a long interrogation would not have transpired. These practical standards that LEOBORs provide could save innocent suspects the torture of a false conviction and imprisonment. States, in avoiding false convictions, would also save millions of dollars in incarceration costs and the cost of lawsuits that flow from the exoneration of the innocent.

Similarly, more humane interrogation practices would reduce the likelihood that a confession results from a suspect’s vulnerability rather than a true desire to confess or a sophisticated knowledge of the benefits of early confession. This could have an impact beyond individual suspects. As many of the most vulnerable suspects are less educated, less wealthy, and less intelligent, their high rate of incarceration is an offense to our notions of justice. Figuring out ways to ensure that justice is meted out as fairly as possible is one of the main aspirations of criminal proce-

282. See supra Part III (describing origins and mechanics of this paradox).
283. See supra section III.A (describing legitimacy deficits in current system).
284. See supra section III.B (arguing special procedures for police may increase distrust of system and scorn for the law).
285. See Leo & Ofshe, supra note 181, at 431 ("[N]o one knows precisely how often false confessions occur in the United States, how frequently false confessions lead to wrongful convictions, or how much personal and social harm false confessions cause.").
286. See Garrett, Contaminated Confessions, supra note 171, at 396 (reviewing recent exonerations and arguing this "second wave of false confessions should cause even greater alarm than the first").
287. See Drizin & Leo, supra note 110, at 910–11 ("Social scientists and legal scholars have amply documented that contemporary methods of psychological interrogation can, and sometimes do, lead innocent individuals to confess falsely to serious felony crimes.").
288. See, e.g., Lawrence C. Marshall, Gideon’s Paradox, 73 Fordham L. Rev. 955, 967 (2004) ("[T]he State of Illinois has paid . . . five defendants approximately $600,000 under its compensation statute for the wrongly convicted . . . . [T]he State also incurred the needless expense [of $1.7 million] of imprisoning these innocent defendants for seventy-six years collectively.").
289. See supra section III.A (noting connection between inhumane interrogation practices and disproportionate number of false confessions from "particularly vulnerable populations").
Humane interrogation procedures are one way to make a dent in this daunting project.

Fewer confessions might also encourage better practices by police and prosecutors generally. As mentioned above, when a confession is made, often no further investigation follows. If fewer confessions were coerced, police would have to use the many other investigative tools in their possession to ensure that the correct suspect had been identified. They would have to interview more witnesses, test DNA samples, and use other scientific and technological advances to investigate. Prosecutors, who could not rest on the assumption that a questionable confession would be ruled voluntary, would also be forced to investigate further or think harder before bringing charges against a suspect. While this may seem like a costly remedy in the short term, avoiding false confessions and giving more thorough precharge process might well save money over time. Particularly if changes led to fewer false confessions, prosecutors could also more credibly assert that confessions were voluntary.

290. See supra notes 59–60 and accompanying text (describing how one main purpose of criminal procedure should be ensuring equal justice).

291. See Leo & Ofshe, supra note 181, at 440–41 ("Once a confession is obtained, investigation often ceases, and convicting the defendant becomes the only goal of both investigators and prosecutors.").

292. See id. ("Sometimes police become so certain of the suspect’s guilt that they refuse to even-handedly evaluate new evidence or to consider the possibility that a suspect may be innocent, even when all the case evidence has been gathered and overwhelmingly demonstrates that the confession is false."); see also Leo, Interrogation and Justice, supra note 221, at 206 (describing case in which, after inducing false confession, police discovered perpetrator of arson but statute of limitations had run).


294. See Garrett, Judging Innocence, supra note 77, at 122 (noting exonerations have raised conversation about ways to reform interrogation to improve accuracy).

295. See Levine, How We Prosecute, supra note 9, at 774 (discussing how more thorough precharge process from prosecutors might actually be economically sound proposition).
Ironically, despite likely protestation, limits on interrogation tactics could actually help the police. As it now stands, it is very hard for even the most scrupulous officer to know how much is too much, how far is too far, and how vulnerable a given suspect is. In Professor Garrett’s most recent study, a number of suspects were reported to have revealed information about their alleged crimes that only a suspect or the police could know. Once these people were exonerated, it became apparent that such “confessions” were clearly contaminated by their interrogators. Professor Garrett suggests that, rather than a function of intentional contamination, such details were given to suspects by police “completely unintentionally” during a “complex” interrogation in which “police offer suspects a set of complicated and increasingly inculpatory accounts of the crime in an effort to secure a confession.” Bright-line rules designed to decrease the complexity of interrogations and to disallow certain techniques would give the police far clearer signals about how to question a suspect. In short, it would not ask police to be psychologists on top of investigators.

Insisting on certain affirmative protections for suspects would also help trial and appellate judges. Rather than having to divine in each case what mixture of tactics may have overborne a suspect’s will, judges would have clearer rules from which to work. If, for instance, it were determined that three hours was the upward limit of an interrogation before it became coercive, judges would be able to rely on a clear rule to make a determination. This would save time and administrative costs and ensure that judges did not have to insert themselves into the minds of individual suspects to determine how vulnerable they were. It would also save judges from having to make individualized guesses about a certain law enforcement officer’s behavior.

296. See Godsey, supra note 92, at 469–70 (noting problematic uncertainty for police caused by fact that “[f]actors that later might become important to the inquiry, such as the education of the suspect or the suspect’s psychological strengths and weaknesses, are usually unknown to the officer at the time of the interrogation”).

297. See id. (noting lack of “clear guidelines . . . hinders [officers’] ability to plan and conduct interrogations in a manner that they can feel confident will be immune from criticism later”).

298. See Garrett, Contaminated Confessions, supra note 171, at 408–09 (discussing how confession contamination may occur intentionally—as when officers “feed facts” to suspect—or unintentionally—as when officers offer suspects “increasingly inculpatory accounts of the crime” to secure confession).

299. Id.

300. See supra section II.A (discussing how coercive but legal police tactics lead to false confessions in disturbing number of cases).

301. See Godsey, supra note 92, at 527 (arguing objective test would be “easier for . . . judges to apply in a courtroom”).

302. See id. at 469 (describing “task of divining a suspect’s state of mind” as “Herculean”).

303. See Herman, supra note 92, at 745 (noting judges have to determine whether police went too far with no objective factors).
possible law enforcement bias on the part of judges by taking away some of their discretion in suppression decisionmaking. 304

Extending LEOWOR protections to all suspects would have, perhaps, an even greater impact on ordinary citizens. At this moment, when citizen distrust of both politicians and law enforcement is at a problematic level, 305 a public acknowledgment that LEOWORs should protect everyone, not only the police, would have an immediate salutary effect. It would be the embodiment of justice appearing just. 306 While repealing LEOWORs might achieve a similar goal, it would not be as effective. Extending LEOWORs to all suspects would show that law enforcement had indeed negotiated sincerely for their protections. It would also show that those in power, recognizing the unfairness of selectively applying such protections, had decided to accord ordinary citizens the same rights. 307 Particularly if publicized in conjunction with data about false confessions, the public would likely respond favorably to common sense and easily understandable protections—protections that some might well assume already exist. 308 Extending LEOWOR protections to all suspects would take a dangerously delegitimizing favoritism and turn it into a legitimizing and politically appealing criminal justice reform. 309 Moreover, the costs of doing this, either through legislative or judicial action,
would be slight—the protections have already been negotiated and outlined for legislators and judges.310

A concrete and beneficial action of this kind by lawmakers could do more than just restore the legitimacy of the system in some portion of society’s eyes.311 If procedural-justice empiricists are correct, it might also impact the normative value of criminal law and even compliance with the laws we care to enforce.312 A public that sees law enforcement actors respecting them, acting to correct corruptive influences, and doing their best to distribute criminal procedure evenly should lead to a higher level of trust from citizens. This higher level of trust should lead, at least in some portions of society, to greater respect for the law.313

Any amount of fairness, accuracy, and legitimacy that can be injected into our current system is a project worth seriously considering. The fact that, in this case, the project emanates from the most knowledgeable insiders and is relatively inexpensive to impose makes extending LEOBORs to all a practical and powerful reform. But like any reform proposal, this suggestion will raise objections.

One counterargument arises immediately: Police, as insiders, are not designing a fair system, they are designing a corrupt one. They know what interrogation techniques compel suspects to confess and they want to protect themselves from such techniques, not to protect innocent police suspects but to protect guilty ones. In other words, a cynic might say that LEOBORs are corrupt protection for corrupt insiders,314 in which case their extension to all suspects will overcorrect, meaning fewer guilty suspects will confess, making it harder for law enforcement to solve crimes efficiently.315

310. See supra section II.B (discussing how Supreme Court and state lawmakers have ensured police suspects benefit from formal protections not extended to most other suspects).
311. See supra section III.A (discussing “appearance of justice” principle).
312. See supra section III.B (noting public perception that authorities have “benevolent” motives encourages deference to criminal law).
313. See supra section III.B (arguing in order for criminal law to encourage compliance for any reason other than fear of punishment, those entrusted to enforce it must be seen as motivated by unbiased and just purposes).
314. See Butler, supra note 160 (“It is far from a fanciful concern that the police will take advantage of all the extra due process they get under [LEOBORs] to concoct an alternative version of events.”); Hager, supra note 5 (discussing Maryland’s LEOBOR legislation and noting “[a]s many as [eleven] other states are considering similar legislation, and many of the rest have written essentially the same rights and privileges into their contracts with the police unions”); Olson, supra note 3 (discussing how some states, like Maryland, passed LEOBORs “invariably after lobbying from police unions and associations”).
315. Cf. Bibas, Right to Remain Silent, supra note 105, at 421–22 (arguing Miranda overcorrects); Cassell, Protecting the Innocent, supra note 92, at 498 (contending interrogators are already too restricted).
This Article has already specifically addressed this issue by suggesting extension of only those LEOBOR provisions that also have an independent rationale. More broadly, overcorrection is a reasonable concern and one reason to advocate for repeal of LEOBORs. However, serious consideration reveals several responses to this position. First, as the history of LEOBORs shows, the police did not lobby for these statutes in a cynical manner. Their statements reflect a real belief that affirmative interrogation protections were necessary in order to protect officers’ rights not to incriminate themselves. Second, while it is impossible to say that extending some or all of these affirmative rights to all suspects will not overcorrect on the margins, it is unlikely to do so for the majority of suspects. This is for a number of reasons. Suspects who genuinely want to talk to the police will not be deterred because they are allowed to tend to basic needs or to sleep or to understand what charges they are facing. Police training manuals themselves make clear that, for most suspects, an hour or two of questioning is enough to produce a voluntary statement. Sophisticated suspects, who are not inclined to talk to the police, will invoke their Miranda rights and refuse to talk to the police at all. This leaves an admittedly unknowable number of suspects who have no rational desire to speak to the police. Some number of these suspects confess, either because they do not understand their rights or because they are compelled through bullying or other interrogation techniques.

This is the current state of interrogation law. Law enforcement and a few scholars believe this is optimal—for all suspects other than the police. Most scholars who write on the subject do not. Potential overcorrection for some guilty suspects who will not speak to the police if we extend LEOBOR rights to them is possible. But it is also certain that some of these suspects are innocent and others are particularly vul-

316. See supra section II.B (detailing development of additional protections for police in interrogations).
317. See Bibas, Right to Remain Silent, supra note 105, at 424–25 (discussing reasons rational suspect would choose to confess); Stuntz, Mistake, supra note 104, at 977 (“[S]uspects separate themselves, not the police, into two categories: talkative and quiet.”).
318. Kassin, Inside Interrogation, supra note 81, at 534 (“The average police interrogation lasts thirty minutes to an hour; the vast majority of interrogations are completed within two hours. In Criminal Interrogation and Confessions, the authors state that three or four hours are almost always sufficient.” (citing Fred Inbau et al., Criminal Interrogation and Confessions 423 (4th ed. 2001))).
319. See Stuntz, Mistake, supra note 104, at 977 (noting sophisticated suspects will not waive Miranda and will refuse to talk at all).
320. See supra section II.A (noting laws governing interrogation favor sophisticated suspects).
321. Cf. Bibas, Right to Remain Silent, supra note 105, at 421–22 (arguing Miranda helps only guilty suspects); Cassell, Protecting the Innocent, supra note 92, at 498 (noting lost confessions arising from restrictions on interrogation).
Whether through putting ourselves in their place, taking lessons from exonerations, or simply caring that constitutional criminal procedure applies equally, these are the suspects society should seek to protect the most.

Another reasonable objection would be the opposite one: Extending affirmative interrogation rights does not go far enough. For instance, many criminal justice reformers believe that no suspect should be allowed to speak to the police without an attorney, period. In practice, however, this means changing Sixth Amendment law to include interrogation as a critical stage at which a suspect must be given an attorney. It also means spending potentially millions of additional dollars for more public defenders. In short, it means reimagining the entire structure of interrogations.

This Article’s proposal is far more limited and may well not protect suspects’ rights as much as many would like. But it has the benefit of feasibility and a more subtle benefit that the police would have to confront their own desired treatment before interrogating others. The very explicitness of this comparison might have more impact on the way police conduct interrogations than we realize. There are surely some detectives who coerce confessions, knowing full well that they would not be subject to the tactics they use. My intuition, however, is that most do not think about it in these terms. If they were made aware that the protections they now needed to respect were designed by them, it would necessarily be harder to toss them aside. Affirmative interrogation protections would be as easy to implement as Miranda rights. Unlike Miranda, however, which law enforcement may still see as imposed by judges from

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322. See, e.g., Garrett, Contaminated Confessions, supra note 171, at 399–400 (noting most false confessors in study of exonerees were young, mentally retarded, or mentally ill).

323. See supra section II.A (noting constitutional interrogation law favors certain suspects); see also supra section III.A (describing issues that providing additional protections in certain interrogation settings create).

324. See, e.g., Dearborn, supra note 101, at 365 (arguing one can rely on Sixth Amendment and “conclude that the right to counsel should attach as soon as practicable following arrest, but no later than prior to any custodial interrogation”); Daniel C. Nester, Distinguishing Fifth and Sixth Amendment Rights to Counsel During Police Questioning, 16 S. Ill. U. L.J. 101, 125 (1991) (“[T]he Sixth Amendment should extend to preindictment situations, [like] custodial interrogation . . . .”).

325. See Massiah v. United States, 377 U.S. 201, 205 (1964) (filing of formal charges triggers critical phase in which attorney is required).

326. This is very unlikely to happen, given that public defenders are already chronically underfunded and overworked. See, e.g., Darryl K. Brown, Rationing Criminal Defense Entitlements: An Argument from Institutional Design, 104 Colum. L. Rev. 801, 808 (2004) (“[T]he underfunding of criminal defense is, in effect, a permanent feature of American criminal justice.”).

327. See, e.g., Weisselberg, supra note 77, at 1595 (noting police organizations have come to “love” Miranda).
on high, to ignore the interrogation protections suggested here would mean that the police were disrespecting rights they themselves had erected.

CONCLUSION

As a society, we are reckoning with police violence specifically and the failures of our criminal justice system more generally as never before. Police as criminal suspects and defendants raise a host of systemic legitimacy issues that have heretofore never been examined. Both through formal rules and informal favoritism, police suspects are granted advantages that no other suspects receive. These procedural advantages add to the growing list of ways in which criminal justice in this country is an unfair and untenable system of law. Police are part of a small cadre of criminal justice professionals who understand and influence how the criminal justice system operates. As such, favoritism toward them presents important and unexplored mechanisms through which to suggest and study reform possibilities for entrenched and problematic areas of the criminal justice process. This Article has addressed how one such area—confession law—can be reformed. Extending the protections police suspects receive from interrogation tactics to all criminal defendants will not solve our criminal justice problems, but it may increase the humanity with which suspects are treated and the accuracy of their confessions. Moreover, recognizing what we can learn from how police protect themselves and are protected by other criminal justice professionals opens up numerous other ways in which we might make critical changes to our overburdened, inaccurate, racially charged, and economically unfeasible system.