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Police Suspects

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ARTICLE

POLICE SUSPECTS

*Kate Levine**

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

1. See, e.g., Sandhya Somashekhar & Steven Rich, Final Tally: Police Shot and Killed 986 People in 2015, *Wash. Post* (Jan. 6, 2016), http://www.washingtonpost.com/national/final-tally-police-shot-and-killed-984-people-in-2015/2016/01/05/3ec7a404-b3c5-11e5-a76a-0b5145e8679a_story.html [<http://perma.cc/GCQ4-XNSF>] (summarizing *Washington Post*'s year-long study of on-duty police killings by firearm).

entrusted with our security are violating it.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).³ Critics charge that police often appear to be above the laws they are tasked with upholding.⁴ As a result, commentators and scholars have begun to call for eliminating the advantages police suspects enjoy; they want more criminal accountability for police.⁵

2. Several movements, including “Black Lives Matter,” have gained followers and clout in direct response to the Michael Brown shooting and its aftermath. See Jay Caspian Kang, ‘Our Demand is Simple: Stop Killing Us’, *N.Y. Times Mag.* (May 4, 2015), <http://www.nytimes.com/2015/05/10/magazine/our-demand-is-simple-stop-killing-us.html> (on file with the *Columbia Law Review*) (describing rise of Black Lives Matter as nation’s first civil rights movement in twenty-first century). President Barack Obama is one of many politicians who have commented on the crisis of police brutality. See, e.g., Ben Mathis-Lilley, Obama Calls Police Violence a “Crisis,” Condemns Mass Neglect of Poor, *Slate: The Slatest* (Apr. 28, 2015, 3:03 PM), http://www.slate.com/blogs/the_slatest/2015/04/28/obama_baltimore_press_conference_president_s_comments_on_police_and_poor.html [<http://perma.cc/5UP7-EFVM>] (covering President Obama’s statement that persistence of police violence in United States is “troubling”).

3. See, e.g., Kate Levine, Who Shouldn’t Prosecute the Police, 101 *Iowa L. Rev.* (forthcoming May 2016) [hereinafter Levine, Who Shouldn’t Prosecute] (manuscript at 2) (on file with the *Columbia Law Review*) (examining conflict of interest between local prosecutors and law enforcement); Shaun King, How the Brelo Verdict in Cleveland Proves Laws Protecting People from Police Are Broken, *Daily Kos* (May 26, 2015, 11:55 AM), <http://www.dailykos.com/story/2015/05/26/1387822/-How-the-Brelo-verdict-in-Cleveland-proves-laws-protecting-people-from-police-are-broken> [<http://perma.cc/UXA4-CHTD>] (noting Officer Michael Brelo was acquitted after bench trial for firing dozens of shots into car window and killing two people); Walter Olson, Police Misconduct and ‘Law Enforcement Officers’ Bill of Rights’ Laws, *Cato Inst.: Cato at Liberty* (Apr. 24, 2015, 1:34 PM), <http://www.cato.org/blog/police-misconduct-law-enforcement-officers-bill-rights> [<http://perma.cc/SUU5-4P43>] (arguing these laws shield police from investigation); Danny Vinik, Here’s Why Ferguson Protesters Don’t Accept the Michael Brown Decision, *New Republic* (Nov. 25, 2014), <http://www.newrepublic.com/Article/120402/ferguson-protests-over-michael-brown-case-about-racist-justice-system> [<http://perma.cc/JX8N-QLFW>] (discussing failure to indict Officer Darren Wilson).

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).

5. See *infra* Parts II–III (discussing police protections and attendant risks); see also Brian Buetler, The NYC Cop Who Strangled Eric Garner to Death Is Free Thanks to a Legal Flaw. Here’s How Voters Can Fix It, *New Republic* (Dec. 3, 2014), <http://www.newrepublic.com/Article/120478/eric-garner-police-officer-shouldve-been-investigated-independently> [<http://perma.cc/Q7QY-WB4Q>] (quoting Professor Ronald Wright about ability to appoint special prosecutors in police brutality cases); Eli Hager, Blue Shield, Marshall Project (Apr. 27, 2015, 12:06 PM), <http://www.themarshallproject>.

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.⁶ 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 inculcate themselves must not be conditioned on losing their job or benefits.⁷

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.⁸ 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.⁹

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

org/2015/04/27/blue-shield [http://perma.cc/QYZ9-SGLA] (quoting several prominent scholars, most of whom argue for repeal of laws protecting police from investigation).

6. See *supra* notes 1–4 (describing prosecutorial treatment of recent police brutality incidents); see also Jeffrey Fagan & Bernard E. Harcourt, Professors Fagan and Harcourt Provide Facts on Grand Jury in Light of Ferguson Decision, *Columbia Law Sch.* (Dec. 5, 2014, 12:00 PM), http://www.law.columbia.edu/media_inquiries/news_events/2014/november2014/Facts-on-Ferguson-Grand-Jury [http://perma.cc/SHR9-3X3A] (comparing evidence presented to Officer Wilson's grand jury with usual presentations by prosecutors).

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,¹⁰ as well as to the existing literature on bias among criminal justice insiders.¹¹ 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,¹² sullies the appearance of fairness in the criminal justice system,¹³ and by doing so, lessens the system's ability to encourage cooperation with the law.¹⁴ The criminal justice system's insider-driven operation,¹⁵ as well as bias on the

10. Recent scholarship on policing has examined several related phenomena. Some of the scholarship has examined noncriminal laws that regulate police. See Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 *Minn. L. Rev.* 2179, 2179–82 (2014) (exploring policing regulation “modifying the scope of police authority”); Seth W. Stoughton, *Policing Facts*, 88 *Tul. L. Rev.* 847, 848–52 (2014) (identifying mechanisms of courts that regulate police action). Other authors have focused on how lawsuits regulate police. See Rachel A. Harmon, *The Problem of Policing*, 110 *Mich. L. Rev.* 761, 762–63 (2012) (contending police regulation should extend beyond traditional paradigm of constitutional criminal procedure); Joanna C. Schwartz, *Police Indemnification*, 89 *N.Y.U. L. Rev.* 885, 887–90 (2014) (offering empirical analysis of extent of police indemnification in misconduct cases). Further, some scholarship considers who should be tasked with prosecuting the police. See Levine, *Who Shouldn't Prosecute*, *supra* note 3 (manuscript at 1–2) (critiquing reliance on local prosecutors in police misconduct cases). Scholars have argued for more prosecutions of less-visible police crimes. See I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 *Ind. L.J.* 835, 835, 873 (2008). Finally, some scholarship has urged preemptive reform. See David M. Jaros, *Preempting the Police*, 55 *B.C. L. Rev.* 1149, 1149 (2014).

11. See generally Stephanos Bibas, *The Machinery of Criminal Justice*, at xv–xvii (2012) [hereinafter Bibas, *Machinery*] (arguing criminal justice system is known only to certain insiders who pursue their own preferences); William J. Stuntz, *The Collapse of American Criminal Justice* 62 (2011) [hereinafter Stuntz, *Collapse*] (describing criminal justice insiders' advantages).

12. See *infra* Part III (describing systemic harms arising from favorable treatment of police suspects).

13. See Levine, *Who Shouldn't Prosecute*, *supra* note 3 (manuscript at 9–14) (discussing appearance-of-justice standard and effect of police defendants' prosecutorial favoritism on standard).

14. Tom R. Tyler, *Why People Obey the Law* 20, 73–74, 110 (2006) [hereinafter Tyler, *Why People Obey*] (noting “procedural justice” matters more to people's notions of fairness than substantive outcomes of individual cases and cooperation with law depends on trust in authorities' impartiality).

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.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.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.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.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.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.²¹ And while some are outraged at the perceived use of grand juries to exculpate police defendants,²² others have called for strengthening the

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

17. See *infra* section IV.A (arguing some aspects of LEOBORs should be extended to all suspects).

18. See *infra* section IV.A (characterizing absolute abolition of LEOBORs as dominant view among scholars covering subject).

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.

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).

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).

22. See, e.g., Letter from Sherrilyn A. Ifill, Dir. & Counsel, NAACP Legal Def. & Educ. Fund, to Maura McShane, Judge, 21st Judicial Dist. (Jan. 15, 2015), http://www.naacpldf.org/files/case_issue/NAACP%20LDF%20Letter%20to%20Judge%20Maura

use of grand juries for all defendants.²³ Similarly, while some may bristle at LEOBORs,²⁴ these statutory rights mirror or exceed many of the procedural protections that scholars have urged for years be extended to nonpolice defendants.²⁵ 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.²⁶ 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.

%20McShane.pdf [http://perma.cc/M9T4-W2LG] (calling for investigation into *State v. Darren Wilson* grand jury proceedings for preferential treatment of defendant and erroneous instructions on law, among other issues); Tamara Aparton, SF Public Defender's Statement on Grand Jury Decision, S.F. Pub. Defender (Nov. 26, 2014), <http://sfpublicdefender.org/news/201411/sf-public-defenders-statement-on-grand-jury-decision> [http://perma.cc/4X2J-99CG] (noting problems with police investigation into Officer Wilson following shooting of Michael Brown); Sara Hossaini, Public Defenders Hold "Black Lives Matter" Rallies for Police Accountability, KQED News (Dec. 18, 2014), <http://ww2.kqed.org/news/2014/12/18/public-defenders-hold-black-lives-matter-rallies-for-police-accountability> [http://perma.cc/ET4T-HWEN] ("Public defenders in San Francisco, Alameda, Contra Costa, Santa Clara and Solano counties protested in support of national outrage over decisions not to indict police officers involved in the deaths of unarmed black men.").

23. See Roger A. Fairfax, Jr., Grand Jury Discretion and Constitutional Design, 93 Cornell L. Rev. 703, 706 (2008) (arguing grand jury discretion contributes to effective administration of criminal justice system); Ric Simmons, Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?, 82 B.U. L. Rev. 1, 15 (2002) (noting modern grand juries participate in criminal justice process in more limited fashion than early grand juries); Suja A. Thomas, Blackstone's Curse: The Fall of the Criminal, Civil, and Grand Juries and the Rise of the Executive, the Legislature, the Judiciary, and the States, 55 Wm. & Mary L. Rev. 1195, 1197 (2014) (arguing substance of jury's power under Constitution has decreased over time); see also Laura I. Appleman, The Plea Jury, 85 Ind. L.J. 731, 732-33 (2010) (calling for jury review of plea bargains).

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).

40. See Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 NYU. L. Rev. 911, 912 (2006) [hereinafter Bibas, *Transparency*] (“A gulf divides the knowledgeable, powerful participants inside American criminal justice from the poorly informed, powerless people outside of it.”).

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.⁴² 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.⁴³

Police are central players in this group of unchecked insiders who control power and knowledge in the criminal justice system.⁴⁴ 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.⁴⁵ 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.⁴⁶ Such suspects also lose out on the constitutional rights and procedural protections that later stages of the process provide.⁴⁷ 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).

45. See Bowers, supra note 21, at 1697–99 (arguing police are in best position to use discretion in low-level cases); Charlie Gerstein & J.J. Prescott, *Process Costs and Police Discretion*, 128 *Harv. L. Rev. F.* 268, 296–99 (2015) (arguing solutions to justice system’s unfairness should focus on police discretion in low-level cases); Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 *Stan. L. Rev.* 611, 636 (2014) (showing police have most discretion of any system actor in many misdemeanor cases); Wayne A. Logan, *After the Cheering Stopped: Decriminalization and Legalism’s Limits*, 24 *Cornell J.L. & Pub. Pol’y* 319, 334–35 (2014) (arguing “police have powerful individual and institutional reasons to make arrests”).

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.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.”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.”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 reported⁵¹ and so rarely prosecuted even when they are reported.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).

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.”).

49. Bibas, Transparency, *supra* note 40, at 912.

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).

51. For instance, a number of scholars have written about the problematic issue of police “testilying.” See, e.g., Capers, *supra* note 10, at 870 (noting police lies are “pervasive” and undercharged); Jennifer E. Koepke, 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, Testilying: 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: ‘testilying.’”).

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.⁵³ 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.⁵⁴ The current state of interrogation protections gives the most rights to among the most sophisticated suspects.⁵⁵ 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.⁵⁶ 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.⁵⁷

The notion that those with knowledge and control will, without checks, do everything they can to maintain their favored status is an old tale.⁵⁸ Indeed, constitutional criminal procedure itself is based in large part on the principle of avoiding this sort of favorable treatment for some.⁵⁹ 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.⁶⁰ 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.”).

60. See William J. Stuntz, *Unequal Justice*, 121 *Harv. L. Rev.* 1969, 1975–76 (2008) [hereinafter Stuntz, *Unequal Justice*] (“In order to identify and combat inequality, one must first know what the term means. My definition is conventional: an egalitarian justice system treats morally like cases alike.”); Kenji Yoshino, *The New Equal Protection*, 124 *Harv. L. Rev.* 747, 791 (2011) (“[T]here are many other liberty guarantees in the Constitution that are inflected with equality concerns; many of the criminal procedure

constitutional criminal procedure revolution has been much maligned in recent years,⁶¹ 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.⁶²

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.⁶³ 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.⁶⁴

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.⁶⁵

There are at least two ways to resolve the problem of preferential procedural protections for police.⁶⁶ 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.⁶⁷ 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.⁶⁸

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 investigative 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.

(Apr. 23, 2015, 10:30 AM), <http://www.baltimoresun.com/news/maryland/crime/blog/bs-md-freddie-gray-mayor-comments-20150422-story.html> [<http://perma.cc/4Q9N-WEV6>] (describing Baltimore Mayor Stephanie Rawlings-Blake's claim Maryland's LEOBOR was "delay[ing] . . . the investigation"). Attention toward the delay in a charging decision in the shooting death of twelve-year-old Tamir Rice in Cleveland also shined light on investigative protections for police officers. See Shaun King, Find Out Why 166 Days After Tamir Rice's Death, Officers Haven't Been Interviewed by Investigators, Daily Kos (May 13, 2015, 9:02 AM), <http://www.dailykos.com/story/2015/05/13/1384436/-166-days-after-they-killed-Tamir-Rice-officers-have-still-not-been-interviewed-by-investigators> [<http://perma.cc/Y8WG-QDSE>] (claiming delay was due to *Garrity* rights); see also Kevin M. Keenan & Samuel Walker, An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bill of Rights, 14 B.U. Pub. Int. L.J. 185, 212 (2005) ("One of the most publicized and controversial issues related to the rights of police officers involves formal 'waiting periods' before formal investigations or interrogations can begin."); infra section IV.A (providing more in-depth discussion of these protections).

77. See, e.g., Brandon L. Garrett, Judging Innocence, 108 Colum. L. Rev. 55, 122 (2008) [hereinafter Garrett, Judging Innocence] (linking confessions and interrogations to erroneous convictions); Charles J. Ogletree, Are Confessions Really Good for the Soul?: A Proposal to Mirandize *Miranda*, 100 Harv. L. Rev. 1826, 1827–28 (1987) (arguing *Miranda* warnings are not effective in practice); Eve Brensike Primus, The Future of Confession Law: Toward Rules for the Voluntariness Test, 114 Mich. L. Rev. 1, 3 (2015) (discussing weaknesses with voluntariness test); Charles D. Weisselberg, Mourning *Miranda*, 96 Calif. L. Rev. 1519, 1521 (2008) ("The best evidence shows that, as a protective device, *Miranda* is largely dead.").

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

78. *Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966) (outlining procedural safeguards required to protect suspect’s right to remain silent).

79. Compare Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. Chi. L. Rev. 435, 442–43 (1987) [hereinafter Schulhofer, *Reconsidering*] (defending *Miranda* against its critics), with Weisselberg, *supra* note 77, at 1521 (pronouncing *Miranda* dead).

80. See Aurora Maoz, Note, *Empty Promises: Miranda Warnings in Noncustodial Interrogations*, 110 Mich. L. Rev. 1309, 1321 (2012) (noting police training manuals advise police to question suspects in non-*Miranda* settings).

81. See Saul M. Kassin, *Inside Interrogation: Why Innocent People Confess*, 32 Am. J. Trial Advoc. 525, 537 (2009) [hereinafter Kassin, *Inside Interrogation*] (“[F]our out of every five people waive [*Miranda*] rights . . .”).

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

83. See *Schneekloth v. Bustamonte*, 412 U.S. 218, 223–25 (1973) (discussing factors courts consider when “assessing the voluntariness of a consent”).

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-

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).

conomic duress,⁹³ lengthy interrogations,⁹⁴ sleep deprivation combined with middle-of-the-night questioning,⁹⁵ refusal to allow basic physical necessities,⁹⁶ lies about the severity of charges or evidence in the case,⁹⁷ threats to family members' welfare,⁹⁸ inducements in the form of leniency or other promises,⁹⁹ 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 (“[A]mong 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).

95. See, e.g., *State v. Doody*, 930 P.2d 440, 446 (Ariz. Ct. App. 1996) (finding thirteen-hour interrogation that began “in the evening” and carried on “without significant breaks” did not render confession 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 for 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.”¹⁰⁰ 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.¹⁰¹

Very few suspects understand or invoke their *Miranda* rights,¹⁰² and the voluntariness test rarely leads to suppression.¹⁰³ 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.”¹⁰⁴

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.”¹⁰⁵ If it is true

100. Ogletree, *supra* note 77, at 1828–29.

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 arriv[es] 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).

105. Stephanos Bibas, The Right to Remain Silent Helps Only the Guilty, 88 Iowa L. Rev. 421, 424–25 (2003) [hereinafter Bibas, *Right to Remain Silent*].

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 “savvy 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.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.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 *Miranda* rights have been provided and waived.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."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.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.¹¹⁶

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

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 exonerees); 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.").

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

113. See Godsey, *supra* note 92, at 513 ("After *Miranda* warnings have been provided to a suspect and waived, most courts simply presume that any confession that follows was made voluntarily.").

114. *Irvin v. Dowd*, 366 U.S. 717, 729 (1961) (Frankfurter, J., concurring).

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))).

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.¹¹⁷ 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,¹¹⁸ 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.¹¹⁹

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.¹²⁰

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 inculcating 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 voluntary¹²⁴

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,¹²⁷ though the result may be the same “economic execution” that police officers face.¹²⁸

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.¹²⁹ 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.¹³⁰ 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.”¹³¹

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.¹³² 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.¹³³ 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).

128. See Mark Porter, *When the Cop Becomes the Suspect: A Primer on Garrity*, 1 Mich. Crim. L. Ann. J. 33, 35 (2002) (noting right established in *Garrity* is explicitly tied to “power of the paycheck”); see also Brandon L. Garrett, *Corporate Confessions*, 30 Cardozo L. Rev. 917, 920 (2008) (discussing situation where government “threatened [corporation] with the corporate equivalent of capital punishment” and as a result, corporation “took the only course open to it” and “exerted substantial pressure on its employees to waive their constitutional rights” (quoting *United States v. Stein*, 440 F. Supp. 2d 315, 319 (S.D.N.Y. 2006))).

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

134. *Id.* at 490 (quoting 118 Cong. Rec. H23,900 (daily ed. June 30, 1972) (statement of Rep. Edward Koch)).

135. *Id.* at 491 (quoting 119 Cong. Rec. H2051 (daily ed. Jan. 23, 1972) (statement of Rep. Frank Annunzio)).

136. *Id.* at 492 (quoting 122 Cong. Rec. H28,950 (daily ed. Sept. 2, 1976) (statement of Rep. Martin Russo)).

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).

139. See *id.* (describing passage of LEOBORs in California, Florida, Illinois, Kentucky, Louisiana, Maryland, Minnesota, Nevada, New Mexico, Rhode Island, Virginia, West Virginia, and Wisconsin). Additionally, Arizona added a Peace Officer Bill of Rights in 2015. See *Ariz. Rev. Stat. Ann.* § 38-1102 (2015). Texas has had a state LEOBOR in place for municipalities of over 1.5 million citizens. See *Tex. Loc. Gov’t Code Ann.* § 143.123 (West 2015).

part of negotiated agreements with counties and municipalities.¹⁴⁰ 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.¹⁴¹ 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,¹⁴² most are silent on the interplay between administrative and criminal investigations.¹⁴³

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.¹⁴⁴
2. Prior to questioning, the officer is to be notified of whoever will be present for the questioning and the nature of the charges.¹⁴⁵

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.

141. Keenan & Walker, *supra* note 76.

142. See *id.* at 205–06 & n.125 (noting three LEOBORs—Illinois, California, and Rhode Island—do not apply when investigation is criminal).

143. See *id.* at 205–06 (noting ten of fourteen LEOBOR statutes analyzed “are silent as to whether they apply to suspected criminal behavior”).

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, while 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).

145. See Del. Code Ann. tit. 11, § 9200(c)(3)–(4) (requiring officer receive notice of officer in charge and nature of investigation); Fla. Stat. Ann. § 112.532(1)(c)–(d) (same); 50 Ill. Comp. Stat. Ann. 725/3.2, 725/3.4 (same); La. Stat. Ann. § 40:2531(B)(1) (2014)

3. The officer can be questioned only by one (sometimes two) person(s) during an interrogation session.¹⁴⁶
4. The interrogation must be for a reasonable period.¹⁴⁷
5. The officer under interrogation must be allowed to attend to personal physical necessities.¹⁴⁸

(requiring notice of nature of investigation and interrogators at beginning of interrogation); Md. Code Ann., Pub. Safety § 3-104(d)(1)–(2) (same); Minn. Stat. Ann. § 626.89(5)–(6) (requiring officer receive copy of signed complaint and allowing officer to require list of witnesses); Nev. Rev. Stat. Ann. § 289.060(2) (listing notice requirements); N.M. Stat. Ann. § 29-14-4(C)–(D) (same); 6C R.I. Gen. Laws § 42-28.6-2(3), (5) (same); Va. Code Ann. § 9.1-501(2) (same); W. Va. Code Ann. § 8-14A-2(2) (same). Compare Cal. Gov't Code § 3303(b)–(c) (requiring officer be informed of officer in charge of investigation and nature of investigation), and Ky. Rev. Stat. Ann. § 15.520(1)(e) (declaring officer is entitled to know nature of charges against him if they are based on violation of local unit of government rule or regulation), with Wis. Stat. Ann. § 164.02(1)(a) (West 2006) (requiring only that officer be informed of nature of investigation).

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 investigator 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).

147. See Cal. Gov't Code § 3303(d) (requiring interrogation occur in “reasonable period” taking “into consideration gravity and complexity of issues”); Del. Code Ann. tit. 11, § 9200(c)(5) (“Interview sessions shall be for reasonable periods of time.”); Fla. Stat. Ann. § 112.532(1)(e) (requiring interrogation “be conducted at a reasonable hour”); 50 Ill. Comp. Stat. Ann. 725/3.5 (“Interrogation sessions shall be of reasonable duration and shall permit the officer interrogated reasonable periods for rest and personal necessities.”); La. Stat. Ann. § 40:2531(B)(2) (requiring any interrogation “be for a reasonable period of time”); Md. Code Ann., Pub. Safety § 3-104(h)(2)(i) (“Each session of interrogation shall be for a reasonable period of time.”); Minn. Stat. Ann. § 626.89(7) (“Sessions at which a formal statement is taken must be of reasonable duration . . .”); N.M. Stat. Ann. § 29-14-4(D)(1)–(3) (stating each session will last no more than two hours).

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)(ii) (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.¹⁴⁹
7. No promise of reward can be made as an inducement to answering any question.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.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.¹⁵²

Taking LEOBOR protections and the *Garrity* 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

149. See 50 Ill. Comp. Stat. Ann. 725/3.6 (“The officer being interrogated shall not be subjected to professional or personal abuse, including offensive language.”); N.M. Stat. Ann. § 29-14-4(D)(6) (“[A]n officer shall not be subjected to offensive language”); W. Va. Code Ann. § 8-14A-2(3) (prohibiting interrogating officers from using “offensive language” or threats of punitive action).

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.”).

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(l)(1) (stating agency may compel officer to submit to polygraph exam).

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.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.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 criminal suspects 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.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

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”).

154. See *supra* section II.A (discussing how current constitutional protections of confessions favor sophisticated suspects).

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

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.¹⁶⁰ 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.¹⁶¹ 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.¹⁶²

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,¹⁶³ it is these actors who are most responsible for whether the public views the system as fairly distributed or as corrupt and unjust.¹⁶⁴ 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.¹⁶⁵

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-

160. See, e.g., Paul Butler, Opinion, *The Police Officers’ Bill of Rights Creates a Double Standard*, N.Y. Times (June 27, 2015, 9:13 PM), <http://www.nytimes.com/roomfordebate/2015/04/29/baltimore-and-bolstering-a-police-officers-right-to-remain-silent/the-police-officers-bill-of-rights-creates-a-double-standard> (on file with the *Columbia Law Review*) (describing alleged preferential treatment of officers in Freddie Gray case as “thwart[ing] transparency and accountability”).

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.”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.”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.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.”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.”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.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.”¹⁷² All twenty-six suspects waived their *Miranda* rights. Professor Garrett found that all but one confession were the product of “lengthy interrogations.”¹⁷³ One man was questioned for twenty-seven hours, another for twelve, and all but one for more than

166. Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 *Yale L.J.* 455, 483–84 (1986).

167. *Id.*

168. See *supra* Part II (describing formal protections for police suspects during interrogations).

169. See Garrett, *Judging Innocence*, *supra* note 77, at 122.

170. *Id.* at 61.

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.”).

172. *Id.* at 399–400.

173. *Id.*

three hours. Judges affirmed the voluntariness of the confessions in every one of these cases.¹⁷⁴ Three of these exonerees had been sentenced to death.¹⁷⁵ 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.¹⁷⁶ 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.¹⁷⁷

Despite this mounting evidence about false confessions,¹⁷⁸ and about how isolation, lengthy interrogations, inducements, threats and other police tactics prevented by LEOBORs contribute to the conviction of innocent defendants,¹⁷⁹ police continue to interrogate suspects with almost no regulation.¹⁸⁰ 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.¹⁸¹

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.¹⁸² 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”).

181. See Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 *J. Crim. L. & Criminology* 429, 440–41 (1998) (“Once a confession is obtained, investigation often ceases, and convicting the defendant becomes the only goal of both investigators and prosecutors.”).

182. See *supra* section II.B (describing role of police unions in negotiating affirmative protections against coercive investigation).

officers into speaking against their will.¹⁸³ 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.¹⁸⁴ 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.¹⁸⁵ 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.¹⁸⁶ 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.”¹⁸⁷ Trust in legal authorities comes from a belief in the “benevolence of motives and intentions of the person with whom one is dealing.”¹⁸⁸ The belief that authorities have “benevolent” motives encourages deference to the criminal law.¹⁸⁹ 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.¹⁹⁰ 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.¹⁹¹ 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.¹⁹² 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,¹⁹³ but this claim has little validity. As has been dis-

187. Tom R. Tyler, *The Psychology of Public Dissatisfaction with Government*, in *What Is It About Government that Americans Dislike?* 227, 238 (John R. Hibbing & Elizabeth Theiss-Morse eds., 2001).

188. *Id.*

189. See *id.* (defining motive-based trust as “trust in the benevolence of the motives and intentions of the person with whom one is dealing”).

190. See, e.g., Stephanie Chin, *Pennsylvania Rocked by ‘Jailing Kids for Cash’ Scandal*, CNN (Feb. 24, 2009, 10:15 AM), <http://www.cnn.com/2009/CRIME/02/23/pennsylvania.corrupt.judges> [<http://perma.cc/9VYR-TTD9>] (reporting several judges accused of sending children to private prisons in return for kickbacks); Dahlia Litwick, *You’re All Out*, Slate (May 28, 2015, 1:38 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/05/orange_county_prosecutor_misconduct_judge_goethal_takes_district_attorney.html [<http://perma.cc/8SEK-GGSU>] (discussing “entrenched and systemic” prosecutorial misconduct in Orange County, California).

191. See White, *Involuntary Confession*, *supra* note 94, at 2037–38 (“[A]ccurate confessions are of great value to society. When . . . little forensic evidence is available and pressure to solve the crime is high, a true confession will be . . . the only means of solving the crime . . .”).

192. See *supra* section II.B (showing how LEOBORs skew constitutional justice in favor of police defendants).

193. See Chuck Canterbury, *Opinion, Greater Scrutiny Makes Officer Vulnerable to False Charges*, N.Y. Times: Room for Debate (Apr. 29, 2015, 6:46 AM), <http://www.nytimes.com/roomfordebate/2015/04/29/baltimore-and-bolstering-a-police-officers-right-to->

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.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.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.¹⁹⁶ But criminal procedure should not be distributed differently to different classes of offenders, and it certainly should not be enshrined in formal law.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.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.

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).

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”).

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.”).

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).

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.”).

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.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.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

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.”).

200. See generally Aziz Z. Huq & Richard H. McAdams, *Litigating the Blue Wall of Silence: How to Challenge the Police Privilege to Delay Investigation* (Univ. Chi. Legal Forum, Pub. Law Working Paper No. 555, 2016), <http://ssrn.com/abstract=2712967> (on file with the *Columbia Law Review*) (discussing problems with delay periods and suggesting ways to challenge them).

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,²⁰¹ the response almost uniformly has been to call for the abolition of LEOBORs.²⁰² 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.²⁰³ The purpose of this waiting period is ostensibly to provide time for an officer to find an attorney.²⁰⁴ Given that police have well-connected union representatives who can easily and quickly secure them representation,²⁰⁵ 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.²⁰⁶

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).

203. See, e.g., Md. Code Ann., Pub. Safety § 3-104(j)(2)(i) (LexisNexis 2011) (providing ten-day waiting period to allow suspect to obtain representation).

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.”).

205. Many were horrified to learn that the police officer who shot Akai Gurley in a Brooklyn stairwell immediately texted his union representative, rather than attempting to help the unarmed man he had just shot. See Andy Cush, *NYPD Cop Who Killed Gurley Texted Union Instead of Seeking Help: Report*, Gawker (Dec. 5, 2014, 9:35 AM), <http://gawker.com/nypd-cop-who-killed-gurley-texted-union-instead-of-1667183543> [<http://perma.cc/W4UK-FA22>] (describing responses in aftermath of police shooting).

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.²⁰⁷ The Baltimore mayor, citing this delay, criticized LEOBORs for making the investigation into the officers involved in Gray’s death more difficult.²⁰⁸ 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.²⁰⁹ 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.²¹⁰

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.”²¹¹ 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.”²¹² He also argued that LEOBORs are laws that “thwart transparency and accountability.”²¹³ His recommendation, unsurprisingly, was to abolish them.²¹⁴ 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.”²¹⁵

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.

209. Ethan Shorey, *Union President Slams Mayor for Comments on Williams, Process*, *Valley Breeze* (Mar. 3, 2015), <http://www.valleybreeze.com/2015-03-03/north-providence/union-president-slams-mayor-comments-williams-process#.VdDXZiVhHw> [<http://perma.cc/48TE-AHKE>].

210. *United Auto Workers Local 2865, UAW Local Calls on AFL-CIO to End Ties to Police Unions, New Politics* (July 27, 2015), <http://newpol.org/content/uaw-local-calls-afl-cio-end-ties-police-unions> [<http://perma.cc/R4QQ-B8FN>] (arguing LEOBORs “aim[] to protect the rights of officers above the needs of the community”).

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.²¹⁶ And it *might* make the police more accountable and even more likely to inculcate 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.²¹⁷ 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.²¹⁸

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 protect suspects' rights.²¹⁹ Yet one weakness in these scholars' writing is that it is mere

a different course. He told the Marshall Project, "I don't think, actually, that police officers should not have these rights. I think that *everyone* should have a bill of rights like this." Id.

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 inculcating 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.²²⁰ Indeed, most people have never been inside an interrogation room or performed an interrogation.²²¹ 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.²²²

LEOBORs are a script for reform, drafted by the system actors who do the interrogating.²²³ 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.²²⁴ 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.²²⁵ And while the media and lobbyists for law enforcement and victims' groups constantly remind us to put ourselves in the shoes of the police,²²⁶ 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”).

220. See Ronald J. Allen, *Theorizing About Self-Incrimination*, 30 *Cardozo L. Rev.* 729, 729 (2008) (“[T]heorizing about self-incrimination in general had been strikingly unhelpful, because the domain of the Self-Incrimination Clause is too unruly to be captured by what passes for theory within the legal realm.”). Critiquing the Supreme Court’s jurisprudence on self-incrimination, William Rehnquist wrote a memo when he was a law clerk to Justice Jackson on an involuntary-confession case claiming that “[t]he ivory towers of jurisprudence . . . [have] weakened local law enforcement Let’s hope it has come to an end.” See Karina Pergament, Comment, *Arizona v. Fulminante: Romancing Coerced Confessions*, 69 *Denv. U. L. Rev.* 153, 170 (1992) (quoting Rehnquist memo to Justice Jackson).

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

victims,²²⁷ there is no such policy- or lawmaking presence on behalf of potential suspects.²²⁸

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.²²⁹ 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.²³⁰ 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.”).

228. See Dennis E. Curtis & Judith Resnik, *Grieving Criminal Defense Lawyers*, 70 *Fordham L. Rev.* 1615, 1618 (2002) (noting criminal defendants lack powerful political organization); Keith Swisher, *Pro-Prosecution Judges: “Tough on Crime,” Soft on Strategy, Ripe for Disqualification*, 52 *Ariz. L. Rev.* 317, 387 (2010) (same).

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.²³¹ In each case, “appearance of justice” principles and procedural justice concerns bolster the extension of certain LEOBOR provisions to all criminal suspects.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.²³³ To be sufficient, LEOBOR provisions should also have an independent value. Here, this Article makes an initial attempt at suggesting which provisions in LEOBORs should be extended.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 maintaining 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 system 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.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.²³⁶ For purposes of this Article, the relevant tactics are (a) lengthy interrogation²³⁷ and (b) false promises of leniency or threats of

231. See *infra* section IV.B (suggesting which LEOBOR protections should apply to all suspects).

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).

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

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.

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

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).

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 statement²³⁸ 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.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 inculcate herself.²⁴⁰

a. *Length of Interrogation.* — In *Ashcraft v. Tennessee*, the Supreme Court held that interrogating a suspect for thirty-six hours was unconstitutional because it was “inherently coercive.”²⁴¹ Since then, social science and studies of exonerated false confessors 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.²⁴² Professors Drizin and Richard Leo found that of all the exonerated false confessors 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.”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.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.²⁴⁵ States considering statutory protections for suspects or judges dealing with the voluntariness test as it currently stands should consider setting a

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

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.

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

241. 322 U.S. 143, 154 (1944).

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).

243. Drizin & Leo, supra note 110, at 948.

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.”).

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.²⁴⁶ 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.²⁴⁷ 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.²⁴⁸ 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.²⁴⁹ 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.²⁵⁰

Similarly, threats of harsh treatment are among the tactics police use that reportedly contribute to false inculpatory statements.²⁵¹ Such threats are often in the form of a legal response to refusal to inculcate, 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").

249. See, e.g., Evan Nesterak, Coerced to Confess: The Psychology of False Confessions, *Psych Rep.* (Oct. 21, 2014), <http://thepsychreport.com/conversations/coerced-to-confess-the-psychology-of-false-confessions> [<http://perma.cc/M8TV-QJ6C>] (describing teenagers who confessed after being held for almost two days and told they could go home if they confessed).

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,²⁵² a very long prison term,²⁵³ or even the death penalty,²⁵⁴ or in the form of suggesting potential consequences of not confessing, such as prison and rape or physical abuse by other inmates.²⁵⁵

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.²⁵⁶ 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.²⁵⁷ But these three tactics are ones that the police

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”).

253. See Welsh S. White, *Miranda's Failure to Restrain Pernicious Interrogation Practices*, 99 Mich. L. Rev. 1211, 1235 (2001) (“[E]mpirical data support the conclusion that threats of punishment . . . sometimes produce false confessions.”).

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.²⁵⁸ Such allowances are largely unaddressed in the false-confession literature.²⁵⁹ This is perhaps because most police detectives already provide such allowances to suspects.²⁶⁰ 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 inculcating 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.²⁶¹ From those cases, it is clear that a floor does exist in terms of what police may do to get a suspect to confess.²⁶² As the Court stated in

there often may not be evidence like DNA that can confirm whether the confession is true or false").

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).

260. But see Aaron Miguel Cantú, *Detroit's Hidden Crack Casualties*, *Intercept* (Oct. 14, 2015, 9:38 AM), <http://theintercept.com/2015/10/14/detroits-hidden-crack-casualties-2/> [<http://perma.cc/ACA5-WP9G>] (describing witness who was locked in dark room and forced to sit in her own urination because police did not believe her account that her friends had not committed murder).

261. See *Davis v. North Carolina*, 384 U.S. 737, 738 (1966) (holding confining suspect for sixteen days without any communication before interrogation renders confession inadmissible); *Ashcraft v. Tennessee*, 322 U.S. 143, 154 (1944) (finding nonstop interrogation for thirty-six hours is "inherently coercive"); *Brown v. Mississippi*, 297 U.S. 278, 286 (1936) (finding physical abuse unconstitutional).

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.²⁶³ At some point, physical deprivation also reaches that floor of revulsion, according to the Court.²⁶⁴

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.²⁶⁵ 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.²⁶⁶

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 *Schnecko*, 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).

C. *How to Extend These Protections and Some Potential Results*

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.²⁶⁷ 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.²⁶⁸ 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.²⁶⁹ Proposals to lower sentences, remove harsh three-strike laws, and decriminalize low-level possession of narcotics abound.²⁷⁰ 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.²⁷¹ 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).

269. *Brown v. Plata*, 131 S. Ct. 1910, 1947 (2011) (discussing manner in which state may implement three-judge court’s order to reduce prison population).

270. In 2014, Congress approved amendments to reduce sentences for drug-trafficking crimes. Sentencing Guidelines for United States Courts, 79 Fed. Reg. 3280 (Jan. 17, 2014). In 2012, California voted to reform its three-strikes law in a referendum. See Jane Susskind, *Changes in Three Strikes Law Reform California’s Prison System*, IVN (Nov. 9, 2012), <http://ivn.us/2012/11/09/changes-in-three-strikes-law-reform-california-prison-system> [<http://perma.cc/9NQD-LZKD>]. Numerous states have decriminalized certain marijuana-possession offenses. See State Laws with Alternatives to Incarceration for Marijuana Possession, MPP.org, <http://www.mpp.org/issues/decriminalization/state-laws-with-alternatives-to-incarceration-for-marijuana-possession> [<http://perma.cc/8S2U-4Z6Y>] (listing states, such as Delaware, that have decriminalized marijuana possession).

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 N.Y. Reg. 73 (July 8, 2015) (requiring Attorney General “to investigate, and if warranted,

option of “secret” grand jury hearings for police suspects.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,²⁷³ but assuming states would not make such a dramatic change to pre-arrest law enforcement tactics,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 *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.

prosecute certain matters involving the death of an unarmed civilian, whether in custody or not, caused by a law enforcement officer”); see also Levine, Who Shouldn’t Prosecute, *supra* note 3 (manuscript at 47) (discussing Governor Andrew Cuomo’s executive order).

272. See Melanie Mason, Gov. Brown Signs Law Barring Grand Juries in Police Deadly Force Cases, *L.A. Times* (Aug. 11, 2015, 2:36 PM), <http://www.latimes.com/local/political/la-me-pc-brown-grand-juries-20150811-story.html> [<http://perma.cc/FL2V-DA6V>] (reporting passage of law banning secret grand juries in cases involving “excessive or deadly force by law enforcement”).

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).

274. See generally, Maoz, *supra* note 80, at 1320–22 (discussing pre-arrest coercive tactics that manipulate *Miranda* restraints).

- f. Nothing in this statute should prevent a law enforcement officer from refraining from any tactic that she would not want used against her should she be the suspect 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 true 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 entirely 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 courtrooms.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 Provide More Clarity on the Scope of Judicial Review*, 61 UCLA L. Rev. 1134, 1178 (2014) (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?²⁷⁹ 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.²⁸⁰

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.²⁸¹

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.²⁸² 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,²⁸³ suggesting that system actors care about fairness for all suspects, and increasing trust in the law.²⁸⁴

It is impossible to calculate how many innocent suspects might not confess if they had extra affirmative rights,²⁸⁵ but it is clear that false confessions are a serious problem.²⁸⁶ 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.²⁸⁷ For example, a number of the exonorees 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.²⁸⁸

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.²⁸⁹ 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”).

dural rights.²⁹⁰ 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.²⁹¹ 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.²⁹² They would have to interview more witnesses, test DNA samples, and use other scientific and technological advances to investigate.²⁹³ 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.²⁹⁴ 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.²⁹⁵ 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).

293. See Keith A. Findley, *Judicial Gatekeeping of Suspect Evidence: Due Process and Evidentiary Rules in the Age of Innocence*, 47 *Ga. L. Rev.* 723, 761 (2013) (“[S]ome forward-looking law enforcement agencies . . . have already adopted [best] practices [supported by social science research] as guidelines.”); Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin’s New Governance Experiment*, 2006 *Wis. L. Rev.* 645, 645 (“[G]rowing collection of DNA exonerations has also revealed deeper patterns of dysfunction in the investigation and prosecution of crimes [including] false confessions”); cf. Shima Baradaran, *Rebalancing the Fourth Amendment*, 102 *Geo. L.J.* 1, 42–43 (2013) (“[M]any police stations in the country have moved to a model of evidence-based policing and track most of their actions—including searches, crimes reported and apprehended—and other safety risks to the public.”); Matthew J. Parlow, *The Great Recession and Its Implications for Community Policing*, 28 *Ga. St. U. L. Rev.* 1193, 1223 (2012) (noting “many local governments have shifted their operational models to include enhanced technology that allows police departments to improve their outcomes and increase efficiency”).

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.²⁹⁶ 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.²⁹⁷ 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.²⁹⁸ 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."²⁹⁹ 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.³⁰⁰ 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.³⁰¹ 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.³⁰² It would also save judges from having to make individualized guesses about a certain law enforcement officer's behavior.³⁰³ It might also correct for

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 LEOBOR 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 LEOBORs 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 LEOBORs might achieve a similar goal, it would not be as effective. Extending LEOBORs 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 LEOBOR 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,

304. See, e.g., David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 *Am. J. Crim. L.* 455, 469 (1999) (noting judges do not scrutinize credibility of police witnesses).

305. See, e.g., Susan Page, *Poll: Whites and Blacks Question Police Accountability*, *USA Today* (Aug. 26, 2014, 4:42 AM), <http://www.usatoday.com/story/news/nation/2014/08/25/usa-today-pew-poll-police-tactics-military-equipment/14561633/> [<http://perma.cc/E85P-47RZ>] (“Americans by 2-to-1 say police departments nationwide don’t do a good job in holding officers accountable for misconduct, treating racial groups equally and using the right amount of force.”); Bill Schneider, *Do Americans Trust Their Cops to Be Fair and Just? New Poll Contains Surprises*, *Reuters: The Great Debate* (Jan. 15, 2015), <http://blogs.reuters.com/great-debate/2015/01/15/one-third-of-americans-believe-police-lie-routinely> [<http://perma.cc/2C23-A683>] (“Thirty-one percent of Americans believe [police lie to serve their own interests], and that number rises to 45 percent among African-Americans, 41 percent among young people and 39 percent among Democrats.”); Paul Steinhauser, *CNN Poll: Trust in Government at All-time Low*, *CNN* (Aug. 8, 2014, 6:00 AM), <http://politicalticker.blogs.cnn.com/2014/08/08/cnn-poll-trust-in-government-at-all-time-low-2> [<http://perma.cc/G4SM-XSNE>] (noting “[j]ust 13% of Americans say the government can be trusted to do what is right always or most of the time”).

306. See *supra* section III.A (arguing special formal protections for police suspects raise numerous systemic harms, particularly in combination with other procedural advantages police receive).

307. See Tyler & Huo, *supra* note 186, at 14–15 (noting trust increases when procedures are distributed evenly and authorities are seen as having unbiased motives).

308. Cf. Drizin & Leo, *supra* note 110, at 910 (“Most people do not appear to know that interrogation-induced false confessions even exist.”).

309. Cf. *supra* section III.A (describing dangers of false confessions to legitimacy of system more generally).

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.³¹⁶ 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.³¹⁷ Police training manuals themselves make clear that, for most suspects, an hour or two of questioning is enough to produce a voluntary statement.³¹⁸ 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.³¹⁹ 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.³²⁰

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.³²¹ 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. Kassir, *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).

nerable.³²² 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.³²³

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.³²⁴ 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.³²⁵ It also means spending potentially millions of additional dollars for more public defenders.³²⁶ 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.³²⁷ Unlike *Miranda*, however, which law enforcement may still see as imposed by judges from

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 363 (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) (“[The] 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,³²⁸ 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.

328. See, e.g., Paul G. Cassell, *Miranda's "Negligible" Effect on Law Enforcement: Some Skeptical Observations*, 20 Harv. J.L. & Pub. Pol'y 325, 345 (1997) (arguing *Miranda* hampers police and stating, "[while] human costs seem unworthy of much attention from the vantage of the ivory tower . . . *Miranda's* countless victims would doubtless tell a different story").