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Possibilities and Limitations*  
**PRELIMINARY ROUGH DRAFT**

# INTERROGATION PARITY

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## INTRODUCTION

Over the past several years there has been increased focus on the way police are treated by the criminal justice system and their own internal disciplinary mechanisms. Scholars and the media have taken note of special interrogation protections afforded to the police when they become the target of internal or criminal investigation.<sup>1</sup> In the approximately 20 states with statutory law enforcement officer bills of rights (LEOBRs), and the vast majority of jurisdictions bound by local collective bargaining agreements, rank and file officers have negotiated for a number of protections, not applicable to anyone else, to shield themselves from coercive interrogation techniques.<sup>2</sup> Some of the protections include time limits on questioning, limiting threats and promises made to suspects, ensuring the suspect is allowed to sleep, use the bathroom, and eat at humane intervals, and many other rights not available to ordinary citizens.<sup>3</sup>

With the exception of a very few,<sup>4</sup> scholars,<sup>5</sup> journalists,<sup>6</sup> and advocates<sup>7</sup> are in agreement that these special interrogation protections

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<sup>1</sup> See Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191 (2017); Kate Levine, *Police Suspects*, 116 COLUM. L. REV. 1197 (2016).

<sup>2</sup> See Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills of Rights*, 14 B.U. PUB. INT. L.J. 185, 186 (2005)

<sup>3</sup> See *infra* Part I.A.

<sup>4</sup> See, e.g., Levine, *Police Suspects*, *supra* note 1.

<sup>5</sup> Lindsey Webb, *Legal Consciousness As Race Consciousness: Expansion of the Fourth Amendment Seizure Analysis Through Objective Knowledge of Police Impunity*, 48 SETON HALL L. REV. 403, 437 (2018) (barrier to accountability);

are unfair, a barrier to accountability for “bad” officers, and a barrier more generally to police reform. Many authors focus their criticism on waiting periods frequently afforded to officers accused of misconduct.<sup>8</sup> But some have also criticized other interrogation protections, arguing that any protection not currently given to civilians should be eradicated.

On the other hand, there is widespread agreement among scholars and criminal justice reform advocates that interrogation protections for ordinary criminal suspects are not strong enough.<sup>9</sup> The constitutional limits on police through *Miranda* and the voluntariness test have proven ineffective to protect vulnerable and even innocent suspects from confessing against their will and interest.<sup>10</sup> The exoneration of an alarming number of people who confessed to serious crimes, combined with new understanding about what lead vulnerable suspects – the young, the mentally ill, the mentally disabled – to confess have led to voluminous scholarly calls for reform.<sup>11</sup> Many such reforms dovetail with the interrogation protections given to police—the very protections many would like to see stripped from the police.<sup>12</sup>

In this Essay, we argue that these diverging positions, while raising legitimate concerns about distributional inequity, stand in the way of interrogation reform for ordinary citizens. But rather than eliminating many of the interrogation protections currently afforded to law enforcement officers, we argue that the law should extend many of these

Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 717–18 (2017) (“Perhaps no issue has been more controversial in the discussion of police union responses to allegations of excessive force than statutory and contractual protections for officers accused of misconduct[.] [C]ritics have assailed such protections.”); Roger Goldman, *Importance of State Law in Police Reform*, 60 ST. LOUIS U. L.J. 563, 386–87 (2016) (barrier to accountability); Paul Butler, *The Police Officers’ Bill of Rights Creates a Double Standard*, N.Y. TIMES (June 27, 2015), <https://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>; Keenan & Walker, *supra* note 2 (“[Some] LEOBOR provisions impede the effective investigation of alleged officer misconduct and consequently militate against the principle of police accountability.”).

<sup>6</sup> See, e.g., Reade Levinson, *Across the U.S., Police Contracts Shield Officers from Scrutiny and Discipline*, REUTERS (Jan. 13, 2017, 1:16 PM GMT), <http://www.reuters.com/investigates/special-report/usa-police-unions> (providing an analysis of 82 police union contracts and describing how they may impair accountability); Eli Hager, *Blue Shield: Did You Know Police Have Their Own Bill of Rights?* MARSHALL PROJECT (Apr. 27, 2015), <https://www.themarshallproject.org/2015/04/27/blue-shield>.

<sup>7</sup> See, e.g., POLICE UNION CONTRACT PROJECT, <http://www.checkthepolice.org/#project> (this important, run by civil rights activists, website has a page devoted to the ways in which LEOBRs block accountability).

<sup>8</sup> See *infra* Part I.A. and accompanying notes.

<sup>9</sup> See *infra* Part I.B.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See Levine, *Police Suspects*, *supra* note 1, at Part IV (arguing same and explaining how state legislatures could do so).

protections to all suspects, both civilian suspects and police suspects.<sup>13</sup> The current distributional inequality is problematic for several reasons, not least because it affords the most sophisticated suspects the most protection while leaving the most vulnerable suspects at the mercy of constitutional protections that have been interpreted time and again to offer weak and limited protection.<sup>14</sup>

In keeping with the theme of this symposium edition, we propose a novel method by which the federal government could combat this sort of distributional inequality in the criminal justice system, while also promoting broader reform in police interrogation procedures. We propose that Congress could use its spending power to condition federal funds to police departments on the adoption of uniform, minimum protections for both civilian and criminal suspects facing interrogations. Using existing LEOBRs and police union contracts as a model, we argue that Congress could mandate that all police departments receiving certain federal funds limit unreasonably long interrogations, ban the use of abusive or threatening language, record all interrogations, and give suspects a right to tend to physical necessities like bathroom use during interrogations. Through an examination of the existing literature on police interrogations, we argue that these protections represent the least a department can do to protect against false confessions.<sup>15</sup>

Admittedly, Congress has rarely conditioned federal grants to police departments on the protection of individual rights. Nevertheless, we argue that such approach is normatively desirable and constitutionally permissible. In parts that follow, we first turn to a comparison of police suspects and civilian suspects. Then we lay out our proposal for universalizing some of the protections police currently enjoy.

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<sup>13</sup> See *infra* Part II.

<sup>14</sup> See *infra* Part I.B. Additionally, when the public sees police officers that are not convicted or even indicted after using apparently excessive force, a double standard appears to be at work. See, e.g., Ilya Somin, *We Should Condemn Both Crimes Against the Police and Crimes Committed by the Police Themselves*, WASH. POST (Dec. 23, 2014) (arguing that we should take crimes by the police more seriously). This perception may be legitimate and based on numerous ways in which police are treated differently by the criminal justice system, including by prosecutors, judges, and juries. See Kate Levine, *How We Prosecute the Police*, 104 GEO L. J. 745 (2016) (discussing the ways prosecutors use their discretion to carefully consider and often decline to prosecute cases against the police); Chase Madar, *Why It's Impossible to Indict a Cop*, THE NATION (Nov. 25, 2014) (discussing difficulties in achieving charges or convictions against police), <https://www.thenation.com/article/why-its-impossible-indict-cop/>.

<sup>15</sup> See *infra* Part II.

I. CURRENT INTERROGATION PROTECTIONS FOR THE POLICE AND CIVILIAN SUSPECTS

The current state of interrogation protections for police and civilians is uneven. The police, often among the most sophisticated suspects and the least likely to fall prey to interrogation practices designed by their colleagues, have an extra layer of protection thanks to LEOBRs. Civilians, including the most vulnerable among us, have far more nebulous protection from the federal Constitution. This Part describes the unequal, even upside down, law of interrogation for police and civilian suspects.

A. *LEOBR Interrogation Protections for Police Suspects*

It appears that as many as 20 or more states have enacted so-called Law Enforcement Officer Bills of Rights (LEOBRs) that explicitly protect officers during internal investigations.<sup>16</sup> Of these LEOBRs, a significant number provide officers with protections during interrogations. Some of these protections appear to only bar unreasonably coercive or inhumane treatment. Other protections go further, and may impair reasonable efforts to promote accountability and elicit truthful statements during interrogations.

At least five states provide officers with rigid waiting periods before investigators can question a police officer. For example, the LEOBRs in Kentucky,<sup>17</sup> Nevada,<sup>18</sup> and Texas<sup>19</sup> all provide some officers with a forty-eight hour delay before an interview or interrogation. The Maryland LEOBR allows officers to delay interrogations for up to ten days in order to obtain representation.<sup>20</sup> And the LEOBR in Louisiana gives the most generous waiting period—fourteen days—before investigators can initiate an interrogation.<sup>21</sup> Other states, like Virginia,

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<sup>16</sup> Previous studies have identified anywhere between 14 and 20 LEOBRs. This difference is likely the result of differing definitions of LEOBRs. Some states have explicitly enumerated LEOBRs as separate protections for police officers. Other states have similar protections as part of their existing civil service statutes. And still others have narrow LEOBR-like statutes that only protect certain classes of law enforcement agencies. We draw this estimate of 20 states from the excellent work by Richard McAdams and Aziz Huq. See Aziz Z. Huq & Richard H. McAdams, *Litigating the Blue Wall of Silence: How to Challenge the Police Privilege to Delay Investigation*, 2016 U. CHI. L. FORUM 213, 222. For a comprehensive analysis of the content of fourteen LEOBRs, see Keenan & Walker, *supra* note 2.

<sup>17</sup> KY. REV. STAT. § 15.520(1)(c).

<sup>18</sup> NEV. REV. STAT. § 289.060(1).

<sup>19</sup> TEX. LOC. GOVT. § 143.123(f). It is worth noting that the Texas LEOBR is somewhat unique in that it provides different types of protections to officers depending on the size of the jurisdiction.

<sup>20</sup> MD. CODE, PUB. SAFETY § 3-104(j)(2)(i)&(ii).

<sup>21</sup> LA. REV. STAT. ANN. § 40:2531(B)(4)(b).

prohibit a department from taking any punitive action against an officer until the officer has been given written notification of the allegations against her with at least five days to respond orally or in writing.<sup>22</sup> A number of other states have established more flexible arrangements, guaranteeing officers only a “reasonable” period of time to secure representation before an interrogation, and giving supervisors additional discretion to initiate interviews as necessary during exigent circumstances.<sup>23</sup> Still others give officers the opportunity to secure both legal counsel and additional guidance from a representative from the police union without providing much leeway for exigent circumstances.<sup>24</sup> And the Florida LEOBR states that “[a]ll identifiable witnesses shall be interviewed, whenever possible, prior to the beginning of the investigative interview of the accused officer.”<sup>25</sup> While this might not qualify as a rigid barrier given the flexibility in the language, it may nevertheless contribute to officers receiving significant delays before interrogations about alleged misconduct. A number of other scholars and advocates have expressed concern about how such waiting periods can frustrate accountability efforts.<sup>26</sup>

In addition, a handful of states give officers access to potentially incriminating evidence against them before an interrogation. For example, the Florida LEOBR ensures that officers get copies of “all witness statements, including all other existing subject matter statements,

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<sup>22</sup> VA. CODE ANN. § 9.1-502.

<sup>23</sup> See, e.g., DEL. CODE § 9200(c)(9) (giving officers a “period of time” to secure representation before an interview, if such representation is “reasonably available”); ILL. COMP. STAT. § 725/3.9 (stating that an officer should have “reasonable time and opportunity” to secure counsel before an interview); MINN. STAT. ANN. § 626.89(9) (offering officers a “reasonable” period of time to secure “representation” before an interview or interrogation); R.I. GEN. LAWS § 42.28.6(9) (also giving officers a “reasonable time” to obtain representation).

<sup>24</sup> See, e.g., IOWA CODE ANN. § 80F.1(8) (giving officer opportunity to secure representation from both union representative and attorney, and seemingly attaching no exception for exigency).

<sup>25</sup> Huq & McAdams, *supra* note 16.

<sup>26</sup> Levinson, *supra* note 6 (providing an analysis of 82 police union contracts and describing how they may impair accountability); Samuel Walker, *The Baltimore Police Union Contract and the Law Enforcement Officers’ Bill of Rights: Impediments to Accountability* (May 2015), available at <http://samuelwalker.net/wp-content/uploads/2015/06/BALTIMORE-POLICE-UNION-CONTRACTFinal.pdf> (analyzing how the Baltimore police union contracts can impair accountability); POLICE UNION CONTRACT PROJECT, <http://www.checkthepolice.org/#project> (providing an important, ongoing analysis of around 81 police union contracts); Rushin, *Police Union Contracts*, *supra* note 1 (evaluating 178 police union contracts, evaluating the law surrounding collective bargaining, and offering normative recommendations for reforming collective bargaining procedures); Fisk & Richardson, *supra* note 5 (providing some observations about how union contracts may impair accountability efforts); Huq & McAdams, *supra* note 16, at 229 (claiming that “interrogation barriers” present a meaningful barrier to accountability); Samuel Walker, *Police Union Contract “Waiting Periods” for Misconduct Investigations Not Supported by Scientific Evidence* (July 1, 2015), available at <http://samuelwalker.net/wp-content/uploads/2015/06/48HourSciencepdf.pdf>; Keenan & Walker, *supra* note 2.

and all existing evidence including, but not limited to, incident reports, GPS locator information, and audio or video recording related to the incident under investigation....”<sup>27</sup> Arizona guarantees officers access to “written notice information the officer of the alleged facts that are the basis of the investigation, the specific nature of the investigation, the officer’s status in the investigation, all known allegations of misconduct that are the reason for the interview and ... copies of all complaint that contain the alleged facts that are reasonable available.”<sup>28</sup> Other states, like Illinois<sup>29</sup> and Rhode Island,<sup>30</sup> require officers to have access to the name of complainants before an interview. A number of scholars and advocates have taken issue with provisions that give officers access to such information prior to an interrogation, on the grounds that they may thwart accountability efforts.<sup>31</sup>

Ultimately, however, the potentially problematic procedures described above section represent only a small portion of the protections afforded by LEOBRs to police officers facing interrogations. Many of the protections afforded by LEOBRs pose less of a risk of thwarting reasonable accountability and oversight. Instead, such LEOBR protections ensure reasonably humane treatment of suspects during interrogations.

A large number of LEOBRs guarantee an officer the opportunity to tend to bodily functions during interrogations.<sup>32</sup> Several prevent unreasonably long interrogations, or ensure that interrogations happen at a reasonable hour.<sup>33</sup> Some ensure that interrogations may be recorded, with officers frequently getting access to these recordings afterwards.<sup>34</sup> Others prevent investigators from using threatening language<sup>35</sup> or from

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<sup>27</sup> FL. STAT. ANN. § 112.532(1)(d).

<sup>28</sup> ARIZ. STAT. § 38-1104(A)(2).

<sup>29</sup> Ill. Comp. Stat. § 725/3.2.

<sup>30</sup> R.I. GEN. LAWS § 42-28.6-2(4).

<sup>31</sup> See, e.g., Rushin, *supra* note 1, at 1224-25, 1235-38.

<sup>32</sup> See, e.g., CAL. GOV’T CODE § 3303(d) (allowing officers to take care of physical necessities like bathroom breaks during interrogations); LA. REV. STAT. ANN. § 40:2531(B)(2) (allowing officers to deal with physical necessities during interrogations); ILL. COMP. STAT. § 725/3.5 (stating that an officer under interrogation may rest and tend to “personal necessities”).

<sup>33</sup> See, e.g., CAL. GOV’T CODE § 3303(a)-(d) (“The interrogation shall be conducted at a reasonable hour, preferably at a time when the public safety officer is on duty, or during the normal waking hours for the public safety officer...” and “[t]he interrogation session shall be for a reasonable period...”); LA. REV. STAT. ANN. § 40:2531(B)(2) (limiting interrogations to a “reasonable duration”); ILL. COMP. STAT. § 725/3.5 (using the reasonable period of time standard).

<sup>34</sup> See, e.g., CAL. GOV’T CODE § 3303(g) (giving right to record interrogation to the officer); La. Rev. Stat. Ann. § 40:2531(B)(3) (stating that the interrogation ought to be recorded in full).

<sup>35</sup> See, e.g., CAL. GOV’T CODE § 3303(e) (“The public safety officer under interrogation shall not be subjected to offensive language or threatened...”); Ky. Rev. Stat. 15.520(b) (barring use of “threats” or other coercions during interrogations of officers).

having multiple investigators ask questions at the same time.<sup>36</sup> Thus, rather than presenting a barrier to investigators, these limits may merely prevent investigators from using potentially dangerous tactics that could increase the risk of involuntary or false confessions.

These protections stand in direct contrast to the virtual free reign police have when questioning civilian suspects.

*B. Constitutional Interrogation Protections for Civilians*

This section describes the limited protections civilians have when faced with police interrogation, and the problems that flow from the lack of constraints.

While the federal constitution has been read to limit interrogation tactics, its protections are narrow and weak. Indeed, in most jurisdictions, police have virtually no restraint on what kind of tactics they use during interrogation. Two strands of Supreme Court doctrine determine whether a confession is considered legally valid. First, any suspect who has been arrested must be given notice of certain constitutional rights. *Miranda* warnings include the right to remain silent, the right to an attorney, and the notice that any statements made to officers can be used against a suspect in later proceedings.<sup>37</sup>

*Miranda* has failed to the extent it was meant to protect suspects from coercive interrogation tactics. First, it applies only in “formal” interrogations.<sup>38</sup> A number of Supreme Court cases decided in the years since *Miranda* have interpreted these situations narrowly.<sup>39</sup> Second, and

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<sup>36</sup> See, e.g., CAL. GOV'T CODE § 3303(b) (requiring no more than one person asking questions at a time).

<sup>37</sup> *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966) (“Procedural safeguards must be employed to protect the privilege and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.”). See also Levine, *Police Suspects*, *supra* note 1, at Part II.B.

<sup>38</sup> Aurora Maoz, *Empty Promises: Miranda Warnings in Noncustodial Interrogations*, 110 MICH. L. REV. 1309, 1321 (2012) (noting that police training manuals advise police to question suspects in non-*Miranda* settings).

<sup>39</sup> See, e.g., *Berghuis v. Thompkins*, 560 U.S. 370 (2010) (suspect must unambiguously assert right to silence, silence itself is not enough); *Davis v. United States*, 512 U.S. 452 (1994) (suspect must unambiguously request counsel in order to cut off questioning); *Illinois v. Perkins*, 492 U.S. 292 (1990) (undercover exception to *Miranda* rule); *Rhode Island v. Innis*, 446 U.S. 291 (1980) (meaning of “interrogation” limited to only when police engage in “express questioning or its functional equivalent.”).

perhaps most germane, most suspects waive their rights to *Miranda*.<sup>40</sup> Some may do this because they voluntarily desire to make statements to the police. Others waive because they do not understand how or are afraid to assert their rights.<sup>41</sup>

If *Miranda* warnings are properly given, judges must rely on the “totality of the circumstances” test,<sup>42</sup> to determine whether a confession is voluntary. This test is supposed to balance the need for law enforcement effectiveness and the “societal value” of ensuring a suspect confesses freely.<sup>43</sup>

Importantly, however, unlike the police’s special interrogation rights, the totality 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.<sup>44</sup> Indeed, courts have ruled voluntary confessions that are the product of economic duress,<sup>45</sup> lengthy interrogations,<sup>46</sup> sleep deprivation combined

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<sup>40</sup> Saul M. Kassin, *Inside Interrogation: Why Innocent People Confess*, 32 AM. J. TRIAL ADVOC. 525, 534-35 (2009) (“[F]our out of every five people waive [*Miranda*] rights . . .”).

<sup>41</sup> Charles J. Ogletree, *Are Confessions Really Good for the Soul? A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1827-28 (1987) (explaining several misunderstandings that lead suspects to waive rights).

<sup>42</sup> *Schneekloth v. Bustamonte*, 412 U.S. 218, 224-25 (1973).

<sup>43</sup> *Id.*

<sup>44</sup> See Levine, *Police Suspects*, *supra* note 1, at Part II.B.; See also 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 both that it is over- and under-protective of criminal suspects. Some argue that it is too hard for officers ex-ante to know whether they have coerced a suspect who confesses. Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward A Workable Test for Identifying Compelled Self-Incrimination*, 93 CAL. L. REV. 465, 469-70 (2005) (noting that factors about a suspect’s particular vulnerability is not known to officers at the time of interrogation but may rule a confession out later); 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 from 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). Those who focus on under-protection 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. Herman, *supra* note 44, at 752 (vague rules will lead unscrupulous officers to “go to the brink” to obtain a confession).

<sup>45</sup> See, e.g., *Sanney v. Montanye*, 500 F.2d 411, 415-16 (2d Cir. 1974) (threat of discharge from job as “drivers assistant” not coercive because not as much of a loss as that of police officer).

<sup>46</sup> Levine, *Police Suspects*, *supra* note 1, at Part II.B.; see also Welsh S. White, *What Is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2046-47 (1998) (noting that courts have held that interrogation sessions of nine hours or more do not render a confession involuntary).

with middle-of-the-night questioning,<sup>47</sup> refusal to allow basic physical necessities,<sup>48</sup> lies about the severity of charges or evidence in the case,<sup>49</sup> threats to family members' welfare,<sup>50</sup> inducements in the form of leniency or other promises.<sup>51</sup>

Both *Miranda* and the voluntariness test are unsuited to protect the very people the Court worried about in designing these constitutional rules -- vulnerable suspects.<sup>52</sup> For example, studies show that *Miranda* warnings require at least a tenth-grade reading level. A significant percent of arrestee, however, read at a sixth-grade level or below.<sup>53</sup> Similarly, the permissiveness of the voluntariness test means that the more sophisticated a suspect is, the less likely police interrogation tactics are to lead to a involuntary confession. Thus, as William Stuntz wrote, "savvy suspects . . . defined by either wealth or experience--meaning

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<sup>47</sup> See, e.g., *State v. Doody*, 930 P.2d 440, 446 (Ariz. Ct. App. 1996) (thirteen hour interrogation that began "in the evening" and "without significant breaks" did not render confession involuntary).

<sup>48</sup> *Id.*

<sup>49</sup> *United States v. Jacques*, 744 F.3d 804, 808 (1st Cir.), *cert. denied*, 135 S. Ct. 131 (2014) (confession ruled voluntary when federal agents told suspect that confession would lead to softer treatment, while non-confession would lead to maximum sentence); *United States v. Meirovitz*, 918 F.2d 1376, 1379 (8th Cir. 1990) (threat of long sentence for non-confession did not make confession involuntary); *Johnson v. Pollard*, 559 F.3d 746, 749 (7th Cir. 2009) (lie by police officer that the suspect failed the polygraph test did not make the confession involuntary).

<sup>50</sup> *United States v. Hufstetler*, 782 F.3d 19, 24-25 (1st Cir. 2015) (threat to detain suspect's girlfriend and comment that "I would hate to see those kids without their mother" not considered coercive); *Brown v. Horell*, 644 F.3d 969, 980 (9th Cir. 2011) (although finding that the detective coerced Brown into confessing by conditioning his ability to be with his child on his decision to cooperate with the police, court does not overturn because state Supreme Court decision was not a "violation of clearly established Supreme Court law" as AEDPA requires).

<sup>51</sup> *Jacques*, 744 F.3d at 808; *United States v. Villapando*, 588 F.3d 1124, 1129 (2009) (voluntary confession despite detective indicating that she would sit down with the DEA, in exchange for his cooperation for drug-related investigation and said "we don't have to charge you."); see also White, *supra* note 46, at 2043 (discussing false confessions and noting that "certain interrogation tactics-- especially tactics involving direct or implied promises of leniency . . . are also likely to precipitate untrustworthy confessions."); Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering Legality of Deceptive Interrogation*, 33 *FORDHAM URB. L.J.* 791, 792 (2006) (one of the later-exonerated "Central Park five" was told he could go home after confessing).

<sup>52</sup> William J. Stuntz, *Miranda's Mistake*, 99 *MICH. L. REV.* 975, 976-77 (2001) ("[S]ophisticated 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."); 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* Stephen J. Schulhofer, *Reconsidering Miranda*, 54 *U. CHI. L. REV.* 435, 447-48 (arguing that even a sophisticated suspect would feel pressure to talk to police).

<sup>53</sup> 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).

experience dealing with the system, something that recidivists naturally possess” are protected. Unsophisticated, “vulnerable suspects, which includes those with the least experience dealing with the system, are helped, if at all, only indirectly.”<sup>54</sup>

Modern police training teaches detectives how to use subtle psychological techniques, including false threats and false promises to encourage confession.<sup>55</sup> Studies have shown that young, mentally retarded, and mentally ill suspects are far more susceptible to this kind of “ordinary” interrogation trickery than their older, healthier peers.<sup>56</sup> Reams of unsuppressed confessions, including an uncomfortable number of false confessions, have shown that judges are unable or unwilling to sort voluntary confessions from coerced confessions.<sup>57</sup> Simply put, trial judges and reviewing courts almost uniformly refuse to suppress powerful confession evidence unless obtained through brutal tactics.<sup>58</sup>

We must also ask ourselves what a true confession is worth? the tactics used by police, particularly on vulnerable suspects, offend many of our closely-held notions of humane treatment in a civilized society. As Justice Jackson has said “[a] significant test of the quality of a civilization is its treatment of those charged with crime.”<sup>59</sup> This notion is clear from the fact that the Supreme Court has outlawed physical brutality. We believe that interrogation tactics that deprive suspects of

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<sup>54</sup> Stuntz, *supra* note 52, at 977.

<sup>55</sup> Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 918-919 (2004) (“The genius or mind trick of modern interrogation is that it makes the irrational (admitting to a crime that will likely lead to punishment) appear rational (if the suspect believes that he is inextricably caught or perceives his situation as hopeless and cooperating with authorities as the only viable course of conduct). Regretfully, most interrogation training manuals—including the widely used and influential manual by Fred Inbau, John Reid, Joseph Buckley, and Brian Jayne— give no thought to how the methods they advocate communicate psychologically coercive messages and sometimes lead the innocent to confess.”);

<sup>56</sup> *Id.* 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.”); Kassin, *supra* note 40, at 533-34 (“That juveniles are vulnerable is not particularly surprising. Over the years, developmental psychologists have observed that adolescents are more compliant and suggestible than adults, and that their decision making reflects an immature pattern of behavior that is impulsive, focused on immediate gratification, and somewhat oblivious to perceptions of future risk. To the adolescent, not fully focused on long-term consequences, confession may serve as an expedient way out of a stressful situation.”).

<sup>57</sup> See Drizin & Leo, *supra* note 55, at 944-45, 963-71 (discussing false confession cases where suspect was young or mentally retarded).

<sup>58</sup> Godsey, *supra* note 44, 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. As a result, courts post-Miranda have provided very little oversight to what goes on during interrogations after the recitation and waiver of Miranda warnings, and interrogators have been able to apply quite a bit of pressure to suspects without running afoul of the Constitution.”).

<sup>59</sup> *Irvin v. Dowd*, 366 U.S. 717, 729 (1961) (Frankfurter, J., concurring).

basic necessities, manipulate their vulnerabilities, and use threats to induce inculpatory statements are offensive to society's values, even when they are successful at obtaining truthful statements.<sup>60</sup>

Perhaps nothing illustrates the problems with our current laws on interrogations of civilians better than the extra protections police bargain for when they become suspects.<sup>61</sup> As the interrogators, police are perhaps in the best position to assert their constitutional rights during an interrogation, yet they still feel the need to statutorily protect themselves further.<sup>62</sup> Thus, any critique of confession jurisprudence does well to take this group into account. In the next Part, we do just this, suggesting federal statutory protections, driven by existent LEOBR rights.

## II. A FEDERAL RESPONSE TO COERCIVE INTERROGATION TECHNIQUES

It appears that officers in many of the nation's largest police departments have protected themselves from the most coercive tactics currently used against civilian in interrogations. And in some cases, police officers have been able to insulate themselves from accountability by receiving rigid interrogation delays, often with a guaranteed right to preview the incriminating evidence against them. Such protections are almost never guaranteed to civilians. In many ways, the simplest solution to this distributional inequality is to have states should strip officers of these procedural protections. After all, why should police officers receive additional protections beyond those minimum protections afforded to civilians?<sup>63</sup> But in our judgment, the legal system's failure to explicitly protect some of these rights for civilian suspects during

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<sup>60</sup> This criticism of our criminal justice system is most often made in the context of the death penalty. *See, e.g.*, William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 436 (1986) (arguing that the death penalty has no place in a civilized society and that "the state, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings.").

<sup>61</sup> *See supra* Part II.A.

<sup>62</sup> *Id.*

<sup>63</sup> For example, the Marshall Project has done excellent reporting that demonstrates how LEOBRs frequently give officers protections against harassment, threats, and inducements during interrogations. Hager, *supra* note 6 ("During questioning, investigators may not harass, threaten, or promise rewards to the officer, as interrogators not infrequently do to civilian suspects."). Additionally, some LEOBRs ensure officers may take bathroom breaks and have access to food and water during lengthy interrogations. *Id.* ("Bathroom breaks are assured during questioning."). And other LEOBRs ensure that officers will not face unreasonably lengthy interrogations, particularly late at night. *Id.* ("The standard LEOBoR also provides that an officer may only be questioned for a reasonable length of time, at a reasonable hour, by only one or two investigators (who must be fellow policemen), and with plenty of breaks for food and water."). Admittedly, state laws and court decisions often do not explicitly guarantee similar protections to civilian suspects facing an interrogation. So, it may be tempting to argue, as others have, that these LEOBRs give officers "special treatment." *Id.*

criminal interrogations does not mean that we ought to strip all of them from police officers. Such a race to the bottom is normatively undesirable.

Instead, we should use our current treatment of police officers during interrogations as a blueprint for how the legal system could improve the treatment of all suspects facing similar interrogations—both civilians and police officers. This raises some challenging empirical and normative questions. First, what limitations on coercive interrogation tactics are necessary to ensure that interrogations elicit truthful information, without resorting to unconscionable methods? Second—and more to the point of this symposium edition—what role can the federal government play in promoting such protections?

We believe that some of the limitations provided by LEOBRs represent humane practices for both civilian and police suspects. In our judgment, these categories of humane limitations do not impair the ability of investigators to obtain accurate, incriminating information, as we describe more in the next subpart. These protections are factually distinguishable from many of the most problematic interrogation protections afforded to many police officers. Within the context of disciplinary interviews, these humane limitations on interrogation practices are the *least* an employer should guarantee an employee that is compelled to engage in an investigatory interview.<sup>64</sup> And within the context of criminal investigations, these humane limitations will ensure that investigators are not resorting to unduly coercive mechanisms that may create a high risk of false confessions.<sup>65</sup>

In order to encourage police departments across the country to adopt these protections, we propose a novel solution. We argue that federal government could condition federal funding to police departments on the adoption of interrogation protections for *both* civilian and police suspects. In the subpart A, we describe the parameters of our proposed federal response to abusive interrogation tactics and consider some historical precedents for this type of legislation. Part B demonstrates that our proposal will satisfy constitutional scrutiny. And in subpart C, we respond to possible critiques of our approach.

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<sup>64</sup> Indeed, we should not lose sight of the fact that the interrogation procedures described in this Article apply to police officers facing internal disciplinary investigations of all types. While some of these disciplinary investigations may result in the discovery of criminal conduct, many of these interviews deal exclusively with mere violations of internal rules or procedures. Most Americans would find it appalling if their employer, as part of their employment, could force them to undergo for an interrogation for an extended period of time without access to food, water, or a bathroom. And most Americans would be shocked if their employer used abusive language, threats, and other coercive conduct in such compulsory interrogations.

<sup>65</sup> See *supra* Part I.B.

*A. Using Congress's Spending Power to Improve Interrogation Procedures in Local Police Departments*

Congress should consider legislation that uses its spending power to condition federal funding to state and local police departments on the elimination of unduly coercive or inhumane techniques against either civilian or police suspects during interrogations. Specifically, such legislation should guarantee that:

- (1) interrogations must happen at a reasonable hour,
- (2) interrogations should only last for a reasonable period of time,
- (3) no person should be subject to abusive language or unreasonable threats,
- (4) all persons facing interrogations should have the right to attend to personal physical necessities,
- (5) all interrogations should be recorded, and
- (6) all persons facing interrogations should have access to a transcript or recording of the interrogation within a reasonable period of time after the interrogation has concluded.<sup>66</sup>

Police departments that verify their compliance with these interrogation limitations should be eligible for federal funding under the measure. The amount of funding attached to this measure should not be so great so as to coercively force departments into implementing these reforms. But the amount of funding should be significant enough to provide a genuine incentive for agencies to make these proactive reforms.

We have found no empirical evidence to suggest that these tactics are useful in eliciting truthful, incriminating information from either civilian or police suspects. On the other hand, some literature has suggested that these tactics create a risk of eliciting false confessions.<sup>67</sup> Notably absent from our proposed legislation are two common features of police union contracts and LEOBRS—rigid interrogation delays and provisions that give suspects access to incriminating evidence or the name of complainants before undergoing an interrogation. As discussed in Part I,

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<sup>66</sup> Congress may also consider making these guarantees subject to limited exceptions depending on the gravity, exigency, or complexity of the issue under investigation.

<sup>67</sup> See *infra* Part I.B. and notes accompanying.

scholars have made compelling arguments that these sorts of protections can thwart reasonable accountability efforts and rather than facilitate humane interrogation conditions.

Admittedly, our proposal would represent a departure from how the federal government has historically exercised its spending power. As Professor Rachel Harmon has recognized, “[d]ozens of federal statutes authorize federal agencies to give money and power to local police departments and municipalities.”<sup>68</sup> These include grants administered through the Department of Justice, like the Edward Byrne Justice Assistance Grants and Community Oriented Policing Hiring Program grants, and other similar programs administered through the Department of Homeland Security and the Department of Agriculture.<sup>69</sup> But historically, these grant programs have focused not on the promotion of accountability, but instead the largely the promotion of public safety and agency coordination.<sup>70</sup> Thus, even though our proposal is relatively modest in scope, it would still represent, perhaps, the most significant legislative attempt to date to condition federal funding of police departments on the promotion of civil rights. But in a handful of cases, the federal government has explicitly taken steps to limit the range of investigatory techniques available to law enforcement out of concern for the protection of constitutional rights (through its spending power or otherwise).

We believe that these provide sufficient historical precedent for our proposal. For instance, Congress already conditions the allocation of federal funds to local law enforcement, in part, on their willingness to abide by limitations on certain investigatory techniques. Take, for example, the Violence Against Women Act (VAWA). That measure, passed by Congress as part of the Violent Crime Control and Law Enforcement Act of 1994.<sup>71</sup> It promoted coordinated responses to domestic violence, strengthened federal penalties for sex offenders, and expanded options for legal relief for battered women.<sup>72</sup> Under the STOP (Services, Training, Officers, Prosecutors) Violence Against Women Formula Grant Program, the measure also conditioned federal funding to localities on the adherence to various federal prerogatives related to the protection of women from domestic violence, sexual assault, and stalking.<sup>73</sup> Over the years, these federal grants have promoted a wide

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<sup>68</sup> Rachel Harmon, *Federal Programs and the Real Cost of Policing*, 90 N.Y.U. L. REV. 870, 870 (2015) (describing generally how the federal government funds different types of local policing initiatives).

<sup>69</sup> *Id.* at 872.

<sup>70</sup> *Id.* at 872-73.

<sup>71</sup> Office on Violence Against Women, U.S. Department of Justice, *The History of the Violence Against Women Act*, [http://www.ncdsv.org/images/OVW\\_HistoryVAWA.pdf](http://www.ncdsv.org/images/OVW_HistoryVAWA.pdf).

<sup>72</sup> *Id.* at 1-2.

<sup>73</sup> *Id.* at 2.

range of goals: the establishment of battered women shelters, rape prevention education, coordinated community responses to domestic violence, improved training, and more.<sup>74</sup>

But the federal government has also used its power under this statute to limit the investigatory techniques that law enforcement ought to use in investigating alleged sex offenses. For example, in order to receive federal funding under VAWA, state and local recipients must certify that “no law enforcement officer, prosecuting officer or other government official shall ask or require an adult, youth, or child victim of an alleged sex offense ... to submit to a polygraph examination or other truth telling device....”<sup>75</sup> Thus, departments that fail to prohibit the use of such polygraphs on alleged victims of sexual abuse may lose federal funding under the statute. This is only one example of how the federal government has utilized its spending power to disincentivize problematic police behavior.

There is also recent historical precedent for congressional proposals to use the spending power to address the problem of coercive interrogation of police officers during internal investigations. Take, for example, the State and Local Law Enforcement Discipline, Accountability, and Due Process Act of 2003, proposed by Representative Jim Ramsted of Minnesota.<sup>76</sup> That bill would have used Congress’s spending power to condition the provision of federal grants on the adoption of expansive protections for law enforcement officers facing internal investigations, including protections against unreasonably coercive interrogation techniques.<sup>77</sup> Thus, there is historical precedent for Congress either considering, or affirmatively regulating, the behavior of local police departments during internal investigations through the use of the spending power.

Nevertheless, the congressional spending power as it relates to local police departments is not without its limits. In at least two recent cases, federal district courts have questioned the constitutionality of attempts by the Trump Administration to strip federal funding from police

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<sup>74</sup> *Id.* at 2-3.

<sup>75</sup> 34 U.S.C. § 10451.

<sup>76</sup> State and Local Law Enforcement Discipline, Accountability, and Due Process Act of 2003, H.R. 2967, 108th Cong. (2003).

<sup>77</sup> Many of the proposed protections offered in that bill, in our judgment, may provide officers with even more protections than are necessary to ensure the protection of officers’ due process rights. For example, in addition to mandating reasonable, humane limitations on interrogations like those proposed in this Essay, that measure would have also required all local police departments to give police officers 24 hours notice before any disciplinary interrogation, placed a 90 day statute of limitation on internal investigations, barred the public from observing disciplinary hearings, deleted records from an officer’s personnel file about disciplinary charges that could not be proven during a hearing, and granted all officers the right to appeal disciplinary action to arbitration. Some of these, we’d argue, go too far. They may sacrifice basic accountability and oversight in the name of due process.

departments in so-called “sanctuary jurisdictions” that fail to comply with applicable federal immigration laws.<sup>78</sup> But as we show in the next section, our proposal would represent a constitutionally valid exercise of the congressional spending power. It would not unconstitutionally commandeer local jurisdiction in violation of the Tenth Amendment. And it is sufficiently clear so as to avoid any vagueness challenges.

### B. *Constitutionality*

We are confident that our proposal would survive any constitutional scrutiny as a lawful exercise of the congressional spending power. In *South Dakota v. Dole*, the U.S. Supreme Court established the operative test for when a federal statute may constitutionally condition the provision of federal money on action by state or local governments.<sup>79</sup> There, the Court considered the constitutionality of the federal statute that conditioned federal highway funds on states establishing a minimum drinking age of at least twenty-one years of age.<sup>80</sup> While Congress may not be able to regulate drinking age directly, the Court in *Dole* held that Congress was acting lawfully in passing this statute under its spending power.<sup>81</sup>

Chief Justice Rehnquist then elaborated a five-part test on when Congress could constitutionally condition federal funds via the spending power on action by state agents. First, Congress must be acting in a manner consistent with “general welfare.”<sup>82</sup> Second, the federal statute must unambiguously establish the terms that states or localities must abide by in order to receive the funding, thus giving states the opportunity to “exercise their choice knowingly, cognizant of the consequences of participation.”<sup>83</sup> Third, the funding at stake must be related “to the federal interest in [a] particular national project[] or program[.]”<sup>84</sup> Fourth, there must be no additional constitutional provision that would bar the provision of such a federal grant. And fifth, the funding condition cannot be “coercive,” suggesting that the funding condition cannot be too onerous, nor can the funding attached be too unreasonably large.<sup>85</sup>

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<sup>78</sup> *County of Santa Clara v. Donald J. Trump, et al.*, No. 17-cv-00574-WHO (N.D. Cal., April 25, 2017); *City of Chicago v. Jefferson Beauregard Sessions III, Attorney General of the United States*, No. 17 c 5720 (N.D. Ill., Sept. 15, 2017).

<sup>79</sup> *South Dakota v. Dole*, 483 U.S. 203 (1987).

<sup>80</sup> *Id.* at 205.

<sup>81</sup> *Id.* at 207-210.

<sup>82</sup> *Id.* at 207; *see also* Lynn A. Baker, *Twenty-Year Legacy of South Dakota v. Dole*, 52 S.D. L. REV. 468, 469-70 (2007) (providing a detailed breakdown of the test articulated by the Court in *Dole* and discussing the implications of this test).

<sup>83</sup> *Id.* at 470 (quoting *Dole*, 483 U.S. at 207).

<sup>84</sup> *Dole*, 483 U.S. at 207.

<sup>85</sup> *Id.* at 211 (concluding that some coercive measures may turn “pressure ... into compulsion.”)

Our proposal would abide by each of the *Dole* requirements. The limitation of coercive and inhumane interrogation tactics that may contribute to involuntary confessions across thousands of decentralized police departments would represent an issue of sufficient general welfare under the first prong of this test. In fact, in some cases, it would represent an attempt by Congress to protect against potentially unconstitutional behavior by local police departments. Our proposal is sufficiently unambiguous as to put police departments across the country on notice about the terms they must honor in order to be eligible for federal funding. Unlike some of the recent attempts by the Trump Administration to use the spending power to incentivize general compliance with federal immigration law, which courts have worried may be unreasonably vague, our proposal lays out clear guidelines on the exact behavior that any police department must avoid in order to be eligible for federal funding. And although the federal government invests billions of dollars each year<sup>86</sup> in facilitating coordination, crime prevention, and other goals in local police departments in each, this money generally represents a tiny fraction of each municipality's annual operating budget.<sup>87</sup> Thus, departments would have the opportunity to exercise a genuine choice—they could choose to accept federal funding to supplement their budgets so long as they abide by these humane limitations on interrogations, or they could forgo these modest funds and continue engaging in these potentially harmful interrogation tactics. Departments would exercise a genuine choice, and as the Court reasoned in *Dole*, the “Tenth Amendment limitation on congressional regulation of state affairs [does] not concomitantly limit the range of conditions legitimately placed on federal grants.”<sup>88</sup>

Thus, Congress could easily craft a proposal consistent with the recommendations in this Essay in a way that abides by the requirements of the Tenth Amendment and *Dole*.

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<sup>86</sup> Harmon, *supra* note 68, at 883-84 (discussing how the federal government spends “billions of dollars” on “programs for local law enforcement”).

<sup>87</sup> See, e.g., Sandhya Somashekhar, *Chicago Sues Justice Department Over New Police Grant Rules Targeting Sanctuary Cities*, WASH. POST (Aug. 7, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/08/07/chicago-to-sue-justice-department-over-new-police-grant-rules-targeting-sanctuary-cities> (explaining how Chicago would have lost \$2.3 million under the Trump executive order); Mayor Rahm Emmanuel, *City of Chicago Budget Overview* (2018), [https://www.cityofchicago.org/content/dam/city/depts/obm/supp\\_info/2018Budget/2018\\_Budget\\_Overview.pdf](https://www.cityofchicago.org/content/dam/city/depts/obm/supp_info/2018Budget/2018_Budget_Overview.pdf) (showing that the City of Chicago plans to spend approximately \$1,552,346,776 on its police department, and \$473,519 on its police board, \$13,289,393 on the Office of Police Accountability). Based on these projections, the amount of money at stake in the City of Chicago's suit against the federal government related to the sanctuary city executive order represents approximately 0.15% of the city's overall police department budget alone.

<sup>88</sup> *Dole*, 483 U.S. at 210.

### C. Possible Drawbacks

Opponents of this approach may argue that this sort of a federal response will have unintended, negative side effects. First, some may argue that these interrogation limitations, particularly as they apply to criminal suspects, may make it more difficult for investigators to elicit incriminating information and subsequently clear cases. For example, prior scholars have shown how the *Miranda* decision coincided with a statistically significant decrease in clearance rates.<sup>89</sup> Other scholars have similarly cautioned how police regulation may contribute to so-called de-policing.<sup>90</sup> While these concerns should not be dismissed lightly, we cannot find any empirical evidence in the scholarly literature to suggest that these limitations would prevent investigators from eliciting incriminating information. We appreciate that some limitations on interrogations may impede reasonable attempts to elicit truthful, incriminating evidence. For example, we find it theoretically compelling that rigid and lengthy waiting periods may it unreasonably difficult to elicit incriminating statements from a suspect. Similarly, providing a suspect with access to some or all of the incriminating evidence against them before an interrogation may allow them to construct a false narrative that deflects responsibility. But we do not propose that Congress use these more restrictive limitations on officer interrogations as a model for civilian interrogations. We only propose extending to civilians a more modest array of protections designed to prevent, in our judgment, inhumane interrogation techniques that substantially increase the probability of false confessions.

Second, critics may reasonably point out that this proposal would be subject to the whims of shifting politics with the executive branch. As previous studies have shown, the political ideology of the President and the Attorney General appear to play a substantial role in the administration of other federal regulations of police conduct.<sup>91</sup> Thus, it seems probable that, even if Congress passed our proposed measure, and the President signed it into law, future administrations may simply choose to not enforce it, much how Attorney General Jeff Sessions has simply chosen not to enforce 42 U.S.C. § 14141, which bars police

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<sup>89</sup> See, e.g., Paul G. Cassell & Richard Fowles, *Still Handcuffing the Cops? A Review of Fifty Years of Empirical Evidence of Miranda's Harmful Effects on Law Enforcement*, 97 B.U. L. REV. 685 (2017) (exploring decades worth of evidence on the link between *Miranda*'s implementation and various indicators of law enforcement effectiveness).

<sup>90</sup> Stephen Rushin & Griffin Edwards, *De-Policing*, 102 CORNELL L. REV. 721 (2017) (finding a link between federal intervention in police departments and a subsequently, but temporary, uptick in property crimes rates).

<sup>91</sup> Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3235-37 (2014) (showing how the enforcement of § 14141 against local police departments was susceptible to changes in political administration).

departments from engaging in a pattern or practice of unconstitutional or unlawful misconduct.<sup>92</sup> Alternatively, some may argue that, absent an exclusionary rule, departments may still utilize these inhumane tactics against civilians. While this is a discouraging limitation of any measure passed by Congress and enforced by the executive branch, we believe it should not discourage advocates from pursuing our proposal. For one thing, we believe our proposed regulation would receive greater support across political administrations because its demand of parity provides benefits to two separate political constituencies that may bridge political divides. And even if such a measure is under or unenforced by some political administrations, we still believe it would have a positive influence when it receives support from the executive branch.

Third, some may argue that our proposal is politically infeasible, particularly given the current President's position on law enforcement issues and the conservative majorities in both houses of Congress. We recognize that our proposal may not be immediately feasible in the current political climate. But we believe that our proposal represents a unique opportunity to find common ground on a highly controversial issue. Even if this proposal is not immediately feasible today, it represents a viable path forward when (and if) the political variables align in the future.

Finally, some critics may claim that federal law should not attempt to promote parity in interrogation conditions for both civilian and police suspects. After all, police suspects often cannot refuse to partake in a disciplinary interview. Police departments may compel officers to answer questions during disciplinary interviews.<sup>93</sup> Refusal to participate in such an interview can result in termination of their employment.<sup>94</sup> By contrast, the Fifth Amendment gives the average criminal defendant the right to end an interrogation at any time through exercising their

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<sup>92</sup> ATTORNEY GENERAL JEFFERSON B. SESSIONS, MEMORANDUM FOR HEADS OF DEPARTMENT COMPONENTS AND UNITED STATES ATTORNEYS (March 31, 2017), <http://www.documentcloud.org/documents/3535155-Memorandum-from-Attorney-General-Jeff-Sessions.html> (announcing that the U.S. Department of Justice would effectively de-prioritize enforcement of pattern or practice cases under § 14141 against local police departments).

<sup>93</sup> For examples of contracts that discuss the fact that police departments may compel officers to answer questions during disciplinary interrogations. *See, e.g.*, THE CITY OF BELLINGHAM, LABOR CONTRACT BETWEEN THE CITY OF BELLINGHAM AND THE BELLINGHAM POLICE GUILD 41 (2017) (on file with author) (showing in Appendix E the statement that officers must face before facing an internal interrogation, which notifies that officer that, “if you refuse to testify or to answer questions relating to the performance of your official duties or fitness for duty, you will be subject to departmental charges which could result in your dismissal from the Police Department.”).

<sup>94</sup> *Id.*

protection against self-incrimination.<sup>95</sup> But while the law may give civilians a greater legal right to terminate an interrogation, empirical evidence suggests that criminal defendants often have an unsophisticated understanding of these protections. Thus, they frequently waive their protections under *Miranda* and speak to law enforcement without the assistance of a lawyer.<sup>96</sup> Because of this, we believe that both police and civilian suspects are similarly situated. Both commonly face the prospect of questioning (compelled either legally or functionally) in a custodial setting by sophisticated interrogators. Given this reality, we believe both parties are deserving of basic protections against unduly coercive or abusive interrogation techniques.

#### CONCLUSION

There is much to be gained from the increased attention on police misconduct, excessive force, and potential criminality. Often lost in the voluminous critiques of the police and criminal justice response to official violence and misconduct, however, are the ways in which the police have helped themselves to common sense protections that all civilians deserve. This is especially clear in the interrogation context, where LEOBR protections provide a roadmap for the reforms that many scholars and reformers have argued are necessary to protect civilian suspects from coerced confessions. In this essay, we have sought to illustrate how a number of LEOBR protections could be extended to all citizens, a result that makes far more sense than stripping these common sense protections from the police.

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<sup>95</sup> *Edwards v. Arizona*, 451 U.S. 477 (1981) (holding that law enforcement must immediately stop questioning a suspect if he or she has clearly asserted his or her right to have counsel present during the custodial interrogation).

<sup>96</sup> Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 275 (1996) (showing that around 75% of all individuals observed in this study ultimately waived their *Miranda* protections and spoke to law enforcement).