
By Nick Place*

LAW ENFORCEMENT BILLS OF RIGHTS, or LEOBORs, create “double due process” by taking the sacred constitutional rights of people suspected of criminal wrongdoing and transplanting those rights onto the internal disciplinary process. LEOBORs are either codified at the state level or woven into contracts and collective bargaining agreements. Police unions are staunch advocates for these measures, whether lobbying and exerting explicit political power to enact a state statute or weave their protections into local contracts1—contracts often negotiated beyond the prying eyes of the public that the police serve.2

I. Law Enforcement Officer Bills of Rights Defined: Double Due Process

Police officers, like other public employees, possess due process rights derived from a property interest in their continued employment.3 Before deprivation of employment (the property interest that triggers due process protections), a public employee is entitled to notification of reasons for impending or possible dismissal and a hearing before he or she is dismissed.4 As a constitutional right applicable to

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4. See id. at 542.
public employees, police officers enjoy these same rights. Similarly, if a police officer is under criminal investigation or charged with a crime, he or she would enjoy the same constitutional protections as any other citizen. The law has been appreciative of unique strains the job of policing might place on cops’ rights. For instance, management cannot coerce police to self-incriminate if questioned about the performance of their duties.5

But law enforcement officers also have a singular power in American society: the power to use violence to coerce citizens, including the threat and actual exercise of lethal force.6 Every day there is the potential for police to come into great personal danger, to be faced with difficult situations implicating their safety and the safety of others. Their need to have the ability to responsibly use coercive force is real and legitimate. But it cannot come with the assumption that any force is legitimate because a police officer used it.

Given this awesome power, it makes sense for society to demand forceful regulation over how it is used. The Supreme Court recognized in National Treasury Employees Union v. Von Raab that law enforcement officers could be held to narrow constitutional protections when there was a public interest in regulating their conduct.7 Though Von Raab dealt with the reasonableness of a search—drug testing customs agents without a warrant or individualized suspicion—the Court reasoned that there is a strong public interest in ensuring the integrity and accountability of law enforcement, as well as the good discretion of agents of the state empowered to use deadly force.8 When society grants police the power to use force against civilians to coerce desired behavior, and even to kill, it has an unquestionably strong interest in regulating the use of that power.

LEOBORS in statutes and collective bargaining agreements are written for one purpose and “sold” publicly for another. They are written, in statute and contract, mostly as seemingly reasonable stipulations any group of employees might have for their bosses, especially in a field with as much potential for “customer dissatisfaction” as policing.9 LEOBORS are pushed by police unions and their representatives

7. See 489 U.S. 656, 670 (1989) (finding that drug testing of United States Customs Service agents was a search under the Fourth Amendment, but that such a search was reasonable without a warrant or individualized suspicion given the agents’ unique duties and responsibilities related to drug interdiction and ability to use deadly force).
8. See id. at 670–71.
9. See Keenan & Walker, supra note 1, at 198.
as necessary to ensure police have *at least* the same rights as criminals. Without LEOBORs, these arguments go, the law offers more protections to potential murderers and thieves than cops. But when police make mistakes or abuse their power, the actual effects of LEOBORs reveal a third, more dangerous purpose: putting even the most vile, destructive actions of law enforcement officers beyond serious accountability. The juxtaposition between the advertisement, the product, and the side effects leaves no doubt that LEOBORs were made for, and have been very effective at, thwarting accountability for police misconduct.

LEOBOR protections can be primarily statutory, generally on the state level (as in Maryland), negotiated by police unions into collective bargaining agreements on the local level (as in Cleveland), or mandated at the state statutory level subject to supersedence by police unions that may have more leverage over local politics as they hammer out their collective bargaining agreements (as with Illinois and Chicago).

A preliminary note on the effects of police misconduct: though the racist nature of the American criminal justice system is far beyond the scope of this paper, any analysis of policing in America must include race. Almost every coercive action taken by police disproportionately affects minorities, especially black men. In 2014, ProPublica found black males were twenty-one times more likely to be shot dead by police than white males. The Washington Post found that forty percent of unarmed people shot dead by police were black, despite

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13. 50 ILL. COMP. STAT. 725/6 (2016).

comprising only six percent of the American population. The Post’s data—which was compiled by the newspaper itself because no federal agency keeps track of police killings—found the majority of those killed by police had some kind of weapon in their possession when police took their lives, but that black and Hispanic men disproportionately made up the dead who had exhibited “less threatening behavior.” In 2014, Department of Justice statistics showed black drivers were thirty-one percent more likely than white drivers to be pulled over for traffic violations, and were more likely to be searched than whites. As of 2010, black men were six times more likely to be incarcerated than white men. Police are the most visceral instruments of a criminal justice system that disproportionately kills, seizes, searches, and cages minorities. Legal instruments that prevent holding police accountable for their conduct and the organizations that peddle them must be analyzed with these facts in mind.

II. Three Police Departments, Three Killings

While LEOBORs exist in many state and countless locally negotiated collective bargaining agreements, this paper’s analysis of these provisions will focus on three police departments: Baltimore, Chicago, and Cleveland. All three cities have had shocking police killings that resulted in protests and discussion of police accountability, or more accurately, the lack thereof.

A. Baltimore: Freddie Gray

On the morning of April 14, 2015, Freddie Gray saw police officers in his neighborhood and allegedly ran away from them. Police

16. Id.
officers chased him down, and then illegally arrested him based on a
knife he was carrying that was legal in Maryland.\textsuperscript{20} He was handcuffed and shackled at his feet, and thrown into a police van without any-
thing fastening him to a seat.\textsuperscript{21} The van made several subsequent
stops, likely as part of a “rough ride”\textsuperscript{22} designed to send a suspect
flying around in the back of a vehicle to cause physical harm.\textsuperscript{23} During
this ride, Gray began to cry out for medical help, but none was given,
and when he arrived at the police station, his spine was mostly
severed.\textsuperscript{24}

\textbf{B. Chicago: Laquan McDonald}

Black seventeen-year-old Laquan McDonald was shot sixteen
times by Jason Van Dyke of the Chicago Police Department on a Chi-
cago street in October 2014.\textsuperscript{25} Initially, Van Dyke told investigators
McDonald was wildly swinging a knife and pointing it at Van Dyke.\textsuperscript{26}
Dashcam video available to investigators and the city exposed this as a
lie: McDonald was walking in the middle of the street away from of-
ficers, no knife drawn.\textsuperscript{27} Authorities did nothing about this discrep-
ancy for an entire year, until a journalist sued the city of Chicago for
the release of the dashcam video.\textsuperscript{28} Van Dyke was charged with mur-
der only after a judge ordered the video be released to the public.\textsuperscript{29}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{20} Id.
\item \textsuperscript{21} Id.
\item \textsuperscript{22} See Manny Fernandez, \textit{Freddie Gray’s Injury and the Police ‘Rough Ride’}, N.Y. T I M ES
\textit{(Apr. 30, 2015)}, http://www.nytimes.com/2015/05/01/us/freddie-grays-injury-and-the-
police-rough-ride.html [https://perma.cc/F4BZ-WQYA].
\item \textsuperscript{23} See Timeline of Freddie Gray, supra note 19.
\item \textsuperscript{24} See Sheryl Gay Stolberg & Ron Nixon, \textit{Freddie Gray in Baltimore: Another City, Another
us/another-mans-death-another-round-of-questions-for-the-police-in-baltimore.html
[https://perma.cc/6W3G-Q8ST].
\item \textsuperscript{25} Associated Press, \textit{Laquan McDonald Swung Knife Aggressively, Claim Newly Released
us-news/2015/dec/05/laquan-mcdonald-swing-knife-aggressively-claim-newly-released-chi-
cago-police-reports [https://perma.cc/JJK2-U2QN].
\item \textsuperscript{26} Id.
\item \textsuperscript{27} Jamiles Lartey, \textit{Laquan McDonald Video Reveals False Police Account – But Still Leaves
Gaps}, \textsc{Guardian} (Nov. 25, 2015, 2:01 PM), http://www.theguardian.com/us-news/2015/
nov/25/laquan-mcdonald-video-chicago-police-shooting-questions-remain [https://perma
cc/D3PZ-KF7G].
\item \textsuperscript{28} Brandon Smith, \textit{I Got the Laquan McDonald Video Released, But Chicago is Still Cover-
ing Up His Death}, \textsc{Daily Beast} (Dec. 1, 2015, 1:00 AM), http://www.thedailybeast.com/
articles/2015/12/01/i-got-the-laquan-mcdonald-video-released-but-chicago-is-still-cover-
\item \textsuperscript{29} See Lartey, supra note 27.
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However long it took Cook County to bring charges against Van Dyke, Chicago Fraternal Order of Police (“FOP”) spokesman Pat Camden had all the answers for the Chicago Tribune the very next day. Camden told the paper with certitude that McDonald had a “100-yard stare” and stabbed a car’s tire before approaching police and lunging at them.

C. Cleveland: Tamir Rice

On November 22, 2014, Cleveland officer Timothy Loehmann and his partner responded to a 911 dispatch about a man with a gun walking around a public park. The person who called in to 911 said the person might be a child with a toy, but that information was not relayed to Loehmann. Loehmann’s partner drove their cruiser into the middle of the park, towards twelve-year-old black boy Tamir Rice. Loehmann started shooting at Rice before the vehicle came to a stop.

In the video of the shooting, the police cruiser drives through the middle of the park before stopping right next to Rice, and then the boy immediately collapses. It is highly unlikely the police could have possibly given Rice any commands from their moving vehicle or that Rice could have possibly had time to obey them before being gunned down.

III. Unions

Like other public employees, police have legitimate interests in organizing and collectively bargaining for fair pay and good working conditions. But these are not the interests that compelled modern police to unionize. Instead, the rise of police unions reveals their funda-

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31. Id.


33. Id.

34. Id.


36. Id.

37. See id.
mental aims: protection of police power over the individual. After a
failed attempt at unionization in the early 20th century, police unions
achieved liftoff in the 1960s as a direct response to the civil rights
movement and the landmark criminal procedure decisions of the
Warren Court.\textsuperscript{38} In that decade, police actions sparked uprisings in
American cities, which were met with additional police violence in re-
sponse.\textsuperscript{39} Activists saw police brutality and racism and questioned the
legitimacy of their authority.\textsuperscript{40} The Warren Court endeavored to place
legal limits on what police could do to citizens—restrictions on how
police could search, seize, and interrogate individuals, and exert
power over people.\textsuperscript{41} Police officers’ needs as laborers were not
enough to bring about functioning unions. Only when the legitimacy
and authority of the police were questioned by a disobedient popu-
lace, and their power over that populace was restricted by the Su-
preme Court could police effectively unionize. This refusal to have
their authority questioned by civilians or to surrender power over to
the public informs the construction of LEOBORs today.

Like many labor unions, police unions are politically active.\textsuperscript{42} They
lobby for favorable legislation at the state and federal level (like
LEOBORs) and vocally support candidates sympathetic to their aims.
At a time when the political power of American organized labor is at a
low point, police unions remain strong due to support from conserva-
tive politicians otherwise openly hostile to organized labor.\textsuperscript{43} Unions
can have real effects on national politics. They sabotaged the nomina-
tion of Debo Adegbile to the position of Assistant Attorney General
for the Department of Justice’s (“DOJ”) Civil Rights Division because
Adegbile had once assisted the NAACP with its appeal of a convicted
cop killer’s death sentence.\textsuperscript{44}

\textsuperscript{38}. See Keenan & Walker, \textit{supra} note 1, at 196.
\textsuperscript{40}. Keenan & Walker, \textit{supra} note 1, at 196.
\textsuperscript{41}. See Sklansky, \textit{supra} note 39, at 1737–38.
\textsuperscript{42}. See Samuel Walker, \textit{Institutionalizing Police Accountability Reforms: The Problem of Mak-
\textsuperscript{43}. See Gilbert Rivera, Article, \textit{Armed Not Militarized: Achieving Real Police Militarization},
\textsuperscript{44}. See id. at 238–39 (2015); see also Letter from Chuck Canterbury, Nat’l President,
Fraternal Order of Police, to Barack Obama, President of the United States (Jan. 6, 2014),
2C35-GCNC] [hereinafter Letter from Chuck Canterbury].
A. Unions’ Relationship with Civilians Is Toxic

Police unions have not abandoned the sentiment that propelled their rise in the ‘60s. Far from it: the modern words and actions of police unions betray utter contempt for anyone who questions the legitimacy of their authority over citizens or seeks to take away their power to coerce individuals. Police unions demand the public offer adoration for, and complete and utter obedience to their members—anything else reeks of criminality.

In the early 2000s, the city of Cincinnati, community groups, and the police department negotiated a “Collaborative Agreement” to reform the city’s policing and improve its relations with the populace. During the process, lawyers for the Cincinnati FOP complained that even if the police complied with the terms of the agreement, the citizens of Cincinnati may not conform with police wishes and might even be disrespectful towards police—as if police could not be expected to hold themselves to professional standards if not shown the proper level of adoration from the public.

As early as 1953, scholars began observing and writing about a collective authoritarianism among police officers. These scholars saw police socially coagulating as an “other” apart from the society they were to serve and protect: civilians could not understand them or the strain of their jobs. Violence was legitimate, and the public is always a potential enemy.

That strain of authoritarianism and “us vs. them” thinking continues today. When asked about the necessity of Cleveland police killing twelve-year-old Tamir Rice, the former president of the Cleveland Police Patrolman’s Association, Jeff Follmer, said “[h]ow about this: [l]isten to police officers’ commands. Listen to what we tell you, and just stop . . . I think that eliminates a lot of problems . . . I think the nation needs to realize that when we tell you to do something, do it.”

47. Sklansky, supra note 39, at 1731–33.
48. See id.
49. Id. at 1732–33.
Follmer’s proposed penalty for failure to instantly obey police commands: death.51

Police unions are utterly hostile to outsiders encroaching on their power, whether it is the Department of Justice, elected officials, or the civilians they serve. The executive director of the Fraternal Order of Police (the national front office for many local FOP lodges), James Pasco, said that an Obama administration decision to limit the flow of war material from the federal government to local police departments put officer safety at risk.52 Among the tools of war handed over to local police under that program: M-16 rifles, night-vision goggles, grenade launchers, and Mine-Resistant, Ambush-Protected (“MRAP”) trucks specifically designed to protect U.S. military personnel from improvised explosive devices in Iraq and Afghanistan.53

Further, the language police unions use reveals their disdain for those they perceive to have ever opposed or questioned them in any capacity. In their campaign to prevent Adegbile’s confirmation to the DOJ, the National Fraternal Order of Police called Adegbile’s work for the NAACP “race-baiting” and accused the Civil Rights Division of sowing distrust between police and minority communities with their “aggressive and punitive approach towards local law enforcement agencies.”54 In other words, Adegbile prevented the execution of someone the National FOP wanted dead, and his nomination was just another indication that the Civil Rights Division would continue to question the power of police. As people in Baltimore protested Freddie Gray’s death and rebelled against the harsh police response, local

51. Though Follmer is convinced that if Tamir Rice had only obeyed the orders of police, he would be alive today, it is unclear from the video of the shooting that police could have possibly given Rice any commands from their moving vehicle or that Rice could have possibly had time to obey them before being gunned down. See Tamir Rice Shooting Video, supra note 35.

52. Sarah Wheaton & Ben Schreckinger, Police Union Accuses White House of Politicizing Cop Safety, POLITICO (May 18, 2015, 6:00 AM), http://www.politico.com/story/2015/05/white-house-limiting-military-equipment-for-police-118041 [https://perma.cc/GGS7-PSKC].


54. Letter from Chuck Canterbury, supra note 44. It is worth noting that the National FOP letter manages to refer to the convicted killer as with the classically racially charged “thug” while explicitly calling Adegbile a race-baiter and suggesting the entire Civil Rights Division is racist. Id.
FOP Lodge 3 president Gene Ryan called those protesting a “lynch mob.”

Police unions demand civilian deference to, and unquestioning acceptance of, any and all actions, however destructive, taken by their members. When Cleveland Browns wide receiver Andrew Hawkins took the field wearing a t-shirt demanding “Justice for Tamir Rice and John Crawford III,” Follmer, then-president of the Cleveland Police Patrolman’s Association, issued a statement calling Hawkins “pathetic” and reminding everyone that the Cleveland police “protect and serve” the Browns, demanding an apology. Chicago’s FOP complained of a decline in morale after a task force created by the mayor found deep racism, prevalent violence, and a complete lack of accountability in the Chicago PD. In Baltimore, the local FOP Lodge 3 blamed a “lack of respect” for police, and that they were “under siege” after the uprising triggered by the severing of Freddie Gray’s spine while in police custody.

According to Lodge 3 president Ryan, because citizens expressed displeasure at a man’s mysterious and unexplainable death in police custody, cops could no longer do their jobs for fear of being persecuted, videotaped, or prosecuted. The unspoken insinuation of these whiny backlashes: do not question, or we will no longer protect or serve. When Ryan said police were afraid of doing their jobs properly, it encapsulated union reactions to protests. Any public hint that police could not do as they pleased, to whom they pleased, threatens the union and puts its members under attack.


59. See id.
The general counsel for Maryland’s state FOP had similar disdain for civilians questioning police actions. Dismissing the idea that civilians could have any say in inquiries into potential police misconduct, Herbert R. Weiner asked, “[w]ho would be the judges of police officers? Plumbers?” The police union’s authoritarian attitude is clear: if you are not a cop, you are not fit to question a cop’s actions, no matter how destructive.

Police unions are often dismissive of or downright vindictive towards those affected by the destructive behavior of their members. Following the city of Cleveland’s settlement of a wrongful-death suit with the family of Tamir Rice, the president of the Cleveland Police Patrolman’s Association, Stephen Loomis, released a terse letter urging the “Rice family and its attorneys” to use the settlement money to educate children about the dangers of toy guns—an unsubtle reminder of the union’s position that Rice caused his own killing. Baltimore Fraternal Order of Police president Ryan called the city of Baltimore’s settlement of a wrongful death suit by Gray’s family for over $6 million “obscene” and feared it suggests cops may have done something wrong.

These behaviors are essential to remember when contrasting the sales pitch for LEOBORs with their legal effects. The unions that lobby and bargain for these measures are not shy of saying what they really think of civilians who show an insufficient level of deference to their authority or question their use of power. When unions argue that their members need the protections of LEOBORs, it is clear they are seeking protection from anyone in the public who might seek to hold them accountable.

B. The Advertisement

Unions often argue for the necessity of double due process on the grounds that police officers need wide discretion to make decisions given the difficult and uncertain nature of the profession. As
established above, while police officers have due process in relation to their employment, it comes from the property interest the government may revoke by terminating that employment.

Illinois’s LEOBOR even includes a provision to help clear up any confusion about these “rights” that are being “protected.” The statute specifically announces that its additional protections “shall not diminish the rights and privileges of officers that are guaranteed to all citizens by the Constitution.”

Police have legitimate labor concerns. Like any other group of employees, they could be subjected to mistreatment by management in any variety of ways: arbitrary punishment, punitive reassignment, or grueling and unsustainable working hours. There is also a real potential for good faith mistakes, misunderstandings, or mishaps beyond the control of individual officers as they carry out their duties: police management—beholden to public pressure and political leadership—may have incentives to discipline or fire undeserving officers.

But those legitimate labor concerns are not the core of police unions’ sales pitch for LEOBORs. Maryland’s FOP boss said the state’s LEOBOR “provide[s] a very basic level of constitutional protections for our officers, so that they can make statements that will stand up later in court.”

He did not explain how the Constitution failed to provide a very basic level of constitutional protections for our officers. The national FOP’s statement in support of a national LEOBOR emphasizes that cops just do not have the same rights as other Americans:

Unfortunately, rank-and-file police officers are sometimes subjected to abusive and improper procedures and conduct on the part of the very departments or agencies they serve. In some instances, the basic rights that most citizens or employees would take for granted are either denied or simply unavailable to police officers . . . .
The need for a minimal level of procedural protections for police officers accused of administrative wrongdoing, the gravity of the potential harm to officers created by the lack of uniform safeguards, and the patently unfair disparity in rights afforded criminal suspects but not police officers are compelling reasons to enact this legislation.68

This is at best a disingenuous mischaracterization. In the criminal context, police officers, like all citizens, have their constitutional rights. It is settled that threats of loss of employment to prevent exercise of those constitutional rights is impermissibly coercive: statements acquired under such coercion must be suppressed as Fifth Amendment violations.69 Further, officers cannot be fired for exercising their Fifth Amendment right against self-incrimination.70 There is no “right” that a criminal suspect possesses that is unavailable to a police officer in the criminal context. In the labor context, police officers have the same right to notice and a hearing before termination as any other public employee.71 When the FOP demands procedural rights, it is really calling for the creation of a whole new set of rights, available to police officers in administrative investigations—and no one else.

While local and national proponents reassure the public that LEOBORs will not protect cops unfit for duty,72 those guarantees do not seem to be borne out of reality. In Chicago, where officers’ power is protected by both a state LEOBOR and specific LEOBOR provisions in their collective bargaining agreement, it seems that almost no allegation of misconduct can get an officer fired or even suspended for more than a week.73 Between March 2011 and September of 2015, 28,567 allegations of misconduct were filed against the Chicago PD.74 In that four-year span, only thirty-three of those complaints resulted in the termination of an officer’s employment, and less than two percent of the complaints resulted in any discipline whatsoever.75 Chicago’s

68. Due Process Rights for Law Enforcement Officers, supra note 10.
73. See 50 ILL. COMP. STAT. 725/4 (2016); see also Agreement between Fraternal Order of Police Chicago Lodge No. 7 and the City of Chicago, Article 6.1(L) (Nov. 18, 2014), available at http://static1.squarespace.com/static/5516f090e4b01b71131460f7/t/55d0b066e4b0c6285e50236/b/143974006221/Chicago-FOP-Contract.pdf [https://perma.cc/T7ER-Y22D] [hereinafter Chicago Agreement].
75. See id.
CBA prohibits anonymous complaints for most conduct, which has the effect of discouraging civilian complaints for fear of reprisals from police.\footnote{See U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV. & U.S. ATTORNEY’S OFFICE N. DIST. OF ILL., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 47 (2017), https://www.justice.gov/crt/case-document/file/925771/download [https://perma.cc/P4XR-4ZFJ].} It is likely that without that provision, Chicago police would have had even more complaints.

Further, around ten percent of the Chicago force received thirty percent of all complaints.\footnote{Id. at 18, 48.} Jason Van Dyke had twenty complaints against him, four occurring between 2011 and 2015.\footnote{Gregor Aisch & Haeyoun Park, For Chicago Police, Many Complaints but Few Consequences, N.Y. Times (Dec. 17, 2015), http://www.nytimes.com/interactive/2015/12/15/us/chicago-police-officers-rarely-punished-for-civilian-complaints.html?_r=0 [https://perma.cc/HH9T-XKVL].} Three of those complaints were for excessive force and one was for using a racial slur.\footnote{Id.} He was disciplined for none of these complaints before (or after) he killed Laquan McDonald.\footnote{Id.} Though it is impossible with the information available to draw a direct line of causation or contribution between LEOBORs and unaccountability, bad Chicago cops certainly enjoy the protections of LEOBOR provisions.

Police management seems to disagree with the assertion that they retain sufficient discretion under the worst of the LEOBOR provisions. In 2005, the International Association of Chiefs of Police published a model LEOBOR as a response to state statutes and national legislative pushes. Vera Institute of Justice Special Counsel Kevin Keenan and University of Nebraska Professor of Criminal Justice Samuel Walker line up some more benign arguments for LEOBORs:

Other typical arguments for LEOBORs advanced by police unions include: (1) Officers need special protections, because policing is perhaps the only job in which people are forced to answer questions or be fired; (2) The lack of due process rights has led to a loss of officer confidence in the disciplinary process and a loss of morale; (3) Unfair treatment of officers may deter or prevent officers from carrying out their duties effectively and fairly; (4) The perception or reality of unfair treatment may negatively impact recruitment and retention efforts; (5) Effective policing depends on stable employer-employee relations, which the LEOBOR promotes; and (6) LEOBORs are needed to provide more uniform fairness among and between different departments that currently have widely different protections.\footnote{Keenan & Walker, supra note 1, at 199.}
These arguments are comprised of various mixtures of nonsense and legitimate concern that have nothing to do with provisions slipped into LEOBORs to avoid accountability: (1) Cops cannot be fired for invoking their Fifth Amendment rights, and outside that context, refusing to answer supervisors’ questions will get people in most professions fired; (2) Police are entitled to exactly the same constitutional due process rights as other citizens in the criminal context and the exact same constitutional due process rights as other public employees in the employment context; (3), (4), and (5) are all genuine concerns as they would be in any public profession; and (6) uniform protections between departments seem like less a noble policy goal and more of a way to outfox unions negotiating LEOBOR protections into their CBAs. Also, the legitimate concerns of (3), (4), and (5) are served in no way by the provisions analyzed below.

The sales pitch may sound innocent, but passing knowledge of the settled law behind the concerns LEOBORs purport to address reveals those concerns to be overblown. Police unions’ words and actions—their disdain for disobedience, their revulsion at encroachment upon police power, and their thirst for adoration—illustrate the purpose behind the “escape route” LEOBOR provisions: ensuring individual cops can do what they want, to whom they want, without question or accountability.

IV. The Escape Routes

LEOBOR provisions, whether contractual or statutory, often address legitimate labor concerns. Those provisions will not be addressed here. Instead, this paper will cover only the provisions most glaringly aimed at thwarting accountability and preserving police power: escape routes designed to shield from any accountability those police officers who abuse their discretion and commit overtly or subtly destructive acts against the communities they serve. The provisions below are squarely aimed at preserving the power of police to do what they please to whom they please.

A. Scope

LEOBOR provisions are billed as protecting officers’ “due process” rights, but the Fifth Amendment’s guarantee that life, liberty, or property will not be taken without due process of law does not ex-
clude police officers. The “due process” smokescreen does not relate to criminal matters: instead, it creates similar “protections” within the realm of organizational inquiries into police actions. Nor are police magically exempted from the Fifth Amendment’s protections. LEOBORs vary from state to state on what sort of “inquiry” is covered. Official investigations into officer misconduct explicitly trigger the LEOBOR “protections,” but some LEOBORs leave open the possibility that routine questioning and supervisory review by police supervisors could trigger LEOBOR protections.

It should be noted that any practical difference in rights between administrative and criminal investigations is irrelevant: any criminal prosecution of a police officer for on-duty conduct will begin with an administrative inquiry.

B. Delays Before Interviewing Officers

A common LEOBOR provision institutes “waiting periods” between an incident or the beginning of an investigation into an incident and when a police officer can be questioned. Maryland’s provision is the most odious. It gives any officer under investigation the right to counsel, and the officer may postpone interrogation for up to five business days to find counsel in the administrative investigation. In effect, officers under investigation can mandate a seven-day waiting period before they can even be questioned about an incident.

Five of the six officers indicted for the killing of Freddie Gray spoke to investigators shortly after Gray’s death—a fact only made public because a lawyer representing some of the officers admonished them in a press conference for speaking to investigators. The lawyer’s implication: had the officers taken the LEOBOR’s protections, they would not be facing charges today.

A ten-day waiting period—or any mandated waiting period—before questioning an officer is indefensible. It is purely an opportunity to confer with fellow officers, find out what other witnesses know.

82. See U.S. CONST. amend. V.
83. Keenan & Walker, supra note 1, at 207.
84. Id. at 209–10.
85. Id. at 207.
86. Id. at 212.
or are going to say, and get stories straight. If police officers are enti-
tled to representation in the administrative setting, the union could
make a representative available on call for such incidents, eliminating
the need for a waiting period. Waiting periods generate the perverse
situation where the loved ones of people killed or injured by police
are notifying other loved ones and explaining the tragedy before po-
lice are ever questioned.89

Neither Illinois’s LEOBOR nor Chicago’s CBA mandates a wait-
ing period for investigators to speak with an officer after a shooting
incident, but the Chicago CBA stipulates that if the officer is inter-
viewed about the incident again in the future, the officer must be pro-
vided with a written summary of his previous remarks to
investigators.90 Like transcript provisions below, this serves no legiti-
mate labor purpose or truth-finding function; it is the FOP’s transpar-
ent attempt to ensure an officer suspected of wrongdoing keeps his
story straight. This was probably extremely useful for Van Dyke and
the other Chicago cops who all reported that McDonald approached
Van Dyke with a knife, swinging it at him and leaving Van Dyke no
other choice but to shoot McDonald—a lie exposed by the dashcam
footage in that case.91

Cleveland’s CBA has no mandatory waiting period after a shoot-
ing, but it seems to have done little to obtain accurate, candid, or
fresh testimony from Timothy Loehmann.92 His first known state-
ment93 was signed eight days after the killing, and contains an obvi-
ously coached and careful restatement of events, including clinical
language such as calling the dead twelve-year-old “suspect” and “the
male,” and the omnipresent post hoc justification for killing an un-

89. As activist and poet Tariq Toure observed, because of Maryland’s 10-day require-
ment, “. . . a mother will have to explain her son’s being shot by police before the police
get questioned.” @TariqToure, Twitter (Apr. 27, 2016, 6:01 PM), https://twitter.com/
TariqToure/status/725490145017925652?lang=en [https://perma.cc/B55W-3WW3].

90. Chicago Agreement, supra note 73, Article 6.1(L).

91. Compare Associated Press, Chicago Releases Hundreds of Emails Related to Laquan
McDonald Video, GUARDIAN (Dec. 31, 2015, 3:13 PM), http://www.theguardian.com/us-
news/2015/dec/31/chicago-releases-hundreds-emails-laquan-mcdonald-video [https://
perma.cc/SEV5-E9NG] with Lartey, supra note 27.

92. See Cleveland Collective Bargaining Agreement, supra note 12, at 8–11 (referring
to Article VIII, Bill of Rights).

i2.cdn.turner.com/cnn/2015/images/12/01/officer.loehmann.statement.pdf [https://
perma.cc/96NF-X833].
armed person: the assertion that the “suspect” was reaching for his waistband.94

C. Giving Officers A Script to Work Off

Illinois requires transcripts of any interrogation of police officers be made available to the officer interrogated without “undue delay.”95 In Maryland, a recording or transcription of an interrogation must be made available to the interrogated officer no later than ten days before any subsequent hearing.96 Cleveland’s CBA requires any recording, transcript, or written statement produced as the result of an interview be available immediately after the interview, unless it is pursuant to a criminal investigation.97 Chicago authorities have seventy-two hours to provide interviewed cops with a transcript or recording of their interview unless that same officer is re-interrogated within that 72-hour window.98 In that case, the transcript or recording must be provided before the follow-up interrogation.99

In a survey of LEOBOR provisions, Keenan and Walker dismiss these requirements as “constitut[ing] a basic right,” without providing any support for that assertion.100 Were such a requirement a “basic right” in the public-employee due process context, it seems to be unmentioned in the requirements of notice and a hearing laid out in Cleveland Bd. of Educ. v. Loudermill and its ilk.101 No such “basic right” exists in the criminal context, though suspects in criminal investigations would certainly enjoy being able to review their statements to police in hours-long interviews before being interviewed again or testifying; such a reference would help the suspect keep their story straight. The Cleveland CBA’s exclusion of this requirement in the context of a criminal investigation concedes this is not a “basic right.”102

95. 50 Ill. Comp. Stat. 725/3.7 (2016).
97. Cleveland Collective Bargaining Agreement, supra note 12, at 8 (referring to Article VIII, 12(c)).
98. Chicago Agreement, supra note 73, at 5 (referring to Article 6.1(H)).
99. Id.
100. Keenan & Walker, supra note 1, at 223.
102. See Cleveland Collective Bargaining Agreement, supra note 12, at 8–11 (referring to Article VIII, Bill of Rights).
Giving interviewed officers copies or recordings of their words ensures they have a script to work from if interviewed by investigators or have some other hearing. Chicago’s provision, in particular, makes this purpose clear: by not allowing officers to be re-interviewed without seeing the story they had previously given investigators, the Chicago FOP ensures statements stay consistent. When coupled with waiting periods before interviews, the script is sure to be well-rehearsed. These two provisions transparently give cops an opportunity to get their stories straight before being interviewed about potential misdeeds, an opportunity they would rightly never give an average citizen. These provisions do not protect employees from menacing management, and they certainly do not further any truth-finding mission. They plainly ensure that officers facing questions about their actions have time to formulate a story and then a script to help them stick to that story.

D. Keeping Identities of Officers Secret

Many LEOBORs have provisions preventing the release of the names or other identifying information of cops accused of or under investigation for wrongdoing, regardless of the charge. Cleveland prohibits the release of the officer’s home address (understandable) or photograph (probably irrelevant, given the Internet). Chicago’s CBA completely prevents disclosure to media of the identity of any officer under administrative or criminal investigation—but officers exonerated by the process can tell the department to make a public proclamation of their exoneration. While releasing every single administrative procedure subject’s name would be excessive, surely the public has a right to know which of its sworn peace officers is suspected of criminal wrongdoing.

E. Do Not Call Lists

Both Baltimore’s union-negotiated contract and the state’s LEORBOR have “do not call list” provisions. If a police officer has credibility issues while testifying in court, prosecutors may put that officer

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103. Id. at 9 (referring to Article VIII, 12(d)).
104. Chicago Agreement, supra note 73, at 8 (referring to Article 6.9).
106. MD. CODE ANN., PUB. SAFETY § 3-106.1 (West 2016).
on a “do not call” or “Brady” list as an unreliable witness not to be put in front of a court again.\footnote{Puente, supra note 105.} Maryland’s LEOBOR prevents any adverse action against officers because they are placed on such a list—not even demotion or a reduction in pay.\footnote{Md. Code Ann., Pub. Safety § 3-106.1(b) (West 2016).} One would think being deemed untrustworthy by prosecutors might warrant formal discipline, but the statute explicitly forbids it. It is unclear what benefit this provides to anyone except cops that prosecutors do not trust.

F. Complaints

The Cleveland CBA requires that any civilian complaint be signed by the complainant.\footnote{Cleveland Collective Bargaining Agreement, supra note 12, at 11 (referring to Article VIII, 12(m)).} The DOJ noted this provision seemed to be specifically aimed at discouraging complaints.\footnote{U.S. Dep’t of Justice Civil Rights Div. & U.S. Attorney’s Office N. Dist. of Ohio, Investigation of the Cleveland Division of Police 40–41 (2014), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf [https://perma.cc/SV4U-SYJ7] (finding that the Cleveland Police Department does “not accept anonymous or third-party complaints”).} If one fears police violence or harassment—a potentially legitimate fear, given the Cleveland Police Department’s well-documented brutality\footnote{Id. at 12–24 (documenting a pattern of unnecessary use of force through the Cleveland Police Department).}—filing a complaint opens the complainant and their loved ones up to the possibility of reprisal. The Chicago FOP’s contract forbids anonymous complaints unless they allege a criminal offense on the part of the officer\footnote{Chicago Agreement, supra note 73, at 4 (referring to Article 6.1(D)).}; less strict but still without any valid purpose other than discouraging complaints. Further, Chicago cops under investigation must be given the names of complainants against them.\footnote{Id. at 5 (referring to Article 6.1(E)).} The Illinois LEOBOR requires a sworn affidavit for any complaint against police officers, raising the same concern.\footnote{50 Ill. Comp. Stat. 725/3.8 (2016).} Maryland’s LEOBOR only requires names to be attached to civilian complaints of brutality.\footnote{Md. Code Ann., Pub. Safety § 3-104(c) (West 2016).} But victims of police brutality need anonymity the most because they would have a real fear of reprisals from police. This provision is not some feint towards accountability—it has the same aim of discouraging complaints as Cleveland’s.
G. Treatment During Interrogation

All three cities analyzed here, and most other LEOBOR-protected police, have rules about the manner in which police must be interrogated. Interviews will occur during working hours, at the officer’s or investigators’ workplace, sessions cannot go over a certain period of time without a break, and no foul language will be used towards the officer. This is not to say that police officers under interrogation should be held for long hours, early in the morning, threatened, or cursed at, but these provisions illustrate the “extra rights” to which police unions imagine their members are entitled. Remember that union bosses tell us these bills are about equalizing cops’ rights with criminals and providing “a basic level of constitutional protection.” It is not difficult to imagine what those same unions’ reactions would be if criminal suspects had to be treated so comfortably.

H. Who Can Investigate Police

Unions historically have been and currently are hostile to civilian review of police actions. As a result, LEOBORs typically mandate that only law enforcement can investigate law enforcement. Maryland requires investigators to be sworn law enforcement officers unless the governor directs the attorney general to step in. Cleveland’s CBA seems to assume only police officers investigate police officers, but does not mandate it. Chicago’s CBA specifically includes a civilian review authority, independent of the police department.

118. See Due Process Rights for Law Enforcement Officers, supra note 10.
119. Hager, supra note 65 (quoting Vince Canales, President, Md. Fraternal Order of Police).
120. The employment administrative and criminal investigations are obviously (and should be) quite different, but it is the unions that conflate these contexts to suit their purpose of securing double due process.
121. See, e.g., Sklansky, supra note 39, at 1752; Dresser, supra note 60.
122. Md. Code Ann., Pub. Safety § 3-104(b) (West 2016) (listing who may serve as an investigating officer or interrogating officer).
123. See Cleveland Collective Bargaining Agreement, supra note 12, at 1 (referring to Article VIII).
124. See Chicago Agreement, supra note 73, at 4 (referring to Article 6.1(b)).
I. Giving Cops a Heads-Up

Many LEOBOR provisions require disclosure of evidence or testimony about an incident to officers under investigation. In Cleveland, the CBA requires written statements of witnesses testifying at an administrative hearing (as well as all previous statements given by the officer under investigation) to be given to the officer under investigation ahead of time. It is a criminal trial discovery concept transplanted to the administrative context, a true example of double due process.

Under the Chicago CBA, if investigators have video or audio recordings of an incident, they can choose whether or not to give officers access to that evidence before interrogation. If investigators choose not to give officers access, and the officers lie and directly contradict the audio or video evidence, they cannot be charged with a Rule 14 violation. “Rule 14” is the rule covering false statements. So, if officers lie about the circumstances surrounding a shooting, and investigators have video proving they lied, the officers cannot be disciplined for lying unless they were shown the video beforehand. But if they were shown the video beforehand, they would be on notice that they needed a new story. The Chicago CBA ensures officers cannot be punished for lying when contradicted by audio or video evidence—the types of evidence most likely to be able to override an officer’s word, especially if their victim is deceased. Remember that Jason Van Dyke and his fellow officers blatantly lied about the circumstances leading to Laquan McDonald’s killing. It is unknown whether they were shown the video in advance (it is difficult to fathom how they told the tale they did if they were shown the video), but if they were not, the department could not even discipline them for lying. More disturbing, though, is that investigators had the video exposing Van Dyke’s lies for almost a year and he was not disciplined until the tape was released to the public.

125. Cleveland Collective Bargaining Agreement, supra note 12, at 1 (referring to Article VIII(j)).
126. Chicago Agreement, supra note 73, at 5 (referring to Article 6.1(M)).
127. Id.
128. Id. at 75 (referring to Appendix L(4)).
V. Conclusion: Defeating Double Due Process

The common LEOBOR provisions above are not reasonable concessions to laborers. They are not good faith measures intended to help police officers do their difficult job while safeguarding them from heavy-handed management or restoring rights unjustly stripped away. The contradiction between the sales pitch for those provisions and the real world effects reveals their nature as codified escape routes for police to avoid accountability for their actions. LEOBORs are pushed by police unions that show a disdain and distrust of the population their members serve and utter hostility towards anyone who would take away their power or who suggests that maybe, just maybe, policing in America can be better. The highly publicized police violence of the last few years have opened many Americans’ eyes to what their fellow citizens—far too often people of color—already knew: American policing can be violent and cruel. If we want it to be better, double due process must be destroyed.