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## Article

# Why Police Should Protect Complainant Autonomy

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## INTRODUCTION

This Article describes a simple way to limit the high cost of police misconduct, which is informed by background principles from U.S. civil procedure.<sup>1</sup> It does so by calling for the Chicago Police Department (CPD) to better protect the complainant autonomy of injured citizens under the scaled-down process that is used to resolve certain legal claims against officers.<sup>2</sup> Complainant autonomy is an injured citizen's right to control how its claims are drafted and framed, even over the objection of a nominal plaintiff, regardless of whether such a right to do so is clearly established or not.<sup>3</sup>

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1. See generally J. Maria Glover, *A Regulatory Theory of Legal Claims*, 70 VAND. L. REV. 221, 223–24 (2017) (“Procedural law in the United States has long sought to achieve three related, and often overlapping goals: (1) efficient processes and institutions that achieve ‘substantive justice’ and deter violations of law, (2) consistent and accurate outcomes based on the merits of parties’ claims, and (3) meaningful legal access for those who have claims.”).

2. See generally Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CALIF. L. REV. 1573, 1579 (2007) (“Autonomy . . . refers to the individual’s interest in having power to make choices about the protection of her own legally authorized . . . rights.”).

3. The question of whether a right is clearly established, often, has a profound impact upon whether it is fully enforced. See, e.g., Michael T. Morley, *Public Law at the Cathedral: Enjoining the Government*, 35 CARDOZO L. REV.

The idea is that complainant autonomy supports the U.S. “judicial system’s ‘jealous protection’ of an individual’s absolute right to control his . . . claim.”<sup>4</sup> Because of its protective function, complainant autonomy has long served as a low-cost way of upholding “personal dignity principles, including the psychological or cathartic values entailed in exercising individual autonomy.”<sup>5</sup> As such, U.S. courts have “traditionally operated from the assumption that [certain] decisions are best made by the true property owner [of a claim], rather than by another person.”<sup>6</sup>

In light of the fact that complainant autonomy has traditionally been recognized as an important element of the U.S. legal system, especially outside of the class action context,<sup>7</sup> this Article seeks to bring attention to the CPD’s undermining of this background rule of civil procedure.<sup>8</sup> It does so by taking as its primary unit of analysis the police complaint intake process in Chicago (i.e. the administrative process by which a police com-

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2453, 2468 (2014) (“Generally, for a right to be deemed clearly established [for qualified immunity purposes], a court must have recognized or upheld the right under closely related factual circumstances. Many circuits do not allow district court rulings to be considered in determining whether a right was clearly established at the time of an official’s challenged conduct. Consequently, public officials in those jurisdictions typically may not be held liable for violating rights that are recognized only in district court opinions. And by declining to appeal adverse district court rulings, government litigants can prevent higher courts from ruling on an issue, thereby preventing the law from becoming clearly established for qualified immunity purposes.”).

4. Linda S. Mullenix, *Competing Values: Preserving Litigant Autonomy in an Age of Collective Redress*, 64 DEPAUL L. REV. 601, 615.

5. *Id.* at 614.

6. *Id.* at 615.

7. Limitations on complainant autonomy may not seem to be very important, but they have serious implications in theory and in practice. See generally Mark K. Moller, *Separation of Powers and the Class Action*, 95 NEB. L. REV. 366, 372–73 (2016) (“Thinking clearly about claim-control . . . requires carefully breaking down the concept of a ‘claim’ into its [three] constituent parts. . . . One is the protected interest that the right to relief protects—what might be termed the ‘primary right.’ The second is the right to a remedy that corrects an infringement of that interest, or the ‘remedial right.’ The third is the right to sue to obtain the remedy from the defendant—which I will call the ‘right of action’ or ‘claim.’”).

8. See City of Chicago, CHICAGO POLICE BOARD, ALLEGATIONS OF MISCONDUCT: A GUIDE TO THE COMPLAINT AND DISCIPLINARY PROCESS (Sept. 15, 2017), <https://www.cityofchicago.org/content/dam/city/depts/cpb/PoliceDiscipline/AllegMiscond20170915.pdf>. (“Whatever the nature of the [police] complaint, [each allegation] is framed . . . in terms of an alleged violation of . . . the [CPD’s] Rules of Conduct.”).

plaint comes to be drafted, characterized, and submitted for investigation).<sup>9</sup> This intake process deliberately impairs the pre-filing rights of tort victims by limiting the grounds for raising claims against police tortfeasors without adequate justification (i.e. since all police misconduct claims must be drafted and characterized through the use of administrative law, as opposed to civil law or criminal law).<sup>10</sup>

Any such limitation on complainant autonomy has especially negative impacts upon police tort victims, since there is a reduced possibility that tortfeasors will be administratively sanctioned under such circumstances. This reduced possibility of sanctions arises from the fact that the CPD, and other pro-officer groups, almost completely control the existing police complaint process. One of the main reasons that the nominal-plaintiff CPD should better protect the complainant autonomy of real parties in interest-injured citizens, even at the risk of possibly interfering with a defendant-officer's pre-filing interests, is that it may be the only time that a real party in interest-injured citizen has any realistic chance to set the administrative record straight.<sup>11</sup>

According to a recent publication by the City of Chicago, which is called *Allegations of Police Misconduct: A Guide to the Complaint and Disciplinary Process*, the CPD requires that

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9. See Chicago Police Department, INSIDE THE CPD: THE COMPLAINT (2018), <https://home.chicagopolice.org/inside-the-cpd/the-complaint/> ("Complaints against [CPD] employees are made by [injured] citizens . . . . Anonymous complaints are also accepted, although this sometimes reduces the ability to gather all relevant facts upon which to make decisions about any given employee's behavior. Not all complaints require a formal supervisory investigation. However, a formal investigation is conducted in all cases where an allegation of misconduct, if proven true, would constitute a violation of the department's conduct rules.").

10. As a general rule, and in numerous legal contexts, the U.S. legal system asserts that procedural rules should not have an unjustifiably-negative impact upon substantive rights. Compare Charles E. Clark, *History, Systems and Functions of Pleading*, 11 VA. L. REV. 517, 542 (1925) ("Pleading . . . [, which includes various rules that govern the drafting and characterization of legal claims,] . . . should perform the office only of aiding in the enforcement of substantive legal relations. It should not limit the operation of the general law which defines rights and duties, privileges and powers of individuals, but should aid in the enforcement of such relations.") With Daniel C. Hopkinson, *The New Federal Rules Of Civil Procedure As Compared With The Former Federal Equity Rules And The Wisconsin Code*, 23 MARQ. L. REV. 159, 160 (1939) ("It was not intended that the Federal Rules of Civil Procedure should affect any substantive rights . . . The intention . . . was to provide a simple, unified system which would be governed by a simple, brief body of rules.")

11. See generally Moller, *supra* note 7, at 373 (describing circumstances in which "the right of action is public, meaning enforced by public officials . . . .").

“[w]hatever the nature of the [police] complaint, [each allegation] is framed . . . in terms of an alleged violation of . . . the [CPD’s] Rules of Conduct.”<sup>12</sup> The implication is that tort victims may frame police misconduct allegations against police tortfeasors solely under administrative law.<sup>13</sup> Among the results is that tort victims may be deprived of any way of holding police tortfeasors to account, due to an inability to call attention to closely related claims under civil and criminal law, especially when considering it is difficult to assure accountability only using administrative law because tort victims often are deprived of real-time updates once a complaint is submitted for CPD consideration.<sup>14</sup>

The CPD offers several excuses for its decision to undermine complainant autonomy. These excuses assume that countervailing legal considerations, such as a need to protect the contractual and constitutional rights of officers, justify the CPD’s failure to properly draft and characterize claims that are raised in exactly the way that is described by injured parties.<sup>15</sup> It also assumes that injured citizens may be forced to give up control over how police complaints are drafted and framed, in order to protect the pre-filing interests of officers, even if such rights do not exist.<sup>16</sup>

One result is that claims are strategically drafted and framed by the CPD and pro-police regulators, often over the objection of injured citizens, so as to avoid imposing any sanctions

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12. City of Chicago, *supra* note 8.

13. For example, when an officer intermeddles with the property of another citizen, at least in cases wherein there is no assumption that the interference is excused, the violation could be framed in terms of administrative law (i.e. as an improper use of the police power), civil law (i.e. as a conversion of property), or criminal law (i.e. as a theft).

14. See generally Jodi S. Cohen, Dan Hinkel, & Jennifer Smith-Roberts, *In Oversight of Chicago Police, IPRA Gives Victims False Sense of Justice*, CHI. TRIB. (Jun. 17, 2016), <http://www.chicagotribune.com/news/watchdog/ct-chicago-police-ipra-mediation-met-20160616-story.html> (“A Tribune investigation of nearly 700 complaints upheld by IPRA [which has preceded COPA as the primary regulator of police misconduct claims] found the agency routinely obscured its findings [excluded many injured citizens from meaningfully participating in subsequent investigations] and misled the public about how its investigations played out, often giving victims of police misconduct a false sense that they had prevailed.”).

15. See Adeshina Emmanuel, *Chicago Police Contract Scrutinized in the Aftermath of Laquan McDonald’s Death*, CHI. REP. (Dec. 10, 2015), <http://www.chicagoreporter.com/chicago-police-contract-scrutinized-in-the-aftermath-of-laquan-mcdonalds-death/> (“The Fraternal Order of Police contract with the city shapes how Chicago handles police misconduct allegations, disciplines rank-and-file officers, as well as when the city pays legal costs for police officers accused of wrongdoing.”).

16. *Id.*

on officers. This strategic drafting and framing may not be done in good faith nor in a relatively timely manner. Among the results is that crucial decisions about whether to investigate claims, to bring charges, or to lay sanctions often rely on administrative records with less-than-true information.

That is why it is almost unheard of for a nominal plaintiff (i.e. the CPD) to challenge how a real party in interest (i.e. the injured citizen) drafts and characterizes allegations, especially when it is done to protect the pre-filing interests of a named defendant (i.e. officers).<sup>17</sup> Thus, as a threshold matter, my Article rejects any such excuse for undermining complainant autonomy under the CPD's existing complaint intake process. It, instead, follows the lead of other recent U.S. legal scholarship on public sector accountability and crime deterrence<sup>18</sup> by showing "that police decision-making at the administrative level is as fateful . . . as the . . . decisions . . . officers make during encounters."<sup>19</sup>

This Article does so by pointing out that the act of requiring police complaints to be exclusively framed in terms of administrative law, as opposed to under civil or criminal law, undermines complainant autonomy and redistributes legal authority

17. See Benjamin J. Conley, *Will the Real Real Party in Interest Please Stand Up?: Applying the Capacity to Sue Rule in Diversity Cases*, 65 WASH. & LEE L. REV. 675, 688 (2008) (finding that "Often, when a party is the real party in interest [i.e. the true holder of a legal right] that party lacks the capacity to bring suit. . . . Such a party needs a surrogate (other than his lawyer) to stand in for him."); *Mexican Cent. Ry. Co. v. Eckman*, 187 U.S. 429, 431 (1903) (describing the rights and obligations of a party that stands in as an agent for the real party in interest, which is often referred to as a nominal plaintiff); see also Conley, *supra* note 17, at 686 (explaining that "courts generally classify parties to a lawsuit depending on the nature of the interest the party has in the outcome of the suit [so, a party that is accused of violating the plaintiff's right may be classified as a defendant].").

18. See, e.g., Rachel Moran, *In Police We Trust*, 62 VILL. L. REV. 953, 993 (2017) ("[T]his paper finds that] [i]t is long past time to hold police departments accountable for misconduct. That is what this [article] aims to do: provide concrete suggestions for dismantling the system of deference that has long plagued review of police misconduct complaints, and replacing it with a system that effectively responds to [police] complaints and holds officers accountable . . . .")

19. Eric J. Miller, *The Policing in America Symposium: Policing on Behalf of the Community*, CITY SQUARE: ONLINE J. FORDHAM URB. L. J. (Aug. 16, 2017), <http://urbanlawjournal.com/on-behalf-of-the-community-2/>. Other recent legal scholarship raises additional and different concerns. See, e.g., Kate Levine & Stephen Rushin, *Interrogation Parity*, 2018 U. ILL. L. REV. 1685, 1687 (2018) ("The current distributional inequity [in terms of how police tortfeasors and others are treated under the law] 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.").

among the parties. As such, such an impairment may not be justified, particularly when the misconduct allegation (for example, an allegation that the officer has taken a citizen's property without an adequate justification) could have been framed as either an administrative law violation (i.e. improper execution of a search warrant), a civil law violation (i.e. as conversion), or a criminal law violation (i.e. as a theft). One example of a case in point is *Elizondo v. U.S.*, which highlights the problems with this approach.<sup>20</sup>

The nominal-plaintiff CPD's undermining of complainant autonomy may arise from an assumption that it has transferred a property interest in police complaints to defendant-officers, despite the fact that this public information is likely to be owned by real parties in interest-injured citizens in their individual capacity and as a member of the general public. Such a mistaken belief may not be reasonable, as indicated by several recent U.S. cases. Examples include: *Fraternal Order of Police v. City of Chicago* and *Carpenter v. U.S.*, which both have been recently decided.<sup>21</sup>

It, therefore, stands to reason that the nominal plaintiff-CPD should allow each real party in interest-injured citizen to raise their claims against defendant-officers under any of the available legal options (i.e. administrative, civil, or criminal law). This modest change in policy is likely to have a host of tangible benefits. These benefits include dignitary, informational, and efficiency gains for most interested parties. Specific examples include improvements in how the CPD and its officers are viewed (dignitary gains), enhanced understandings about how

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20. See United States Attorney's Office, Northern District of Illinois, *Federal Grand Jury Indicts Two Chicago Police Officers for Fraudulently Obtaining Search Warrants and Stealing Evidence*, U.S. DEP'T OF JUST. NEWS (May 10, 2018), <https://www.justice.gov/usao-ndil/pr/federal-grand-jury-indicts-two-chicago-police-officers-fraudulently-obtaining-search> (providing relevant information about the case, including the federal indictment for each officer).

21. See generally 2016 IL App (1<sup>st</sup>) 143884, 11. ("[This case holds that, as a matter of law,] [a] citizen complaint, an officer's date of appointment, the complaint category, the [police complaint] number, the incident date, the date the complaint was closed, and a finding of unfounded do not constitute a disciplinary report, letter of reprimand, or other record of disciplinary action that [may be exempt from disclosure under FOIA]. The court also found that these data are not exempt from disclosure under the Personnel Record Review Act nor the Public Labor Relations Act."); 138 S.Ct. 2206, 2223 (2018) (holding that "the fact that [cell phone location data] is gathered by a third party [which asserts that it has acquired title to this information through common law contract] does not make it any less deserving of [constitutional] protection.").

the law is applied (informational gains), and more useful interactions among the parties to a police complaint (efficiency gains).

This Article also notes that allowing each real party in interest-injured citizen to initially control how their complaints about defendant-officers are framed does not mean that the nominal plaintiff-CPD must do any additional work. Better protecting complainant autonomy, in fact, could reduce the CPD's data-collection and investigatory workload. As a result, the nominal plaintiff-CPD could make better use of its scarce public sector resources, especially if the CPD shares these complaints with other police regulators with the authority to resolve them. Examples of these regulators could include the City of Chicago's Inspector General (i.e. for administrative law claims that are not covered by the CPD's rules and regulations), the City of Chicago's Department of Law (i.e. for most civil law claims), and the Cook County State's Attorney (i.e. for criminal law claims).

A final benefit of letting a real party in interest-injured citizen decide which framing to use is that the nominal plaintiff-CPD may be put on notice about the high cost of any bad police work by a defendant-officer. The Article supplements this point by marshalling economic arguments for reform, as opposed to more familiar moral and ethical justifications, in its three additional parts (Parts I–III). Part I describes the applicable law for police complaint intake. Part II contains this Article's positive analysis, which includes a detailed explanation of why reform is needed. Part III has the Article's normative analysis. The Conclusion summarizes this Article's findings and conclusions.

## I. APPLICABLE LAW

In Chicago, tort victims have a legal right to raise administrative claims against police tortfeasors under the CPD's existing police complaint intake process.<sup>22</sup> This right is acknowledged by many statutory, decisional and administrative law sources.<sup>23</sup> A recent publication, *Allegations of Misconduct: A Guide To The Complaint And Disciplinary Process*, even expressly-states that:

[The Civilian Office of Police Accountability (COPA)], an independent

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22. See, e.g., Chicago Police Board, POLICE DISCIPLINE (2018), [https://www.cityofchicago.org/city/en/depts/cpb/provdrs/police\\_discipline.html](https://www.cityofchicago.org/city/en/depts/cpb/provdrs/police_discipline.html) ("The Civilian Office of Police Accountability (COPA), the Police Department, and the Police Board have different roles. The responsibility to receive complaints of alleged misconduct by Chicago police officers rests with COPA. Depending on the nature of the allegations, either COPA or the Police Department's Bureau of Internal Affairs [(the "BIA")] will investigate.").

23. See, e.g., CHICAGO POLICE DEPARTMENT, *supra* note 9.

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City [of Chicago administrative] agency, is responsible for receiving all complaints of misconduct made against members of the Police Department. . . . Whatever the nature of the [police] complaint, it is framed . . . in terms of an alleged violation of one or more of the Police Department's Rules of Conduct. . . . Detailed information on the investigative process . . . is available [online] at [www.ChicagoCOPA.org](http://www.ChicagoCOPA.org).<sup>24</sup>

Within this context, it is well-established that:

The intake process begins once COPA receives complaints from residents or incident notifications from the Chicago Police Department (CPD), and then cases are sorted and classified based on which investigative body will investigate the incident [as determined by how each specific allegation of police misconduct has been framed in a police complaint]. . . . COPA investigates allegations of biased-based verbal abuse, coercion, death or serious bodily injury in custody, domestic violence, excessive force, improper search and seizure, firearm discharge, taser discharge that results in death or serious bodily injury, pattern or practices of misconduct, [and] unlawful denial of access to counsel. CPD's Bureau of Internal Affairs investigates all other complaints of police misconduct including but not limited to criminal misconduct, operational violations, theft of money or property, planting of drugs, substance abuse, residency violations and medical roll abuses [that officers may have committed].<sup>25</sup>

Any valid police complaint requires a good-faith and relatively-timely filing by an injured citizen or the CPD.<sup>26</sup> Once these initial requirements are met, and an investigation is undertaken,<sup>27</sup> a recommendation may be made about whether to pursue sanctions.<sup>28</sup> Every recommendation for sanctions requires on-the-record findings.<sup>29</sup> Possible sanctions include a suspension or discharge.<sup>30</sup>

Each potential sanction must be submitted to, and later signed-off on by, the Chicago Police Superintendent.<sup>31</sup> Levied sanctions may be challenged or appealed, in a number of different ways, due to the enhanced protections given to officers.<sup>32</sup>

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24. City of Chicago, *supra* note 8.

25. Civilian Office Of Police Accountability, INVESTIGATIVE PROCESS: STEP 1, INTAKE AND CLASSIFICATION PROCESS (2018), <https://www.chicagocopa.org/investigations/investigative-process/>.

26. See City of Chicago, *supra* note 8.

27. *Id.* at 1.

28. *Id.*

29. *Id.* at 1–2.

30. *Id.* at 2.

31. *Id.* at 1.

32. E.g. Moran, *supra* note 18, at 978 (“Chicago’s collective bargaining agreement provides that, when the investigating agency possesses video or audio evidence of a misconduct incident, an officer cannot be charged with making a false statement unless the officer is first given an opportunity to review the

Other appellate options also are available, which may be used to overturn sanctions because most complainants are intentionally-excluded from participating in the post-filing components of the process (i.e. investigations and sanctions).<sup>33</sup>

As a result, it should be no surprise that police complaint data may be subject to manipulation at the time of intake, during investigations and after a final determination.<sup>34</sup> For example, recent scholarship indicates most complaints are discounted or under-investigated.<sup>35</sup> But, even in the rare event that a police complaint is taken seriously and fully-investigated by regulators, less than three (3) percent of the allegations raised by citizens have been upheld in recent years.<sup>36</sup>

This lack of accountability has real-world implications, as it has been found that “most of the police misconduct lawsuits that led to settlements or verdicts . . . were based . . . on . . . complaints that were never investigated . . . [by regulators].”<sup>37</sup> One possible explanation for this failure-to-investigate is that the CPD, albeit indirectly, shapes the entire police complaint process. The CPD

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evidence, and subsequently given an opportunity to clarify or amend his statement if desired”).

33. See Jennifer Smith Richards and Jodi S. Cohen, *Secretive Appeals Process Quietly Reducing Punishment For Cops After Findings Of Misconduct*, CHICAGO TRIBUNE (Dec. 13, 2017), <http://www.chicagotribune.com/news/watchdog/ct-chicago-police-grievance-cases-met-20171213-story.html> (“In the first examination of its kind, the Chicago Tribune and ProPublica Illinois found that 85 percent of disciplinary cases handled thorough the Chicago Police Department’s grievance process since 2010 led to officers receiving shorter suspensions or, in . . . cases, having . . . punishments overturned entirely . . . [without giving notice to tort victims].”).

34. See Rachel Moran, *Contesting Police Credibility*, 93 WASH. L. REV. 1339, 1366 (2018) (noting that police complaint processes “[are] often biased—implicitly or, not uncommonly, overtly—in favor of the officers, and conducted with the intent to justify the officers’ behavior.”).

35. See, e.g., Shane Shifflett et al., *Police Abuse Complaints By Black Chicagoans Dismissed Nearly 99 Percent Of The Time*, THE HUFFINGTON POST (Dec. 7, 2015), <http://data.huffingtonpost.com/2015/12/chicago-officer-misconduct-allegations> (“Overall, [COPA’s immediate predecessor, the Independent Police Review Authority (IPRA)] sustained just 2.6 percent of all 29,000 complaints. Nationally, between 6 and 20 percent of citizen-initiated complaints are sustained . . . .”).

36. *Id.*

37. See Brentin Mock, *Chicago Cops, Unaccountable by Design*, CITYLAB (Jan. 24, 2017), <https://www.citylab.com/equity/2017/01/chicago-police-accountability/513791/> (explaining that regulators “can flat-out reject any complaint involving a police officer accused of handcuffing someone too tightly, or who aggressively tackles someone during an arrest.”).

does so by exploiting conflicts of interest,<sup>38</sup> the behavioral economic biases of police regulators<sup>39</sup> and its own path dependency.<sup>40</sup> Thus, as evidenced by a host of recent studies, tort victims have almost no chance of holding any police tortfeasors to

38. See Chip Mitchell, *Who Polices The Police? In Chicago, It's Increasingly Ex-Cops*, WBEZ NEWS (Dec. 5, 2014), <https://www.wbez.org/shows/wbez-news/who-polices-the-police-in-chicago-its-increasingly-ex-cops/fbeca316-8b2a-4ef2-beb1-d07f8b6e3bef> (“[A] WBEZ investigation raises questions about just how independent the agency is. City records obtained through a Freedom of Information Act request show that IPRA's management now includes six former cops—officials who have spent most of their career in sworn law enforcement. Those include the agency's top three leaders. . . . [One result is that police complaints] may be seen not through the eyes of the citizen but through the eyes of a police officer,’ said Paula Tillman, a former IPRA investigative supervisor who was a Chicago cop herself in the 1970s and 1980s. ‘The investigations can be engineered so that they have a tilt toward law enforcement and not what the citizen is trying to say.”). But see Miles Bryan, *Expert: Police Board Decision in Dakota Bright Shooting Is ‘Due Process Run Amok’*, WBEZ NEWS (Oct. 15, 2018), <https://www.wbez.org/shows/wbez-news/chicago-police-board-often-sides-with-officers/bacd6ad0-0088-49ba-825b-fc20aded2807> (“The Chicago Police Board regularly overturns the findings of [a final misconduct] investigation and . . . filing for dismissal by the police superintendent. Records indicate that between 2005 and 2015, the board voted about 58 percent of the time to allow an officer to keep his or her job even though the police superintendent was seeking to fire them. The board either found the officer not guilty or reduced the punishment.”). Such problems, however, are not the sole province of the CPD. See, e.g., Christina Hall, *Toledo Police Promotion Ceremony Has Family Feeling*, TOLEDO BLADE (Jan. 23, 2004), <http://www.toledoblade.com/local/2004/01/23/Toledo-police-promotion-ceremony-has-family-feeling.html> (describing how Toledo Police Department Captain Wes Bombrys, Captain Edward Bombrys, Sr., Sergeant Mike Bombrys and Sergeant Matthew Bombrys are close relatives of former Internal Affairs Investigator and current Special Investigations Bureau Captain Edward Bombrys, Jr., who was previously-tasked with investigating such colleagues).

39. See Matthew Bishop, *Behavioral Economics*, ECONOMICS: AN A TO Z GUIDE (2018), <https://www.economist.com/economics-a-to-z>. (explaining that behavioral economics is a “branch of economics that concentrates up explaining the decisions people make in practice, especially when these conflict with what conventional economic theory predicts they will do.”). See, e.g., RoNeisha Mullens, *Perrysburg Township Settles with Fired Chief*, TOLEDO BLADE (Jul. 25, 2015), <http://www.toledoblade.com/Police-Fire/2015/07/25/Perrysburg-Township-settles-with-fired-chief.html> (describing why former Toledo Police Officer and Perrysburg Township Deputy Police Chief Michael Gilmore was dismissed from his leadership position with a suburban law enforcement agency, but still received a monetary settlement).

40. See Bishop, *supra* note 39 (“Path dependency refers to the way in which apparently insignificant events and choices can have huge consequences for the development of a market or an economy.”). See, e.g., Nick Dutton, *Toledo Cops Plead No Contest To Drug And Alcohol Charges*, CBS 11 WTOL.COM (Dec. 14, 2009), [http://m.wtol.com/toledonewsnow/pm/\\_contentdetail.htm?contentguid=od:yXNW1E0T](http://m.wtol.com/toledonewsnow/pm/_contentdetail.htm?contentguid=od:yXNW1E0T) (describing how Toledo Police Department Officers, including Curtis Jewell, do not deny engaging in serious wrongdoing yet are retained).

account under the existing CPD complaint process: especially if less-than-true information is added to the administrative record.<sup>41</sup>

The CPD, therefore, does not feel any need to fully-protect the rights of tort victims since their complaints about police tortfeasors are unlikely to be vindicated.<sup>42</sup> One such example is how the CPD deals with complainant autonomy, which is a background rule of U.S. civil procedure that is meant to assure that tort victims maintain control over their legal claims. The CPD does not fully-protect, nor even seem to recognize, this particular right. Especially as it pertains to the ability to initially control how an injured citizen's claims are framed under the CPD's complaint process.

This point is evidenced by the fact that “[w]hatever the nature of the [police] complaint, it is framed . . . in terms of an alleged violation of . . . the . . . [CPD's] Rules of Conduct.”<sup>43</sup> Such a required framing has important implications for distributional fairness, especially in terms of the type, quality and quantity of information that may be introduced into the administrative record. By definition, “distributional fairness . . . depends on the amount of in-kind goods . . . [or services, which are provided to] citizens . . . [and is a valid way to measure the validity of public policies].”<sup>44</sup>

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41. See Shifflett, *supra* note 35. Unfortunately, such cynicism is not limited to the employees of U.S. law enforcement agencies. See generally Chris Fusco, *Absentee-Ballot Handling Got City Election Board Supervisor Fired*, CHICAGO SUN-TIMES, (June 24, 2016), <https://chicago.suntimes.com/politics/absentee-ballot-handling-got-city-election-board-supervisor-fired/> (“Jim Allen, a [Chicago Board of Election Commissioners (CBEC)] spokesman, declined to comment about [the firing of Sheri M.] Bowen and also about whether disciplinary action might have been taken against other employees [such as Principal Clerk and Vote By Mail Supervisor Steven Cieslicki] because of the absentee-ballot problems [that caused an untold number of Chicago-area voters to be disenfranchised.”]).

42. See Shifflett, *supra* note 35.

43. City of Chicago, *supra* note 8, at 1.

44. Randall K. Johnson, *Uniform Enforcement or Personalized Law? A Preliminary Analysis of Parking Ticket Appeals in Chicago*, 93 IND. L.J. SUPP. 34, 39 n.27 (2018) (using percentage analysis to find out how parking tickets, and other related matters, are distributed by zip code in Chicago.). The author's past work with on parking tickets, and parking ticket appeals, has inspired a host of follow-up research in Chicago. See WOODSTOCK INSTITUTE, *The Debt Spiral: How Chicago's Vehicle Ticketing Practices Unfairly Burden Low-Income and Minority Communities* (Jun. 21, 2018), <http://woodstockinst.org/wp-content/uploads/2018/06/The-Debt-Spiral-How-Chicagos-Vehicle-Ticketing-Practices-Unfairly-Burden-Low-Income-and-Minority-Communities-June-2018.pdf> (using percentage analysis to examine parking tickets, and other related matters,

In other words, the CPD has created an alternate approach to drafting and characterizing police complaints in Chicago. This alternate approach is used to undermine the traditional goals of the U.S. legal system. These goals include “(1) efficient processes and institutions that achieve ‘substantive justice’ and deter violations of law, (2) consistent and accurate outcomes based on the merits of parties’ claims, and (3) meaningful legal access for those who have claims for relief.”<sup>45</sup>

For an illustration of how this alternate approach operates in practice, this Article looks at *U.S. v. Elizondo*.<sup>46</sup> This federal case arose from the fact that two CPD officers were criminally-charged with injuring citizens, mostly by taking their personal property, after being accused of the very same behavior in a host of previously-ignored complaints.<sup>47</sup> The alleged police misconduct in *Elizondo*, at least as it was described in complaints that predated the litigation, could be framed as either a violation of the administrative law (i.e. an improper execution of a search warrant), a violation of the civil law (i.e. as conversion) or a violation of the criminal law (i.e. as theft).<sup>48</sup>

As stated previously, limiting complainant autonomy deprives a real party in interest-injured citizen of a chance to be made whole for violations of their dignitary interests by defendant-officers. This limitation on complainant autonomy also deprives defendant-officers, such as the police tortfeasors in *Elizondo*, of useful information about how their misconduct drives up the cost of police work in Chicago. Lastly, it deprives the nominal plaintiff-CPD of the benefits of potential efficiency gains by shielding defendant-officers from the valid critiques that are

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are distributed in Chicago). This follow-up work has garnered attention from local, state, national, and international publications and substantiated my preliminary research findings about parking tickets, parking ticket appeals and win rates on appeal. See, e.g., Melissa Sanchez & Sandhya Kambhampati, *How Chicago Ticket Debt Sends Black Motorists into Bankruptcy*, PROPUBLICA ILLINOIS (Feb. 27, 2018), <https://feastures.propublica.org/driven-into-debt-chicago-ticket-debt-bankruptcy> (describing how excessive ticketing has especially-severe consequences for disadvantaged groups).

45. Glover, *supra* note 1, at 223–24.

46. See United States Attorney’s Office, *supra* note 20.

47. See generally Sam Charles et al., *Lawsuits, Citizen Complaints Dog 2 CPD Cops Charged With Stealing Cash, Drugs*, CHICAGO SUN-TIMES (May 10, 2018), <https://chicago.suntimes.com/crime/2-cpd-cops-charged-with-stealing-cash-drugs-sharing-proceeds-with-snitches/> (“Two Chicago Police officers charged with stealing cash and drugs . . . after submitting false affidavits to judges . . . have been the subjects of dozens of misconduct complaints over the years. [Nearly none of these complaints were sustained.]”).

48. *Id.*

raised by real party in interest-injured parties, which too often leads to subsequent litigation with or by the CPD.

Within this context, better protection of complainant autonomy could limit the cost of any bad police work that is not properly-deterring by the threat of conventional sanctions.<sup>49</sup> As this author implied in a 2013 article, which explained why the third-party data that is contained within every police complaint works so well, this modest reform may do so for three reasons:

First, it may provide better and more complete information about the underlying causes of misconduct. Second, [better protection of complainant autonomy] ... may be useful for modeling actual police behavior. Lastly, [this modest reform] ... may help ... [police] ... departments ... [to] ... overcome heuristic biases and other informational failures.<sup>50</sup>

Therefore, in order to provide a measure of guidance to U.S. administrative agencies that purport to give its officers a property interest in public goods or services, this Article outlines several ways to better protect complainant autonomy.<sup>51</sup> It does so,

49. It is likely that the CPD has some interest in detecting and deterring police tortfeasors, if only to limit its liability. See generally Hazel Glenn Beh, *Municipal Liability For Failure To Investigate Citizen Complaints Against Police*, XXV FORDHAM URB. L.J. 209, 210 (1998) (“Federal courts have signaled that a municipality must systematically address citizen complaints as a part of its responsibility to manage and supervise its police officers.”). This liability may arise in a variety of ways. See generally Rachel A. Harmon, *Legal Remedies for Police Misconduct*, ACADEMY FOR JUSTICE: A REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM (ERIK LUNA ED., 2017) 28 (2017) (“A variety of legal remedies for constitutional violations by police officers, including the exclusionary rule, civil suits for damages or reform, and criminal prosecution, exist to ensure that officers follow the law and provide redress when they do not.”) According to several recent studies, limitation of liability could be enhanced by placing an increased focus on the misconduct allegations that are raised in all police complaints. See, e.g., Kyle Rozema & Max Schanzenbach, *Good Cop, Bad Cop: Using Civilian Allegations To Predict Police Misconduct*, AMER. ECON. J. (forthcoming) (manuscript at 1–2) (“This article assesses the potential for civilian allegations to predict police officer misconduct using recently released data on over 50,000 civilian allegations of police officer misconduct in Chicago.”).

50. Randall K. Johnson, *Why Police Learn from Third-Party Data*, 3 WAKE FOREST L. REV. ONLINE 1, 5 (Supp. 2013), <http://wakeforestlawreview.com/2013/01/why-police-learn-from-third-party-data/> (applying a ratio-based approach to determine the nature of the relationship between third-party data collection and published §1983 cases.).

51. Cf. Alisa Chang, *Ticket-Fixing Officers Say They Just Followed Supervisors’ Example*, WNYC NEWS (Nov. 4, 2011), <https://www.wnyc.org/story/168571-blog-ticket-fixing-officers-say-they-just-followed-supervisors-example/> (“As 11 New York City police officers face ticket-fixing charges in the Bronx, the largest police union in the city — the Patrolmen’s Benevolent Association — has angrily stuck to one position: Ticket-fixing has been condoned for decades as part of the “NYPD culture” . . . [In support of this position, some members of the union] . . . point out . . . [that] . . . the NYPD’s own Patrol Guide allows for the

specifically, by accounting for previously-ignored issues such as conflicts of interest, behavioral economic biases and path dependency. The goal is to limit hidden market failures, which arise when “a market left to itself does not allocate resources efficiently,” so that these agencies better account for the high cost of bad public service work.<sup>52</sup> An example of how agencies could overcome these issues, even in cases where a host jurisdiction is not very economically-efficient, is described in the rest of this Article.

As such, the Article does not seek to challenge the nominal plaintiff-CPD’s right to place jurisdictional limits upon its administrative complaint processes. Nor does it assume, in cases where complainant autonomy is not fully-protected in administrative proceedings, that a real party in interest-injured citizen has no other viable way to hold a defendant-police officer to account. This Article, instead, questions the wisdom of a nominal plaintiff-CPD’s decision to limit the type, quality and quantity of information that may be produced by a real party in interest-injured citizen while too often allowing defendant-officers to intentionally add less-than-true information to the public record.

## II. POSITIVE ANALYSIS

Serious economic issues have plagued Chicago, especially in recent years, which made it increasingly difficult for this U.S. city to provide the same amount of public goods and services as similarly situated municipalities.<sup>53</sup> These economic issues arose from excessive spending on the CPD, a failure to adequately fund the municipality’s public pension obligations, and half-hearted attempts to capture valid parking ticket fines and other potential own-source revenues.<sup>54</sup> This inefficient approach to admin-

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voiding of tickets . . . [But, upon closer inspection, the union’s position is untenable because,] . . . according to the rules . . . [in the Patrol Guide, any ‘voiding privilege’] . . . is only for tickets that were first issued “in error” . . . other kinds of ticket-fixing were never acceptable . . . [under the letter nor the spirit of the law] . . . such as defacing a ticket by writing false information, or removing a ticket from the pile.”).

52. See Bishop, *supra* note 39.

53. See, e.g., Chi. Tribune Editorial Bd., *How Chicago Debt Exploded*, CHICAGO TRIBUNE, Nov. 17, 2013, [http://www.chicagotribune.com/news/opinion/plan/ct-edit-chicago-taxpayers-edit-1117-20131117\\_1\\_pension-money-chicago-debt-police-and-fire-funds-story.html](http://www.chicagotribune.com/news/opinion/plan/ct-edit-chicago-taxpayers-edit-1117-20131117_1_pension-money-chicago-debt-police-and-fire-funds-story.html) (“Decades of abuse and neglect by its political class leave Chicago with insufficient funds for necessities, let alone for smart extras.”).

54. *Id.* (“The most devastating sin in Chicago was arrogance—mayors and

istration led to even worse outcomes during the Great Recession.<sup>55</sup>

The Great Recession, which began in 2007 and led to additional reductions in the quality and quantity of the city's public goods and services, forced Chicago to become more economically efficient.<sup>56</sup> For example, the city reduced its annual spending by implementing new cost controls.<sup>57</sup> It also created a plan to meet its public pension obligations.<sup>58</sup> Lastly, Chicago improved its revenue collection by increasing local taxes, collecting on its debts and ensuring laws are better enforced.<sup>59</sup>

One way for Chicago to become even more economically efficient, at least in the absence of additional legislative action, is to avoid unnecessary CPD litigation.<sup>60</sup> CPD litigation is too often unnecessary because it arises from predictable and systematic police errors.<sup>61</sup> Among the worst examples of these police errors involve deliberate under-enforcement of the law, as exemplified

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aldermen sure they could see the city's economic future and, paradoxically, doubting that it ever could implode.").

55. *Id.* ("[The damage caused by the Great Recession] . . . is deep and prolonged because [Chicago] City Hall had spent, borrowed and promised so much that it couldn't tolerate any revenue dips.").

56. See, e.g., Fran Spielman, *Emanuel's 2017 Budget Address: "Chicago Is Back on Solid Ground"*, CHICAGO SUN-TIMES (Oct. 11, 2016), <http://chicago.suntimes.com/news/emanuels-2017-budget-address-chicago-is-back-on-solid-ground/> ("Chicago has regained its financial footing because city officials made some tough decisions, Mayor Rahm Emanuel said Tuesday in his 2017 budget address.").

57. *Id.* ("Under the category titled 'improved fiscal management,' Emanuel anticipates generating \$86.4 million by 'sweeping aging revenue accounts, TIF reform' and through investment reforms . . .").

58. *Id.* ("The Chicago Sun-Times reported last week that Emanuel plans \$30 million in 'targeted' taxes[,] fines and fees, even as it closes 'loopholes' and holds the line on property, sales, and gasoline taxes."). Other efficiency-enhancing reforms, which include a pension reform option that was originally recommended by this author but only recently-taken up also may be available.

59. *Id.* ("The mayor's budget assumes \$148 million in revenue growth, driven by increases in sales, personal property lease tax and city sticker fees.").

60. See, e.g., Heather Kerrigan, *Chicago's Police Misconduct Cases Go to Court*, GOVERNING (Feb. 2011), <http://www.governing.com/topics/public-justice-safety/Chicagos-Police-Misconduct-Cases-Go-to-Court.html> ("Chicago found a somewhat counterintuitive way to save money and save face – by taking every single police misconduct case to court ... [including textbook examples of civil rights violations].").

61. See generally Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STANFORD L. REV. 1471, 1477-8 (explaining that "someone using . . . a rule of thumb may be behaving rationally in the sense of economizing on thinking time, but such a person will nonetheless make forecasts that are different from those that emerge from the standard rational-choice model.").

by how CPD officers refused to address the valid complaints of Che “Rhymefest” Smith in 2016.<sup>62</sup>

The failure to address this bad police work, combined with Illinois’ abolition of the public duty doctrine,<sup>63</sup> caused Chicago to become the undisputed leader in misconduct costs.<sup>64</sup> According to its own records, this city paid “\$936 million in [CPD] settlements, judgments and legal expenses” from 2010 to 2016.<sup>65</sup> This translates into \$156 million in annual costs, which is significantly than what similarly situated U.S. cities paid over the same six-year (6) timeframe.<sup>66</sup>

Other under-enforcement issues arose directly from the CPD’s mistaken beliefs. For example, the CPD inexplicably believes that it has some property interest in police complaints (i.e. administrative records, which contain allegations of officer wrongdoing).<sup>67</sup> This belief does not seem reasonable, especially after a close examination of the law.<sup>68</sup> It is well established that

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62. See Nereida Moreno et al., *Rhymefest Posts Video of Trying to Report Crime, Gets Apology from Police*, CHICAGO TRIBUNE (Aug. 29, 2016), [www.chicagotribune.com/news/local/breaking/ct-rhymefest-robbery-report-met-20160827-story,amp.html](http://www.chicagotribune.com/news/local/breaking/ct-rhymefest-robbery-report-met-20160827-story,amp.html) (“Chicago rapper . . . Rhymefest took to Twitter to say he was not only robbed . . . but also that he was treated ‘disgustingly’ by officers when [Rhymefest] tried to report the crime [and subsequent police misconduct].”). Unfortunately, this under-enforcement by officers may not be unintentional. See Simone Weichselbaum, *The Police Laboratory*, TIME (2018), <http://time.com/chicago-police-3/> (quoting “Sergeant James Ade, who runs Chicago’s police sergeant’s union. ‘If we don’t do anything, then we can’t get hammered.’”).

63. The public duty doctrine previously immunized government officials that failed to fully-protect members of the general public, sometimes even without adequate justification. See *Coleman v. E. Joliet Fire Prot. Dist.*, 46 N.E.3d 741, 758 (holding that the Illinois Supreme Court has chosen to “abolish the public duty rule and its special duty exception.”).

64. See, e.g., Steve Daniels, *How Chicago’s Financing of Police Misconduct Payouts Adds Hundreds of Millions to the Tab*, CRAIN’S CHICAGO BUSINESS (Jul. 6, 2018), <http://www.chicagobusiness.com/article/20180706/ISSUE01/180709939/how-chicagos-financing-of-police-misconduct-payouts-adds-hundreds-of-millions-to-the-tab> (explaining why “there’s little doubt Chicago holds the dubious distinction as the nation’s top spender on police misconduct.”).

65. Daniels, *supra* note 64 (“From 2010 through 2016, the city financed \$486 million of the \$936 million in settlements, judgments and legal expenses over that time . . . with bonds.”).

66. See Daniels, *supra* note 64 (describing how Chicago paid \$936 million in total costs, over a six-year period, and the fact that “Los Angeles’ debt to finance police-related settlements is a pittance compared to Chicago’s.”).

67. See Emmanuel, *supra* note 15 (explaining that a recent collective bargaining agreement, which was agreed to by the City of Chicago, the CPD and police unions purports to give officers a property interest in police complaints).

68. See generally Eugene Volokh, *Police Officers Have No Constitutional Right of Privacy in Records of Their Official Misconduct*, THE VOLOKH CONSPIRACY (Aug. 5, 2014), <https://www.washingtonpost.com/news/volokh>

“the people are the ... [true] ... owners, ... shareholders ... [and] ... custodians of the authority that temporarily vests with ... public officials.”<sup>69</sup> Therefore, in the absence of a change to this rule, it stands to reason that members of the general public are the owners of public goods and services.<sup>70</sup>

Recent litigation has begun to challenge the CPD’s mistaken beliefs about who owns public goods and services,<sup>71</sup> which may arise from the fact that U.S. courts defer to police in most legal situations.<sup>72</sup> Thus, in light of the unsettled nature of the law,<sup>73</sup>

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-conspiracy/wp/2014/08/05/police-officers-have-no-constitutional-right-of-privacy-in-records-of-their-official-misconduct/?utm\_term=.c542604039a4 (explaining that it “[s]hould be pretty obvious [that police have no constitutional right to conceal official misconduct that is documented,] ... but it had to be litigated ... [in] *Chasnow v. Mokwa* (Mo. Cir. Ct. June 11, 2014).”).

69. David H. Hoffman & Juliet S. Sorensen, PUBLIC CORRUPTION AND THE LAW: CASES AND MATERIALS 2 (2017).

70. Officers have tried to change the default rule for police complaints, often with varying degrees of success, through state and local-level collective bargaining agreements. *See, e.g.*, Bainbridge Island Police Guild v. City of Puyallup, 259 P.3d 190, 208 (Wash. 2011) (holding that “where some investigative records have already been disclosed and information connecting the individual officer to unsubstantiated allegations has already been made public, further disclosure of the investigative records in any form will repeat the identification of the officer and violate the officer’s right to privacy.”).

71. *See* Watkins v. McCarthy, 980 N.E.2d 733, 745 (Ill. App. 1st Dist. 2012) (holding “that the requested [police complaint data, i.e. complaint register files (or CRs),] in their entirety, including [any police] complaints found to be without merit, are not exempt [from disclosure under the Illinois Freedom of Information Act (FOIA), although these individual-level data should be redacted to remove any information in these public records that fall under a valid FOIA exemption]”); *see* Kalven v. City of Chicago, 7 N.E.3d 741, 749 (Ill. App. 1st Dist. 2014) (holding that the requested public records, i.e. individual-level police complaint data (CRs) and group-level police complaint data (repeater lists of officers with a certain number of complaints (RLs), are not exempt from disclosure under the Illinois FOIA and that the CPD has the burden of proving that any information in these public records should be redacted under a valid FOIA exemption); *See* Fraternal Order of Police v. City of Chicago, 59 N.E.3d 96, 108 (Ill. App. 1st Dist. 2016) (holding that, as a matter of law, “a citizen complaint, an officer’s date of appointment, the complaint category, the [police complaint] number, the incident date, the date the complaint was closed, and a finding of unfounded do not constitute a disciplinary report, letter of reprimand, or other record of disciplinary action that [may be exempt from disclosure under FOIA].”) The court also found that these data are not exempt from disclosure under the Personnel Record Review Act nor its Public Labor Relations Act. *Id.*

72. *See, e.g.*, United States v. Blagojevich, 612 F.3d 558 (7th Cir. 2015) (finding that “*Cleveland v. United States*, 531 U.S. 12 (2000) holds that state and municipal licenses, and similar documents, are not ‘property’ in the hands of a public agency” nor in the hands its public employees.).

73. *See generally* Moller, *supra* note 7, at 375–76 (explaining that “[c]onsistent with this property-like conception of remedies, the law of proper parties identified, although with exceptions, the party in interest entitled to the remedy

it is important to determine who owns police complaints.<sup>74</sup> A recent Illinois case that provides useful insights, especially when it is properly-contextualized and narrowly-framed, is *Fraternal Order of Police v. City of Chicago*.<sup>75</sup>

*Fraternal Order*, which interpreted 5 ILCS 140/7(1)(C) among other Illinois statutes, shined a harsh light on the CPD's mistaken beliefs.<sup>76</sup> It did so by strongly-implying, but never quite declaring, that police complaints cannot be owned by the CPD.<sup>77</sup> One potential implication is that the CPD holds this information in trust for members of the general public, in keeping with the public trust doctrine, and cannot transfer title to its officers.<sup>78</sup> Thus, even if such a transfer is the subject matter of an otherwise valid contract, it may not be permitted under the applicable law.

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as the only person with standing to enforce the [legal] claim.”).

74. See generally Sergio J. Campos, *Do Claims About Claims To Claims Matter?*, JOTWELL (Mar. 23, 2017), <http://courtslaw.jotwell.com/do-claims-about-claims-to-claims-matter/> (reviewing J. Maria Glover, *A Regulatory Theory of Legal Claims*, 70 VAND. L. REV. 221 (2017)) (“Civil procedure scholars continue to debate whether the legal claim is a party’s ‘property,’ as opposed to an aspect of procedure.”).

75. See *Fraternal Order of Police v. City of Chicago*, 59 N.E.3d 96, 108 (Ill. App. 1st Dist. 2016) (finding that police complaint files “are not personnel files in any sense because they pertain to the ‘initiation, investigation, and resolution of complaints of misconduct.’”). Other U.S. state-law cases, which deal with different issues presented, also could serve as a launching point for innovative work on police complaints. Examples include *Denver Policemen’s Protective Ass’n v. Lichtenstein*, 660 F. 2d 432, 436–37 (10th Cir. 1981) (noting that police misconduct data, even when they are contained within the personnel file of an officer, are analogous to a citizen’s criminal history data and thus discoverable under Colorado state law).

76. Compare 5 ILL. COMP. STAT. 140/7(1)(C) (2012) (finding that “The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy.”), with *Fraternal Order of Police v. City of Chicago*, 59 N.E.3d 96, 106 (Ill. App. 1st Dist. 2016) (finding that “there was no legal basis for the circuit court to enjoin defendants from releasing the requested records in order to allow plaintiff to pursue a legally-unenforceable remedy.”).

77. *Id.* at 104 (finding that the “Court should deny injunctive relief where it will cause serious harm to the [general] public without a corresponding great advantage to the movant [police union].”).

78. See *Illinois Central R. Co. v. Illinois*, 146 U.S. 387, 435 (1892) (holding that “it is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found with the consequent right of use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of congress to control their navigation in so far as may be necessary for the regulation of commerce with foreign nations and among the states.”)

A similar point has been made, albeit in an entirely different policing context, in *Carpenter v. United States*.<sup>79</sup> *Carpenter* held that “the fact that [public] information is gathered by a third party,” which asserts that it has acquired marketable title to this property under a valid common law contract, “does not make it any less deserving of [constitutional] protection.”<sup>80</sup> The implication is that when the CPD attempts to transfer any ownership interest in public information to third-parties (such an individual officer or an organization that represents groups of officers), and it holds title in public trust or as described in *Carpenter*, courts should not allow a complete transfer of property rights.<sup>81</sup>

This analysis indicates that *Fraternal Order* was properly-decided, although it does not directly answer the question of who is the owner of police complaints.<sup>82</sup> Specifically, the case held:

[A]s a matter of law, neither the [Illinois] Review Act nor the pendency of the parties’ arbitrations under [the CPD-union contract] interfere with [Chicago’s] obligations to [preserve and to] disclose the requested [police complaints] . . . under the [Illinois Freedom of Information Act], where, as here, no exemptions apply. [Therefore,] [t]he preliminary injunctions must be vacated because they prevent [Chicago] from complying with the disclosure requirements . . . [under state law].<sup>83</sup>

Since *Fraternal Order* also does not directly address related claim-control questions, there is still additional work to be done.<sup>84</sup> In an attempt to avoid future litigation, the CPD could take the initiative and put its officers on notice that complainant

79. See generally Chris Odinet, *Data as Property at the Supreme Court (Updated)*, PROPERTYPROFBLOG (Jun. 22, 2018), <http://lawprofessors.typepad.com/property/2018/06/data-as-property-at-the-supreme-court.html> (“The majority [in *Carpenter v. United States*] is basically saying that even though the agreement between the cell phone provider and the customer says that the information collected about user location belongs to the provider, this doesn’t necessarily mean that the customer has no privacy interest.”).

80. *Carpenter v. United States*, 138 S. Ct. 2206, 2223 (2018).

81. Cf. Odinet, *supra* note 79.

82. See, e.g., *Fraternal Order of Police v. City of Chicago*, 2016 IL App (1st) 143884, ¶ 31–32 (finding that the “remedy [ the police union] seeks . . . is to have the arbitrators order the city to ‘comply with Section 8.4 by destroying records more than five years old forthwith.’ However, this remedy would not be enforceable if it impeded the defendants form complying with the pending FOIA requests.”).

83. *Id.* at ¶ 54.

84. See *Fraternal Order of Police v. City of Chicago*, 59 N.E.3d 96, 99 (Ill. App. 1st Dist. 2016) (explaining that the issues presented are that “defendants the City of Chicago (City) and the Chicago Police Department (CPD) argue that the circuit court erred in granting preliminary injunctions . . . [to] enjoin defendants from releasing certain information contained in records generated by police oversight agencies’ investigations of citizen complaints of alleged police misconduct.”).

autonomy should be upheld and may even be sacrosanct.<sup>85</sup> This notice could take the form of an email, a certified letter or a public posting that indicates injured citizens have an initial right to draft and characterize their own complaints about any officer.

This Article acknowledges that any such notice may prove ineffective since some officers simply cannot accept the truth. The truth is that the injured citizen and/or general public are sole owners of police complaints.<sup>86</sup> Such owners are entitled to draft, characterize, and see what happens to their own complaints.

### III. NORMATIVE ANALYSIS

To review, police complaints have the potential to reduce bad police work and unnecessary litigation. Their potential, however, has been undermined by a limitation on how claims are framed. This limitation requires that every allegation be framed, as part of any valid police complaint, exclusively under certain legal theories (i.e. administrative law theories). By implication, there is no option for them to be framed in other terms under the adjudicative process that is used to resolve police complaints in Chicago (i.e. civil law theories, or criminal law theories, which regulators should be made aware of).

Such an unjustified limitation on complainant autonomy has distributional effects upon the parties to a police complaint, since each real party in interest-injured citizen is being involuntarily-deprived of the legal right to draft and characterize their own claims by the nominal plaintiff-CPD. The goal is to protect the pre-filing interests of defendant-officers. Such protections affect the traditional relationship between the parties to a police complaint and prevent defendant-officers from being held fully-accountable by real parties in interest-injured citizens for any wrongdoing that is not covered by the nominal plaintiff-CPD's administrative rules. This unjustified impairment, which takes the form of a reduction in a real party in interest-injured party's ability to draft and characterize their own misconduct allegations, may be grounded in a mistaken belief about who owns police complaints.

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85. See generally Keeley & Sons, Inc. v. Zurich American Ins. Co., 947 N.E.2d 876, 884 (Ill. App. 5th Dist. 2011) (finding that Illinois courts "must respect the traditional notion that the plaintiff is the master of his complaint, thereby free to choose his own theory of liability so long as the evidence supports it.").

86. See Emmanuel, *supra* note 15.

Currently, defendant-officers are believed to have acquired a property interest in police complaints because of their signing of a collective bargaining agreement with the nominal plaintiff-CPD. This mistaken belief cannot be considered reasonable, as indicated by recent cases at the federal and state-level, even if such a transfer of property rights is the subject-matter of an otherwise-valid common law contract. It, therefore, stands to reason that the nominal plaintiff-CPD should allow real parties in interest-injured citizens to frame their allegations under all the available options: since defendant-officers may not have any pre-filing interests that need to be protected.

Thus if the CPD wants to realize the multiple benefits that arise from restoring the traditional distribution of rights between the parties, which could take the form of dignitary, informational and efficiency gains, one follow-up question is “whether different protections must be offered, so as to achieve this goal?”<sup>87</sup> This department is likely to answer in the affirmative, especially if it draws on recent scholarship in local government law.<sup>88</sup> The best of this work argues that the CPD should offer different protections,<sup>89</sup> although much of this literature does not offer guidance for doing so.<sup>90</sup> This lack of guidance, especially with respect to what is meant by different, which could mean better or additional, leads to confusion about what administrative reforms should be undertaken under the adjudicative process that is used to resolve complaints.<sup>91</sup>

Therefore, in order to provide a measure of guidance to the CPD and other U.S. law enforcement agencies that purport to give officers a property interest in public goods and services, this

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87. See, e.g., Aditi Bagchi, *Other People’s Contracts*, 32 YALE J. ON. REG. 211, 212 (2015) (describing an “interpretive rule that would better protect third party losers in contract: textual ambiguity should be resolved to avoid compromising the legally-recognized interests of third-parties.”).

88. See, e.g., Randall K. Johnson, *Why We Need a Comprehensive Recording Fraud Registry*, 2014 N.Y.U. J. LEGIS. & PUB. POL’Y QUORUM 88 (2014) (explaining that U.S. administrative agencies that provide citizens with greater access to public information are better at detecting, and deterring, public employee misconduct in various ways.”).

89. See generally Moran, *supra* note 18, at 39 (“I propose three remedies that . . . address different aspects of the [problem].”).

90. See, e.g., Andrew S. Baer, *Dignity Restoration and the Chicago Police Torture Reparations Ordinance*, 92 CHI. KENT L. REV. 593 (2017) (finding that “social movements can facilitate dignity restoration, but these efforts work best in tandem with other provisions [that are not fully-described in the article].”).

91. Cf. Randall K. Johnson, *How the United States Postal Service (USPS) Could Encourage More Local Economic Development*, 92 CHI. KENT L. REV. 593, 598 (2017) (describing similar problems with USPS reform efforts).

Part III describes ways to better protect complainant autonomy.<sup>92</sup> It does so, specifically, by accounting for previously-ignored issues such as conflicts of interest, behavioral economic biases and path dependency. The goal is to limit externalities, as well as any other existing market failures, so that the CPD may better account for the cost of bad police work.

Within this context, there may be several ways to better protect complainant autonomy under the adjudicative process that is used to resolve police complaints: regardless of whether such a right is clearly-established or not.<sup>93</sup> For example, the CPD could explain to its officers that “citizens are the owners of government and . . . public officials owe a fiduciary duty to act in . . . [the general public’s] . . . best interest.”<sup>94</sup> As such, it would be a breach of duty for a mere agent (the nominal plaintiff-CPD or defendant-officers) to impair the rights of its principal (the general public, whose interested are represented by a real party in interest-injured citizen).<sup>95</sup> Better protecting complainant autonomy, therefore, helps to avoid future rights violations and litigation due to dignitary gains: especially by real parties in interest-injured citizens and the general public.

Another reform option is for the nominal plaintiff-CPD to assure that defendant-officers learn from police complaints that are made by real parties in interest-injured citizens.<sup>96</sup> The nominal plaintiff-CPD may do so by running the numbers on police complaints about defendant-officers and finding out what types

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92. See Bishop, *supra* note 39 (explaining, implicitly, that a low-cost designation could arise from “reaching economic decisions by comparing the costs of doing something with its benefits (cost-benefit analysis.”).

93. Other U.S. jurisdictions, such as the State of New Jersey, acknowledge the existence of various related rights and protect them against unjustified impairments. See generally Sally Herships, *Update: NJ Police Complaint System Broken*, WNYC NEWS (Feb. 12, 2013), <https://www.wnyc.org/story/269147-2-nj-police-complaint-system-broken/> (“The rules for filing complaints against police in New Jersey are what they should be, according to Alex Shalom, a lawyer and investigator with the ACLU. Citizens can file . . . by phone, anonymously, or even through a third-party.”).

94. Hoffman, *supra* note 69, at 49 (2017).

95. See Emmanuel, *supra* note 15 (explaining that a “union recently halted a city effort to grant requests for police misconduct records dating back to the 1960s, arguing that the city violated . . . [a CPD-police] . . . union agreement.”).

96. See Rob Arthur, *How To Predict Bad Cops In Chicago*, FIVETHIRTYEIGHT (Dec. 15, 2015), <https://fivethirtyeight.com/features/how-to-predict-which-chicago-cops-will-commit-misconduct/> (explaining that “a data-driven mechanism to reduce police misconduct would be extremely valuable to the Chicago Police Department and the City of Chicago.”).

of actions, or inactions, cause police complaints to be filed in the first place.<sup>97</sup> Such an approach also could help police tortfeasors to learn from their errors, which may translate into informational gains for the nominal plaintiff-CPD and defendant-officers.

Lastly, the nominal plaintiff-CPD could move away from having defendant-officers deal with complaint intake at all.<sup>98</sup> It may do so, at little-to-no-cost, by turning over these data-collection responsibilities to U.S. law schools, other legal service providers and state agencies such as the Illinois Criminal Justice Information Authority.<sup>99</sup> Using law schools to do all initial intake work may prove to be a particularly-inspired choice, especially if the Albany Law School serves as the model for how to draft and characterize police complaints.<sup>100</sup> Potential benefits include efficiency gains by real parties in interest-injured citizens, the nominal plaintiff-CPD and even some of the defendant-officers.<sup>101</sup>

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97. See Emmanuel, *supra* note 15 (“[Former Chicago] Ald. Will Burns (4th) . . . said . . . that the [current CPD-police union] contract should be reviewed to allow authorities to suspend or fire cops with too many complaints as well as officers subject to excessive force lawsuits settled by the city”).

98. Compare Mock, *supra* note 37 (explaining that the “requirement to meet personally with a government agent . . . [have that agent draft and characterize the police complaint] . . . and sign an affidavit is not applied across other Chicago government agencies.”) with Rachel Moran, *Ending the Internal Affairs Farce*, 66 BUFF. L. REV. 837, 854 (2017) (finding that “allowing officers within the same police department to investigate each other presents a variety of problems throughout the entire complaint process, from intake to investigation to decision-making and discipline.”).

99. See Johnson, *supra* note 50, at 5 (“Fortunately, each of these data-collection issues may be overcome by employing solutions that are grounded in practice. Several examples may be found in legal clinics, especially when law students are used to collect . . . third-party data . . . [about police misconduct].”). One potential distribution of authority would allow law school clinics to do police complaint intake, other legal service providers to track complaints after their submission and for state agencies to analyze how these complaints are resolved.

100. See Albany Citizen’s Police Review Board, ALBANY LAW SCHOOL, <http://www.albanylaw.edu/centers/government-law-center/citizens-police-review-board> (“In a unique arrangement, the Government Law Center of Albany Law School provides substantial support services to assist the [Albany Citizen’s Police Review] Board in its duties and responsibilities.”) (last visited Feb. 16, 2019).

101. Studies suggest that police misconduct may arise from poor educational attainment, as opposed to merely poor training and oversight, since college-educated officers have fewer issues than others. See generally John L. Hudgins, *Require College Degrees For Police*, BALTIMORE SUN (Sep. 30, 2014), <http://www.baltimoresun.com/news/opinion/oped/bs-ed-police-degrees-20140930-story,amp.html> (“Numerous studies conducted since the 1970s have suggested that the benefits of

But, as this author anticipated in a 2013 article, such reform efforts may be limited when:

[The nominal plaintiff-CPD does not] avoid situations that distort third-party data. For example, third-party data may be less accurate when regulators and [defendant-] officers share office space. It also may have limited usefulness when data collection is not done in a timely manner or employs substandard procedures. Lastly, third-party data may be less effective when there are costly barriers to [real parties in interest-injured citizens raising claims with the nominal plaintiff CPD].<sup>102</sup>

If these problems could be overcome, at least with respect to the police complaint intake process in Chicago, then the nominal plaintiff-CPD may restore the traditional distribution of legal rights. This distribution accepts that each real party in interest-injured citizen has the initial right to draft and characterize any police misconduct allegations that are made about the defendant-officers. This traditional distribution of rights has been acknowledged, and fully-upheld, in numerous contexts within the U.S. legal system. These contexts include administrative, civil and criminal proceedings, which each acknowledge that injured parties are the masters of their own complaint.<sup>103</sup> An example of a case in point is *Keeley & Sons, Inc. v. Zurich American Ins. Co.*<sup>104</sup>

### CONCLUSION

In closing, since the nominal plaintiff-CPD purports to have the ability to properly-sort police misconduct allegations under the scaled-down process that is used to resolve these types of administrative complaints, this Article takes the agency at its word and defers to CPD expertise. This Article, thus, does not seek to challenge the nominal plaintiff-CPD's right to place jurisdictional limits upon its own adjudicative processes. Nor does it assume, in cases where complainant autonomy is not fully-protected in administrative settings, that a real party in interest-

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higher education in policing include: better behavioral and performance characteristics, fewer on-the-job injuries and assaults; fewer disciplinary actions from accidents and use of force allegations, greater acceptance of minorities and a decrease in dogmatism, authoritarianism, rigidity and conservatism.”).

102. Johnson, *supra* note 50, at 4.

103. See generally 409 Ill. App. 3d 515 (5th Dist. 2011) (finding that Illinois courts “must respect the traditional notion that the plaintiff is the master of his complaint, thereby free to choose his own theory of liability so long as the evidence supports it.”).

104. *Id.*

injured citizen has no other way to hold defendant-officers to account. The Article, merely, questions the wisdom of the nominal plaintiff-CPD's decision to limit the type, quality and quantity of information that may be added to the public record by a real party in interest-injured citizen through their police complaints.

Among the benefits of allowing real parties in interest-injured citizens to describe the full range of harms that have been imposed upon them by defendant-officers is that the nominal plaintiff-CPD may be put on notice about the high cost of any bad police work. As such, this Article argues that complainant autonomy should be fully-protected because it has the potential to limit any such cost, regardless of whether this right is clearly-established or not. One reason is the nominal plaintiff-CPD may no longer claim to be unaware of misconduct by defendant-officers, at least once a real party in interest-injured citizen has the ability to add previously-ignored information to the administrative record. Adding such information helps to assure that each real party in interest-injured citizen, just like all defendant-officers and the nominal plaintiff-CPD, has a chance to shape the record.

In laying out its argument, which focuses upon the police complaint intake process in Chicago, the Article also identifies a novel approach to CPD reform. It does this work by letting defendant-officers know what is legally-required of them, removing any ability for police to limit the legal claims that are raised by real parties in interest-injured citizens and using all relevant and probative information to inform the administrative work of the nominal plaintiff-CPD. These reforms help to overcome a range of issues, such as conflicts of interest, behavioral economic biases or path dependency, which arise from the nominal plaintiff-CPD's complaint intake process.

The Article, lastly, explains why such reforms may be cost-effective. There are, at least, three reasons why. First, these reforms reduce transaction costs.<sup>105</sup> These reforms also produce fewer opportunity costs, which is the idea that the "true cost of something is what you give up to get it."<sup>106</sup> Lastly, each provides a potentially low-cost way to better protect complainant autonomy.

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105. Bishop, *supra* note 39.

106. *Id.*