

**CHICAGO CITY COUNCIL
COMMITTEE ON PUBLIC SAFETY**

HEARING:

Creating a Community Commission
for Public Safety and Accountability

DATE:

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TESTIMONY OF BARRY FRIEDMAN

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Honorable Members of the Chicago City Council:

You have asked me to testify about public oversight of policing in the context of a proposed ordinance to create a Community Commission for Public Safety and Accountability (CCPSA). I would first like to tell you about myself and the work my organization does, both here in Chicago and elsewhere in the country. I am then going to explain the concept of “front-end accountability” that defines all our work. I will explain why the CCPSA is a vital element of front-end accountability here in Chicago. Finally, I’m going to speak to the District Councils that the ordinance would create, and how they also will help with another important initiative here in Chicago, the Neighborhood Policing Initiative.

Background for Testimony

I am the Jacob D. Fuchsberg Professor of Law and Affiliated Professor of Politics at New York University School of Law. For over thirty years I have taught a number of courses relevant to this legislation, including Constitutional Law, Criminal Procedure, and Democratic Policing. I

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also am the author of numerous publications, in both the scholarly and public realm, about regulating policing. Among them is my book *Unwarranted: Policing Without Permission*, which calls for just the sort of oversight that CCSPA would provide.

Perhaps most germane, I also am the Faculty Director of the Policing Project at NYU Law School. Our mission is to “partner with communities and police to promote public safety through transparency, equity, and democratic engagement.”¹ We conduct research, but also do work on the ground all over the country, both with policing agencies and the communities they serve, to promote democratically-accountable policing. Ours is an all-stakeholders approach. Everywhere we work, we endeavor to do so both with communities affected by policing, *and* with the police themselves. In that way we hope to move the needle toward greater public safety that is just, non-discriminatory, and effective. We have worked on projects in (among other places) Cleveland, Tampa, Tucson, Los Angeles, and New York. But nowhere is our mission more in evidence than the work we have been doing here in Chicago. On the one hand, we have assisted the Grassroots Alliance for Police Accountability in drafting this ordinance. We tried to work as good partners to think through what such a commission ought to look like to perform effectively here in Chicago. I hope we offered some useful perspective, but we also learned from GAPA in the process. At the same time, we have worked very closely with the Chicago Police Department on their Neighborhood Policing Initiative, about which I will say a bit more later. In the course of our work on both these projects, we have convened a number of meetings, either between GAPA and CPD personnel, or between CPD and other community members.

I want to stress the fact that our work seeks to bring people together. There has been a lot of strife around policing, both in this city and throughout the country. But we cannot all be safe

¹ *Our Mission*, Policing Project, www.policingproject.org/about-landing.

unless communities and police learn to “co-produce” public safety together. That is precisely the approach we seek to foster. If you are interested in the full scope of our work, you can learn more at our website, www.policingproject.org.

I would be remiss if I did not, at the outset, express gratitude to the foundations here in Chicago that funded our work, and are supporting so much other good work to make Chicago a safe and better place. From the start the Joyce Foundation and the John D. and Catherine T. MacArthur Foundation carried both these projects along; recently we were happy to obtain additional support from the Polk Bros. Foundation and the Pritzker-Pucker Foundation.

The Need for “Front-End Accountability”

An ordinance like that proposed to create the CCPSA is a form of “front-end accountability” that is at the core of the Policing Project’s mission. To explain why that is, I would like to draw an important distinction between what we refer to as “front-end” as opposed to “back-end” accountability. That distinction is particularly important here in Chicago, which already has a number of oversight bodies, and so one might legitimately ask, “why one more?” Let me explain the concept generally, then I will turn to Chicago.

There has been a great deal of concern in the country over the last few years about the impact of policing, but I think it is fair to say that perhaps nowhere has that concern been more acute than in this city. The issues about which concern has been expressed here run the gamut. They include use of force, pedestrian and traffic stops, interrogation practices, the use of technology like cell-site simulators or facial recognition to conduct surveillance, and overall transparency.

When issues like these are discussed, the word “accountability” often is used, but in truth there are at least two different forms of accountability, and they are very different. Most of what

we hear about concerning policing—here and elsewhere—is “back-end accountability.” The police have done something that people feel is wrong, and they want to assign responsibility and see that responsive action taken. Examples include proceedings in court to exclude evidence that is obtained unlawfully, or the criminal prosecution of officers, or federal investigations, or civil rights suits against officers or the department and the city, or investigations of alleged police misconduct by bodies like the Civilian Office of Police Accountability, or audits by Inspectors General, or court-appointed monitors.

You have bodies like this aplenty in Chicago; I will say more about them in a moment. But for now, notice: all of these are aimed at accountability *after-the-fact*, after something has happened. Again, their job is to assign responsibility if indeed anyone is responsible, and to impose some sort of resolution.

As I argue in my book *Unwarranted*, and in my scholarly writings, what has been almost entirely missing from policing throughout this country’s history is accountability of a very, very different sort. Front-end accountability. This absence of front-end accountability around policing is ironic, because that is the sort of accountability we find most prominent in the rest of government. Front-end accountability means sound, public, decision-making before agencies act. Before anything goes wrong. Indeed, the whole point of front-end accountability is to try to keep things from going wrong in the first place. The most familiar form of front-end accountability is what this body does: enact legislation. And three things are true of that sort of lawmaking: (1) the public and its representatives have a voice in what is adopted; (2) the rules themselves are transparent, which is to say we all know what they are; and (3) we do our utmost best to make sure the laws do more good than harm, that they make sense, sometimes through the use of a technique such as cost-benefit analysis.

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That is exactly what most people think of when they think of democratically-accountable government. Lawmaking by public officials in a way we can all watch and comment upon, with the goal of bettering society.

Although this sort of thing is common in society, around policing not so much. We delegate power to the police in the most general of terms, asking them to assure public order and safety, such as in Chicago's Municipal Code § 2-84-220, which provides that the police should "preserve order, peace and quiet and enforce the laws and ordinances throughout the city." But as is true here, we give them almost no direction about how to do this. The police of course have expertise in law enforcement, just as all agencies of government are expert in their fields. All agency officials deserve a certain amount of deference and exercise a certain degree of discretion. Still, with most agencies other than the police, we do not let them just do what they choose, and then try to fix problems after they crop up. Rather, we always rely on this sort of front-end accountability to provide guidelines and create guardrails. We have back-end accountability throughout government too, of course: lawsuits and oversight hearings and the like. But it is simply unthinkable that the rest of government would run without front-end accountability.

It is worth reviewing some of the reasons that front-end accountability is essential, because these are equally true of the police as of all other agencies.

First, there is our basic commitment to democracy. In administrative government we properly rely on the expertise of the dedicated public servants who act in our name. But it is a fundamental principle of American governance that the public sets the rules and standards by which those agencies act. And that happens transparently. Governance is not supposed to happen in secret, out of view of those who are governed. Policing is no different, although it may have

special needs for secrecy in some situations, which I am delighted to discuss should it become relevant.

Second, that commitment to democracy assures the basic level of legitimacy that government requires in order to act effectively. Government is supposed to be a collaboration between the governed and the governors, in which public participation assures the legitimacy of the actions government takes. If anything, this is more true, not less so, around policing. We have all seen the difficulty of policing when the public resents the police and refuses to cooperate, because they question the legitimacy of what the police are doing. The Task Force on 21st Century Policing appointed by President Obama called for the “co-production” of public safety to address this issue. That is precisely why we at the Policing Project are currently working with the City of Chicago, the Chicago Police Department, and grassroots activists to establish neighborhood policing in this city.

Third, we simply get better decisions when decision-making is open to many voices, even (or especially) dissenting ones. Agencies are mission-oriented, and the police are—again—no different. We want them to be that way. But mission-orientation also can lead to tunnel vision if decisions are isolated from public and critical views. People affected by policing have a lot to offer about what works and what does not, and it is essential to hear those voices and their views in order to formulate the best policy.

Finally, front-end accountability is particularly important when systemic change is the issue. Sometimes when there is a problem or something bad happens, it is because a very specific thing went wrong; perhaps someone failed to follow policy, with bad results. But sometimes, problems happen because policy or procedure needs to be fixed. When that is true, rather than there being one problematic incident, there may be several. So, to give an example from policing:

a police department could have a perfectly good use of force policy, and excellent training, but an officer could deviate with tragic results. Or, a department could have inadequate policy or training. Each of these problems calls for different solutions; the former largely calls for some form of back-end accountability, while the latter cries out for front-end attention.

One last point that is going to become particularly important here. Front-end and back-end accountability are supposed to work together. One reason back-end accountability fails is because the rules are not clear up front. Many people are discontent with back-end accountability around policing, but a large part of the problem in my view is that front-end standards either are not clear enough, or do not operate with sufficient democratic legitimacy. On the other hand, back-end review when things have gone wrong often point out the need for new front-end measures. Any healthy system has front-end and back-end accountability, as well as both systemic policy-making and incident level review.

Two Models of Democratic Governance

I have been speaking generally about democratic governance and front-end accountability, but in this country, and this city, there are two basic models of how this operates. (There are more, but these two are both sufficient and essential to evaluate this proposed ordinance.)

The first model is, as I said, legislative. Elected bodies pass laws that govern all of us, including those who govern in our name. That model obviously is familiar to this Council; that is your job.

The second model is administrative. Under an administrative model, legislative bodies delegate authority to administrative agencies to do the regulating. This model often is thought to be more manageable in complex and changing areas not susceptible to constant legislative monitoring, and it takes advantage of agency expertise. Legislation instructs the administrative

agency in broad terms what is to happen, then the agency adopts rules and regulations, and engages in enforcement, to see that the legislative will is carried out. Agency regulation can happen in a number of ways, but the most common is through notice-and-comment rulemaking. The agency proposes a rule, the public (especially affected parties) are permitted to comment, and the agency then reviews those comments and adopts a final rule. Although the agency need not adopt the public's views, the rule of law requires the agency to explain publicly the reasons it went with its final version, especially when it rejects others' views. (Often there is judicial review of this sort of process.)

In most places in the country, the police department is an agency of government, like any other. But in most places in the country, the police do not act like an agency, which is to say they do not solicit public input into their policies. They simply adopt which policies they wish. There are exceptions. The Policing Project was asked by the NYPD to engage in a form of notice-and-comment rulemaking around its body camera policy. We created a survey that was made available to New Yorkers, and also created a portal for more elaborate comments. We received some 30,000 surveys, and comments from about 50 organizations. We then wrote a report summarizing all of this.² Ultimately the NYPD considered those views, and released its own report summarizing what it had done, and why.³ We have done this sort of thing in other cities.

In some jurisdictions in this country, however, there is a variant of the administrative model, which is that the city has a commission of lay individuals, which engages in rulemaking

² POLICING PROJECT, REPORT TO THE NYPD SUMMARIZING PUBLIC FEEDBACK ON ITS PROPOSED BODY-WORN CAMERA POLICY (Apr. 2017), <https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/59ce7edfb0786914ba448d82/1506705121578/Report+to+the+NYPD+Summarizing+Public+Feedback+on+BWC+Policy.pdf>.

³ NYPD, NYPD RESPONSE TO PUBLIC AND OFFICER INPUT ON THE DEPARTMENT'S PROPOSED BODY-WORN CAMERA POLICY (Apr. 2017), https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/body-worn-camera-policy-response.pdf.

for and with the police department. That is the model in Los Angeles and San Francisco. There is an advisory variant in Seattle. And that is the sort of model you are considering here today.

Policing Accountability in Chicago and the Role for the CCPSA

The role that the CCPSA would play in Chicago may be apparent by now, but I want to say a few words more. And I want to use that as a springboard for answering what undoubtedly is a primary question on your mind: with so many oversight bodies in Chicago, why ought there to be yet one more?

The Police Accountability Task Force set out in detail the troubled history between the Department and the community in Chicago and the concomitant loss of trust and legitimacy. The Report of the U.S. Department of Justice Civil Rights Division did the same. The PATF report was fully cognizant of the many oversight bodies in this city, and recommended some unification and the creation of a Community Safety Oversight Board.

Although both those reports show a compelling need here in Chicago, I would in a sense like to step past them because I don't think a city needs to have a troubling history to create a police commission like the CCPSA proposed here. What I said about the value of front-end accountability justifies creation of such a body in any jurisdiction, no matter how warm the relationship between the community and the police. My reasons offered earlier in support of front-end accountability do not rest in making up for past problems. They rest in sound democratic governance.

And indeed, I do not think the word "oversight" is entirely appropriate here—I'm glad this ordinance does not use it.⁴ Oversight involves second-guessing. That is the sort of thing that is

⁴ I also dislike the use of the word "civilian" around domestic policing. "Civilian" gets used in contrast to the "police." That's the sort of terminology you hear around the military but the police are not the military and we are not an occupied land. As Sir Robert Peel, the patriarch of modern policing who helped create London's Metropolitan Police

common in back-end accountability. Do not get me wrong, every healthy governmental system—and many in private industry—have back-end oversight mechanisms. They are part of sound governance.

But front-end accountability is and can be and should be more collaborative from the outset, and much less about second-guessing. A careful reading of this ordinance shows the expectation that CCPSA and the Department will collaborate on the making of policy. It shows the interlocking relationships and roles of other governmental actors in critical matters like choosing the Superintendent, the Police Board, and the head of COPA. When I travel around the country and talk with cops—from the rank-and-file to the brass, there often is reluctance about back-end accountability. That’s natural, no one likes to be second-guessed—even if second-guessing is part of sound administration, and back-end accountability is part of life. But I find much less reluctance and much more acceptance around the idea of front-end accountability, precisely because it aligns with democratic ideals and is collaborative by nature.

And it is for this sort of reason that I believe that a body like CCPSA can play a valuable and essential role in Chicago, even though there are bodies like the Police Board, of COPA, and the Office of the Inspector General (OIG). There are at least five reasons for this.

First, all of the bodies currently created by ordinance in Chicago are back-end accountability bodies. COPA investigates allegations of police misconduct. The Police Board reviews instances of police discipline. The OIG’s Office of the Deputy Inspector General for Public Safety analyzes disciplinary investigations and audits police policies and practices that have already been implemented. None of them is explicitly designed to work on the front end,

said almost two hundred years ago, “the police are the public and the public are the police.” If we cannot all learn to stop separating ourselves, and to work together, we will not achieve real public safety.

with independent agenda-setting authority to address whatever seems necessary regarding the Department's authority.

Second, for the most part the existing bodies are directed at responses to individual incidents, not to the sort of systemic change I described earlier. That is most definitely true of the Police Board and COPA and to some degree is true of the OIG as well—though, as I'll explain in a moment Chicago's Deputy Inspector General for Public Safety does a great deal more.

Third, these other bodies are for the most part not offering up policy recommendations. It is indeed notable how seldom the Police Board or COPA recommend policy direction. Generally speaking there simply is not a culture of Department policy being made outside of the Department itself. The OIG *is* an exception; the Public Safety Section has both set an agenda and recommended policy on a number of subjects, including CPD's "Gang Database" and the process for internal affairs investigations.

Fourth, given the novel selection method set out in the ordinance, CCPSA will have a notable amount of democratic legitimacy. What is largely missing around policing in this country is democratic accountability—that representatives of the people have a say in how policing occurs. Such democratic legitimacy is important to effective policing, and a body like CCPSA would provide such legitimacy.

Finally, there is a difference between recommending and adopting. The CCPSA will have authority to adopt department policy. That puts the decision about how the community is policed in the hands of the people of Chicago. As with all other policy decisions, that is where it belongs.

That said, the Commission will be foolhardy if it even seeks to exercise that authority without making every effort to work collaboratively with the Department, and the ordinance wisely calls for that to be the case. There is an enormous amount of accumulated knowledge, experience,

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and wisdom within the Department, and one hopes that given the reforms currently underway, that will only increase with time. Democratic governance is an exercise in merging expertise and know-how with popular sentiment. This ordinance does as much as any I have ever seen to make use of both those valuable tools.

Possible Concerns

I know that the purpose of this hearing is about “oversight” in general, rather than a close focus on this ordinance, but I thought I would offer some thoughts about a few concerns I can imagine would be expressed about the CCPSA.

First, there is already a court-appointed monitor working with the Department on policy reform. Is there a danger the CCPSA will conflict with that process or overburden the Monitor or the Department?

I think not. Under this ordinance the soonest the CCPSA will be sworn in will be sometime in the fall of 2021. That relies on many things going without a hitch. Then, once sworn in there will be a learning curve. Much is to be done, from staffing up to obtaining training for the CCPSA members and staff. I cannot imagine that the CCPSA is in a position to even begin to set policy on anything until 2022. That is two years from now, which strikes me as ample time for the Monitor and the Department to do much of the work around Department policy (as opposed to other components of the Consent Decree.) Even yet, the ordinance carefully gives precedence to the work of the Monitor. Indeed, my only hope is the Monitor also finds space to work collaboratively with the CCPSA to help them get up to speed.

Second, does this jeopardize the safety of Chicago in any way, by putting policy in the hands of those who are not themselves law enforcement. This is a concern one might express about any public-led public safety body.

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Again, I think not. To begin with, this is hardly the first police commission of this sort in the United States. There are any number of commissions in places like San Francisco and Detroit. I particularly admire the Los Angeles commission, which over time has accomplished some real good and developed a very sound working relationship with the LAPD. People who do the work to end up on commissions like this quickly learn that the task is a large one. If anything, they look to others for support. I hope both the communities of Chicago and the officials in the Department embrace the collaborative spirit and learn from one another to make Chicago actually safer than it is today.

This is an experiment. It is not unprecedented, though the form this Ordinance takes is unique to Chicago. In reading it, I recall the words of Justice Oliver Wendell Holmes, Jr. in *Abrams v. United States*, a case in which the United States government punished criminally a protestor to World War I. In one of the most famous judicial dissents in this country ever, Holmes—whose views ultimately found much more favor in our First Amendment—said referring to the Constitution itself, “It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge.” If all goes well, then looking back years from now, the people of Chicago, those who wear blue and those who do not, will come to believe this was a great exercise in healing, in collaboration, and in improving the quality of public safety.

The District Councils and the Neighborhood Policing Initiative

I’d like to say one last word about one aspect of the Ordinance that is uniquely Chicago, which is the creation of the District Councils. The genesis of these Councils was two-fold: in identifying a means of selecting the members of the CCPSA that gave it the broadest possible

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imprimatur of legitimacy, and in fostering the widest possible engagement between police and community.

Without diminishing their value as part of CCPSA, I want to point out the inestimable value those Councils will have with regard to one of the Department's most consequential initiatives, what is being called the Neighborhood Policing Initiative, or NPI. NPI is a comprehensive model for community and neighborhood policing that is meant to bring CPD officers into constant touch with community members to identify and solve neighborhood problems, and to allow the community real say in how it is policed. Part of NPI's structure at present is a set of Community Ambassadors who stay in dialogue not only with the Department's District Coordinating Officers, but with the District Command as well.

It is a large burden for community members to perform this sort of ongoing work and it is a challenge identifying those who do so.

One of the merits of the District Councils is that it is expressly their mandate to perform this sort of work. There is provision for three elected members, who receive some small compensation for their hard work. And there is a means to enlarge that group through adjunct members. Over time, that structure, when married to the Department's own ambitious efforts to put in place true community and neighborhood policing, is likely to strengthen the ties between the communities in Chicago and those who have sworn to help keep those communities safe.

Conclusion

I want to thank you for the opportunity to testify today. The question of public participation in public safety that you are considering is extremely consequential. We would of course be willing to provide any other information that could be of use.