To: Illinois Legislative Task Force on Constitutional Rights and Remedies
From: Craig B. Futterman, University of Chicago Law School
Date: November 27, 2021
Subject: Task Force Recommendations

I. RECOMMENDATION

The Task Force on Constitutional Rights and Remedies should recommend that the General Assembly pass H.B. 1727, the Bad Apples in Law Enforcement Accountability Act (“Bad Apples Act”). In addition, the Task Force should consider two amendments to this legislation: first, a provision allowing for punitive damages against individual officers; and second, a provision applying the law to certain other public employees in addition to peace officers. (I’m not making a specific recommendation about whether to apply this bill to other public employees, or to which types of employees the law should apply, but this is a topic worthy of discussion and consideration by the General Assembly.)

The Legislature should pass the Bad Apples in Law Enforcement Accountability Act for three reasons. First and foremost, it would provide a real remedy to victims of constitutional violations in Illinois, as contemplated by the Illinois Constitution. Second, it would promote accountability and prevent constitutional violations in Illinois by imposing civil liability upon public employers when their employees violate the Illinois Constitution and by creating incentives for police departments and other local governmental bodies to ensure that their employees comply with the Constitution.

1 University of Chicago law students, Vatsala Kumar and Katherine Koza, provided substantial assistance in preparing these recommendations to the Task Force.
2 See H.B. 1727, 102nd Gen. Assemb., Reg. Sess. (Ill. 2021). The Bad Apples in Law Enforcement Accountability Act seeks to create a five-year statute of limitations, but the Task Force may wish to consider a two statute of limitations instead, because it would align with the statute of limitations in most Illinois personal injury and tort claims. See, e.g., 735 ILCS 5/13-202 (“Actions for damages for an injury to the person . . . shall be commenced within 2 years next after the cause of action accrued . . . .”).
3 ILL. CONST. art. I, § 12 (1970) (“Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly.”).
Third, this legislation would promote trust between community members and police officers, which in turn improves officer effectiveness in protecting public safety throughout Illinois.

II. REASONING

The primary basis for my recommendation is straightforward: Illinois residents should have redress when their most fundamental rights are violated.

a. Qualified immunity has denied court access to Illinois residents who have suffered constitutional violations.

Qualified immunity is an affirmative defense created by federal judges, which has denied the opportunity for a remedy to thousands of victims of federal civil rights violations. The United States Supreme Court has held that qualified immunity protects “all but the plainly incompetent” defendants, and those who “knowingly violate the law.”

When courts evaluate qualified immunity, they consider two questions. First, was there a constitutional violation? This question applies to all constitutional cases, irrespective of qualified immunity, so it does not bear on our analysis here. Qualified immunity’s true impact lies in its second question: did the defendants violate a “clearly established” right? In practice, this frequently results in courts asking whether a case with nearly identical facts has been previously decided by the governing federal circuit court of appeals (in Illinois, the Seventh Circuit) or United States Supreme Court; if it has not, the defendant is entitled to qualified immunity, even when the defendant has violated a person’s constitutional rights. This is a high bar. As a result, qualified immunity poses a major hurdle to individuals who have suffered civil rights violations because “it generally requires them to identify not just a clear legal rule but a prior case with functionally identical facts.” As explored below, this doctrine has denied Illinois residents who have had their constitutional rights violated their ability to have their case heard.

6 Id.
7 Id.; see also Pearson v. Callahan, 555 U.S. 223 (2009).
b. Qualified immunity has caused real harm to real people in Illinois.

As detailed in the memorandum my law students and I submitted to the Task Force last month,\(^9\) qualified immunity has had a direct and harmful impact on individuals in Illinois. Tadeusz Glozek was killed as a result of a high-speed car chase where the officer did not use his lights or sirens, but qualified immunity prevented his family from getting any redress.\(^10\) Lemia Britt’s private photos were taken from her cell phone by an officer and placed on his own phone for his pleasure, but qualified immunity denied her any justice from this violation.\(^11\) Terrell Eason was shot by officers six times and killed simply because he was fleeing and had a gun, but qualified immunity denied his estate a trial or remedy.\(^12\) The Duran family and their guests were subjected to false arrests and excessive force during a Baptism party, but qualified immunity denied them their day in court.\(^13\) Sharnia Phillips was forced from her home in the middle of the night while officers ransacked her home pursuant to a warrant, but qualified immunity prevented her from pursuing justice for the officers’ illegal search and invasion of privacy.\(^14\) Robert Bills, a fifth-grader, was interrogated daily for five days—and forced to give a false confession—about a fire he did not start, but qualified immunity denied him justice.\(^15\) Patrick Dockery was Tased four times for patting an officer on the shoulder, but qualified immunity denied him any redress for this excessive force.\(^16\) James White was tackled and severely injured by officers in his own home because he denied them access without a warrant, but qualified immunity denied him his day in court.\(^17\) Regina Warlick was arrested as a result of a wrong warrant and planted evidence, but qualified immunity denied her justice.\(^18\) Jonathan

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\(^18\) Warlick v. Cross, 969 F.2d 303 (7th Cir. 1992).
Catlin was brutally handcuffed by plainclothes officers who did not identify themselves, but qualified immunity denied him the right to pursue excessive force and false arrest claims.\textsuperscript{19} Catherine Brown was cursed at, maced, kicked, arrested, and threatened with a gun while her children sat in the car, but qualified immunity denied her the right to seek justice.\textsuperscript{20} Andy Thayer and Bradford Lyttle were falsely arrested for participating in a peaceful rally, but qualified immunity denied them a trial or remedy.\textsuperscript{21} Rosalyn Graham was detained and interviewed for several hours while trying to purchase a gun, but qualified immunity denied her any Fourth Amendment redress.\textsuperscript{22}

These cases represent only a small sample of the countless individuals who have been impacted by qualified immunity. The real number of individuals impacted is unknowable, as many individuals do not even get to file a claim, let alone obtain redress for the violations against them. Over the past twenty-plus years that I have directed the Civil Rights and Police Accountability Project at the University of Chicago Law School, civil rights practitioners and victims have regularly shared stories with me of cases that they did not bring because of qualified immunity, despite the existence of serious constitutional violations and harm. While I am unable to quantify the number of times Illinois attorneys reject meritorious claims for these reasons, I can confidently state that these rejections occur numerous times every month. Civil rights attorneys also routinely complain about the costs and delays imposed by qualified immunity that prevent them from bringing meritorious cases, because defendants can repeatedly appeal orders denying qualified immunity on an interlocutory and piecemeal basis, increasing plaintiffs’ cost and time investments for years before they may finally secure their right to a trial.\textsuperscript{23}

\textsuperscript{19} \textit{Catlin v. City of Wheaton}, 574 F.3d 361 (7th Cir. 2009).
\textsuperscript{22} \textit{Graham v. Blair}, Nos. 10-cv-772, 10-cv-780, 2011 WL 6888528, at *1 (S.D. Ill. Dec. 28, 2011). As explained in our October 27, 2021 memo to the Task Force, we present these examples based on the facts alleged by the civil rights plaintiffs, just as courts are required to do when evaluating a defense motion to dismiss or for summary judgment on the basis of qualified immunity. \textit{See Ashcroft v. Iqbal}, 556 U.S. 662, 664 (2009); \textit{Anderson v. Liberty Lobby, Inc.}, 477 U.S. 242, 255 (1986).
c. Qualified immunity exacerbates the problem of police accountability in Illinois, erodes public trust in the police, and harms public safety, by sending a message that the police are above the law.

The role of police officers is unique, in that they have the awesome powers—to arrest people, to take their freedom, to use force, and even to kill people—in order to protect and serve the people of Illinois. With great power comes responsibility and accountability to the public. However, qualified immunity protects officers who have violated the Illinois Constitution, and has exacerbated Illinois’s challenges with police accountability.

Chicago’s long history of systemic police abuse, including a period of documented torture, ultimately led to a civil rights investigation by the United States Department of Justice (DOJ), which found in its 2017 report that the Chicago Police Department (CPD) “has engaged in a pattern or practice of unreasonable force” disproportionately borne by Black and Brown Chicagoans, tolerated racially discriminatory conduct, and has maintained dysfunctional systems of accountability that have not only hurt people, but also undermined police legitimacy. This report resulted in a federal Consent Decree between the State of Illinois and City of Chicago that mandates numerous changes to CPD policies and practices to remedy these violations and “to foster public trust.” Despite the Consent Decree, CPD has continued to lag in its reforms, denied the reality of ongoing abuse, and resisted change.

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Problems with police accountability and racial bias extend beyond Chicago. Just last year, the Illinois Department of Transportation found that police throughout the state of Illinois pulled over Black people 2.76 times as often as White people, and Hispanic or Latino individuals 1.413 times as often as Whites.\(^27\) Across Illinois, Black individuals are ticketed and searched more often than White individuals, but are less likely to have illegal drugs or contraband.\(^28\) The disparities are even worse for pedestrian stops: statewide, police stop Black pedestrians \textit{twenty-one} times more often than White pedestrians.\(^29\) And police departments throughout Illinois continue to grapple with misconduct and lack of accountability.\(^30\)


\(^{28}\) Kristin Crowley, \textit{13 Investigates: Traffic Stop Study to Track Racial Profiling May Miss the Mark}, 13 WREX (Feb. 10, 2021), https://www.wrex.com/news/13-investigates/traffic-stop-study-to-track-racial-profiling-may-miss-the-mark/article_080f2e0b-9925-5c2d-9b6b-bbef37bba2c4.html (noting that in Freeport, Winnebago, Ogle, Rockford, Belvidere, and others, officers pulled over, ticketed, and searched Black drivers at a far higher rate, but that Black drivers in those areas were less likely to have illegal drugs or weapons than white drivers).


The DOJ has long recognized that “trust and effectiveness in combating violent crime are inextricably intertwined.” By allowing officers to escape liability when they violate the Constitution, qualified immunity erodes public trust in the police and undermines public safety. In contrast, by holding police accountable when they violate the Illinois Constitution, passing the Bad Apples in Law Enforcement Accountability Act would generate trust and enhance officers’ ability to do their jobs. When people see that police are held accountable when they violate the law, they “are more likely to obey the law; they are more likely to trust law enforcement; and they are more likely to work together with law enforcement to improve public safety, such as reporting crime, serving as witnesses, identifying safety concerns, and cooperating with the police in investigations.”

III. ADDRESSING TASK FORCE CONCERNS ABOUT REMEDYING CONSTITUTIONAL RIGHTS

a. Officers are indemnified and do not pay out for violations.

Some Task Force members have raised concerns that police officers will face financial hardship and will leave the force if the General Assembly establishes a remedy for victims when officers violate their Constitutional rights. Those concerns are unfounded. Under Illinois law, public agencies must indemnify their employees and pay compensatory damages and any attorneys’ fees


31 U.S. Dep’t of Just., supra note 24, at 1–2.
32 See id. (public trust in the CPD “has been broken by systems that have allowed CPD officers who violate the law to escape accountability. This breach in trust has in turn eroded CPD’s ability to effectively prevent crime”); see also Craig B. Futterman et al., Youth/Police Encounters on Chicago’s South Side: Acknowledging the Realities, 2016 U. CHI. LEGAL F. 125, 155–56 n. 105 (“Chicago data… reveal that police are least successful in addressing crime in the areas they have the least trust.”).
awarded when police officers or other public employees hurt people while acting within the scope of their employment.\textsuperscript{34} Passing the Bad Apples in Law Enforcement Act would not change the fact that in Illinois, government bodies—not officers—pay compensatory damages when they are awarded.\textsuperscript{35}

Nonetheless, I recommend that the Task Force consider imposing some financial consequence directly upon individual officers in the form of punitive damages, in the limited circumstance in which a jury finds that an officer willfully and wantonly violated a person’s rights. This would require an amendment of the Illinois Bad Apples Act, because the current bill does not authorize punitive damages.

Punitive damages in Illinois are paid by the individual offender and not the municipality,\textsuperscript{36} and may be granted only if the offender acted with “fraud, actual malice, deliberate violence or oppression,” or “willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others.”\textsuperscript{37} Everyone should agree that officers should face individual responsibility when they maliciously violate a person’s rights. If an officer abuses and disgraces their badge by acting so far outside the bounds of human decency as to intentionally and maliciously harm people, the imposition of punitive damages against them sends the unmistakable message to the police and public that this is not who we are. Allowing punitive damages in these limited instances is good for both the public and police.

b. Qualified immunity is unnecessary to insulate officers from liability for genuine split-second decisions.

Notwithstanding the doctrine of qualified immunity, police officers are already protected from constitutional liability when they make reasonable split-second decisions to use force based on the circumstances at the time. The United States Supreme Court has long recognized that, under the

\textsuperscript{34} 745 ILCS 10/9-102.
\textsuperscript{35} Officers outside Illinois would similarly face no financial consequences should qualified immunity be abolished elsewhere, because “they are virtually certain not to pay anything from their own pocket” since governments pay approximately 99.98\% of the amounts that plaintiffs recover. Joanna Schwartz, Ending Qualified Immunity Won’t Ruin Cops’ Finances. It Will Better Protect the Public., USA TODAY (Oct. 14, 2021), https://www.usatoday.com/story/opinion/2021/10/14/qualified-immunity-reform-police-accountability/6001696001; Joanna Schwartz, Police Indemnification, 89 N.Y.U. L. REV. 885 (2014).
\textsuperscript{36} 745 ILCS 10/2-302 (“[N]o local public entity may elect to indemnify an employee for any portion of a judgment representing an award of punitive or exemplary damages.”). Loitz v. Remington Arms Co., 138 Ill. 2d 404 (1990) (citing Kelsay v. Motorola, Inc., 74 Ill. 2d 172 (1978)).
Fourth Amendment to the U.S. Constitution, officers’ decisions may not be judged after the fact by armchair quarterbacks, but must be judged from the perspective of a reasonable officer on the scene based on the totality of the circumstances at the time that the officer made the decision to use force. Officers do not need qualified immunity to insulate themselves from civil liability for reasonable decisions made under stressful, evolving circumstances.

Because a number of Task Force members have raised concerns about protecting police officers from the consequences of difficult split-second decisions, it is also important to note that the frequency of true split-second decisions has been overstated. As an empirical matter, it is rare that external factors make it necessary for officers to make split-second decisions to use force. As Professor Michael Avery recognized nearly twenty years ago, “Reliance on the need for split-second decisions is highly questionable when the actions of the officers have created or enhanced the likelihood of a need for rapid action.”

When police departments train their officers to properly assess situations, to take tactical positions to maximize safety and the opportunity to develop a sound response, and to de-escalate conflict, officers can usually avoid the need for split-second decisions to use force. In practice, split-second decision making is “often compelled by a specific officer’s behavior and also lacks support in policing best practices.” Additional psychological and scientific research “calls into question the wide-spread acceptance of the maxim that police officers are often forced to make split-second decisions.”

38 Graham v. Connor, 490 U.S. 386, 396-97 (1989) (stating that the reasonableness calculus must account for “split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation”).

39 Michael Avery, Unreasonable Seizures of Unreasonable People, 34 COLUM. HUM. RTS. L. REV. 261, 321 (2003); see also id. at 266 (“Sound training minimizes the need for split-second decisions. Untrained officers, or those who forget or disregard their training, are far more likely to exacerbate the tensions inherent in confrontations with emotionally disturbed people and are thus more likely to escalate the risk of a violent outcome.”)

40 Erik Zimmerman, The Incompatibility of the Police Use of Force Objective Reasonableness Standard and Split-Second Decision Making, CRIM. JUST. (forthcoming 2022); see also Jamie Kalven & Eyal Weizman, How Chicago Police Created a False Narrative After Officers Killed Harith Augustus, INTERCEPT (Sept. 19, 2019), https://theintercept.com/2019/09/19/harith-augustus-shooting-chicago-police/ (“The critical point, though, is that it was not criminal activity by Augustus, but aggressive and inept policing that produced the split second in which an officer responded with deadly force . . . .”).

41 Zimmerman, supra note 40 (“Policing researchers have shown through empirical studies that there are concrete steps — such as how an officer points the muzzle of their weapon when confronting someone — that can significantly decrease the chances of making an incorrect split-second decision.” (citing Paul L. Taylor, Engineering Resilience Into Split-Second Shoot/No Shoot Decisions: The Effect of Muzzle-Position, 24 POLICE Q. 185
c. The SAFE-T Act and other reforms do not address this particular issue.

Another recurring theme has been that the Task Force should wait and see how the SAFE-T Act and other recent reforms (such as body cameras, additional training, etc.) play out before passing legislation along the lines that I have recommended. This is a false comparison: the SAFE-T Act and the Bad Apples in Law Enforcement Accountability Act address two entirely different issues and are not equivalent. While I hope and expect that the SAFE-T Act will prevent some constitutional violations, the SAFE-T Act itself does not address what happens when officers commit constitutional violations. Nothing in the SAFE-T Act or other recent reforms provides Illinois residents with a remedy when police violate their state constitutional rights. The Bad Apples in Law Enforcement Accountability Act would fill this gap.

IV. CONCLUSION

The crux of the matter the Task Force is considering is simple: when police violate a person’s constitutional rights in Illinois, should there be a remedy? This is an easy answer—yes.

(Sept. 2020); B. Keith Payne, Weapon Bias: Split-second Decisions and Unintended Stereotyping, 15 CURRENT DIRECTIONS IN PSYCH. SCI. 287 (2006)).