

**Memorandum of Support from
The Legal Aid Society**

To: The New York State Legislature

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**An act to amend the civil rights law, in relation to providing a civil
action for deprivation of rights**

A4331/S1991

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Introduction

George Floyd’s murder came at the knee of a veteran Minneapolis police officer who had been the subject of at least 17 previous complaints of misconduct, most of which were closed with no discipline.¹ Thousands of Black lives have similarly been claimed by police violence in recent years, including Breonna Taylor, Eric Garner, Sandra Bland, Akai Gurley, Tamir Rice, Philando Castile, Michael Brown, Walter Scott, and Tony McDade, among others. Their deaths inspired a global movement for racial justice, a national reckoning with police brutality, and an unequivocal demand to hold officers accountable.² But as millions took to streets this summer to protest police violence, their demands were met with batons, body slams, and chokeholds.³

The brutal and lawless police response to protesters came as no surprise. Law enforcement agencies across the country have operated in a culture of impunity for decades. That culture has festered under the doctrine of qualified immunity, which shields even the worst officers from one of the most effective and widely available mechanisms of accountability – civil lawsuits brought by victims of police misconduct – and denies justice to millions of Black and Brown New Yorkers just as vulnerable to police brutality as George Floyd.⁴

At The Legal Aid Society, we strongly support measures to rein in law enforcement abuse and urge passage of A4331/S1991, a bill that would provide redress to victims of police brutality and government misconduct. At its core, this bill advances the simple and important principle that where there is a right, there should be a remedy. As the nation’s oldest and largest private non-profit legal services agency, and NYC’s primary public defender, Legal Aid is uniquely positioned to share its expertise in this critical area of public policy.

Internal Discipline and a Failure of Accountability

¹ Shaila Dewan & Serge F. Kovaleski, *Thousands of Complaints Do Little to Change Police Ways*, N.Y. Times, June 8, 2020, <https://nyti.ms/38P0iVF>; See also Communities United Against Police Brutality, *Police Complaint Lookup*, Derek M. Chauvin, badge #1087, (last visited Nov. 17, 2020).

² Larry Buchanan, Quoc Trung Bui and Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. Times, July 3, 2020, <https://nyti.ms/3lyf1HU>.

³ Allison McCann, Blacki Migliozi, Andy Newman, Larry Buchanan & Aaron Byrd, *N.Y.P.D. Says It Used Restraint During Protests. Here’s What the Videos Show.*, N.Y. Times, (July 14, 2020) (<https://nyti.ms/38LLjMc>).

⁴ Ashley Southall, Ali Watkins & Blacki Migliozi, *A Watchdog Accused Officers of Serious Misconduct. Few Were Punished.*, N.Y. Times, Nov. 13, 2020, <https://nyti.ms/3pB3gTG>.

Law enforcement agencies in New York state routinely fail to hold officers accountable for misconduct. Internal affairs divisions are typically tasked with handling allegations of police wrongdoing, but they have historically failed to hold officers accountable for their misconduct.⁵

In 1993, New York City created the Civilian Complaint Review Board (CCRB) in an effort to rein in police misconduct. While the civilian agency investigates allegations and makes recommendations for discipline, the NYPD's Commissioner has final discretion on all police disciplinary matters. According to records reviewed by the New York Times, since 2001, the CCRB has brought charges—reserved for the most serious cases of substantiated misconduct—against more than three thousand NYPD officers, yet very few have been seriously disciplined:

- In over 80 percent of cases of alleged misconduct, NYPD refused to honor the disciplinary recommendations of the CCRB.⁶
- Of the 3,188 officers charged with serious misconduct, 890 faced no discipline whatsoever and 798 returned to street duty with warnings and minimal re-training.⁷
- In the last 19 years, *only seven (7) officers* found guilty of charges brought by the CCRB were fired for misconduct, typically after being convicted of a crime or lying during the course of an investigation. The seven officers included Daniel Pantaleo who killed Eric Garner with a prohibited chokehold.⁸
- Punishment for serious misconduct frequently resulted only in lost vacation or internal probation with a warning to stay out of trouble.⁹
- Many officers rose in rank despite multiple CCRB findings against them.¹⁰

⁵ A Human Rights Watch investigation of police accountability across major U.S. cities, including New York City, found that “internal affairs units conducted substandard investigations, sustained few allegations of excessive force, and failed to identify, or deal appropriately with, problem officers against whom repeated complaints had been filed.” Human Rights Watch, *Shielded from Justice: Police Brutality and Accountability in the United States*, June 1998, <https://bit.ly/2IG7Mzh>; See also William K. Rashbaum, Joseph Goldstein & Al Baker, *Experts Say N.Y. Police Dept. Isn't Policing Itself*, N.Y. Times, Nov. 2, 2011, <https://nyti.ms/2UAv5Nr>.

⁶ Southall, Watkins & Migliozi, *supra* note 4.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Joaquin Sapien, Topher Sanders & Nate Schweber, *Over a Dozen Black and Latino Men Accused a Cop of Humiliating, Invasive Strip Searches. The NYPD Kept Promoting Him.*, ProPublica, Sep. 10, 2020, <https://bit.ly/3pyWFZK> (“McCormack is just one of dozens of high-ranking NYPD officers who have risen despite allegations of misconduct in their records.”).

Internal discipline in correctional agencies has been just as ineffective. Since 2015, the New York City Department of Correction (DOC) has been subject to an independent monitor as a result of its flagrant use of force against juvenile prisoners and well-documented failure to discipline abusive staff.¹¹ The monitor arose out of extensive litigation brought by Legal Aid and joined by the United States Department of Justice (DOJ), that detailed a culture of impunity within DOC.¹²

Internal discipline in New York State's Department of Corrections and Community Supervision (DOCCS) has been notoriously ineffective as well, with little transparency in disciplinary procedures and outcomes.¹³ Journalists and human rights agencies have reported staggering cases of physical, sexual and psychological abuse perpetrated by guards in prisons across the state, abuses that persist unabated.¹⁴

Against this backdrop of the systemic failure of internal discipline systems to provide a reliable mechanism for accountability, the ability of individual victims of police and corrections officer misconduct to seek redress in civil litigation is crucial to ongoing efforts to address patterns of harassment and violence, and bring justice to the primarily Black and brown New Yorkers who too often are subject to those patterns.

Qualified Immunity and a Failure of Accountability

In cases where law enforcement officials are sued for violating a person's constitutional rights, federal courts are quick to shield officers from liability under the doctrine of qualified immunity, even when those courts agree that the officer has violated the law.¹⁵ The doctrine insulates government officials from civil damages –

¹¹ See Consent Judgment, *Nunez v. City of New York*, No. 11 Civ. 5845 (LTS) (S.D.N.Y. Oct. 21, 2015), <https://bit.ly/36IwVwK>.

¹² See United States Complaint-in-Intervention, *Nunez*, No. 11 Civ. 5845 (LTS) (S.D.N.Y. Dec. 18, 2014), <https://bit.ly/2IOhRdb>.

¹³ Human Rights Watch, *More than 100 groups urge New York Governor to Create Public Misconduct Database for Corrections Officers*, Aug. 26, 2020, <https://bit.ly/32RdlSs>.

¹⁴ Tom Robbins, *I Was Terrified: Inmates Say They Paid a Brutal Price for a Guard's Injury*, N.Y. Times, Nov. 15, 2016, <https://nyti.ms/36Gdzz4>; Michael Schwartz, Michael Winerip & Robert Gebeloff, *The Scourge of Racial Bias in New York State's Prisons*, N.Y. Times, Dec. 3, 2016, <https://nyti.ms/2IH9xMQ>; Michael Winerip, Michael Schwartz & Tom Robbins, *New York State Corrections Dept. Takes On Guards' Union Over Brutality*, N.Y. Times, April 11, 2016, <https://nyti.ms/3kxb44Y>; Michael Winerip & Michael Schwartz, *An Inmate Dies and No One is Punished*, N.Y. Times, Dec. 13, 2015, <https://nyti.ms/2INPCLG>.

¹⁵ See, e.g., *United States v. Weaver*, 975 F.3d 94, 109 (2d Cir. 2020) (Calabresi, J., concurring) (“There may well be hundreds of situations in which [illegal] searches like the one before us today turned up

the only form of relief available against individual officers in such situations -- unless their actions violated rights that had been clearly established by federal appellate courts in factually identical cases.

Courts can (and often do) award qualified immunity without determining whether the victim's constitutional rights have been violated,¹⁶ and often do so even after determining that the victim's rights *were* violated.¹⁷ Indeed, the doctrine has resulted in a lack of accountability for officers who have committed, or who were alleged to have committed, a range of heinous acts. For example, courts have applied the doctrine where individuals in the grips of obvious but often nonthreatening mental-health emergencies are injured killed by police officers who use weapons and mechanical restraints instead of compassion, patience, and de-escalation tactics.¹⁸

nothing. But surely no more than a handful will get to court. And even these will almost always get decided against the innocent 'searchee' on qualified immunity.'").

¹⁶ See, e.g., *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (granting lower courts the discretion, when deciding qualified immunity motions, to skip the constitutional question and simply answer whether the right at issue was "clearly established" at the time of the challenged conduct.); *Black v. Pettinato*, 761 Fed. App'x 18 (2d Cir. 2019) (granting qualified immunity because the challenged conduct had not yet been ruled unlawful, despite the Second Circuit having passed on at least four previous opportunities to rule on the lawfulness of the challenged conduct.); *Zadeh v. Robinson*, 928 F.3d 457, 479-80 (5th Cir. 2019) (Willet, CJ, dissenting) ("[M]any courts grant immunity without first determining whether the challenged behavior violates the Constitution. They avoid scrutinizing the alleged offense by skipping to the simpler second prong: no factually analogous precedent. Forgoing a knotty constitutional inquiry makes for easier sledding, no doubt. But the inexorable result is 'constitutional stagnation'—fewer courts establishing law at all, much less clearly doing so. Section 1983 meets Catch-22. Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because no one's answered them before. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads government wins, tails plaintiff loses. . . ."); Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 Mich. L. Rev. 1219, 1249 (May 2015) ("[I]f a court reviewing a constitutional claim to which qualified immunity applies [does] not address the merits of the claim, the same right may be violated time and again, with courts declining each time to provide a remedy or state the law for future cases.").

¹⁷ See, e.g., *Francis v. Fiocco*, 942 F.3d 126, 140-49 (2d Cir. 2019) (concluding that state prison officials violated the plaintiff's due process rights by running sentences consecutively when state law required that they run concurrently, but granting qualified immunity because there was no factually identical precedent); *Price v. City of New York*, No. 15-CV-5871 (KPF), 2018 WL 3117507, at *11-18 (S.D.N.Y. June 25, 2018) (finding that NYPD officials violated plaintiff's First Amendment rights when they blocked her from viewing or commenting on certain NYPD Twitter accounts, but granting qualified immunity because there was no factually identical precedent).

¹⁸ See, e.g., *City & Cnty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600 (2015) (granting qualified immunity to officers who approached a woman they knew to be in severe mental-health distress,

The doctrine allows for immunity even where officers exact revenge in reaction to perceived slights or disrespect, sometimes called “contempt of cop.” Courts have applied the doctrine:

- Where police officers, after a brief chase, rear-cuffed a winded, obese man on ground and repeatedly ignored his pleas that he could not breathe in the prone position, causing his death.¹⁹
- Where officers ignored a tightly cuffed arrestee’s “non-verbal aural and physical manifestations of” pain, because prior caselaw held that officers need only respond to clear, verbal complaints of pain.²⁰
- Where an officer tackled a college student to the ground and kicked him in the head for asking why the officer ordered him to drop a water balloon, even where the jury had awarded \$100,000 in damages and concluded that the officer acted with “malice” in using excessive force.²¹

Police officers have also benefitted from qualified immunity in cases where they suppressed peaceful dissent and media coverage of it. Courts have applied the doctrine:

- Where NYPD officers arrested scores of Occupy Wall Street protestors, even where the court *itself* recognized that there was no legal basis to arrest or detain them.²²
- Where police pepper-sprayed a demonstrator at close range, despite a prior appellate ruling that “[t]he assessment of a jury [was] needed” to evaluate whether the officers used excessive force against her.²³
- Where high-ranking officials singled out and arrested a well-known photographer for allegedly stepping into the street to take pictures of

and instead of waiting for back-up that they could hear had almost arrived, confronted the woman and shot her five times); *Roell v. Hamilton Cnty., Ohio/Hamilton Cnty. Bd. of Cnty. Commr’s*, 870 F.3d 471 (6th Cir. 2017) (granting qualified immunity to officers who used deadly force on an unarmed naked man with a garden hose in his hand in a mental-health crisis, finding no previous case with identical facts).

¹⁹ *Day v. Wooten*, 947 F.3d 453 (7th Cir. 2020).

²⁰ *Cugini v. City of New York*, 941 F.3d 604 (2d Cir. 2019).

²¹ *Shafer v. Padilla*, 868 F.3d 1110 (9th Cir. 2017).

²² *Berg v. Kelly*, 897 F.3d 99 (2d Cir. 2018).

²³ *See Brown v. City of New York*, 798 F.3d 94 (2d Cir. 2015) (reversing grant of summary judgment, remanding for trial on issue of excessive force), *on remand*, 2016 WL 1611502 (S.D.N.Y. Apr. 20, 2016) (declining to conduct trial, instead granting qualified immunity), *aff’d*, 862 F.3d 182 (2d Cir. 2017).

questionable arrests, while choosing not to arrest or admonish others standing in the street. That conduct essentially blessed the NYPD's abuse of the jaywalking ordinance to squash demonstrations and media coverage of them.²⁴

In the context of jails and prisons, courts have awarded qualified immunity for truly sadistic conduct:

- Where a guard, for no legitimate purpose related to his job, fondled a detainee's penis during a search to make sure that he did not have an erection, an act that the appeals court ruled was "repugnant to the conscience of mankind" but nevertheless shielded by qualified immunity.²⁵
- Where a corrections officer, without any provocation, deployed a burst of pepper spray into a person's face at close range.²⁶
- Where correctional officials punished a person with 89 days in solitary confinement for writing a nonthreatening letter to a third party outside of prison expressing that he was attracted to a correctional officer inside the facility.²⁷
- Where guards for four days purposefully locked a person in a cell with "massive amounts" of feces on the cell floor, ceiling, window, walls, and inside the water faucet, causing the person to refuse water from the faucet for four

²⁴ *Nigro v. City of New York*, No. 19-CV-2369, 2020 WL 5503539 (S.D.N.Y. Sept. 11, 2020).

²⁵ See *Cranford v. Cuomo*, 796 F.3d 252 (2d Cir. 2015) ("*Cranford P*") (recognizing that the conduct violated the Eighth Amendment but remanding to the district court to determine whether a reasonable officer would have known it was illegal to grope a person in custody without a penological purpose to do so), *appeal after remand*, 721 Fed. App'x 57 (2d Cir. 2018) ("*Cranford IP*") (affirming district court's grant of qualified immunity for same conduct); see also *Shannon v. Venetozzi*, 749 F. App'x 10, 12 (2d Cir. 2018) (in response to allegations that officer repeatedly groped incarcerated individual without a penological justification and the for the sole purpose of humiliating the detainee or gratifying the officer, concluding that "[a]lthough the conduct alleged in the amended complaint is reprehensible both then and now, when it occurred in 2011, our precedent did not establish that such conduct was clearly unconstitutional.").

²⁶ *McCoy v. Alamu*, 950 F.3d 226, 228 (5th Cir. 2020) (granting qualified immunity to corrections officer who sprayed person in face with a burst of pepper spray, unprovoked, because the appeals court had not yet adjudicated a case involving a correction's officers unprovoked use of pepper spray).

²⁷ *Bacon v. Phelps*, 961 F.3d 533 (2d Cir. 2020) (holding that prison officials unlawfully retaliated against person in custody who wrote a non-threatening letter to a friend outside of prison that he was attracted to one of the corrections officers, but granting qualified immunity because no previous case had specifically held that there was a constitutional right to write a nonthreatening "letter to a third party expressing his desire for a woman later identified as a female correctional officer").

days, and later moving him to a “frigidly cold” cell without a toilet for almost two days.²⁸

Restoring Accountability Through A4331/S1991

A4331/S1991 empowers New Yorkers to remedy grave injustices in state courts where federal courts have failed. At its core, the bill amends the Civil Rights Law to create a remedy for violation of a person’s rights under the Federal and State Constitutions²⁹, similar to the federal private rights of action created by the Reconstruction-era Congress in enacting 42 U.S.C. §§ 1983, 1985-86. The bill allows for a civil action to be brought either by the injured party or by the Attorney General. And like its federal counterparts, this civil rights bill provides for attorneys’ fees for a prevailing plaintiff, thereby incentivizing the private bar to litigate cases brought under this bill³⁰, including so-called “small damages” cases that private attorneys would be unlikely to take on contingency alone.³¹

But unlike its federal counterparts, A4331/S1991 would eliminate the defense of qualified immunity in whatever shifting forms that doctrine has taken in courts over the years, regardless of whether that immunity was based upon an officer’s alleged subjective “good faith” or “reasonable belief” about the lawfulness of their

²⁸ *Taylor v. Stevens*, 946 F.3d 211 (5th Cir. 2019) (granting qualified immunity to corrections officers who, for four days, confined a person in a cell with “massive amounts” of feces on cell floor, ceiling, window, walls, and inside water faucet, causing person to refuse water from the faucet, and later confined the persons in a “frigidly cold” cell without a toilet for almost two days), *rev’d sub. nom.* *Taylor v. Riojas*, No. 19-1261, 2020 WL 6385693 (U.S. Nov. 2, 2020).

²⁹ The Court of Appeals has held that an implied right of action under the New York State Constitution only exists in extremely limited circumstances. *Brown v. State*, 89 N.Y.2d 172 (1996). This bill, if passed, would supersede the *Brown* holding.

³⁰ *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep’t of Health & Human Res.*, 532 U.S. 590.8, 635-36 (2001) (“[C]ivil rights statutes vindicate public policies of the highest priority, yet depend heavily upon private enforcement. Persons who bring meritorious civil rights claims, in this light, serve as private attorneys general. Such suitors, Congress recognized, often cannot afford legal counsel. . . . Congress enacted [42 U.S.C.] § 1988 to ensure that nonaffluent plaintiffs would have effective access to the Nation’s courts to enforce civil rights laws.”).

³¹ *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986) (“Because damages awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases, unlike most private law cases, to depend on obtaining substantial monetary relief. Rather, Congress made clear that it ‘intended that the amount of fees awarded under [§ 1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature.’” (quoting Senate Report, at 6, U.S. Code Cong. & Admin. News 1976, p. 5913 (emphasis added))).

conduct³² or whether it was based on the rights at issue having not yet been clearly established by the courts.³³ Unlike the federal civil rights statutes, this bill guarantees that where there is a violation of a person’s federal or state constitutional rights, there will be a remedy under New York law. As one federal judge has commented, “every hour we spend in a § 1983 case asking if the law was ‘clearly established’ or ‘beyond debate’ is one where we lose sight of why Congress enacted this law those many years ago: to hold state actors accountable for violating federally protected rights.”³⁴

A4331/S1991 also strikes a proper balance between two competing goals: compensation to victims and deterrence of misconduct.³⁵ By requiring public entities to indemnify their employees from damages awards under most circumstances, the bill ensures that victims of government misconduct will be made whole monetarily. But the bill prohibits public entities from indemnifying officials whose conduct results in their own conviction, creating yet another specific deterrent for public officials tempted to engage in criminal acts.

Finally, A4331/S1991 allows claims for state and federal constitutional violations to be brought against employees of the Department of Corrections and Community Supervision (DOCCS), who are currently immune from claims arising under state law by virtue of Correction Law 24(1).³⁶ The bill leaves the statutory immunity in place for all state-law claims against DOCCS officials *except* those arising under the proposed law, and for the first time in decades, it would open the doors of Supreme Court to these claims against DOCCS officials.

³² *Pierson v. Ray*, 386 U.S. 547, 557 (1967) (“We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under s 1983.”).

³³ *Pearson*, 555 U.S. at 231 (qualified immunity protects officers from civil liability so long as their conduct “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known”).

³⁴ *Jamison v. McClendon*, No. 16-CV-595 (CWR) (LRA), 2020 WL 4497723, at *29 (S.D. Miss. Aug. 4, 2020).

³⁵ *Robertson v. Wegmann*, 436 U.S. 584, 590-91 (1978) (“[Section] 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well.”).

³⁶ *See* Correction Law 24(1) (“No civil action shall be brought in any court of the state, except by the attorney general on behalf of the state, against any officer or employee of the department, which for purposes of this section shall include members of the state board of parole, in his or her personal capacity, for damages arising out of any act done or the failure to perform any act within the scope of the employment and in the discharge of the duties by such officer or employee.”); *Baker v. Coughlin*, 77 F.3d 12, 15 (2d Cir. 1996) (“[B]y its plain terms, [Correction Law] § 24 governs the substantive rights of corrections officers by conferring upon them an immunity from liability for activities that fall within the scope of the statute.”).

Since Reconstruction, New Yorkers have had one legal remedy to vindicate their constitutional rights, and it existed only under federal law. But if A4331/S1991 passes, New Yorkers will no longer need to rely solely on federal civil rights statutes—and federal courts that have effectively gutted them by creating and expanding the doctrine of qualified immunity. For these reasons, The Legal Aid Society strongly supports passage of A4331/S1991.