



Testimony of

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Section 50-a of the Civil Rights Law

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My name is Christopher Boyle and I am the Director of Data Research and Policy at New York County Defender Services (NYCDS). We are a public defense office that represents New Yorkers in thousands of cases in Manhattan’s Criminal and Supreme Courts every year. I have been a New York City public defender for more than twenty years. Thank you to Senator Bailey and the Senate Standing Committee on Codes for holding this hearing today and inviting us to testify about the urgent need to repeal Civil Rights Law 50-a (hereafter “50-a”).

New York is the worst state in the nation in terms of police transparency. No other state deprives its residents of documented evidence of police misconduct to the extent that New York does. We are a national outlier and our current policy costs taxpayers millions and harms relations with policed communities. NYCDS joins with our colleagues from the other defender offices in their comments about the threat of the current state of the law to accused people and their communities. I hope my testimony, which will focus more on the data that exists about police transparency and

accountability in New York and across the country, will be useful to the committee in assessing the proposed reform.

50-a permits law enforcement entities like the NYPD to shroud their disciplinary records in secrecy. As a result, criminal trials in New York are conducted without highly relevant prior wrongdoing by police witnesses ever coming to light. The law, at its core, seeks to conceal the truth and does so at the expense of a criminal defendant's fundamental right to confront the witnesses against them.

50-a was enacted in 1976 to protect police officers from cross-examination during criminal prosecutions based on unproven or irrelevant material in their personnel files.¹ Yet court interpretations of 50-a have expanded over the past fifty years to bar the disclosure of substantiated civilian complaints of misconduct. Last year, the New York State Court of Appeals held that 50-a extends blanket police privacy rights to law enforcement with protections exceeding those of all other state employees.² This broad interpretation deprives the public of information that is essential to democratic oversight of the police.

New York may be the least transparent in the nation, but that does not mean that taxpayers are shielded from the costs of accountability. New York City alone pays hundreds of millions of dollars every year in legal settlements to victims of NYPD torts. As these payout amounts continue to rise, civilian deaths at the hands of police gain increasingly more scrutiny and media coverage. Shootings by police are now so common that they are the sixth leading cause of death for black men nationwide. It is no wonder that policed communities express increasing frustration with law enforcement and tensions are at an all-time high.

There is another path. New York can follow the lead of all of the other states in the country and end the shroud of secrecy around substantiated complaints of misconduct by New York police. Their personal records can and should be protected to the same level as any other state employee, but no more. True transparency and resulting accountability cannot begin in our state until the legislature repeals 50-a. We urge you to do so this session.

New York's Police Record Secrecy Law is a National Outlier

New York has the worst record in the nation in terms of public transparency of police misconduct.³ 50-a has the highest standard of scrutiny for release of police records and the Court of Appeal's recent decision in *NYCLU v. NYPD* (2018) held that law enforcement officers' personnel records confidential. New Yorkers seeking information regarding police misconduct must present a good faith factual predicate to warrant judicial review for information that is "relevant and material" to

¹ New York Department of State Committee on Open Government, *2018 Report to the Governor and State Legislature* (2018), available at <https://www.dos.ny.gov/coog/pdfs/2018%20Annual%20Report.pdf>.

² *In the Matter of New York Civil Liberties Union v. New York Police Department*, 32 N.Y.3d 556 (2018), available at <https://www.nycourts.gov/ctapps/Decisions/2018/Dec18/133opn18-Decision.pdf>.

³ New York Public Radio WNYC News, *Is Police Misconduct a Secret in Your State*, Oct 15, 2015, available at <https://www.wnyc.org/story/police-misconduct-records/>.

the case.⁴ This is a higher standard than even Delaware, the next-worst state in the nation in terms of police transparency.⁵

California was until recently in the same tier as New York, but even in that state many police oversight agencies, including those in large metropolitan areas such as San Francisco, Los Angeles, and Oakland, voluntarily made their police disciplinary records public prior to reform.⁶ In 2018, California passed the Right to Know Act (Senate Bill 1421). The new law, which went into effect on January 1, 2019, requires police departments to open internal investigation records related to serious use of force and police wrongdoing.⁷

In repealing 50-a, New York would join Alabama, Arizona, California, Connecticut, Florida, Georgia, Maine, Minnesota, North Dakota, Ohio, Utah, Washington State, and Wisconsin – the other states where police disciplinary records are generally available to the public.⁸ We could not find any evidence from these states showing that transparency of police records of misconduct impacted public safety or that it proved more costly for taxpayers.

Unchecked Police Misconduct Levies Significant Costs on Taxpayers

Each year, the City of New York pays out hundreds of millions of dollars to victims of police misconduct. According to the 2018 New York City Comptroller Annual Claims Report, tort claim settlements and judgements from 2018 accounted for 229.8 million dollars in NYPD payouts.⁹ NYPD misconduct settlements and judgements account for 38 percent of the total cost of claims made against the city in Fiscal Year 2018.¹⁰ Tort claims against the NYPD include allegations of excessive force, civil rights violations, and personal injury or property damage claims stemming from motor vehicle accidents involving police vehicles.¹¹

Yet this multi-million-dollar figure does not cover all of the NYPD's misconduct. As the city comptroller's report points out, "Civil Rights settlements due to excessive force, wrongful conviction claims under 42 U.S.C. § 1983, and false arrest claims that arise from constitutional violations" are not included in the NYPD tort settlement and judgement statistics in the

⁴ *Dunnigan v. Waverly Police Department* 719 N.Y.S.2d 399, 400 (2001).

⁵ According to WNYC, police disciplinary records in Delaware are confidential under the state's Law Enforcement Officers' Bill of Rights and the privacy exemption to the Delaware Freedom of Information Act. See New York Public Radio WNYC News, *Is Police Misconduct a Secret in Your State*, Oct. 15, 2015, available at <https://www.wnyc.org/story/police-misconduct-records/>.

⁶ Lisa Fernandez, *Interactive map: Who is releasing police personnel files under new law, and who is not*, KTVU Fox 2, Oct. 3, 2019, available at <https://www.ktvu.com/news/interactive-map-who-is-releasing-police-personnel-files-under-new-law-and-who-is-not>

⁷ ACLU of Southern California, *Access to CA Police Records*, available at <https://www.aclusocal.org/en/know-your-rights/access-ca-police-records>.

⁸ According to WNYC, many of these states still make records of unsubstantiated complaints or active investigations confidential. WNYC, *Is Police Misconduct a Secret in Your State* (2015).

⁹ New York City Comptroller, *Annual Claims Report* 18, April 15, 2019, available at <https://comptroller.nyc.gov/reports/annual-claims-report/>.

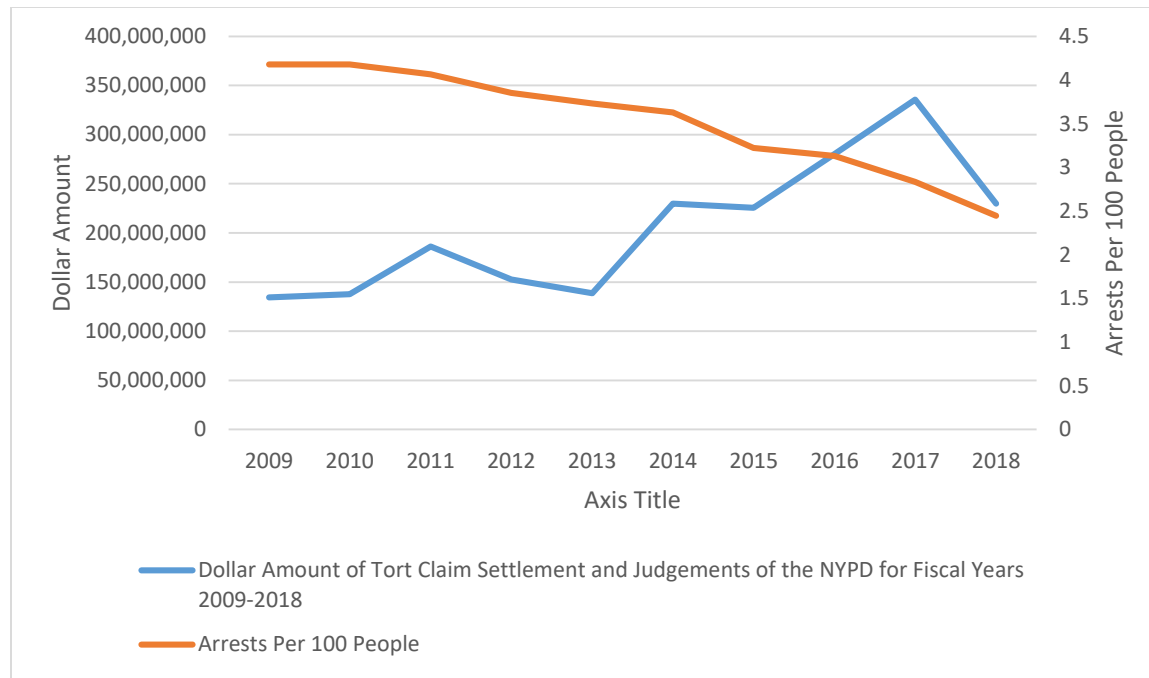
¹⁰ *Ibid* at 18.

¹¹ *Ibid*.

Comptroller Annual Claims Report.¹² Thus the actual costs to taxpayers for police misconduct are even greater than the tort claim settlement and judgment numbers suggest.

We compare the comptroller’s data with NYC arrests per 100 people below. Even as police interactions with the public ostensibly are going down, the total costs to taxpayers for NYPD misconduct continues to rise.

Dollar Amount of Tort Claim Settlement and Judgements of the NYPD for Fiscal Years 2009-2018, compared with NYC arrests rates for same years¹³



Communities are Harmed and Misconduct is Allowed to Flourish Under 50-a

As public defenders, we have long witnessed the lack of trust between communities of color and the police. Generations of systemic violence against communities of color at the hands of police officers have rightly made many people of color wary of any interaction with law enforcement. And the harm they may potentially experience is not abstract.

A recent study by Rutgers University identified police use of fatal force as a leading cause of death in young men.¹⁴ The researchers found that black men in the U.S. are twice as likely to be killed

¹² NYCDs verified this with the Office of Comptroller via phone conversation on 10/15/19.

¹³ Data sources: New York City Comptroller, *Annual Claims Report* 18 (April 15, 2019), available at <https://comptroller.nyc.gov/reports/annual-claims-report/> and Division of Criminal Justice Services, *Adult Arrests: 2009-2018*, available at <https://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/nyc.pdf>.

¹⁴ Frank Edwards, Hedwig Lee, and Michael Esposito, *Risk of being killed by police use of force in the United States by age, race-ethnicity, and sex*. Proceedings of the National Academy of Sciences, 2019, available at

by police than men overall. Latinx men are 1.4 times as likely to be killed by police as their white counterparts. Frank Edwards, one of the researchers for the study, advised that “if we are going to decrease the number of civilian deaths in this country as a result of these encounters” government must increase transparency of police use-of-force.¹⁵

Edwards is not the only person to call for increased transparency as an antidote to persistent misconduct and killings by police. Cynthia Conti-Cook, an attorney at The Legal Society who published a law review article earlier this year, argues that:

Courts have recognized that transparency can have a “community therapeutic value” that provides an “outlet[] for ‘community concern, hostility, and emotions.’” Transparency facilitates healing. Without transparency, fear of future harm continues, officers are able to exploit the power of reliable anonymity, and lack of information further deprives family and community members of informed decision-making when considering whether to pursue justice through a civil lawsuit, a civilian complaint, political campaigns, media campaigns, or criminal prosecution.

Families of people killed by police suffer significant harm because of laws like 50-a that limit public accountability. Constance Malcolm, Ramarley Graham's mother, had to bring a lawsuit to gain access to internal NYPD records related to the investigation and prosecution of her son's death at the hands of the NYPD in 2012. Ms. Malcolm alleges that police tampered with the crime scene after her son's death when they moved his body from his grandmother's bathroom.¹⁶ The police officer who shot Ramarley was not successfully indicted in state criminal court, was never charged with federal civil rights crimes, and was allowed to quietly resign in 2017.¹⁷ Ms. Malcolm may never know what happened to her son because 50-a shields the officers in his case from accountability.

Gwen Carr, the mother of Eric Garner, fought for five years for the NYPD to take action against Daniel Pantaleo, the officer who killed her son in 2014.¹⁸ Ms. Carr has been at the front lines of the advocacy efforts to repeal 50-a, along with Ms. Malcolm and other family members of people killed by the police. In 2017, Mr. Pantaleo's Civilian Complaint Review Board (CCRB) history was leaked to the press. His records showed that Mr. Pantaleo had four prior substantiated complaints for abusive stops and searches. In those four cases, the NYPD, which is not required to comply with the CCRB's recommendations, “imposed the weakest disciplinary action for two violations, and modified penalties for the other two violations.”¹⁹ Mr. Pantaleo could have been

<https://news.rutgers.edu/news/police-use-fatal-force-identified-leading-cause-death-young-men/20190729#.XaXryndFwiR>.

¹⁵ Ibid.

¹⁶ David Colon, *City Councilmember to NYPD: Release Ramarley Graham's Records to His Family*, GOTHAMIST, Aug. 17, 2017, available at <https://gothamist.com/news/city-councilmembers-to-nypd-release-ramarley-grahams-records-to-his-family>.

¹⁷ Cynthia Conti-Cook, *A New Balance: Weighing Harms of Hiding Police Misconduct Information from the Public*, 22 CUNY Law Review 157, 166, 2019.

¹⁸ Ibid at 157.

¹⁹ New York City Bar, *Committee Report: Allow for Public Disclosure of Police Records Relating to Misconduct: Repeal CRL 50-a* (May 2018), available at <https://s3.amazonaws.com/documents.nycbar.org/files/2017285-50aPoliceRecordsTransparency.pdf>.

taken off the streets years before he killed Eric Garner, but he was not. Mr. Pantaleo was fired by the NYPD earlier this year after mounting public pressure.

There is no doubt that activism by directly impacted families, along with increased media attention and new social science research, have brought increased scrutiny to actions by police, particularly excessive use of force cases and killings. But in New York, the only way to begin to allow families to heal is to drop the veil of secrecy and repeal 50-a.

Secret Police Records Harm Accused People and the Community's Faith in the Criminal Legal System

The cost of secret police records is born every day by accused people across New York State. The U.S. Constitution requires prosecutors to disclose to defendants any favorable, material evidence know to the prosecution, including evidence related to impeachment of a police officer. But 50-a makes it nearly impossible for accused people to obtain this information, denying them their right to a fair trial.

And the fact of the matter is that some police officers do lie under oath and some engage in misconduct. In 2018, the *New York Times* found that on more than 25 occasions since January 2015, judges or prosecutors determined that a key aspect of a New York City police officer's testimony was probably untrue.²⁰ A recent *Gothamist/WNYC* investigation in partnership with *The Appeal* found that prosecutors in all five boroughs consistently fail to document similar signs of officer dishonesty.²¹ These findings are consistent with what NYCDS attorneys see on a regular basis in criminal court.

When a person's liberty is at stake, they must have access to evidence of prior untruthfulness under oath and relevant disciplinary records, including prior acts of misconduct. This evidence should be provided to accused people early on in the case so that they can better assess the weight of the evidence against them. Because of 50-a, police lie in court and abuse people in the streets with impunity, and then testify again and again against people in court. Police officers who engage in misconduct must be weeded out and jurors and judges must know about their records in order to properly assess the evidence in the case. Anything less is not a fair trial and is a violation of our clients' rights.

Conclusion

There are countless reasons why New York should repeal 50-a. The Department of State's Committee on Open Government made the argument succinctly in a December 2018 report: "It is

²⁰ Joseph Goldstein, *Testilying by Police: A Stubborn Problem*, N.Y. TIMES, March 18, 2018, available at <https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html>.

²¹ George Joseph & Ali Winston, *When Prosecutors Bury NYPD Lies*, GOTHAMIST, Sept. 17, 2019, available at <https://gothamist.com/news/when-prosecutors-bury-nypd-officers-lies>.

ironic that public employees having the most authority over peoples' lives are the least accountable relative to disclosure of government records. This situation is untenable.”²²

There is another way forward. New York State can join the rest of the country and afford police officers the same standards of privacy as other public employees. Their private records can be protected, but the public can and must have access to evidence of wrongdoing so that we can begin to rebuild communities that have been harmed for too long by NYPD officers who act with impunity.

If you have any questions about my testimony, feel free to contact me at cboyle@nycds.org.

²² New York Department of State Committee on Open Government, *2018 Report to the Governor and State Legislature* (2018), available at <https://www.dos.ny.gov/coog/pdfs/2018%20Annual%20Report.pdf>. (pg 4).