

Testimony of Jonathan C. Moore, Esq.

Before the New York Advisory Committee  
U.S. Commission on Civil Rights  
March 21, 2017

Thank you for the opportunity to address this committee. I offer these remarks as a civil rights lawyer involved in hundreds of police misconduct cases over my career, as a member of the National Lawyers Guild and as a founder and Advisory Board Member of the National Police Accountability Project, which is a nationwide organization of legal workers who are involved in police misconduct and government accountability litigation. I would also be remiss given the location of this hearing if I didn't take the opportunity to acknowledge the great work that is being done every year by the faculty and staff of the City University of New York School of Law. I am proud to be a member of the adjunct faculty of CUNY Law.

By way of background, I should also note that I was one of the trial counsel in the stop and frisk litigation, known as the Floyd litigation, that resulted in a finding by a federal court that for a number of years the NYPD had in place a policy and practice of engaging in racial profiling in the course of conducting stops and frisks. I also was lead counsel in the wrongful conviction case brought by the five young men wrongfully accused of numerous crimes against the so-called Central Park Jogger. That matter resolved in 2014 with a settlement against the City of New York on behalf of the five for \$41 million.

There has been and continues to be an endemic, systemic problem of the excessive use of force within the New York City Police Department. I offer this opinion having represented hundreds if not thousands of victims of police abuse in this City and around the country. These include Michael Stewart, a graffiti artist who was killed by Transit Authority police

officers in 1983 and most recently the Estate of Eric Garner, an individual who was killed by police for the heinous crime of suspicion of selling loose cigarettes on Bay Street in Staten Island on July 17, 2014. In between, I have represented hundreds of unheralded victims of police abuse in this City.

The tragic death of Eric Garner highlights many of the systemic problems regarding the use of force in the NYPD. On July 17, 2014, Eric Garner was approached by several plainclothes officers on Bay Street in Staten Island. Reportedly, the officers had been advised that Mr. Garner was selling loose cigarettes, an administrative violation in the City of New York, not a crime under the New York Penal Code. We have all seen the video of this encounter too many times. Mr. Garner is approached in a very aggressive way by several officers who surround him, indicating to any reasonable person that he is being stopped and is not free to leave. Right there, before you go any further, you have a violation of Mr. Garner's right to be free from unreasonable search and seizure. The law was clear at the time that police officers could not stop and question someone unless they had reasonable suspicion that he or she had committed, was committing, or was about to commit a felony or penal law misdemeanor. An anonymous report that someone is selling loose cigarettes does not justify stopping, questioning or frisking someone. So from the first moment of this encounter these officers were violating the Fourth Amendment rights of Mr. Garner.

As we know, this was but the beginning of the constitutional violations suffered by Mr. Garner on that day. The event quickly escalated with officers attempting to take Mr. Garner into custody. The video shows Mr. Garner being taken to the ground and clearly being

subjected to a chokehold. You also see other officers on top of Mr. Garner, a large man with a history of respiratory problems.

And then we all witness the horrible end of Mr. Garner's life as he calls out 11 times, "I can't breathe," with his voice growing more faint after each time until he no longer can talk and he becomes motionless. Remarkably, you then witness the officers simply ignore Mr. Garner, refusing to provide any medical or emergency treatment. This includes even the paramedics who came to the scene from the Richmond University Medical Center.

What resulted understandably generated intense public criticism of the NYPD. The death of Eric Garner was reminiscent of the manner in which Michael Stewart had been killed 34 years later.

What has ensued has been an abject failure of leadership within the law enforcement community. The killers of Eric Garner, just like the killers of Michael Stewart, just like the killers of Sean Bell, just like the killers of Ramarley Graham, never served a day in jail for having taken someone's life. To this day, those responsible for Mr. Garner's death continue to draw salaries from the NYPD.

When you examine the "investigations" that followed the death of Mr. Garner, you understand how much work is to be done to address the issue of excessive use of force. There were no arrests of the killers of Mr. Garner. The Richmond County DA, Daniel Donovan, now a U.S. Congressman, convened a grand jury that was clearly designed to exonerate the officers involved. Let me give two examples to illustrate this point. First, unlike 99.9% of all other prosecutions in Richmond County, this grand jury was permitted to hear a plethora of

evidence, most of which had nothing to do with the objective of obtaining an indictment. As a result, the grand jury refused to indict and to this day the DA opposes any efforts to release the minutes of the grand jury. Whenever you hear a district attorney say, "We just wanted the grand jury to hear all the evidence," you know that means we wanted to sow enough doubt so that the grand jury would not indict.

Second, the DA's office decided to present to the grand jury only against Officer Pantaleo, who is pictured in the video with his arm around Mr. Garner's neck. All the other officers who were in part responsible for the death of Mr. Garner were given immunity from prosecution so that they could go into the grand jury, testify in a way that they hoped would exonerate their brother officer, and do so free of any threat of future prosecution. This decision is even more suspect when you consider that the medical examiner ruled that Mr. Garner's death was caused by a combination of neck and chest compression. So they presented only against the officer who compressed Mr. Garner's neck but not against the officers who piled on top of Mr. Garner. The fix was in. The outcome of that grand jury was never in doubt.

So what is to be done?

Before we can deal with the problem there must first be an acknowledgment that there is a problem. And there is a problem. In fiscal year 2016, the city spent \$228.5 million settling and paying out for settlements and judgments in police misconduct lawsuits. By way of perspective, that is almost as much as the \$257 million budgeted for the entire Department of Aging. For even more perspective, that's 0.27 percent of the city's entire 2016 budget, and

about \$27 per New Yorker.

The good news is that I believe that there exists in this City a climate for positive change within the NYPD. We have seen this through the stop and frisk litigation. As a result of the historic and unprecedented judgment we obtained in Floyd in August, 2013, the police department has begun to change the culture within the NYPD concerning stop and frisk. It will not change overnight but I do believe that there have been positive changes in this regard. These changes have occurred not because of the Floyd lawsuit, but because that lawsuit played a part in an overall community mobilization against the abuses that were rampant in the stop and frisk policies of the Giuliani/Bloomberg Administration. We really need to acknowledge the work of groups like Communities United for Police Reform as the true catalyst for forcing the issue of stop and frisk onto the front pages of the newspapers and injecting it into the 2013 campaign for mayor. As much as he has been criticized for no shortage of failings as the mayor of this city, I would be remiss if I didn't credit Mayor DeBlasio and his current Police Commissioner, James O'Neill, for supporting and standing behind, in the face of vicious criticism from the police unions, the changes brought about by the Floyd litigation and the overall campaign to redress abuses in stop and frisk.

Several more changes must take place before we begin to see a change in culture with regard to the use of force by the NYPD.

First, there must be a truly independent Civilian Complaint Review Board. So long as their decisions are subject to review by the police department, it will remain an ineffective way to address excessive use of force by the NYPD.

Second, we need a truly independent special prosecutor to investigate and, if necessary, prosecute, police misconduct. As the Garner case so clearly demonstrated, relying on our current District Attorney's to prosecute police officers for excessive use of force has not and will not work. Executive Order No. 147, issued by Governor Cuomo in July, 2015, does not go far enough. It appointed the New York State Attorney General as a special prosecutor in matters relating to the deaths of unarmed civilians caused by law enforcement officers. The order also allows the special prosecutor to review cases where there is a question whether the civilian was armed and dangerous at the time of his or her death. Police misconduct that results in the death of a civilian is, thankfully, the exception rather than the rule. This legislation omits the overwhelming majority of police misconduct cases from independent prosecutorial reviews.

Third, as we have seen in Floyd, the NYPD needs to change how it trains, supervises and monitors officers with regard to the issue of use of force. There have been some recent changes in NYPD's use of force policy. New guidelines specifically prohibit chokeholds like was used in the Garner case. Prior use of force guidelines and reporting standards were inconsistent and scattered throughout the NYPD patrol guide. These changes better define force and lay out what constitutes force. The new guidelines classify force on three levels.

Level 1 involves use of Physical Force and the use of Less Lethal Devices, like hand strikes, foot strikes, forcible take-downs and use of pepper spray.

Level 2 involves the Use of Impact Weapon/Canine/Less Lethal Device like the use of stun guns, batons or police canine bites.

Level 3 involves the use of deadly physical force like firearms discharge, physical force

readily capable of causing death or serious physical injury.

The level of force will determine who investigates. Immediate Supervisor will conduct an inquiry into Level 1 uses of force. Duty Captains and the Patrol Borough Investigative Unit will investigate Level 2 uses of force. This would include police action resulting in physical injury to any person; allegations of excessive level 1 force with no injury; the use of stun guns or tasers.

All Level 3 uses of force (except firearms discharges) will be investigated by the Internal Affairs Bureau of the NYPD. This would include any serious physical injury to any person, resulting from police activity. A newly created division of the NYPD, the "Force Investigations Division" will look into firearm discharges and cases of serious injury or death of an individual during an arrest.

Time will tell whether this new approach to investigating use of force will have an effect.

Fourth, we need transparency in all investigations of officers for use of force. This is particularly true with regard to grand jury proceedings that result in a non-indictment of police officers, like in the Garner case. They are public servants who are the subject of serious allegations of police misconduct and the public has an important interest in knowing the facts of the case, particularly where the public has been denied a public trial of these allegations.

Again, I want to thank the Committee for the opportunity to present these remarks and I am of course happy to answer any questions that members of this Committee may want to ask.