

**Testimony of the Public Advocate for the City of New York, Letitia James,
Before the Standing Committee on Codes, the
Assembly Standing Committee on Judiciary, and the
New York State Black, Puerto Rican, Hispanic, and Asian Legislative Caucus
March 11, 2015**

Thank you for the opportunity to give testimony today on issues that remain at the forefront of people's minds following the death of Eric Garner, the failure to obtain an indictment against the officers involved in that case, and the tragic murders of Officers Ramos and Liu. While Mr. Garner's death and the grand jury process that followed have undermined the public's trust in our justice system, the associated outrage has led many of the dedicated public servants in our police force to feel unprotected and unsupported. We need to begin the process of healing this divide by enacting meaningful reforms aimed at increasing transparency and accountability to the shared benefit of the police, the prosecutors, and the people they work hard to protect.

Since becoming Public Advocate, I have called for measures that would offer greater protection to the police and the public: I have urged the NYPD to "civilianize" its workforce and increase the number of uniformed officers available to patrol our streets.¹ I have stood up for the right of officers injured on the job to receive fair benefits²; and, in the wake of Akai Gurley's shooting, I urged the NYPD ensure that "rookie" police are paired with department veterans while on patrol.³

¹ http://www.huffingtonpost.com/letitia-james/putting-more-police-offic_b_5485364.html;
<http://www.dnainfo.com/new-york/20140416/civic-center/letitia-james-criticizes-de-blasios-slow-pace-hiring-top-level-staffers>.

² <http://www.capitalnewyork.com/article/city-hall/2014/06/8546999/de-blasio-concerned-about-hiking-police-disability-pensions>

³ <http://www.capitalnewyork.com/article/city-hall/2014/11/8557233/wake-fatal-police-shooting-call-systematic-change>

I have also been the champion of several measures aimed at increasing accountability and transparency in law enforcement. I filed papers as *amicus curiae* in support of going forward with police reforms in *Floyd v. The City of New York* and I will continue to keep a close eye on the ongoing implementation process that began when Mayor de Blasio directed the City to drop its appeal in that case.

In the wake of *Floyd*, I also fought successfully for a pilot project requiring the use of body-worn cameras by law enforcement. I believe that, by offering an objective record of police-civilian interactions, the use of body-worn cameras presents an opportunity to significantly improve police-community relations, while also reducing the hundreds of millions of dollars that New York City pays each year in claims related to police misconduct. I commend Commissioner Bratton and the NYPD for implementing the pilot program in New York City, and I strongly encourage that it be expanded city and statewide as soon as possible.

While we have made great strides in reforming police practices and rebuilding community trust these past fifteen months, the death of Eric Garner and the grand jury's failure to return an indictment raised questions over the fundamental equity of our very system of justice. I took a stand on the Eric Garner case early on, calling on the Governor to appoint a special prosecutor, and I stood with the Attorney General when he requested the authority to investigate deaths of unarmed citizens at the hands of police officers.

Although the executive has the power to appoint special prosecutors in individual cases under existing law, I believe that, in the service of promoting public trust and ensuring that justice is done in every case, the state legislature should strongly consider proposals, such as the

one advanced by Senate Democratic Leader Stewart-Cousins, creating a mandatory and uniform statutory scheme for cases where an unarmed civilian dies during a police encounter.⁴

While reasonable minds can disagree about the need to mandate special prosecutors in every police-involved civilian death, we should all be able to unite behind the idea that, whatever the adjudicatory process is, its integrity and impartiality must be above reproach. It must give “both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done.”⁵

The need for our criminal justice system to appear fair and equal is not an abstract concept, devoid of real-world significance. When a legal system or government authority is perceived as legitimate and just, it enhances the core tenets of criminal justice: voluntary compliance with the law, cooperation with law enforcement, and genuine rehabilitation.⁶ When the system appears biased, unjust and illegitimate, it can undermine the very foundation of a lawful, democratic society: that laws are made and enforced by individuals and institutions empowered by and accountable to those they represent.

But legitimacy also requires transparency. To many of the millions of people who followed the Garner case, in New York and across the nation, both the result of the grand jury, and the process that led to it, seem fundamentally unfair and unnecessarily opaque. If we are to rebuild public trust in our system, we need an open airing of the facts and a robust debate about what we should do going forward.

That is why, less than a week after the decision by the Staten Island grand jury, my office filed litigation to have its records unsealed. The public has a right to understand what has

⁴ S. 2180-2015 (Stewart-Cousins)

⁵ *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980)(quoting *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring)) (internal quotation omitted).

⁶ See generally, e.g. Tom Tyler, *Legitimacy and Criminal Justice: The Benefits of Self-Regulation*, 7 *Ohio State Journal of Criminal Law* 307-359 (2009).

gone on. Policy makers representing the public and engaging in the decision-making process have the right to know.

It is important to take a moment to remember just what happened to Eric Garner. He died unarmed, in broad daylight, on a public street. A witnesses recorded the entire struggle that caused his death, including the police officer's use of a chokehold, and that video has been viewed by millions of people across the world.

Our eyes do not lie. The video shows a non-violent discussion between Garner and the officers in which Garner asks to be left alone. He never attacks or threatens any officer and he clearly has no weapon. Despite the absence of any threat, the officers approach Garner and wrestle him to the ground. Officer Pantaleo wraps his arm around Garner's neck, and keeps it there for the entire time Garner is restrained, prone on the concrete. The recorded audio captured Garner saying that he could not breathe, eight times, before he appears to lose consciousness. He died in the hospital shortly afterwards, and the New York City Medical Examiner's autopsy found the cause of death to be "compression of neck (chokehold), compression of chest and prone positioning during physical restraint by police."

To many of the millions who saw this video and followed the story through the news, this looked and sounded like a criminal act. Even if Officer Pantaleo was not ultimately convicted of a crime, many members of the public believed that surely there was sufficient evidence, based the video alone, to secure an indictment and guarantee a public trial. After all, prosecutors "generally enjoy wide discretion in presenting their case to the Grand Jury and are not obligated ... to present all evidence in their possession that is favorable to the accused."⁷ For most of the

⁷ *People v. Lancaster*, 69 N.Y.2d 20, 26 (1986).

ten thousand or so people on Rikers Island, this standard generally means a skeletal, one-sided presentation and a swift indictment.

Two months after Eric Garner's death, a Staten Island Grand Jury was convened to hear the case against Daniel Pantaleo. The presentation was neither skeletal nor one-sided, and the result was neither swift nor an indictment. The grand jury sat for nine weeks, heard from 50 witnesses, and reviewed 60 exhibits. The District Attorney stated publicly that the investigation leading up to the grand jury was "the biggest allocation of resources since I've taken office."

Clearly, this case was not treated like other felonies. But the law is the same. A victim is a victim, a grieving family is a grieving family, and a defendant is a defendant. They all deserve access to the same justice system. Yet that is clearly not the reality we live in.

Because all of this goes on behind closed doors, in secrecy, "neither the courts nor Congress, nor, especially, the public, can gauge how the institution is being used."⁸ And without a narrative to explain why the officers are not indicted, the public loses faith in the impartiality of our justice system. The public perception persists that district attorneys avoid obtaining indictments of police officers because they have a professional relationship that leads to a clear conflict of interest. We do not know with any certainty whether this perception matches reality, because the public gaze is barred from these proceedings. But even the perception of inequity is enough to do lasting damage to the legitimacy and efficacy of our system. As Chief Justice Burger once wrote, "no community catharsis can occur if justice is done in a corner [or] in any covert manner."⁹

⁸ Marvin E. Frankel & Gary P. Naftalis, *The Grand Jury: An Institution on Trial* 125 (1977).

⁹ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 570-71 (1980) (internal citation omitted) (alteration in original).

I therefore commend Chief Judge Jonathan Lippmann for his recent proposal to put a judge in charge of such grand juries, rather than the prosecutor, and to make crystal clear that the public interest in these cases compels that they not be secret.¹⁰ The momentum has clearly been building for these changes. Public trust and fundamental justice demand a clean start, and sunlight is the best disinfectant.

While the Garner decision and its aftermath exposed the inequity of grand jury proceedings, it also laid bare a fundamental mistrust that goes far beyond the specific facts of that case. Governor Cuomo summarized the situation well, when he said in an interview: "We have a large segment of the population that believes they do not get justice, not just [in] this case ... not just this year....It's corrosive to society and I think we have to do everything we can to restore confidence... I think we should look at the whole system. I don't think there will be any one answer."¹¹

On this issue, Governor Cuomo and I agree. We need to look at this system from the top down and every issue must be on the table.

In the City of New York, since the beginning of the new administration, criminal justice reform has been a top priority. But, while we have made enormous progress using the tools that are available to us, as a municipal government, there is something we do not have, something that not even the federal government has—the nearly unencumbered constitutional authority to establish and enforce laws protecting the welfare, safety, and health of the public, also known as police power. That power is reserved to the states and their elected representatives by the 10th

¹⁰ Available at <http://www.nycourts.gov/publications/grand-jury-reform2015.pdf>.

¹¹ See <http://www.nydailynews.com/new-york/reforms-eyed-justice-system-eric-garner-case-article-1.2034033> (quoting the Governor's Dec. 4, 2014 interview on *Capitol Pressroom*).

Amendment.¹² So long as a law or policy does not infringe upon the state or federal constitutional rights of our citizens, the power of the state legislature and state executive over all things criminal justice is nearly absolute. And that's why I'm here.

Along with Mayor de Blasio and Comptroller Stringer, I was elected to serve all eight-and-a-half million people who call the City of New York home. The heart of my role as Public Advocate is to ensure that the voices of those people are heard, particularly when it comes to the government entities and agencies that exist to serve them. In most instances, these are city agencies and institutions following municipal laws and regulations, policies and guidelines established on the city-level. But, when it comes to criminal justice, there are many instances where our hands are tied. The penal laws that police enforce, district attorneys charge and prosecute under, and judges apply, are made by the state and only the state. The courts themselves are state institutions. Prosecutorial conduct is regulated by state law. Determining the outer bounds of permissible police practices is the purview of state law. When it comes to the regulation of public protection and personal liberty, many of the laws and governmental entities that most affect my eight-and-a-half million constituents are under the nearly exclusive control of the state. That is why, in order to do the job I was elected to do, I must advocate for the people of New York City here in Albany, where the criminal justice system can be reformed from top to bottom.

I know that in this room and throughout this institution there are many tireless champions for a fairer, more effective criminal justice system. People who have been fighting for years to get commonsense reforms enacted, only to be obstructed at every turn. But, I believe that this is the year that all that begins to change. It is time to make our criminal justice system do its job: to

¹² See, e.g., *Hamilton v. Kentucky Distilleries Co* 251 U.S. 146, 156 (1919)

protect people so they can live with dignity and without fear, to prevent crime and rehabilitate offenders through smart, results-oriented policies, and to ensure that every level of the system is applied equally to all.

We need to look at every phase of the system and its collateral consequences from the first interaction between a police officer and a citizen all the way to whatever is the final step for a given individual—be it a brief stop, a citation, a night in jail, or long years in prison, multiple appeals, and the arduous task of re-entering society. While it is impossible provide a comprehensive list of the issues we must grapple with to truly do this right, I would like highlight a few of the issues I will be fighting for this year alongside my state representatives:

1) Raising the Age:

It is past time that New York rid itself of the shameful distinction of being one of two states that prosecutes *all* sixteen-year-olds as adults. Just as appallingly, we not only charge every youth as an adult the minute he turns sixteen, we also do the same to an additional six-hundred middle school aged kids every year and arrest and try children as young as seven as juvenile delinquents.¹³ These laws and practices are contrary to modern brain science, sound crime prevention, rehabilitative and educational policy, and basic morality.

Juveniles serving time in adult penitentiaries are exponentially more likely to be the victims of beatings, sexual assaults and inhumane solitary confinement.¹⁴ They are thirty-four times more likely to commit suicide during incarceration.¹⁵ And, when they're released, they are

¹³ *Raise the Age Campaign Fact Sheet*, available at <http://raisetheageny.com/get-the-facts>

¹⁴ *Id.*

¹⁵ *Id.*

significantly more likely to recidivate or move on to more serious crimes.¹⁶ This is completely unacceptable, and it is well past time we did away with a law that leads inexorably to destroying the lives of children the government should be rehabilitating, teaching, and protecting.

I applaud Governor Cuomo and the Assembly Speaker Heastie for including “Raise the Age” in their budget proposals. I am proud to stand with the many legislators, advocates, as well as the Chief Judge of this state, who have been pushing for years to get this done. I look forward to joining in the fight to make sure it stays in the final enacted budget and becomes the law in New York.

2) Preventing Wrongful Convictions from the Outset:

There is no greater miscarriage of justice than when the government robs an innocent person of her liberty for a crime she did not commit. We have taken steps to proactively exonerate those who have been wrongfully convicted in the past and we must keep pushing for their freedom and for proper restitution. However, we must also implement laws reflecting best practices to ensure that we guard against future failures. I therefore strongly support:

- i) Recorded Custodial Interrogations:** If we are to rebuild public trust, prevent wrongful convictions, and ensure that we have the best available evidence, it is vital that we enact legislation that Chairman Lentol, Chief Judge Lippman, and many others have been advocating for for years and finally mandate the electronic recording of all custodial interrogations statewide.¹⁷
- ii) Eyewitness Identification Reform:** We also must finally reform the way eyewitness testimony is used in our courts and solicited in our precincts. We need to mandate

¹⁶ Id.

¹⁷ A. 2773-2015 (Lentol).

double-blind lineups and take other measures to ensure that this notoriously unreliable, but undeniably persuasive, form of evidence is as trustworthy as possible and is considered in the proper context.¹⁸

3) Fixing Bail and Jail:

New York must overhaul its illogical bail system and reduce the costly, damaging over-incarceration that is its inevitable result. As Chief Judge Lippman said in his 2015 State of the Judiciary Address, “a system that presumes an individual is innocent should also presume that a non-violent individual should not be incarcerated pending trial without good reason.”¹⁹ In a just system, pre-trial detention should be reserved *only* for those defendants who cannot safely be released or who cannot be relied upon to return to court. Unfortunately, that is far from the current reality.

In 46 other states, judges are required to consider public safety when making a bail determination. In New York, not only is public safety not a mandatory consideration for bail, it is not even a *permissible* one.²⁰ Additionally, the imposition of financial burdens as a condition of pretrial release has risen significantly over the last two decades, according to the Vera Institute of Justice.²¹ These conditions combine to give us a system where the primary factor determining pre-trial liberty versus confinement is the ability to pay a bail bondsman. That means that non-dangerous individuals, constitutionally presumed innocent and often charged only with minor

¹⁸ See, e.g., Chief Judge Lippman’s State of the Judiciary Address at 17

¹⁹ Id. at 16

²⁰ See A. 6699-2014 (Lentol) (introduced at the request of the Chief Judge of the State of New York) (sponsors memo)

²¹ Vera Institute of Justice, *Incarceration’s Front Door: The Misuse of Jails in America*, at 13 (Feb. 2015) (available at <http://www.safetyandjusticechallenge.org/wp-content/uploads/2015/01/incarcerations-front-door-report.pdf>)

crimes, must languish in jail for days, weeks, and even months while waiting for their trial date or disposition simply because they are poor.

Over-incarceration in local jails is an inexcusable waste of resources, costing a jaw-dropping \$22 billion a year to taxpayers nationally.²² It is also an unjust and unnecessary deprivation of liberty for many of the 731,000 people who, on average, are confined in our nation's local jails.²³ There are also massive collateral consequences for those who are incarcerated instead of released. The damage ranges from lost jobs and wages, health deterioration, and potential loss of custody while awaiting trial, higher conviction rates at trial, and longer sentences after trial. New York deserves better from its policy-makers and for its people. That's why I strongly support legislation submitted at the request of Chief Judge Lippman and sponsored by Chairman Lentol to do the logical thing and let judges consider public safety, while simultaneously creating a strong statutory presumption for pre-trial release.²⁴

4) Meaningful Rehabilitation and Successful Re-Entry:

The vast majority of criminal laws that are enacted are narrowly focused on punishment, retribution, deterrence and prevention. None of these goals are inherently unworthy, but there is far too little focus on rehabilitation and reentry. Smart rehabilitation and re-entry policies are often treated as antithetical to law-and-order when, in fact, they only bolster it. If an individual comes out of the penal system with a set of vocational skills or an education and has a meaningful chance to become a law-abiding, gainfully employed member of society, that means less crime and a stronger economy. New York is better than many states in that it prohibits most

²² Id. at 4.

²³ Id. at 14.

²⁴ A. 6699-2014

employers from discriminating against job applicants based on criminal history, but there is plenty of room to improve.

We must do a better job of providing educational and vocational training opportunities for prisoners and create and fund stronger affirmative re-entry programs for when they are released. We must also extend our anti-discrimination policy to college and university admissions decisions as proposed in the Fair Access to Education Act, sponsored by Assembly Member Peoples-Stokes and Senator Montgomery.²⁵ If we are serious about rehabilitation, re-entry, and preventing recidivism, we must ensure that those who have overcome the long odds and qualified for college admission have the chance to build upon their hard work and become productive members of our economic future.

There are great many more important bills throughout both houses that deserve full consideration, open debate and ultimate enactment. I am eager to discuss all these issues with my state colleagues in the weeks and months ahead. We have much work to do, but I look forward to standing alongside you as we fight to give the people of New York the system of justice they deserve.

Thank you for your time and consideration.

²⁵ S. 969 (Montgomery)/A. 3363 (Peoples-Stokes).