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Eric Garner is proof that we need to reform laws on excessive force

Opinion by **Alvin Bragg**

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Alvin Bragg, a visiting professor and co-director of the Racial Justice Project at New York Law School, was chief deputy New York state attorney general from late 2017 through 2018. He has provided legal advice to the family of Eric Garner.

After an unconscionable five-year wait, the Justice Department announced Tuesday that it would not bring any criminal charges in connection with the death of Eric Garner. Yet again, we have another failure to pursue a criminal charge for the police killing of an unarmed African American man. Yet again, we fail to get anything approaching real transparency.

The Justice Department's decision flies in the face of the reality we all have seen on video: Officer Daniel Pantaleo put Garner into what the prior New York Police Department commissioner acknowledged was a prohibited chokehold and, as a result, Garner died before our eyes. This in itself is tragic.

More broadly, the decision highlights the urgent need to reform the federal criminal law governing excessive force. Congress needs to do away with the requirement of proof that officers have acted "willfully" when they use excessive force. This intent requirement is far higher than what states generally use. Congress also must mandate public reporting explaining the Justice Department's reasoning in detail when it decides not to bring a charge.

I previously served as the special prosecutor in New York state, tasked with handling police killings of unarmed civilians. This position was created in 2015 to have someone handle these cases who, unlike the local prosecutor, does not work daily with the police department whose officer is under investigation. Similarly, the Justice Department can step into the breach when a local prosecution does not result in a conviction. So, what is Justice's explanation for not bringing charges in the face of the video that shows Pantaleo choking Garner?

As outlined in its brief news conference this week, there are three key things that the Justice Department would be required to prove: (1) Pantaleo used excessive force; (2) such force caused Garner's death; and (3) Pantaleo's use of excessive force was willful. The Justice Department sidestepped the first issue, saying there was no need to resolve this issue, because it could not, in its view, prove that Pantaleo caused Garner's death or acted willfully. As for the second issue, the Justice Department looked past the New York medical examiner's conclusion that the chokehold led to Garner's death and pointed to "another medical examiner" (apparently one commissioned by Pantaleo) who it said could not support that determination.

It is the third issue –– whether Pantaleo willfully used excessive force –– that the Justice Department appears to view as the most important. As a general matter, an officer acts willfully if the officer acts with a "bad purpose" to disobey the law. As the Justice Department acknowledges, willfulness can be established through circumstantial evidence. But, the Justice Department's cursory analysis does not tell us what circumstantial evidence it looked at. The department made reference to Pantaleo's training and experience but told us nothing about either. The Justice Department also failed to note whether it took into consideration Pantaleo's disciplinary history. It is wholly unacceptable that DOJ's answer for how it justifies its conclusion on willfulness is, essentially, to direct us to look at the video we have had for five years –– especially given that a jury could reasonably find willfulness based on the video alone.

The department's wholly deficient rationale for the decision not to prosecute Pantaleo highlights the need for fundamental change moving forward. Congress should do away with the willfulness standard. Excessive-force cases often turn on a self-defense argument: If an officer reasonably believes deadly force is necessary to save his or her own life, then the officer may lawfully use deadly force. This argument almost always works in the officer's favor. Requiring proof of bad purpose on top of the reasonable belief requirement serves no meaningful public policy objective. To the contrary, the bad purpose requirement can insulate from criminal liability an officer who needlessly uses excessive force. Rather than insulate officers in this way, Congress should be pushing the law in the other direction. Congress should make clear that an officer's reasonable belief that force is necessary means that the officer exhausted all other options and had no reasonable alternative to the use of deadly force. In the Garner case, such a law would have shifted the Justice Department's focus to the question of whether Pantaleo's use of force was reasonable. The department's decision not to answer this question speaks volumes.

Congress also should mandate that the Justice Department provide detailed public reporting on its reasoning if it declines to bring charges. The only explanation the public received on the Pantaleo decision was a brief news conference: no medical reports, no policy or training materials on chokeholds, and no disciplinary history for Pantaleo. Public reporting is crucial to restore trust in our criminal-justice system. Prosecutors routinely claim that such reporting would have a chilling effect on an investigation or otherwise hamper law enforcement. My experience in New York –– where we did public reports in every case where there was no criminal charge and pointed out ways to improve law enforcement practices that might avoid future tragedies –– tells me this is not so.

It is fundamentally unfair and unjust to wait five years to receive an answer that defies what we have all seen. We must fix this system before it collapses under its own weight.