

PREFACE

THE DEATH OF GEORGE FLOYD, THE TRIAL OF DEREK CHAUVIN, AND DEADLY-FORCE ENCOUNTERS WITH POLICE: HAVE WE FINALLY REACHED AN INFLECTION POINT? OR WILL THE CYCLE OF INACTION CONTINUE?

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“Mama!” George Floyd, 46, cried out in the waning moments of his life. “Mama! I’m through,” gasped Floyd as Derek Chauvin ground his knee into Floyd’s neck and face into the asphalt road surface. “I can’t breathe,” Floyd declared at least fifteen times during the first four minutes of seventeen-year-old Darnella Frazier’s smart-phone video. Then his voice faded, his pleas grew further apart, and he eventually went silent. Bystanders, shocked, appalled, and armed with smartphones, pleaded seventeen times with officers to check Floyd’s pulse.

As the world knows, George Floyd would not survive.

Do the worldwide demands for justice following the death of George Floyd and the trial and conviction of Derek Chauvin for Floyd’s murder mean we have finally reached an inflection point when it comes to deadly-force encounters with police? It depends.

The case of George Floyd was not typical, but no case is.

There are approximately 1,000 deaths at the hands of police a year.¹ That number has held constant for many years, including since the death of George Floyd. Floyd’s death at the hands of Minneapolis police officers on May 25, 2020 was not typical for many reasons.

First, although many police-involved deaths of unarmed civilians happen at the split-second flash of a gunshot, the death of George Floyd at the hands of then-Minneapolis police officer Derek Chauvin—aided and abetted, the State of Minnesota alleged, by three others—took place not in a split second—as the State of Minnesota proved at the trial of Derek Chauvin—but over nine minutes and twenty-nine seconds, half of them after Floyd had lost consciousness and become non-responsive, then died. That’s 569 seconds, not a single one of them split.

Also rare was the social-media virality of the bystander video of the death of George Floyd. Millions of people saw George Floyd die. In too many cases, there has been no video evidence of the deaths of unarmed civilians at the hands of law

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1. Mark Berman, John Sullivan, Julie Tate & Jennifer Jenkins, *Protests Spread Over Police Shootings. Police Promised Reforms. Every Year, They Still Shoot and Kill Nearly 1,000 People*, WASH. POST (June 8, 2020), https://www.washingtonpost.com/investigations/protests-spread-over-police-shootings-police-promised-reforms-every-year-they-still-shoot-nearly-1000-people/2020/06/08/5c204f0c-a67c-11ea-b473-04905b1af82b_story.html.

enforcement. Think Michael Brown, Sandra Bland, Breonna Taylor. In other cases where video evidence did exist, it took years before the video evidence that authorities had suppressed saw the light of day. Think Laquan McDonald. In the case of the death of George Floyd, however, seventeen-year-old Darnella Frazier—who was out with her nine-year-old cousin to buy some penny candy at the corner store happened by a man, whom she had never met and about whom she knew nothing, having the life squeezed out of him—bravely pulled out her phone and recorded the death of George Floyd for the city, the nation, and the world. The act was so simple yet so profound. In 2021, Frazier was honored with a Special Citation in journalism by the Pulitzer Prize jury. This is significant because “in more than a century, the board has never recognized an act of journalism conducted without the imprimatur of a newsroom.”²

Remarkable, too, was the near-immediate reaction of the city, the nation, and the world to Floyd’s death. Although any death of an unarmed civilian at the hands of law enforcement is a tragedy to be mourned, the immediacy and intensity of the reaction was unlike any America had seen in three decades—not since the 1992 beating of Rodney King at the hands of Los Angeles police officers and the subsequent acquittal of those officers at trial. The conscience of the nation and the world were shocked: Floyd’s death led to millions of people across the nation and the world taking to the streets to demand justice; many of them for the first time in their lives.

It is not that George Floyd was more worthy than other unarmed people who have died at the hands of police. His life did not have more value than theirs. The loss of every life in this way is a tragedy. Nevertheless, George Floyd’s death led to an exceptional charitable outpouring of hundreds of millions of dollars into the coffers of nonprofits and community-led organizations fighting for racial justice, with a speed and in amounts never seen before. In Minnesota, as in other states as well as cities, it led to quick passage of a criminal-justice reform bill that had been proposed in many iterations over many years at the state legislature, to no significant progress until the death of George Floyd.

The prosecution of Derek Chauvin was also remarkable. It is not common for attorneys general to review and prosecute police-involved deaths. In Minnesota, the only original criminal jurisdiction that the attorney general has by law³—to date, at least—is over Medicaid fraud. Otherwise, all other criminal jurisdiction lies in the hands of elected county prosecutors and the only way the Minnesota attorney general may prosecute a criminal case is when one is referred to the office by a county prosecutor or assigned to the office by the governor. The criminal division of the attorney general’s office does routinely handle criminal prosecutions for murder or other violent crimes for county prosecutors from rural counties where they often lack the resources to prosecute such cases, when those counties request it. The case of the murder of George Floyd was the first time that a police-involved death was referred to the office, and the first time the referral came from largest, most well-equipped county prosecutor’s office in the state with the vocal support of the governor.

And as the attorney general and lead prosecutor in the case, I knew that there was a historic moment that had to be met, I assembled a prosecution team not only of the best criminal prosecutors in my office, but of the best prosecutors, trial attorneys, and appellate attorneys I could find. Some volunteered, because they also understood the

2. Syreeta McFadden, Opinion, *What Giving a Pulitzer Prize for Filming George Floyd’s Murder to Darnella Frazier Really Means*, NBC NEWS (June 14, 2021) <https://www.nbcnews.com/think/opinion/what-giving-pulitzer-prize-filming-george-floyd-s-murder-darnella-ncna1270778>.

3. Chris Toth, Adam Eisenstein & Salini Nandipati, *Attorneys General & Criminal Law*, in STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES (2020).

power of the historic moment to be met. It was a team with a breadth and depth of experience, background, and talent the likes of which I think it is fair to say America had not seen before in the prosecution of a police officer.

At trial, we presented an extraordinary set of eyewitnesses, medical experts, and use-of-force experts. From Darnella Frazier and her nine-year-old cousin to eyewitnesses ranging in age from sixteen to sixty-one—each one of whom, thanks to our skilled prosecutors—became to the public like actors in a tragedy that was the death of George Floyd; to medical experts like Dr. Martin Tobin, who with his lilting Irish accent and gentle but authoritative demeanor was able to show both jurors and people watching around the world exactly how, and exactly when, George Floyd died at Derek Chauvin’s hands; to experts in reasonable and unreasonable uses of force—and who better to distinguish between them than the eight Minneapolis police officers who testified that Derek Chauvin’s use of force was unreasonable, led by Chief of Police Medaria Arradondo. No trial of a police officer for excessive use of force or the death of an unarmed civilian has ever featured as many police officers testifying for the prosecution—and none the chief of police, testifying in full uniform that the defendant’s behavior was not a reasonable use of force and not in line with the policy of the department. Chief Arradondo earned a place in history for his testimony.⁴

The conviction and sentencing of Derek Chauvin were also uncommon. Chauvin was convicted of second-degree unintentional murder, third-degree murder, and second-degree manslaughter. No police officer in Minnesota has ever been convicted of second-degree murder, and almost none in America ever have. The sentence meted down to Chauvin—twenty-two and a half years—is one of the longest any police officer in America has ever received for unlawfully causing the death of a civilian.

Finally, and powerfully, the Floyd family handled themselves with exceptional grace—as many families in their position have done. They faced their worst fears and took the worst moment of their lives—one no one should have to live through but too many have—and have turned their loss into hope and optimism for a better society. Every day during the Chauvin trial, they came to the courthouse to bear witness in the spirit of justice and accountability. They stood not with vengefulness, but with dignity and respect for each other and all people.

To date, then, nearly every aspect of the entirely tragic and entirely unnecessary death of George Floyd and the trial of Derek Chauvin has been noteworthy, if not unprecedented. This is not to say that other police-involved deaths of unarmed civilians were not noteworthy, because they all were. Each one devastates a family and does long-term damage to a community, a police department, and trust between law enforcement and community. To say that George Floyd’s death and all that has come from it are nonetheless exceptional is only to emphasize the impact they have had to date had on our notions and practices of justice and injustice.

Yet we cannot count on every death of an unarmed person at the hands of police to attract worldwide attention and spark a worldwide movement for accountability and change. We cannot count on every death of an unarmed person at the hands of police to be prosecuted. We cannot count on every prosecution to be noteworthy or successful. And we cannot count on every verdict and sentence to meet our expectations for accountability and justice.

Will the legacy of George Floyd and the successful prosecution of his death endure and take deeper root? Are we now at an inflection point where the singularity of this case can be harnessed into long-term, transformational change across America?

4. Libor Jany, *Minneapolis Police Chief’s Historic Testimony Reveals Latest Crack in Blue Wall of Silence*, STAR TRIB. (April 6, 2021) <https://www.startribune.com/minneapolis-police-chief-s-historic-testimony-reveals-latest-crack-in-blue-wall-of-silence/600042534>.

It depends.

The cycle of inaction

“For more than 100 years, Black communities in America have sadly been marching against police abuse and calling for the police to protect and serve us as they do others,” said Representative Karen Bass, Chair of the Congressional Black Caucus.⁵ “We marched, we voted, and today we re-introduce the bill with renewed hope that it will become law. Never again should an unarmed individual be murdered or brutalized by someone who is supposed to serve and protect them . . . Never again should the world be subject to . . . what we saw happen to George Floyd in the streets [of] Minnesota.”⁶

Unfortunately, it would happen again. According to Mapping Police Violence, 288 people died at the hands of police in the three months after George Floyd was murdered.⁷ This is not a surprise. For many years now, the number of civilians killed by police has averaged three a day or about 1,000 a year.⁸ So 288 in three months is right on average.

Representative Bass is right that communities of color in America have been addressing police issues for over 100 years. In 1968, the famous sociologist Dr. Kenneth Clark—who with his equally acclaimed sociologist wife Dr. Clark of the *Brown v. Board* doll study—testified before the Kerner Commission.⁹ Dr. Clark laid out the longevity and intractability of the problem: “I read that report . . . of the 1919 riot in Chicago,¹⁰ and it is as if I were reading the report of the investigating committee on the Harlem riot of ’35, the report of the investigating committee on the Harlem riot of ’43, the report of the McCone Commission on the Watts riot . . . I must again in candor say to you members of this Commission—it is a kind of Alice in Wonderland—with the same moving picture re-shown over and over again, the same analysis, the same recommendations, and the same inaction.”¹¹

The writers of the Kerner Commission report themselves wrote: “The police are not merely a ‘spark’ factor. To some Negroes police have come to symbolize white power, white racism, and white repression. And the fact is that many police do reflect and express these white attitudes. The atmosphere of hostility and cynicism is reinforced by a widespread belief among Negroes in the existence of police brutality and in a ‘double standard’ of justice and protection—one for Negroes and one for whites.”¹²

Others noticed before the Kerner Commission. In 1947, the “President’s Committee on Civil Rights” that President Truman established published its report, called “To Secure These Rights.”¹³ In it, the Committee wrote: “There is evidence of lawless police action against whites and Negroes alike, but the dominant pattern is that of race prejudice. Negroes have been shot, supposedly in self-defense, under circumstances indicating, at best, unsatisfactory police work in the handling of

5. Press Release, U.S. House to Vote on the Bill Next Week As Police Brutality and Protests Against It Continue, U.S. HOUSE COMM, ON THE JUDICIARY, <https://judiciary.house.gov/news/email/show.aspx?ID=HKWUFKUGXSUFWPWIZWYHEJITIZM>.

6. *Id.*

7. MAPPING POLICE VIOLENCE, <https://mappingpoliceviolence.org>.

8. *Id.*

9. 1968 Kerner Commission Report, OTHERING & BELONGING INSTITUTE, [//belonging.berkeley.edu/1968-kerner-commission-report](https://belonging.berkeley.edu/1968-kerner-commission-report).

10. *The Red Summer of 1919*, HISTORY (Aug. 6, 2020) <https://www.history.com/topics/black-history/chicago-race-riot-of-1919>.

11. *Id.*

12. *Id.*

13. *To Secure These Rights*, HARRY S. TRUMAN LIBRARY MUSEUM, <https://www.trumanlibrary.gov/library/to-secure-these-rights>.

criminals, and, at worst, a callous willingness to kill.”¹⁴ Indeed, in a new book by Yale University law professor Elizabeth Hinton, “America on Fire,” the author documents that the last half-century of so-called “race riots” are more accurately characterized as rebellions of Black communities against inappropriate police conduct.¹⁵ According to the *New York Times*, by the author’s calculation “between July 1964 and April 2001 nearly 2,000, often violent, urban rebellions erupted in the United States in response to the racially biased policing of housing projects, public schools, parks, neighborhoods and street corners.”¹⁶

Yet even with this pattern clear—and even though we have long known what we need to do to end it—America has been stuck for a century in a cycle of inaction. At various junctures in past decades—such as the 1968 Kerner Commission, but hardly limited to it—leaders of government and civil society have stopped to examine the cycle and make recommendations for ending it. Then what has happened? Politicians, prosecutors, and law-enforcement leaders have failed to act. As a result, understandable tensions and resentments have continued to build, tragic incidents of police use of force have continued to occur, people have continued to rise up in anger and hope, leaders have continued to form commissions to examine the problem and make recommendations—then no one has taken meaningful action and the cycle of inaction has continued.

It is a long and sobering history that we are up against as a country and a people. The singular case of the death of George Floyd has so far shown signs of having the power to finally break it. Can the murder of George Floyd and the subsequent conviction of Derek Chauvin represent an inflection point on the journey towards just and humane law enforcement and public safety? Have we finally reached that moment? Can we break the cycle of inaction once and for all?

My answer: it depends on whether we heed the warning of Dr. Clark and break the cycle of inaction.

Breaking the cycle of inaction with meaningful action

Four sets of people must take meaningful action if we are to break the century-long cycle of inaction: prosecutors, lawmakers, law-enforcement officials, and the community.

Prosecutors

Prosecutions of law-enforcement officers for unlawful use of force must be vigorous, visible, and swift. This means that all prosecutors—at the local, state, and federal levels—must be willing to think creatively about and not be afraid to use all the tools the law puts at their disposal in prosecuting unlawful conduct. None of the training, policy, reports, or speeches will matter if officers who are inclined to skirt or break the law on use of force can rest peacefully knowing that they will face no ultimate consequences when they do.

Convictions, if they arise out of prosecutors’ duties as ministers of justice, are welcome—but no prosecutor can win every case, no matter how sound the case. It is still critically important that prosecutors vigorously prosecute cases of unlawful use of force to the full extent the law allows, even if the chances of a conviction are slim. After all, too often cases are undercharged—as in the case of the death of Breonna

14. Adam Harris, *Racism Won’t Be Solved by Yet Another Blue-Ribbon Report*, ATLANTIC (June 4, 2020) <https://www.theatlantic.com/politics/archive/2020/06/george-floyd-racism-police-brutality/612565>.

15. Peniel E. Joseph, Book Review, *Recasting ‘Riots’ as Black Rebellion*, N.Y. TIMES (May 18, 2021) <https://www.nytimes.com/2021/05/18/books/review/america-on-fire-elizabeth-hinton.html>.

16. *Id.*

Taylor, when the Kentucky attorney general misinstructed the grand jury about the law it could apply¹⁷—if they are prosecuted at all.

The visibility of prosecutions is as important as the vigor of them: regardless of the outcome the prosecution, it is important for building and restoring public trust for the public to see the effort that goes into a vigorous prosecution. In the case of the prosecution of Derek Chauvin, the high visibility of the trial was critical to building trust that regardless of the outcome. The State did everything in its power to mount a vigorous prosecution and had left no stone unturned.

Equal in importance to prosecutions being vigorous and visible is that they be swift. It took four years from the death of Laquan McDonald at the hands of Chicago police officer Jason Van Dyke before Van Dyke was tried and convicted.¹⁸ We cannot possibly build the trust of the public that is a necessary component of breaking the cycle of inaction if we allow just prosecutions to take this long.

Federal prosecutors have a role to play as well in supporting local and state prosecutors, and by stepping in when they are not able to win convictions or refuse to act. It was critically important to public faith in the justice system that the Los Angeles police officers who beat Rodney King, and the North Charleston, South Carolina police officer who killed Walter Scott, were brought to justice on federal charges when local prosecutors were not able to win convictions. The United States attorney general herself or himself also has a key leadership role to play. When former Attorney General Sessions took office, he promptly announced that the Department of Justice was getting out of the business of holding malfunctioning police departments accountable through pattern-and-practice lawsuits and consent decrees.¹⁹ This announcement had the desired effect of saying to all who were listening that there would be few to no federal consequences for unlawful behavior in law enforcement. It matters that soon after current Attorney General Garland was sworn in, he reversed that policy and announced that the federal government was back in the business of helping make sure that police departments follow the law, and are held accountable with serious consequences when they do not.²⁰

Beyond holding law-enforcement officers accountable in court when they break the law, prosecutors must also be willing to be advocates for reforms that make it possible to hold law enforcement accountable for unlawful uses of deadly force—and that reduce deadly-force encounters in the first place. Of the five recommendations that the Public Rights Project makes in its September 2020 publication, “The Power and Potential of State Attorneys General to End Police Brutality,”²¹ the first is that attorneys general hold officers accountable for breaking the law, and the remaining

17. Jason Riley, Marcus Green & Chad Mills, *Three Breonna Taylor Grand Jurors File Petition to Impeach Attorney General Daniel Cameron*, WDRB NEWS (Jan. 23, 2021) https://www.wdrb.com/in-depth/three-breonna-taylor-grand-jurors-file-petition-to-impeach-attorney-general-daniel-cameron/article_855317de-5cdd-11eb-9291-6f5c939c5d8e.html.

18. Nausheen Husain, *Laquan McDonald Timeline: The Shooting, the Video, the Verdict and the Sentencing*, CHI. TRIB. (Jan. 18, 2019) <https://www.chicagotribune.com/news/laquan-mcdonald/ct-graphics-laquan-mcdonald-officers-fired-timeline-htmlstory.html>.

19. Christy E. Lopez, *Preventing Remedying Patterns or Practices of Law Enforcement Misconduct*, GOVERNING FOR IMPACT (Jan. 2021) <https://www.law.georgetown.edu/wp-content/uploads/2021/01/Preventing-and-Remedying-Patterns-or-Practices-of-Law-Enforcement-Misconduct.pdf>.

20. Sadie Gurman, *Garland Commits to Police Department Prbes With Their Voices at the Table*, WALL ST. J. (April 23, 2021) <https://www.wsj.com/articles/merrick-garland-and-law-enforcement-leaders-to-confer-on-federal-role-in-policing-11619170203>.

21. *The Power and Potential of State Attorneys General to End Police Brutality*, PUBLIC RIGHTS PROJECT (Sept. 2020) <https://static1.squarespace.com/static/592c8640c534a5adf895986b/t/5f6bfff0e228e738ad46e4c8/1600897009236/PRP-stateAG2020-v06.pdf>.

four are that attorneys general be better advocates—by fighting for the authority to bring lawsuits against police departments for misconduct, issuing advisory opinions, calling for decriminalization of certain offenses, and support reform and accountability.

I agree that attorneys general can advocate in all these areas, and I have already advocated in some of them. I co-signed a June 2020 letter to Congress²² with seventeen other attorneys general urging Congress to expand federal law to give state attorneys general clear statutory authority to investigate patterns or practices of unconstitutional policing. Congress has already delegated enforcement of some federal laws to states, for example over antitrust behavior. It should do so here as well. I have also been a longtime supporter of marijuana decriminalization. In addition, my office is leading in other criminal-justice reforms, including making expungements of certain non-violent crimes much easier to win, and in reviewing convictions of people believed to have been wrongfully convicted, among other areas.

I have also advocated for reducing deadly-force encounters with law enforcement of all kinds, lawful or unlawful. In 2019, shortly after both Minnesota Public Safety Commission John Harrington and I had taken our respective offices, our offices collaborated on the formation of a working group²³ that we charged with coming up with practical, implementable recommendations for reducing police-involved deadly-force encounters. We deliberately selected a racially and professionally diverse set of members from the criminal-justice system, including police, sheriffs, prosecutors, and judges along with representatives from philanthropy, research, advocacy, law-making, and the community—including the uncle of Philando Castile.

We organized our work around five pillars: community healing and engagement, prevention and training, investigations and accountability, policy and legal implications, and officer wellness. The criteria we established for developing recommendations included that they be actionable, with identifiable steps; that they address both community and law-enforcement concerns; and that they are likely to have an impact on reducing deadly-force encounters. After six months of public hearings and much debate, some of it occasionally heated, we adopted twenty-eight recommendations and thirty-three action steps²⁴ by consensus—three months before the death of George Floyd.²⁵

The working group did not claim that these are only steps that need be taken to reduce deadly-force encounters: rather, it said simply that these are the ones with the necessary buy-in from both law enforcement and the community that can be realistically and quickly adopted through policy change, administrative action, or legislative or budgetary action—and that if adopted, they will reduce police-involved deadly-force encounters. In the year that followed the release of the recommendations—the year that included the death of George Floyd—significant progress²⁶ was made in implementing them, with more progress to come.

22. Letter from Kwame Raoul, III, Attorney General, & Letitia James, N.Y. Attorney General, to Congressional Leadership (June 4, 2020) https://www.illinoisattorneygeneral.gov/pressroom/2020_06/20200604_Executed_Ltr_to_Congress_to_Expand_Sections_12601-02.pdf.

23. *State of Minnesota Working Group on Police-Involved Deadly Force Encounters*, MINN. DEP'T OF PUBLIC SAFETY, <https://dps.mn.gov/divisions/co/working-group/Pages/default.aspx>.

24. *Id.*

25. Press Release, Working Group Releases Consensus Recommendations for Reducing Police-Involved Deadly Force Encounters, OFFICE OF MINN. ATTORNEY GENERAL KEITH ELLISON, https://www.ag.state.mn.us/Office/Communications/2020/02/24_WorkingGroup.asp.

26. 2021 Progress Update Summary, POLICE-INVOLVED DEADLY FORCE ENCOUNTERS WORKING GROUP, <https://dps.mn.gov/divisions/co/working-group/Documents/2021-progress-report.pdf>.

There is no one-size-fits-all when it comes to steps prosecutors can and must take to end the cycle of inaction. Each state and locality, with the support of the Department of Justice, must determine what works best for it, but states and localities must engage in an open, transparent, and honest conversation about what is working and what has not worked before they can determine what will work best and produce meaningful results going forward. To default to the status quo simply because it is the status quo and “how we’ve always done it” is no longer good enough. It does not rise to the historic moment that we are called to meet.

In that spirit, I gladly admit that I was mistaken in my initial opposition to televising the trial of Derek Chauvin.²⁷ Until the trial, there was almost no past practice of televising trials in Minnesota. Because of that, and because I was concerned about the impact on vulnerable witnesses of testifying live on camera, and because I feared the trial degenerating into grandstanding solely for the benefit of the camera like the trial of O.J. Simpson, the State opposed televising the trial. The trial judge ruled against us in ordering that the trial be televised, then ruled against us again when we moved that the court reconsider its order. During trial, however, the court took the important step of ordering that the faces of the minor witnesses not be broadcast during their testimony, which addressed one of my principal concerns. And as the trial unfolded, I increasingly recognized the value that televising the trial had on building public trust both in the prosecution and in the fair administration of justice. I now acknowledge that in my initial opposition, I was relying in part on doing it “how we’ve always done it.” I am glad to have been wrong.

In short, prosecutors—be they district or county attorneys, attorneys general, or federal prosecutors—must break through the barrier of believing that we can either have public safety and civil order, or we can have human rights. We must insist on both. There is no other path forward if we are to break the cycle of inaction.

Lawmakers

Lawmakers at every level of government—city, county, state, and federal—must act.

This starts with Congress. As of this writing—more than one year after the murder of George Floyd—Congress has still not passed the George Floyd Justice in Policing Act. The bill as written does many important things, including banning no-knock warrants and chokeholds; improving transparency through more robust data collection about misconduct and use of force; expanding the ability to investigate and hold police officers accountable in court for misconduct; and empowering community to redefine public safety at the grassroots.

Nevertheless, one of the reasons the bill has not passed Congress is due to the provision that would eliminate qualified immunity²⁸ for law enforcement. Although I am not alone in believing that qualified immunity for law enforcement is bad precedent and support keeping this provision in this law, I believe it is far more important to pass a substantive, if imperfect, bill than to fail with a perfect bill.

I would remind those who disagree of the passage of the Civil Rights Act of 1964. Many activists who had worked years, if not decades, on the passage of this bill opposed it on the grounds that it took no steps to protect voting rights or to promote

27. Chao Xiong, *Prosecutors Challenge Judge’s Order Allowing livestreaming of Floyd Trial, Arguing it Could Harm Testimony*, STAR TRIB. (Nov. 30, 2020) <https://www.startribune.com/prosecutors-challenge-livestreaming-of-floyd-trial-arguing-it-could-limit-testimony/573238421>.

28. Nathaniel Sobel, *What is Qualified Immunity, and What Does it Have to Do with Police Reform?*, LAWFARE (June 6, 202) <https://www.lawfareblog.com/what-qualified-immunity-and-what-does-it-have-to-do-police-reform>.

fair housing. But in 1964, the only realistic route to passing the bill in Congress and sending it to President Johnson's desk was without voting-rights protections or fair-housing provisions. Without them, the bill passed and became law—transformational law. Although it was not perfect then or now, few today would argue that it would have been better for Congress not to have passed the Civil Rights Act when it did.

And of course, due to continuous pressure from the community and civil-rights leaders, the Voting Rights Act became law in 1965, and the Fair Housing Act became law in 1968. When it comes to the George Floyd Justice in Policing Act in 2021, we must remind ourselves of this history and not let the perfect be the enemy of the good. Lives are depending on Congress passing the best version of the bill that can actually pass, and passing it now, with more necessary reform to come later.

State legislatures must also act. In Minnesota, the Legislature passed and the Governor signed a comprehensive criminal-justice reform package the month after George Floyd's death.²⁹ It, too, was not perfect: political compromise meant leaving important reforms out of the final bill, but it contained meaningful steps forward that are having a positive impact.

Among the steps that legislatures in every state can take now are to explicitly authorize state attorneys general or other state agencies to conduct pattern-and-practice investigations of law-enforcement agencies, just as the Department of Justice may already do under federal law. Attorneys general in Illinois have already done so, and in Minnesota, the state Department of Human Rights has used its authority under current law to conduct an investigation of the Minneapolis police department.³⁰ But legislatures can and must do to expand this authority at the state level.

Where state law does not explicitly authorize state-level officials to conduct pattern-and-practice investigations, Congress should make it possible for them officials to rely on existing federal authority to do so, just as state attorneys general can now enforce federal antitrust law. The George Floyd Justice in Policing also creates a grant program for state attorneys general to conduct independent investigations into problematic law-enforcement agencies.

At the local level, city councils and county boards should support reform-minded leaders in law enforcement in enacting progressive change to policy, training, and culture, and use the power of the purse if and when necessary to compel reform.

Law-enforcement leaders

Law-enforcement leaders must take meaningful action and be diligent about it. Perhaps the most remarkable example of a law-enforcement leader taking exceptional action to break dramatically with the cycle of inaction was when Minneapolis Police Chief Medaria Arradondo took the witness stand in full uniform to testify that Derek Chauvin's actions in causing the death of George Floyd were wrong.

His doing so represented a paradigm shift. Breaking ranks, even with the worst behavior, is not seen often in police culture. In his book, *Police Unbound*, former Minneapolis Police Chief Tony Bouza wrote: "The Mafia never enforced its code of blood-sworn omerta with the ferocity, efficacy, and enthusiasm the police bring to

29. Steve Karnowski, *Minnesota Lawmakers Pass police Accountability Package*, AP NEWS (July 21, 2020) <https://apnews.com/article/police-reform-police-health-us-news-bills-6ae40d92363db59a112bf6e96eaeef8da>.

30. Jeremiah Jacobsen, *Minnesota Dept. of Human Rights Files Civil Rights Charge Against Minneapolis Police*, KARE (June 3, 2020) <https://www.kare11.com/article/news/local/george-floyd/minnesota-dept-of-human-rights-files-civil-rights-charge-against-minneapolis-police/89-fbec01ad-8638-49f4-9287-a307ff616176>.

the Blue Code of Silence. Stand-up guys and gals have balls. This includes silence or support. It does not include contradiction or exposure.”³¹

And yet Chief Arradondo, who fired former officer Chauvin shortly after the death of George Floyd, testified: “There is an initial reasonable in trying to get him under control in the first few seconds, but once there was no longer any resistance and Mr. Floyd was no longer responsive and even motionless to continue to apply that level of force to a person prone out handcuffed behind their back—that in no way, shape, or form is anything that is by policy is not part of our training and is certainly not part of our ethics or value.”³²

Chief Arradondo’s swift decision to discharge Chauvin, his willingness to take the witness stand, and his testimony sent an important signal to Minneapolis police officers inclined to use to excessive force: the top of the department won’t support your wrongdoing.

It was not only the chief who spoke up in outrage about the torture and murder of George Floyd. During the trial, seven other current and former officers took the stand against former Officer Chauvin, including the most senior active member of the department, with 40 years’ tenure. Nearly a year before that, though, fourteen Minneapolis police officers joined the millions who protested through an open letter, which they addressed to “everyone—but especially Minneapolis citizens.”³³ Among the letter’s notable passages: “Derek Chauvin failed as a human and stripped George Floyd of his dignity in life. This is not who we are.”³⁴ The 4 active-duty officers who signed it made it clear that they did not speak for the union or for the department’s administration, but did claim to speak for “the vast majority of Minneapolis Police Officers” and to “communicate a sentiment that is broad within our ranks.”³⁵ They noted further that “[w]e stand ready to listen and embrace the calls for change, reform and rebuilding.”³⁶ This letter too was paradigm-busting. A rank-and-file officer inclined to discount the disavowal of misconduct by the brass cannot so easily discount it when it comes from the rank and file.

Law enforcement leaders across the country must take meaningful action as Chief Arradondo and the other officers who testified and wrote against the actions of Derek Chauvin did. Unfortunately, it is still not common: see, for example, the treatment of former Buffalo, New York police officer Cariol Horne.³⁷ In 2006, then-Officer Horne, a Black woman, intervened when a White officer had a handcuffed Black man in a chokehold and it looked to her like the man was going to die. In so doing, she likely saved his life.³⁸

Officer Horne did then exactly what we all say today should be done: she intervened when she saw a fellow officer using excessive force that was about to turn deadly. She should, of course, have been hailed as a hero and lionized for doing the right thing. What happened instead? By 2008, she had been fired just months before she was eligible for her full pension.

31. Tony Bouza, *Police Unbound: Corruption, Abuse, & Heroism by the Boys in Blue* 172 (2001).

32. *Id.*

33. Letter from Minneapolis Police Officers to Everyone But Especially Minneapolis Citizens, https://kstp.com/kstpImages/repository/cs/files/policeofficersletter.pdf?_gl=1*jwrrnh*_ga*YW1wLU52djI3MHY4Z1BWS2RGUnptRkl4bTA0MnMtVDRTcTlRzRKdW9JSFEwVWpwMGw0S1lpZEKxVWh0M2Ffa2pmUWI.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Cariol Horne, Former Officer who was Fired After Stopping 2006 Chokehold, “Kept Fighting” for Justice*, CBS NEWS (April 15, 2021) <https://www.cbsnews.com/news/former-buffalo-officer-cariol-horne-2006-chokehold>.

38. *Id.*

Had Officer Horne not intervened—indeed, if Officer Horne had even participated in the chokehold or otherwise assaulted the handcuffed person in custody—she would not have gotten in trouble and most of us would never know her name. But because she did, the leadership of the Buffalo Police Department chose to ruin the career of a good officer and preserve the career of a brutal one. By drumming her out of the department, they said you can assist in brutality but not in saving people. (Notably, the officer involved in the chokehold was sentenced to four months in federal prison in 2018 for a separate incident of excessive use of force that dated back to 2009.)³⁹

Fortunately, a measure of justice has finally been done in this case. In April 2021, a New York state court ordered Cariol Horne’s full police pension restored. In his order, Judge Dennis Ward of Erie County Supreme Court wrote: “While the Eric Garners and the George Floyds of the world never had a chance for a ‘do-over,’ at least here the correction can be done.”⁴⁰

We should not need courts to step in years after the fact and do what law-enforcement leaders should do in the first instance. We need law-enforcement leadership across the country to support the Cariol Hornes and the Minneapolis police officers who spoke out against Derek Chauvin and in support of community. We need law-enforcement leadership to break once and for all the so-called “blue wall of silence.”

In so doing, those law-enforcement leaders need the support of elected leaders at every level: not only the mayors and city council members that they report directly to, but all the way up to the president of the United States. When in 2017, then-President Trump told an assembly of police officers that they need not worry about roughing people up when taking them into custody,⁴¹ he sent a powerful message across the country that accountability for law enforcement should not matter—when the year since the death of George Floyd has shown that it matters deeply to millions of Americans in every state of the union.

Regardless of the intentionally inflammatory rhetoric of the former president, no police officer of integrity and good intention who genuinely desires to guard and serve community is threatened by accountability. Accountability measures do not put them at risk: they protect them and their careers. If the Buffalo Police Department had chosen to hold accountable the officer who was choking out a handcuffed person in custody rather than hold accountable the person who broke up that potentially deadly encounter, Cariol Horne would have been able to retire with distinction and would not have had to fight for more than a decade to get her pension back.

Officers around the country like the fourteen in Minneapolis who signed the open letter to community want their leaders to support officers who treat everyone with dignity and respect and hold accountable their colleagues who refuse to do so. They want them to support officers who take risks to speak up and demand that we all do better.

Why do police officers want accountability? Think of how the nine-year-old girl, wearing a love t-shirt, who witnessed George Floyd’s murder will feel from now on when she thinks about law enforcement. Think about what anyone in the community affected by Floyd’s murder will think.

39. April Siese, *Former Buffalo Officer who Stopped Fellow Cop’s Chokehold on Suspect Will Get Pension After Winning Lawsuit*, CBS NEWS (April 15, 2021) <https://www.cbsnews.com/news/cariol-horne-former-buffalo-police-officer-pension-lawsuit-win>.

40. *Horne v. City Buffalo*, 148 N.Y.S.3d 635 (N.Y. Sup. Ct. 2021).

41. Mark Berman, *Trump Tells Police Not to Worry About Injuring Suspects During Arrests*, WASH. POST (July 28, 2017) <https://www.washingtonpost.com/news/post-nation/wp/2017/07/28/trump-tells-police-not-to-worry-about-injuring-suspects-during-arrests>.

It is not fair to judge all police officers by Derek Chauvin's actions, but people inevitably will generalize—unless there is accountability. You cannot heal a dirty wound. And when there is little trust, there is little safety. But when law-enforcement leaders take clear steps to build in accountability, they will have their officers' respect, trust between officers and the people they serve will grow, and all communities will be safer.

Can a police officer make an honest mistake, even a tragic one with deadly consequences? Of course, just as anyone can. But when law-enforcement leaders take meaningful steps in direction of accountability that the public can trust, they and the criminal-justice system will finally be able to distinguish between an honest if tragic mistake and criminal misconduct. There will no longer be any rationale for a "blue wall of silence."

Critically, though, along with accountability measures, law-enforcement and elected leaders must also commit themselves to the serious work of officer wellness, including mental wellness. The reason the recommendations of the State of Minnesota working group on deadly-force encounters begin with recommendations for Community Healing and Engagement and end with recommendations for Officer Wellness is because those two pillars hold up the working group's many other recommendations for training, accountability, and policy. Officer wellness is one of the necessary bookends of the work of imposing accountability and breaking the cycle of inaction.⁴² Police officers and first responders must see that their leaders are taking real, concrete, public steps to support them as human beings even as they demand accountability as professionals. Officer accountability cannot succeed without officer wellness.

Some may say that all the training, policy, and accountability measures in the world will have no effect if you cannot change toxic police culture. They may say that culture beats policy every time, as if it were a game of rock-paper-scissors that toxic police culture always wins. To them, I say that of course it's important to change hearts, minds, and culture along with policy, training, and law. But if you cannot change hearts and minds, you can change behavior through real accountability and law-enforcement and elected leaders who will publicly and transparently demand, impose, and enforce it. You can lead with accountability and lift up those officers who are doing right by the people they serve, and hearts and minds will follow—or will leave the profession.

Culture will necessarily change when accountability mechanisms that are created through policy, legislation, and prosecution spark behavior change. Derek Chauvin was prosecuted and convicted not only on the word of the regular people who witnessed the death of George Floyd and the video they took, he was prosecuted and convicted on the word of police leaders and officers who took the stand against him. That example marks a paradigm shift and holds promise for finally breaking the cycle of inaction when it comes to law enforcement accountability and restoring trust in communities of color.

The Community

Finally, the community must act—or more aptly, must continue to act. The community must keep up the pressure for reform, accountability, and justice so that we do not fall once again into the cycle of inaction.

Prosecutors, lawmakers, and law-enforcement leaders who are fighting to take meaningful action need every community member to keep up the pressure:

42. See *supra* note 23.

constructively and peacefully, but clearly and forcefully. This means everyone who wants to live a society with dignity and respect as core values, everyone who wants to be safe in their homes and on their streets, everyone who wants to get help when they need it and don't want to have to fear it, everyone who wants their loved ones to get home safely.

In short, this is almost everyone. Almost everyone has a role to play.

The community's insistent and consistent demand for meaningful action is an indispensable part of the equation: but for community speaking up and rising up, little progress is likely. Realistically, my office would not have been charged with the prosecution of the murder of George Floyd without the brave community members who stopped to bear witness to his death and share what they saw with the world, and the community members in Minnesota and around the world who rose up and cried the cry of justice in demanding action that took the real measure of their grief and pain.

Frederick Douglass said: "If there is no struggle, there is no progress."⁴³ If the old saw that politicians see the light when they feel the heat is true, the community can and must continue to bring the heat of struggle and the light of moral clarity whenever and wherever it is lacking in the pursuit of accountability and justice.

Can we break the cycle of inaction? Yes—if we act.

We cannot rely on one singular, though in many ways exceptional case, to carry the whole burden. But we do get to use it to catapult ourselves out of the cycle of inaction that has condemned America to repeating the most painful parts of its history for the last century.

We are not lacking for good, proven, data-driven policy ideas. What we're lacking is the will to put them into practice. It's not that we don't know what works. We just haven't committed ourselves to doing what works.

I do not pretend that the steps I have outlined are the only steps that need to be taken. One important one I have not touched on here is the urgent need to protect the integrity and foundation of America's democracy from those who are proposing and successfully passing bills to restrict voting to the privileged, largely white, few. So much of the work we must do to break the cycle of inaction relies on elected officials of good will being willing to do make hard, sometimes unpopular choices and do hard work that is not rewarded at the ballot box. If the health of our democracy is compromised by those who seek only power for the sake of power for themselves and the privileged few at the expense of the many, we will struggle even to elect the leaders we need to do the work we need.

But it's in everyone's interest to do something meaningful, to do many things meaningful, and to do them as soon as possible. Collectively, everyone with an interest in ending the cycle of inaction—which is everyone of good will—can put their shoulder to the wheel to figure out openly and honestly what works and what does not, how communities can finally end the cycle of loss of life, how cities can finally end the massive payouts and verdicts, how police departments can rebuild morale among demoralized officers and recruits, how officers who and the ensuing distrust which leaves communities less safe and more vulnerable—all of which contribute to and continue to nourish the seemingly never-ending cycle that we all want to end?

So: can we finally break the cycle of inaction and move boldly and confidently into a future of accountability and equal justice that works for everyone? Yes, definitely—but only if we act.

43. Frederick Douglass: *If There is No Struggle, There is No Progress*, BLACKPAST (Jan. 25, 2007) <https://www.blackpast.org/african-american-history/1857-frederick-douglass-if-there-no-struggle-there-no-progress>.

At the end of the day, maybe what it will take is for all of us to face our deepest, worst fears head on and transform them into bold, compassionate action—like George Floyd’s family has done. When we all become more like the Floyd family, we will finally find the courage to climb the mountain, break the cycle, and make the change we all need.