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Expanding the Authority of State Attorneys General to Combat Police Misconduct

By Connor Maxwell and Danyelle Solomon December 12, 2018

In January 2017, the city of Baltimore and the U.S. Department of Justice (DOJ) unveiled a landmark agreement to reform the city's policing practices.[1] The agreement, supervised by a federal court, sought to bring fair, evidence-based policing practices to the Baltimore Police Department while resolving rampant racial discrimination; excessive use of force; and unlawful stops, searches, and arrests. One week later, however, President Donald Trump was inaugurated, and his administration almost immediately mounted a campaign to strip resources, oversight, and accountability from local law enforcement agencies across the United States.[2] Baltimore's efforts survived, despite former U.S. Attorney General Jeff Sessions' efforts to derail them.

By passing the Violent Crime Control and Law Enforcement Act of 1994, Congress empowered the DOJ to investigate, negotiate, and resolve the "pattern or practice" of unconstitutional policing, such as the case in Baltimore.[3] Pattern or practice refers to the regular practice of policing, rather than isolated, accidental, or sporadic instances. Despite the DOJ's limited resources and lack of subpoena powers, the department has facilitated police reform in dozens of jurisdictions across the country under presidents of both parties. President George W. Bush's DOJ, for example, negotiated 11 police reform agreements and opened 10 new investigations.[4] President Barack Obama's DOJ negotiated 20 agreements and launched 20 new investigations into law enforcement agencies.[5] These efforts helped restore accountability and confidence in police while improving public and officer safety. This has been especially helpful among communities of color, where generations of unlawful and unconstitutional policing have devastated police-community relations.[6] But the Trump administration has broken this long-standing precedent: It has not entered into a single court-supervised agreement nor opened any formal pattern or practice investigations. Even with the ouster of former Attorney General Sessions in November, the administration's policies and approach to policing continues to undermine law enforcement nationwide.[7]

In the wake of this unprecedented failure of federal leadership, states should empower their own attorneys general to investigate the pattern or practice of police misconduct and pursue court-enforceable police reform agreements when neces-

sary. While such authority is neither a panacea nor a permanent replacement for the federal government's historic oversight responsibilities, it can help bridge the divide between law enforcement officers and the communities they serve; hold bad actors accountable; reduce crime; and help lay the groundwork for fair, evidence-driven policing throughout the United States.

This issue brief provides background on police reform efforts in the United States and recommends that states expand the authority of their attorneys general to combat police misconduct.

Law enforcement misconduct in the United States

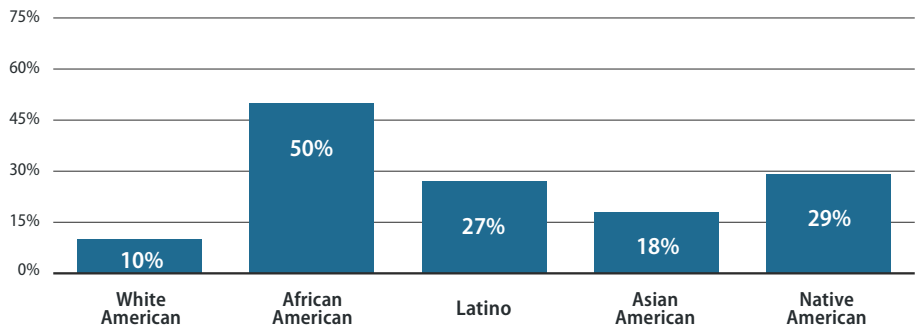
The United States is home to more than 18,000 law enforcement agencies and more than 750,000 officers sworn to protect and serve.[8] While the vast majority of officers serve with honesty and integrity, rampant unconstitutional policing plagues some agencies.

When the pattern or practice of police misconduct goes unchecked, it undermines public trust and cooperation between law enforcement officers and the communities they serve.[9] This is especially true for communities of color, where racial profiling and excessive force remain pervasive.[10] Beyond racial profiling and excessive force, some agencies have been inundated with officers violating civilians' freedom of speech and assembly; unlawfully searching, stopping, or arresting civilians; mishandling sexual assault investigations; and demonstrating bias around civilians' gender identity and sexual orientation.[11] Today, half of African Americans across the United States, along with more than 1 in 4 Latinos and Native Americans, report that they were treated unfairly by police because of their race or ethnicity.[12] (see Figure 1) Additionally, while black and Hispanic Americans together constituted just 30 percent of the U.S. population in 2017, almost half of all unarmed Americans fatally shot by police that year were black or Hispanic.[13]

FIGURE 1

People of color are more likely to report racial discrimination when interacting with police

Likelihood of experiencing racial discrimination when interacting with police, by race, 2017



Source: Harvard T.H. Chan School of Public Health, Robert Wood Johnson Foundation, and NPR, "Discrimination in America: Experiences and Views on Affects of Discrimination Across Major Population Groups in the United States" (2017), available at https://www.rwjf.org/en/library/research/2017/10/discrimination-in-america--experiences-and-views.html.

The erosion of trust between civilians and law enforcement has serious public safety implications. A 2016 Cato Institute survey found that African Americans and Hispanic Americans are 20 percentage points less likely to report a crime they witness to police.[14] A subsequent DOJ study found that even when black and Hispanic Americans do call the police for assistance, fewer than 60 percent report that the police improved the situation.[15] Without trust and cooperation, law enforcement becomes less effective, crimes go unsolved, and the safety of both sworn officers and civilians is jeopardized.

Federal efforts to reform pattern or practice policing

As stated above, in 1994, Congress authorized the U.S. attorney general to begin investigating allegations of rampant unlawful or unconstitutional policing and to negotiate reform agreements when and if he or she identifies systemic problems.[16] These cases, commonly referred to as Section 14141, or pattern or practice, cases, have become an important vehicle for reforming troubled law enforcement agencies and holding bad actors accountable.

Studies show that when implemented properly, these reform agreements strengthen communities, reduce crime, and improve trust in law enforcement, all without undermining the authority and autonomy of the police chief. One review of all cases even found that "many police chiefs who have been through the process of a DOJ investigation said that the end result was a better police department—with improved policies on critical issues such as use of force, better training of officers, and more advanced information systems that help police executives to know what is going on in the department and manage their employees."[17] The chiefs also felt, "In some cases, consent decrees have been instrumental in giving chiefs the authority and the resources to act."[18]

One study found that pattern or practice reforms minimize law enforcement misconduct and "generate desirable policy outcomes" for local communities.[19] But sustaining police reforms is a challenge: The same study found that "organizational changes are not self-sustaining; implementation does not in and of itself guarantee meaningful, institutionalized change." Jurisdictions that have been subject to DOJ intervention have also been found to have reduced the risk of civil rights litigation, suggesting that consent decrees—or court-enforceable reform agreements—improve satisfaction with police agencies and reduce police misconduct.[20] But while the DOJ has helped bring about reform in dozens of states and localities nationwide, it has never possessed the tools or resources necessary to address every case of systemic police misconduct.

Section 14141 of the Violent Crime Control and Law Enforcement Act of 1994[21]

(a) It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(b) Whenever the Attorney General has reasonable cause to believe that a violation of paragraph (1) has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.

One significant limitation to Section 14141 cases is the DOJ's lack of subpoena power to compel the release of internal documents from law enforcement agencies.[22] Therefore, if an agency refuses to cooperate with an investigation, the DOJ may be unable to obtain documents that could help in determining whether a pattern or practice case exists. Although the DOJ receives a multitude of complaints against state and local law enforcement agencies, it must exercise significant discretion in choosing cases or else risk a potentially lengthy and expensive lawsuit if it meets resistance from local leadership.[23]

Another limitation to bringing such cases is persistent underfunding. The Special Litigation Section of the DOJ's Civil Rights Division enforces civil rights laws designed to protect people in state or local institutions; individuals with disabilities who receive services in their communities; youth involved in the juvenile justice system; individuals who wish to access reproductive care clinics; and people who interact with state and local law enforcement. But in 2015, the section had just 71 positions and $12 million available for police misconduct enforcement nationwide.[24] This constituted just 0.01 percent of the $105 billion state and local governments spent on policing in 2015.[25] With such limited resources and a large mandate, the Special Litigation Section cannot afford to investigate every serious allegation of systemic policing problems.

Between 1994 and 2017, the DOJ opened 69 formal pattern or practice investigations and entered into 40 police reform agreements.[26] But the DOJ's Civil Rights Division admits that it "identifies far more jurisdictions that meet the basic criteria for opening an investigation than it is able to investigate."[27] Without subpoena powers and additional resources, the DOJ is unable to adequately address systemic misconduct at state or local law enforcement agencies across the country.

The Trump administration's approach to police accountability

Under then-Attorney General Sessions, the DOJ abdicated its responsibility to support constitutional and effective policing.[28] In 2017, Sessions ordered a review of all existing and contemplated police reform agreements and proclaimed DOJ would no longer enter into new agreements to help police departments address misconduct issues.[29] The DOJ then abandoned or undermined reform in multiple jurisdictions that it had previously identified as engaging in a pattern or practice of unconstitutional policing.[30]

The DOJ under President Obama, for instance, identified rampant unconstitutional policing in the predominantly African American city of Ville Platte, Louisiana.[31] It found that the Evangeline Parish Sheriff's Office and the Ville Platte Police Department had violated the Fourth Amendment by engaging in a pattern or practice of arresting, strip searching, and jailing residents with neither a warrant nor probable cause. The DOJ planned to forge a court-enforceable agreement to end the unconstitutional practice, rebuild community trust, and ensure effective policing in Ville Platte.[32] But several weeks later, Donald Trump was inaugurated, and soon after, his DOJ placed the case on hold.[33] More than a year later, the department announced a pair of settlement agreements in the Ville Platte case, which lacked both judicial oversight and independent monitoring to ensure that law enforcement agencies involved would carry out the terms of the agreements.[34] While settlement agreements—or out-of-court resolutions—can sometimes be preferable to consent decrees, the agreements in this case provided few mechanisms to ensure that reforms would be fully implemented and sustained. According to former Deputy Assistant Attorney General for the Civil Rights Division Roy Austin Jr., who oversaw the DOJ's pattern or practice cases under the Obama administration, "This is a way to basically allow these departments to go forward just as they were before."[35]

Beyond abandoning the DOJ's pattern or practice responsibilities, former Attorney General Sessions also stripped essential federal grants and technical assistance from law enforcement across the country.[36] Among other things, Sessions rolled back the department's Collaborative Reform Initiative for Technical Assistance Center program, which provided local law enforcement interested in community policing with free analysis and recommendations from data scientists and policing experts.[37] This voluntary program was so popular with local law enforcement that at one point, there was a monthslong waitlist to participate.[38]

On the eve of his resignation, Sessions codified his stance on policing by issuing a memorandum that effectively bars the DOJ from using settlement agreements and consent decrees.[39] Among other things, the memo stipulates that consent decrees may only be appropriate when a law enforcement agency has an "established history" of violating orders and agreements; has attempted to obstruct the investigation; or has continued its unlawful or unconstitutional practices despite other attempted remedies. But even in such cases, approval of the use of a consent decree

or settlement agreement is not guaranteed. In the rare cases when the DOJ is permitted to pursue reforms, the memo includes specific time restrictions and requires that they be "narrowly tailored" to remedy only the injury caused by the misconduct. They may not be used to achieve broader policy goals, such as addressing an underlying culture of racial animus and promoting community engagement. Ultimately, Sessions' final act has undercut one of the most effective tools for promoting oversight, accountability, and trust in law enforcement.

Sessions' refusal to assist local law enforcement has had dangerous consequences, especially among communities of color. Today, just 45 percent of Hispanics and 30 percent of blacks have confidence in the police, compared with 59 percent and 35 percent, respectively, just a few years ago.[40] Although the Obama administration made great strides in addressing police misconduct, police-community relations will continue to deteriorate without renewed leadership on this issue.

Granting pattern or practice powers to state attorneys general

With insufficient tools and resources—and an administration that has indicated that it opposes evidence-based police reform—the DOJ is incapable of eliminating systemic misconduct nationwide. But states are well-positioned to provide oversight and accountability in the absence of federal leadership. States possess the resources, relationships, and expertise necessary to begin leading reform efforts around the country during the current administration, as well as when the DOJ comes under new, more motivated leadership. For these reasons, states should empower their own attorneys general to investigate, litigate, and resolve the pattern or practice of law enforcement misconduct. By granting this authority, along with robust subpoena powers and significant financial resources, states can ensure every community has access to fair, evidence-based, and effective policing.

In 2000, California became the first state to statutorily authorize its attorney general to address rampant police misconduct.[41] The following year, it secured a state court-enforced consent decree to reform the Riverside Police Department (RPD), which was plagued by systemic violations of civil rights and a failure to uniformly enforce the law.[42] The sweeping reforms included diversity training; reporting of police stops and use of force; and increased monitoring and oversight of law enforcement officers.[43] The reforms were a success and have endured long after the agreement's dissolution in 2006.[44] Indeed, complaints against RPD officers plummeted by almost 80 percent—from 185 in 2002 to just 38 in 2015.[45] While today's RPD is not without its problems, evidence suggests the agency and the community it serves benefited tremendously from the state's pattern or practice police reform case.[46]

California A.B. 2484[47]

(a) No governmental authority, or agent of a governmental authority, or person acting on behalf of a governmental authority, shall engage in a pattern or practice of conduct by law enforcement officers that deprives any person of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States or by the Constitution or laws of California.

(b) The Attorney General may bring a civil action in the name of the people to obtain appropriate equitable and declaratory relief to eliminate the pattern or practice of conduct specified in subdivision (a), whenever the Attorney General has reasonable cause to believe that a violation of subdivision (a) has occurred.

For almost 20 years now, California has launched investigations into systemic law enforcement misconduct and negotiated reform agreements that improve trust and safety in local communities.[48] Yet, while it was the first and may serve as a model for interested states, California is not the only state committed to ensuring fair, evidence-based, and effective policing.

Just days prior to President Trump's inauguration, the DOJ released the results of a yearlong investigation into unconstitutional use of force and racially discriminatory conduct at the Chicago Police Department (CPD).[49] The DOJ identified a pattern or practice that devastated police-community relations, undermined cooperation, and diminished public safety. It argued that the CPD was unlikely to succeed in addressing these systemic problems "without a consent decree with independent monitoring."[50] But after Sessions took control of the DOJ, he dismissed the findings—without even reading the report[51]—and ordered the department to halt its efforts to address misconduct at the CPD.[52]

In response to Sessions' actions, Illinois Attorney General Lisa Madigan used her pattern or practice authority under the Illinois Human Rights Act of 2004 to file a lawsuit to begin the process of negotiating a consent decree in Chicago.[53] In September 2018, Madigan, Chicago Mayor Rahm Emanuel, and CPD Superintendent Eddie Johnson filed a 236-page proposed reform agreement in federal court.[54] The agreement contains court oversight and an independent monitor and requires substantial reforms in training, reporting, and use of force policy. The agreement is now pending approval from a federal judge, despite former Attorney General Sessions' efforts to discredit and vilify it.[55]

When implemented fully, reform agreements are a reliable tool for ensuring that law enforcement agencies engage in fair, evidence-based, and constitutional policing in the communities they serve.

Underutilized state authority to pursue pattern or practice cases

While many states will need to pass legislation granting pattern or practice authority to their attorneys general, some existing statutes and state constitutions may already permit such cases. In these states, attorneys general may not need to wait for legislative authorization to begin to address systemic law enforcement misconduct. For example, Chapter 12, Section 11H of the Massachusetts General Laws states:

> *Whenever any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, the attorney general may bring a civil action for injunctive or other appropriate equitable relief in order to protect the peaceable exercise or enjoyment of the right or rights secured. Said civil action shall be brought in the name of the commonwealth and shall be instituted either in the superior court for the county in which the conduct complained of occurred or in the superior court for the county in which the person whose conduct complained of resides or has his principal place of business.*[56]

And the state constitution of Louisiana provides that:

> *As necessary for the assertion or protection of any right or interest of the state, the attorney general shall have authority (1) to institute, prosecute, or intervene in any civil action or proceeding; (2) upon the written request of a district attorney, to advise and assist in the prosecution of any criminal case; and (3) for cause, when authorized by the court which would have original jurisdiction and subject to judicial review, (a) to institute, prosecute, or intervene in any criminal action or proceeding, or (b) to supersede any attorney representing the state in any civil or criminal action.*[57]

Attorneys general in states such as Massachusetts and Louisiana may, in some cases, be permitted to use existing powers to begin the process of helping a law enforcement agency address rampant unconstitutional or unlawful policing. Still, state attorneys general should always consult with their legal advisers and departmental budget executives before opening an investigation.

Conclusion

Accountability is a core pillar of good government, as it allows the public to have faith in the institutions built to protect and serve them. When accountability is rarely delivered, faith and trust diminish. Law enforcement officers have challenging jobs, but they are not above the law and should be held accountable when appropriate. This is particularly true among communities of color, where residents have faced rampant discrimination, excessive force, and harassment at the hands of police for generations. Yet, with the support of the president of the United States, former Attorney General Sessions stripped essential resources, oversight, and accountability from police departments nationwide. The Trump administration's irresponsible approach to law enforcement is failing to improve police-community relations and public and officer safety. But law enforcement officers and the communities they serve cannot afford to wait for a new administration—they deserve better.

Fortunately, states are well-positioned to ensure local law enforcement has the training, resources, oversight, and accountability necessary to reduce crime and strengthen relationships with communities. The time is now for states to usher in a new era of policing. They should empower state attorneys general to investigate, litigate, and resolve the pattern or practice of police misconduct and begin the hard work of rebuilding trust.

Connor Maxwell is a research associate for Race and Ethnicity Policy at the Center for American Progress. Danyelle Solomon is the Senior Director of Race and Ethnicity Policy at the Center.

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