

THE POWER AND POTENTIAL OF STATE ATTORNEYS GENERAL TO END POLICE BRUTALITY

5 Ways That State Attorneys General Can Make a
Difference on Police Reform and Accountability

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Since demonstrations have rightfully erupted throughout the United States—and the world—to protest police killings and brutality against Black communities, activists have called upon government officials to take immediate action to hold police officers accountable, reform the culture and practices of police departments, and to transform policing itself. Advocates have directed their demands to a wide range of policymakers—mayors and governors, state and federal legislators, school districts, and more. One government actor on which advocates can, and should, also focus their attention are state attorneys general. As the chief law enforcement officers of their states, state attorneys general have great power and potential to contribute to the urgent need of ending police brutality and racist policing.

Below we discuss five specific ways that state attorneys general can use their powers to make a difference on police reform and accountability. We urge advocates to push their state attorneys general on these points and hold them—and policymakers at all levels of government—accountable to the urgent task of remaking the system of policing in our cities and states.

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STATE ATTORNEYS GENERAL CAN HOLD INDIVIDUAL POLICE OFFICERS ACCOUNTABLE FOR BREAKING THE LAW

In many states, the attorney general can use their criminal authority to bring charges and prosecute individual police officers that have violated criminal laws through their misconduct. For example, state attorneys general are equipped to pursue criminal violations like murder and manslaughter, reckless endangerment, assault and battery, as well as hate crime and other civil rights laws. Advocates may want to push for the attorney general—as opposed to the local prosecutor—to investigate and prosecute cases of police killing and brutality, because the day-to-day work of local prosecutors requires them to work closely with police officers. This could thereby present a potential conflict of interest, or an appearance of a conflict, when it comes to prosecuting the officers (or, at the least, an officer in a department) with whom they have close working relationships.¹ With that said, state attorneys general often work closely with local police as well and may also have an affinity toward police as part of the law enforcement community, which is why some advocates have pushed for establishing a special prosecutor's office for police misconduct. Advocacy does not end solely because the attorney general has decided to take over an investigation. That is one of the reasons why Public Rights Project encourages advocates to push for more civilian and community engagement in the work of attorneys general on policing specifically and racial justice more broadly.

The mechanics of attorney general involvement in these prosecutions depends on the specifics of state law. Some states give attorneys general authority to step in and criminally prosecute a case when the local prosecutor cannot handle a case due to a conflict.² In several states, the attorney general can prosecute any criminal law on the books,³ which

would mean that the attorney general can prosecute any police officers that violate those laws. Many other states permit the attorney general to bring any criminal action, so long as it is at the request of the governor,⁴ one of the legislative branches,⁵ or some other government official.⁶ In Minnesota, following the tragic murder of George Floyd, Governor Tim Walz, for example, appointed Attorney General Keith Ellison to

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prosecute Officer Derek Chauvin. AG Ellison has filed charges against Chauvin for second-degree murder as well as charges of aiding and abetting against the other present officers.⁷ In Wisconsin, Attorney General Josh Kaul opened an investigation into the police shooting of Jacob Blake.⁸ In New York, in the wake of the mass protests, advocates have successfully pushed to pass a law establishing an Office of Special Investigation within the attorney general's office that gives this office the power to investigate and prosecute police officers that cause the death of unarmed

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civilians.⁹ Advocates should also encourage state attorneys general to publish public reports at the conclusion of investigations of police misconduct that do not result in prosecution to provide more transparency and accountability to the public.

Depending on the state, the attorney general may also have the power to bring civil lawsuits against individual police officers for violating civil rights laws. For instance, under the Massachusetts Civil Rights Act, the attorney general can bring a lawsuit against any person (including a police officer) that threatens or intimidates another's right to, for example, use public parks, walk on public streets, attend school, or live peacefully in one's home.¹⁰ Lawsuits brought against individual officers, even when brought by a state attorney general, may be subject to restrictions similar to the controversial qualified immunity doctrine that shields police officers and other state and local officials from money judgments in litigation brought under 42 U.S.C. § 1983.

In addition to pushing for the investigation and prosecution of individual police officers by state attorneys general, advocates should also push their offices to develop internal protocols for responding to police brutality and violence, so teams are ready to respond, gather evidence, and bring cases immediately. Some attorney general offices have never prosecuted or investigated individual officers and may lack the expertise to do so, in which case advocates should push these offices to hire attorneys and investigators with experience in advance to ensure that these offices are prepared to bring such cases. Additionally, advocates should push for public hearings led by the attorney general to investigate incidents of police brutality. Most recently, New York's Attorney General held public hearings to investigate interactions between police officers and the public in connection with recent protests, which brought to light many instances of abuse.¹¹

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The federal government has the power to investigate and file lawsuits against local police departments that have a “pattern or practice” of violating people’s constitutional rights.¹² Recently, eighteen state attorneys general have laudably written to Congress asking for “explicit authority” to also initiate such “pattern or practice” investigations under federal law.¹³ In the absence of federal legislation,¹⁴ some state attorneys general already have this power under state law and state legislatures could certainly pass laws to give state attorneys general this authority. For example, under California law, the state attorney general has the power to bring lawsuits against police departments for engaging in practices that violate people’s constitutional rights.¹⁵ California’s attorneys general have used this authority to make structural changes to police departments in Riverside, Maywood and Kern counties, as well as school police departments in Stockton.¹⁶

Even if there is no state law that specifically gives the attorney general this power, however, advocates can still call on the attorney general to bring lawsuits against police departments for violating federal law¹⁷ or using other existing sources of authority.¹⁸ For example, in 2017, the Illinois Attorney General sued the City of Chicago alleging violations of 42 U.S.C. § 1983, the Illinois Constitution, and the Illinois Human Rights Act.¹⁹ The lawsuit led to the entry of a consent decree, pursuant to which a federal judge and court-appointed monitor ensure that reforms are implemented.²⁰

Consent decrees are a powerful vehicle for meaningful and extensive changes to police departments. Consent decrees that the federal Department of Justice have entered into local police departments in the past have addressed, for example, use of force, illegal stops, searches and arrests, custodial interrogations, photographic line-ups, discriminatory policing, community engagement, recruitment, training, performance evaluations and promotions, supervision, and misconduct investigations.²¹ The Illinois Attorney General’s consent decree with the Chicago Police Department was just extensive in scope as federal consent decrees.

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There are challenges for state attorneys general to take on these “pattern and practice” cases and investigations—these cases require significant resources and technical expertise that offices may not yet have. To that end, advocates should not only push for laws giving state attorneys general the power to investigate such “pattern and practice” cases, but also push state legislatures and governors to ensure that attorneys general have the **resources** needed to investigate these cases and hold police departments accountable. Without technical expertise on the inner-workings of police departments, state attorneys general may not be able to succeed in bringing these cases and proving wrongdoing. Additionally, without adequate resources, attorneys that were previously devoted to other civil rights or racial justice issues may be transferred to handling these matters, possibly to the detriment of Black communities and communities of color overall.

**Specific reforms included in
the Chicago Police Department
consent decree included:**

- requiring police officers to report each incident in which they point their guns at individuals
- prohibiting police officers from using a Taser to shock a person who is simply running away
- requiring police to render first aid to persons harmed by officers’ use of force increasing the number of supervisors on watch in every district
- shortening the investigation timeline for disciplinary cases

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STATE ATTORNEYS GENERAL CAN ISSUE ADVISORY OPINIONS REGARDING CERTAIN POLICE PRACTICES

All state attorneys general have the power to issue opinions on questions of state law, typically at the request of another government actor, like the governor or legislature.²² Although these opinions do not automatically become the law of the state, courts often treat these opinions as “highly persuasive.” In other words, a strong opinion that certain policing practices violate the state constitution or other state laws, in particular, can make a big difference in making that opinion come true. In addition, attorney general opinions may provide the impetus that police chiefs, city attorneys, and other actors need to make policy changes, amend collective bargaining agreements, or otherwise take needed action.

For example, advocates could push state attorneys general to issue advisory opinions finding that pretextual stops²³ and consent searches²⁴ violate their state constitutions. In New Mexico, Alaska, and Washington, the state supreme courts departed from federal precedent and have found that pretextual stops violate their state constitutions.²⁵ Additionally, the New Jersey Supreme Court has found that consent searches violate the New Jersey constitution. Pretextual stops and consent searches are legal loopholes that enable police officers to racially profile drivers, increase the number of potential contacts between police officers and drivers, and extend the length of a police interaction. These legal concepts make “Driving while Black” frustrating, dangerous, and potentially deadly—as was the case with Sandra Bland,²⁶ and the tragic killing of Philando Castille.²⁷ An attorney general opinion on one of these or other topics could result in significant changes to departmental practices, especially if particular tactics, means, or uses of force are deemed illegal under state law.

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STATE ATTORNEYS GENERAL CAN CALL FOR DECRIMINALIZATION OF MINOR “BROKEN WINDOWS” OFFENSES

State attorneys general are public, typically elected, figures with an important platform from which they can push policy changes. Moreover, as the chief law enforcement officers for their state, the position of state attorneys general on the enforcement of criminal laws carries particular weight. State attorneys general also typically have close relationships with local prosecutors and, in some states, may have the power to coordinate and supervise the work of local prosecutors.²⁸ As such, advocates should push state attorneys general to take public stances on decriminalizing minor “broken windows” offenses like marijuana possession, consumption of alcohol on streets, disorderly conduct, trespassing, loitering, disturbing the peace, spitting, jaywalking, and bicycling on the sidewalk and publicly push local prosecutors to do the same. Criminalizing such offenses does not contribute to public safety but, rather, provides too much discretion to police forces to stop and arrest Black people.²⁹ For state attorneys general to take such positions is not unprecedented. In 2019, for example, Virginia’s attorney general called publicly for the legalization of marijuana and proposed decriminalization as a first step toward legalization.³⁰

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STATE ATTORNEYS GENERAL CAN TAKE ACTIONS TO ENSURE THAT THEY ARE SUPPORTING POLICE REFORM AND ACCOUNTABILITY IN ALL OF THE WORK OF THEIR OFFICES

In addition to the ways that state attorneys general could contribute to ending police brutality discussed thus far, advocates should also push attorneys general to take actions to ensure that they are supporting police accountability in all the work done by their offices. Specifically, state attorneys general can make complaints of police misconduct that they receive and other data on police misconduct available to the public. As counsel that defends state police forces, state attorneys general can evaluate the legal positions they take and possibly reconsider positions that are inconsistent with state law and police reform efforts. Lastly, state attorneys general can set up advisory councils on racial justice to guide police accountability efforts.

Transparency is the foundation of police accountability, and without data about police accountability, advocates have a much harder time making concrete demands that will result in meaningful change.

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Depending on the state, the attorney general may have varying levels of access to data on police stops, arrests, complaints of police misconduct, etc. In some states, local police departments are required to provide such data to the attorney general.³¹ Even in states where the attorney general does not have the power to access this data from local police departments, all state attorneys general receive complaints from the public, which are likely to include complaints about police misconduct. If they are not prevented from doing so,³² state attorneys general should make such complaints public, as well as what actions they have taken, if any, to investigate those complaints so that advocates can use the information to put pressure on police departments and other political actors to take action.

State attorneys general typically serve as the lawyers for state agencies, which means that they are often responsible for representing and defending state police forces (often referred to as state troopers). State police forces also have a history of misconduct, excessive force, and racist policing practices. Advocates should push state attorneys general to perform an immediate review of any litigation where they are defending misconduct by state police officers and reconsider any positions that are inconsistent with police reform efforts. State attorneys general also typically have the power to decline to defend, and so can adopt a policy of refusing to defend unlawful conduct by state police. State attorneys general may also provide training to state police officers about what policing practices are legal or illegal, which may also be an area where advocates can push for change.

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In addition to an “outside” strategy to put pressure on state attorneys general, advocates should also consider an “inside” strategy by pressuring attorneys general to set up, and then participate in, advisory councils on racial justice with active participation from community members and advocates. These advisory councils should have meaningful involvement in the office’s activities on police accountability. For example, these councils can be empowered to review charging decisions in officer-involved shootings, review the attorney general’s practices for investigating and prosecuting police officers and departments, and otherwise help to set policy on advisory opinions, transparency, and more. Such advisory councils must be for something more than a tag line in which community involvement is cited, but not actually allowed in practice. These groups and councils must be given the chance to speak freely and publicly about their engagement with the office.

At Public Rights Project, we know that racial inequities have been intentionally created and maintained through state and local government since the founding of our country. We know that in many places and instances, both historically and currently, law enforcement is serving to undermine the rights and freedoms of Black people. We believe that pushing state attorneys general to hold police officers and departments accountable and to reduce the footprint of racist policing is one crucial piece to ending police brutality.

Public Rights Project is a national non-profit, based in Oakland, that builds state and local governments’ capacity to enforce their residents’ rights. Their mission is to close the gap between the promise of our laws and the lived reality of our most vulnerable communities. They work to achieve this mission by training attorney fellows to catalyze the proactive work of government law offices; providing strategic support in legal strategy, research, partnerships and data analytics to help offices develop high-impact legal cases; and designing and spreading community outreach and organizing approaches that empower community residents and advocates to be active partners in an enforcement agenda rooted in equity.

ENDNOTES

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- 2 - Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 545-50 (2011), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1165&context=mlr>.
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- 4 - See, e.g., Ga. Const. art. V, § 3, ¶ IV; Md. Const. art. V, § 3; Colo. Rev. Stat. § 24-31-101; Idaho Code § 31-2227; Ohio Rev. Code Ann. § 109.02.
- 5 - See, e.g., Md. Const. art. V, § 3 (allowing the general assembly to direct a prosecution by law or joint resolution); Kan. Stat. Ann. § 75-702 (allowing the Kansas attorney general to prosecute “when required by the governor or either branch of the legislature”); Wis. Stat. § 165.25 (providing that Wisconsin’s statewide department of justice will appear in criminal matters, including as prosecutor “if requested by the governor or either house of the legislature”).
- 6 - See Ky. Rev. Stat. Ann. § 15.200 (allowing the attorney general to prosecute criminal cases when requested by the Governor, or by any of the courts or grand juries of the Commonwealth, or upon receiving a communication from a sheriff, mayor, or majority of a city legislative body stating that his participation in a given case is desirable to effect the administration of justice and the proper enforcement of the laws of the Commonwealth).
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- 9 - S.B. 2574, 2019-2020 Leg., Reg. Sess. (N.Y. 2020) (enacted).
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- 11 - Alan Feuer, *‘It Felt Like Warfare’: Protesters Say the Police Attacked Them*, N.Y. Times (June 17, 2020), <https://www.nytimes.com/2020/06/17/nyregion/nydp-leticia-james-hearing-protests.html>.
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- 20 - *Illinois v. City of Chicago*, No. 1:17-cv-06260, 2019 WL 398703, at *1 (N.D. Ill. Jan. 31, 2019) (order approving proposed consent decree)
- 21 - Ivana Dukanovic, *Reforming High-Stakes Police Departments: How Federal Civil Rights Will Rebuild Constitutional Policing in America*, 43 HASTINGS CONST. L.Q. 911, 921 (2016). https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2028&context=hastings_constitutional_law_quaterly.
- 22 - Ian Eppler, *The Opinion Power of the State Attorney General and the Attorney General As A Public Law Actor*, 29 B.U. PUB. INT. L.J. 111, 112 (2019).
- 23 - A pretextual traffic stop involves a police officer stopping a driver for a traffic violation, minor or otherwise, to allow the officer to then investigate a separate and unrelated, suspected criminal offense.
- 24 - Consent searches are searches that are made by police officers based on consent of the person whose property they wish to search.

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