



**NACDL Statement to the
Presidential Commission on Law
Enforcement and the Administration of Justice**

7 June 2020

The National Association of Criminal Defense Lawyers (NACDL) offers the following statement for the Commission's consideration. NACDL is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's many thousands of direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal justice system. Critical to this mission are NACDL's efforts to identify and reform flaws and inequities in the criminal justice system, and specifically address systemic racism and its impact on the administration of justice.

As a criminal defense organization, we do not profess to possess expertise in policing practices insofar as those practices do not directly intersect with the criminal justice system. But many police practices do have a direct impact on the treatment of accused persons, the degree to which their cases are litigated justly, and case outcomes. Accordingly, we offer a few key insights, which we hope will find their way into the Commission's recommendations.

It is obvious that this is a fraught time to present testimony to this Commission. Two weeks ago, the nation first learned of the events leading up to the arrest and death of George Floyd in Minneapolis. NACDL's commitment to the presumption of innocence and due process requires that we refrain from comment on pending cases, but we must acknowledge that unfolding events have cast a long shadow over this Commission's work, and NACDL's comments are informed by Mr. Floyd's death and other recent tragedies. There is no criminal defense lawyer who has not borne witness to the racism that infects policing in this nation. Where police are deployed, how they are deployed, how they interact with the public, and how suspects and accused persons are treated, both physically and legally, all reflect a legacy of both implicit and explicit bias.

NACDL and its allies have commented on the pervasive resistance to clear-eyed self-examination, cultural change and meaningful reform that has undermined the law enforcement profession and sown public mistrust. In the same vein, many prominent civil rights organizations have pointed out that this Commission's composition, agenda, and limited public engagement foretell more of the same.¹ NACDL shares the concern that a commission dominated by law enforcement will only deepen the divide between law enforcement agencies and the communities they serve. Against the backdrop of recent events, without frank acknowledgements and bold recommendations, the Commission's report will lack credibility with the larger public. Failure to engage with communities and seek community input has contributed to the current crisis, and a commitment to implement tangible and meaningful reform in partnership with communities is the only road to reconciliation and national healing.

¹ As these groups have noted, the Commission is comprised entirely of law enforcement officials and all but 5 members of the working groups are law enforcement officials. Working group descriptions and opaque and inconsistent public notice and comments processes have further reinforced the perception that community views are irrelevant to the Commission's work.

Police Accountability and Transparency

First and foremost, NACDL challenges the administration and law enforcement agencies at every level to immediately reject the perennial resistance of so many in their ranks to greater transparency and accountability as relates to police misconduct. If the argument is that it's just "a few bad apples," then let the sun shine in so that the public – those the government is meant to serve in this democracy in the first place – can know the truth for themselves. But in most states that is not possible because misconduct complaints against police officers are handled internally and are treated as confidential employment records. Recent history shows, however, that many of these so-called bad apples have a long record of complaints – often involving excessive force and racial insensitivity. Accordingly, NACDL supports state legislative action to repeal these secrecy laws and policies wherever they exist. Further, the federal government should leverage funding for law enforcement to incentivize states to repeal laws that shield police misconduct from public view.

Second, NACDL urges the creation of a national database to track police misconduct. It should not be possible, as it is now, for a police officer to be dismissed from one police department for substandard or abusive conduct only to be rehired by another department oblivious to that history. NACDL itself is committed to developing police accountability databases for the defense bar. These databases are necessary for all stakeholders, including not just defense lawyers, but prosecutors, the judiciary, and the public. Transparency about police misconduct is vital to promote improved decision-making in every criminal case. Awareness of prior misconduct can inform every decision point, from the initial charging decision, to conditions of release, to judicial determinations about the lawfulness of a stop, a search, an identification procedure, or an alleged confession. This information can also affect the ultimate question of guilt or innocence and the appropriate sentence.

Overcriminalization and Overreliance on Law Enforcement

While transparency and accountability are critical to securing public trust, the police regulatory sphere must also be greatly reduced. Police are often called to respond to incidents that can be far more effectively addressed by social services and other direct community support. Responding to health and economic issues with policing is costly, ineffective, and at times fatal. Here are three prominent examples of this damaging misallocation of resources:

(1) Law enforcement resources and mental illness. According to the [National Alliance on Mental Health](#), 2 million people with mental illness are booked into jails each year and nearly 15% of men and 30% of women booked into jails have a serious mental health condition. Police officers are not equipped to address people who are experiencing a mental health crisis, and [studies](#) have shown that the risk of being killed while being approached or stopped by law enforcement in the community is 16 times higher for individuals with untreated serious mental illness than for other civilians. Even by conservative estimates, at least 1 in 4 fatal law enforcement encounters involves an individual with serious mental illness. Instead of relying on police officers, authorities should dispatch a crisis intervention team of medical workers or other service providers who are trained to de-escalate and center the person in crisis. If police are needed in certain situations, they should take direction from the medical providers and social

workers coordinating the response. Similarly, diversion of these cases from the criminal justice system should be a priority. The Commission should recommend that funding be provided to augment the capacity to provide these vital services.

(2) Law enforcement resources and addiction. The war on drugs has fueled mass incarceration, and drug laws result in wildly disparate outcomes for people of color and excessive sentences for possession and other criminalized acts arising from addiction. The National Institutes of Health [estimates](#) that one-half of all prisoners (including some sentenced for non-drug offenses) meet the criteria for diagnosis of drug abuse or dependence. By addressing a health crisis with a law enforcement response, resources are diverted from treatment and other harm mitigation to policing and incarceration, even though [studies](#) have shown that providing treatment for addiction is more effective at reducing crime. The smart approach is to decriminalize substance abuse and have police work with treatment providers and medical professionals to divert people into treatment rather than incarceration when they encounter individuals engaged in addiction-related criminal behavior.

(3) Law enforcement resources and homelessness. Cities have passed myriad laws [criminalizing homelessness](#) including vagrancy laws, laws against camping or sleeping in public, and laws against sleeping in cars. Homelessness is a result of economic factors, including the lack of affordable housing and living wages, but can also result from addiction and mental health issues. A [study](#) in Santa Barbara found that the cost to incarcerate a homeless person with mental illness is estimated to be approximately 25% higher than providing supportive services such as housing, medical care, and substance abuse and mental health treatment. The Commission should recommend that policymakers decriminalize homelessness and remove police officers from enforcing related violations; the focus should be on providing affordable housing and social services to address homelessness.

Law Enforcement and Technology

(1) Face recognition technology. Face recognition technology has enjoyed widespread use by police departments with little public information about how the technology was obtained and used. Notice is not given to the accused in criminal cases that the technology was used to identify them, frustrating their ability to challenge a technology that has been [shown](#) to misidentify young people, women and people of color at a much higher rate than white men. Due to the concentration of people, prevalence of surveillance cameras and frequency of police encounters, low income communities and communities of color are more likely to be captured on camera and also more likely to be investigated and processed by police. In addition, police departments have engaged in [outrageous manipulations](#) in order to generate a presumptive match. Even if the accused does have notice of the use of such technologies, access to the algorithms that identified their client is frustrated because the companies claim “[trade secrets](#)” protections. Face recognition is too faulty and the risk that it may implicate the innocent should foreclose its use by law enforcement.

(2) “Predictive Policing.” Police departments have been using tools and technologies that search and categorize large swaths of data to determine where to patrol and who to investigate. Sometimes labeled “[predictive policing](#),” these practices involve police searching

internal data and scraping publicly available data. One of the tools used by departments is [social media monitoring](#), where law enforcement agencies use technology to scrape social media and draw connections between people online. Police have used this information to [surveil](#) and criminalize people engaged in protected First Amendment activity and [label](#) people as gang members, later using that designation to charge them as co-conspirators. In one case, over [100 people](#) were indicted for a broad conspiracy charge based on likes and online associations.

Predictive policing is broken down into [two categories](#): “Place based,” which directs police resources to particular neighborhoods, and “person based,” which predicts who is likely to be a victim or perpetrator of crime. These programs use historical crime data as a significant part of their input (where crimes occurred in the past, prior arrest records, etc.) and as such necessarily [recreate systemic biases](#) in the system. In addition, the use of such programs is not disclosed to the accused. If their use is discovered, as with face recognition, when attorneys seek access to the underlying algorithms, they are rebuffed with claims of trade secrets. This data is supplemented with information gathered by private companies enjoying broad access to information that law enforcement would only be able to gather with a warrant, creating an end run around critical Fourth Amendment protections. Law enforcement agencies should not utilize tech tools that replicate existing biases in the criminal justice system, circumvent the Fourth Amendment, and undermine due process.

Standards and Training Concerning Use of Force

The Commission should support federal legislation to promote training and set standards for the use of force when police officers effectuate arrests or prevent escapes. While law enforcement is necessarily empowered to use force, including deadly force, when necessary to apprehend suspects and protect public safety, there must be mechanisms to ensure that the force used respects constitutional rights, proportionality, and fundamental respect for human life. And if there is to be any justice, these standards must be calibrated to differentiate both between the nature of the offense for which a person is arrested and the measure of force appropriate before an individual is effectively restrained and after.

Interrogation Practices and Intentional Deception in Custodial Interrogation

Perhaps one of the greatest stains on policing in this nation is the high rate of false confessions. A decade ago, when the Innocence Project in its 21st year recorded its 250th DNA exoneration, 40 of those (16 percent) involved false confessions; just five years later, an additional 26 DNA exonerations were determined to have involved false confessions.² The National Registry of Exonerations, which now records 2,624 exonerations since 1989, has determined that false confessions were present in 319 of those cases or 12 percent.³ Yet this is only the tip of the iceberg. Since 95 percent of all criminal cases in this nation are resolved by guilty plea, the actual instance of false confession is far higher. This problem should be of

² Garrett, Brandon L. “CONTAMINATED CONFESSIONS REVISITED.” *Virginia Law Review*, vol. 101, no. 2, 2015, pp. 395–454.

³ <http://www.law.umich.edu/special/exoneration/Pages/browse.aspx>, last visited June 6, 2020.

singular concern to this Commission. Protection of the innocent from wrongful conviction should be the highest aspiration of law enforcement. But it has been long known and well-recognized that interrogation techniques widely used in this country are flawed,⁴ as evidenced by the alarming rate of documented false confessions.

NACDL urges this Commission to make tangible recommendations to improve interrogation practices. The object should be to secure convictions from actual perpetrators, not from innocent suspects. At a minimum, the following steps should be required: (1) all custodial interrogations of felony suspects should be video recorded in their entirety; (2) conditions and duration of custody should be humane and limited in time, with special sensitivity for vulnerable suspects, such as youths, adolescents, those with cognitive and intellectual limitations, and those suffering from substance abuse withdrawal; and (3) presentation of false evidence must be prohibited. This last factor, actively lying to suspects about the existence of other inculpatory evidence, is a significant contributing factor to false confession and wrongful conviction. Beyond that, this practice, which is not permitted in many democracies, ill befits the dignity and honor that the nation should expect of its law enforcement agents. If the goal of this Commission is to restore and preserve that dignity and honor, this is an issue that must be addressed.

Conclusion

The above recommendations are far from exhaustive, and NACDL urges consideration of the thoughtful proposals set forth in statements submitted by the ACLU, NAACP-LDF, the Leadership Conference on Civil and Human Rights and other civil liberties groups. Law enforcement faces an unprecedented and escalating crisis in confidence that requires transformative thinking and a rejection of deep-rooted self-protection and myopia. If the Commission wishes to participate in the national dialogue, it must evince a willingness to reimagine the role of law enforcement in civil society. This is much more difficult than the work undertaken thus far and will require greater community involvement and a willingness to listen to community voices without defensiveness. Barring such a step, the Commission will undoubtedly be sidelined by current events and the groundswell for significant reform.

⁴ Kassin, Saul M., et al., *Police-Induced Confessions: Risk Factors and Recommendations* (July 15, 2009). *Law and Human Behavior*, 2009; Univ. of San Francisco Law Research Paper No. 2010-13.