BEN CRUMP
JUSTICE EQUALS RESPECT

REMARKS OF PROFESSOR MARK T. HARRIS, ESQ.
BEFORE THE CALIFORNIA ASSEMBLY SELECT COMMITTEE ON POLICE REFORM
STATE CAPITOL
SACRAMENTO, CALIFORNIA
DECEMBER 16, 2021

"Investigating Misconduct In Practice"

Mr. Chair and Members of the Select Committee:

First, let me thank you for granting me the opportunity to appear before you today to offer my thoughts on a very important topic that affects all Californians. In light of December being "Police Accountability Month," it is very appropriate for this body to be exploring the topic of "investigating misconduct in practice" relative to law enforcement.

Second, please accept the heartfelt greetings from my law partner, Attorney Benjamin Crump, and all of our colleagues located throughout the United States of America. Our national law firm is headquartered in Tallahassee, the state capital of Florida. I am the firm's managing attorney in Central California, headquartered both in Sacramento and Merced, California. Also, I am the Director of Pre-Law Studies at the University of California, Merced and a member of the Management and Business Economics faculty at UC Merced.

Our law firm represents the dispossessed whom the general society often greet with derision and mistrust. Ben Crump Law represents the families of Trayvon Martin; George Floyd; Breonna Taylor; Ahmaud Arbery and Stephon Clark. Here in Sacramento I am proudly linked to local civil rights and social justice advocates like Stevante Clark, brother of Stephon; Betty Williams, President of the Sacramento Branch of the N.A.A.C.P. and Tanya Faison, founder of Black Lives Matter Sacramento.

Three times during my career, I have had the distinct honor and privilege of contributing to the development of civil rights and social justice policies that have been molded and shaped in this very building. During the 80's, after graduating from UC Berkeley School of Law, I served as Chief of Staff and Counsel to the California Assembly Judiciary Committee under then Chair, The Honorable Elihu M. Harris. During the 90's, as an appointee of former Governor Gray Davis, I served as Undersecretary of the California Business Transportation and Housing Agency which, at the time, had oversight jurisdiction for the California Highway Patrol. Earlier in this decade, I served as an appointee of former governor Edmund G. Brown, Jr. as a member of the California Fair Employment and Housing Council which is charged with the promulgation of regulations that implement California's civil rights laws pertaining to employment and housing.

Further, I have served as a member of two local police oversight bodies; one university advisory police oversight body and as the chair of a local civil service board that had jurisdiction over the employment and discipline of police officers.

During 2016, Mr. Joseph Mann, an intellectually disabled African-American male, was shot and killed by Sacramento police in a hail of gunfire. Mr. Mann was unarmed at the time. In response to the senseless killing, I co-founded a citizens' advocacy organization known by the acronym "L.E.A.D." which stands for "Law Enforcement Accountability Directive." L.E.A.D. believes that through the lens of enhanced transparency comes enhanced accountability and improved public confidence in policing.

Let me focus my contribution to the exploration of this topic by paraphrasing a sentiment expressed by my colleague Dean Kevin Johnson of the UC Davis Martin Luther King, Jr. School of Law. During a recent town hall meeting chaired by Senator Bill Dodd, Dean Johnson stated that lawyers and judges will not repair the broken policies associated with civil rights and social justice … instead California's policy makers will! This is

why we have all gathered today, both in the State Capitol and virtually from throughout the country.

To the question of whether law enforcement officials should be granted the same constitutional due process protections as everyone else, my answer is an emphatic yes! However, I do not believe that the unique role that law enforcement officials play in our society should place them above the law with extraordinary due process rights and privileges. What we are witnessing in California and throughout the country is a mistrust of both law enforcement and the government they are employed by. The shroud of secrecy and opaque transparency that surrounds police officers and policing ultimately builds mistrust within the very community they profess a commitment to serve.

I believe affording law enforcement officials "qualified immunity" from personal liability is based on a set of outdated fallacies that serve to diminish the protections that should be provided to all Californians. Our collective confidence in our law enforcement officials, which should always remain at the highest levels, has been shattered by the countless examples of inappropriate behavior of certain individual law enforcement officials and or entire departments (e.g., the recent allegations pertaining to the City of Torrance Police Department). The actions of the outlaw rogue element within various departments have served to cast a shadow of doubt on the policing profession.

Many in my community perceive law enforcement as an "occupying force" who prey on African-American and Latino residents in a manner leaving the victims with little recourse. Over the same four plus decades that I have personally been engaged in the pursuit of social justice, I have witnessed an increased erosion of trust in the premise that law enforcement officials, operating in our community, will conduct themselves in a manner consistent with protecting and serving the public.

Even with the recent passage of SB 2, it is unclear how a major loophole, concerning qualified immunity, will be closed. Several state courts have held that in order for a lawsuit to continue under the Bane Act, individuals

must show that there was a specific intent to interfere with someone's constitutional rights, or that the interference was deliberate or spiteful. That has made it exceedingly difficult for victims to win in court. An earlier version of SB 2 was amended to close this loophole, but ultimately that amendment was removed to ensure the bill's passage.

Even the watered down version of the bill was still considered a hard stop for law enforcement unions. As the main opponents of SB 2, police unions claimed the bill would threaten individual officers with financial ruin and lead to a mass exodus. However, SB 2 leaves the state's indemnification laws intact, which largely prevent officers from paying out of pocket. Moreover, a recent nationwide study of police indemnification by UCLA Law Professor Joanna Schwartz found that "governments paid approximately 99.98% of the dollars that plaintiffs recovered in lawsuits alleging civil rights violations by law enforcement."

To be completely transparent, I must admit, I have no BIG ideas or sweeping reforms to offer this committee. I merely offer a vantage point from the perspective of the dispossessed in our state who often become victimized rather than served by law enforcement. Hopefully, as a result of the work of this fine committee and your colleagues in the legislature, incremental changes to the current system may be fashioned in a manner which will lead to increasing public confidence in the process of investigating allegations of police misconduct.

Many of the clients we represent are reluctant to engage with law enforcement in any context. It does not require a degree in applied mathematics to understand that if one's entire experience with law enforcement has been negative it leads that person to treat systemic structures linked to law enforcement with suspicion and apprehension. Adding to the difficulties associated with law enforcement accountability and discipline is the fact that many who have experienced inappropriate treatment at the hands of law enforcement have had previous legal challenges themselves. Some who would report police misconduct are on probation or parole while others have outstanding warrants. Many victims of police misconduct are undocumented immigrants and fearful of

becoming linked to a complaint that could result in their deportation. It should not be difficult to appreciate that a major flaw of our intake process relative to alleged police misconduct is structural.

Unfortunately the situation we find ourselves in today is one of asking the figurative chicken to enter the fox's den to file a complaint against a member of the fox pack. Expecting the potential victim of police misconduct to "trust" the very system from which the harmful conduct springs forth is not only illogical, it is insulting. According to the Public Policy Institute of California, "Black Californians are about three times more likely to be seriously injured, shot, or killed by the police relative to their share of the state's population." Is it any wonder why African-Americans mistrust the police?

Unlike some of our colleagues and allies, like Black Lives Matter Sacramento, our law firm is not comprised of "abolitionists" when it comes to law enforcement. As an officer of the court, I took an oath upon swearing in to the legal profession that implicitly recognizes that in order to maintain a functioning social structure, we need police. Our law firm completely supports the premise that all of us, including our brothers and sisters in law enforcement, should be entitled to constitutionally enumerated due process rights. Unfortunately, what the Police Officers Bill of Rights has provided to law enforcement officials in our state, and others throughout the country, are due process protections on steroids that have effectively blurred transparency and diluted accountability. Attempting to "fix" the structurally flawed Police Officers Bill of Rights ("POBR") would appear to us to be an exercise as nonsensical as rearranging the deck chairs on the Titanic.

The triggering mechanism for some aspects of POBR protections is the intake of a citizen complaint against an officer or officers. The complaint must meet a time requirement that on its face, appears to most as reasonable. The complaint is typically filed within city hall or some location tied to civic administration or local law enforcement. There is very little infrastructure in place to assist the potential complainant with navigating the documentation required to support the complaint. The few lawyers

who have been retained to represent clients in this process are unaware of the various procedural requirements and timetable associated with filing the administrative complaint on their client's behalf. Clearly, this process is not one that may bring either the lawyer or the complainant a high financial reward.

The spectrum of potential police misconduct includes, but is broader than those interactions with law enforcement involving lethal force. Take the circumstance whereby the complaint is one of an inappropriate police "search" leading to evidence seized. In the criminal proceeding related to the seized evidence, a question may arise as to whether the seized evidence should be excluded pursuant to the Fourth Amendment to the U.S. Constitution's so-called "exclusionary rule."

Assuming the criminal defendant is successful relative to their Fourth Amendment argument, and the seized evidence is excluded from their criminal proceeding as "fruit of the poisonous tree," a separate question is whether the criminal defendant has a credible basis for a civil action against the officer or officers for seizing the "fruit of the poisonous tree" in the first place.

Similarly, in the context of various requirements that law enforcement officers announce themselves prior to entering a dwelling, very few violations of these provisions have resulted in any civil liability on the part of the violating officer or officers. U.C. Berkeley Law School Dean Erwin Chemerinsky, in his recent book "Presumed Guilty: How The Supreme Court Empowered The Police and Subverted Civil Rights," opines that

> [s}ince the 2006 *Hudson v. Michoigan* decision, police have virtually no reason ever to meet the Fourth Amendment's requirements for knocking and announcing before entering a dwelling. They know they will likely face no consequence for violating this rule.

Further, Dean Chemerinsky went on to point out the real meat on the bones of the problem that has us gathered together today. Dean Chemerinsky states

> [I]n the vast majority of instances where the police violate the knock-and-announce requirement, individuals will likely not bring a lawsuit, let alone successfully. They will have difficulty obtaining an attorney because in most instances the damages are not sufficient to make a lawsuit worth it.… Moreover even if someone brings a lawsuit, the Court has made it virtually impossible for anyone to sue cities for such violations, and it has made it difficult to sue police officers by providing them immunity to many suits for civil rights violations.

When the context of the citizen's complaint shifts to an allegation that a police officer used an inappropriate level of deadly or excessive force resulting in significant physical and/or emotional trauma to the complainant, the courts have been even more frustrating in their treatment of those claims.

Over the past decade, the U.S. Supreme Court has made it clear that because of qualified immunity, police officers cannot be held liable for unnecessarily using deadly force even though a complainant's constitutional rights have been violated. In the words of Dean Chemerinsky,

> the (U.S. Supreme) Court has elevated qualified immunity to a bar never before seen, as in case after case, it has reversed lower courts and held that officers cannot be held liable because of this protection. ***By closing the courthouse doors to***

those whose rights have been violated, it has made qualified immunity, practically speaking, very much like absolute immunity." (emphasis added)

I am sure by now you are wondering what can be done about these challenges facing those of us who advocate for enhanced transparency and accountability.

One simple suggestion would be to remove the citizen complaint process associated with alleged police misconduct, from within city hall or city administrative buildings and instead locate it in a place more geographically accessible to the complaining public and less intimidating. Such a move might lead to increased complainant's participation in the process and increased transparency and accountability with regard to law enforcement conduct. Further, one or more "resource personnel" should be assigned to provide assistance to the complainant in the filing of their complaint.

One overarching goal for this legislature should be to continue to strive to increase the confidence the public should have in the processes associated with regulating the conduct of law enforcement officials. The process of evaluating law enforcement behavior should be transparent and equitable to all members in our community including those employed in law enforcement.

A second suggestion would be for more uniformity in the police accountability processes throughout the state. Today, Sacramento's process for filing a police conduct complaint is different from Los Angeles' which is different from Oakland's etc. It is unfair to the complainant, who may have moved from one California jurisdiction to another, to be left with the task of having to figure out the processes and timetables associated with the police accountability process from jurisdiction to jurisdiction.

Many in our community do not trust a process shrouded in secrecy and controlled by internal affairs officials who they view as just a different

chapter of the same blue fraternity. Those of us who have argued for increased transparency leading to enhanced police accountability recognize that the best way to enhance the public's protection from police misconduct will come from enhancing the presence and authority of citizens' law enforcement oversight bodies. At minimum, these bodies should be allowed full investigative authority including the ability to subpoena witnesses and question them under oath. In addition, these bodies should contain no active duty sworn officers and limit the participation of former law enforcement officers to combat a potential perception of bias.

Third, the fact that almost every police accountability official in California is a former police officer has a chilling effect on public trust and credibility. The argument that "it takes one to know one" when it comes to law enforcement oversight is outweighed by the intimidating effect such a practice has relative to fostering public confidence. I have had numerous clients who were unwilling to file a complaint at all because it required them to engage with a (former) "cop in a suit" now serving as a local law enforcement accountability official. The vast majority of California jurisdictions have neither a police accountability official nor a citizens' police oversight board.

The real heart of the matter, from a public protection and police accountability standpoint, rests with the actual process associated with officer misconduct. While police officers should be entitled to various constitutional protections, many believe that law enforcement advocates are using the constitution to shield certain police officers from an appropriate transparent and unbiased evaluation of their conduct.

In our opinion, there is no getting around the fact that investigating police misconduct in practice is hamstrung by what remains of qualified immunity. It is our hope that this legislature will continue to explore the

very important topics associated with law enforcement transparency and accountability and come to the conclusion that officers who violate citizens' rights should bear more of the direct personal liability for their actions.

Thank you for allowing me to present my views.