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COMMENTARY

Wilda White: Vermont Senate's master class in structural racism

By **Commentary**

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Editor's note: This commentary is by Wilda L. White, of Poultney, who is the chair of the [Vermont Mental Health Crisis Response Commission](#).

The two bills moved forward Friday by the Vermont Senate Judiciary Committee in response to the execution of George Floyd are a master class in structural racism.

By a vote of 5-0, the committee recommended that the full Senate adopt a purported statewide policy on police use of deadly force and a purported ban on chokeholds.

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S.119, the recommended statewide policy on police use of deadly force, is based on the law that became effective in California less than six months ago. Under the policy, California peace officers are authorized to use deadly force only when “necessary.” When proponents first introduced the bill in the California legislature, they intended that deadly force be used only as a last resort and the bill included a definition to that effect.

However, reportedly, to appease law enforcement, the definition of “necessary” was removed from the bill before it became law. In response to criticism of the bill, California Gov. Gavin Newsom, who signed the bill said, “there’s aspects of this, I imagine, still fall short.”

Despite the criticisms of the California law and its acknowledged shortcomings, Vermont borrowed the California law without including a definition of “necessary.” Despite written and oral testimony before the Senate Judiciary Committee that without a definition, appellate courts might strike down the law as void for vagueness or insert a definition that results in no real change to existing law, the committee declined to define “necessary.”

Thus, under S.119, a Vermont law enforcement officer would be justified in using deadly force “when the officer reasonably believes, based on the totality of the circumstances, that such force is necessary” in the defense of life.

The Senate Judiciary Committee also purported to ban the use of “chokeholds” and to make an officer’s use of “chokeholds” a crime if it results in serious bodily injury or death. However, under S.219 an officer may defend against the charge by resorting to Vermont’s justifiable homicide defense. Such defense would permit the use of chokeholds “in suppressing opposition against [an officer] in the just and necessary discharge of [the officer’s] duty.”

Furthermore, S.219 sets no mandatory, minimum penalty for law enforcement officers who are convicted of using chokeholds in the line of duty. In other words, an officer who is convicted of using a chokehold can escape punishment entirely under S.219. S.219 also does not require the Criminal Justice Training Council to take any disciplinary action against a law enforcement officer’s first-time use of a chokehold. The bill only provides that it may.

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Structural racism is generally defined as the public policies, institutional practices and cultural norms that work in reinforcing ways to maintain white supremacy and reproduce racial disparities such as the

disproportionate killings of black people at the hands (and knee) of law enforcement.

One of the ways white supremacy is maintained is by appearing to make political concessions without in fact making any. Here, S.219 appears to ban chokeholds, but the bill allows officers an out by preserving the defense of justifiable homicide, which on the surface may seem reasonable, but in practice results in no change to current law. In fact, the language of the justifiable homicide defense seems in direct conflict with the proposed statewide policy on deadly force.

It's also worth noting here that when California adopted its new use of force policy, it also amended its self-defense language and amended its justifiable homicide statute, whose wording was very similar to Vermont's justifiable homicide statute. However, Vermont's Senate Judiciary Committee has not recommended similar amendments to Vermont law.

Structural racism also perpetuates racial disparities by investing decision-makers outside of the Legislature with unchecked discretionary authority, discretion that is susceptible to implicit and explicit racial biases. Here, S.219, through the justifiable homicide defense, bestows upon prosecutors the discretion not to charge officers with a crime and bestows upon judges the discretion not to penalize officers if convicted. And even if prosecutors do bring charges, it's left to a jury, where black people tend to be underrepresented, to decide whether the officer's wounding or killing was "in the just and necessary" discharge of duty.

And when the decedent is black, juries tend to accept without question the testimony of an officer that he feared for his life because our culture equates black/African American with fear. This was most recently on display in New York's Central Park where a white woman who wished to avoid leashing her dog at the request of an African American birder, warned the birder that she would call the police and tell them that she was "being threatened by an African American man." Despite the vagueness of her report, she knew her coded language would evoke a sense of imminent threat of death or serious bodily harm in the 9-1-1 operator's imagination.

Structural racism is also implicated in the Judiciary Committee's deliberate omission of a definition of "necessary," especially when you consider that the Judiciary Committee did choose to define some words in the bill. For example, the bill includes definitions of "deadly force" and "law enforcement officer," phrases which are hardly susceptible to multiple meanings.

The same cannot be said for the word "necessary." According to Black's Law Dictionary, the word 'necessary' "is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper or conducive to the end sought."

In essence, the Senate Judiciary Committee has pretended to recommend a statewide policy on deadly force without actually doing so. Rather, it has left it to appeals courts, including the U.S. Supreme Court which has shown a bias in favor of law enforcement, to decide the meaning of the bill's most critical word using rules of statutory construction.

Under rules of statutory construction, a word or phrase is presumed to bear the same meaning throughout a text. Accordingly, courts assume that if the Legislature wanted to change the meaning of a word, it would have supplied a new definition. In the absence of a new definition, a court is likely to apply the same meaning to the word "necessary" in S.119 as it applies to the word "necessary" in the current justifiable homicide statute, which in effect will result in no change to existing law.

And that is how structural racism, through seemingly benign policies, practices and cultural norms, works insidiously to reproduce the same racially inequitable outcomes. At the same time, it allows the Vermont Legislature to pat itself on the back for going through the motions of changing the law, and

doing so quickly, without actually doing anything to put black Vermonters at less risk of harm from excessive use of force by police.

I have never felt more that my black life does not matter in the state of Vermont.

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Crea Lintilhac, VJT Board Member

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