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House Committee on Government Operations
House Committee on the Judiciary
Vermont General Assembly
115 State Street
Montpelier, VT 05633-5301

Re: *S.119 and S.219*

Dear House Committee on Government Operations and House Committee on the Judiciary:

I write to express my strong opposition to S.119 and S.219 as passed by the Senate. Neither bill makes black lives matter. Rather, they maintain white supremacy and perpetuate the disproportionate killings of black people by law enforcement.

I am also deeply troubled by this body's rush to pass these measures, which are at best empty gestures. Racism in this country has persisted for 400 years. As a black person, I can wait a few months for Vermont's General Assembly to enact legislation that might actually recognize that black lives matter and begin the process of dismantling structural racism.

Legislative Findings

I urge the House to make and include explicit legislative findings in support of S.119 and S.219. If the Vermont General Assembly truly wishes to introduce a new use of deadly force standard, the bill should include findings to make transparent the Legislature's intent, analysis and thought process. Legislative findings serve as an explicit rationale for legislative action. Legislative findings help the public and courts understand the goals and purposes of the legislation. Legislative findings also signal to the public, including law enforcement, that the legislation is the result of a deliberative process rather than a knee-jerk reaction to current events. Legislative findings also help reviewing courts interpret the statute as the legislature intended.

Definition of Necessary

The most critical word in S.119 is "necessary," and it is left undefined. S.119's use of force provision appears to be based on a recently enacted California statute that purported to set limits on the lawful use of deadly force. The statute, as introduced in California, included a definition of "necessary." However, the statute, as enacted, excluded a definition of "necessary" because the law enforcement community successfully lobbied for its removal in an attempt to weaken the statute.

I urge this Committee to include a definition of "necessary." Without a definition of "necessary, S.119 is no more than an empty gesture. In addition, without a definition, it will be impossible to re-train law enforcement officers to use deadly force only when it is "necessary" as opposed to when it might be "objectively reasonable," which is the current, U.S. constitutional standard.

The definition of "necessary" that appeared in the California statute as introduced was as follows:

> "necessary" means that, given the totality of the circumstances, an objectively reasonable peace officer in the same situation would conclude that there was no reasonable alternative to the use of deadly force that would prevent death or serious bodily injury to the peace officer or to another person."

This definition gives clear guidance to officers and ensures that deadly force is truly a last resort.

Justifiable Homicide Defense

While the Senate purported to pass a bill adopting a statewide policy on police use of deadly force, it left intact the language of the justifiable homicide defense. The current justifiable homicide defense allows officers to use deadly force in circumstances that would ostensibly be disallowed under the proposed statewide policy on deadly force.

Therefore, officers will not be held to account for violating the proposed statewide policy on police use of deadly.

When California adopted its new use of force policy, it also amended its justifiable homicide statute. The circumstances of justifiable homicide changed from when "overcoming actual resistance to the execution of some legal process or in the discharge of any other legal duty" to "the homicide results from a [police] officer's use of force that is in compliance with [the new use of force policy.]"

In the Senate's passage of S.119, it's as if Vermont copied its California classmate's homework but neglected or deliberately chose not to flip the page and copy what was written on the reverse.

S.119 enacts no real change in Vermont use of force policies without a change to the justifiable homicide defense.

Body Cameras

While I agree that body cameras can be an effective deterrent against excessive use of force, I do not believe that the body camera provision in S.219 will serve as an effective deterrent.

What I learned from my work on the Mental Health Crisis Response Commission is that despite the existence of body camera video footage, law enforcement officers will nonetheless testify under oath on material matters contrary to what is depicted on the footage. And such contrary testimony will make its way into applications for search warrants and decisions on whether use of force was justified. This has led me to believe that officers may have some understanding that there is a good chance that investigators and/or supervisors will not review body camera footage.

Thus, to serve as an effective deterrent, any requirement that officers wear body cameras must be paired with a requirement that body camera footage be made available to the public without charge particularly where there is a question whether an officer used excessive force.

I strongly disagree with the ACLU's model body camera policy. In cases of excessive use of force, in particular, the release of body camera footage should not be limited to the person that is the subject of excessive use of force or the legal representative of such person. In addition, the Public Records Act should not be the mechanism for requesting the footage. There should be no charge for obtaining easy and rapid access to the footage.

As I read the ACLU's model policy, it strikes me as a classic example of a policy that looks race neutral on its face but in practice will result in racial inequity by denying access based on, among other things, lack of funds or the inability to retain legal counsel.

Excessive use of force by law enforcement harms entire communities and the entire community should have access to such footage at no cost and on a timely basis. Allowing greater public access to police body camera footage will more effectively deter excessive use of force.

Of note, New York City recently announced a policy to release body camera footage to the public within 30 days of the incident. The policy applies to incidents where an officer fires a gun and hits someone or could have caused injury, uses a stun gun or makes use of any other force

that causes harm. The videos will be posted on the internet after those who were involved have seen them first.[1]

Improper Restraint

While S.219 as passed by the Senate purports to make the use of "chokeholds" a crime, it only does so if the chokehold results in serious bodily injury or death. Chokeholds are a special form of terror whether or not they resort in serious bodily injury or death. A police officer's mere application of a chokehold on a black person, regardless of duration, will yield an ineffable psychic injury, especially after the world witnessed the chokehold execution of George Floyd. It is not enough to deem "chokeholds" a crime only if they result in serious body injury or death.

Moreover, S.219 does not actually ban chokeholds because S.219 preserves the justifiable homicide defense. Such defense permits the use chokeholds "in suppressing opposition against [an officer] in the just and necessary discharge of [the officer's] duty" which is inconsistent with the proposed statewide policy on use of deadly force which ostensibly permits deadly force "when the officer reasonably believes, based on the totality of the circumstances, that such force is <u>necessary</u>" in the two instances enumerated in the bill.

S.219 is also a very weak deterrent because the measure sets no minimum penalty for law enforcement officers who are convicted of using chokeholds in the line of duty. And S.219 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.

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S.119 and S.219 follow that long line of tradition in American lawmaking of preserving white supremacy by transforming the means of maintaining its grip. When Congress purported to ban slavery with the adoption of the thirteenth amendment, it included the exception, except in the case of prisoners. Thus, black people were transformed from slaves to mass incarcerated prisoners.

Here, the Vermont General Assembly has purported to ban chokeholds and the unnecessary use of deadly force, except "in suppressing opposition against [an officer] in the just and necessary discharge of [the officer's] duty." The except makes all the difference and in this case, no difference at all from the status quo.

[1] NYC Office of the Mayor, "Mayor de Blasio Announces New Body Camera Footage Policy," June 16, 2020, accessed June 17, 2020, https://www1.nyc.gov/office-of-the-mayor/news/438-20/mayor-de-blasio-new-body-camera-footage-policy

I am deeply saddened by this body's rush to enact these woefully inadequate bills, which, in the effect, has actually given California residents more say than Vermonters in setting a statewide policy on police use of deadly force in Vermont.

Very truly yours,

Wilda L. White

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Enclosure: Commentary by Wilda L. White, published June 23, 2020, vtdigger.org, "Vermont Senate's master class in structural racism"