

From: Falko Schilling, Advocacy Director, ACLU of Vermont
To: House Government Operations Committee and House Judiciary Committee
RE: S.119 Use of Force

Thank you for the opportunity to testify today on S.119, an act relating to the use of force by law enforcement. This discussion could not be more timely, and the ACLU of Vermont supports Vermont establishing a statutory standard for the use of force that ensures force is only used when necessary and requires an officer to evaluate the totality of the circumstances before they use force. At the same time, we must also ensure that people who are victims of excessive force have the ability to redress the harms they suffered.



Need for statewide standard

Most people can agree police officers should use force only as a last resort, and that the force used must be no more than is absolutely necessary. To better guarantee the safety of the communities they serve, law enforcement must prioritize a model of policing that employs force only when necessary and that emphasizes de-escalation and mutual respect between community and police.

Vermont currently lacks statutory standards to better ensure that happens in practice. Individual departments may establish their own standards that comply with existing Supreme Court precedent, but there is not uniformity across the state. At the same time, we have seen fatal use of force incidents steadily increasing over the last few decades. S.119 presents an opportunity to create a uniform statewide standard that permits the use of force only when it is necessary, not just when an officer believes it is reasonable in the moment.

Importance of the necessary and proportional standards

This bill asks an officer to answer two questions before using force. First, is force necessary? And second, if so, what is the least amount of force necessary for the officer to achieve their lawful objective?

The “*necessary*” standard established in S.119 requires officers to use other techniques and resources, other than force, when reasonably safe and feasible to do so. The “*proportional*” standard requires that, even if it is necessary to use force, officers can use only such force as is necessary to achieve a lawful objective—they cannot, for example, use a firearm where a wrist lock would suffice. Taken together, these standards mean that, if de-escalation is possible, then an escalation in force is unlawful.

To this end we support the addition of language found on line 3 of page 4 of draft 2.4 clarifying “*a law enforcement officer’s failure to use feasible and reasonable alternatives to force shall be a consideration of whether it was objectively reasonable.*” This language makes it clear that law enforcement

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cannot escalate a situation to a point where force is necessary and then claim that the use of force was reasonable.

Totality of the Circumstances

In making decisions about if force is necessary and proportional, the bill asks an officer to evaluate the necessity of the use of force based on the totality of the circumstances. This represents a positive step in the right direction, and allows for the consideration of the whole event, not just the few moments immediately preceding the use of force. The bill as currently drafted sets out six criteria that would need to be considered when evaluating the totality of the circumstances. We propose striking the section as currently written and inserting the definition of “totality of the circumstances” taken from Massachusetts *HD.5128* and *SD.2968 an act relative to saving black lives and transforming public safety*.¹

These additions speak more fully to the conduct of law enforcement leading up to the use of force that needs to be taken into consideration. These factors also help to reinforce the requirements found elsewhere in the bill that officers must use feasible alternatives to force and that officers ascertain

¹ *“Totality of the circumstances”, the entire duration of an interaction between law enforcement officers and a victim of force, from the first contact through the conclusion of the incident, including consideration of contextual factors the law enforcement officer knew or should have known during such interaction, including, but not limited to:*

- (i) whether the law enforcement officer’s conduct during the interaction contributed to the risk of imminent harm to an identifiable person by the victim of force;*
- (ii) whether the law enforcement officer attempted de-escalation tactics and techniques during the interaction;*
- (iii) whether the law enforcement officer failed to identify as a law enforcement officer to the victim of force;*
- (iv) whether an arrest could have been effected at a later time with a lower risk to the safety of the public or to the victim of force;*
- (v) whether the law enforcement officer made reasonable accommodations in light of the victim of force’s physical disability, mental illness, developmental or neurological condition or disability, drug interactions, linguistic limitations, then-existing mental, emotional or physical condition or other characteristics that may have interfered with the victim of force’s ability to cooperate or comply with a law enforcement officer’s instructions;*
- (vi) whether the law enforcement officer failed to call in a medical or mental health professional in response to a potential medical or mental health crises;*
- (vii) whether the law enforcement officer gave any warnings to the victim of force before undertaking a use of force or other escalation; and*
- (viii) whether the law enforcement officer exacerbated the injury sustained by the victim of force by subsequent actions.*



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more fully the medical and mental state of an individual when deciding to use force.

Ability for victims to receive justice

Another area where the bill should be improved is enumerating the rights of individuals who are the victims of excessive force. The bill should establish that any individual who was the victim of force in violation of this statute can bring a private action for damages and that qualified immunity will not be available as a defense against such a suit. Without such changes victims of police violence as defined by the bill would have no way to redress the harms done to them.

Qualified immunity is judicially created doctrine that holds public officials immune from lawsuit unless they have violated clearly established statutory or constitutional rights of which a reasonable official would have known.² In practice, this doctrine often bars lawsuits from being decided on the merits because courts routinely avoid answering the question of whether the official violated the plaintiff's rights, instead skipping to the question of whether those rights (if any exist) were clearly established. Unless the plaintiff can point to a case where a court in their jurisdiction found a constitutional violation on an almost identical fact pattern, the court will hold that the right was not clearly established and the defendant is entitled to immunity, regardless of whether they violated plaintiff's constitutional rights³—thus ensuring that those rights never become “clearly established.” Moreover, qualified immunity provides immunity from suit, not just from liability for damages, which means courts regularly rule that a right was not “clearly established” even before the plaintiff can engage in discovery to prove the merits of their case. For these reasons, among others, organizations, judges, and academics across the political spectrum are calling for the abolition of the qualified immunity defense.

In the case of S.119, the legislature is creating new statutory rights for Vermonters to be free from excessive force by law enforcement. Since there will be no existing case law to point to a clearly established right under the statute, and since qualified immunity doctrine frustrates the establishment

² Harlow v. Fitzgerald, 457 U.S. 800 (1982)

³ Examples of significant misconduct shielded by qualified immunity abound, but we provide one example for the Committee's consideration. These facts are taken from *Corbitt v. Vickers*, 929 F.3d 1304 (9th Cir. 2019). Officers were attempting to arrest an individual who had “wandered into” the yard of people he had never met. One adult and six minor children—two under the age of three—were also in that yard. The officers demanded that all present, including the children, get on the ground. All complied. After the officers had handcuffed the suspect, and “without necessity or any immediate threat or cause,” an officer shot at, but missed, the family's dog. The dog retreated under the house, then reappeared and was approaching its owners, when the officer fired at him again, missing the dog and shooting a ten-year-old child—who was still lying face-down on the ground a mere eighteen inches from the officer and was “visibly unarmed and readily compliant”—in the leg. The Ninth Circuit held that the officer was entitled to qualified immunity because “[n]o case capable of clearly establishing the law for this case holds that a temporarily seized person—as was [the child] in this case—suffers a violation of his Fourth Amendment rights when an officer shoots at a dog—or any other object—and accidentally hits the person.”



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of clearly established rights, Vermonters will be unable to sue law enforcement officers who violate the new statutory standard. This means that in practicality victims of excessive force as defined by S.119 will have no redress if law enforcement violates the law. This is an untenable situation and one that the legislature needs to address when enacting more stringent use of force standards.

Conclusion

The ACLU of Vermont supports the goals of S.119 and thinks it represents a positive step forward in ensuring law enforcement in Vermont use force only when necessary, and that such force is proportional to the threat they are encountering. One area where the bill can be improved is further enumerating factors that should be considered in the “totality of the circumstances.” The other substantial area for improvement would be establishing a private right of action for violations of the statute and eliminating qualified immunity as a defense so that victims of police violence can have their day in court.

Sincerely,
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