

Wilda L. White
147 College Street North
Poultney, VT 05764-1084
(802) 770-4050
WildaLWhite@gmail.com

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Senate Committee on the Judiciary
Vermont General Assembly
115 State Street, Room 1
Montpelier, VT 05633-5301

Re: *S.219 – An act relating to requiring law enforcement to comply with race data reporting requirements in order to receive State grant funding*

Dear Senate Committee on the Judiciary:

I hereby submit this testimony regarding S.219 in my personal capacity. However, for purposes of identification, I am the current Chair of the Vermont Mental Health Crisis Response Commission and the former Executive Director of Vermont Psychiatric Survivors.

I am also a black woman who has been diagnosed with a so-called severe mental illness for which I receive no treatment. According to the Treatment Advocacy Center, people with untreated, “severe mental illness” are 16 times more likely to be killed during a police encounter than other individuals.¹ In fact, in 2015, in the United States, 42 women perceived to be in a mental health crisis were killed by police.² In addition, black people are 2.8 times more likely than white people to be killed by police.

Haste is not the answer

Notwithstanding my disproportionate risk of being killed by law enforcement, I do not support this Committee’s haste, in the wake of George Floyd’s murder, to pass legislation ostensibly aimed at reducing deaths of black people at the hands of law enforcement.

¹ Doris A. Fuller et al., Overlooked in the Undercounted: The Role of Mental Illness in Fatal Law Enforcement Encounters, *Treatment Advoc. Ctr.* 1, 12 (2015)

² Andrea J. Ritchie, *Invisible No More: Police Violence Against Black Women and Women of Color*. Boston: Beacon Press, 2017 at p. 236.

I do not believe that this Committee has engaged in the deep reflection, careful thought and broad public engagement that effective legislation in this domain requires.

The disproportionate rate of deaths of black people and people in mental health crisis at the hands (or knee) of law enforcement are rooted in white supremacy, structural racism, explicit and implicit racial bias and deep-seated prejudice against people perceived to be mentally ill.

It will require more than a hodgepodge collection of statutory measures -- data collection; mandatory body-worn cameras; and an anemic use of force policy cribbed from the State of California -- to overcome the structural racism and implicit biases that have allowed police officers to escape prosecution, conviction and/or punishment for excessive use of force.

Judges, juries, prosecutors, appellate courts, indeed the law itself, are all implicated and work in reinforcing ways to perpetuate these disproportionate killings.

This Committee needs to understand how investigations of excessive force are carried out by fellow law enforcement officers, how Supreme Court precedent and rules of statutory construction operate, and how prosecutorial discretion, the rules of evidence, the selection of juries, etc., all conspire to perpetuate the disproportionate use of excessive force against black people without holding anyone to account.

When I read S.219, I do not have confidence that this Committee appreciates the enormity of the problem and the massive undertaking that a solution will require.

The work of this Committee should be to identify, and through legislation, dismantle the policies, institutional practices, and cultural norms that have historically failed to deter excessive use of force against black people and failed to hold police to account for such excessive use of force.

Legislative Findings

I urge the Committee to make and include explicit legislative findings in support of S.219. If this Committee truly wishes to introduce a new use of force standard, the Committee should include findings to make transparent the Committee'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.

Definition of Necessary

The most critical word in S.219 is “necessary,” and it is left undefined. S.219’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.219 is no more than an empty gesture. It is also possible that a court might void the provision due to vagueness.

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.

For your information, I have included as an attachment to this letter, a copy of the California statute as enacted compared to the California statute as introduced.

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. This is a perfect example of how structural racism operates.

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.³

Excessive Use of Force against People in Mental Health Crisis

I disagree with the recent rhetoric to the effect that society is asking too much of police officers, particularly when what is cited in support of this claim are calls to the police about people in a mental health crisis. According to the Substance Abuse and Mental Health Services Administration (SAMHSA), the federal agency charged with addressing issues of mental health, one in four Americans has a mental health diagnosis. I simply will not accept that it is too much to ask those charged with public safety to ensure the safety of one-fourth of our population. Mental health status should not determine who receives the protection and assistance of law enforcement.

Nationally and in Vermont, people in mental health crisis are disproportionately killed by law enforcement. In the four years since Phil Grenon was killed by a Burlington Police office in

³ 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>

March 2016, there have been five law enforcement killings involving people in a mental health crisis, according to *Counterpoint*, a newspaper published by Vermont Psychiatric Survivors. These five deaths equal the total number of similar deaths over the previous 16 years between 2001 and 2016.⁴

While I am pleased that S.219 limits use of force against persons who are threatening harm only to themselves, I find it problematic that S.219 does not do more to address the excessive use of force by law enforcement against people in a mental health crisis.

This is another area where the Committee should take some time to understand what is driving excessive use of force against people in a mental health crisis. I am including with this testimony a copy of the 2019 Mental Health Crisis Response Commission report. The report is the result of the Commission's investigation into the death of Phil Grenon at the hands of the Burlington Police Department. In the report, I conclude that unconscious bias against people with mental illnesses was the root cause of Mr. Grenon's death.

Improper Restraint

I suggest re-writing the definition of "improper restraint" as follows:

"Improper restraint" means the use of any physical maneuver on a person that prevents or hinders breathing, reduces intake of air or impedes the flow of blood or oxygen to the brain, including but not limited to pressure to the neck, throat, windpipe or carotid artery."

I am also confused by the provision in S.219 that provides that a law enforcement officer who employs an improper restraint on a person that causes serious bodily injury to or death of the person "shall be imprisoned for not more than 20 years or fined not more than \$50,000.00 or both."

Does S.219 intend to make the use of "improper restraint" a crime in itself? What is the process that would be employed to imprison or fine a law enforcement officer for the use of "improper restraint" and why does the statute impose a maximum sentence and fine but no minimum? Conceivably, because of the way the statute is written, an officer could receive no fine or imprisonment for the use of "improper restraint" resulting in death or serious bodily injury.

⁴ Donahue, Anne. "Deaths from Use of Force Skyrocket," p. 1, *Counterpoint*, vol. XXXIV No. 2, Fall 2019

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Conclusion

I urge the Committee not to rush to enact S.219 simply for the sake of doing something in the wake of George Floyd's death. The disproportionate deaths of black people at the hands of law enforcement are deeply rooted in white supremacy and structural racism.

Black lives will not matter until the policies, practices and cultural norms that have endured and adapted over time to deliver racial injustice are dismantled. I urge this Committee to undertake the work of dismantling these structures.

I also urge the Committee to address law enforcement related-deaths of people in mental health crisis.

Thank you for your consideration.

Very truly yours,



Wilda L. White

Enclosures: 2019 Mental Health Crisis Response Commission Report

California AB-392 - Peace officers: deadly force (as enacted compared to as introduced)