



MONTGOMERY COUNTY, MARYLAND

WOMEN'S DEMOCRATIC CLUB

EXPEDITED BILL 27-20, POLICE—REGULATIONS—USE OF FORCE POLICY

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND SUPPORT WITH AMENDMENTS

Thank you for this opportunity to submit written testimony to the Montgomery County Council concerning an important priority of the **Montgomery County Women's Democratic Club (WDC)**. WDC is one of the largest and most active Democratic Clubs in our County with more than 600 politically active women and men, including many elected officials.

WDC recently created a Task Force on Racial Equity in Public Safety. This Task Force is leading WDC's work to support greater racial justice in our County's policing, and the Task Force has recommended its support for the immediate implementation of the policing reforms known as **#8CANTWAIT**, as a first step in an overall re-imagining and re-structuring of the Montgomery County Police Department (MCPD). The eight immediate reforms of the **#8CANTWAIT** agenda are:

- 1. Ban on Chokeholds and Strangleholds** - Allowing officers to choke or strangle civilians results in unnecessary death or serious injury. Chokeholds and all other neck restraints must be banned in all cases.
- 2. Require De-escalation** - Require officers to de-escalate situations, where possible, by communicating with subjects, maintaining distance, and otherwise eliminating the need to use force.
- 3. Require Warning Before Shooting** - Officers must give a verbal warning in all situations before using deadly force.
- 4. Require Exhausting All Alternatives Before Shooting** - Officers must exhaust all other non-force and less lethal alternatives before resorting to deadly force.
- 5. Duty to Intervene** - Require officers to intervene and stop excessive force used by other officers and report these incidents immediately to a supervisor.
- 6. Ban Shooting at Moving Vehicles** - Ban officers from shooting at moving vehicles in all cases, which is particularly dangerous and ineffective.
- 7. Require Use of Force Continuum** - Establish a Force Continuum that restricts the most severe types of force to the most extreme situations and creates clear policy restrictions on the use of each police weapon and tactic.
- 8. Require Comprehensive Reporting** - Require officers to report each time they use force or threaten to use force against civilians. Comprehensive reporting includes requiring officers to report whenever they point a firearm at someone, in addition to all other types of force.

County Executive Marc Elrich, together with MCPD and the Police union, has already implemented one of these reforms, which is also addressed in Expedited Bill 27-20: the requirement that fellow officers intervene to stop an officer from using deadly force. WDC appreciates the work of Councilmember Will Jawando and the Lead Co-Sponsors of this bill for taking the first legislative step to limit the use of force by MCPD, but we believe that Expedited Bill



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27-20 does not go far enough and should incorporate all of the **#8CANTWAIT** reforms as immediate measures to save lives and reduce the serious injuries that frequently result from police use-of-force. *Again, WDC stresses that it supports a more comprehensive review and reform process for MCPD, but we support the #8CANTWAIT reforms as first steps to control the use of deadly force right now.*

Expedited Bill 27-20 would require: 1) the MCPD Police Chief to adopt a policy directive regarding the use of force; 2) the use of force policy to include certain minimum standards, including standards regarding the use of deadly force, including the use of carotid and neck restraints, and 3) the intervention by officers when another officer is violating the law or police policies. The minimum standards adopted in accordance with Bill 27-20 would not be subject to collective bargaining.

As is noted above, WDC does not believe that Expedited Bill 27-20 goes far enough in protecting those in Montgomery County—and specifically Black individuals and other people of color—from unwarranted, potentially lethal use of force by MCPD police officers. We believe that the bill should incorporate all of the **#8CANTWAIT** reforms. If the County Council is not willing to expand the scope of Bill 27-20 to include all the **#8CANTWAIT** reforms, WDC urges the County Council to at least amend Expedited Bill 27-20 to: 1) expand the definitions of “deadly force” and “neck restraint” and “carotid restraint” to include, “chokeholds, strangleholds, Lateral Vascular Neck Restraints, carotid restraints, chest compressions, or any other tactics that restrict oxygen or blood flow to the head or neck”; 2) add “shooting at a moving vehicle” to the definition of “deadly force;” and 3) ban outright the use of these uses of deadly force.

On May 25, 2020, citizens of Montgomery County, together with people around the world, watched in horror as Minneapolis Police Officer Derek Chauvin killed George Floyd in just under nine minutes with a knee pressed to his neck. Three other Minneapolis police officers stood by and did nothing. This was nearly six years after we watched Eric Garner’s killing by police chokehold on Staten Island, an act of brutality that was watched by four additional police officers who did nothing to intervene. Eric Garner died by police chokehold despite the fact that chokeholds of the type used by Officer Daniel Pantaleo had been banned by the New York City Police Department since 1993. A study by the New York Times found that nationwide, 70 people have died after uttering the words, “I Can’t Breathe.”¹.

The first reason that WDC is urging amendment of Bill 27-20 is that we believe that the definition of restraints included in the definition of “deadly force” is too narrow and should explicitly include chokeholds of the kind that killed Eric Garner. It should also include any other means of restricting breathing or blood flow such as kneeling on the back of a prone suspect or using hoods as a means of restraint. Accordingly, WDC believes that Bill 27-20 should incorporate **#8CANTWAIT**’s broader definition of prohibited restrictions of oxygen and blood flow: *chokeholds, strangleholds, Lateral Vascular Neck Restraints, carotid restraints, chest compressions, or any other tactics that restrict oxygen or blood flow to the head or neck.*

¹ <https://www.nytimes.com/interactive/2020/06/28/us/i-cant-breathe-police-arrest.html>



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Secondly, WDC believes that Bill 27-20 should be amended to ban outright any restraint on an apprehended individual's blood flow or ability to breathe. These restraints are inherently dangerous and all too frequently are lethal, and they should no longer be permitted in Montgomery County. By making the use of these restraints subject to policy only—and a policy with large exceptions at that—Bill 27-20 does not go far enough to ensure that no one in Montgomery County will ever utter, "I Can't Breathe" as their last words.

WDC also urges the County Council to amend Bill 27-20 to ban shooting at moving vehicles. According to Campaign Zero, the sponsor of the **#8CANTWAIT** reforms, this use of deadly force is an ineffective, but nonetheless deadly, tactic. According to Campaign Zero, 62 individuals were killed last year because police shot at their moving vehicles.² This practice should be included in the definition of "deadly force" and, like restraints on oxygen or blood flow, should be banned outright.

Bill 27-20 requires that the Police Chief issue a directive that establishes the permissible uses of force by members of the police. However, a directive is not law. It is not enacted by the elected representatives of the people of this County, and the Police Chief is not accountable to the public in the same way our elected officials are. The County Council is proposing to put in the hands of the Police Chief the responsibility for crafting a policy to reform the law enforcement agency of which he is the head. While we agree that MCPD must be a partner in a meaningful re-imagining of policing in the County, there are certain issues on which there should be no discretion. Restraints on breathing and blood flow and shooting at moving vehicles fall into that category.

Bill 27-20 states that the directive on use of force must "promote fair and unbiased policing," and protect "vulnerable populations," including those "that are disproportionately impacted by inequities." Achieving this goal through a police directive is entirely unrealistic. A directive cannot erase the explicit and implicit biases and underlying structural racial disparities in policing that have resulted in a shockingly disproportionate number of deaths of Black individuals at the hands of law enforcement officers in Maryland. Pursuant to House Bill 954, the Governor's Office of Crime Control and Prevention (GOCCP) must report annually on the number of law-enforcement-involved deaths in Maryland and must identify the race of both the deceased civilian and responsible police officer. As of the 2010 Census, Black citizens made up 29% of Maryland's population. However, in 2013 (the first year for which data was reported), of those police-involved deaths determined to be homicides, 63% of the victims were Black. In 2014, the percentage of Black homicide victims was 78%; in 2015 78%; in 2016, 68.8%, in 2017 61.5%, in 2018, 78.6%.³ The overwhelming percentage of police officers involved in these homicides were white. These

²<https://8cantwait.org/>

³ See, First, Second, Third, Fourth, and Fifth Reports to the State of Maryland Under House Bill 954—Deaths Involving a Law Enforcement Officer. <http://goccp.maryland.gov/reports-publications/law-enforcement-reports/deaths-involving-law-enforcement/> Note that for several years of reporting, "Hispanics" were reported as an ethnicity not a race and were classified in the reporting as "White" or "Unknown," thus lowering the number of police homicides involving people of color. In the report for 2018, "Hispanic" citizens were classified as a "race" for the first time. Therefore the 2018 numbers include all People of Color. As an aside, we note that "Hispanic" officers were classified by race from the very beginning of the reporting. The result is that the numbers of Black victims was lower because "Hispanic" victims were considered White. However, "Hispanic" officers were not classified as "White," but were separately categorized thus lowering the number of "White" officers involved in the reported homicides.



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numbers replicate the numbers of Black citizens killed by law enforcement from 2010-2014 as reported by the ACLU of Maryland.⁴

The glaring racial disproportion of police-involved homicides is not the result of a policy that explicitly directs police to ignore fair and unbiased policing or instructs the police not to protect populations that are disproportionately impacted by inequities. If we believed that the disparities were the result of a deliberate police policy, then we might be willing to believe that a reversal of that policy could create a different outcome. However, these shocking numbers can only be explained by the explicit and implicit biases that reside in police officers and the structure of racism built into law enforcement within communities of color. The only way to ensure that police officers will not disproportionately use deadly restraints against Black people and other people of color is to forbid the police from using these deadly restraints at all.

WDC believes that the “Minimum standards” proposed as Section 35-22 (c) create a large loophole that will permit the use of deadly force with impunity. Specifically, subsection (c)(2)(A) prohibits the use of deadly force unless “*such force is necessary as a last resort to prevent serious bodily injury or death to the officer or another person.*” (emphasis added). The definition of “necessary” as set forth in proposed section (a) “*means that another reasonable law enforcement officer would objectively conclude, under the totality of the circumstances, that there was no reasonable alternative to the use of force.*” This standard derives from the Supreme Court’s decision in *Graham v. Connor*, 490 U.S. 386 (1989), in which the Court determined that the Constitutional standard under which matters of police violence and excessive use of force must be adjudicated lies in the Fourth Amendment’s prohibition on unreasonable searches and seizures.

As legal scholars have noted, the use of the “objectively reasonable” standard moves the adjudication of constitutionally actionable harm at the hands of the police from a rights-based, systemic evaluation of excessive use-of-force (as might be applied in a Fourteenth Amendment analysis), and examines only the facts of the specific use-of-force incident in isolation from the systemic, racist policing that often underlies the excessive use of force in the first place.⁵ This standard, which only sees death from excessive use-of-force from the “reasonable police officer’s point of view and not as the intended, culminating act within a system of racist policing, will not stop death by police use-of-force. As Georgetown University law professor Paul Butler wrote, “what happens in places like Ferguson, Missouri, and Baltimore, Maryland—where the police routinely harass and discriminate against African-Americans—is not a flaw in the criminal justice system. Ferguson and Baltimore are examples of how the system [of structural racism and racial subordination] are supposed to work.”⁶

The “objectively reasonable” standard also perpetuates the “bad apple” theory of excessive use of force, that is, that most members of the police force are good and well-meaning, but it is just a few

⁴ ACLU of Maryland, *Briefing Paper on Deaths in Police Encounters in Maryland, 2010-2014*, https://www.aclu-md.org/sites/default/files/legacy/files/md_deaths_in_police_encounters.pdf

⁵ Obasogie & Newman, *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through an Empirical Assessment of Graham v. Conner*, Northwestern University Law Review, Vol 112, No. 6 (2018).

⁶ Paul Butler, *Chokehold: Policing Black Men*, 6 (2017).



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bad apples who use excessive force. The “objectively reasonable” standard individually pits the victim against the officer and views the incident from the officer’s perspective. It does not consider either the officer’s race or the victim’s race, factors which in a disproportionate number of cases determine the outcome of the encounter. This standard does not consider, for example, that a Black man might run from an encounter from the police precisely because the racist policing in his community has made him fear for his life. The benefit of the doubt goes to law enforcement, who become the judge and jury in deciding whether an apprehended or fleeing individual will be subject to deadly use-of-force. This standard also does not consider the nature of the offense the police may believe the victim had committed. Are there any circumstances in which the death penalty without trial is appropriate for an allegation (even if presumed to be true) of using a counterfeit \$20 bill or selling single cigarettes?

We must also recognize that the “objectively reasonable officer” is also operating within a structurally racist system that makes it seem objectively reasonable to apprehend a Black man just for being a Black man. The racist culture of policing in this country has corrupted the notion of what is “objectively reasonable.” The hundreds of thousands of protesters who have taken to American streets to protest police violence tell us that what a police officer might think is “objectively reasonable” is very different from what the majority of Americans think is “objectively reasonable.” This standard of judgment must not be incorporated into Bill 27-20. The lines that this bill draws must be clear to all. The only way that we can ensure that these life-threatening uses-of-force no longer result in death or serious injury to individuals in Montgomery County is to forbid their use entirely.

In conclusion, WDC urges the County Council to amend Expedited Bill 27-20 include all #8CANTWAIT policing reforms. Short of that, WDC urges the County Council to amend Bill 27-20 to: 1) expand the definition of deadly force to include “chokeholds, strangleholds, Lateral Vascular Neck Restraints, carotid restraints, chest compressions, or any other tactics that restrict oxygen or blood flow to the head or neck;” 2) to include shooting at moving vehicles in the definition of “deadly force;”; and 3) fully ban the Montgomery County Police Department from using these forms of potentially deadly uses-of-force in every case and under all circumstances.

Respectfully,

Diana Conway
President