



MONTGOMERY COUNTY, MARYLAND
WOMEN'S DEMOCRATIC CLUB

P.O. Box 34047, Bethesda, MD 20827

www.womensdemocraticclub.org

**SENATE BILL 50-CRIMINAL PROCEDURE-POLICE OFFICERS-DUTY TO INTERVENE
JUDICIAL PROCEEDINGS COMMITTEE-JANUARY 28, 2021
SUPPORT WITH AMENDMENT**

Thank you for this opportunity to submit written testimony to the Judicial Proceedings Committee 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 hundreds of politically active women and men, including many elected officials.

SB0050 requires intervention by police officers when a fellow officer is using or intends to use excessive force. WDC believes that this legislation is an important first step in creating police accountability for failure to intervene in the use of excessive force. This legislation is also consistent with the U.S. Department of Justice's policy to prosecute law enforcement officers for failure to intervene to prevent use of excessive force and other civil rights violations, but the penalties under federal law can be much more severe than a misdemeanor.¹

Accordingly, WDC believes that SB0050 does not go far enough in protecting Maryland's men and women—particularly its Black men and women—from use of excessive force by law enforcement officers. WDC urges the members of the Judicial Proceedings Committee to amend SB0050 to: 1) change the definition of "EXCESSIVE FORCE" to "PHYSICAL FORCE THAT, UNDER THE TOTALITY OF THE CIRCUMSTANCES, IS OBJECTIVELY UNNECESSARY", 2) clarify the definition of "REASONABLE" in proposed Section 2-109 (B) to make clear that the reasonableness of the attempt to intervene should be judged from the perspective of an objective observer of the totality of the circumstances and not solely from the perspective of the reasonable officer on the scene, and 3) amend proposed Section 2-109 (D) to allow prosecutors to charge an officer who violates Section 2-109 with more than a misdemeanor.

First, WDC urges *amendment* to SB0050 to replace the "objectively unreasonable" standard to define Excessive Force with an objectively unnecessary standard. This standard is proposed in **HB139-Law**

¹ "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or an officer who purposefully allows a fellow officer to violate a victim's Constitutional rights may be prosecuted for failure to intervene to stop the Constitutional violation. To prosecute such an officer, the government must show that the defendant officer was aware of the Constitutional violation, had an opportunity to intervene, and chose not to do so. This charge is often appropriate for supervisory officers who observe uses of excessive force without stopping them, or who actively encourage uses of excessive force but do not directly participate in them." www.justice.gov/crt/law-enforcement-misconduct. Penalties for civil rights violations are set forth in 18 U.S.C. Section 242, which states: "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, *shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.* (emphasis added).



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Enforcement Officers-Use of Force. The current language in the bill uses the term “objectively unreasonable” standard, which leaves too much leeway for officers to justify the use-of-force, and we believe that officers should use force only when necessary, and as a last resort. The Montgomery County Council recently adopted the “necessary” standard for use of force in Montgomery County Council [Bill 27-20E](#). This use-of-force law permits the use of force only when necessary, which “means that another reasonable law enforcement officer could objectively conclude, under the totality of the circumstances, that there was no alternative to the use of force” (MCC Bill 27-20E, Line 46), and that “such force is necessary, as a last resort, to prevent imminent and serious bodily injury or death to the officer or another person” (Line 99).

Second, WDC believes that judging the reasonableness (or unreasonableness) of the use of force should not be judged solely from the point of view of the “objectively reasonable” officer on the scene, because it is difficult to define who is the “objectively reasonable” officer. Are they the officers in *Graham v. Conner* (referenced in the [Fiscal and Policy Note](#)) who injured and denied medical help to a victim in a diabetic crisis who did nothing more than enter and leave a convenience store quickly rather than wait in a long line to purchase a product containing glucose? Are they the officers who idly watched George Floyd and Eric Garner beg for their lives? The multitude of Americans protesting police violence tell us that a police officer’s view of what is objectively reasonable is not what Americans think is objectively reasonable.

There are several additional reasons to use a different measure of what use of force is objectively reasonable:

- The “objectively reasonable” standard considers neither the officer’s nor the victim’s race, which, within our structurally racist criminal system, too often makes use of force against Black people seem reasonable. 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. [They] are examples of how the system [of structural racism and racial subordination] are *supposed* to work.”²
- The “objectively reasonable” standard does not consider the offense the police believe the victim committed. Are there ever circumstances in which it is reasonable to cause injury or death for suspicion of using a counterfeit \$20 bill, selling single cigarettes, or in the case of *Graham v. Connor* itself, committing no crime at all?
- The “objectively reasonable” standard does not clearly consider all the actions of the officer(s) from the beginning of the encounter with the victim as opposed to considering only the situation at the exact moment of the use of force.

Third, WDC believes that higher penalties should be available to prosecutors, particularly when the use of force involves injury or loss of life. Therefore, WDC proposes amending subsection 2-109 (D) to allow prosecutors to charge stand-by officers with a crime that carries higher penalties than a misdemeanor. WDC suggests this amendment for two reasons. First, in the killings of George Floyd and Eric Garner, the attending officers had every opportunity to stop those foreseeable deaths. Limiting charges to misdemeanors in those situations does not serve justice. Second, WDC has stated its opposition to Maryland’s felony-murder rule in its testimony submitted on [HB385-Criminal Law-Felony Murder-Limitation and Review of Convictions for Juveniles](#). It seems entirely

² Paul Butler, *Chokehold: Policing Black Men*, 6 (2017)



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unjust that individuals—including juveniles—may be sentenced to life imprisonment (possibly without parole) for a killing that they did not intend, did not commit, and may have had no opportunity to prevent, while a trained officer who knew or should have known of a fellow officer's use of excessive force and had an opportunity to intervene to stop it, is guilty only of a misdemeanor even if the use of force results in death. The state cannot have it both ways. Since WDC opposes over-incarceration, we would support imposing misdemeanor liability under SB0050 for stand-by police officers *only* if this Committee abolishes felony-murder entirely.

We ask for your support for SB0050 and urge the Committee to issue a favorable report with the amendments noted in this testimony.

Respectfully,

Diana Conway
President