REVISITING GARNER WITH GARNER: A LOOK AT DEADLY FORCE AND THE USE OF CHOKEHOLDS & NECK RESTRAINTS BY LAW ENFORCEMENT

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I. INTRODUCTION

A police officer will never employ unnecessary force or violence and will use only such force in the discharge of duty as is reasonable in all circumstances. Force should be used only with the greatest restraint and only after discussion, negotiation and persuasion have been found to be inappropriate or ineffective. While the use of force is occasionally unavoidable, every police officer will refrain from applying the unnecessary infliction of pain or suffering and will never engage in cruel, degrading or inhuman treatment of any person.1

“I can’t breathe.”2 The final words of Eric Garner haunted many people across America, and the world, as they watched the video of Eric Garner being choked to death.3 What made the death of Eric Garner even more unsettling is that he died at the hands of law enforcement officers. It left a lingering question in many minds: Could I be next?4

On July 17, 2014, Eric Garner died from a chokehold in Staten Island, New York, after he was wrestled to the ground by police officers attempting to arrest him for selling loose cigarettes.5 The encounter between New York

police officers and forty-three-year-old Eric Garner was captured on video and seen all around the world. The video, which clearly depicted the chokehold used on Eric Garner, was an anomaly in what is usually a factually intense analysis of situations involving a police officer’s use of force. Without video, there may exist many differing versions of the incident. Use of force determinations are usually established by officer’s testimony, the account of the person injured or upon whom the force was used, or by witnesses to the incident. But, where a videotape of the use of force incident exists, the facts can be viewed in light of what is depicted on the videotape. The incident captured on video of Eric Garner showed officers and Mr. Garner verbally arguing about whether he was selling untaxed cigarettes. Mr. Garner told the five police officers surrounding him that he had done nothing, to leave him alone, and to not touch him. Though Eric Garner was verbally resistant, he was not physically combative. Nevertheless, Officer Daniel Pantaleo wrapped his arms around Mr. Garner’s neck from behind, using a chokehold. Eric Garner fell to the ground while the officer continued to choke Mr. Garner until his body went limp.

While Eric Garner was being held on the ground, he stated repeatedly: “I can’t breathe, I can’t breathe.” He lost consciousness, and subsequently died with his face on the pavement. The city’s medical examiner ruled Eric Garner’s death a “homicide,” resulting from the chokehold. The use

6. See id.
7. See Scott v. Harris, 550 U.S. 372, 381 (2007) (stating that when a videotape exists, the factual issues should be viewed “in the light depicted by the videotape”).
8. Id.
9. See id. at 383–84.
10. Id. at 381; see also Plumhoff v. Rickard, 134 S. Ct. 2012, 2021 (2014).
11. GUARDIAN, supra note 3.
12. Id.
13. Id.
14. Id.
15. Id.
16. Id.
17. Id.
18. The term “homicide” is “one of five categories medical examiners use to label cause of death and it indicates that ‘someone’s intentional actions led to the death of another person’ . . . .” Massimo Calabresi, Why a Medical Examiner Called Eric Garner’s Death a ‘Homicide’, TIME (Dec. 4, 2014), http://time.com/3618279/eric-garner-chokehold-crime-staten-island-daniel-pantaleo/ (quoting the president of the National Association of Medical Examiners).
19. Id. (noting that the cause of death was found to be a homicide from the neck compressions by the officer’s chokehold and the compression of the chest while being restrained by the police). Medical examiners ruled Garner’s death a homicide, but said that his poor health—obesity and asthma—were also contributing factors to his death. See Nia-Malika Henderson, Peter King Blames Asthma and Obesity for Eric Garner’s Death. That’s a Problem for the GOP, WASH.
of the chokehold against Eric Garner was deadly, and it was applied intentionally.

In 1985, the Supreme Court held in *Tennessee v. Garner* that deadly force may not be used unless the suspect poses a significant threat of death or serious physical injury to officers or others.\textsuperscript{20} Revisiting *Garner* with the death of Eric Garner in mind, this Comment argues that all types of neck restraints used by law enforcement should be categorized as deadly force.

The Eric Garner incident raises two questions: (1) Should “chokeholds and neck restraints”\textsuperscript{21} be used by law enforcement? and (2) Under what circumstances are chokeholds and neck restraints reasonable under the Fourth Amendment to the United States Constitution?\textsuperscript{22} These are questions of “vital concern to those interested in effective and humane policing.”\textsuperscript{23} This Comment argues that all types of neck restraints should be limited in use to circumstances where deadly force is necessary. Part II looks at Supreme Court jurisprudence on the use of force by law enforcement under the Fourth Amendment. Part III explains what the neck restraints used by law enforcement are, and why they are dangerous. Part IV discusses the responses by the judiciary, legislatures, and police departments to the use of chokeholds in law enforcement. Part V analyzes the limitations on the effectiveness of these responses to the use of chokeholds. Part VI, in light of the limits of current responses, proposes what actions should be taken to stop the use of chokeholds by police officers. Part VII concludes that all types of neck restraints used by law enforcement should be categorized as deadly force.


\textsuperscript{21} Throughout this Comment the terms referring to chokeholds and neck restraints will be used interchangeably, with the ultimate conclusion that all types of compression to the neck no matter what the name of the restraint—chokehold, carotid hold, lateral vascular neck restraint, vascular neck restraint, etc.—are a use of deadly force.

\textsuperscript{22} See U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”). The Supreme Court has a line of case precedent establishing the constitutional standard of reasonableness used to analyze “seizures”—uses of force by law enforcement to detain people. See *Garner*, 471 U.S. at 3; see also Plumhoff v. Rickard, 134 S. Ct. 2012, 2024 (2014); Scott v. Harris, 550 U.S. 372, 383–84 (2007); Graham v. Connor, 490 U.S. 386, 394 (1989).

\textsuperscript{23} James J. Fyfe, *Enforcement Workshop: The Los Angeles Chokehold Controversy*, 19 CRIM. L. BULL. 61, 65 (1983) (“[C]hokeholds should be classified as a means of deadly force . . . [and] as carefully regulated by police departments as is the use of firearms and other means of deadly force.”).
II. SUPREME COURT JURISPRUDENCE: USE OF FORCE UNDER THE FOURTH AMENDMENT

The Fourth Amendment regulates all types of force used by law enforcement. One guarantee of the Fourth Amendment is the right of the people to be secure in their persons against unreasonable seizures.\(^24\) Whenever a police officer restrains a person’s freedom to walk away, that person has been seized.\(^25\) Arrests, investigatory stops, or other “seizures” of persons are properly analyzed under the Fourth Amendment’s objective reasonableness standard.\(^26\) Any use of force by law enforcement, including the use of deadly force, is analyzed as a seizure and subject to reasonableness under the Fourth Amendment.\(^27\) If force is found to be unreasonable, it is excessive and unconstitutional.\(^28\)

A. Use of Force: Fourth Amendment Reasonableness Standard

Claims that law enforcement officers used excessive force are analyzed under the Fourth Amendment’s reasonableness standard.\(^29\) The reasonableness of the manner of force used to apprehend a person by law enforcement is analyzed by balancing the extent of the intrusion upon the person’s Fourth Amendment right with the government’s interest justifying the intrusion.\(^30\) The Court looks at the totality of the facts and circumstances surrounding each case to determine whether the use of force is reasonable.\(^31\)

Facts and circumstances that courts consider in analyzing the reasonableness of force include: severity of the crime, whether the suspect poses a threat to the safety of the officers or others, and whether the suspect is actively resisting or attempting to evade arrest.\(^32\) The reasonableness of the use of force is “judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”\(^33\) The Court acknowledges that officers must make split second decisions in circumstances that are “tense, uncertain, and rapidly evolving” about what amount of force is necessary in the situations which they face.\(^34\) The inquiry into reasonableness looks at whether the force used was objectively

\(^24\) U.S. CONST. amend. IV.
\(^25\) Garner, 471 U.S. at 7.
\(^26\) Graham, 490 U.S. at 388.
\(^27\) Garner, 471 U.S. at 7.
\(^28\) See id. at 6, 11.
\(^29\) Graham, 490 U.S. at 388.
\(^30\) Garner, 471 U.S. at 7–8.
\(^31\) Graham, 490 U.S. at 396.
\(^32\) Id.
\(^33\) Id.
\(^34\) Id. at 397.
reasonable in light of the circumstances, without regard to any underlying motivations of the officer.\textsuperscript{35} Whether an officer had evil or good intentions is not relevant as part of the reasonableness inquiry.\textsuperscript{36} The Fourth Amendment recognizes that in conjunction with a police officer’s right to seize a person in the form of an investigatory stop or an arrest, there is a right to use “some degree of coercion or threat thereof to effect it.”\textsuperscript{37} The use of a particular type of force in a specific situation is analyzed circumstantially to determine whether or not it was reasonable.\textsuperscript{38} When force is justified, an officer need not stop using the force deemed necessary until the threat is no longer present.\textsuperscript{39} The type and amount of force used must be appropriately reasonable under the circumstances.\textsuperscript{40}

B. Deadly Force Under Tennessee v. Garner

The use of deadly force to apprehend a person requires that there be an immediate threat of physical harm to the officer or another person.\textsuperscript{41} Deadly force is defined as “force which a reasonable person would consider likely to cause death or serious bodily harm.”\textsuperscript{42} In Tennessee v. Garner, the Supreme Court analyzed an officer’s use of a firearm to shoot an unarmed suspect.\textsuperscript{43} The Court found that the use of a firearm to shoot a suspect was a use of deadly force and unconstitutional when used against a suspect who posed no threat of serious injury or death to officers or others.\textsuperscript{44}

On October 3, 1974, Memphis police officers received a call reporting a burglary.\textsuperscript{45} Edward Garner was seen fleeing from the scene of the burglary toward the fence at the edge of the yard.\textsuperscript{46} Officers could see Edward Garner’s face and hands with their flashlights, saw no weapon, and were reasonably sure that he was unarmed.\textsuperscript{47} One officer yelled “police, halt,”

\begin{enumerate}
\item \textsuperscript{35} Id.
\item \textsuperscript{36} Id.
\item \textsuperscript{37} Id. at 396.
\item \textsuperscript{38} Tennessee v. Garner, 471 U.S. 1, 8 (1985).
\item \textsuperscript{39} Plumhoff v. Rickard, 134 S. Ct. 2012, 2022 (2014) (reasoning that if police officers were justified in shooting at a suspect to end a severe threat to public safety, then they were justified to keep shooting until the threat had ended).
\item \textsuperscript{40} See id. at 2020.
\item \textsuperscript{41} Garner, 471 U.S. at 11.
\item \textsuperscript{42} 10 C.F.R. § 1047.7 (2015). Both federal law and model laws define “deadly” similarly, using the reasonable person standard in the force decision when one is faced with serious bodily injury or death. Id.; MODEL PENAL CODE § 3.11 (1964).
\item \textsuperscript{43} See Garner, 471 U.S. at 3.
\item \textsuperscript{44} Id.
\item \textsuperscript{45} Id.
\item \textsuperscript{46} Id.
\item \textsuperscript{47} Id.
\end{enumerate}
and as he stepped forward, Edward Garner began to climb the fence.\textsuperscript{48} One officer reasoned that if Edward Garner made it over the fence he would not be captured, so the officer shot him, hitting the back of his head.\textsuperscript{49} Edward Garner had stolen ten dollars and a purse from the home.\textsuperscript{50} After being shot by the officer, he was taken to the hospital and pronounced dead.\textsuperscript{51} At the time, both Tennessee statute and police department policy permitted this use of deadly force.\textsuperscript{52}

When the Court decided \textit{Tennessee v. Garner}, there were similar statutes across the country which allowed officers to use “all necessary means to effect [an] arrest,” on suspects who were fleeing or forcibly resisting.\textsuperscript{53} States at the time followed the common law rule that allowed for the “use of whatever force was necessary to effect the arrest of a fleeing felon.”\textsuperscript{54} Officers at this time were allowed to use deadly force against apparently unarmed and fleeing felony suspects.\textsuperscript{55} In addition to the state statute in Tennessee at the time of this case, the Memphis Police Department policy also allowed the use of deadly force in cases of burglary.\textsuperscript{56} Memphis was in the minority of police departments, as the majority of police departments at that time prohibited the use of deadly force against nonviolent suspects.\textsuperscript{57}

The Court in \textit{Garner} examined the seizure of the suspect by use of a firearm, balancing the extent of the intrusion caused by the force with the need for it.\textsuperscript{58} The Court reasoned that the intrusion caused by deadly force on a suspect is unmatched because it takes away the “suspect’s fundamental interest in his own life.”\textsuperscript{59} Additionally, deadly force also deprives society of the judicial determination of guilt or innocence.\textsuperscript{60} The intrusion caused by deadly force was balanced against the government’s interest in effective law enforcement.\textsuperscript{61} The Court was “not convinced that the use of deadly

\begin{thebibliography}{9}
\bibitem{48} Id. at 4.
\bibitem{49} Id.
\bibitem{50} Id.
\bibitem{51} Id.
\bibitem{52} Id. (citing TENN. CODE ANN. § 40-4-108 (1982)).
\bibitem{53} Id. (emphasis added).
\bibitem{54} Id. at 12. The Court explained that the common law rule arose during a time when most felonies were punishable by death and thus the use of deadly force against a fleeing felon was not considered excessive. Id. at 13.
\bibitem{55} See id. at 12–13.
\bibitem{56} Id. at 5.
\bibitem{57} Id. at 11.
\bibitem{58} Id. at 7.
\bibitem{59} Id.
\bibitem{60} Id. at 9.
\bibitem{61} Id. (describing the government interest in “overall violence . . . be[ing] reduced by encouraging the peaceful submission of suspects who know that they may be shot if they flee”).
\end{thebibliography}
force [was] a sufficiently productive means of accomplishing [the goals of effective law enforcement] to justify the killing of nonviolent suspects.”

The Court stated that a police officer may not seize an unarmed, nondangerous suspect by shooting him dead and found the Tennessee statute to be unconstitutional “insofar as it authorize[d] the use of deadly force against such fleeing suspects.”63 The Court stated in Garner, that deadly force to prevent the escape of all felony suspects, no matter what the circumstances are, is unreasonable and thus unconstitutional.64 Deadly force may not be used unless “the officer has probable cause to believe that the suspect poses a significant threat of death or serious bodily injury to the officers or others.”65

The same reasoning that the Court used in Garner, with respect to the use of firearms against nonviolent unarmed suspects, should be used in analyzing the use of all types of neck restraints by law enforcement. Neck restraints, like firearms, are force that is reasonably likely to cause serious injury or death.

III. “I CAN’T BREATHE:” WHAT A CHOKEHOLD IS AND WHY IT IS DEADLY

The arm bar or “chokehold,” the carotid restraint or “sleeper hold,” and the lateral vascular neck restraint are names for different types of neck restraints used by law enforcement.66 All types of neck restraints have the potential to cause death, and have caused death in various incidents.67 No matter the name or technique used, each neck restraint involves either the restriction of air, or the restriction of blood flow to the brain with the goal of controlling a person by rendering that person unconscious.68

“It is undisputed that chokeholds pose a high and unpredictable risk of serious injury or death.”69 Depending on the position of the officer’s arm when the neck restraint is implemented, the reaction of the person being

62. Id. at 10.
63. Id. at 11.
64. Id.
65. Id. at 3.
67. See Nava v. City of Dublin, 121 F.3d 453, 458–59 (9th Cir. 1997), overruled on other grounds by Hodgers-Durgin v. de la Vina, 199 F.3d 1037 (9th Cir. 1999) (analyzing the death caused by the use of a carotid restraint or “sleeper hold”); see also Drummond ex rel. Drummond v. City of Anaheim, 343 F.3d 1052, 1056–60 (9th Cir. 2003) (analyzing the death caused by use of a chokehold); Complaint, supra note 65 at ¶ 2 (complaining of the death caused by use of a lateral vascular neck restraint).
choked, and the health condition of the person being choked, an officer may crush the larynx, trachea, or thyroid, which can result in death by asphyxiation or cardiac arrest.\textsuperscript{70} Despite the unpredictable risk of serious injury or death, law enforcement still uses neck restraints in situations that do not require the use of deadly force. Chokehold and neck restraint incidents have continued through the years, resulting in minor and severe injuries,\textsuperscript{71} and even deaths.\textsuperscript{72}

In light of the risk and reality of death, chokeholds and neck restraints of any type should be classified as deadly force. “Deadly force is force capable of killing or likely to kill, but it does not always kill.”\textsuperscript{73} Chokeholds and other neck restraints are unpredictable and pose a high risk of serious injury and death associated with their use, thus they are rightly classified as deadly force.

A. Medical Risk of Serious Bodily Injury or Death

Although there are many types of neck restraints, they are generally separated into two categories: respiratory neck restraints and vascular neck restraints.\textsuperscript{74} The respiratory neck restraint, which puts pressure on the

\textsuperscript{70} Id. at 117.

\textsuperscript{71} Werner v. City of Poulsbo, 548 F. App’x 381, 382 (9th Cir. 2013) (analyzing an officer’s use of a chokehold upon Leif Werner, causing him difficulty of breathing); Barnard v. Theobald, 721 F.3d 1069, 1073 (9th Cir. 2013) (analyzing an officer’s use of a chokehold during the arrest of Charles Barnard resulting in multiple spinal surgeries due to collapsed vertebrae in his spine); Williams v. Miami-Dade Cnty. (Williams II), 516 F. App’x 899, 900 (11th Cir. 2013) (per curiam) (analyzing an officer’s use of a chokehold in detaining Tiandre Williams which caused him to have a seizure and pass out); Crutcher v. Athens Police Dep’t, No. CV-10-S-1176-NE, 2014 WL 5521944, at *3–4 (N.D. Ala. Oct. 31, 2014) (analyzing an officer’s use of a chokehold to detain Courtney Crutcher, who refused to sign a traffic citation and suffered a muscle sprain in the neck).

\textsuperscript{72} See Griffith v. Coburn, 473 F.3d 650, 653 (6th Cir. 2007) (analyzing the death of Arthur Partee, who died while arrested by two officers who used a chokehold to wrestle Partee to the ground); Thompson v. City of Chicago, 472 F.3d 444, 448 (7th Cir. 2006) (analyzing the death of James Thompson following a struggle with police officers after being detained using a chokehold); Drummond, 343 F.3d at 1054 (analyzing the death of Brian Drummond, who died when one officer put his knee on Drummond’s neck while he repeatedly told officers that he could not breathe); United States v. Livoti, 196 F.3d 322, 324–35 (2d Cir. 1999) (analyzing the death of Anthony Baez after being put in a chokehold by Officer Livoti); Nava, 121 F.3d at 454 (analyzing the death of Randolph Bennett, a man subdued by an officer using a carotid hold); Lewis v. City of Chicago, No. 04 C 3904, 2005 WL 947195, at *2 (N.D. Ill. Apr. 11, 2005) (analyzing the death of Christopher Hicks during his arrest where he was detained using a chokehold); McQuarter v. City of Atlanta, Ga., 572 F. Supp. 1401, 1407 (N.D. Ga. 1983) (analyzing the death of Bennie McQuarter after he was detained with the use of a chokehold by an officer putting pressure to the front of his throat with a flashlight and later adjusting the hold to the sides of McQuarter’s neck).

\textsuperscript{73} Fyfe, supra note 23, at 61.

trachea and larynx, is commonly known as a chokehold, and causes unconsciousness by depriving the lungs of oxygen.\textsuperscript{75} It can cause asphyxia and fractures to the internal structure of the neck.\textsuperscript{76} Proponents of the use of neck restraints acknowledge the hazards of respiratory neck restraints.\textsuperscript{77} Thus, most law enforcement agencies in the United States prohibit the use of what are considered technical chokeholds.\textsuperscript{78}

Vascular neck restraints cause unconsciousness not by restricting the flow of oxygen, but by restricting blood flow to the brain.\textsuperscript{79} The vascular neck restraint puts pressure on the carotid arteries on the sides of the neck.\textsuperscript{80} Unconsciousness can occur in less than 15 seconds.\textsuperscript{81} However, unlike chokeholds, vascular neck restraints typically result in a relatively quick recovery to consciousness.\textsuperscript{82} Thus, advocates of neck restraints emphasize the safety of properly applied vascular neck restraints.\textsuperscript{83} Law enforcement officers typically employ vascular neck restraints to quickly gain control of the person being detained through pain compliance or during the period of the suspect’s temporary unconsciousness.\textsuperscript{84}

The inherent risk of using any type of neck restraint in the law enforcement context is that a vascular restraint can turn into a respiratory chokehold while the suspect is struggling, leading to fatal consequences.\textsuperscript{85} A natural response to being unable to breathe, or to losing consciousness, is trying to free oneself from the neck restraint. Moreover, an officer cannot distinguish an involuntary reaction to compression of the neck from voluntary resistance to the detention.\textsuperscript{86} In either case, this struggle could increase the force used on the neck by the officer trying to detain the struggling person, which then would increase the chances of death.\textsuperscript{87} Medical research confirms that when officers employ neck restraints to subdue suspects, death can ensue without the officer intending to cause

\begin{thebibliography}{99}
\bibitem{75} Id. at 3.
\bibitem{76} City of Los Angeles v. Lyons (Lyons II), 461 U.S. 95, 117 n.7 (1983).
\bibitem{78} NAT’L. L. ENFORCEMENT TRAINING CTR., \textit{supra} note 74, at 3.
\bibitem{79} Id.
\bibitem{80} Id.
\bibitem{82} AELE Civil Liability Pt. 1, \textit{supra} note 81, at 101–02.
\bibitem{83} Id. at 101 (emphasis added).
\bibitem{84} Reay, \textit{supra} note 68, at 9–10.
\bibitem{85} Id. at 10.
\bibitem{86} City of Los Angeles v. Lyons (Lyons II), 461 U.S. 95, 117 n.7 (1983).
\bibitem{87} Id.
\end{thebibliography}
death.\textsuperscript{88} Indeed, there are documented cases where law enforcement officers used vascular neck restraints, which inadvertently turned into a respiratory chokehold and caused death.\textsuperscript{89} Thus, \textit{proper application} of vascular neck restraints is not realistic in the context of law enforcement.

Additionally, the condition of the person being restrained may increase the possibility of death from neck restraints that might otherwise have proved “non-lethal.”\textsuperscript{90} Conditions that increase the risk of sudden death include intoxication from alcohol and drugs, physical exhaustion, and obesity.\textsuperscript{91} Pre-existing diseases, such as cardiovascular or respiratory disease, also increase the likelihood of death even when neck restraints are \textit{properly applied}.\textsuperscript{92} Accordingly, neck restraints cannot be recommended medically because, although they may be safely used on some people, they are not safe on all people.\textsuperscript{93}

In a study of civil liability arising from the use of neck restraints, the AELE Law Enforcement Legal Center recommends that officers should be trained to restrict the use of neck restraint techniques to circumstances where officers or third parties are at risk of physical injury.\textsuperscript{94} Dr. Reay and Dr. Eisele, writing in the American Journal of Forensic Medical Pathology, state that neck restraints should be viewed in the same light as firearms because both have the potential for fatal outcomes each time they are used.\textsuperscript{95}

Pressure upon the neck is potentially lethal and should only be used when there is no other alternative.\textsuperscript{96} All types of neck restraints are deadly due to the inherent risk of “death or permanent disability” associated with respiratory chokeholds and the risk that, when vascular neck restraints are not \textit{properly applied} or are misused, they can turn into respiratory chokeholds and restrict the airway.\textsuperscript{97} Therefore, all types of neck restraints should be considered deadly force and used only in circumstances that require the use of deadly force.


\textsuperscript{89} Reay & Eisele, \textit{supra} note 77, at 255.

\textsuperscript{90} Reay, \textit{supra} note 68, at 19.

\textsuperscript{91} Id.

\textsuperscript{92} Reay & Eisele, \textit{supra} note 77, at 256.

\textsuperscript{93} NAT’L L. ENFORCEMENT TRAINING CTR., \textit{supra} note 74, at 12.


\textsuperscript{95} Reay & Eisele, \textit{supra} note 77, at 256.

\textsuperscript{96} Id.

\textsuperscript{97} \textit{AELE Civil Liability Pt. 1}, \textit{supra} note 81, at 102.
B. Strangulation, No Matter the Context, Is Capable of Causing Death

Although disagreement exists about the risks associated with the use of different types of neck restraints in policing, there is national consensus about the dangers inherent in criminal choking assaults within the context of domestic violence. The link between the restriction of breath and deaths in domestic violence situations has resulted in states across the nation revising their criminal statutes that deal with acts which impede breathing, such as asphyxiation, choking, smothering, and suffocation. In jurisdictions across the nation, a defendant can now be charged with felony strangulation, or misdemeanor obstruction of breathing, rather than a simple assault upon proof of intent to obstruct breathing or blood circulation. These offenses were created to address situations in domestic violence contexts where it was difficult to prove that an assault had occurred due to the lack of visible injury sustained by victims whose breathing had been impaired by choking or other means of restricting air.

As of November 2014, forty-four states, the District of Columbia, the Federal government, and two territories have some form of strangulation or impeding breathing statute. The most recent was House Bill 911, which was signed into law in Georgia, adding language that penalizes strangulation as a felony to the existing aggravated assault statute. It describes strangulation as “impeding the normal breathing or circulation of blood of another person by applying pressure to the throat or neck of such person.” House Bill 911 is similar to legislation in thirty-eight other states. The Senate Bill report from Washington State’s similar legislative changes stated that assaults by strangulation are “among the most serious crimes in the criminal justice system.”

The impetus behind legislative changes in the area of criminal assaults highlights the inherent risks associated with neck restraints and the severity of the hazards associated with the use of them. The underlying risks
associated with neck restraints do not change simply because a police officer is the person applying the neck restraint to another person. When a neck restraint is applied in any context it is done so with the intent to restrict air or blood flow by placing pressure on the neck and as a result death can occur from restricting a person’s normal breathing or blood flow.\(^\text{106}\) The same risk concerns reflected in assault legislation exist in the area of policing.\(^\text{107}\) The danger of strangulation does not go away simply because the neck restraint is being used in the context of law enforcement. Regardless of whether the intent to use a neck restraint is to harm a victim or the intent is to restrain a suspect for an arrest, the underlying risk of death from restricting oxygen and blood flow remain the same whether neck restraints are used within the civilian or the law enforcement population.

IV. RESPONSES TO POLICE USE OF CHOKEHOLDS

Within the context of law enforcement, there have been judicial, legislative, and police department policy responses to the injury and death caused by the use of neck restraints. The judicial response involves the application of reasonableness to the use of neck restraints and the determination of the type of relief that is available to people who have been choked by police officers. For some states, the legislative response has been, and currently is, to create bans or limits upon the use of neck restraints by law enforcement.\(^\text{108}\) Police departments that address the use of neck restraints across the country have varying approaches to neck restraints in their use of force policies.

A. Judicial Response: Reasonableness and Chokeholds

A chokehold or neck restraint used by law enforcement to apprehend a person is a seizure under the Fourth Amendment and is therefore subject to the requirement of reasonableness.\(^\text{109}\) Courts across the country have looked at the use of neck restraints by law enforcement and found the use to be reasonable in some circumstances and unreasonable in others.\(^\text{110}\) When neck restraints are found to be unreasonable the courts are limited in the remedies that are available to people who have suffered injury or death.

\(^\text{106}\) Reay & Eisele, *supra* note 77, at 255.
\(^\text{107}\) Wash. S. 5953-60, at 2.
\(^\text{108}\) See D.C. CODE § 5-125.01; see also NEV. REV. STAT. ANN. § 289.810.1(a)–(b) (LexisNexis 2008); see also TENN. CODE ANN. § 38-3-121 (2010).
\(^\text{109}\) See Graham v. Connor, 490 U.S. 386, 395 (1989); see *supra* Part II.A. for a discussion on the Supreme Court’s standard of reasonableness.
\(^\text{110}\) See *infra* Part IV.
limitation on judicial relief for unconstitutional uses of force by law enforcement is due to the Supreme Court’s decision in *City of Los Angeles v. Lyons.*

1. *Supreme Court Limitation on Injunctive Relief in City of Los Angeles v. Lyons*

   In *Los Angeles v. Lyons,* Adolph Lyons sought damages for the harm caused to his larynx from a chokehold used by police to detain him on a traffic stop, an injunction against the city to ban the use of neck restraints, and declaratory relief against the city to make the use of chokeholds, absent the threat of deadly force, a *per se* violation of constitutional rights.

   Adolph Lyons was placed in a chokehold by Los Angeles police during a traffic stop on October 6, 1976, which rendered him unconscious and caused damage to his larynx. Mr. Lyons was pulled over due to a burned out tail light, told to exit his vehicle, slammed on the hood of the police car and when Mr. Lyons complained of pain, the officer put his forearm around his throat and began to choke him. The chokehold was applied to Mr. Lyons until he blacked out. When Mr. Lyons regained consciousness he was on the ground, gasping for air, spitting up blood and dirt, and had urinated and defecated on himself. After Mr. Lyons regained consciousness, police issued him a traffic citation and he was released.

   A preliminary injunction was ordered by the United States District Court for the Central District of California, “enjoining the use of both the carotid artery and bar arm holds under circumstances which do not threaten death or serious bodily injury.” The Ninth Circuit affirmed the district court’s preliminary injunction forbidding police officers from using all types of chokeholds under circumstances that did not threaten serious bodily injury or death to the officer. The Ninth Circuit held that there was a “sufficient likelihood that Adolph Lyons would again be stopped and subjected to the unlawful use of force to constitute a case and controversy

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112. *Id.* at 97–98.
113. *Id.*
114. *Id.* at 114–15.
115. *Id.* at 115.
116. *Id.*
117. *Id.*
118. *Id.* at 100. The injunction also ordered improved training that would characterize chokehold use as deadly force and improved record-keeping of force incidents. *Id.*
and to warrant the issuance of an injunction.” But, in a split five-to-four decision, the Supreme Court of the United States reversed the Court of Appeals, holding that Mr. Lyons lacked standing to seek injunctive relief against the city’s use of chokeholds.

a. Lyons Majority

Around the time that the Supreme Court granted certiorari in Lyons, deaths resulting from the use of chokeholds in Los Angeles were continuing to occur on a consistent basis.122 On May 6, 1982, the Chief of Police in Los Angeles prohibited the use of chokeholds under any circumstances, and on May 12, 1982, a six-month moratorium was placed upon the use of carotid-artery holds except where deadly force was authorized.123 The Court’s majority opinion in Lyons, written by Justice White, and joined by Justices Burger, Powell, Rehnquist, and O’Connor, held that “the federal courts are without jurisdiction to entertain Lyons’ claim for injunctive relief.”124 The Court found that “a federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional.”125

The Court reasoned that Lyons had not met the threshold requirement of standing to assert a claim because he failed to allege an actual case or controversy with the city that would justify equitable relief.126 The Court found that for Lyons to have “standing to seek the injunction requested depended on whether he was likely to suffer future injury from the use of chokeholds by police officers.”127 The majority acknowledged that “Lyons may have been illegally choked by the police,” which would give him a cause for damages against the officers, and possibly the city, but not the ability to seek an injunction on the future practices of Los Angeles police officers.128 To establish an actual controversy Lyons would have had to show: (1) all police officers in Los Angeles always choke citizens for the purpose of arrest during questioning or issuance of a citation, or (2) that the

120. Lyons II, 461 U.S. at 99.
121. Id. at 113 (instructing that while injunctive relief was not proper in this case, a civil action for deprivation of rights under Title 42 Section 1983 of the United States Code could succeed).
122. Id. at 100.
123. Id.
124. Id. at 101.
125. Id. at 111.
126. Id. at 105.
127. Id.
128. Id.
city ordered or authorized police to act in such a manner. Although Lyons had alleged that the city authorized the use of chokeholds in situations where deadly force was not merited, he failed to show how he continued to be threatened by the use of chokeholds. The Court found that Lyons could not show that he was “realistically threatened by a repetition of his experience,” that he would again be subjected to the use of chokeholds, and thus his assertion was speculative and conjectural, not sufficient to make out a federal claim for equitable relief. The Court noted in its conclusion that state courts did not need to impose the same standing and remedial requirements that govern federal courts, that individual states could permit the use of injunctive relief to oversee the conduct of state law enforcement agencies. But, that “this is not the role of a federal court, absent far more justification than Lyons has proffered in this case.”

b. Lyons Dissent

In the Court’s dissent, Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, criticized the majority for taking away the federal court’s power to enjoin enforcement of the city of Los Angeles’s policy regardless of how “flagrantly unconstitutional it may be.” Justice Marshall stated,

We now learn that wrath and outrage cannot be translated into an order to cease the unconstitutional practice, but only an award of damages to those who are victimized by the practice and live to sue and to the survivors of those who are not so fortunate . . . the federal judicial power is now limited to levying a toll for such a systematic constitutional violation.

The dissent expressed that no one would be able to show they would be choked in the future, and therefore not even someone like Lyons who has nearly been choked to death would have standing to challenge the

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129. Id. at 105–06. The Court found it “untenable to assert . . . that strangleholds are applied by the Los Angeles police to every citizen who is stopped or arrested regardless of the conduct of the person stopped.” Id. at 108.
130. Id. at 106 n.7, 107.
131. Id. at 108–09 (“Lyons’ lack of standing does not rest on the termination of the police practice but on the speculative nature of his claim that he will again experience injury as a result of the practice even if continued.”).
132. Id. at 113.
133. Id.
134. Id. at 114 (Marshall, J., dissenting) (stating that there was a case and controversy regarding the constitutionality of the city’s chokehold policy which was directly implicated by Mr. Lyons’ damages claim).
135. Id. at 137.
continuation of a use of force chokehold policy. The dissent declared that “[t]he city is free to continue the policy indefinitely as long as it is willing to pay damages for the injuries and deaths that result” and that the majority’s approach to standing was unprecedented and unwarranted. The dissent further found that Lyons had established a case or controversy concerning the constitutionality of the city’s policy because the constitutionality of the policy was implicated by his claim for damages, alleging that officers who used the chokehold on Lyons were carrying out an official policy. Lyons was choked “without provocation pursuant to an unconstitutional city policy,” thus Lyons had established injury from the policy itself and the risk of serious injury to other citizens, supporting the district court’s grant of injunctive relief. The dissent reasoned that standing depends on the plaintiff’s personal stake in the outcome of the controversy, not on the precise nature of the relief sought. By not allowing Lyons standing to challenge the chokehold policy, the dissent stated that “[t]he Court’s decision removes an entire class of constitutional violations from the equitable powers of a federal court.” By not allowing relief the Court effectively “immunizes from prospective equitable relief any policy that authorizes persistent deprivations of constitutional rights as long as no individual can establish with substantial certainty that he will be injured, or injured again, in the future.”

An officer placed his forearm around Adolph Lyon’s neck and against his throat, nearly choking him to death, pursuant to police policy that at that time authorized the use of chokeholds. During the time of the Lyons case, the Court recorded that there had been no less than sixteen persons that had died due to the use of chokeholds by the Los Angeles Police Department. It was also reported that Los Angeles Police Department officers used chokeholds more frequently than any other means of physically restraining people at the time.

136. Id. at 113.
137. Id.
138. Id. at 113–14.
139. Id. at 135–36.
140. Id. at 114 (stating that Lyons had standing to challenge the city’s chokehold policy and to obtain whatever relief a court may deem appropriate, because he has a “personal stake in the outcome” of the controversy (quoting Baker v. Carr, 369 U.S. 186, 204 (1962))).
141. Id. at 137.
142. Id.
143. See id. at 113, 115.
144. Id. at 115–16.
145. Id. at 116 (noting that officers applied chokeholds on at least 975 occasions, which made up three-quarters of the reported uses of force at the time).
c. Injunctive Relief Denied: Deaths from Chokeholds After Lyons

The Supreme Court had the opportunity to address the reasonableness of chokeholds when it granted certiorari in Lyons.\textsuperscript{146} The Court could have addressed this use of force on the merits and found that the use of chokeholds “where neither death nor serious bodily injury is threatened . . . [is] unconscionable in a civilized society,”\textsuperscript{147} that police officers “may not apply life threatening strangleholds to persons stopped in routine police work unless the application is necessary to prevent serious bodily harm to an officer.”\textsuperscript{148} But instead, the Court reversed the decision of the lower courts on the issue of standing in Lyons and did not address the constitutionality of neck restraints.\textsuperscript{149}

Since Lyons, courts have been constrained in their ability to address and remedy unconstitutional uses of chokeholds and other unconstitutional police practices. Shortly after police in Los Angeles choked Adolph Lyons, Bennie McQurter was choked and killed by officers in Atlanta, Georgia.\textsuperscript{150} Officers brought a combative Bennie McQurter under control initially by using a chokehold until he could be handcuffed.\textsuperscript{151} One officer continued to use the chokehold even after Mr. McQurter was handcuffed.\textsuperscript{152} In the court’s analysis, it stated that neither officer could have reasonably believed that the “use of deadly force was necessary to prevent death or serious bodily injury to themselves or a third party” once Mr. McQurter was effectively restrained.\textsuperscript{153} The court in McQurter noted that the officers had been trained in the chokehold, “a defensive tactic capable of causing death or serious bodily injury.”\textsuperscript{154} In addition to damages, the plaintiff in McQurter sought an injunction against the Atlanta Bureau of Police Services, but pursuant to the Court’s decision in Lyons, the injunction prohibiting the use of chokeholds was denied.\textsuperscript{155} Once again a federal district court in the 1980’s qualified the use of a chokehold as deadly force,

\textsuperscript{146} Id. at 99–100.
\textsuperscript{147} See id. at 99.
\textsuperscript{148} Lyons v. City of Los Angeles (Lyons I), 656 F.2d 417, 418 (9th Cir. 1981) (per curiam), rev’d, 461 U.S. 95 (1983) (“This relatively innocuous interference by the judiciary with police practice can hardly be characterized as an abuse of discretion when the record reveals that nine suspects . . . who have been subdued by the use of carotid and bar arm control holds have subsequently died . . . .”).
\textsuperscript{149} Lyons II, 461 U.S. at 100.
\textsuperscript{151} Id. at 1414.
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} Id. at 1418.
\textsuperscript{155} Id. at 1423.
as the district court had done in Lyons, but the court was powerless to enjoin and stop the use.\textsuperscript{156}

In 1992, Randolph Bennett died after he was detained by a California Highway Patrol (CHP) officer using a carotid neck restraint.\textsuperscript{157} Randolph Bennett’s son, Scott Nava, filed an action in the federal district court seeking damages and an injunction.\textsuperscript{158} The Ninth Circuit in Nava stated:

If we were unencumbered by controlling Supreme Court precedent, we might be inclined, as was the district court, to allow Nava access to federal courts on the basis of his damages claims and to uphold the entry of injunction in this case on the basis of the jury’s finding that Nava’s father was choked to death pursuant to CHP policy. We must, however, follow the law as it is construed by the Supreme Court.\textsuperscript{159}

In Nava, the court found that there was a constitutional violation, and that there was substantial evidence that the carotid neck restraint authorized by CHP policy was deadly force.\textsuperscript{160}

The Lyons decision has done harm to the courts’ ability to stop or deter the use of neck restraints by law enforcement.\textsuperscript{161} The continued occurrences of deaths from use of neck restraints year after year beg the question: if Lyons had been decided differently could more deaths from neck restraints have been prevented? One can only wonder. Under Lyons, the federal courts remain powerless to enjoin state law enforcement policies and practices regardless of how unconstitutional they may be.\textsuperscript{162} Since Lyons was decided in 1983, the lower courts have continued to deal with injuries and deaths caused by law enforcement use of neck restraints and police officers still continue to use them as a restraint technique.

2. \textit{Post-Lyons: Decisions Holding Chokeholds to be Reasonable}

Uses of chokeholds have been found to be reasonable by various courts under circumstances where the person being placed under arrest is actively resisting arrest by a police officer.\textsuperscript{163} Courts have looked at the
resistance of the suspect, both physical and verbal, the suspect’s history of violent encounters with the police, and whether the chokehold caused injury as factors in determining the reasonableness of the force.

Courts have held that chokeholds were reasonable when there was resistance to arrest by the suspect and the injury to the suspect was minor. In Crutcher v. Athens, the Northern District of Alabama, relying on precedent from the Eleventh Circuit Court, found that the use of a chokehold under the circumstances of active resistance from a suspect that results in minor, non-permanent injuries was reasonable. In this case, an officer used a chokehold to put a suspect under arrest for driving with a revoked license and speeding. The suspect was actively resisting arrest, cursing at the officer, and threatening the officer with future harm when the officer used a chokehold on the suspect, causing the suspect to pass out and sustain a muscle sprain to his neck. The court held that the use of the chokehold under these circumstances was reasonable and necessary, and the suspect only suffered minor injury. The court clarified that the chokehold was reasonable even if it was not considered a de minimis use of force; under these circumstances it still would have been reasonable force due to the active resistance of the suspect.

Courts have also found that the use of chokeholds were reasonable in circumstances of active resistance, even when the chokehold caused the death of the suspect. In 2000, James Thompson died following a struggle with police after leading them on a high-speed car chase, actively resisting arrest, being restrained with a chokehold, and dying “at least in part from

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524 F. App’x 164, 167–68 (6th Cir. 2013) (finding the officer’s conduct to be reasonable due to the active, violent resistance of the suspect); Eggleton v. Jackson, No. 09-CV-81292-Dimitrouleas, 2011 WL 379186, at *12 (S.D. Fla. Jan. 13, 2011) (finding that using a chokehold to remove a suspect who was known to have an extensive criminal history and to be an escape risk constitutes a de minimis use of force and was insufficient to prevail on a Fourth Amendment claim of excessive force); Wasserman v. Bartholomew, 38 P.3d 1162, 1170 (Alaska 2002) (holding that officers’ belief that the suspect might be armed and dangerous coupled with the suspects resistance to officers’ attempts to control him rendered the officers’ actions objectively reasonable).

164. Post v. City of Fort Lauderdale, 7 F.3d 1552, 1556, 1559 (11th Cir. 1993), modified per curiam, 14 F.3d 583 (11th Cir. 1994) (holding that officers were reasonable when they used a five second chokehold to detain a suspect who was known for violently resisting arrest in the past, was repeatedly defying the instructions of the officers, and threw his hands in the air, which officers interpreted as a further act of defiance).


166. Id. at *2 (finding that the suspect refused to sign the citations and began verbally threatening the police officer).

167. Id. at *5.

168. Id.

169. Id.
[the] chokehold. Officers were attempting to stop Thompson in a high drug trafficking area for behavior consistent with drug trafficking when he sped away from officers and a car chase ensued. Thompson crashed his car during the chase, exited his vehicle and began trying to fist fight two officers while they attempted to restrain him. As the two officers wrestled with Thompson and tried to handcuff him, a third officer arrived and placed his arm around Thompson’s neck until the other officers were able to handcuff him. Thompson continued to struggle with officers even after he was handcuffed. It was then that Thompson complained of having trouble breathing. Officers rolled him on his side to get air but he continued to complain that he was having trouble breathing and officers called for an ambulance. Thompson had blood blocking his airway and was pronounced dead upon his arrival to the hospital.

In cases where chokehold use was found to be reasonable, the subject of the chokehold was actively resisting arrest when the chokehold was used and usually the suspects had a background of violent resistance to arrest. But, in the case of Tiandre Williams, out of the Southern District of Florida, the appellate court found that because there was no active resistance by Williams the use of the chokehold could be found unreasonable by a jury. The district court had found that an officer’s use of the “lateral vascular neck restraint” was reasonable when officers were approached by sixteen-year-old Tiandre Williams, whom officers knew to have a “temper problem,” when they were attempting to arrest Williams’ brother after a street fight. The district court held that officer’s application of the neck

170. Thompson v. City of Chicago, 472 F.3d 444, 446 (7th Cir. 2006).
171. Id. at 447.
172. Id. at 448.
173. Id.
174. Id.
175. Id.
176. Id.
177. Id.
178. Id. at 455, 458.
179. See, e.g., Post v. City of Fort Lauderdale, 7 F.3d 1552, 1559 (11th Cir. 1993), modified per curiam, 14 F.3d 583 (11th Cir. 1994); Watts v. Williams, No. Civ.A. 01-0284(RJL), 2006 WL 3734169, at *2 (D.D.C. Dec. 15, 2006).
181. Williams v. Miami-Dade Cnty. (Williams I), 859 F. Supp. 2d 1297, 1300 (S.D. Fla. 2012), aff’d in part, rev’d in part per curiam, 516 F. App’x 899 (11th Cir. 2013) (reasoning that officers
restraint on Williams was reasonable “in light of the tense and potentially dangerous situation surrounding [the officers]” and granted summary judgment in favor of the officers.\(^{182}\) However, on appeal the Eleventh Circuit Court concluded that if William’s version of the events of that night were true, then a reasonable juror could conclude that the officer’s use of the neck restraint on Williams was unreasonable.\(^{183}\) Williams’ account of the events was that officers “subjected him to a chokehold, which he contends caused him to have a seizure and pass out.”\(^{185}\) Officers had “previous contact with [Williams] and believed [him] to have a temper problem,” not a history of violent arrest.\(^{186}\) Also, Williams was not physically resisting arrest.\(^{187}\) He was “unarmed, holding his palms open and upward in a posture of supplication” when officers grabbed him and put him in a neck restraint.\(^{188}\) The Eleventh Circuit Court remanded the case back to the district court to determine whether the officer’s use of the neck restraint was reasonable or not.\(^{189}\) Under the precedent for finding chokeholds reasonable it appears from the facts of Williams that the use of a neck restraint was unreasonable because the encounter with Williams lacked the factors of the suspect’s active resistance and the suspect’s violent history of encounters with the police which are typically relied upon by the courts to find reasonableness.

3. Post-Lyons: Decisions Holding Chokeholds to be Unreasonable

Courts have found chokeholds to be an unreasonable use of force when the crime that is the subject of the arrest is not serious, the suspect poses no threat to officers or others, and the suspect is not actively resisting arrest.

The Eleventh Circuit in Thornton v. Macon, found that the use of a chokehold was unreasonable when used upon suspects who: (1) did not commit a serious crime; (2) did not pose an imminent threat to anyone; and (3) were not actively resisting arrest.\(^{190}\) Officers arrived to a civil dispute acted reasonably in using a neck restraint on Williams because officers were being surrounded by a crowd of about 100 people, and Williams, who officers had previous encounters with, approached them asking why they were arresting his brother).

182. Id. at 1303.
183. Id. at 1304.
184. Williams II, 516 F. App’x at 900.
185. Id.
186. Williams I, 859 F. Supp. 2d at 1300.
187. Id.
188. Id.
189. Williams II, 516 F. App’x at 899.
190. Thornton v. City of Macon, 132 F.3d 1395, 1400 (11th Cir. 1998) (per curiam). This case is distinguished from the Eleventh Circuit decision in Post v. City of Ft. Lauderdale where the suspect verbally and physically resisted the directives of officers and had a history of violently
between Thornton and Mullis who had previously lived together. Mullis wanted officers to go to Thornton’s home, return his keys and to get Mullis’s mattress from Thornton’s home. When officers persuaded Thornton to open his screen door so he could take his keys, officers charged into his home and one grabbed him around the neck. The court reasoned that the officers had no probable cause to arrest Thornton, and that there was no indication that Thornton had threatened Mullis or the officers with physical violence. The court held the officers were not justified in using any force upon Thornton, and thus, the use of the chokehold was unreasonable.

The Fifth Circuit, in Williams v. Bramer, held that the chokehold used by the officer was in a manner that was excessive and objectively unreasonable. Officers began using a chokehold against Williams when they were searching his mouth for contraband, after patting him down and searching his car. Williams alleged that he was choked on two occasions by officers and while being choked he could not breathe, was unable to swallow, and became dizzy. The court stated that the objective reasonableness of a chokehold depends on the suspect’s level of resistance and in this case, because the resistance was minimal, the chokehold was unreasonable. Texas courts “have found that the use of force against a suspect who is already physically restrained, or who is not actively resisting an officer’s commands, is objectively unreasonable.”

Similarly in the Sixth Circuit, in Griffith v. Coburn, the court held that people who pose no safety risk to officers should be free from unwarranted violence during arrest. In Griffith, Arthur Partee died during his arrest when officers used a neck restraint to detain him. Partee was sitting on his couch when officer’s informed him that he had a traffic warrant.

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resisting arrest. Post v. City of Fort Lauderdale, 7 F.3d 1552, 1559 (11th Cir. 1993), modified per curiam, 14 F.3d 583 (11th Cir. 1994).
191. Thornton, 132 F. 3d at 1398.
192. Id.
193. Id.
194. Id. at 1400.
195. Id.
197. Id. at 701.
198. Id. at 702.
199. Id. at 704.
201. Griffith v. Coburn, 473 F.3d 650, 659 (6th Cir. 2007).
202. Id. at 652.
203. Id.
Partee ignored the officers but did not resist them. The officers grabbed and struggled with Partee, pulled him to the ground, and placed him in a neck restraint. When the medics were called and arrived at Partee’s home he was not breathing, had no pulse, and was pronounced dead at the hospital. The court reasoned in Griffith that if a jury concluded the officer “used the neck restraint without an objectively reasonable belief that Partee posed a threat of serious bodily injury” that it was “obvious” that “no reasonable officer could believe that such [use of force] would not violate another’s constitutional rights.”

Additionally, the Ninth Circuit Court of Appeals has written a series of scathing opinions on the use of neck restraints by law enforcement. The court’s condemnation of neck restraints, post-Lyons, began in Nava v. City of Dublin, where the court stated that “the application of the carotid hold constitutes deadly force.” The Ninth Circuit spoke again in Drummond v. City of Anaheim, where the court held that under the circumstances of Brian Drummond’s arrest, the use of a neck restraint was severe force and was constitutionally excessive. On March 26, 1999, Brian Drummond, a man with a history of mental illness, was detained by officers for his own safety, and after the officers used a neck restraint to detain him, fell into a coma and suffered brain damage that left him in a vegetative state. Officers had pressed weight upon Drummond’s neck while ignoring him repeatedly telling them that he could not breathe.

The court’s analysis in Drummond, looked at whether the officer’s conduct violated the Constitution by assessing: (1) the severe nature of the force applied, (2) the minimal need for force, and (3) by balancing the severe nature force against the minimal need for force. The Ninth Circuit classified the neck restraint as deadly force stating that, “although the officers in this case did not shoot or beat Drummond, the force allegedly employed was severe and, under the circumstances, capable of causing death or serious injury.” The court determined that the need for the force

204. Id.
205. Id. at 653.
206. Id. at 652.
207. Id. at 660 (alterations in original) (emphasis added) (internal quotation marks omitted).
208. See Barnard v. Theobald, 721 F.3d 1069 (9th Cir. 2013); Drummond ex rel. Drummond v. City of Anaheim, 343 F.3d 1052 (9th Cir. 2003); Nava v. City of Dublin, 121 F.3d 453 (9th Cir. 1997), overruled on other grounds by Hodgers-Durgin v. de la Vina, 199 F.3d 1037 (9th Cir. 1999).
209. Nava, 121 F.3d at 458; see supra notes 145–62 and accompanying text.
210. Drummond, 343 F.3d at 1060.
211. Id. at 1054–55.
212. Id.
213. Id. at 1056–60.
214. Id. at 1056.
did not exist because: (a) there was no underlying crime at issue— 
Drummond was emotionally disturbed and potentially a danger to himself 
not others; (b) even if Drummond was a threat to himself or others, once he 
was handcuffed he was no longer a threat; and (c) once Drummond was on 
the ground he was not resisting arrest, according to eyewitnesses.  

The court further noted that Drummond had mental illness, which must 
be a factor in determining the reasonableness of the force used.  

When balancing the use of the neck restraint against the minimal need for the 
force, the court found that “[o]nce on the ground, prone and handcuffed, 
Drummond did not resist the arresting officers . . . Drummond was not 
sufficiently dangerous to others to warrant the use of the severe force 
applied.” Officers squeezed the breath from Drummond while he was on 
the ground, handcuffed, pleading for air. The court found that the neck 
restraint used under these circumstances was a degree of force greater than 
reasonable, and thus an unconstitutional. The court noted that the use of 
chokeholds is not only severe but “wholly unwarranted” and that this type 
of force “appears with unfortunate frequency in the reported decisions of 
the federal courts, and presumably occurs with even greater frequency on 
the street.”  

Again, on July 1, 2013, the Ninth Circuit delivered an opinion in 
Barnard v. Theobald regarding excessive force by law enforcement using a 
chokehold on Charles Barnard. The analysis in Barnard stated that an 
officer’s mistaken belief that the suspect was resisting is not relevant to 
whether an officer’s use of a chokehold was reasonable or not. Barnard 
sustained five collapsed cervical vertebrae after an officer used a chokehold 
to detain him. While Barnard was obeying police officers’ orders and 
handcuffed, one officer tripped and all three men fell down, with Barnard 
landing on top of one officer. Another officer came over to Barnard and 
put him in a chokehold, lifted him up and off of the ground, and flipped him 
onto his hands and knees, at which point Barnard’s legs went numb. The

215. Id. at 1057–58.  
216. Id. at 1058 (explaining that tactics used against individuals who are emotionally disturbed 
are different from “those involved in law enforcement efforts to subdue an armed and dangerous 
criminal who has recently committed a serious offense.” (quoting Doerle v. Rutherford, 272 F.3d 
1272, 1282–83 (9th Cir. 2001))).  
217. Id. at 1059.  
218. Id.  
219. Id. at 1059–60.  
220. Id. at 1063.  
221. Barnard v. Theobald, 721 F.3d 1069, 1072 (9th Cir. 2013).  
222. Id. at 1076.  
223. Id. at 1073.  
224. Id. at 1072.  
225. Id.
Ninth Circuit affirmed the district court’s finding that Barnard’s resistance, or the perception of resistance, did not entitle the police to use any amount of force to restrain Barnard and thus the chokehold was unreasonable. The chokehold used by officers was found by a jury to be unreasonable even in light of the officer’s mistaken belief that Barnard was resisting arrest. The mistaken belief of the officer, whether with good or evil intention, is not relevant in the objective reasonableness analysis of the force used.

Even though some circuit courts have found the use of neck restraints to be an unreasonable severe use of force, neck restraints and chokeholds are still used to detain suspects who give minimal or no resistance to law enforcement. People continue to get injured and some, like Eric Garner, die. In 1983, the Supreme Court had an opportunity to classify chokeholds as deadly force and to allow federal courts to bar the use of neck restraints in Los Angeles through an injunction. The ability of the federal courts to stop the use of neck restraints through injunctive relief came and went with the Supreme Court’s decision in City of Los Angeles v. Lyons.

The Court noted that while federal courts could not enjoin state law enforcement, absent more justification than the Court found in Lyons, “[t]he individual States may permit their courts to use injunctions to oversee the conduct of law enforcement authorities on a continuing basis.” Some states have begun to respond to the use of chokeholds by enacting legislation prohibiting or limiting the use by law enforcement instead of seeking injunctive relief in the courts.

B. Legislative Response: Ban or Limit Chokehold Use

Although majority of states have not addressed the use of chokeholds by law enforcement through legislation, there are some that have. Currently, there are a few states that have laws addressing law enforcement use of chokeholds. State legislative responses can be categorized into three

226. Id. at 1076. The Ninth Circuit similarly held in Werner v. City of Poulsbo that using a chokehold was unlawful and unreasonable when it was applied to the suspect before the suspect engaged in any conduct justifying the use of force. Werner v. City of Poulsbo, 548 F. App’x 381, 382 (9th Cir. 2013).
227. Barnard, 721 F.3d at 1076.
229. See discussion supra Part I (discussing Eric Garner’s death in 2014).
231. See id. at 113.
232. Id.
233. D.C. CODE § 5-125.01 (2001); NEV. REV. STAT. ANN. § 289.810.1(a)-(b) (LexisNexis 2008); TENN. CODE ANN. § 38-3-121 (2010).
types: (1) legislation restricting the use of chokeholds to situations that require the use of deadly force; (2) legislative limitations placed upon the use of certain types of neck restraints; and (3) total bans on the use of chokeholds.

1. Legislation Restricting Chokeholds to the Use to Deadly Force

The first jurisdiction to enact legislation pertaining to law enforcement use of chokeholds was the District of Columbia on January 25, 1985. This legislation is called the “Limitation on the Use of the Chokehold Act of 1985.” The intent of this legislation was to declare the “use of restraints generally known as chokeholds by law enforcement officers” as lethal force because “unrestricted use of force present[ed] an unnecessary danger to the public.” The enactment of this legislation was in response to two deaths caused by the use of chokeholds and the Act served to “classify the chokehold as a service weapon.” The Act states that,

The use of the trachea hold by any police officer shall be prohibited under any circumstances and the carotid artery hold shall be prohibited except under those circumstances and conditions under which the use of lethal force is necessary to protect the life of a civilian or a law enforcement officer . . .

The District of Columbia’s Act is currently the only statute of its kind, but since the death of Eric Garner in 2014, other state legislatures have proposed bills similar to the D.C. statute attempting to limit the use of neck restraints to situations where deadly force is required. Colorado legislators proposed a bill that would prohibit the use of chokeholds unless the officer’s life is in danger. Illinois legislators also introduced bills into both the house and senate that would prohibit the use of chokeholds by police officers unless deadly force is justified.

Similarly, in New Jersey, State Assemblyman Charles Mainor proposed a bill that would classify chokeholds and carotid holds as deadly force. Mr. Mainor served as a New Jersey police detective for twenty-five years.

234. D.C. CODE § 5-125.01.
235. Id.
236. Id.
237. Id. § 5-125.03(a).
years.\textsuperscript{241} His intent in proposing this bill was to bring consistency to police policies addressing the use of neck restraints across all police departments throughout New Jersey.\textsuperscript{242} His proposed bill classified pressure on the throat, windpipe, or carotid artery which prevents the ability to breathe or interferes with the flow of blood to the brain as deadly force.\textsuperscript{243}

2. **Legislative Limitations on Certain Types of Neck Restraints**

Tennessee enacted legislation that classifies and limits certain types of neck restraints.\textsuperscript{244} This Tennessee legislation was enacted in 1994, and prohibits the use of chokeholds and other similar restraints “unless other methods of restraint are ineffective.”\textsuperscript{245} This legislation makes respiratory neck restraints a force of last resort but does not categorize the force as lethal or deadly.\textsuperscript{246} Although while limiting the use of some neck restraints, the Tennessee legislation allows for other types of neck restraints by stating that, “[n]othing in this section shall be construed to prohibit the use of the lateral vascular maneuver.”\textsuperscript{247}

Another state that has legislation that limits how and when law enforcement can use chokeholds is Nevada. Nevada legislation delegates the classification and training on use of chokeholds to the individual police agencies.\textsuperscript{248} Nevada allows for the use of chokeholds only when the “agency employing the peace officer authorizes the use of the choke hold,”\textsuperscript{249} and when “the peace officer has successfully completed training in the proper use of the choke hold and holds [a] current certification.”\textsuperscript{250} The Nevada statute also mandates that the individual police agencies adopt a policy that determines whether or not the use of chokeholds is authorized.\textsuperscript{251}

3. **Legislation Placing a Total Ban on Use of Chokeholds**

Hawaii legislators introduced a bill in 2015 that would place a total ban on law enforcement use of both respiratory and vascular neck restraints

\textsuperscript{241} See Mark Bonamo, Mainor Moving Forward with Choke Hold Bill, POLITICKERNJ (Feb. 6, 2015, 10:34 AM), http://politickernj.com/2015/02/mainor-moving-forward-with-choke-hold-bill.

\textsuperscript{242} See id.

\textsuperscript{243} N.J. Assemb. No. 4081.

\textsuperscript{244} TENN. CODE ANN. § 38-3-121 (2010).

\textsuperscript{245} Id.

\textsuperscript{246} See id.

\textsuperscript{247} Id.

\textsuperscript{248} NEV. REV. STAT. ANN. § 289.810.1(a)-(b) (LexisNexis 2008).

\textsuperscript{249} Id. § 289.810.1(a).

\textsuperscript{250} Id. § 289.810.1(b).

\textsuperscript{251} Id. § 289.810.3.
as methods of force application.252 The Hawaii bill, as proposed, bans the use of any type of neck restraint including pressure over the trachea, compression of the carotid arteries, jugular veins, or the sides of the neck.253 The bill’s rationale for the banning of law enforcement use of neck restraints is that “respiratory . . . and vascular neck restraints . . . sometimes used by law enforcement officers to restrain a person . . . [are] a type of force [that] ha[ve] led to deaths of suspects around the nation.”254 This bill reasons that the prohibition is necessary to safeguard the health of suspects by banning neck restraints as a method of force that officers may use to detain a person.255

A proposed New York bill takes banning the use of chokeholds further by proposing to criminalize the use of chokeholds by officers. The New York bill makes the use of chokeholds punishable as a crime for “obstruction of breathing or blood circulation.”256 The bill not only proposes to make obstruction of breathing or blood circulation a misdemeanor offense, but also proposes to aggravate the offense to a felony when a person “disregards any procedures banned by his or her employment and commits the crime of criminal obstruction of breathing or blood circulation.”257 The New York bill makes note of “evidence that the penalties for using a chokehold have resulted in little more than a loss of vacation time . . . that the NYPD is either unable or unwilling to enforce its own employee manual” as justification for the bill.258 The justification section of this bill emphasizes that “NYPD’s ban on the use of chokeholds [was] not sufficient to prevent police officers from using this method to restrain individuals whom they are trying to arrest.”259

The United States Congress also introduced a bill that proposed a total ban on the use of chokeholds. On April 28, 2015, this bill, called the “Excessive Use of Force Prevention Act,” was introduced by New York Representative Hakeem Jeffries.260 This proposed bill sought to amend 18

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253. Id.
254. Id.
255. Id.
257. Id.
258. Id.
259. Id. (referring to the incident of the use of a chokehold that was in violation of NYPD policy that caused the death of Eric Garner in 2014).
U.S.C. § 242, to penalize “the application of any pressure to the throat or windpipe which may prevent or hinder breathing or reduce intake of air.”

The flaw in the “Excessive Use of Force Prevention Act,” and other legislation that proposes total bans and criminalization of the use of chokeholds, is that these laws would not allow officers the ability to use the chokehold as a valid use of deadly force even when they, or others, are faced with the risk of serious bodily injury or death. By putting a statutory ban on chokeholds, officers’ actions would automatically be criminalized whether the officers’ actions were reasonable or not. A total ban is an extreme response that is not practical in the context of policing where the use of lethal force is constitutionally reasonable under circumstances where officers are faced with imminent serious bodily injury or death. Thus, legislation that limits the use of chokeholds to situations where deadly force is required are the more practical, and constitutionally sound, legislative attempts at addressing law enforcement use of neck restraints.

Legislation of neck restraints that categorizes and limits the use to situations where deadly force is required would be effective to bring some continuity in police practice and policy with regard to the use of neck restraints. Because police policy is different throughout the country, among the various states, and differs from one department to another, even within the same state, the public in one area of the country or state may be more susceptible to being choked by law enforcement than others.

C. Departmental Response: Police Policy from Department to Department

By looking at the use of force policy for some of the larger police departments in the United States one can get an idea of how police departments respond to the use of neck restraints through police policy. Some police departments have their use of force policies, and others, available on the Internet for the public to see. There are other departments that make their policies viewable but with certain portions redacted, while others do not make their policies available to the public at all under exceptions to various state public information acts.


262. H.R. 2052.

263. See id.

264. See supra Part II.B for a discussion of the circumstances under which the use of deadly force by law enforcement is reasonable under the Fourth Amendment.
1. Publically Unavailable Police Use of Force Policy

Police department’s that make their use of force policies available online in full do so on their own initiative.\textsuperscript{265} Exceptions to public requests under freedom of information requests would likely exempt law enforcement from having to disclose their use of force policy.\textsuperscript{266} The federal Freedom of Information Act does not apply to state governments and thus each state will have its own laws governing disclosure of records held by government bodies such as police departments.\textsuperscript{267} For example, under the Texas Public Information Act\textsuperscript{268} there is an exception to the public’s right of access to “information held by a law enforcement agency . . . that deals with the detection, investigation, or prosecution of crime.”\textsuperscript{269} Specifically, Texas law enforcement agencies are not required to disclose detailed guidelines of their use of force policy.\textsuperscript{270} The rationale for not disclosing police use of force policy is that “the release of the detailed guidelines would impair an officer’s ability to arrest a suspect and would place individuals at an advantage in confrontations with police.”\textsuperscript{271} Even though public information request statutes may not require law enforcement to make use of force policies publically available, there are agencies nationwide that voluntarily make their policy manuals available in full online for public access.


\textsuperscript{268} TEX. GOV’T CODE ANN. § 552.001 (West 2012).

\textsuperscript{269} Id. § 552.108.


\textsuperscript{271} Id. (“[D]etailed guidelines regarding a police department’s use of force policy may be withheld, but not those portions of the procedures that restate generally known common-law rules, constitutional limitations, or Penal Code provisions; the release of the detailed guidelines would impair an officer’s ability to arrest a suspect and would place individuals at an advantage in confrontations with police.” (citing Tex. Att’y Gen. OR1989-531, available at http://www.texasattorneygeneral.gov/opinions/openrecords/47mattox/ord/1989/htm/ord19890531.txt)).
2. *Use of Force Policies that Are Disclosed*

Typically, police departments will set forth police procedure in the form of policy manuals or operating procedures. Use of force policies will vary from department to department depending on how that particular state or police department views the use of neck restraints as force. Police departments across the nation address the use of chokeholds or neck restraints as varying levels of force. Chokeholds are typically distinguished from other “types” of neck restraints by departments that continue to allow the use of some form of neck restraint by officers.\(^{272}\) According to a 2007 survey, forty-six percent of police departments serving populations of one million or more people authorized some form of hold or neck restraint.\(^{273}\)

a. **Sample of Department Policy Not Mentioning Chokehold Use**

There are some law enforcement agencies that do not mention chokeholds or neck restraints in their use of force policies. By remaining silent on the categorization of this type of force it is not discernable whether or not the particular department prohibits or condones the use. Silence also begs the question as to whether an officer would be punished for using a neck restraint and causing harm to a person within these police departments who do not address the use in policy.

For example, the Austin Police Department in Texas does not address the use of neck restraints, but does address the use of pain compliance techniques stating that these techniques should be “discontinued once the officer determines that compliance has been achieved or other more appropriate alternatives can reasonably be utilized.”\(^{274}\) Austin Police Department policy does not define what is specifically considered a pain compliance technique.\(^{275}\) As a general note, neck restraints could be categorized as pain compliance techniques.\(^{276}\) Because the Austin Police

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\(^{272}\) See infra Part IV.C.2.c.


\(^{275}\) See id. (stating when pain compliance techniques could be used by officer, but not specifying what types of pain compliance techniques are authorized to be used).

\(^{276}\) Generally, neck restraints could be considered pain compliance techniques. Personal Protections Systems defines one type of neck restraint, the bar-arm hold, as a pain compliance technique, stating that “[t]he intent of a bar-arm choke is to achieve subject control through either: 1. Pain compliance: when pressure is applied directly to the trachea, extreme pain is exhibited, or experienced, or; 2. Closure of the airway, which induces unconsciousness through suffocation.” *Neck Restraints As a Use of Force*, PERS. PROTECTION SYS. INC. 4,
Department does not mention neck restraints in its policy, it cannot be discerned if this method of force is prohibited or not.

The Los Angeles Police Department also does not discuss the use of neck restraints in the policy manual that is available online to the public, but has been quoted in the media as stating that it forbids chokeholds, but allows officers to use carotid neck restraints in situations requiring deadly force.277 Likewise, the Miami-Dade Police Department does not specifically address the use of neck restraints in its publicly available Law Enforcement Handbook.278 Because a law enforcement agency either does not mention neck restraints at all in a use of force policy, or lists types of force such as pain compliance but does not define the acceptable types of pain compliance, it can be difficult for the public and for officers to know whether neck restraints are authorized as a proper use of force by that agency.

b. Sample of Department Policy Prohibiting or Limiting Chokehold Use

There are police departments across the country that limit the use of various types of neck restraints to situations where the use of deadly force is necessary.279 The Cincinnati Police Department classifies “[a]ll uses of a carotid” chokehold to be a use of deadly and serious force.280 The Denver Police Department also limits the use of the carotid compression technique


279. In addition to those listed in this section, there are other police departments that limit neck restraints to deadly force. For example, El Paso County Sheriff’s department in Colorado also categorizes neck restraints as a use of deadly force. Policy and Procedure Manual: Policy 501, EL PASO COUNTY SHERIFF’S OFF. 1 (Mar. 12, 2015), http://shr.elpasoco.com/sites/default/files/assets/Documents/Policy/500/501_Use_of_Force.pdf.


to situations rising to a level of an “[a]ggravated [a]ctive [a]ggression—
[d]eadly force encounter.” The Denver Police Department further limits
the use of the carotid compression technique by only allowing officers who
receive training from the Denver Police Department on the technique to use
it. This policy further emphasizes that officers should be “mindful not to
apply direct pressure to either the front of the throat, back of the neck or
head area either through compounded body weight, or direct pressure...
as application of such pressure can cause unintended serious bodily injury
or even death.”

There are police departments that go beyond just limiting carotid
restraints and chokeholds and categorize all types of neck restraints as the
use of deadly force. The Seattle Police Department policy states that,
“[o]fficers may only use neck and carotid restraints when deadly force is
justified.” The New Orleans Police Department (NOPD) use of force
policy restricts the use of all types of neck restraints, qualifying them as
lethal force. The NOPD policy is clear in its restriction by naming the
types of neck restraints and categorizing them all together as neck holds.
The NOPD defines neck holds to include arm-bar control holds, carotid
restraint holds, lateral vascular neck constraint, and holds where officers use
a knee or another object to the back of a prone suspect’s neck. The policy
declares that, “[a] neck hold shall be considered lethal force.”

Short of banning the use of neck restraints entirely, the District of
Columbia, Metropolitan Police policy limits neck restraints as a last resort
of deadly force. The Metropolitan Police General Order states, “[m]embers
shall not employ any form of neck restraint except when an imminent threat
of death or serious bodily injury exists, and no other option is available.”

282. Id.
283. Id.
284. Seattle Police Department Manual, SEATTLE POLICE DEP’T § 8.300-POL-10 (Sept. 1,
tools#Neck%20and%20Carotid%20Restraints.
1.
286. Id.
287. Id.
288. General Order GO-RAR-901.07: Use of Force, D.C. METROPOLITAN POLICE 8 (Oct. 7,
c. Sample of Department Policy Allowing Chokehold Use

Though there are police departments that expressly categorize neck restraints as deadly force and limit their use as such, there are other police departments that allow their use and do not consider it to be deadly force. Many of the police departments that allow the use of neck restraints will distinguish neck restraints from chokeholds. The Chicago Police Department categorizes chokeholds as “[a]ctions . . . likely [to] cause death or serious physical injury.”289 It further defines chokeholds as direct pressure to the trachea or windpipe with intention of reducing the intake of air, and declares, “[c]hokeholds are only justified as a use of deadly force.”290 But, the policy distinguishes chokeholds from “[h]olding and control techniques involving contact with the neck . . . not intended to reduce the intake of air,”291 thus allowing for some types of neck restraints to be used.

Las Vegas Police Department allows the use of the “Lateral Vascular Neck Restraint®” (LVNR) defining it as “a specific method of applying pressure onto the side of a subject’s neck to overcome resistance and allow for safe control,” to be used only according to department policy and training certification.292 The policy describes the LVNR as “a control technique in which the carotid arteries on the sides of the neck are compressed, restricting blood flow to the brain, causing the subject to pass out.”293 The Las Vegas Police Department prohibits the use of “any other arm bar technique that involves a neck restraint.”294 Their policy categorizes this neck restraint as a low to intermediate level of force.295

Like the Las Vegas Police Department, the Honolulu Police Department also categorizes neck restraints as an intermediate use of force. The Honolulu Police Department groups vascular neck restraints with intermediate weapons and conducted electrical weapons (i.e. the TASER®).296 The Honolulu Police Department calls the vascular neck restraint a “submission hold.”297 The qualification is that officers are only


290. Id.

291. Id.


293. Id. at 23.

294. Id.

295. Id.


297. Id.
allowed to use vascular neck restraints after completing department training. The section in this policy, dated April 24, 2015, is available online except that the section detailing vascular neck restraints is redacted pursuant to the government records exception to Hawaii’s Uniform Information Practices Act. Although allowed by police policy, legislators in Hawaii proposed a Senate Bill that would prohibit the use of respiratory neck restraints and vascular neck restraints entirely in Hawaii.

Despite the controversy surrounding deaths caused by the use of chokeholds in Los Angeles in the late 1970’s and early 1980’s during the time that the Supreme Court decided City of Los Angeles v. Lyons, the Los Angeles County Sheriff’s Department still allows the use of carotid neck restraints. The Sheriff’s Department while permitting the use, does acknowledge the risk associated with the use of neck restraints by mandating that the suspect must be transported to a medical facility and treated by medical staff when an officer uses any kind of neck or throat restraint, even if the use does not result in unconsciousness.

Notwithstanding the Ninth Circuit Court’s expressed disdain regarding the use of neck restraints and lawsuits surrounding the use of neck restraints, police departments in California, including the Los Angeles County Sheriff’s Department, continue to also allow neck restraint use. The San Diego Police Department’s Use of Force Matrix authorizes the use of a carotid neck restraint when the officer is faced with active resistance behavior. This force matrix classifies the carotid neck restraint as a “greater controlling force,” the same category as chemical agents, takedown pressure point techniques, and conducted electrical weapons. Thus, in San Diego, police use of a carotid neck restraint is not deadly force, but rather some form of intermediate use of force, despite the Ninth Circuit’s categorization of carotid neck restraints as deadly force.

In Northern California, the San Francisco Police Department states that “choking by means of pressure on a subject’s trachea is a prohibited practice” but “rendering a subject unconscious by applying pressure to the

298. Id.
299. HAW. REV. STAT. ANN. § 92F-13(3) (LexisNexis 2012).
300. See supra note 252.
301. See supra note 122 and accompanying text.
303. Id. at 17.
304. See supra notes 208–26 and accompanying text.
306. Id.
307. See supra note 209, 214 and accompanying text.
carotid artery is permissible... when lesser types of restraint would be ineffective.\textsuperscript{308} But, San Francisco does emphasize that the carotid hold is acceptable only when “the officer is physically attacked, to stop physical attack on another person, or when a lesser use of force has already been attempted and found to be ineffective.”\textsuperscript{309} San Francisco also admonishes officers to use a liquid chemical agent (i.e. ‘pepper spray’) rather than batons or carotid restraint when it is practical for the officer to do so.\textsuperscript{310} San Francisco policy has a long description of when and how to use a carotid restraint. The policy qualifies the restraint “when properly applied, [as] a very effective means of subduing violent subject[s]; however, caution must be used in its application.”\textsuperscript{311} The San Francisco policy directs that officers who use the carotid hold “must attempt to ensure the hold does not slip into a bar arm trachea choke.”\textsuperscript{312} Officers who use the carotid hold must “monitor the subject’s vital signs closely,” call paramedics immediately if the person has lost consciousness, and in all cases must have the subject medically evaluated as well as inform the jail on the booking form that a carotid restraint was used.\textsuperscript{313} Although the San Francisco police policy allows the use of the carotid hold, it seems that it is not a preferred method of restraint as the department uses a great amount of cautionary language surrounding its use and expresses an explicit preference that other types of force be used instead of it.\textsuperscript{314} This policy reads as if San Francisco wants to prohibit the use of the carotid hold except as a use of deadly force, but does not do so expressly.

By looking at the various police department policies on neck restraints it is clear that there is a need for uniformity regarding the use and classification of neck restraints in law enforcement. The use should not differ from department to department, city to city, and state to state. If neck restraints are not a reasonable force option for one police department then they should not be reasonable for another police department in a different geographic context. The limitation on the effectiveness of police department policy response to the use of neck restraints is illustrated by the fact that there are differences in the use of neck restraints and the categorization of the level of force that these are qualified as across the country.

\textsuperscript{309} Id. at 6.
\textsuperscript{310} Id. at 5.
\textsuperscript{311} Id. at 6.
\textsuperscript{312} Id.
\textsuperscript{313} Id.
\textsuperscript{314} Id.
V. LIMITATIONS OF EFFECTIVENESS OF CURRENT RESPONSES TO POLICE USE OF CHOKEHOLDS

Current judicial, legislative, and police policy responses have had limitations in effectuating change in the area of neck restraint use by law enforcement. The judiciary is limited in effectiveness because it cannot enjoin what may be considered unconstitutional police practices. Legislative and police policy attempts to address neck restraint use in law enforcement are limited in scope and have not taken a consistent stance. Even when police departments, or the legislature, ban the use of respiratory chokeholds, some still authorize the use of different types of holds such as the carotid hold and other types of vascular neck restraints. As discussed in Part III of this Comment, a vascular neck restraint may easily become a respiratory chokehold in the context of policing. Ultimately, all types of neck restraints should receive formal classification as a use of deadly force. This deadly force classification responsibility cannot rest solely upon police departments. There are limits to the effectiveness of department policy and procedures alone. Even when the use of chokeholds is prohibited by police department policy, chokeholds are still used in situations where officers are not threatened with serious bodily injury or death, as demonstrated by the Eric Garner incident in 2014.

A. Limitations of the Departmental Response

Even when a police department policy exists that prohibits chokeholds, this type of force has still been used. The incident with Eric Garner highlighted the ineffectiveness of police policy to control the use of chokeholds. The New York City Police Department (NYPD) limited the use of chokeholds since 1985, qualifying them as “potentially lethal and unnecessary,” only to be used if the officer or another person’s life is in danger. In 1993, NYPD banned the use of chokeholds entirely following the in-custody death of Frederico Pereira. In 1993, former police

315. See supra Part III.
318. Lancman & Pearlstein, supra note 100, at 252 (discussing the April 23, 1985 NYPD Interim Order No. 29 issued by police commissioner Benjamin Ward).
commissioner John F. Timoney of the New York Police Department, when asked about the NYPD’s chokehold ban, did not distinguish between any types of neck restraints but plainly stated, “basically, stay the hell away from the neck.” Even with a complete ban on chokeholds by police policy in New York, the use of such force did not stop and deaths still occurred.

On December 22, 1994, while playing football in the street, Anthony Baez was put in a chokehold by then-officer Francis Livoti. Anthony Baez was choked to death while his father pleaded with the officer to stop choking his son. A district court trial jury convicted Livoti of manslaughter and several civil rights violations. Livoti was aware at the time he choked Baez that NYPD prohibited the use of chokeholds and had trained officers on the danger of their use. Livoti “not only disregarded a known risk, he also flouted direct orders and department policy.” The court looked at various factors, namely that: Livoti created the violent situation that led to Baez’s death, he lacked probable cause to arrest Baez for any offense, and Livoti was aware of the policy regulations prohibiting chokeholds.

Notwithstanding NYPD policy, Eric Garner was killed by a chokehold, however the punishment for the officer was much less than what resulted in Livoti. Unlike Livoti, the officer that choked Eric Garner was not indicted on criminal charges by a grand jury and was still employed by the NYPD after the incident. Punishment for violation of NYPD policy “can be: a warning and admonishment, loss of vacation days, suspension without pay, a dismissal probation, or termination from NYPD.” It is evident from a look at the history of NYPD’s chokehold ban, coupled with incidents of

320. Id. (discussing NYPD’s categorical ban on the use of chokeholds in 1993).
321. United States v. Livoti, 196 F.3d 322, 324 (2d Cir. 1999).
322. Id. at 325.
323. Id.
324. Id. at 329.
325. Id.
326. Id.
chokehold deaths, that police policy alone is not enough to stop the use of chokeholds by police officers. The New York Citizen Complaint Review Board found that “there was a systemic failure of the NYPD disciplinary process which resulted from the failure to define properly chokehold cases which, in turn, resulted in virtually total failure to discipline chokehold violations.”

Between 2009 and 2013, the New York Citizen Complaint Review Board received over 1,000 chokehold complaints, fully investigated 462, and found the claims to be substantiated in nine of the complaints. Of the nine complaints where the unlawful use of a chokehold was found, the most serious punishment for the officers was a loss of vacation days.

The use of department policy is generally limited to internal police department punishment and job evaluation. Police policy is not a determining factor for the judiciary in determining whether or not the use of force would be reasonable under the Constitution. “The violation of police regulations or even state law is completely immaterial as to the question of whether a violation of the federal constitution has been established.” Department policy does serve to inform officers of the risks associated with certain forms of force but alone does not determine whether the force is reasonable.

In Whren v. United States, the Supreme Court addressed the use of police policy manuals in evaluating reasonableness under the Fourth Amendment. The Court found that because police policy and procedure varies from “place to place and from time to time,” it is not a reliable gauge by which to measure a police officer’s conduct under the Fourth Amendment. Courts could consider police policy in their analysis of a use of force, but it is not dispositive on the issue of reasonableness.

330. Id. at 57.
331. Lancman & Pearlstein, supra note 100, at 253.
332. Id.
333. See Thompson v. City of Chicago, 472 F.3d 444, 454 (7th Cir. 2006).
334. See Graham v. Connor, 490 U.S. 386, 396 (1989) (listing factors to determine whether a seizure is reasonable such as severity of the crime at issue, whether the suspect poses an immediate threat, and whether the suspect is actively resisting).
335. Thompson, 472 F.3d at 454.
338. Id.
339. Drummond ex rel. Drummond v. City of Anaheim, 343 F.3d 1052, 1059 (9th Cir. 2003) (“Training materials are not dispositive . . . .” “It may be difficult to conclude that the officers acted reasonably if they performed an action that had been banned by their department . . . .” (quoting Gutierrez v. City of San Antonio, 139 F.3d 441, 449 (5th Cir. 1998))).
B. Limitations of the Legislative Response

Similar to the limitation of the effectiveness of department policy is that of the limitations of legislation. First, each state would need to adopt its own law through the legislative process. Once a law is passed, each state’s law regarding neck restraint use by law enforcement could be different. Thus, the situation is presented that some people in the United States could lawfully be choked by police officers, and in other states it would be unlawful. Also, once a law passes through the legislature, the governor of the state or mayor of the city could ultimately veto the law. For example, Mayor De Blasio of New York City promised to veto the City Council bill that proposed to criminalize the use of chokeholds by police officers if the bill came across his desk.

C. Limitations of the Judicial Response

The inability of federal courts to enjoin law enforcement agencies when practices and procedures are found to be unconstitutional limits the overall effectiveness of judicial remedies for chokeholds. Experience has borne out the truth of Justice Marshall’s statement in his Lyons dissent. His frustration was that the only remedy that would be available to people who suffered injury or death from neck restraint use by law enforcement would be monetary damages. Justice Marshall stated that, without the availability of injunctive relief for people subjected to unconstitutional force by law enforcement, there only exists an “award of damages to those who are victimized by the practice and live to sue and to the survivors of those who are not so fortunate.”

Even after all of the death cases involving neck restraints, people are still being choked and damages are being paid absent a possible remedy of injunctive relief against the police practice of using neck restraints. For example, during the time that City of Los Angeles v. Lyons was being decided by the Court, another man named James Mincey, Jr. was choked by
Los Angeles police and his family brought suit for his chokehold death. After a long lawsuit, Mincey’s father received $450,000 and an additional $1.1 million went to four other relatives. In 2011 in Las Vegas, Dustin Boone died after an officer put him in a “lateral vascular neck restraint,” and he lost consciousness and stopped breathing. The Las Vegas Metro Police Department paid $1 million to the surviving family of Dustin Boone. The family members of Anthony Baez were awarded $2.94 million for his chokehold death case in New York. The dissent in City of Los Angeles v. Lyons was correct in saying a “city is free to continue the policy indefinitely as long as it is willing to pay damages for the injuries and deaths that result.” Years after the death of Baez in New York, Eric Garner’s family received a settlement of $5.9 million in their wrongful death claim against the City of New York for Eric Garner’s 2014 chokehold death. Even though damages are assessed in these cases, neck restraints are still used by law enforcement. Thus, damages alone have not been a sufficient deterrent to the use of neck restraints by law enforcement and the deaths resulting therefrom.

VI. PROPOSED ACTION

Deterrence against the use of neck restraints by law enforcement can be accomplished through a uniform stance with regard to the permissibility of their use. Without a consistent stance on what level of force neck restraints are, their use will continue. As neck restraint use proceeds, people will continue to be unnecessarily injured and die from neck restraint use. Because neck restraints pose a substantial and unpredictable risk of death, the only proper force categorization for them is deadly force. The use of neck restraints by law enforcement has been under scrutiny since City of Los Angeles v. Lyons, and controversy continues regarding the use of neck restraints as the issue resurfaced again on a national level after the death of

346. James Rainey, Final Suit over LAPD’s Use of Chokehold Settled, L.A. TIMES, Sept. 29, 1993, http://articles.latimes.com/1993-09-29/local/me-40159_1_police-officer (discussing the death of James Mincey, Jr. who was the sixteenth chokehold death in Los Angeles over the seven years that the Lyons I case was being litigated).
347. Id.
348. AELE Civil Liability Pt. 1, supra note 81, at 107.
349. Id.
350. Id. at 104.
352. Goodman, supra note 327.
353. See Lyons II, 461 U.S. at 117 n.7 (Marshall, J., dissenting) (quoting Appellate Record at 364–67) (describing the reasons that neck restraints are “extremely dangerous in an unpredictable fashion”).
Eric Garner in 2014. As people die from the use of neck restraints, there is still no consensus regarding when neck restraints should and should not be used. If the judiciary, legislature, and police departments across the nation would declare that all types of neck restraints are categorically a use of deadly force, this would establish a uniform stance on this force technique that has been a subject of controversy all over the nation since the late 1970s and early 1980s.

First, judicially, and if enacted legislatively, all types of neck restraints should be categorically deemed a use of deadly force and only found reasonable in situations that merit the use of deadly force. Neck restraints should be assessed in the same manner as the use of firearms. Not only do neck restraints pose a high risk of death like firearms, unlike firearms this risk is unpredictable. The lethal nature and unpredictable risk of causing serious bodily injury or death inherent in restricting air and blood flow by compressing a person’s neck should only be used in situations where the use of deadly force is necessary. To protect people from law enforcement misconduct or misuse of neck restraints as force, there must be a categorical classification of all types of neck restraints as deadly force.

Second, if neck restraints are categorically deemed to be a use of deadly force then Tennessee v. Garner should apply to cases involving neck restraints. Garner determined that deadly force cannot be used unless “the suspect poses a significant threat of death or serious physical injury to the officer or others.” If neck restraints were categorized as deadly force, under Garner, the use of a neck restraint against unarmed suspects who do not pose a threat of death or serious bodily injury to the officers would be unlawful under the Fourth Amendment. The reasonableness of the use of the neck restraint would be determined under the circumstances of the use, and whether the officer or someone else was threatened with serious bodily injury or death. If the federal courts followed Garner, neck restraints used on an unarmed suspect posing no threat of serious bodily injury or death would be an unconstitutional use of force and could serve to deter unlawful uses of neck restraints by law enforcement. This could prevent incidents such as Eric Garner’s death from occurring in situations where the suspect is not armed and not posing a serious threat to officers or others.

354. See id. at 116 (“It is undisputed that chokeholds pose a high and unpredictable risk of serious bodily injury or death.”); Fyfe, supra note 23, at 66.


356. Id. at 11.

Third, *City of Los Angeles v. Lyons* should be overturned.\textsuperscript{358} When an ongoing, unconstitutional practice of police use of force results in death, the federal courts should have the power to stop it through the ability to enjoin and scrutinize the potentially unconstitutional practice.\textsuperscript{359} Injunctions against ongoing systematic constitutional violations should be allowed as a remedy in federal and state courts against unconstitutional uses of force.\textsuperscript{360} *Lyons* is a seemingly impossible barrier to many suits seeking to challenge ongoing harmful police practices through injunctive relief; therefore, *Lyons* hinders legitimate challenges to unconstitutional practices committed by law enforcement. Because of *Lyons*, private citizens do not have standing to challenge systematic unconstitutional practices by law enforcement in federal court.\textsuperscript{361}

Even if *Lyons* is not overturned, or until it is overturned, the Department of Justice has the ability to deter unconstitutional practices by law enforcement. The Department of Justice, under 42 U.S.C. § 14141, has the potential ability to stop unconstitutional practices by law enforcement agencies through federal civil enforcement.\textsuperscript{362} Under 42 U.S.C. § 14141, it is “unlawful for any government authority . . . to engage in a pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights . . . protected by the Constitution or laws of the United States.”\textsuperscript{363} When the Attorney General has “reasonable cause to believe that a violation . . . has occurred, the Attorney General . . . may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.”\textsuperscript{364} The “pattern or practice” requirement is not satisfied by individual incidents of unconstitutional police conduct, but rather by “police agency policies that violate the Constitution, or multiple incidents that amount to a ‘pattern or practice’ that deprives people of their Constitutional rights.”\textsuperscript{365} Police use of excessive force is one type of conduct covered by this law.\textsuperscript{366} Only the Department of Justice may file suit

\textsuperscript{358} See supra Part IV.A.1.b., for a discussion of the dissenting opinion in *City of Los Angeles v. Lyons* (Lyons II), 461 U.S. 95 (1983).

\textsuperscript{359} See *Lyons II*, 461 U.S. at 114 (Marshall, J., dissenting).

\textsuperscript{360} See id. at 137.

\textsuperscript{361} Id. at 113.


\textsuperscript{363} 42 U.S.C. § 14141(a) (2012).

\textsuperscript{364} Id. § 14141(b).


\textsuperscript{366} Civil Rights Division, supra note 361.
for violations of the “Police Misconduct Provision.” The remedy under this provision is injunctive relief, “such as orders to end the misconduct and changes in the agency’s policies and procedures that resulted in or allowed the misconduct.”

The Department of Justice has made comments and given guidance to various police departments regarding the use of neck restraints through their statutory authority to address patterns of unconstitutional practice by law enforcement. For example, recently the Department of Justice published an assessment of the use of force in the Philadelphia Police Department (PPD). The report stated that, since “PPD is in the minority of large [police] departments that train on the use of neck restraint maneuvers, and . . . officers do not regularly train on such tactics after the academy, special attention should be given to this particular tactic.” The recommendation by the Department of Justice to PPD was to “discontinue training on the use of neck restraints and eliminate its use from the field except in exigent circumstances when life or grave bodily harm are at risk.” This assessment of Philadelphia police practice was part of a collaborative reform initiative between PPD and the Department of Justice that focused on evaluating the use of force by PPD and recommending changes to policies and practices. This assessment of PPD was initiated by Philadelphia Police Commissioner Charles Ramsey, requesting assistance from the Department of Justice’s Office of Community Oriented Policing in response to an increase of officer-involved shootings in Philadelphia. The assessment prescribed ninety-one recommendations to enhance and improve the policies and procedures of PPD with respect to use of force, with the goal of implementing industry best practices. From this Department of Justice assessment of PPD, the general position of the Department of Justice appears to be that neck restraints should not be used

368. Civil Rights Division, supra note 362.
371. Id.
373. Id.
374. Id.
in any situation other than where deadly force would reasonably be used to protect against serious injury or death of the officer or another person.\textsuperscript{375}

With the Department of Justice’s ability to investigate systematic excessive use of force by law enforcement, and either bring civil suit under 42 U.S.C. § 14141 or negotiate a resolution such as an injunction or “consent decree,”\textsuperscript{376} there is a discernable best practice that has developed with regard to neck restraints and how they should be addressed in police policy. The language of Department of Justice consent decrees regarding neck restraints defines,

neck hold[s] [to] mean[] one of the following types of holds: (1) arm-bar control hold, a hold that inhibits breathing by compression of the airway in the neck; (2) carotid restraint hold, a hold that inhibits blood flow by compression of the blood vessels in the neck; (3) a lateral vascular neck constraint; or (4) a hold with a knee or other object to the back of a prone subject’s neck.\textsuperscript{377}

The Department of Justice consent decrees specifically state that “a neck hold shall be considered lethal force.”\textsuperscript{378} The limit to the consent decree is that it only addresses police practice and the use of neck restraints one police department at a time.\textsuperscript{379} Perhaps, in order to provide guidance to law enforcement agencies as a whole, the Department of Justice could issue a general statement of best practices, or general guidelines regarding its stance on law enforcement use of neck restraints and other types of force. The best practice regarding neck restraint use that is gleaned from published consent decrees should be considered and followed by police departments across the nation. The language of these consent decrees should be implemented in all police policies, and police departments should train officers according to this best practices definition of neck restraints and

\textsuperscript{375} See Fachner & Carter, supra note 370, at 69.

\textsuperscript{376} POLICE EXECUTIVE RES. F., supra note 365, at 11.


\textsuperscript{378} City of Albuquerque Settlement Agreement, supra note 377, at 12; City of New Orleans Consent Decree, supra note 377, at 8; see also City of Cleveland Settlement Agreement, supra note 377, at 13 (defining neck holds and stating that “officers will not use neck holds”).

\textsuperscript{379} See POLICE EXECUTIVE RES. F., supra note 365.
their categorization as deadly force. A consistent stance on the use of neck restraints across the nation’s law enforcement agencies would help to deter future tragedies surrounding law enforcement use of neck restraints.

VII. CONCLUSION

This Comment is written to shed light on the prevalence of deaths that have been related to the use of neck restraints by law enforcement, with the hope to help prevent another incident like Eric Garner’s death from occurring. As a matter of public policy, the judiciary, state and federal legislators, the nation’s police departments and the Department of Justice should revisit and reflect upon the tragedy of the death of Eric Garner and the many other people throughout the nation’s history who have been harmed and killed by the use of neck restraints. People have been harmed and killed by neck restraints for decades. Adolph Lyons attempted to stop the use of neck restraints by law enforcement back in 1976 when he began litigating to prohibit the use of neck restraints by law enforcement in Los Angeles. History reflects the need for neck restraint use by law enforcement to be addressed on a national level. By revisiting the Supreme Court’s decision in Tennessee v. Garner with the recent death related to neck restraints of Eric Garner, the same stance against neck restraints should be made as it was against the use of firearms when their use had previously been allowed against unarmed, non-dangerous suspects before Garner was decided. Neck restraints should be categorized as deadly force like the use of firearms.

This Comment is meant to be an encouragement to law-makers to continue to push for legislation that classifies neck restraints as deadly force. It commends police agencies that have restricted the use of neck restraints to deadly force, and it also commends the Department of Justice for pushing to stop the systematic use of all types of neck restraints absent the need to use deadly force. Lastly, this Comment is written in support of the judiciary to continue to find the use of neck restraints absent the threat

380. See supra note 377–78.
of serious bodily injury or death an excessive, unconstitutional use of force by law enforcement.

Anna Swanson*