

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

I.	INTRODUCTION.....	402
II.	SUPREME COURT JURISPRUDENCE: USE OF FORCE UNDER THE FOURTH AMENDMENT.....	405
	A. <i>Use of Force: Fourth Amendment Reasonableness Standard</i>	405
	B. <i>Deadly Force Under Tennessee v. Garner</i>	406
III.	“I CAN’T BREATHE:” WHAT A CHOKEHOLD IS AND WHY IT IS DEADLY	408
	A. <i>Medical Risk of Serious Bodily Injury or Death</i>	409
	B. <i>Strangulation, No Matter the Context, Is Capable of Causing Death</i>	412
IV.	RESPONSES TO POLICE USE OF CHOKEHOLDS	413
	A. <i>Judicial Response: Reasonableness and Chokeholds</i>	413
	1. <i>Supreme Court Limitation on Injunctive Relief in City of Los Angeles v. Lyons</i>	414
	a. <i>Lyons Majority</i>	415
	b. <i>Lyons Dissent</i>	416
	c. <i>Injunctive Relief Denied: Deaths from Chokeholds After Lyons</i>	418
	2. <i>Post-Lyons: Decisions Holding Chokeholds to Be Reasonable</i>	419
	3. <i>Post-Lyons: Decisions Holding Chokeholds to Be Unreasonable</i>	422
	B. <i>Legislative Response: Ban or Limit Chokehold Use</i>	426
	1. <i>Legislation Restricting Chokeholds to the Use of Deadly Force</i>	427
	2. <i>Legislative Limitations on Certain Types of Neck Restraints</i>	428
	3. <i>Legislation Placing a Total Ban on Use of Chokeholds</i> ...	428
	C. <i>Departmental Response: Police Policy from Department to Department</i>	430
	1. <i>Publically Unavailable Police Use of Force Policy</i>	431
	2. <i>Use of Force Policies That Are Disclosed</i>	432
	a. <i>Sample of Department Policy Not Mentioning Chokehold Use</i>	432
	b. <i>Sample of Department Policy Prohibiting or Limiting Chokehold Use</i>	433

	c. Sample of Department Policy Allowing Chokehold Use	435
V.	LIMITATIONS OF EFFECTIVENESS OF CURRENT RESPONSES TO POLICE USE OF CHOKEHOLDS	438
	A. <i>Limitations of the Departmental Response</i>	438
	B. <i>Limitations of the Legislative Response</i>	441
	C. <i>Limitations of the Judicial Response</i>	441
VI.	PROPOSED ACTION	442
VII.	CONCLUSION	447

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

1. *Law Enforcement Code of Ethics (1989)*, INT’L ASS’N CHIEFS POLICE (Oct. 17, 1989), <http://ethics.iit.edu/ecodes/node/3353>.

2. See Ben Zimmer, *The Linguistic Power of the Protest Phrase ‘I Can’t Breathe’*, WIRED (Dec. 15, 2014, 8:19 AM), <http://www.wired.com/2014/12/ben-zimmer-on-i-cant-breathe>.

3. *‘I Can’t Breathe’: Eric Garner Put in Chokehold by NYPD Officer – Video*, GUARDIAN (Dec. 4, 2014, 2:46 PM), <http://www.theguardian.com/us-news/video/2014/dec/04/i-cant-breathe-eric-garner-chokehold-death-video>.

4. “Am I Next?” became a phrase used by people in protest of police use of deadly force in America beginning in 2014 with the deaths of Michael Brown and Eric Garner. See Jeremy Levine & Nicholas Weissman, *‘Am I Next?’: Ferguson’s Protests Through the Eyes of a Teenager*, BROOKLYN FILMMAKERS COLLECTIVE, <http://brooklynfilmmakerscollective.com/our-work/am-i-next-ferguson-s-protests-through-the-eyes-of-a-teenager> (last visited May 5, 2016).

5. J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn’t Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES, Dec. 3, 2014, <http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html>.

police officers and forty-three-year-old Eric Garner was captured on video and seen all around the world.⁶ 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.⁷ Without video, there may exist many differing versions of the incident.⁸ 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.⁹ 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.¹⁰ The incident captured on video of Eric Garner showed officers and Mr. Garner verbally arguing about whether he was selling untaxed cigarettes.¹¹ Mr. Garner told the five police officers surrounding him that he had done nothing, to leave him alone, and to not touch him.¹² Though Eric Garner was verbally resistant, he was not physically combative.¹³ Nevertheless, Officer Daniel Pantaleo wrapped his arms around Mr. Garner's neck from behind, using a chokehold.¹⁴ Eric Garner fell to the ground while the officer continued to choke Mr. Garner until his body went limp.¹⁵

While Eric Garner was being held on the ground, he stated repeatedly: "I can't breathe, I can't breathe."¹⁶ He lost consciousness, and subsequently died with his face on the pavement.¹⁷ The city's medical examiner ruled Eric Garner's death a "homicide,"¹⁸ resulting from the chokehold.¹⁹ 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.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”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?²² These are questions of “vital concern to those interested in effective and humane policing.”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.

POST (Dec. 4, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/12/04/peter-king-blames-asthma-and-obesity-for-eric-garners-death-this-is-a-problem-for-the-gop>.

20. *Tennessee v. Garner*, 471 U.S. 1, 11–12 (1985).

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.

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).

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.³⁵ Whether an officer had evil or good intentions is not relevant as part of the reasonableness inquiry.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."³⁷ The use of a particular type of force in a specific situation is analyzed circumstantially to determine whether or not it was reasonable.³⁸ When force is justified, an officer need not stop using the force deemed necessary until the threat is no longer present.³⁹ The type and amount of force used must be appropriately reasonable under the circumstances.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.⁴¹ Deadly force is defined as "force which a reasonable person would consider likely to cause death or serious bodily harm."⁴² In *Tennessee v. Garner*, the Supreme Court analyzed an officer's use of a firearm to shoot an unarmed suspect.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.⁴⁴

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

35. *Id.*

36. *Id.*

37. *Id.* at 396.

38. *Tennessee v. Garner*, 471 U.S. 1, 8 (1985).

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).

40. *See id.* at 2020.

41. *Garner*, 471 U.S. at 11.

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).

43. *See Garner*, 471 U.S. at 3.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

and as he stepped forward, Edward Garner began to climb the fence.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.⁴⁹ Edward Garner had stolen ten dollars and a purse from the home.⁵⁰ After being shot by the officer, he was taken to the hospital and pronounced dead.⁵¹ At the time, both Tennessee statute and police department policy permitted this use of deadly force.⁵²

When the Court decided *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.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.*”⁵⁴ Officers at this time were allowed to use deadly force against apparently unarmed and fleeing felony suspects.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.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.⁵⁷

The Court in *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.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.*”⁵⁹ Additionally, deadly force also deprives society of the judicial determination of guilt or innocence.⁶⁰ The intrusion caused by deadly force was balanced against the government’s interest in effective law enforcement.⁶¹ The Court was “*not convinced that the use of deadly*

48. *Id.* at 4.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* (citing TENN. CODE ANN. § 40-4-108 (1982)).

53. *Id.* (emphasis added).

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.

55. *See id.* at 12–13.

56. *Id.* at 5.

57. *Id.* at 11.

58. *Id.* at 7.

59. *Id.*

60. *Id.* at 9.

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*”).

force [was] a sufficiently productive means of accomplishing [the goals of effective law enforcement] to justify the killing of nonviolent suspects.”⁶²

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.

66. See Complaint at ¶ 2, *Boone v. City of Las Vegas*, 2:10-cv-00759-JCM-PAL (D. Nev. June 30, 2011), available at <http://www.aele.org/law/Boone-v-LVMPDcomplaint.pdf>.

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).

68. See *City of Los Angeles v. Lyons (Lyons II)*, 461 U.S. 95, 116 (1983); Donald T. Reay, *Death in Custody*, 18 *CLINICS LABORATORY MED.* 1, 9 (1988).

69. *Lyons II*, 461 U.S. at 116.

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.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,⁷¹ and even deaths.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.”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.⁷⁴ The respiratory neck restraint, which puts pressure on the

70. *Id.* at 117.

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).

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).

73. Fyfe, *supra* note 23, at 61.

74. Grand Junction Police Dep’t, *LVNR Staff Study: An Appropriate Force Option?*, NAT’L L. ENFORCEMENT TRAINING CTR. 1 (Sept. 29, 2010), <http://www.nletc.com/files/GJPD--LVNR-Staff-Study.pdf>.

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

Vascular neck restraints cause unconsciousness not by restricting the flow of oxygen, but by restricting blood flow to the brain.⁷⁹ The vascular neck restraint puts pressure on the carotid arteries on the sides of the neck.⁸⁰ Unconsciousness can occur in less than 15 seconds.⁸¹ However, unlike chokeholds, vascular neck restraints typically result in a relatively quick recovery to consciousness.⁸² Thus, advocates of neck restraints emphasize the safety of *properly applied* vascular neck restraints.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.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.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.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.⁸⁷ Medical research confirms that when officers employ neck restraints to subdue suspects, death can ensue without the officer intending to cause

75. *Id.* at 3.

76. *City of Los Angeles v. Lyons (Lyons II)*, 461 U.S. 95, 117 n.7 (1983).

77. Donald T. Reay & John W. Eisele, *Death from Law Enforcement Neck Holds*, 3 AM. J. FORENSIC MED. & PATHOLOGY 255, 256 (1982).

78. NAT'L L. ENFORCEMENT TRAINING CTR., *supra* note 74, at 3.

79. *Id.*

80. *Id.*

81. *Id.*; see also AELE Law Enforcement Legal Ctr., *Civil Liability for the Use of Neck Restraints* (pt. 1), 2013 (12) AELE MO. L.J. 101, 101 (Dec. 2013), <http://www.aele.org/law/2013all12/2013-12MLJ101.pdf> [hereinafter *AELE Civil Liability Pt. 1*].

82. *AELE Civil Liability Pt. 1*, *supra* note 81, at 101–02.

83. *Id.* at 101 (emphasis added).

84. Reay, *supra* note 68, at 9–10.

85. *Id.* at 10.

86. *City of Los Angeles v. Lyons (Lyons II)*, 461 U.S. 95, 117 n.7 (1983).

87. *Id.*

death.⁸⁸ Indeed, there are documented cases where law enforcement officers used vascular neck restraints, which inadvertently turned into a respiratory chokehold and caused death.⁸⁹ Thus, *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.”⁹⁰ Conditions that increase the risk of sudden death include intoxication from alcohol and drugs, physical exhaustion, and obesity.⁹¹ Pre-existing diseases, such as cardiovascular or respiratory disease, also increase the likelihood of death even when neck restraints are *properly applied*.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.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.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.⁹⁵

Pressure upon the neck is potentially lethal and should only be used when there is no other alternative.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 *properly applied* or are misused, they can turn into respiratory chokeholds and restrict the airway.⁹⁷ Therefore, all types of neck restraints should be considered deadly force and used only in circumstances that require the use of deadly force.

88. DR. DEAN HAWLEY, DEATH BY STRANGULATION 1, *available at* <http://www.markwynn.com/wp-content/uploads/death-by-strangulation.pdf> (last visited Feb. 12, 2016).

89. Reay & Eisele, *supra* note 77, at 255.

90. Reay, *supra* note 68, at 19.

91. *Id.*

92. Reay & Eisele, *supra* note 77, at 256.

93. NAT'L L. ENFORCEMENT TRAINING CTR., *supra* note 74, at 12.

94. AELE Law Enforcement Legal Ctr., *Civil Liability for the Use of Neck Restraints* (pt. 2), 2014 (1) AELE MO. L.J. 101, 106 (Jan. 2014), <http://www.aele.org/law/2014all01/2014-01MLJ101.pdf> [hereinafter *AELE Civil Liability Pt. 2*].

95. Reay & Eisele, *supra* note 77, at 256.

96. *Id.*

97. *AELE Civil Liability Pt. 1*, *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.⁹⁸ 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.⁹⁹ 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.¹⁰⁰ 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.¹⁰¹

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.¹⁰² 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.¹⁰³ 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.”¹⁰⁴ 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.”¹⁰⁵

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

98. See *Criminal Strangulation/Impeding Breathing*, NAT’L DISTRICT ATT’YS ASS’N 1 (Nov. 2014), http://www.ndaa.org/pdf/strangulation_statutory_compilation_11_7_2014.pdf.

99. See *id.*; see also, e.g., H.B. 911, 2013–14 Gen. Assemb., Reg. Sess. (Ga. 2014).

100. Rory I. Lancman & Daniel Pearlstein, *Clamping Down on Chokeholds*, 17 N.Y. L.J. 252 (2014), available at LexisNexis.

101. *Id.*

102. NAT’L DISTRICT ATT’YS ASS’N, *supra* note 98, at 1.

103. Georgia is the thirty-eighth state to adopt legislation making strangulation a felony in the context of domestic violence. Ga. H.B. 911 (passing unanimously in the Georgia house and senate in 2014.).

104. *Id.* (emphasis added).

105. S. 5953-60, 2007 Reg. Sess., at 2 (Wash. 2007) (describing strangulation as occurring when the arteries in the neck are compressed, stopping blood flow to the brain and causing the victim to lose consciousness).

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.¹⁰⁶ The same risk concerns reflected in assault legislation exist in the area of policing.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.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.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.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. The

106. Reay & Eisele, *supra* note 77, at 255.

107. Wash. S. 5953-60, at 2.

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).

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.

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*.¹¹¹

I. *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.¹¹²

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.¹¹³ 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.¹¹⁴ The chokehold was applied to Mr. Lyons until he blacked out.¹¹⁵ 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.¹¹⁶ After Mr. Lyons regained consciousness, police issued him a traffic citation and he was released.¹¹⁷

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."¹¹⁸ 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.¹¹⁹ 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

111. See *City of Los Angeles v. Lyons (Lyons II)*, 461 U.S. 95, 105 (1983).

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.*

119. *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).

and to warrant the issuance of an injunction.”¹²⁰ 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.¹²¹

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.¹²⁹ 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.¹³⁰ 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.¹³¹ 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.¹³² But, that “this is not the role of a federal court, absent far more justification than Lyons has proffered in this case.”¹³³

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.”¹³⁴ 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.¹³⁵

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

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.¹³⁶ 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.¹³⁷ 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.¹³⁸ 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.¹³⁹ 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.¹⁴⁰ 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.”¹⁴¹ 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.”¹⁴²

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.¹⁴³ 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.¹⁴⁴ 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.¹⁴⁵

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*.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,”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.”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.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 McQuarter was choked and killed by officers in Atlanta, Georgia.¹⁵⁰ Officers brought a combative Bennie McQuarter under control initially by using a chokehold until he could be handcuffed.¹⁵¹ One officer continued to use the chokehold even after Mr. McQuarter was handcuffed.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. McQuarter was effectively restrained.¹⁵³ The court in *McQuarter* noted that the officers had been trained in the chokehold, “a defensive tactic capable of causing death or serious bodily injury.”¹⁵⁴ In addition to damages, the plaintiff in *McQuarter* 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.¹⁵⁵ Once again a federal district court in the 1980’s qualified the use of a chokehold as deadly force,

146. *Id.* at 99–100.

147. *See id.* at 99.

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 . . .”).

149. *Lyons II*, 461 U.S. at 100.

150. *McQuarter v. City of Atlanta, Ga.*, 572 F. Supp. 1401, 1406–07 (N.D. Ga. 1983).

151. *Id.* at 1414.

152. *Id.*

153. *Id.*

154. *Id.* at 1418.

155. *Id.* at 1423.

as the district court had done in *Lyons*, but the court was powerless to enjoin and stop the use.¹⁵⁶

In 1992, Randolph Bennett died after he was detained by a California Highway Patrol (CHP) officer using a carotid neck restraint.¹⁵⁷ Randolph Bennett's son, Scott Nava, filed an action in the federal district court seeking damages and an injunction.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.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.¹⁶⁰

The *Lyons* decision has done harm to the courts' ability to stop or deter the use of neck restraints by law enforcement.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.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. *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.¹⁶³ Courts have looked at the

156. *Id.* at 1415.

157. *Nava v. City of Dublin*, 121 F.3d 453, 454 (9th Cir. 1997), *overruled on other grounds by* *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999).

158. *Id.*

159. *Id.* at 460.

160. *Id.* at 454, 458.

161. *See supra* notes 149–59 and accompanying text; *see also* *City of Los Angeles v. Lyons (Lyons II)*, 461 U.S. 95, 113 (noting that without sufficient justification, only state courts, not federal courts, are permitted to oversee the conduct of law enforcement authorities through the use of injunctions).

162. *Id.* at 113 (Marshall, J., dissenting).

163. *Gassner v. City of Garland, Tex.*, 864 F.2d 394, 400 (5th Cir. 1989), *abrogated on other grounds by* *Devenpeck v. Alford*, 543 U.S. 146 (2004); *see also* *Burdine v. Sandusky Cnty., Ohio*,

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,¹⁶⁴ 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.¹⁶⁵ In this case, an officer used a chokehold to put a suspect under arrest for driving with a revoked license and speeding.¹⁶⁶ 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.¹⁶⁷ The court held that the use of the chokehold under these circumstances was reasonable and necessary, and the suspect only suffered minor injury.¹⁶⁸ 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.¹⁶⁹

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

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).

165. *Crutcher v. Athens Police Dep't*, No. CV-10-S-1176-NE, 2014 WL 5521944, at *5 (N.D. Ala. Oct. 31, 2014).

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.”¹⁷⁰ 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.¹⁷¹ Thompson crashed his car during the chase, exited his vehicle and began trying to fist fight two officers while they attempted to restrain him.¹⁷² 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.¹⁷³ Thompson continued to struggle with officers even after he was handcuffed.¹⁷⁴ It was then that Thompson complained of having trouble breathing.¹⁷⁵ 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.¹⁷⁶ Thompson had blood blocking his airway and was pronounced dead upon his arrival to the hospital.¹⁷⁷ The Seventh Circuit Court affirmed the decision of the district court in *Thompson*, finding the use of the chokehold was reasonable due to the facts that the suspect attempted to evade arrest, led officers on a high speed chase, crashed his car, then actively resisted arrest.¹⁷⁸

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.¹⁷⁹ 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.¹⁸⁰ 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.¹⁸¹ 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).

180. *Williams v. Miami-Dade Cnty. (Williams II)*, 516 F. App’x 899, 900 (11th Cir. 2013) (*per curiam*).

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]”¹⁸² and granted summary judgment in favor of the officers.¹⁸³

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.¹⁸⁴ 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.¹⁹¹ Mullis wanted officers to go to Thornton's home, return his keys and to get Mullis's mattress from Thornton's home.¹⁹² 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.¹⁹³ 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.¹⁹⁴ The court held the officers were not justified in using any force upon Thornton, and thus, the use of the chokehold was unreasonable.¹⁹⁵

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.¹⁹⁶ Officers began using a chokehold against Williams when they were searching his mouth for contraband, after patting him down and searching his car.¹⁹⁷ 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.¹⁹⁸ 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.¹⁹⁹ 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."²⁰⁰

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.²⁰¹ In *Griffith*, Arthur Partee died during his arrest when officers used a neck restraint to detain him.²⁰² Partee was sitting on his couch when officer's informed him that he had a traffic warrant.²⁰³

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.*

196. *Williams v. Bramer*, 180 F.3d 699, 704 (5th Cir. 1999).

197. *Id.* at 701.

198. *Id.* at 702.

199. *Id.* at 704.

200. *See, e.g., Callaway v. City of Austin*, No. A-15-CV-00103-SS, 2015 WL 4323174, at *13 (W.D. Tex. July 14, 2015).

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.²⁰⁴ The officers grabbed and struggled with Partee, pulled him to the ground, and placed him in a neck restraint.²⁰⁵ 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.²⁰⁶ 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."²⁰⁷

Additionally, the Ninth Circuit Court of Appeals has written a series of scathing opinions on the use of neck restraints by law enforcement.²⁰⁸ 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."²⁰⁹ 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.²¹⁰ 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.²¹¹ Officers had pressed weight upon Drummond's neck while ignoring him repeatedly telling them that he could not breathe.²¹²

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.²¹³ 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."²¹⁴ 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.²¹⁵

The court further noted that Drummond had mental illness, which must be a factor in determining the reasonableness of the force used.²¹⁶ 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.”²¹⁷ Officers squeezed the breath from Drummond while he was on the ground, handcuffed, pleading for air.²¹⁸ The court found that the neck restraint used under these circumstances was a degree of force greater than reasonable, and thus an unconstitutional.²¹⁹ 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.”²²⁰

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.²²¹ 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.²²² Barnard sustained five collapsed cervical vertebrae after an officer used a chokehold to detain him.²²³ 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.²²⁴ 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.²²⁵ 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.²²⁶ 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.²²⁷ The mistaken belief of the officer, whether with good or evil intention, is not relevant in the objective reasonableness analysis of the force used.²²⁸

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.²²⁹ 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.²³⁰ 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*.²³¹

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."²³² 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.²³³ State legislative responses can be categorized into three

226. *Id.* at 1076. The Ninth Circuit similarly held in *Werner v. City of Poulso* 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 Poulso*, 548 F. App'x 381, 382 (9th Cir. 2013).

227. *Barnard*, 721 F.3d at 1076.

228. *Graham v. Connor*, 490 U.S. 386, 397 (1989).

229. See discussion *supra* Part I (discussing Eric Garner's death in 2014).

230. See *City of Los Angeles v. Lyons (Lyons II)*, 461 U.S. 95, 97–98 (1983).

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.”²³⁴ 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.”²³⁵ 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.”²³⁶ 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 officer²³⁷

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.²³⁸ 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.²³⁹

Similarly, in New Jersey, State Assemblyman Charles Mainor proposed a bill that would classify chokeholds and carotid holds as deadly force.²⁴⁰ Mr. Mainor served as a New Jersey police detective for twenty-five

234. D.C. CODE § 5-125.01.

235. *Id.*

236. *Id.*

237. *Id.* § 5-125.03(a).

238. H.B. 15-1291, 70th Gen. Assemb., 1st Reg. Sess. (Colo. 2015).

239. H.B. 1394, 99th Gen. Assemb., Reg. Sess. (Ill. 2015); S.B. 0065, 99th Gen. Assemb., Reg. Sess. (Ill. 2015).

240. Assemb. No. 4081, 216th Leg. (N.J. 2015).

years.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.²⁴² His proposed bill classified pressure on the throat, windpipe, or carotid artery which prevents the ability to breath or interferes with the flow of blood to the brain as deadly force.²⁴³

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

Tennessee enacted legislation that classifies and limits certain types of neck restraints.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.”²⁴⁵ This legislation makes respiratory neck restraints a force of last resort but does not categorize the force as lethal or deadly.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.”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.²⁴⁸ Nevada allows for the use of chokeholds only when the “agency employing the peace officer authorizes the use of the choke hold,”²⁴⁹ and when “the peace officer has successfully completed training in the proper use of the choke hold and holds [a] current certification.”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.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

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>.

242. See *id.*

243. N.J. Assemb. No. 4081.

244. TENN. CODE ANN. § 38-3-121 (2010).

245. *Id.*

246. See *id.*

247. *Id.*

248. NEV. REV. STAT. ANN. § 289.810.1(a)–(b) (LexisNexis 2008).

249. *Id.* § 289.810.1(a).

250. *Id.* § 289.810.1(b).

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

252. S.B. 185, 28th Leg., Reg. Sess. (Haw. 2015).

253. *Id.*

254. *Id.*

255. *Id.*

256. B. A10170, 2013–14 Gen. Assemb. (N.Y. 2014).

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).

260. Excessive Use of Force Prevention Act of 2015, H.R. 2052, 114th Cong. (2015).

U.S.C. § 242,²⁶¹ to penalize “the application of any pressure to the throat or windpipe which may prevent or hinder breathing or reduce intake of air.”²⁶²

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.²⁶³ 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.²⁶⁴ 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.

261. This federal statute criminalizes the willful deprivation of rights of persons by those acting “under the color of law.” 18 U.S.C. § 242 (2012).

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.²⁶⁵ Exceptions to public requests under freedom of information requests would likely exempt law enforcement from having to disclose their use of force policy.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.²⁶⁷ For example, under the Texas Public Information Act²⁶⁸ 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."²⁶⁹ Specifically, Texas law enforcement agencies are not required to disclose detailed guidelines of their use of force policy.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."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.

265. See generally *Memorandum for the Heads of Executive Departments and Agencies: Transparency and Open Government*, 74 Fed. Reg. 4685 (Jan. 21, 2009), available at <http://www.gpo.gov/fdsys/pkg/FR-2009-01-26/pdf/E9-1777.pdf>. This memorandum issued by President Barack Obama focused on encouraging government agencies to commit to publishing information on its own initiative, rather than on government responses to public information requests. *Id.*

266. See *Memorandum for Heads of Executive Departments and Agencies*, OFF. ATT'Y GEN. 1 (Mar. 19, 2009), <http://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf> ("The [Freedom of Information] Act provides exemptions to protect, for example, national security, personal privacy, privileged records, and law enforcement interests.").

267. *The Freedom of Information Act: A User's Guide*, FREEDOM INFO. CLEARINGHOUSE (Nov. 2005), <http://www.citizen.org/documents/FOIABrochureWEB.pdf> (referring to 5 U.S.C. § 552 (West 2012) as "the Freedom of Information Act").

268. TEX. GOV'T CODE ANN. § 552.001 (West 2012).

269. *Id.* § 552.108.

270. *Public Information Handbook 2014*, OFF. ATT'Y GEN. TEX. 98 (2014), https://www.texasattorneygeneral.gov/files/og/publicinfo_hb.pdf.

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

272. *See infra* Part IV.C.2.c.

273. Bureau of Justice Statistics, *Local Police Departments, 2007*, U.S. DEP’T JUST. 38 (Dec. 2010), <http://www.bjs.gov/content/pub/pdf/lpd07.pdf>.

274. *Austin Police Department Policy Manual*, AUSTIN POLICE DEP’T § 206.6(b), at 61 (June 1, 2013), http://austintexas.gov/sites/default/files/files/Police/APD_Policy_2013-2_Effective_6-1-2013.pdf.

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 publically 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

http://www.personalprotectionsystems.ca/books/articles/neck_restraints_as_a_use_of.pdf (last visited Feb. 12, 2016).

277. Javier Panzar, *Police Wrestle with Definition of Chokehold*, L.A. TIMES (Dec. 9, 2014, 8:15 PM), <http://www.latimes.com/nation/la-na-chokehold-20141210-story.html>; Kaveh Waddell, *Why Many Large Police Departments Tolerate Their Officers Using Neck Holds*, NAT’L J. (Dec. 10, 2014), <http://www.nationaljournal.com/congress/2014/12/10/why-many-large-police-departments-tolerate-their-officers-using-neck-holds>.

278. See *2014 Florida Law Enforcement Handbook: Miami-Dade County Edition*, MIAMI-DADE POLICE DEP’T (2014), <http://www.miamidade.gov/police/library/mdpd-handbook.pdf>.

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.

The Madison Police Department in Wisconsin states that “blocking or restricting the carotid neck arteries creates a substantial likelihood of death or great bodily harm and is therefore considered deadly force.” *Madison Police Policy Manual*, MADISON POLICE DEP’T § 6-100, at 133, <http://mavweb.mnsu.edu/robbim1/madison.pdf> (last visited Feb. 12, 2016). The Peoria Police Department, near Phoenix, Arizona, limits use of “carotid neck restraint or other types of neck restraints” to situations involving deadly force. *Policy and Procedure Manual: Policy 1.03*, PEORIA POLICE DEP’T pt. V, at 4, http://www.peoriaaz.gov/PoliceDepartment/administration/docs/policy_manual/1.03_UseForce_GeneralPolicyReporting.pdf (last updated Mar. 12, 2007).

280. *Cincinnati Police Department Procedure Manual*, CINCINNATI POLICE DEP’T § 12.545, at 9 (May 14, 2015), <http://www.cincinnati-oh.gov/police/assets/File/Procedures/12545.pdf>.

to situations rising to a level of an “[a]ggravated [a]ctive [a]ggression—[d]eadly force encounter.”²⁸¹ 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.²⁸² 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.”²⁸³

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.”²⁸⁴ The New Orleans Police Department (NOPD) use of force policy restricts the use of all types of neck restraints, qualifying them as lethal force.²⁸⁵ 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.²⁸⁶ The policy declares that, “[a] neck hold shall be considered lethal force.”²⁸⁷

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.”²⁸⁸

281. *Denver Police Department Operations Manual*, DENVER POLICE DEP’T § 2-15, at 105–15, <http://www.denvergov.org/portals/720/documents/operationsmanual/105.pdf>.

282. *Id.*

283. *Id.*

284. *Seattle Police Department Manual*, SEATTLE POLICE DEP’T § 8.300-POL-10 (Sept. 1, 2015), <http://www.seattle.gov/police-manual/title-8---use-of-force/8300---use-of-force-tools#Neck%20and%20Carotid%20Restraints>.

285. *Policy Manual*, NEW ORLEANS POLICE DEP’T § 300.1.1, at 97 (Sept. 15, 2013), <http://nola.gov/nopd/publications/documents/new-orleans-police-department-policy-manual-2014-1>.

286. *Id.*

287. *Id.*

288. *General Order GO-RAR-901.07: Use of Force*, D.C. METROPOLITAN POLICE 8 (Oct. 7, 2002), https://go.mpdconline.com/GO/GO_901_07.pdf.

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

289. *General Order G03-02-02: Force Options*, CHI. POLICE DEP’T 4 (Mar. 11, 2015), <http://directives.chicagopolice.org/lt2015/data/a7a57be2-128ff3f0-ae912-9001-1d970b87782d543f.html>.

290. *Id.*

291. *Id.*

292. *General Order GO-005-14: Use of Force*, LAS VEGAS METROPOLITAN POLICE DEP’T 4 (Jan. 29, 2014), http://www.lvmpd.com/Portals/0/OIO/GO-005-14_Use_of_Force.pdf.

293. *Id.* at 23.

294. *Id.*

295. *Id.*

296. *Policy No. 1.04: Use of Force*, HONOLULU POLICE DEP’T 6 (Apr. 24, 2015), <http://www.honolulu.police.org/information/pdfs/UseofForce-05-01-2015-08-05-48.pdf>.

297. *Id.*

allowed to use vascular neck restraints after completing department training.²⁹⁸ 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.²⁹⁹ 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.³⁰⁰

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*,³⁰¹ the Los Angeles County Sheriff's Department still allows the use of carotid neck restraints.³⁰² 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.³⁰³

Notwithstanding the Ninth Circuit Court's expressed disdain regarding the use of neck restraints³⁰⁴ 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.³⁰⁵ 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.³⁰⁶ 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.³⁰⁷

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.

302. *Use of Force Policy*, L.A. COUNTY SHERIFF'S DEP'T § 3-10, at 17, 50, 61, <http://shq.lasnews.net/content/uoa/EPC/force-policy.pdf> (last visited Feb. 12, 2016).

303. *Id.* at 17.

304. *See supra* notes 208-26 and accompanying text.

305. *Policy No. 1.04 - Admin: Procedural Change*, SAN DIEGO POLICE DEP'T 8, <http://www.sandiego.gov/police/pdf/forattach.pdf> (last visited Feb. 12, 2016).

306. *Id.*

307. *See supra* note 209, 214 and accompanying text.

carotid artery is permissible . . . when lesser types of restraint would be ineffective.”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.”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.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.”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.”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.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.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.

308. *General Order 5.01: Use of Force*, S.F. POLICE DEP’T 4 (Oct. 4, 1995), <http://sf-police.org/Modules/ShowDocument.aspx?documentid=14790>.

309. *Id.* at 6.

310. *Id.* at 5.

311. *Id.* at 6.

312. *Id.*

313. *Id.*

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.³¹⁵ Ultimately, all types of neck restraints should receive formal classification as a use of deadly force.³¹⁶ 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,”³¹⁷ only to be used if the officer or another person’s life is in danger.³¹⁸ In 1993, NYPD banned the use of chokeholds entirely following the in-custody death of Frederico Pereira.³¹⁹ In 1993, former police

315. See *supra* Part III.

316. Fyfe, *supra* note 23, at 67.

317. *Interim Order No. 29*, N.Y.C. POLICE DEP’T (Apr. 23, 1985), https://www.prisonlegalnews.org/media/publications/nyc_police_dept_taser_interim_order_2008.pdf.

318. Lancman & Pearlstein, *supra* note 100, at 252 (discussing the April 23, 1985 NYPD Interim Order No. 29 issued by police commissioner Benjamin Ward).

319. In 1991, Frederico Pereira was choked by a New York police officer while being detained as a suspect in a car theft and died in police custody. Ian Fisher, *Kelly Bans Choke Holds by Officers*, N.Y. TIMES, Nov. 24, 1993, <http://www.nytimes.com/1993/11/24/nyregion/kelly-bans-choke-holds-by-officers.html>. One of the officers in the arrest of Pereira was tried for criminally negligent homicide, but was acquitted in 1992. *Id.*

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, "[b]asically, stay the hell away from the neck."³²⁰ 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.³²¹ Anthony Baez was choked to death while his father pleaded with the officer to stop choking his son.³²² A district court trial jury convicted Livoti of manslaughter and several civil rights violations.³²³ 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.³²⁴ Livoti "not only disregarded a known risk, he also flouted direct orders and department policy."³²⁵ 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.³²⁶

Notwithstanding NYPD policy, Eric Garner was killed by a chokehold, however the punishment for the officer was much less than what resulted in *Livoti*.³²⁷ 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.³²⁸ 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."³²⁹ 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.*

327. J. David Goodman, *Eric Garner Case Is Settled by New York City for \$5.9 Million*, N.Y. TIMES, July 13, 2015, <http://www.nytimes.com/2015/07/14/nyregion/eric-garner-case-is-settled-by-new-york-city-for-5-9-million.html>.

328. The officer that used a chokehold on Eric Garner is still employed by NYPD working a desk job. Margaret Hartmann, *Officer Who Put Eric Garner in Fatal Choke Hold Would Like His Old Job Back*, NYMAG.COM (July 13, 2015, 1:26 AM), <http://nymag.com/daily/intelligencer/2015/07/officer-in-eric-garner-case-wants-old-job-back.html>.

329. *A Mutated Rule: Lack of Enforcement in the Face of Persistent Chokehold Complaints in New York City*, N.Y.C. CIVILIAN COMPLAINT REV. BOARD 59 (2014), http://www.nyc.gov/html/ccrb/downloads/pdf/Chokehold%20Study_20141007.pdf ("The Police Commissioner retains the authority under all circumstances to decide the level and degree of discipline.").

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.”³³⁰ 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.³³¹ 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.³³²

The use of department policy is generally limited to internal police department punishment and job evaluation.³³³ 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.³³⁴ “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.”³³⁵ 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.³³⁶ In *Whren v. United States*, the Supreme Court addressed the use of police policy manuals in evaluating reasonableness under the Fourth Amendment.³³⁷ 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.³³⁸ Courts could consider police policy in their analysis of a use of force, but it is not dispositive on the issue of reasonableness.³³⁹

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.

336. *See* *United States v. Livoti*, 196 F.3d 322, 329 (2d Cir. 1999).

337. *Whren v. United States*, 517 U.S. 806, 815 (1996).

338. *Id.*

339. *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1059 (9th Cir. 2003) (“[T]raining materials are not dispositive [I]t 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.³⁴⁰ 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.³⁴¹ 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.³⁴²

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.³⁴³ 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.³⁴⁴ 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."³⁴⁵

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

340. See *supra* Part IV.B.

341. Every state constitution empowers the executive branch to veto bills passed by the legislature. *Separation of Powers—Executive Veto Powers*, NAT'L CONF. STATE LEGISLATURES, <http://www.ncsl.org/research/about-state-legislatures/separation-of-powers-executive-veto-powers.aspx> (last visited Feb. 12, 2016).

342. J. David Goodman, *Mayor de Blasio Vows to Veto Chokehold Bill*, N.Y. TIMES, Jan. 13, 2015, <http://www.nytimes.com/2015/01/14/nyregion/mayor-de-blasio-vows-to-veto-chokehold-bill.html>; see *supra* notes 256–59 and accompanying text regarding the proposed New York chokehold bill.

343. See *supra* Part IV.A.1.b.

344. *City of Los Angeles v. Lyons (Lyons II)*, 461 U.S. 95, 137 (1983).

345. *Id.*

Los Angeles police and his family brought suit for his chokehold death.³⁴⁶ After a long lawsuit, Mincey's father received \$450,000 and an additional \$1.1 million went to four other relatives.³⁴⁷ 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.³⁴⁸ The Las Vegas Metro Police Department paid \$1 million to the surviving family of Dustin Boone.³⁴⁹ The family members of Anthony Baez were awarded \$2.94 million for his chokehold death case in New York.³⁵⁰ 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."³⁵¹ 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.³⁵² 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.³⁵³ 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.

351. *City of Los Angeles v. Lyons (Lyons II)*, 461 U.S. 95, 114 (1983) (Marshall, J., dissenting).

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.³⁵⁴ 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."³⁵⁵ 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.³⁵⁶ 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.³⁵⁷ 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.

355. *Tennessee v. Garner*, 471 U.S. 1, 3 (1985).

356. *Id.* at 11.

357. *See Graham v. Connor*, 490 U.S. 386, 396 (1989).

Third, *City of Los Angeles v. Lyons* should be overturned.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.³⁵⁹ Injunctions against ongoing systematic constitutional violations should be allowed as a remedy in federal and state courts against unconstitutional uses of force.³⁶⁰ *Lyons* is a seemingly impossible barrier to many suits seeking to challenge on-going 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.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.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.”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.”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.”³⁶⁵ Police use of excessive force is one type of conduct covered by this law.³⁶⁶ Only the Department of Justice may file suit

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).

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

360. See *id.* at 137.

361. *Id.* at 113.

362. Civil Rights Division, *Addressing Police Misconduct Laws Enforced by the Department of Justice*, U.S. DEP’T JUST., <http://www.justice.gov/crt/addressing-police-misconduct-laws-enforced-department-justice> (last updated Aug. 6, 2015).

363. 42 U.S.C. § 14141(a) (2012).

364. *Id.* § 14141(b).

365. *Civil Rights Investigations of Local Police: Lessons Learned*, POLICE EXECUTIVE RES. F. 4 (July 2013), http://www.policeforum.org/assets/docs/Critical_Issues_Series/civil%20rights%20investigations%20of%20local%20police%20-%20lessons%20learned%202013.pdf.

366. Civil Rights Division, *supra* note 361.

for violations of the “Police Misconduct Provision.”³⁶⁷ 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.”³⁶⁸

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).³⁶⁹ 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.”³⁷⁰ 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.”³⁷¹ 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.³⁷² 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.³⁷³ 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.³⁷⁴ 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

367. 42 U.S.C. § 14141.

368. Civil Rights Division, *supra* note 362.

369. *Department of Justice Releases Report on Philadelphia Police Department’s Use of Deadly Force*, U.S. DEP’T JUST. (Mar. 23, 2015), <http://www.justice.gov/opa/pr/department-justice-releases-report-philadelphia-police-departments-use-deadly-force>.

370. George Fachner & Steven Carter, *Collaborative Reform Initiative: An Assessment of Deadly Force in the Philadelphia Police Department*, U.S. DEP’T JUST. 69 (2015), <http://ric-zai-inc.com/Publications/cops-w0753-pub.pdf>.

371. *Id.*

372. Mary Brandenberger, *U.S. Department of Justice Releases Report on Philadelphia Police Department’s Use of Deadly Force*, U.S. DEP’T JUST. (Mar. 23, 2015), <http://www.cops.usdoj.gov/Default.asp?Item=2787>.

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.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,"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.³⁷⁷

The Department of Justice consent decrees specifically state that "a neck hold shall be considered lethal force."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.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

375. See Fachner & Carter, *supra* note 370, at 69.

376. POLICE EXECUTIVE RES. F., *supra* note 365, at 11.

377. Settlement Agreement at 101-02, *United States v. City of Cleveland*, No. 1:15-cv-01046 (N.D. Ohio May 26, 2015) [hereinafter *City of Cleveland Settlement Agreement*], available at http://www.justice.gov/sites/default/files/crt/legacy/2015/05/27/cleveland_agreement_5-26-15.pdf; Settlement Agreement at 12, *United States v. City of Albuquerque*, No. 1:14-cv-01025 (D.N.M. Nov. 10, 2014) [hereinafter *City of Albuquerque Settlement Agreement*], available at <http://www.justice.gov/sites/default/files/usao-nm/legacy/2015/01/20/DOJ-ABQ%20Settlement%20Agreement%20EXECUTED.pdf>; Consent Decree Regarding the New Orleans Police Department at 8, *United States v. City of New Orleans*, No. 2:12-cv-01924-SM-JCW (E.D. La. July 24, 2012) [hereinafter *City of New Orleans Consent Decree*], available at <http://www.nola.gov/getattachment/NOPD/About-Us/NOPD-Consent-Decree/NOPD-Consent-Decree-7-24-12.pdf>.

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").

379. See POLICE EXECUTIVE RES. F., *supra* note 365.

their categorization as deadly force.³⁸⁰ 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.³⁸¹ 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.³⁸² 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.

381. *City of Los Angeles v. Lyons (Lyons II)*, 461 U.S. 95, 98 (1983).

382. *Tennessee v. Garner*, 471 U.S. 1, 3 (1985).

of serious bodily injury or death an excessive, unconstitutional use of force by law enforcement.

*Anna Swanson**

* J.D. 2016, South Texas College of Law, summa cum laude; B.A. 2003, University of California, Los Angeles. Licensed attorney, State Bar of Texas. Police Officer, Houston Police Department, licensed in June, 2008. The opinions in this writing do not reflect those of the Houston Police Department but rather they are solely the research, opinions, and conclusions of the author. Thank you to Professor Tobin Sparling, South Texas College of Law, for his valuable input and guidance in developing this Comment. Thank you to my pastor, Dr. Dana Carson, who inspires me to be a voice for disenfranchised people, and to speak truth even when truth may be unpopular. This Comment is written in memory of Eric Garner and others who have died from excessive uses of force.