

Northwestern Pritzker School of Law

Northwestern Pritzker School of Law Scholarly Commons

JCLC Online

Spring 2022

Regulating Police Chokeholds

Trevor George Gardner

Esam Al-Shareffi

Follow this and additional works at: https://scholarlycommons.law.northwestern.edu/jclc_online



Part of the [Criminal Law Commons](#)

Recommended Citation

Trevor George Gardner & Esam Al-Shareffi, Regulating Police Chokeholds, 112 J. CRIM. L. & CRIMINOLOGY ONLINE 111 (2022).

This Article is brought to you for free and open access by Northwestern Pritzker School of Law Scholarly Commons. It has been accepted for inclusion in JCLC Online by an authorized administrator of Northwestern Pritzker School of Law Scholarly Commons.

REGULATING POLICE CHOKEHOLDS

TREVOR GEORGE GARDNER & ESAM AL-SHAREFFI*

This Article presents findings from an analysis of police chokehold policies enacted at the federal, state, and municipal levels of government. In addition to identifying the jurisdictions that restricted police chokeholds in the wake of George Floyd’s death on May 25, 2020, the Article conveys (via analysis of an original dataset) the considerable variance in the quality of police chokehold regulation. While many jurisdictions regulate the police chokehold, the strength of such regulations should not be taken for granted. Police chokehold policies vary by the type of chokehold barred (“air choke” and/or carotid choke), the degree of the chokehold restriction, an officer’s “duty to intervene” when observing improper police application of the chokehold, and the type of sanction attached to a chokehold policy violation (criminal and/or administrative). Following the presentation of chokehold policy variance, the authors recommend an absolute bar of both air chokes and carotid chokes. However, in contemplating such a policy, policymakers should consider whether an officer authorized to use deadly force but barred from applying the air or carotid choke will be inclined to use his firearm as a force alternative.

INTRODUCTION	112
I. AIR CHOKES AND CAROTID (BLOOD) CHOKES	115
II. FEDERAL REGULATION OF THE POLICE CHOKEHOLD..	118
A. Executive Order 13929	118
B. Congressional Efforts to Regulate Police Chokeholds ...	119
III. STATE REGULATION OF THE POLICE CHOKEHOLD	122
A. Quality of Sanction	124
B. Degree of Restriction	125
C. A Duty to Intervene	125
IV. MUNICIPAL REGULATION OF THE POLICE CHOKEHOLD.....	126

* Trevor Gardner, Professor of Law and (by courtesy) Sociology, Washington University in St. Louis, School of Law; Esam Al-Shareffi, J.D. candidate—2022, Washington University in St. Louis, School of Law. Thanks to Matthew Suddarth, Sara Hubaishi, and Andrew Cavarano for research support.

A. Quality of Sanction	126
B. Degree of Restriction	127
C. A Duty to Intervene	128
D. The Relative Strength of Municipal Restrictions	128
V. RECOMMENDATIONS	129
CONCLUSION	132

INTRODUCTION

On the evening of May 25, 2020, George Floyd bought a pack of cigarettes from Cup Foods, a grocery store in Minneapolis, Minnesota.¹ Cup's owner would later describe Mr. Floyd as a "regular"—a pleasant customer with a friendly face.²

The owner was not working at the store on the evening of Floyd's death. A teenage employee standing in for the owner took Floyd's money but suspected that Floyd had passed a \$20 counterfeit bill.³ The employee called 911.⁴

When officers arrived at the store, they found Floyd sitting with two other people in a parked car.⁵ The officers removed Floyd from the vehicle and handcuffed him.⁶ Minutes later, with Officer Derek Chauvin's left knee planted between Floyd's head and neck, Floyd stated repeatedly, "I can't breathe."⁷ He would eventually call out for his mother ("Mom, I love you"), his children ("Tell my kids I love them"), and accurately predict his grim fate ("I'm dead").⁸

¹ *George Floyd: What Happened in the Final Moments of His Life*, BBC (July 16, 2020), <https://www.bbc.com/news/world-us-canada-52861726> [<https://perma.cc/Q82M-NRZL>].

² *Id.*

³ *Id.*

⁴ Soo Kim, *Why Was George Floyd Arrested? Police Release 911 Call That Led to His Death*, NEWSWEEK (May 29, 2020, 7:50 AM), <https://www.newsweek.com/george-floyd-911-transcript-1507317> [<https://perma.cc/FWK3-PZLG>].

⁵ *George Floyd: What Happened in the Final Moments of His Life*, *supra* note 1.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* Bystanders urgently asked the restraining officers to check Floyd's pulse. One of the officers complied, later saying that he "couldn't find one." It was only then that Officer Chauvin removed his knee from a motionless Mr. Floyd. Floyd was taken by ambulance to Hennepin County Medical Center where he was pronounced dead approximately one hour later. Joseph Goldstein & Nate Schweber, *Man's Death After Chokehold Raises Old Issue for the Police*, N.Y. TIMES, July 19, 2014, at A1.

Only six years earlier, Eric Garner said, “I can’t breathe” eleven times in the moments after an NYPD police officer attempted to subdue Garner by wrapping his arms around Garner’s torso and neck.⁹ The medical examiner ruled that Garner died from the physical pressure applied by police, “compression of the neck (choke hold), compression of the chest and prone positioning during physical restraint.”¹⁰ In the year following Garner’s death, only a handful of jurisdictions moved to regulate the police chokehold¹¹ despite a broadly circulated video of police applying the neck restraint and Garner subsequently dying from cardiac arrest.¹²

The forthcoming longitudinal analysis of police chokehold policy data demonstrates that the national public responded differently to Mr. Floyd’s death than to Mr. Garner’s. In the summer of 2020, thirty-three jurisdictions banned or restricted police use of the chokehold maneuver.¹³ This Article

⁹ Wesley Lowery, *‘I Can’t Breathe’: Five Years After Eric Garner Died in Struggle with New York Police, Resolution Still Elusive*, WASH. POST (June 13, 2019), https://www.washingtonpost.com/national/i-cant-breathe-five-years-after-eric-garner-died-in-struggle-with-new-york-police-resolution-still-elusive/2019/06/13/23d7fad8-78f5-11e9-bd25-c989555e7766_story.html [https://perma.cc/JWP3-P8K8].

¹⁰ Joesph Goldstein & Marc Santora, *Staten Island Man Dies from Chokehold During Arrest, Autopsy Finds*, N.Y. TIMES (Aug. 1, 2014), <https://www.nytimes.com/2014/08/02/nyregion/staten-island-man-died-from-officers-chokehold-autopsy-finds.html> [https://perma.cc/C8FH-M2L7].

¹¹ See, e.g., DET. POLICE DEP’T, DETROIT POLICE DEPARTMENT MANUAL: USE OF FORCE § 3.04.2-4.3 (2014) (revising the existing policy on August 6, 2014, and banning all neck restraints, except where deadly force is authorized); CONSOL. CITY OF JACKSONVILLE, OFF. OF THE SHERIFF, GENERAL ORDER LXXII.6 (72) § VII (2014) (taking effect on October 30, 2014, and banning the use of the “Tactical Neck Restraint”).

¹² Al Baker, J. David Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner’s Death*, N.Y. TIMES (June 13, 2015), <https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html> [https://perma.cc/XM8C-PP9F]. In the 1980s, Daryl Gates, then Los Angeles chief of police, characterized the chokehold as an act of compassion given the alternative forms of force available to police. William Raspberry, *The Chief and the Chokehold*, WASH. POST, May 17, 1982, at A17. Gates also called for investigation as to whether African Americans were uniquely vulnerable to injury from chokeholds: “We may be finding that in some blacks when it (the choke hold) is applied, the veins and arteries do not open as fast as they do in normal people.” *Id.* After being subject to extensive criticism, Gates apologized, explaining that his “reference to ‘normal people’ was unfortunate—very unfortunate—and was meant only to apply to the normal functioning of blood traveling through arteries to the brain.” *Id.*

¹³ The project’s underlying dataset includes nearly all enacted state chokehold policies as well as all enacted municipal policies for the fifty largest municipal jurisdictions with publicly available use-of-force policies. ERICA L. SMITH & ALEXIA D. COOPER, U.S. DEP’T OF JUST., OFFENSES KNOWN TO LAW ENFORCEMENT IN LARGE CITIES, 2018 (2020). Of a total of sixty enacted policies identified, thirty-two were enacted after Mr. Floyd’s death on May 25, 2020.

details the quality and arc of this policy trend. To our knowledge, it is one of the few national surveys of its kind.

This Article consists of five parts. Part I provides a detailed description of the chokehold, drawing a distinction recognized in police department policy manuals and statutory law between “air chokes” (intended to stem the flow of oxygen to the lungs) and carotid or “blood” chokes (intended to stem the flow of blood to the brain in order to quickly render the subject unconscious).¹⁴ The difference between the two chokeholds is critical to understanding the quality of the chokehold restrictions enacted in the wake of Mr. Floyd’s death.¹⁵

Part II reviews federal consideration of police chokehold policy in the summer of 2020.¹⁶ It begins with the Trump administration’s executive order

¹⁴ See, e.g., Martin Kaste, *Chokeholds: The Difference Between Sleeper and Airway Holds*, NPR (Dec. 4, 2014), <https://www.npr.org/2014/12/04/368408203/chokeholds-the-difference-between-sleeper-holds-and-airway-holds> [https://perma.cc/8TXY-9YME] (describing the differences between “chokehold” and “vascular hold”); Lyndsay Winkley, *San Diego Police Leaders Defend Use of Controversial Neck Restraint, Despite Continuing Calls for a Ban*, SAN DIEGO UNION-TRIB. (May 20, 2019), <https://www.sandiegouniontribune.com/news/public-safety/story/2019-05-19/san-diego-police-leaders-defend-use-controversial-neck-restraint-despite-calls-for-ban> [https://perma.cc/WAQ2-U4V2] (demonstrating an illustration by Michelle Guerrero showing the difference between chokeholds and carotid restraints). Police use of the air and carotid chokeholds should not be confused with the “prone restraint” where the officer leaves the suspect lying on his stomach after applying handcuffs. Brief for Professor Seth Stoughton as Amicus Curiae Supporting Plaintiffs-Appellants at 5, *Timpa v. City of Dallas*, No. 20-10876 (5th Cir. Jan. 15, 2021). The prone restraint poses a similar risk of asphyxiation given that a person subject to a prone restraint must lift his or her bodyweight breathe because the position compresses the abdomen. *Id.*

¹⁵ Dataset on file with authors. Dataset variables include level of government (federal, state, or local), type of sanction (criminal/administrative), date enacted, degree of restriction, type of chokehold restricted (air/blood), and the duty to intervene.

¹⁶ In our accounting of federal chokehold policies, we searched for all Congressional legislation and executive orders that sought to regulate police chokeholds or neck restraints. The state-level inquiry encompassed all state-level legislation or gubernatorial executive orders that sought to regulate the police chokehold or neck restraint. The municipal chokehold policy dataset includes chokehold restrictions introduced by police departments as either administrative policies and/or restrictions based in municipal orders for the fifty most populous municipal jurisdictions. A table published by THE WASHINGTON POST was helpful in this effort. Kimberly Kindy, Kevin Schaul & Ted Mellnik, *Half of the Nation’s Largest Police Departments Have Banned or Limited Neck Restraints Since June*, WASH. POST (July 16, 2020), <https://www.washingtonpost.com/graphics/2020/national/police-use-of-force-chokehold-carotid-ban/> [https://perma.cc/R2L9-BRAM]. Search tools included LexisNexis; Westlaw; *Responses for Policing—State Bill Tracking Database*, NCSL (Nov. 11, 2021), <https://www.ncsl.org/research/civil-and-criminal-justice/legislative-responses-for-policing.aspx> [https://perma.cc/HKS8-YV64]; the aforementioned WASHINGTON POST article, and derivative searches via Google.com.

conditioning federal funding for state and municipal security administration on police chokehold regulation. It proceeds to a review of similar legislation proposed in Congress.

Parts III and IV outline state and municipal government policy activity as it pertains to the absolute or partial bar of police chokeholds as well as the type of chokehold regulated, the presence or absence of criminal sanction specific to the chokehold, and whether the policy requires an officer witnessing a police chokehold violation to intervene to stop the transgression.

Part V offers a series of policy recommendations. It proposes, first, that all states pass legislation restricting police use of chokeholds and, second, that this legislation designate police application of the chokehold as deadly force. It then recommends that the chokehold be excluded from the force options available to police under agency policy. Finally, this Part advises that governments refrain from enacting new criminal sanctions regarding the chokehold. In our view, the statutory frameworks that govern unlawful police violence are sufficient for prosecutorial purposes.¹⁷ The creation of new superfluous choke-specific assault statutes and ordinances would ultimately work against ongoing efforts to narrow the scope of the criminal code in adherence to the philosophy of criminal law minimalism.¹⁸

I. AIR CHOKES AND CAROTID (BLOOD) CHOKES

Police chokehold policy is based, at least in part, on the intricate physiology associated with the chokehold maneuver. The term *air choke* characterizes the intentional application of pressure to the neck and throat to prevent a subject from breathing.¹⁹ Alternatively, the *carotid* or “*blood*” *choke* references pressure placed on the carotid arteries, located on either side of the neck. The purpose of the blood choke is to interrupt the flow of oxygenated blood to the brain.²⁰

¹⁷ See, e.g., MO. REV. STAT. § 565 (2020).

¹⁸ For a synthesis of the normative scholarship arguing criminal law minimalism as a primary philosophy of crime governance, see generally Máximo Langer, *Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then*, 134 HARV. L. REV. F. 42 (2020).

¹⁹ See, e.g., PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 3 (2017) (“A chokehold is a maneuver in which a person’s neck is tightly gripped in a way that restrains breathing.”); E. Karl Koiwai, *Deaths Allegedly Caused by the Use of “Choke Holds” (Shime-Waza)*, 32 J. FORENSIC SCI. 419, 428 (1987).

²⁰ BUTLER, *supra* note 19, at 3 (“The truth is any human being will suffer distress when pressure on the carotid arteries interrupts the supply of blood from the heart to the brain.”); Koiwai, *supra* note 19, at 426–27.

A person subject to the blood choke can lose consciousness in as little as five to eleven seconds,²¹ and yet, some consider the blood choke to be a less dangerous method of physical restraint as compared to physical blows or the application of heavy pressure on the trachea (as in the case of the air choke).²² There is also an emerging view that chokes are safer than punches in light of studies that find more injuries in boxing as compared to sports such as Brazilian jiu-jitsu, judo,²³ and mixed martial arts,²⁴ where the carotid choke is applied as a submission technique.²⁵ And while such studies might be taken to support the relative safety of chokeholds in the context of sport, it is important to remember that the carotid choke is rarely applied in combat sport for a period sufficient to induce unconsciousness.²⁶

When applied in the context of sport, the chokehold is typically managed in a controlled setting by trained referees and participants who

²¹ Jamie R. Mitchell, Dan E. Roach, John V. Tyberg, Israel Belenkie & Robert S. Sheldon, *Mechanism of Loss of Consciousness During Vascular Neck Restraint*, 112 J. APPLIED PHYSIOLOGY 396, 396 (2012).

²² *Id.* at 401; see also Koiwai, *supra* note 19, at 431.

²³ Judo is known more for spectacular throws, but participants may win a match by applying *shime-waza*, or choking techniques that cause the opponent to give up or lose consciousness. INT'L JUDO FED'N, REFEREEING RULES 2011-12 art. 20 (2011), https://web.archive.org/web/20150924042953/http://www.intjudo.eu/editor_up/up/IJF%20REF%20RULES_Final%20print%20vers_2011-12_ENG_Final_amended.pdf [<https://perma.cc/HS46-RQ86>].

²⁴ Victory can be achieved by striking methods or choking methods, such as the chokes utilized in Brazilian jiu-jitsu. *Fighting Glossary*, UFC, <https://www.ufc.com/fighting-glossary> [<https://perma.cc/EY8R-U7WD>] (“MMA is the abbreviation for “mixed martial arts” and refers to fighting with a combination of striking and grappling.”). In referencing use of the chokehold in contemporary martial arts training and competition, we intend, in part, to convey the “norm-ing” of the chokehold in pockets of American life in the same cultural moment in which legislative bodies have come to recognize police application of the chokehold as an underappreciated risk to the public.

²⁵ Rate of injury per 1,000 athlete exposures is 250.6 in boxing, where punches are the only legal technique, compared to 9.2 in Brazilian jiu-jitsu, where chokes are utilized by punches and strikes are prohibited. For the boxing statistic, see T. R. Zazryn, C. F. Finch & P. McCrory, *A 16 Year Study of Injuries to Professional Boxers in the State of Victoria, Australia*, 37 BRIT. J. SPORTS MED. 321, 322 (2003). For Brazilian jiu-jitsu, see James F. Scoggin III, Georgiy Brusovanik, Byron H. Izuka, Eddy Zandee van Rilland, Olga Geling & Seren Tokumura, *Assessment of Injuries During Brazilian Jiu-Jitsu Competition*, 2 ORTHOPAEDIC J. SPORTS MED. 1, 1–2 (2014).

²⁶ See, e.g., T.P. Grant, *Palhares Breaks the Etiquette of the Tap*, SB NATION (Aug. 3, 2015, 3:30 PM), <https://www.bloodyelbow.com/2015/8/3/9086187/wsof-22-rousimar-palhares-vs-jake-shields-opinion-editorial-tapping-etiquette-bjj-grappling-mma> [<https://perma.cc/4TD4-EZLB>] (emphasizing the importance of “tapping out” or referee intervention in sports grappling and mixed martial arts to end fights before an athlete is rendered unconscious).

consent in advance to this specific form of combat.²⁷ To state the obvious, the street-combat environment in which police apply the carotid choke is not similarly controlled. Moreover, few if any studies have examined the quality of officer training regarding application of the chokehold, the precision with which the maneuver is applied during a volatile encounter in the field, and its attendant rate of injury and death.²⁸

Physiologically, the carotid and air chokes operate in very different ways, but both act upon critical organs vulnerable to damage. Carotid chokes take effect by compressing both the left and right internal carotid arteries, which reduces blood flow to the brain²⁹ (a particularly sensitive organ that requires twenty percent of the body's energy supply despite accounting for only two percent of the human body mass).³⁰

Air chokes trigger a different but overlapping physiology. The air choke reduces breathing capacity by restricting the supply of oxygen to the lungs. The suspension of oxygen flow to an organ is referenced in the medical field as anoxia.³¹ An air choke rises to the level of anoxia if it blocks all oxygen from reaching the lungs. As a function of blocking oxygen from the lungs, the air choke may also sap the circulating blood of oxygen, which, in effect, restricts the flow of oxygen to the brain, potentially damaging and killing brain cells.³²

Additionally, air chokes require more force as compared to carotid chokes. The air choke is applied through pressure placed on the windpipe to reduce or stop the flow of oxygen to the lungs. Significant pressure is placed on the windpipe. This pressure carries a substantial risk of permanent damage to the windpipe and its surrounding structures.³³

²⁷ *Id.*

²⁸ See, e.g., COUNCIL ON CRIM. JUST., CHOKEHOLDS AND OTHER NECK RESTRAINTS 2 (2021), <https://counciloncj.foleon.com/policing/assessing-the-evidence/i-chokeholds-and-other-neck-restraints/> [<https://perma.cc/N7NQ-72L9>] (“There is no reliable national data describing how often police use chokeholds, airway restrictions, or carotid holds.”).

²⁹ Mitchell, Roach, Tyberg, Belenkie & Sheldon, *supra* note 21, at 396–402; Koiwai, *supra* note 19, at 431; TOM NOVACK, SUZANNE PENNA & ROBERT BRUNNER, U. ALA. BIRMINGHAM TRAUMATIC BRAIN INJ. MODEL SYS. HYPOXIC/ANOXIC BRAIN INJURY 2 (2006).

³⁰ Suzana Herculano-Houzel, *Scaling of Brain Metabolism with a Fixed Energy Budget Per Neuron: Implications for Neuronal Activity, Plasticity and Evolution*, 6 PLOS ONE 1, 1 (2011).

³¹ Novack et. al, *supra* note 29.

³² *Anoxic or Hypoxic Brain Injury*, BANCROFT NEUROREHAB (June 19, 2021, 4:15 PM), <https://neurorehab.bancroft.org/conditions-treated/anoxic-or-hypoxic-brain-injury/> [<https://perma.cc/J8HF-2N8C>].

³³ *Ask the Fight Doc: Is Brain Damage Possible When Chokes Are Held Too Long?*, MMAJUNKIE (July 12, 2011, 2:55 PM), <https://mmajunkie.usatoday.com/2011/07/ask-the->

Alternatively, the principal function of the carotid choke is to limit (rather than stop) oxygen flow to the brain (a condition known as *hypoxia*) in order to render the subject unconscious.³⁴ The negative physical effects of hypoxia are reversible if the condition lasts only a few seconds. This is true even when the subject is rendered unconscious.³⁵ However, prolonged hypoxia and anoxia both carry a high risk of devastating and irreversible brain injury and death.³⁶

For these and other reasons, several state governments moved to restrict police use of both air and carotid chokes in the months following George Floyd's death, with many states opting to prohibit the maneuver even in circumstances in which the officer's life is threatened. Municipal police departments that addressed chokeholds also tended to restrict both chokes, but opted against an absolute bar on the maneuver.³⁷ Notably, the Trump Administration's Executive Order 13929 applied only to air chokes, abstaining from carotid choke regulation.³⁸

II. FEDERAL REGULATION OF THE POLICE CHOKEHOLD

Federal regulation of the police chokehold is limited to Executive Order 13929, signed by President Trump on June 16, 2020. In the months following George Floyd's death, the U.S. House of Representatives and the U.S. Senate advanced separate bills incentivizing state and local government regulation of police chokeholds. Neither bill was enacted.

A. EXECUTIVE ORDER 13929

President Trump waded into the debate on police use of chokeholds by way of Executive Order 13929. The Order requires that state and local police departments seeking federal funds certify that the use-of-force policies of affiliated police departments bar the police use of chokeholds except in

fight-doc-is-brain-damage-possible-when-chokeholds-are-held-too-long [https://perma.cc/EU6N-P8PZ].

³⁴ Mitchell, Roach, Tyberg, Belenkie, & Sheldon, *supra* note 21, at 396–402.

³⁵ *Id.*

³⁶ *Anoxic or Hypoxic Brain Injury*, *supra* note 32.

³⁷ Of the sixty enacted policies in our dataset, forty-three of sixty specifically regulate both air and blood chokes while only ten out of the sixty regulate air chokes exclusively.

³⁸ Exec. Order No. 13,929, 85 Fed. Reg. 37,325 (June 16, 2020). Credentialing bodies must certify that a law enforcement agency meets the (admittedly minimal) requirements of the Executive Order for the agency to receive competitive federal grants. For a list of the credentialing bodies, see *List of Designated Independent Credentialing Bodies*, U.S. DEP'T OF JUST., https://cops.usdoj.gov/pdf/executive_order/List_of_Credentialing_Bodies.pdf [https://perma.cc/B3AP-UWZM].

instances where deadly force is authorized.³⁹ It expressly applies to air chokes, describing the maneuver as an attempt to “restrict[] an individual’s ability to breathe.”⁴⁰ The Order does not address blood chokes. Additionally, it assigns the Attorney General the responsibility of monitoring state and local government compliance by establishing “independent credentialing bodies.”⁴¹ To be credentialed by such bodies, law enforcement agencies must comply with the Order’s standards for police chokehold regulation.⁴²

B. CONGRESSIONAL EFFORTS TO REGULATE POLICE CHOKEHOLDS

To this point, Congress has not passed a federal law that deals explicitly with the police chokehold. Representative Hakeem Jeffries (D-New York) introduced the “Excessive Use of Force Prevention Act” in 2015.⁴³ Jeffries’ bill would have made police application of the chokehold a “punishment, pain, or penalty”⁴⁴ under 18 U.S.C. § 242, which allows the federal government to prosecute deprivations of civil rights under color of law.⁴⁵ It applied exclusively to police use of air chokes.⁴⁶

In the month following the police killing of George Floyd, two other bills addressing police chokeholds drew national attention: the “JUSTICE Act,”⁴⁷ sponsored by GOP Senator Tim Scott (S. 3985), and the “George Floyd Justice in Policing Act of 2020,”⁴⁸ broadly supported by House Democrats (H.R. 7120).⁴⁹ The two bills were similar in that each would have incentivized chokehold regulation at the state and local levels by withholding federal funding from law enforcement agencies that refused to take regulatory action. The primary difference between the two bills is the degree

³⁹ Exec. Order No. 13,929, 85 Fed. Reg. 37,325 (June 16, 2020).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ Excessive Use of Force Prevention Act of 2015, H.R. 2052, 114th Cong. (2015).

⁴⁴ The bill championed by House Democrats in 2020 contains very similar language. H.R. Res. 7120, 116th Cong. § 363(c)(2) (2020), <https://www.congress.gov/bill/114th-congress/house-bill/2052/text> [<https://perma.cc/DW8R-UTNJ>].

⁴⁵ 18 U.S.C. § 242.

⁴⁶ Excessive Use of Force Prevention Act of 2015, H.R. 2052, 114th Cong. § 2 (2015)

⁴⁷ JUSTICE Act, S. 3985, 116th Cong. (2020).

⁴⁸ George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020).

⁴⁹ Felicia Sonmez and Colby Itkowitz, *House Passes Expansive Policing Overhaul Bill Named in Honor of George Floyd*, WASH. POST (March 3, 2021, 10:30 PM), https://www.washingtonpost.com/politics/george-floyd-police-reform-bill-vote/2021/03/03/5ea9ba3a-7c6c-11eb-85cd-9b7fa90c8873_story.html [<https://perma.cc/UP52-WT5F>].

to which each restricts the maneuver. While S. 3985 prohibited the use of chokeholds *except when deadly force is authorized*, H.R. 7120 contained no such exception, requiring that state and local governments place an absolute ban on police chokeholds to be eligible for federal criminal administration funding.⁵⁰ H.R. 7120 incorporated much of Rep. Jeffries' 2015 bill but expanded the definition of a chokehold to include both air chokes and carotid chokes.⁵¹

Neither bill addressed police chokeholds exclusively. The Senate bill criminalized sexual acts between federal law enforcement officers and those in their custody and encouraged states to pass similar criminal provisions.⁵² The bill would also have given the federal government the authority to prosecute lynching and, separately, interference with the exercise of federal rights.⁵³

The House bill encompassed a number of policies apart from police chokehold regulation, including provisions imposing reporting requirements on state and local police departments in terms of their use-of-force doctrine⁵⁴ and data collection.⁵⁵ It sought to establish a national task force on law enforcement oversight⁵⁶ and a "National Police Misconduct Registry,"⁵⁷ and prohibited racial profiling at the federal,⁵⁸ state, and municipal levels.⁵⁹ Like the Senate bill, the House bill provided grants to police departments that facilitated officer training in the duty to intervene,⁶⁰ incentivized the use of

⁵⁰ The relevant sections are S. 3985, 116th Cong. § 105(b)(1) (2020) and H.R. 7120, 116th Cong. § 363(b) (2020).

⁵¹ See H.R. 7120, 116th Cong. § 363(c)(2) (2020).

⁵² S. 3985, 116th Cong. §§ 1001–03 (2020).

⁵³ S. 3985, 116th Cong. §§ 401–03 (2020). Additional provisions in the Senate bill include the imposition of reporting requirements on federal, state, and local police use of force, *id.* § 101, and execution of no-knock warrants, *id.* § 102; a mandate regarding the retention of law enforcement records, *id.* § 301; funding for municipal law enforcement body-worn cameras, *id.* §§ 201–02; grants to agencies for the training in alternatives to the use of force, de-escalation, and the duty to intervene, *id.* §§ 601–02; and the creation of commissions and studies tasked with obtaining expert advice and recommendations on issues affecting African-American men and boys, *id.* §§ 501–08.

⁵⁴ H.R. 7120, 116th Cong. §§ 221–27 (2020).

⁵⁵ *Id.* § 118.

⁵⁶ *Id.* § 117.

⁵⁷ *Id.* §§ 201–02.

⁵⁸ *Id.* §§ 301–21.

⁵⁹ *Id.* §§ 331–35.

⁶⁰ *Id.* § 361.

body-worn cameras,⁶¹ sought regulation of no-knock warrants,⁶² and criminalized sexual acts between federal law enforcement officers and those in their custody.⁶³

Neither bill was enacted into law in 2020. A motion to invoke cloture on S. 3985 failed with only fifty-five Senate members in favor and forty-five against.⁶⁴ H.R. 7120 passed the House of Representatives (236 in favor, 181 against) on June 25, 2020;⁶⁵ however, the Senate did not take up the bill, and the Trump White House conveyed that if the bill passed, it would be vetoed.⁶⁶

A renewed effort at Congressional regulation of the chokehold began in the 117th Congress when the House passed H.R. 1280 on March 3, 2021, by a vote of 220 to 212.⁶⁷ H.R. 1280 is virtually identical to H.R. 7120.⁶⁸ It remains to be seen if H.R. 1280 will be enacted into law, though Democratic Party control of the U.S. Senate and President Biden's vocal support for police chokehold reform via Congressional action suggest a better opportunity at passage than in 2020.⁶⁹

⁶¹ See *id.* §§ 371–82.

⁶² *Id.* § 362.

⁶³ *Id.* §§ 401–05. Curiously, the final version of the House bill did not contain the anti-lynching provision originally introduced. The anti-lynching provisions were present in the original bill introduced on June 6, 2020, in §§ 401–03 and in the amended version reported in the House after scrutiny by the Judiciary Committee on June 19, 2020 (also in §§ 401–03). The anti-lynching provisions were removed, however, in the amended version passed by the House Rules Committee in House Bill 1017. H.R. 1017, 116th Cong. § 4 (2020).

⁶⁴ *Roll Call Vote 116th Congress – 2nd Session*, U.S. SENATE (June 24, 2020), https://www.senate.gov/legislative/LIS/roll_call_votes/vote1162/vote_116_2_00126.htm [<https://perma.cc/LH46-FNUD>]. Per Senate rules, the bill required sixty “Yes” votes in order to invoke cloture and defeat a filibuster.

⁶⁵ *Roll Call 119 | Bill Number: H.R. 7120*, U.S. HOUSE REP. CLERK (June 25, 2020), <https://clerk.house.gov/Votes/2020119> [<https://perma.cc/3CU5-EDEQ>].

⁶⁶ *House Passage of George Floyd Bill Puts Eyes on Senate*, PITTSBURGH POST-GAZETTE (June 27, 2020), <https://www.post-gazette.com/news/nation/2020/06/27/House-passage-of-George-Floyd-bill-puts-eyes-on-Senate/stories/202006270037> [<https://perma.cc/57CC-YQRM>].

⁶⁷ *George Floyd Justice in Policing Act of 2021*, H.R. 1280, 117th Cong. (2021); Clare Foran, *House Passes Bill Named in Honor of George Floyd Aimed at Preventing Police Misconduct*, CNN (Mar. 3, 2021), <https://www.cnn.com/2021/03/03/politics/house-vote-george-floyd-policing-bill/index.html> [<https://perma.cc/UF82-6QA9>].

⁶⁸ A side-by-side comparison of both bills shows only cosmetic differences, such as the updating of the short title of House Bill 7120 from “George Floyd Justice in Policing Act of 2020” to “George Floyd Justice in Policing Act of 2021” in House Bill 1280.

⁶⁹ Although the U.S. Senate is as of this writing technically under Democratic control, the chamber is evenly divided, with Vice President Harris breaking any 50-50 ties. It remains to be seen if the Senate version of House Bill 1280 can garner sufficient bipartisan support to overcome a Senate filibuster. President Biden indicated his support for the bill in a tweet

III. STATE REGULATION OF THE POLICE CHOKEHOLD

As of this writing, a minority of states regulate the police chokehold by way of statutory law. Table 1 summarizes the quality of state-level statutory regulation with respect to four categories: the type of sanction, the degree of the chokehold restriction, the type of chokehold banned, and whether an officer observing an unlawful chokehold is legally obligated to intervene.

Table 1: State Statutes Regulating Chokeholds

State	Statute	Effective Date of Enactment	Penalty ⁷⁰	Degree of Restriction ⁷¹	Type of Chokehold banned ⁷²	Duty to Intervene ⁷³
Indiana	IND. CODE § 35-41-3-3 (2022)	7/1/2021	Administrative	Deadly Force	Air	No
Massachusetts	S.B. 2963, 191st Gen. Ct., Reg. Sess. (Mass. 2020)	12/31/2020	Administrative	Total	Both	Yes
Vermont	S.B. 219, 2020 Leg., Reg. Sess. (Vt. 2020)	10/1/2020	Criminal/ Administrative	Total	Both	Yes
California	CAL. GOV'T CODE § 7286.5 (West 2022)	9/30/2020	Administrative	Total	Both	No

published on February 25th, 2021. Joseph Biden (@POTUS), TWITTER (Feb. 25, 2021, 11:04 AM), <https://twitter.com/POTUS/status/1364984502133657602> [<https://perma.cc/5SSK-75KQ>].

⁷⁰ Indicates statutes that specifically criminalize the police chokehold.

⁷¹ "Total" restrictions ban chokeholds in all circumstances. The term "Deadly Force" is used where the statute creates an exception allowing the use of chokeholds in situations where deadly force is authorized.

⁷² "Both" refers to bans on air and blood chokes. "General" indicates that the legislation does not clearly define the chokehold term. "Air" refers to restrictions placed on air chokes exclusively.

⁷³ Indicates whether a police chokehold policy requires police officers to intervene to stop and/or report other officers who apply a chokehold in violation of chokehold policy.

Delaware	DEL. CODE ANN. tit. 11 § 607A (West 2020)	8/13/2020	Criminal/ Administrative	Deadly Force	Both	No
Minnesota	H.F. 1, 2020 Leg., Spec. Sess (Minn. 2020)	8/1/2020	Administrative	Deadly Force	Both	No
Connecticut	H.B. 6004, 2020 Leg., Spec. Sess. (Conn. 2020)	7/31/2020	Administrative	Deadly Force	Both	Yes
Iowa	H.F. 2647, 88th Gen. Assemb., Reg. Sess. (Iowa 2020)	7/1/2020	Administrative	Deadly Force	Air	No
Oregon	H.B. 4203, 80th Leg. Assemb., Spec Sess. (Or. 2020)	6/30/2020	Administrative	Deadly Force	Both	No
Utah	H.B. 5007, 2020 Leg., 5th Spec. Sess. (Utah 2020)	6/25/2020	Criminal/ Administrative	Total	Both	No
Colorado	S.B. 20-217, 2020 Leg., Reg. Sess. (Colo. 2020) -	6/19/2020	Criminal/ Administrative	Total	Both	Yes
New Hampshire	H.B. 1645, 2020 Leg., Gen. Sess. (N.H. 2020)	6/16/2020	Administrative	Deadly Force	Both	Yes
New York	N.Y. PENAL LAW § 121.13a	6/12/2020	Criminal/ Administrative	Total	Both	No

	(McKinney 2022)					
Illinois	720 ILL. COMP. STAT. ANN. 5/7-5.5 (West 2020)	1/1/2016	Administrative	Deadly Force	Air	No
Nevada	A.B. 3, 2020 Leg., 32 nd Sess. (Nev. 2020)	8/7/2020	Administrative	Total	Both	Yes
Tennessee	TENN.CODE ANN. § 38-8-113	7/1/1993	Administrative	Intermediate*	General	No
Washington, D.C.	D.C. CODE § 5-125.03 (2022)	1/25/1986	Criminal/ Administrative	Total (Air) / Deadly Force (Blood)	Both	No

* The Tennessee statute requires that officers utilize a chokehold only when other “less dangerous restraint methods” have been exhausted.

A. QUALITY OF SANCTION

Most state governments do not regulate the police chokehold, though sixteen states and the District of Columbia restrict police application of the chokehold by way of statutory law. Five of the regulating states criminalized a police chokehold policy violation. A number of states have made officer-defendants charged with illegal application of the police chokehold ineligible for criminal law justification defenses.⁷⁴

Washington D.C. passed a statute regulating police chokeholds in 1986.⁷⁵ The D.C. regulation requires that District police officers charged with illegal use of the chokehold while on duty be subject to dismissal as well as

⁷⁴ See CYNTHIA LEE & ANGELA P. HARRIS, *CRIMINAL LAW: CASES AND MATERIALS* 603 (4th ed. 2015) (“A justification defense is one in which the defendant claims he did the right thing or took the most appropriate actions under the circumstances.”). *Defendants* can generally offer justification defenses such as self-defense, which advance the claim that the defendant acted correctly under the circumstances despite having violated the criminal law. Many if not most justification defenses serve as a complete defense to the underlying criminal charge, nullifying criminal liability if credited. *Id.*; see, e.g., H.B. 4203, 80th Legis. Assemb., Spec. Sess. (Or. 2020).

⁷⁵ D.C., CODE § 5-125.01–.03 (1986).

a fine of up to \$5000, imprisonment for up to one year, or both.⁷⁶ Apart from this early outlier (momentarily categorizing D.C. as a quasi-state), no state introduced criminal sanctions for the police chokehold until the killing of George Floyd. On June 12, 2020, New York state enacted a statute establishing the offense of “aggravated strangulation.”⁷⁷ The prohibition applies to any chokehold resulting in serious injury or death, and a violation represents a Class C felony punishable by up to fifteen years imprisonment.⁷⁸ Colorado,⁷⁹ Utah,⁸⁰ Delaware,⁸¹ and Vermont⁸² have since followed New York’s lead, adding “aggravated strangulation” or a similarly characterized offense to their respective state criminal codes.

Several other states have limited the sanction for a chokehold violation to administrative sanction. Oregon’s HB 4203 exemplifies this genre of sanction.⁸³ HB 4203 prohibits chokehold training for police and clarifies that the justification defense is inapplicable for a defendant charged with unlawful use of the chokehold unless the underlying event was such that the officer was legally authorized to use deadly force.⁸⁴ The statute does not create a new criminal offense, leaving the implication that the statutory framework for criminal assault would suffice for prosecutorial purposes.

B. DEGREE OF RESTRICTION

Nearly all state statutory chokehold regulations impose either a total ban on the use of chokeholds or limit their use to circumstances in which deadly force is authorized.

C. A DUTY TO INTERVENE

Only two state statutes require officers to physically intervene upon observing a fellow officer apply an unauthorized chokehold. Vermont requires that a police officer, having made such an observation, stop the

⁷⁶ D.C., CODE § 5-125.03(c) (1986).

⁷⁷ Eric Garner Anti-Chokehold Act, N.Y. PENAL LAW § 121.13 (McKinney 2021). New York State passed the Anti-Chokehold Act eight years after Eric Garner’s strangulation by New York Police Department officers on Staten Island.

⁷⁸ *Id.*

⁷⁹ Enhance Law Enforcement Integrity Act, 2020 Colo. Sess. Laws 445.

⁸⁰ UTAH CODE ANN. § 53-13-115 (West 2020).

⁸¹ DEL. CODE ANN. tit. 11, § 607A (2021).

⁸² 2020 Vt. Acts & Resolves 639 (Act No. 147).

⁸³ 2020 Or. Laws Spec. Sess. 2508 (HB 4203).

⁸⁴ *Id.*; see also 2020 Iowa Acts 68 (H.F. 2647); 2020 Minn. Laws 1261 (H.F. 1).

violating officer and report the infraction.⁸⁵ Failure to intervene amounts to “gross professional misconduct” enabling the Vermont Criminal Justice Training Council to impose sanctions on the officer in question, up to and including termination.⁸⁶ Colorado recently took the step of making an officer’s failure to intervene to prevent excessive force a Class 1 misdemeanor, expressly characterizing the banned chokeholds as excessive force that triggers the corresponding intervention obligation.⁸⁷

IV. MUNICIPAL REGULATION OF THE POLICE CHOKEHOLD

Our policy data indicate that the chokehold policies enacted among the nation’s largest municipalities generally do not impose criminal sanctions.⁸⁸ Instead, large municipalities tend to restrict police use of the chokehold through police department procedural manuals (or their equivalent). Such manuals generally articulate the degree of the chokehold restriction and the associated administrative penalty. The administrative penalty is itself addressed in a separate section pertaining to any number of procedural violations. Of the fifty largest municipalities in the country (by population), forty-three regulate police chokeholds through administrative regulations established by the police department.⁸⁹

A. QUALITY OF SANCTION

Municipal police department manuals typically list authorized applications of force—the matrix of force options available to police officers.⁹⁰ The San Antonio Police Department General Manual dictates that

⁸⁵ S. 219, 2020 Leg., Reg. Sess., § 5 (Vt. 2020).

⁸⁶ *Id.*

⁸⁷ 2020 Colo. Sess. Laws 445, § 6(d) (codified at COL. REV. STAT. § 18-8-802(1.5)(d) (2021)).

⁸⁸ The lone exception in the dataset is N.Y.C., N.Y., ADMIN. CODE § 10-181 (2020), which bans all chokeholds “in the course of effecting or attempting an arrest,” punishable by a fine of up to \$2,500, up to one year’s imprisonment, or both.

⁸⁹ Those forty-three municipalities are: New York City; Chicago; Houston; Phoenix; Las Vegas; Philadelphia; San Antonio; San Diego; Dallas; Suffolk County, NY; Fairfax County, VA; San Jose, CA; Montgomery County, MD; Honolulu; Austin; Charlotte, NC; Jacksonville, FL; Fort Worth, TX; Columbus, OH; San Francisco; Indianapolis; Baltimore County, MD; Seattle; Denver; Washington, D.C.; Prince George’s County, MD; Boston; Nashville; Louisville; Detroit; Portland; Oklahoma City; Memphis; Baltimore; Cobb County, GA; Albuquerque; Tucson; Anne Arundel County, MD; Fresno, CA; Sacramento; Mesa, AZ; Kansas City, MO; Raleigh, NC.

⁹⁰ SAN ANTONIO POLICE DEP’T, GEN. MANUAL: PROCEDURE 501 – USE OF FORCE 2 (2017), <https://www.sanantonio.gov/Portals/0/Files/SAPD/GeneralManual/501.pdf> [<https://perma.cc/JCZ7-HMFF>].

police must respond to a cooperative suspect with verbal communications, but may use an intermediate weapon such as an “Electronic Control Device” if a suspect engages in active resistance.⁹¹ In discussing force options, many manuals specify whether chokeholds are permitted and under what circumstances. In its overview of force options, the Chicago Police Department limits police application of the chokehold to circumstances in which deadly force is authorized.⁹² As mentioned above, most police manuals do not directly address the sanction for violating chokehold policies, but hold that any member violating departmental policy may be subject to disciplinary action, the most severe action being employment termination.

Several municipalities regulate the police chokehold by way of city ordinance.⁹³ New York City bans use of the chokehold “in the course of effecting or attempting an arrest.”⁹⁴ An officer in violation of the ordinance faces up to a year in jail and a fine of up to \$2,500, or both.⁹⁵ Seattle’s ordinance, enacted in 2020, prohibits all police chokeholds and creates a right of action for victims of police chokeholds to sue the city.⁹⁶ The civil suit provision sets minimum damages for victims at \$100,000 and requires city coverage of attorney and court fees.⁹⁷

B. DEGREE OF RESTRICTION

Of the fifty largest municipalities, only two do not appear to regulate police chokeholds specifically.⁹⁸ Most have established strict restrictions. A substantial majority of the municipal chokehold policies (thirty-seven out of forty-eight) prohibit both air and carotid chokes.⁹⁹ Twenty ban police use of the chokehold without exception, while nearly all of the others permit police use of the chokehold in circumstances in which an officer would be

⁹¹ *Id.* at 4.

⁹² CHI. POLICE DEP’T, GENERAL ORDER G03-02-01: FORCE OPTIONS 6 (2017) (“Chokeholds are only justified as a use of deadly force.”)

⁹³ A search using a comprehensive municipal code research database did not reveal additional municipal-tier police chokehold ordinances among the fifty largest municipalities. *Search*, MUNICODE, library.municode.com/search [https://perma.cc/83YY-MMMH].

⁹⁴ N.Y.C., N.Y., ADMIN. CODE § 10-181 (2020).

⁹⁵ *Id.*

⁹⁶ Seattle, Wash., Ordinance 126096 (June 26, 2020).

⁹⁷ *Id.*

⁹⁸ For instance, MILWAUKEE POLICE DEP’T, STANDARD OPERATING PROCEDURE: SEC. 460 - USE OF FORCE (2015), <https://static1.squarespace.com/static/56996151cbced68b170389f4/t/569abf43c21b86e3d56a32fe/1452982086699/Milwaukee+Use+of+Force+Policy.pdf> [https://perma.cc/N9VT-YAYD] did not contain references to chokeholds or neck restraints.

⁹⁹ Project Dataset.

authorized to use deadly force. None of the municipal policies in the dataset authorized police chokeholds in response to a nondeadly threat.

C. A DUTY TO INTERVENE

Nearly two-thirds of the dataset's municipal chokehold policies contained a provision that required police officers to intervene if they observed a fellow officer engaging in excessive force, which would include circumstances in which an officer violated chokehold policy.

D. THE RELATIVE STRENGTH OF MUNICIPAL RESTRICTIONS

Table 2: Chokehold Regulation Across Federal, State, and Local Government

	States ¹⁰⁰	Municipalities ¹⁰¹	Federal
Police Chokehold Regulation	33% (17/51)	96% (48/50)	(1/1)
Legislative Action ¹⁰²	100% (17/17)	8.3% (4/48)	(0/1)
Administrative Action	12% (2/17)	100% (48/48)	(1/1)
Total Ban	47% (8/17)	41.6% (20/48)	(0/1)
Deadly Force Exception	47% (8/17) ¹⁰³	58% (28/48)	(1/1)
Criminal Sanction ¹⁰⁴	35% (6/17)	2% (1/48)	(0/1)
Administrative Sanction	88% (15/17)	100% (39/44)	(1/1)
Criminal and Administrative Sanction	29 % (5/17)	0% (0/48)	(0/1)
Regulation of Both Air and Carotid Chokes	76% (13/17)	77% (37/48)	(0/1)
Duty to Intervene	35% (6/17)	66% (29/44)	(0/1)

¹⁰⁰ Includes Washington, D.C.

¹⁰¹ Here, we assess the fifty largest municipalities in the country (by population size served by a single police department) set aside from the well over 18,000 municipalities at the local level, encompassing 12,000 police agencies and 18,000 agencies that employ police officers. YALE KAMISAR, WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING, ORIN S. KERR, & EVE BRENSIKE PRIMUS, *MODERN CRIMINAL PROCEDURE: CASES, COMMENTS, AND QUESTIONS 4* (14th ed. 2015). Municipalities that did not have publicly available use of force documents at the time of the dataset's population were counted as non-regulated jurisdictions.

¹⁰² Percentage of police chokehold policies enacted by way of the legislature.

¹⁰³ See NEV. REV. STAT. § 289.810 (2011). A Nevada police chokehold statute was excluded from the "total ban" and "deadly force exception" categories as it only went so far as to require that Nevada policing agencies create police chokehold regulations. *Id.*

¹⁰⁴ Police chokeholds that criminalize violations of the underlying policy.

A comparison of state and municipal regulations of police chokeholds shows a mixed bag. Table 2 compares the quantity and strength of police chokehold regulations at each level of government, adding as a backdrop policy details from the executive order established by the Trump administration in July of 2020.

Just sixteen states and Washington, D.C. regulate the police chokehold (33%), while a substantial majority of the most populous municipalities in the nation (96%) have chosen to limit or prohibit application of the maneuver.¹⁰⁵ Moreover, of the large municipalities that regulate police chokeholds, 66% have established an officer's duty to intervene as compared to 35% of the regulating states.¹⁰⁶ But of the states that expressly regulate police chokeholds, the rate at which they attach a criminal sanction is significantly higher than that of large municipalities (35% to 2%).¹⁰⁷ Finally, it seems that the states and municipalities that regulate police chokeholds apply restrictions exceeding those requested by the federal government.¹⁰⁸ Nearly all the state and municipal policies populating the dataset meet or exceed the minimum standard required of subnational governments within the regulatory framework of Executive Order 13929.

V. RECOMMENDATIONS

As the nation processed the events surrounding Mr. Floyd's death, a sizable number of states and municipalities chose to regulate police chokeholds. We laud these regulations and find them to be in keeping with the ethos of the Black Lives Matter movement and responsive to the broader national reckoning regarding police accountability. In this Part, we shift from a profile of government regulation of the police chokehold to offer a series of basic recommendations regarding chokehold policy.

1. The Reach of Police Chokehold Policy: Every police officer should be subject to chokehold regulation. To this end, the thirty-seven states that have yet to establish policies regulating police use of the chokehold should do so in short order. Municipalities should also consider establishing police chokehold restrictions, either to compensate for the absence of a state-level regulatory framework or to strengthen state-level restrictions in keeping with the regulatory parameters outlined below.

¹⁰⁵ Project Dataset.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ For a detailed overview of Executive Order 13929, see Exec. Order No. 13929, 85 Fed. Reg. 37325, Part I (Jun. 16, 2020).

2. *An Absolute Bar on Air and Carotid Chokes*: Several states and municipalities have recently moved to ban the police chokehold without qualification (Table 2).¹⁰⁹ We find this policy movement heartening given recent video evidence of the brutality of the chokehold and its reckless application by police. At a minimum, state and local governments should bar police use of chokeholds for the purpose of apprehending a fleeing suspect or a “dangerous person” thought to pose a hypothetical and future (rather than immediate) threat to the public.¹¹⁰

There remains the question of whether legislatures should bar police chokeholds without exception. Our tentative response is, *yes*. Police chokeholds are manifestly dangerous, prone to abuse, and hold the subtext of national pathologies at the intersection of race, punishment, and asphyxiation.¹¹¹ We call on governments to consider each of these factors, but also the relative risk associated with various force options including air and carotid chokes, police taser use, and police firearm use.

We acknowledge that while tasing may seem a welcome alternative to the chokehold in terms of a submission technique short of firing a gun, there

¹⁰⁹ See *supra* Table 2 and text accompanying notes 100–04.

¹¹⁰ It is worth mentioning again that both the air choke and the carotid choke are potentially lethal maneuvers. The touchstone of what constitutes deadly force should be the type of force that holds a significant risk of loss of life. Though a carotid choke might be relatively effective at causing unconsciousness without also restricting air flow or posing a *high* probability of death, the potential for death by way of carotid choke is significant. Mitchell, Roach, Tyberg, Belenkie & Sheldon, *supra* note 21, at 396–402. Moreover, the risk of death is sometimes compounded by the involuntary injection of drugs to subdue an unruly suspect for purposes of arrest. Osagie K. Obasogie & Anna Zaret, *Medical Professionals, Excessive Force, and the Fourth Amendment*, 109 CAL. L. REV. 1, 25–27, 55 (2021) (describing an incident in which a suspect was taken to the ground by police, “put into a chokehold, and handcuffed face-down with his hands behind his back. While handcuffed and immobilized, Aurora Fire Rescue arrived at the scene and injected McClain with five hundred milligrams of ketamine. McClain went into cardiac arrest in the ambulance on the way to the hospital. He was pronounced brain dead several days later and taken off of life support.”).

¹¹¹ See AMY LOUISE WOOD, *LYNCHING AND SPECTACLE: WITNESSING RACIAL VIOLENCE IN AMERICA, 1890-1940* 29–30 (Charles Reagan Wilson, 2009) (presenting a history of “hanging-day” rituals at which African-Americans were often executed before large crowds:

In 1879, the *Chicago Tribune* bemoaned hanging days in the South, which ‘seem to be devised for the entertainment of the people and to take the place of the circus and the dog-fight,’ a phenomenon that was only made more ‘atrocious’ by the fact that ‘the gallows is intended only for the negro.’ When it came to black criminals, the paper opined, ‘the usual mode is to hang him and lynch him without the benefit of the law,’ and even when he did stand trial, ‘the demand for justice is tremendous—if the prisoner is a negro—and he is hurried out of the world neck and heels.’

See also, comments by Daryl Gates, Rasberry, *supra* note 12.

is evidence indicating that tasing poses a significant risk of death.¹¹² Moreover, in some instances an officer grappling with a suspect and authorized to use deadly force will not be able to use his or her taser effectively. It is at least conceivable that the officer might at that point elect to use his or her firearm given the chokehold ban. This is merely to suggest that in the absence of a deadly force exception to the police chokehold, police officers authorized to use deadly force may be incentivized to use force options more lethal than the chokehold. In this sense, the utility of the chokehold is not immediately clear to us given our uncertainty as to the relative risk of the various deadly force options, particularly as they map onto various categories of physical engagement.¹¹³ However, in the event that the chokehold cannot be definitively established as safer than alternative forms of deadly force, it should be barred in all circumstances.

3. *Adherence to the Principle of Criminal-Law Minimalism:* Police chokeholds should be regulated closely. The chokehold policy blitz in the wake of George Floyd's death suggests that this sentiment is taking hold among legislatures and police departments across the nation. But the instinct to attach a criminal penalty for unlawful police application of the chokehold should be resisted given that, as a general matter, state and municipal legislatures should be oriented toward narrowing rather than expanding the scope of the criminal code.

In prosecuting police chokeholds, the state should be left to rely on the part of the criminal code that addresses aggravated criminal assault. Prosecutors do not need a new criminal assault category that punishes chokeholds outside of the standard criminal legal framework governing

¹¹² For a review of the risks associated with police taser use, see Cheryl W. Thompson & Mark Berman, *Improper Techniques, Increased Risks: Deaths Have Raised Questions About the Risk of Excessive or Improper Deployment of Tasers*, WASH. POST (Nov. 26, 2015), <https://www.washingtonpost.com/sf/investigative/2015/11/26/improper-techniques-increased-risks/> [<https://perma.cc/796K-4YXV>].

¹¹³ Perhaps there is a case to be made that an officer grappling with a suspect and authorized to use deadly force cannot use his or her taser effectively. It would seem that, as a general matter, the risks associated with taser use should be considered in relation to the risks associated with air and carotid chokes. Matthew J. Hickman, Robert M. Scales, Jared N. Strote & John L. Worrall, *Use of Vascular Neck Restraints in Law Enforcement: A Case-Study of Spokane, WA*, 22 POLICE PRAC. & RSCH. 1, 14 (forthcoming Jun. 2021) (arguing based on a quantitative study of police chokeholds in Spokane, Washington, that “[b]anning [vascular neck restraints] will not reduce the need to use force, so officers will just use some other tactic or weapon. Taking away less-lethal options from officers may increase the likelihood they will end up using their firearms.”).

assaults.¹¹⁴ While the criminalization of the police chokehold is the sort of criminal lawmaking that may have a strong expressive function,¹¹⁵ it would exemplify the pathology that drives contemporary penal dysfunction given that it is superfluous to state criminal codes.¹¹⁶ Legislators can affirm the principle of criminal-law minimalism while also (i) barring police departments from authorizing police chokeholds, (ii) mandating an administrative sanction for police use of the chokehold, and (iii) allowing for criminal prosecution of police use of the chokehold in cases such as that of Officer Chauvin in relation to the killing of George Floyd.

Every jurisdiction in the U.S. is governed by criminal laws that prohibit and punish assault, battery, and aggravated versions of these offenses. Thus, as a general matter, conventional criminal law is sufficient to hold rogue officers accountable. The remaining question is the disposition of prosecutors and juries. Will prosecutors hold police accountable to the criminal laws already on the books? Will juries hold police accountable for criminal violence when the evidence dictates conviction, or opt instead for verdicts that vaguely signal jury nullification?

CONCLUSION

Police encounters with the public far too often lead to unnecessary escalation, bloodshed, and death. The data analysis presented in this Article suggests that a growing portion of the public and its elected representatives share this sentiment. The nation is trending toward broad regulation of police chokeholds by way of related policies at the federal, state, and municipal levels of government. Police reform advocates must continue to pressure governments to regulate both air and carotid chokes such that police administrators no longer hold the authority to validate police application of the chokehold under use-of-force policy. When police apply the chokehold

¹¹⁴ *But see* Kate Levine, *Police Prosecutions and Punitive Instincts*, 98 WASH. U. L. REV. 997, 1035 (2021) (arguing that the call for police prosecutions risks repetition of the pathologies of the penal system: “[T]he individual prosecutions of officers in the past few years suggest one major risk of increased police prosecutions is the increased prosecution of officers of color. The recent trials of three officers of color suggest, at least, that the racial pathologies of the criminal legal system replay themselves in the tropes and language employed against them.”).

¹¹⁵ *See* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024 (1996) (“[T]he function of law [is] in ‘making statements’ as opposed to controlling behavior directly.”); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1044 (1995) (“The social world is constituted by social meanings; these social meanings impose costs on, and supply benefits to, individuals and groups; individuals and groups use them to advance individual or collective ends; and their range makes them essential tools in any individual’s or collective’s life.”).

¹¹⁶ *See* Kindy, Schaul & Mellnik, *supra* note 16.

in violation of administrative policy, they should be subject to harsh administration sanction along with close prosecutorial scrutiny.