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Clamping Down On Chokeholds

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The Eric Garner tragedy re-presents not merely the New York Police Department's operational failure to stamp out the use of chokeholds during arrests 21 years after the NYPD patrol guide banned the technique, but our legal system's failure to effectively deter chokeholds even after such high-profile tragedies as the Anthony Baez case in 1994 exposed the legal gaps that allow such conduct to go unprosecuted in state courts.

This article examines the existing legal road map that investigators and prosecutors must navigate in determining whether criminal liability might attach to the conduct of the officers involved.

Prohibition on Chokeholds

Garner was a 43-year-old asthmatic Staten Island man who died while being arrested for allegedly selling untaxed cigarettes ("loosies"). During the arrest, after Garner resisted being handcuffed—but without attacking the officers or attempting to flee—one of the many arresting officers present was videotaped performing a chokehold on Garner as Garner was wrestled to the ground and subdued. He is heard to repeatedly complain, "I can't breathe," until he passed out and, ultimately, died. The city medical examiner has yet to determine the extent, if any, to which the chokehold contributed to Garner's death, but the NYPD transferred two officers involved to non-patrol assignments.

Chokeholds have been limited by the NYPD in some form since at least 1985, when commissioner Benjamin Ward issued the following order:

> 1. Effective immediately, choke holds, which are potentially lethal and unnecessary, WILL NOT be routinely used by members of the New York City Police Department.
>
> 2. Choke holds will ONLY be used if the officer's life is in danger or some other person's life is in danger and the choke hold is the least dangerous alternative method of restraint available to the police officer.[1]

New York City's decision to limit chokeholds followed the technique's ban in Los Angeles in 1982, after 16 people died in police custody between 1977 and 1982 while being restrained by a chokehold.[2] Other jurisdictions limiting or banning chokeholds include Miami, Chicago, Dallas, Denver, Detroit, Houston, Philadelphia, San Antonio and San Diego.

In a chokehold, the person executing the maneuver wraps an arm around the victim's neck and limits or cuts off either the flow of air by compressing the windpipe, or the flow of blood through the carotid arteries on each side of the neck. Historically, chokeholds have had a role in martial arts, self-defense, law enforcement and military combat. Perhaps ironically, New York City police are not trained to use chokeholds because they are prohibited, which creates a greater potential for their tragic misuse.

What makes a chokehold so dangerous is how quickly it can kill, depending on a number of essentially unpredictable (and even unknowable) variables, including the underlying physical and mental health of the person being restrained and the skill of the officer applying the hold.

> [B]ecause of the structures involved, neck holds must be considered potentially lethal under any circumstance and used only where there is no other alternative. Use of neck holds must be viewed in the same way as firearms; the potential for a fatal outcome is present each time a neck hold is applied and each time a firearm is drawn from its holster. The neck hold is different in that its fatal consequence can be totally unpredictable. It can turn a simple arrest where the suspect offers resistance to being placed in handcuffs, into a death which is publicly scrutinized for potential criminal prosecution of the participating officer.[3]

The NYPD itself finally banned the use of chokeholds outright in 1993, following the

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1991 death in police custody of Federico Pereira, a suspected car thief in Queens, of "traumatic asphyxia." (One of the officers involved in Pereira's arrest was tried for manslaughter and criminally negligent homicide but acquitted in 1992.[4] The NYPD patrol guide admits of no circumstance where a chokehold is permissible:

> Members of the New York City Police Department will NOT use chokeholds. A chokehold shall include, but is not limited to, any pressure to the throat or windpipe, which may prevent or hinder breathing or reduce intake of air.[5]

Despite the complete prohibition in New York City, the use of chokeholds remains a persistent problem. The Civilian Complaint Review Board received over 1,000 chokehold complaints between 2009 and 2013; after fully investigating 462 cases, the board substantiated the claims in nine cases and lacked evidence to make a determination one way or the other in 206 cases. The newly appointed chairman of the board has announced a study "to discern why officers continue to use this forbidden practice" and "to shed light on the CCRB methodologies that led to such a large number of cases that are unsubstantiated."[6] Of the nine cases where an illegal chokehold was found to be used, the most serious sanction was a loss of vacation days.[7]

Death in the Bronx

Garner is not the first New Yorker to die in a police encounter where a chokehold was used following its complete prohibition in 1993. Just a year later, in 1994, Police Officer Francis Livoti choked Anthony Baez to death in the Bronx while arresting him after an errant football struck Livoti's patrol car.

The Livoti case provides a road map for the Staten Island district attorney's current criminal investigation into Garner's death, and exemplifies the challenges that state prosecutors face in bringing cases where a police officer engages in a prohibited chokehold.

The Bronx district attorney had attempted to indict Livoti for second-degree manslaughter, but the grand jury only returned an indictment for criminally negligent homicide.[8]

Criminally negligent homicide is a class E felony[9] punishable by up to four years in prison.[10] Prosecutors must show that the defendant created a substantial and unjustifiable risk of death to another person; the defendant must not have properly perceived that risk; a reasonable person would have perceived the risk; and the death resulted from the risk. The determination of guilt centers on the reasonableness of the defendant's perceptions and actions.[11]

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Second-degree manslaughter, a class C felony[12] carrying a possible 15 years in prison,[13] requires evidence that the defendant not only took an unreasonable risk, but consciously disregarded that risk. Both negligence and recklessness involve substantial and unjustifiable risk-taking, but while a negligent defendant is unreasonably unaware of the risk involved, the reckless defendant knows of the risk and consciously disregards it.[14]

One might think that the NYPD's rules prohibiting chokeholds, and officers' presumed awareness of this rule, would weigh in favor of a finding at least that the involved officer's behavior was unreasonable and criminally negligent, or even reckless and rising to second-degree manslaughter. But not only did the grand jury decline even to indict Livoti for manslaughter; ultimately he was acquitted in a state court bench trial even of the criminally negligent homicide charge; this was despite the judge's finding that (a) Livoti employed a prohibited chokehold, (b) Baez's death was "tragic, unnecessary and avoidable," and (c) Livoti's "rude confrontational attitude and raw disrespect heightened the emerging friction."[15]

Federal law held Livoti accountable for Baez's death. After his acquittal in state court, the Justice Department brought criminal charges against Livoti in federal court in the Southern District of New York, alleging a violation of Baez's civil rights under 18 U.S.C. §242.

To establish a violation of Baez's federal civil rights, the prosecution needed to establish that Livoti "(1) acted under color of law; (2) used unreasonable force; (3) acted willfully; and (4) caused bodily injury to Baez."[16] The differences between the federal civil rights claim brought in the Southern District and the New York penal law claim brought in state court were discussed by the district court in rejecting Livoti's double jeopardy claim:

> Criminal offenses under two statutory provisions are different for purposes of double jeopardy if "each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); *United States v. Liller*, 999 F.2d 61, 62-63 (2d Cir. 1993). Title 18 U.S.C. §242 requires proof of at least two elements that are not required by N.Y. Penal Law §125.10: (1) that the defendant acted under color of law; and (2) that in so doing, he willfully deprived another person of a right secured and protected by the Constitution and laws of the United States. 18 U.S.C. §242; *United States v. Langer*, 958 F.2d 522, 523-24 (2d Cir. 1992); *United States v. Schatzle*, 901 F.2d 252, 257 (2d Cir. 1990); 1 L. Sand, et al., Modern Federal Jury Instructions, ¶17.01 at 17-4 (1997).

Similarly, §125.10 requires proof of elements that are not required by §242: (1) that the defendant committed an act creating a substantial and unjustifiable risk of death to another person; (2) that at the time the defendant acted, he failed to perceive the substantial and unjustifiable risk of the other person's death; (3) that the defendant's failure to perceive this risk constituted a gross deviation from the standard of care that a reasonable person would observe in

the situation; and (4) that the defendant's act caused the other person's death. N.Y. Penal Law §15.05; §125.10; *People v. Boutin*, 75 N.Y.2d 692, 696, 556 N.Y.S.2d 1, 555 N.E.2d 253 (1990); *People v. Galle*, 77 N.Y.2d 953, 955-56, 570 N.Y.S.2d 481, 573 N.E.2d 569 (1991).[17]

Interestingly, in upholding the jury's guilty verdict against Livoti's post-trial challenge that the evidence was insufficient to show, among other things, that he acted "'willfully' and with 'specific intent' [to] deprive[] Anthony Baez of his constitutional rights by using unreasonable force," the district judge specifically cited the NYPD's chokehold ban:

> A rational juror could also have determined beyond a reasonable doubt that Livoti's actions were willful based on his prolonged application of a chokehold—a restraining technique that he knew was prohibited by the New York City Police Department in all situations.[18]

In other words, Livoti's presumed knowledge of the NYPD's chokehold ban was sufficient evidence of his "willfulness" so as to establish a federal civil rights violation, but seemed not to help prove in state court—either to the grand jury or the judge—that he "perceived the risk" of his actions so as to establish criminally negligent homicide, let alone that he "consciously disregarded" that risk so as to establish second-degree manslaughter under state law.

Changes in Law

In 2010, the state Legislature created a potentially powerful new tool to prevent unlawful chokeholds: the misdemeanor offense of criminal obstruction of breathing or blood circulation.[19] The crime, requiring proof of intent to obstruct breathing or blood circulation but without inflicting serious injury, is punishable by up to one year in prison. With the same proof of intent, a defendant can be charged with felony strangulation in the first or second degree if the victim dies or suffers serious injury.[20] These offenses were created to address domestic violence situations in which it can be difficult for prosecutors to prove assault for lack of a visible physical injury.

Nonetheless, a substantial gap remains between existing state law's application to chokehold occurrences and the NYPD's internal rule absolutely banning the technique, calling out for a change in the law.

As the Livoti case demonstrated, the state's criminally negligent homicide and manslaughter laws require a degree of intent to inflict harm that fails to capture the unacceptably risky and unpredictably harmful consequences of submitting someone to a chokehold. Even the recently enacted criminal obstruction of breathing law requires a proof of intent that exceeds the standard laid out by the NYPD patrol guide, which flat-out prohibits any use of chokeholds, i.e., "any pressure to the throat or windpipe, *which may* prevent or hinder breathing or reduce intake of air."[21]

> What makes a chokehold so dangerous is how quickly it can kill, depending on a number of essentially unpredictable (and even unknowable) variables, including the underlying physical and mental health of the person being restrained and the skill of the officer applying the hold.

A direct approach might be for the New York City Council to establish a misdemeanor offense that tracks the NYPD's own internal rules (and the NYPD's own assessment as to the danger that chokeholds present to the public), and prohibits chokeholds as a matter of law. By adopting the language in the NYPD patrol guide as local law, the City Council and Mayor can turn what is now a work-rule violation into a misdemeanor offense, creating an additional incentive for police to follow a rule that has been on the NYPD's books for at least two decades, but which seems to be widely ignored.

An alternative, broader approach might be for the council to, in essence, close the existing loophole in the state penal law for assault that requires proof of conduct that is merely criminally negligent only if a deadly weapon is used,[22] but otherwise requires either intentional[23] or at least reckless[24] conduct if no weapon is used (or if the only "weapon" used is a forearm). Accordingly, an individual who is criminally negligent—who unreasonably creates a substantial and unjustifiable risk of physical injury to his or her victim—cannot be convicted of assault absent a deadly weapon. By establishing a new municipal offense of criminally negligent infliction of physical injury, the city can give prosecutors a new tool to deter chokeholds and related restraints that pose unreasonable risks of injury.

Indeed, what the city would really be doing is creating an additional line of defense against tragedies of the kind that befell Eric Garner.

1. Interim Order No. 29, N.Y.P.D., April 23, 1985 (emphasis in original).
2. Ian Fisher, "Kelly Bans Choke Holds By Officers," N.Y. Times, Nov. 24, 1993, at B2.
3. Donald T. Reay, M.D. and John W. Eisele, M.D., "Death From Law Enforcement Neck Holds," Am. J. Forensic Med. Pathol. Vol. 3, No. 3 (September 1982), at 257.
4. Joseph P. Fried, "Police Officer Is Acquitted In the Killing of a Suspect," N.Y. Times, March 25, 1992.
5. N.Y.P.D. Patrol Guide, Procedure No. 203-11, Aug. 1, 2013, at 1 (emphasis in original).
6. N.Y.C. Civilian Complaint Review Board, Press Release, June 19, 2014.
7. J. David Goodman, "In 9 Cases of Police Chokeholds, Punishment Was Rare, Review Board Says," N.Y. Times, July 21, 2014.
8. *People v. Livoti*, 166 Misc.2d 925, 632 N.Y.S.2d 425 (Sup. Ct. Bx. Cnty. 1995); see also "Jorge Fitz-Gibbon, Cop's Death Rap is KOd, Case Axed Over Bronx DA's Paper Work Error," N.Y. Daily News, Sept. 6, 1995.
9. Penal Law §125.10.
10. Penal Law §70.00.
11. Penal Law §15.05.
12. Penal Law §125.15.
13. Penal Law §70.00.
14. Penal Law §15.05.
15. David M. Herszenhorn, "Judge Assails but Acquits Officer in Man's Choking Death in Bronx," N.Y. Times, Oct. 8, 1996.
16. *U.S. v. Livoti*, 196 F.3d 322 (2d Cir. 1999).
17. *U.S. v. Livoti*, 8 F.Supp.2d 246, 247-248 (S.D.N.Y. 1998).
18. *U.S. v. Livoti*, 25 F.Supp.2d 390, 391 (S.D.N.Y. 1998).
19. Penal Law §121.11.
20. Penal Law §§121.12, 121.13.
21. N.Y.P.D. Patrol Guide, Procedure No. 203-11, Aug. 1, 2013, at 1 (emphasis supplied).
22. Penal Law §120.00(3).
23. Penal Law §120.00(1).
24. Penal Law §120.00(2).