

POLICING & THE PROBLEM OF PHYSICAL RESTRAINT

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STEVEN ARRIGG KOH*

Abstract: The Fourth Amendment of the U.S. Constitution prohibits unreasonable “seizures” and thus renders unlawful police use of excessive force. On one hand, this definition is expansive. In the U.S. Supreme Court’s 2021 Term, in *Torres v. Madrid*, the Court clarified that a “seizure” includes any police application of physical force to the body with intent to restrain. Crucially, Chief Justice Roberts’ majority opinion emphasized that police may seize even when merely laying “the end of a finger” on a layperson’s body. And yet, the Supreme Court’s Fourth Amendment totality-of-the-circumstances reasonableness balancing test is notoriously imprecise—a “factbound morass,” in the famous words of Justice Scalia.

Such breadth and imprecision in the Court’s Fourth Amendment jurisprudence create a problem: it under-specifies forms of deleterious police conduct. In particular, while scholarship has explored police firearm use, less research has considered the role of police putting “hands on” a civilian and its potential to escalate toward lethal physical encounters. This is regrettable, given that such a “hands on” scenario occurs millions of times a year. At worst, it has escalated into high-profile police killings in cases like those of George Floyd, Eric Garner, Rayshard Brooks, and Michael Brown. Simply put, when police lay “hands on” laypeople, they may hurt or even kill them.

This Article calls this “the problem of physical restraint” and systematically considers this problem in constitutional criminal procedure, law, and policy. As an initial matter, it shows how this problem is inevitable in both reformist and abolitionist agendas. It then shows how judges, policymakers, and police departments alike have overlooked such physical restraint due to legal under-specification, the political economy of policing, and a cultural-historical contingency that includes anti-Asian attitudes. It thus argues for robust intervention—judicial, legislative, and police training—to redress this oversight in pervasive police use of force.

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INTRODUCTION

Imagine you are a police officer in your first week on the job. You are lawfully interacting with a civilian, and the civilian physically lays hands on your body. How do you react?

Likely, you will have one of four reactions. At one extreme, you may determine that you are overwhelmed by the physical hold and shoot the civilian, as occurred in Kansas City in the 2013 case of unarmed firefighter Anthony Bruno who, on his wedding night, got into a physical altercation with a police officer.¹ Second, you could opt for less deadly force, such as using a taser or oleoresin capsicum (OC), better known as “pepper spray.”² Third, you may use your hands to control the person physically. Finally, you may attempt to verbally de-escalate.

If your reaction to the above hypothetical is uncertain, this is not surprising: American law, policy, and culture systematically overlook such a “hands on” scenario. Consider constitutional criminal procedure. As every student of Criminal Law and Criminal Procedure knows, the Fourth Amendment of the U.S. Constitution prohibits unreasonable “seizures” and thus renders unlawful police use of excessive force.³ On one hand, this definition is expansive. In the U.S. Supreme Court’s 2021 Term, in *Torres v. Madrid*, the Court clarified that a seizure includes any police “application of physical force to the body of a person with intent to restrain.”⁴ Crucially, Chief Justice Roberts’s majority opinion emphasized that police may seize even when merely laying “the end of a finger” on a layperson’s body.⁵ And yet, on the other hand, the Supreme Court’s Fourth Amendment totality-of-the-circumstances reasonableness balancing test is notoriously imprecise—a “factbound morass,” in the famous words of Justice Scalia.⁶ Such breadth and imprecision in the Court’s Fourth Amendment jurisprudence creates a problem: it under-specifies forms of dele-

¹ *Wedding Night Fight Ends with Officer Killing Firefighter in Front of New Wife*, KFOR-TV (Feb. 27, 2014), <https://kfor.com/news/video-wedding-night-fight-ends-with-officer-killing-firefighter-in-front-of-new-wife/> [<https://perma.cc/8N9Q-PV7Z>].

² Christopher Mele & Johnny Diaz, *Tasers: Are These Police Tools Effective and Are They Dangerous?*, N.Y. TIMES (Apr. 14, 2021), <https://www.nytimes.com/article/police-tasers.html> [<https://perma.cc/A222-EEVM>]; Artemis Moshtagian & Dakin Andone, *Police Used Pepper Spray to Break Up a North Carolina March to a Polling Place*, CNN, <https://www.cnn.com/2020/10/31/us/north-carolina-police-pepper-spray-polls/index.html> [<https://perma.cc/39R7-SG3B>] (Nov. 1, 2020).

³ *Tennessee v. Garner*, 471 U.S. 1, 8 (1985); *Scott v. Harris*, 550 U.S. 372, 383 (2007). See generally Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. L. REV. 1119, 1119–20 (2008) (discussing police use of force).

⁴ 141 S. Ct. 989, 994 (2021).

⁵ *Id.* at 998 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *288 (1768)).

⁶ *Scott*, 550 U.S. at 383.

terious police conduct,⁷ in particular how police should conduct themselves when laying “hands on civilians.”

Cynthia Lee and Gregory Parks have previously explored aspects of this question through study of police training and psychology.⁸ Otherwise, scholars have paid little systematic attention to such situations, wherein police engage with civilians through physical holds, punches, kicks, or throws.⁹ In fact, this space is so under-specified that it does not even have a single name: it is alternatively referred to as police self-defense,¹⁰ hand-to-hand,¹¹ “hands on,”¹² combatives,¹³ or survival tactics.¹⁴ This is especially surprising given that the

⁷ See generally Seth W. Stoughton, *How the Fourth Amendment Frustrates the Regulation of Police Violence*, 70 EMORY L.J. 521 (2020) (discussing the Fourth Amendment in the context of police use of force).

⁸ For these scholars’ treatment of the topic, see generally Cynthia Lee, *Race, Policing, and Lethal Force: Remediating Shooter Bias with Martial Arts Training*, 79 LAW & CONTEMP. PROBS. 145 (2016) [hereinafter Lee, *Race, Policing, and Lethal Force*]; Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629 [hereinafter Lee, *Reforming the Law on Police Use of Deadly Force*]; Gregory S. Parks, *Martial Arts as a Remedy for Racialized Police Violence*, 83 OHIO ST. L.J. ONLINE 41, 42 (2022) (discussing racial bias in policing), https://moritzlaw.osu.edu/sites/default/files/2022-06/Online%20Vol.%2083%20-%20Parks%20-%20Final%20Format_0.pdf [<https://perma.cc/9F67-DQDN>].

⁹ Jose Torres, *Predicting Law Enforcement Confidence in Going ‘Hands-On’: The Impact of Martial Arts Training, Use-of-Force Self-Efficacy, Motivation and Apprehensiveness*, 21 POLICE PRAC. & RSCH. 187, 187 (2018) (“[L]ittle attention has confronted when de-escalation is not possible, and the officer can or has to physically engage a citizen without lethal force.”).

¹⁰ See, e.g., *Police Training*, CONTEMP. FIGHTING ARTS, <https://contemporaryfightingarts.com/police-training/> [<https://perma.cc/53VK-EPAK>]; KEVIN PARSONS, TECHNIQUES OF VIGILANCE: A TEXTBOOK FOR POLICE SELF-DEFENSE 19 (1980); Lee, *Race, Policing, and Lethal Force*, *supra* note 8, at 637 (referring to self-defense in a policing context); Olga Kirillova et al., *Practical Recommendations for Improving the Training of Police Officers*, J. LEGAL ETHICAL & REGUL. ISSUES, Sept. 2018, at 1, 2.

¹¹ See, e.g., Julia Musto, *Retired Navy SEAL Jocko Willink: Why Police Officers Need Far More Training*, FOX NEWS (June 23, 2020), <https://www.foxnews.com/media/jocko-willink-why-police-officers-need-far-more-training> [<https://perma.cc/X8EE-LRAF>] (describing a retired SEAL’s calls for more hand-to-hand training); Kirillova et al., *supra* note 10, at 2; C.J. CARACCI, NAT’L CRIM. JUST. REFERENCE SERV., NCJ-152170, PRACTICAL HAND-TO-HAND COMBAT FOR THE POLICE OFFICER (1993), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/practical-hand-hand-combat-police-officer> [<https://perma.cc/S58Y-6AV8>] (referring to a police training video from 1993).

¹² See, e.g., Alice Ristorph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1212 (2017); Emma Tucker, Ryan Young & Julia Jones, *With Virtual Reality Police Training, Sacramento Tries to ‘Get to a Much Better Place,’* CNN (Apr. 27, 2021), <https://www.cnn.com/2021/04/27/us/virtual-reality-police-training-sacramento/index.html> [<https://perma.cc/39HE-EB2D>] (describing Sacramento police hands-on training); Patrick V. Murphy, *The Impact of Additional Police*, 20 U. DAYTON L. REV. 745, 745 (1994); HOWARD RAHTZ, UNDERSTANDING POLICE USE OF FORCE 48 (2003).

¹³ See, e.g., Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 250 (2017).

¹⁴ See SETH W. STOUGHTON, JEFFREY J. NOBLE & GEOFFREY P. ALPERT, EVALUATING POLICE USES OF FORCE 191 (2020) (distinguishing between “pain compliance and mechanical disruption” techniques); R.J. ADAMS, T.M. MCTERNAN & C. REMSBERG, NAT’L CRIM. JUST. REFERENCE SERV., NCJ-75902, STREET SURVIVAL—TACTICS FOR ARMED ENCOUNTERS (1980), <https://www.ojp.gov/>

chokehold—an obvious category of physical restraint—made national news following the death of Eric Garner, who suffocated to death after New York City police officers choked him from behind.¹⁵ Writ large, this scenario is staggeringly common: while the typical police officer will never fire a gun in his or her career, all officers will lay hands on a civilian as early as their first week.¹⁶ And although reliable data on policing practice is difficult to find and even harder to measure,¹⁷ studies show that police effect over 4.5 million arrests annually,¹⁸ and reports on the amount of nonlethal force used by the police include rates of up to 31.8% of all arrests made.¹⁹ According to another estimate, “police use or threaten to use force in 1.7% of all contacts and in 20.0% of all arrests.”²⁰

When police lay “hands on,” the stakes are high. First, police tactics may present a problem unto themselves, wherein officers use excessive physical force in an unwarranted situation and injure or kill a layperson. This occurred, for example, when Officer Derek Chauvin placed a knee on George Floyd’s neck in Minneapolis in 2020 and when police officers choked Eric Garner

ncjrs/virtual-library/abstracts/street-survival-tactics-armed-encounters [https://perma.cc/F62Q-5EP8] (referencing the abstract of a book on police tactics).

¹⁵ Joseph Goldstein & Marc Santora, *Staten Island Man Died 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/HY3T-L5FN]. While legal scholar Paul Butler has used the term “chokehold” as a broader metaphor for the way in which Black men are policed and mistreated in the contemporary U.S. criminal justice system, the chokehold itself has only been briefly discussed in scholarship. See PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 28 (2017); Trevor George Gardner & Esam Al-Shareffi, *Regulating Police Chokeholds*, 112 J. CRIM. L. & CRIMINOLOGY ONLINE 111, 113 (2022), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1016&context=jclc_online [https://perma.cc/DR2B-VH94].

¹⁶ Interview with Reinaldo Figueroa, Sergeant, Marietta Police Dep’t (Dec. 7, 2021). For a discussion of incidents involving police use of force on individuals, see generally POLICE EXEC. RSCH. F., *RE-ENGINEERING TRAINING ON POLICE USE OF FORCE*, 13–19 (2015), <https://www.policeforum.org/assets/reengineeringtraining1.pdf> [https://perma.cc/DG9B-ZS3W].

¹⁷ Rachel Harmon, *Why Do We (Still) Lack Data on Policing?*, 96 MARQ. L. REV. 1119, 1121 (2013) (“[T]oday we still lack enough information about what the police do to shape their conduct effectively.”); Ristroph, *supra* note 12, at 1216 (“[W]e lack good data on police violence, and partly because we do not yet know what data to collect.” (first citing generally Harmon, *supra*; and then citing Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Use of Force* 2 (Nat’l Bureau Econ. Rsch., Working Paper No. 22399, 2016), https://www.nber.org/system/files/working_papers/w22399/w22399.pdf [https://perma.cc/E958-ZKXF])); STOUGHTON ET AL., *supra* note 14, at 231 (“Anyone who looks for reliable data about police uses of force . . . is quickly frustrated; even dedicated researchers . . . have found themselves stymied.”).

¹⁸ Fed. Bureau of Investigation, *Number of Arrests for All Offenses in the United States from 1990 to 2021*, STATISTA (Oct. 2022), <https://www.statista.com/statistics/191261/number-of-arrests-for-all-offenses-in-the-us-since-1990/> [https://perma.cc/8WBG-BD55].

¹⁹ Matthew J. Hickman, Alex R. Piquero & Joel H. Garner, *Toward a National Estimate of Police Use of Nonlethal Force*, 7 CRIMINOLOGY & PUB. POL’Y 563, 563 (2008).

²⁰ *Id.*

from behind in New York City in 2014.²¹ Second, “hands on” may lead to further escalation in the use of force toward firearm use. This occurred, for example, when Atlanta police tackled Rayshard Brooks to the ground and shortly thereafter shot him in 2020, and in 2014 when Michael Brown and Officer Darren Wilson engaged in a physical altercation through the window of a police SUV, before Officer Wilson shot and killed Brown.²²

Simply put, when police lay “hands on,” they may hurt or even kill lay-people. This Article calls this the *problem of physical restraint*, defined as the situation wherein police use their own bodies (hands, body weight, etc.) to forcibly control a civilian’s movement. Part I of this Article describes the problem of physical restraint.²³ It also describes the body mechanics gap, which is a police failure to address the problem of physical restraint, in three regards—the physical distance between two people, a collective conceptualization in the use of force, and the lack of knowledge in the mind of the individual police officer in how to address the problem of physical restraint.²⁴ Part II then emphasizes that the problem of physical restraint is inevitable, and thus must be addressed by both police reformists and abolitionists.²⁵ Part III provides an explanatory account of the persistence of the physical restraint problem, considering constitutional criminal procedure, federal and state law, and the political economy of policing.²⁶ Part IV describes and evaluates the rise of hand-to-hand training, which has proliferated in police departments nationwide in recent years.²⁷ It also argues that Western cultural conceptions of violence and anti-Asian attitudes have likely deterred certain departments from engaging in such training.²⁸ Finally, Part V situates such training alongside changes to Fourth Amendment judicial evaluation of use of force and broader police reform efforts in law and policy.²⁹

The present moment is ideal for analyzing the problem of physical restraint. First, as noted above, the Supreme Court in *Torres* explicitly affirmed in 2021 that police may unconstitutionally “seize” when engaging in physical restraint.³⁰ Second, lower federal court jurisprudence on such force is evolving,

²¹ See *A Look at High-Profile Cases Over Killings by US Police*, KSAT (Dec. 23, 2021), <https://www.ksat.com/news/national/2021/06/24/a-look-at-high-profile-cases-over-killings-by-us-police/> [<https://perma.cc/3XKG-G5AK>].

²² *Id.*

²³ See *infra* notes 44–88 and accompanying text.

²⁴ See *infra* notes 67–88 and accompanying text.

²⁵ See *infra* notes 89–105 and accompanying text.

²⁶ See *infra* notes 109–230 and accompanying text.

²⁷ See *infra* notes 239–423 and accompanying text.

²⁸ See *infra* notes 256–296 and accompanying text.

²⁹ See *infra* notes 426–443 and accompanying text.

³⁰ 141 S. Ct. 989, 994 (2021).

applying various constitutional tests to physical restraint.³¹ And third, a contemporary trend—hand-to-hand police training—claims to redress the problem of physical restraint.³² Progressive police departments, such as the one in Camden, New Jersey, have made hand-to-hand skills integral to their community-oriented approach to policing.³³ And since hand-to-hand trainings began in Marietta, Georgia, police reported a 53% reduction of injuries to the person being arrested when force was required, a 23% reduction of the use of a taser, and a 48% reduction of injuries to officers using force.³⁴

This Article contributes to several important scholarly discourses. First, it meets the current moment of national discourse regarding police violence, contributing to scholarship that has considered this question from constitutional³⁵ and sub-constitutional levels.³⁶ In recent years, for example, scholars have considered the role of police unions,³⁷ insurance regulation of police,³⁸ local

³¹ See, e.g., *Chambers v. Pennycook*, 641 F.3d 898, 906 (8th Cir. 2011) (considering “whether the force used to effect a particular seizure is ‘reasonable’” under the Fourth Amendment (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989))); *Hyde v. City of Willcox*, 23 F.4th 863, 870 (9th Cir. 2021) (considering the constitutionality of the use of force during pretrial detention).

³² See, e.g., HBO, *Real Sports with Bryant Gumbel: Force for Change (Full Segment)*, YOUTUBE (Aug. 31, 2021), <https://www.youtube.com/watch?v=SQxuwzXbcEI> [<https://perma.cc/M656-JB4F>].

³³ See, e.g., *Unity Policing Model*, CAMDEN CNTY. POLICE DEP’T (Jan. 6, 2022), <https://camdencountypd.org/unity-policing-model/> [<https://perma.cc/VA7G-PNFJ>]. In Camden, New Jersey, the police department was dissolved and reincorporated under a county policing system. Michelle M.K. Hatfield, *Can Police Unions Help Change American Policing?*, 5 UCLA CRIM. JUST. L. REV. 211, 241 (2021). In this process, “[h]undreds of officers were fired and made to reapply following new training and psychological evaluations.” Sidney Fussell, *What Disbanding the Police Really Meant in Camden, New Jersey*, WIRED (July 1, 2020), <https://www.wired.com/story/disbanding-police-really-meant-camden/> [<https://perma.cc/GZH6-VLNV>]. Camden saw a decline in violence following these changes. *Id.* The city previously reported multiple shootings daily, but has since dramatically reduced shootings to once every few days. Interview with Kevin Lutz, Captain, Camden, New Jersey Police Department (Dec. 21, 2021); Fussell, *supra*. In particular, the Camden Police Department lists de-escalation first in the principles it upholds, alongside “wellness, leadership, transparency, and empathy.” *Unity Policing Model*, *supra*.

³⁴ *BJJ Training Program—Data Summary*, MARIETTA POLICE DEP’T (Apr. 1, 2019), https://www.gracieuiversity.com/Pages/Players/DocViewer?doc=MARIETTA_PD_BJJ_DATA.pdf [<https://perma.cc/UN6Q-6QER>].

³⁵ See, e.g., Ristroph, *supra* note 12, at 1182; Garrett & Stoughton, *supra* note 13, at 218 (considering the Fourth Amendment’s application to excessive use of force by police).

³⁶ Hilary Rau, Kim Shayo Buchanan, Monique L. Dixon & Phillip Atiba Goff, *State Regulation of Policing: POST Commissions and Police Accountability*, 11 U.C. IRVINE L. REV. 1349, 1354 (2021) (“More recently, legal scholars have begun to explore a broader ecology of police regulation.” (citing Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 786 (2012))); see also Shawn E. Fields, *The Fourth Amendment Without Police*, 90 U. CHI. L. REV. (forthcoming 2023) (manuscript at 40–41) (considering police involvement in civil actions).

³⁷ See generally Benjamin Levin, Essay, *What’s Wrong with Police Unions?*, 120 COLUM. L. REV. 1333, 1333 (2020) (situating police unions within broader scholarly discourse on both unions and policing).

administrative regulation of police³⁹ and traffic law enforcement,⁴⁰ citizen cop watching groups,⁴¹ and state police commission regulation.⁴² Second, this Article fully embraces a granular, physical dimension to scholarly discourse on police reform, a dimension that is often underspecified or overlooked.⁴³ Finally, this Article adds a novel angle to race and policing questions, situating oversight in police awareness of body mechanics in cultural history and anti-Asian attitudes.

I. THE PROBLEM OF PHYSICAL RESTRAINT

In our national police reform movement, the use of force remains the most significant issue.⁴⁴ Novel ideas can and should address the factors that lead to escalation toward police violence and—at worst—lethal force.⁴⁵ This

³⁸ See generally John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1540 (2017) (reviewing the impact of private insurers in deterring police misconduct and enforcing the Constitution).

³⁹ See Maria Ponomarenko, *Rethinking Police Rulemaking*, 114 NW. U. L. REV. 1, 1 (2019) (analyzing permanent administrative bodies as a stand in for the public and an alternative to rulemaking for regulating police).

⁴⁰ See Jordan Blair Woods, *Traffic Without the Police*, 73 STAN. L. REV. 1471, 1471, 1490–94 (2021) (considering flaws with the conventional notion that traffic enforcement is impossible without police and the benefits of nonpolice alternatives to traffic enforcement).

⁴¹ Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 391–92 (2016) (discussing the benefits of organized copwatching as an “adversarial, bottom-up mechanism[] of police accountability” affording populations a vehicle to have direct, real-time input on policing decisions that affect their neighborhoods).

⁴² Rau et al., *supra* note 36, at 1349.

⁴³ As will be noted in more depth below, Cynthia Lee is the only legal scholar to have meaningfully addressed the question of martial arts in policing. See Lee, *Reforming the Law on Police Use of Deadly Force*, *supra* note 8, 150–51. Additionally, Professor Seth Stoughton has briefly discussed the factors that cause an instance of physical restraint to become a seizure. Stoughton, *supra* note 7, at 542–45.

⁴⁴ See generally, e.g., BUTLER, *supra* note 15 (analyzing use of force against Black men in the United States); Nirej Sekhon, Essay, *Police and the Limit of the Law*, 119 COLUM. L. REV. 1711, 1712–14 (2019) (reviewing a half century of problems endemic to municipal policing); Spencer Bokkat-Lindell, Opinion, *Why Is Police Brutality Still Happening?*, N.Y. TIMES (May 28, 2020), <https://www.nytimes.com/2020/05/28/opinion/minneapolis-police-brutality.html> [<https://perma.cc/R3JY-FNLH>] (reviewing police killings in the 2010s).

⁴⁵ See, e.g., Shaun Ossei-Owusu, *Police Quotas*, 96 N.Y.U. L. REV. 529, 529 (2021) (“Mounting visual evidence of police brutality and social protests are generating an appetite for something different.”); Robin S. Engel, Hannah D. McManus & Tamara D. Herold, *Does De-escalation Training Work?*, 19 CRIMINOLOGY & PUB. POL’Y 721, 722 (2020) (“During this tumultuous time, a general sentiment has emerged across the country that meaningful reforms in policing are desperately needed to protect both officers and the citizens they serve.”); *Training*, CAMPAIGN ZERO, <https://campaignzero.org/train> [<https://perma.cc/KD9Z-5UVN>] (“The existing research literature is inconclusive on the effectiveness of training at reducing police violence . . . [E]xisting training programs should be replaced with programs that de-emphasize firearms and use of force and that empower communities to design and implement new training paradigms for first responders . . .”).

Part describes this problem of physical restraint, first in Part A through the example of the killing of Rayshard Brooks,⁴⁶ and then in Part B by defining the body mechanics gap in American law and policy.⁴⁷

A. The Case of Rayshard Brooks

Let us preliminarily clarify the scope of the problem by examining the death of Rayshard Brooks. Due to videos from police body cameras, dash cams, and the camera at the local Wendy's in Atlanta, Georgia, we can precisely reconstruct what occurred⁴⁸:

On the night of June 12, 2020, a Wendy's employee called the police to report a man asleep in a parked car blocking the drive-through line. Shortly thereafter, Officer Devin Brosnan arrived at the scene, knocked on the window of Brooks' car, woke Brooks up, and asked him to move the vehicle. When Brooks afterwards fell asleep again, Officer Brosnan again approached the car, woke Brooks up, and told him to move his car into a nearby parking lot space. Minutes later, Officer Garrett Rolfe arrived, asked Brooks if he had any weapons on him, and—once Brooks replied no—asked Brooks if he could pat him down to make sure; Brooks consented, and Officer Rolfe found no weapons. Officer Rolfe then performed a series of sobriety tests on Brooks; during such tests, Brooks offered to lock his car and walk home to his sister's house. Brooks eventually failed a breathalyzer test, his 0.108% result exceeding the legal limit of 0.08%. Officer Rolfe then told Brooks that he had had too much to drink to drive and to put his hands behind his back.⁴⁹

What happened next is most relevant for this Article: Brooks immediately resisted arrest, the three men fell to the ground, and Officers Rolfe and Brosnan quickly lost control of the situation. As the three wrestled on the ground for thirty-three seconds, one yelled, "Stop fighting! Stop fighting!" and "You're gonna get tased! You're gonna get tased!" One of the officers immediately reached for his taser but it did not properly activate. Brooks then broke free, holding one officer's taser while the other officer attempted to tase Brooks. Brooks ran away through the parking lot and, seconds later, turned to fire the taser at Officer Rolfe, who responded with three gunshots, two of

⁴⁶ See *infra* notes 50–65 and accompanying text.

⁴⁷ See *infra* notes 66–87 and accompanying text.

⁴⁸ Aimee Ortiz, *What to Know About the Death of Rayshard Brooks*, N.Y. TIMES (Nov. 21, 2022), <https://www.nytimes.com/article/rayshard-brooks-what-we-know.html> [<https://perma.cc/K5RM-HUUR>].

⁴⁹ *Id.*

which hit Brooks in the back. Brooks was taken to the hospital and died there after surgery.⁵⁰

The Brooks case exemplifies the numerous factors that contribute to police killings.⁵¹ The case involved questions of racial bias and disproportionate impact on communities of color,⁵² police discretion to arrest,⁵³ police use of force in situations where individuals resist arrest,⁵⁴ taser use and effectiveness,⁵⁵ and the utility of body cameras.⁵⁶ Overlooked, however, is something else in plain sight: Officers Rolfe and Brosnan were obviously incompetent in their ability to physically manage a situation where a civilian resists arrest. Unable to place handcuffs on Brooks, the officers' use of force rapidly escalated to tasers and then firearms, leading to Brooks' death. This physical incompetence should come as no surprise; at its eleven-week police academy, the State of Georgia only provides three days of hand-to-hand defensive tactics training and then never requires any form of physical training again.⁵⁷ By contrast, Georgia police officers must re-certify firearms proficiency twice a year.⁵⁸ And yet, only a minority of officers ever use a firearm during their career, whereas every officer in their first week will engage in some hand-to-hand physicality.⁵⁹

How frequently does a physical restraint case like that of Rayshard Brooks arise? It is impossible to say precisely. We know that numerous con-

⁵⁰ Officer Rolfe was fired but has since been reinstated; he has been charged with eleven counts of crime, including felony murder and aggravated assault with a deadly weapon. *Id.* Officer Brosnan has been charged with aggravated assault. *Id.*

⁵¹ See STOUGHTON ET AL., *supra* note 14, at 154 ("Any given use of force is the result of an iterative process, an interaction or, more often, a series of interactions between an officer and a subject.").

⁵² Brooks was Black, the officers are both white. *See generally*, e.g., BUTLER, *supra* note 15 (reviewing the disproportionate impact of policing on black men).

⁵³ *See generally*, e.g., Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307 (2016) (questioning arguments for police necessity to arrest).

⁵⁴ *See*, e.g., Lisa Chaco & Jodi Melamed, *How Police Abuse the Charge of Resisting Arrest*, BOS. REV. (June 29, 2020), <https://bostonreview.net/articles/lisa-cacho-jodi-melamed-resisting-arrest/> [<https://perma.cc/9H9Y-D7NE>].

⁵⁵ *See*, e.g., BRUCE TAYLOR ET AL., POLICE EXEC. RSCH. F., COMPARING SAFETY OUTCOMES IN POLICE USE-OF-FORCE CASES FOR LAW ENFORCEMENT AGENCIES THAT HAVE DEPLOYED CONDUCTED ENERGY DEVICES AND A MATCHED COMPARISON GROUP THAT HAVE NOT 1 (2009).

⁵⁶ *See generally*, e.g., *Considering Police Body Cameras*, 128 HARV. L. REV. 1794 (2015) (canvassing arguments for and against police use of body cameras).

⁵⁷ Interview with Reinaldo Figueroa, *supra* note 16. *See generally* GA. COMP. R. & REGS. 464-5-.03.1 (2022) (making no mention of hand-to-hand training).

⁵⁸ GA. COMP. R. & REGS. 464-5-.03.1(b) (2023) ("Annual firearms training shall, at a minimum, consist of three hours of training provided by a POST-certified firearms instructor . . ."); Interview with Reinaldo Figueroa, *supra* note 16.

⁵⁹ *See*, e.g., Rich Morin & Andrew Mercer, *A Closer Look at Police Officers Who Have Fired Their Weapon on Duty*, PEW RSCH. CTR. (Feb. 8, 2017), <https://www.pewresearch.org/fact-tank/2017/02/08/a-closer-look-at-police-officers-who-have-fired-their-weapon-on-duty/> [<https://perma.cc/5YT5-XEWK>]; Interview with Reinaldo Figueroa, *supra* note 16.

texts arise wherein police are called upon to use physical restraint during their daily routines—often “when making an arrest, breaking up an altercation, dispersing an unruly crowd, or performing a myriad of other official activities.”⁶⁰ And we know that police make millions of arrests each year,⁶¹ though arrests are not the only times police may become involved in non-lethal physical altercations.⁶² And, as is well documented, we know that police tend to use force at higher rates against communities of color, especially Black Americans.⁶³ But unfortunately, little research exists on non-lethal physical altercations with police, specifically those involving punching or kicking. For decades, the lack of standard definitions and the absence of uniform data sources have posed significant challenges to collecting reliable data on police use of force in general.⁶⁴ Researchers and courts alike have noted the ambiguous nature of non-lethal physical altercations that may make it more difficult to collect data on the subject.⁶⁵

⁶⁰ TOM MCEWEN, U.S. DEP’T OF JUST., NCJ-160113, BUREAU OF JUSTICE STATISTICS: NATIONAL COLLECTION ON POLICE USE OF FORCE 1 (1996), <https://bjs.ojp.gov/content/pub/pdf/ndcopuof.pdf> [<https://perma.cc/XH9L-R784>].

⁶¹ This number has been steadily decreasing, down to just over ten million in 2016. Fed. Bureau of Investigation, *supra* note 18; Alice Sperti, *Police Make More Than 10 Million Arrests a Year, but That Doesn’t Mean They’re Solving Crimes*, THE INTERCEPT (Jan. 31, 2019), <https://theintercept.com/2019/01/31/arrests-policing-vera-institute-of-justice/> [<https://perma.cc/CL2Z-GT75>]; Rebecca Neusteter & Megan O’Toole, *Every Three Seconds: Overview*, VERA INST. OF JUST. (Jan. 2019), <https://www.vera.org/publications/arrest-trends-every-three-seconds-landing/arrest-trends-every-three-seconds/overview> [<https://perma.cc/S7FA-AB4T>]. A significant drop to 7.6 million followed in 2020. Fed. Bureau of Investigation, *supra* note 18.

⁶² In 2015, 21% of U.S. residents, age sixteen or older, about 53.5 million persons, had some type of contact with police. ELIZABETH DAVIS, ANTHONY WHYDE & LYNN LANGTON, U.S. DEP’T OF JUST., NCJ-251145, SPECIAL REPORT: CONTACTS BETWEEN POLICE AND THE PUBLIC, 2015, at 1 & fig.1 (2018), <https://bjs.ojp.gov/content/pub/pdf/cpp15.pdf> [<https://perma.cc/5KYN-U4G2>]. This number was lower than the 26% of residents who had contact with police in 2011. *Id.* at 1. In 2015, 1.8% or 985,300 people out of the 53.5 million U.S. residents who had contact with police, experienced threats or use of force. *Id.* at 16 tbl.18; John Wihbey & Leighton Walter Kille, *Excessive or Reasonable Force by Police? Research on Law Enforcement and Racial Conflict*, JOURNALIST’S RES. (July 28, 2016), <https://journalistsresource.org/criminal-justice/police-reasonable-force-brutality-race-research-review-statistics/> [<https://perma.cc/F3GR-S99U>].

⁶³ See Parks, *supra* note 8, at 42.

⁶⁴ See Ristroph, *supra* note 12, at 1216.

⁶⁵ See *Graham v. Connor*, 490 U.S. 386, 397 (1989) (recognizing that officers make choices about the application of force under conditions that are “tense, uncertain, and rapidly evolving” (emphasis added)); STOUGHTON ET AL., *supra* note 14, at 232 (“[N]ational data collection efforts have been lackadaisical, ineffective, or both.”); Kelly A. Hine, Louise E. Porter, Nina J. Westera & Geoffrey P. Alpert, *Too Much or Too Little? Individual and Situational Predictors of Police Force Relative to Suspect Resistance*, 28 POLICING & SOC’Y 587, 600 (2018) (noting that data limitations hindered the study of certain factors, including an officer’s “decision-making, experiences, beliefs, and expectations, as well as details about the suspect’s history with police, and alcohol/drug consumption . . . along with situational details”); Ross Wolf, Charlie Mesloh, Mark Henych & L. Frank Thompson, *Police Use of Force and the Cumulative Force Factor*, 32 POLICING: INT’L J. POLICE STRATEGIES &

In sum, physical restraint arises virtually every minute in America. And yet it is overlooked, under-specified, and under-trained; its ultimate consequence is death, either due to the physical restraint tactic or to the use of firearms.

B. The Body Mechanics Gap

The Rayshard Brooks case is not an isolated incident of police officer failure in physical restraint. American law, policy, and culture have rendered this space a collective blind spot, comparatively underexplored and underspecified. I call this the *body mechanics gap*. Body mechanics is the set of possible movements of the human body, rooted in human musculoskeletal structure.⁶⁶ The body mechanics gap in law enforcement is a failure to address the problem of physical restraint in three regards.

First, descriptively, the body mechanics gap is a *physical space*: when a police officer and civilian are within physical reach of one another, the space between them transforms from benign to a zone of potentially acute physical contestation.⁶⁷ Officers Devin Brosnan and Garrett Rolfe were within this physical zone when initially interacting with Rayshard Brooks.⁶⁸ Given such transformative potential, this physical space must be managed as safely as possible for both the civilian and police officer involved. By definition, this is a space of tradeoffs. At one extreme, a police officer discharging a firearm would surely neutralize the civilian and be of maximum safety to the police officer. And yet, this would also be obviously undesirable—not to mention an unconstitutional use of force under the Fourth Amendment, triggering criminal sanction.⁶⁹ At the other extreme, the police officer could herself resort to only

MGMT. 739, 741 (2009) (observing the inherent limitations of data examined through police reports, including the bias of the reporting officer). Furthermore, other data-driven inferences may be gleaned. For the 2011–2012 period, police made over twelve million arrests each year. Fed. Bureau of Investigation, *supra* note 18.

⁶⁶ See, e.g., NORMAN LINK & LILY CHOU, *THE ANATOMY OF MARTIAL ARTS: AN ILLUSTRATED GUIDE TO THE MUSCLES USED IN KEY KICKS, STRIKES & THROWS* 7 (2020) (describing human anatomy and its use in martial arts training). Each of us has some intuitive sense of body mechanics: we know that our thumb can easily touch our palms and yet cannot touch the backs of our hand, for example.

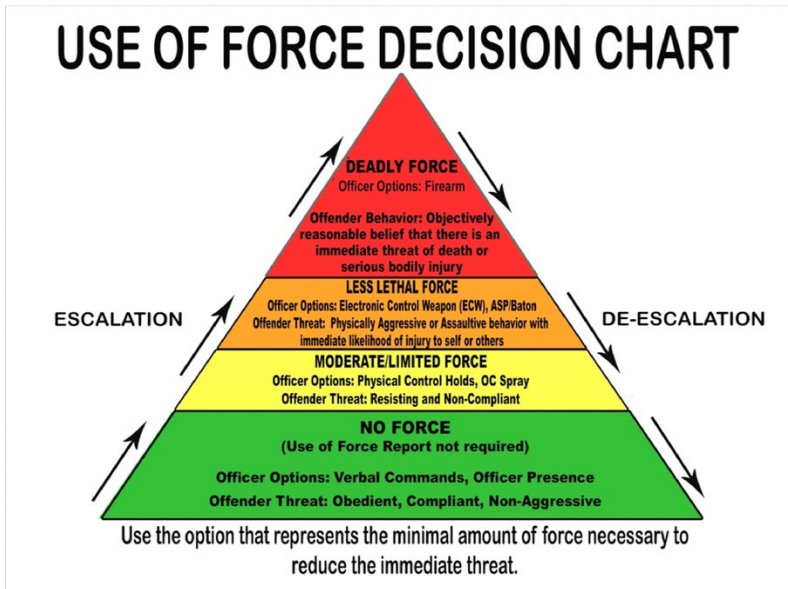
⁶⁷ More generally, every use-of-force situation between police and a civilian involves: (1) anticipation (officer realization that she will interact with a civilian); (2) entry (an officer begins interaction, deciding how best to approach the subject); (3) information exchange (the officer and civilian evaluate one another based on exchanged verbal and non-verbal cues); and (4) final frame decision (an officer decides whether to use force and which type to use). STOUGHTON ET AL., *supra* note 14, at 155 (citing Arnold Binder & Peter Scharf, *The Violent Police-Citizen Encounter*, 452 ANNALS AM. ACAD. POL. & SOC. SCI. 111, 116 (1980)). The body mechanics gap presents itself in this final stage.

⁶⁸ See Ortiz, *supra* note 48.

⁶⁹ See U.S. CONST. amend. IV; *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (“Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.”).

verbal de-escalation, but this would probably be undesirable: at the point when a civilian has closed the physical space and laid “hands on” a police officer, the officer must respond with some physical force; to do otherwise risks the civilian injuring the officer or, at worst, taking the officer’s gun and using it against the officer or others.⁷⁰

Second, the body mechanics gap is a *gap in collective conceptualization of the use of force*. Consider the following graphic from the Philadelphia Police Department⁷¹:



As can be seen above, the police use of force continuum stretches from the use of a firearm to, at the other end, mere verbal engagement with a civilian.⁷² Drawing of weapons, tasers, and OC are in between.⁷³ But also in this

⁷⁰ This also creates the situation where other officers immediately use deadly force against a civilian who is armed with another officer’s firearm. See, e.g., *Police: Man Who Took Oklahoma Officer’s Gun Fatally Shot*, U.S. NEWS (Sept. 17, 2021), <https://www.usnews.com/news/best-states/oklahoma/articles/2021-09-17/police-man-who-took-oklahoma-officers-gun-fatally-shot> [<https://perma.cc/S3FQ-BZT8>].

⁷¹ *Use of Force Decision Chart* (illustration), in PHILA. POLICE DEP’T, DIRECTIVE 10.1, USE OF FORCE—INVOLVING THE DISCHARGE OF FIREARMS 4, <https://www.phillypolice.com/assets/directives/D10.1.pdf> [<https://perma.cc/G4MJ-NZPT>] (2017).

⁷² Such tactics “limit the suspect’s ability to inflict harm and advance the ability of the officer to conclude the situation in the safest and least intrusive way.” Jeffrey J. Noble & Geoffrey P. Alpert, *State-Created Danger: Should Police Officers Be Accountable for Reckless Tactical Decision Making?*, in CRITICAL ISSUES IN POLICING: CONTEMPORARY READINGS 346, 347 (Roger G. Dunham, Geoffrey P. Alpert & Kyle D. McLean eds., 8th ed. 2015).

middle zone is the *physical competence to manage the problem of physical restraint*—a critical middle passage through which use of force may pass when either escalating or de-escalating. And yet, as noted above, the body mechanics gap renders this space so under-specified that it lacks a single name; it is alternatively referred to as police self-defense,⁷⁴ hand-to-hand,⁷⁵ “hands on,”⁷⁶ combatives,⁷⁷ or survival tactics.⁷⁸ It is often overlooked or under-emphasized in police academy training and, especially, in-service training once officers join the force.

Third and finally, the body mechanics gap is a *lack of knowledge in the mind of the individual police officer*: an incomplete understanding of how to address the problem of physical restraint, leading to adverse physical consequences in law enforcement. Officers Devin Brosnan and Garrett Rolfe exhibited this gap when interacting with Rayshard Brooks in 2020.⁷⁹ Some police officers are aware of this deficiency: a 2000 study of approximately 600 American police officers showed collective dissatisfaction with defense and control tactics, noting a 1990 survey wherein academy training varied widely—from ten to 148 hours—with only seven agencies (ten percent) requiring any such training once police entered the service.⁸⁰ Over seventy-five percent of the police officers surveyed expressed interest in in-service training in defensive tactics, including wrestling, takedowns, and gun retention techniques.⁸¹

Once we become attentive to the body mechanics gap, we see it in many of the most high-profile police killings in recent memory—and also realize that the contentious issue of chokeholds is the tip of a much larger iceberg. Consider the 2014 case of Eric Garner, whom two police officers confronted for allegedly selling untaxed cigarettes and who died after Officer Daniel Pantaleo

⁷³ STOUGHTON ET AL., *supra* note 14, at 154–224 (canvassing various law enforcement use of force tactics); U.S. DEP’T OF JUST., NAT’L INST. OF JUST., NCJ-181655, OLEORESIN CAPSICUM: PEPPER SPRAY AS A FORCE ALTERNATIVE 1 (1994) (defining OC, commonly known to the public as pepper spray).

⁷⁴ *Supra* note 10 and accompanying text.

⁷⁵ See, e.g., Musto, *supra* note 11 (describing retired SEAL’s calls for more hand-to-hand training); Kirillova et al., *supra* note 10, at 2; CARACCI, *supra* note 11.

⁷⁶ See, e.g., Ristroph, *supra* note 12, at 1212; Tucker et al., *supra* note 12 (describing Sacramento police hands-on training); Murphy, *supra* note 12, at 745; RAHTZ, *supra* note 12, at 48.

⁷⁷ See, e.g., Garrett & Stoughton, *supra* note 13, at 250.

⁷⁸ See STOUGHTON ET AL., *supra* note 14, at 191 (describing police methods for overcoming a suspect).

⁷⁹ Ortiz, *supra* note 48.

⁸⁰ Robert J. Kaminski & Jeffrey A. Martin, *An Analysis of Police Officer Satisfaction with Defense and Control Tactics*, 23 POLICING: INT’L J. POLICE STRATEGIES & MGMT. 132, 133 (2000).

⁸¹ *Id.* at 141.

used a chokehold to subdue him.⁸² That same year, Officer Darren Wilson shot and killed Michael Brown after the two engaged in a hand-to-hand physical altercation.⁸³ And in the moments before George Floyd's tragic death in 2020, police officers were physically unable to restrain and place him in a police cruiser, at which point all three officers then used their body weight to restrain him for nine minutes and twenty-nine seconds.⁸⁴

Indeed, systemic inattention to the problem of physical restraint obscures research into the place of restraint in escalation toward police use of firearms, particularly when dealing with unarmed individuals. In 2015, Franklin Zimring & Brittany Arsiniega found that although the rate of killings by police had significantly declined in the past decades, it remained at approximately fifteen per 100,000 people as of 2012, the most recent data used in the study.⁸⁵ Further work indicates a high likelihood "that there are a large number of gun cases that do not involve shots fired by civilians and that need not provoke police gunfire"⁸⁶ And, according to the *Washington Post*, when the scope of incidents is limited to only police shootings of unarmed individuals, 461 unarmed people have been fatally shot by police since 2015, of which thirty-two of those shootings have occurred during 2021.⁸⁷ In sum, "significant gaps" still exist in our collective knowledge of the problem and the impact of changes to use-of-force policies and training.⁸⁸

II. AN INEVITABLE PROBLEM: POLICE REFORMISM AND ABOLITIONISM

Before turning to the core of the legal analysis, we must address a threshold consideration: how should we situate the problem of physical restraint within reformist and abolitionist scholarly movements? As is well known,

⁸² Troy Closson, *Officers to Testify About Eric Garner's Death in Long-Delayed Inquiry*, N.Y. TIMES, <https://www.nytimes.com/2021/10/25/nyregion/eric-garner-death-inquiry.html> [<https://perma.cc/7TCT-8QEF>] (Nov. 2, 2021).

⁸³ *Timeline of Events in Shooting of Michael Brown in Ferguson*, AP NEWS (Aug. 8, 2019), <https://apnews.com/article/shootings-police-us-news-st-louis-michael-brown-9aa32033692547699a3b61da8fd1fc62> [<https://perma.cc/5SET-KZ9J>].

⁸⁴ Eric Levenson, *Former Officer Knelt on George Floyd for 9 Minutes and 29 Seconds—Not the Infamous 8:46*, CNN, <https://www.cnn.com/2021/03/29/us/george-floyd-timing-929-846/index.html> [<https://perma.cc/FM8H-G7UM>] (Mar. 30, 2021).

⁸⁵ Franklin E. Zimring & Brittany Arsiniega, *Trends in Killing of and by Police: A Preliminary Analysis*, 13 OHIO ST. J. CRIM. L. 247, 249 & fig.1 (2015).

⁸⁶ Franklin Zimring, *Police Killings as a Problem of Governance*, 687 ANNALS AM. ACAD. POL. & SOC. SCI. 114, 115 (2020) (citing FRANKLIN E. ZIMRING, WHEN POLICE KILL 68–69 (2017)).

⁸⁷ *Fatal Force*, WASH. POST, <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/> [<https://perma.cc/EU43-GU82>] (Jan. 19, 2023) (scroll to "Explore the data"; click the "Filter results" dropdown; filter to "2021" under "Year of shooting" and "Unarmed" under "Victim armed/unarmed"; and then click on the main screen to view results).

⁸⁸ Engel et al., *supra* note 45, at 722–23.

criminal legal scholarship may be broadly bifurcated into two schools.⁸⁹ In one camp, reformists argue in favor of more police training, such as de-escalation training, to reduce police violence.⁹⁰ They note that although police may be ill-suited to respond to many situations, data suggest an inverse relationship between police presence and violent crime, at least somewhat justifying their continued existence.⁹¹ Alternatively, abolitionists, mindful in particular of racial and class disparities in policing, call for a complete reconceptualization of law enforcement, including abandoning state-sponsored violence in favor of community enforcement.⁹² Some currently envision an “abolitionist horizon,” wherein police are removed as a defining piece of architecture in the American political economy.⁹³

The answer is that, for both camps, the problem of physical restraint is inescapable. The reason, simply, is that communities will inevitably confront situations wherein individuals engage in violent behavior and will need to be momentarily physically restrained. Although the origins and nature of violence are contested in legal and other disciplines of scholarship, even the more hopeful conceptions of the future imagine some form of inevitable violence.⁹⁴ For example, in an Afrofuturist conception, Professor Bennett Capers argues that “to the extent that much economic crime and even violent crime is traceable to frustrations from wealth inequality, legislation and norm building to redistrib-

⁸⁹ See Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1802 (2020) (describing scholarly focus on reforming the police).

⁹⁰ *Id.*

⁹¹ Generally, this is in response to studies showing a positive impact on society from the police response to violent crime. See Fields, *supra* note 36 (manuscript at 10) (discussing the movement to defund the police); see also Christopher Lewis & Adaner Usmani, *The Injustice of Under-Policing in America*, 2 AM. J.L. & EQUAL. 85, 85 (2022) (noting that the United States is under-policed compared to other developed countries).

⁹² See, e.g., Akbar, *supra* note 89, at 1786–87 (“[An] abolitionist horizon . . . reimagines and redirects reform toward the political, economic, and social transformations necessary to confront the enduring realities of police violence.” (first citing *Active Campaigns*, PRISON INDUS. DIVESTMENT MOVEMENT, <https://prisondivest.com/active-campaigns/> [<https://perma.cc/797B-CSCA>]; then citing *Our Work*, FREEDOM TO THRIVE, <https://freedomtothrive.org/our-work/> [<https://perma.cc/G7GA-B7UW>]; and then citing *Platform & Demands*, FREEDOM CITIES, available at <https://web.archive.org/web/20220819061155/http://freedomcities.org/platform/>)).

⁹³ See *id.*

⁹⁴ Abolitionists have also advanced a theory of violence rooted in the “racialized political, economic, militarist, and environmental roots and manifestations of violence.” Allegra McLeod, *An Abolitionist Critique of Violence*, 89 U. CHI L. REV. 525, 527 (2022). See generally HANNAH ARENDT, *ON VIOLENCE* (1970) (considering the nature of violence in the second half of the twentieth century); ELIZABETH FRAZER & KIMBERLY HUTCHINGS, *VIOLENCE AND POLITICAL THEORY* (2020) (historically surveying political theorists’ accounts of the nature of violence); DAVID ALAN SKLANSKY, *A PATTERN OF VIOLENCE* (2021) (reviewing conceptions of violence across various criminal law and procedural doctrines); Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571 (2011) (situating notions of violence and violent crime in historical and political context).

ute wealth and de-fetishize unadulterated capitalism will have already removed the major incentive for much of this type of crime.”⁹⁵ But this scholar also recognized that “some crime will persist” and that “[c]hanges in police training will also likely impact police-citizen interactions.”⁹⁶ And Professor Paul Robinson has recently canvassed historical examples of “no punishment” communities that eventually had to enforce formal rules in the wake of harmful misconduct.⁹⁷

Furthermore, even in an abolitionist future, we must grapple with a society in which the Fourth Amendment no longer formally applies and other forms of regulation would constrain non-police actors such as emergency responders, mental health first responders, social workers, violence interrupters, and civilian traffic enforcement.⁹⁸ Even the most critical contemporary abolitionist projects, which argue for community or neighborhood norm enforcement over state actors in law enforcement, do not call for such actors to desist from all forms of physical restraint.⁹⁹ Such a future will likely involve technologies and tactics absent today, including “improvements to terahertz scanners [that] will soon allow officers to not only detect illegal firearms remotely, but also remotely disengage them”¹⁰⁰ We may also imagine a future in which police default to firearm use less, opting for verbal de-escalation or, most often, hand-to-hand de-escalation.

In this way, this Article’s focus on the problem of physical restraint is both agnostic and decidedly realist. In one regard, as just noted above, the problem inheres in any system of community norm enforcement.¹⁰¹ In another regard, it sees itself as addressing a step two analysis in law enforcement. Although much scholarly emphasis rightly focuses on critical step one questions—the structural and racial factors that drive policing and over-policing—this has led to inattention to the step two question of how police physically restrain civilians. The reasons for this physical restraint may be myriad—lawful and unlawful

⁹⁵ I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1, 39 (2019).

⁹⁶ *Id.* at 48–49.

⁹⁷ See Paul H. Robinson, *Criminal Law’s Core Principles*, 14 WASH. U. JURIS. REV. 153, 170–71 (2021).

⁹⁸ See U.S. CONST. amend. IV; Fields, *supra* note 36 (manuscript at 20–42). At least one scholar has called for the elimination of the current Fourth Amendment test as a solution to police violence. Stoughton, *supra* note 7, at 521.

⁹⁹ See Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1629–30 (2019) (describing community initiatives in situations of acute mental health crises and other urgent situations, recognizing that not all interpersonal harm will be prevented by such measures).

¹⁰⁰ Capers, *supra* note 95, at 42 (citing I. Bennett Capers, *Techno-Policing*, 15 OHIO ST. J. CRIM. L. 495, 497–98 (2018)).

¹⁰¹ See *supra* notes 94–97 and accompanying text.

stops by police, “legitimate” and “illegitimate” resistance by laypeople,¹⁰² and other, broader situational factors where this occurs.¹⁰³ But such restraint warrants close scrutiny. The reality is that, literally every few minutes in America, police officers cross into this physical space; scholars and policymakers alike must grapple with this critical site of police-civilian interaction.

The analogy here is to gun use: although collective analysis must bear on the question of the critical factors leading to a law enforcement actor using a firearm—for example, over-policing of certain neighborhoods—focus should also rightly be on firearm-related decision making and skills, such that law enforcement does not use their firearm unnecessarily and act inappropriately when they do use their firearm. Similarly, focus should also be on physical-restraint-related decision-making and skills, such that law enforcement does not engage in physical restraint unnecessarily and act inappropriately when they do engage in physical restraint.

Furthermore, redressing the problem of physical restraint dovetails with our national movement to de-militarize the police.¹⁰⁴ Many envision the end to armed police, particularly given the national movement to reduce firearm proliferation in the wake of the Uvalde and other mass shootings in 2022.¹⁰⁵ Such change begs the question: what are the safest and most effective alternatives to firearms? As this movement grows, it will emphasize hand-to-hand skills and training to restrain individuals without recourse to guns.

In sum, redressing physical restraint is no panacea for the pathologies of contemporary policing. It is not alone sufficient to mitigate all harm, but it is necessary in any law enforcement system for physical restraint to be appropriately conceptualized and circumscribed.

III. PHYSICAL RESTRAINT IN LAW AND THE POLITICAL ECONOMY OF POLICING

Why has physical restraint been so overlooked? The answer lies at the intersection of law and policy. The problem of physical restraint is under-

¹⁰² Resistance is a contested subject in legal scholarship. *See generally* RACHEL HARMON, *THE LAW OF THE POLICE* 423–78 (2020); *see also* Alice Ristroph, *Respect and Resistance in Punishment Theory*, 97 CALIF. L. REV. 601, 615–19 (2009) (arguing that resistance to punishment is a natural right produced by the natural right to self-preservation as put forth by Thomas Hobbes).

¹⁰³ *See, e.g.*, Ristroph, *supra* note 12, at 1230–35 (detailing the right to resist unlawful arrest in American legal history).

¹⁰⁴ *See, e.g.*, RADLEY BALKO, *RISE OF THE WARRIOR COP* 242 (2014).

¹⁰⁵ *See* Jeremy Hobson, *Do Police Need Guns?*, WBUR (June 23, 2020), <https://www.wbur.org/hereandnow/2020/06/23/do-police-need-guns> [<https://perma.cc/KW5R-JYKW>] (discussing interview with Professor Tracey Meares regarding police use of firearms); *A Partial List of Mass Shootings in the United States in 2022*, N.Y. TIMES (Jan. 5, 2023), <https://www.nytimes.com/article/mass-shootings-2022.html> [<https://perma.cc/M8DY-VTZ4>].

specified in constitutional criminal procedure, federal and state regulation, and the political economy of policing.

This Part begins with the question of how the Supreme Court and lower courts interpret Fourth Amendment seizures, particularly as applied to police use of force.¹⁰⁶ It then considers how state statutes and regulations provide little categorical guidance regarding police physical restraint and, similarly, largely lack hand-to-hand training requirements analogous to those governing firearms.¹⁰⁷ Finally, this Part discusses the function of police unions, insurance policies, and civil asset forfeiture regimes in the legal regulation of physical restraint.¹⁰⁸

A. *Capacious Constitutional Law*

The plain language of the Fourth Amendment prohibits unreasonable seizures, and the Supreme Court has interpreted the term capaciously to include shooting, arrests, stop and frisk, and physical restraint situations.¹⁰⁹ The Court has defined seizure as the situation wherein, “in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave”¹¹⁰ As is well known, both civil and criminal remedies are available in cases wherein police have violated constitutional rights,¹¹¹

¹⁰⁶ See *infra* notes 109–162 and accompanying text.

¹⁰⁷ See *infra* notes 164–212 and accompanying text.

¹⁰⁸ See *infra* notes 213–230 and accompanying text.

¹⁰⁹ See U.S. CONST. amend. IV; *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (“Examples of circumstances that might indicate a seizure . . . would be the threatening presence of several officers, the display of a weapon by an officer, *some physical touching of the person of the citizen*, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.” (emphasis added) (first citing *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968); then citing *Dunaway v. New York*, 442 U.S. 200, 207 & n.6 (1979); and then citing 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE 53–55 (1978))); *Ristroph*, *supra* note 12, at 1193 (“[T]he word seizure is applied to a wide range of police interventions, from short conversation to brutal beating to killing.”); see also *Stoughton*, *supra* note 7, at 525 (noting that the categories of seizure and use of force are overlapping but distinct categories).

¹¹⁰ *Mendenhall*, 446 U.S. at 554; *Terry*, 392 U.S. at 30.

¹¹¹ The patchwork of American laws regarding police use of force fall into three categories. First, individuals may bring a civil suit against a state or local government or the federal government (*Bivens*) in instances where their constitutional rights have been violated. See 42 U.S.C. § 1983; *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 397 (1971). Section 1983 “is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes.” *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979). And “*Bivens* actions closely parallel claims filed under § 1983.” MICHAEL AVERY, DAVID RUDOVSKY, KAREN M. BLUM & JENNIFER LAURIN, POLICE MISCONDUCT: LAW & LITIGATION § 5:2 (2022). Second, 18 U.S.C. § 242 criminalizes police willfully subjecting any person to “the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.” 18 U.S.C. § 242. This statute prohibits use of force that is “objectively unreasonable” when “judged from the perspective of a reasonable officer on the scene” and is the basis for certain DOJ investigations of police misconduct of state and local law enforcement. *Graham v. Connor*, 490 U.S. 386, 396–97 (1989); see also, e.g., U.S. DEP’T OF JUST., REPORT REGARDING

and the Supreme Court has brought all claims of excessive police force under the Fourth Amendment prohibition against unreasonable seizures.

As a preliminary matter, physical restraint falls clearly within the zone of Fourth Amendment seizure. In 2021, the Supreme Court in *Torres v. Madrid* held that the mental state of an officer, and whether there was an intent to restrain, was the critical focus of inquiry for determining whether police engaged in a “seizure” under the Fourth Amendment.¹¹² In that case, two New Mexico state police officers pursued 42 U.S.C. § 1983 plaintiff Roxanne Torres while attempting to execute an arrest warrant and, as she fled in her car, fired upon her thirteen times, striking her twice.¹¹³ The issue on appeal was “whether a seizure occurs when an officer shoots someone who temporarily eludes capture after the shooting.”¹¹⁴ Writing for the majority, Chief Justice Roberts explicitly affirmed the “mere-touch rule” that dictates that police may seize even when merely laying “the end of [a] finger” on a layperson’s body.¹¹⁵ In particular, he identified English and American judicial rulings and commentaries standing for the propositions that “‘seizure’ readily bears the meaning of a *laying on of hands or application of physical force to restrain movement*, even when it is ultimately unsuccessful”¹¹⁶ and that “[a]ll the authorities, from the earliest time to the present, establish that a *corporal touch is sufficient* to constitute an arrest, even though the defendant do[es] not submit.”¹¹⁷

And yet, the relevant Fourth Amendment totality-of-the-circumstances reasonableness balancing test is so capacious as to under-specify physical restraint relative to deadly force such as firearm use. We will consider this test first in Supreme Court jurisprudence,¹¹⁸ followed by lower federal court rulings.¹¹⁹

THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 10 (2015). And third, state statutes criminalize police conduct under either general crimes or criminal laws specific to law enforcement. JENS DAVID OHLIN, CRIMINAL LAW: DOCTRINE, APPLICATION, AND PRACTICE 693–712 (2d ed. 2018) (describing criminal investigations into law enforcement conduct).

¹¹² 141 S. Ct. 989, 994 (2021).

¹¹³ *Id.*

¹¹⁴ *Id.* at 993–94.

¹¹⁵ *Id.* at 996 (“Early American courts adopted this mere-touch rule from England, just as they embraced other common law principles of search and seizure.”).

¹¹⁶ *Id.* at 995 (emphasis added) (quoting *California v. Hodari D.*, 499 U.S. 621, 626 (1991)).

¹¹⁷ *Id.* at 996 (alteration in original) (emphasis added) (quoting *Nicholl v. Darley* (1828) 148 Eng. Rep. 974).

¹¹⁸ See *infra* notes 121–141 and accompanying text.

¹¹⁹ See *infra* notes 142–162 and accompanying text.

1. Fourth Amendment “Seizures”

As a matter of positive law, the problem of physical restraint is overlooked because the relevant use-of-force doctrine under-specifies this form of police force.

As every law student in Criminal Procedure knows, once a court determines that law enforcement has engaged in a seizure, it must then conduct a reasonableness balancing test to determine if the amount of force that police used was constitutional given the totality of circumstances.¹²⁰ Courts balance the “intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.”¹²¹ The fact-specific nature of this test means that police are free to engage in a wide variety of tactics as long as they are proportional. And yet, as Professor Bill Stuntz aptly noted, “[o]ne who studies the law of criminal investigation cannot help wondering at the chasm between the mass of rules and regulations governing where the police can look and what they can touch when they look there, and the virtual absence of any constitutional constraint on when police can strike a suspect.”¹²² Professor Alice Ristroph has also recognized that “there has been surprisingly little attention to the constitutional rules that set the boundaries of seizure authority.”¹²³ And Professors Brandon Garrett and Seth Stoughton have identified such flaws as part of their call for a reconstruction of the Fourth Amendment around police tactics.¹²⁴

Consider the development of the doctrine. The first in this line of cases is *Tennessee v. Garner*, which found that a police officer acted unreasonably when he used deadly force to shoot in the back of the head a Black American male suspect who was fleeing.¹²⁵ The Court established the test that, in determining the constitutionality of police use of force, courts must “balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion,” and, in the case of a fleeing suspect, the use of deadly force, in all circumstances, is constitutionally prohibited.¹²⁶ Four years later, in *Graham*

¹²⁰ *Tennessee v. Garner*, 471 U.S. 1, 8 (1985).

¹²¹ *Id.* (first quoting *United States v. Place*, 462 U.S. 696, 703 (1983); then citing *Delaware v. Prouse*, 440 U.S. 543, 555 (1976); and then citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976)); see *infra* notes 127–130.

¹²² William J. Stuntz, *Privacy’s Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1066 (1995).

¹²³ Ristroph, *supra* note 12, at 1186.

¹²⁴ See generally Garrett & Stoughton, *supra* note 13 (evaluating the Fourth Amendment’s application to police use of excessive force).

¹²⁵ *Garner*, 471 U.S. at 21–22.

¹²⁶ *Id.* at 8 (first quoting *Place*, 462 U.S. at 703; then citing *Prouse*, 440 U.S. at 555; and then citing *Martinez-Fuerte*, 428 U.S. at 555).

v. Connor, the Court applied this balancing again to the use of non-deadly force, stating that the Fourth Amendment governs “all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen”¹²⁷ In this case, police officers injured a Black American man suffering diabetes-related symptoms on the erroneous suspicion that the man was engaging in criminal activity.¹²⁸ The Court emphasized three factors that lower courts have since applied: (1) the reasonableness of the use of force “from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight”; (2) allowing for the reality that police officers are often making split-second judgments about force, in “tense, uncertain, and rapidly evolving” situations;¹²⁹ and (3) the fact that the reasonableness inquiry is an objective consideration.¹³⁰

Given that it relies on this totality-of-the-circumstances analysis, the *Garner* standard is—to put it colloquially—quite slippery.¹³¹ Although the seizure test lacks an explicit proportionality analysis, constitutional law validates a back-and-forth dynamic between police and civilians:

In a typical framework, verbal noncompliance from the suspect may be met with verbal commands. But “passive resistance” (failure to comply with commands) may be met with “hands-on tactics” or pepper spray; active resistance (efforts to escape or avoid arrest that are unlikely to inflict injury) may be met with batons, [t]asers, and other non-deadly force; and . . . any threat of death or serious bodily injury to the officer or anyone else may be countered with deadly force.¹³²

Under Fourth Amendment jurisprudence, when an officer is confronted with lay resistance, “the officer’s authority to use force expands rapidly and reaches a license to kill quickly.”¹³³ Recent jurisprudence has only underscored the precarious balance of under-specification and risk of escalation. In 2007, the Supreme Court in *Scott v. Harris* rejected any more categorical “on/off switch” regarding preconditions for use of force, re-emphasizing the “factbound mo-

¹²⁷ *Graham v. Connor*, 490 U.S. 386, 395 (1989) (emphasis omitted).

¹²⁸ Non-deadly force included officers “shov[ing] his face down against the hood of the car,” which led to a broken foot, cuts on his wrists, a bruised forehead, an injured shoulder, and permanent loud ringing in his right ear. *Graham*, 490 U.S. at 389–90.

¹²⁹ RICHARD M. THOMPSON II, CONG. RSCH. SERV., R44256, POLICE USE OF FORCE: RULES, REMEDIES, AND REFORMS 1, 5 (2015).

¹³⁰ *Graham*, 490 U.S. at 397.

¹³¹ *Tennessee v. Garner*, 471 U.S. 1, 7 (1985).

¹³² Ristroph, *supra* note 12, at 1212–13 (footnote omitted).

¹³³ *Id.* at 1203.

ness” of reasonableness balancing in each factual situation.¹³⁴ In 2017, in *County of Los Angeles v. Mendez*, the Supreme Court also rejected a Ninth Circuit Court of Appeals rule that permitted Fourth Amendment excessive force claims in instances where an officer provoked the violent confrontation, constituting an independent Fourth Amendment violation.¹³⁵ Most recently, in 2021, the Court in *Torres* clarified that a “seizure” occurs when an officer applies physical force to a person’s body with intent to restrain, even if the force does not subdue the person.¹³⁶

The critical point here is that the *Garner* test is so fact-sensitive that it under-specifies forms of police force.¹³⁷ As Professor Rachel Harmon noted, the test “provides unprincipled, indeterminate, and sometimes simply misleading guidance to lower courts, police officers, jurors, and members of the public because it fails to articulate a systematic conceptual framework for assessing police uses of force.”¹³⁸ Applied to the problem of physical restraint, the issue has often faded into the “factbound morass” of totality-of-the-circumstances analysis.¹³⁹

The result on the ground, then, is that in a hands-on situation, law enforcement already knows they have crossed into the legal category of a seizure. Police in such situations know they are “in for a penny, in for a pound.” One consequence of this conceptual categorization is that it often disincentivizes de-escalation. In such “middle zone” situations, police may more easily use physical restraint, tasers, or pepper spray, techniques that officers may deploy with little training.¹⁴⁰ If, in an alternative Fourth Amendment legal regime, the Court had placed use of firearms and tasers in a zone of greater constitutional concern, police would have more incentive to develop hand-to-hand training to prevent a situation from ripening into that space. Of course, incentives for po-

¹³⁴ *Scott v. Harris*, 550 U.S. 372, 382–83 (2007).

¹³⁵ 137 S. Ct. 1539, 1544–45 (2017) (detailing a case wherein Los Angeles police entered a wooden shed without a warrant and did not knock or announce, then fired on two individuals, one of whom was holding a rifle).

¹³⁶ 141 S. Ct. 989, 994 (2021) (describing a case wherein New Mexico State Police wrongly suspected Torres to be an individual for whom they had an arrest warrant and fired upon her, injuring her as she drove away).

¹³⁷ *Tennessee v. Garner*, 471 U.S. 1, 7 (1985).

¹³⁸ Harmon, *supra* note 3, at 1127; *see also* Stoughton, *supra* note 7, at 534–61 (noting flaws in the application of the Fourth Amendment totality of the circumstances reasonableness analysis to cases of police violence).

¹³⁹ *Scott v. Harris*, 550 U.S. 372, 383 (2007).

¹⁴⁰ *Cf.* Garrett & Stoughton, *supra* note 13, at 218 (“[T]here are no constitutional incentives for police agencies to adopt rules or provide officers with training on how to approach and engage with emotionally disturbed or disabled individuals.”). Police officers in departments with limited resources may undergo “barebones training in which instructors recite federal cases without giving officers sound guidance on when and how to avoid potentially fatal confrontations . . .” *Id.*

lice—and government actors more generally—is a highly contested topic.¹⁴¹ But assuming that police actors do respond to doctrinal constraints, the indeterminacy and lack of incentive are significant.

2. Three Use-of-Force Tests in the United States Circuit Courts of Appeals: A Spectrum of Judicial Intervention

Although Supreme Court doctrine provides limited categorical guidance to courts or law enforcement, lower courts—after slowly apprehending new technologies or uses of force—have conceptualized such categories of force with varying degrees of granularity. Scholarship has only lightly touched on judicial treatment of such force.¹⁴² Federal circuit courts fall along a spectrum of judicial intervention, using one of three different tests—*de minimis* force, intermediate force, and force-specific tests—to advance judicial rules that circumscribe or could be applied to circumscribe physical restraint.¹⁴³

As an initial matter, some circuits have adopted the *de minimis* force test. This is essentially a threshold test, focusing on whether the police used some minimum force necessary to trigger constitutional inquiry.¹⁴⁴ This category arose from cases dealing with so-called “*de minimis* injuries,” or cases where the victim suffered a very minor injury due to police force.¹⁴⁵ For example, in *Chambers v. Pennycook*, St. Louis County police executed a search warrant at an apartment with 42 U.S.C. § 1983 plaintiff Kevin Chambers in it, arresting

¹⁴¹ According to one scholar, because police officers do not internalize the financial cost of their actions from their employing governments, constitutional damages for unconstitutional force are ineffective. See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 348 (2000). Another scholar, however, disagrees with this assessment and believes police officers are deterred by the prospect of constitutional torts. Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 855 (2001). Meanwhile, others emphasize the incentives to avoid unconstitutional force created by police liability insurers in response to lawsuits. Rappaport, *supra* note 38, at 1591; see also Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1189 (2016).

¹⁴² See, e.g., Stoughton, *supra* note 7, at 542–45. “Most civil actions against police officers for misconduct are filed as civil suits in federal court under 42 U.S.C. § 1983.” EDWARD A. HAILES, JR. & JOSEPH MANALILI, U.S. COMM’N ON C.R., *REVISITING WHO IS GUARDING THE GUARDIANS?: A REPORT ON POLICE PRACTICES AND CIVIL RIGHTS IN AMERICA* 65 (2000) (citing 42 U.S.C. § 1983). Future research should consider the nature of these suits at the state level.

¹⁴³ As will be seen below, the same circuit may apply multiple tests to physical restraint. See *infra* notes 144–170.

¹⁴⁴ The Eighth, Tenth, and Eleventh Circuits have adopted this category. See, e.g., *United States v. Rodella*, 804 F.3d 1317, 1328 (10th Cir. 2015); *Chambers v. Pennycook*, 641 F.3d 898, 906 (8th Cir. 2011); *Nolin v. Isbell*, 207 F.3d 1253, 1257 (11th Cir. 2000).

¹⁴⁵ *De minimis* force includes actions such as grabbing an arm or turning someone around. See *Curd v. City Court*, 141 F.3d 839, 841 (8th Cir. 1998).

him while jamming a gun into his back, causing Chambers pain.¹⁴⁶ In 2011, the Eighth Circuit Court of Appeals ruled that Chambers' injury—which involved scrapes, bruises, and aggravation of a prior shoulder condition—was a *de minimus* injury that did not foreclose a Fourth Amendment claim of excessive force.¹⁴⁷

Other circuits have introduced a more exacting test to curb physical restraint and the use of tasers, applying an *intermediate force test* to govern police use of force that is less than firearm use.¹⁴⁸ Intermediate force is defined as a broad category that covers a variety of uses of force, including but not limited to tasers, dog bites, pepper spray, and strikes.¹⁴⁹ Under this test, adopted by the Ninth Circuit Court of Appeals, the court considers whether the victim was resisting.¹⁵⁰ Then, depending on the nature of victim resistance, courts will find a constitutional violation when intermediate force is used on an unrestrained, non-compliant suspect.¹⁵¹ For example, in *Hyde v. Willcox*, 42 U.S.C. § 1983 plaintiff Luke Hyde was arrested by Willcox, Arizona police for driving under the influence.¹⁵² While at the police station, he became resistant, and the police applied intermediate force (in the form of tasers and strikes) to restrain him—but then continued to use force after.¹⁵³ In 2021, the Ninth Circuit accepted that the intermediate force was necessary before Hyde was restrained, but found the force excessive from the moment he was restrained.¹⁵⁴ District courts outside of the Ninth Circuit have also applied the intermediate force test.¹⁵⁵

Finally, and furthest along the spectrum of judicial intervention, courts will at times use a *force-specific test*, crafting judicial rules to circumscribe the

¹⁴⁶ *Chambers*, 641 F.3d at 902.

¹⁴⁷ *Id.* at 906.

¹⁴⁸ *Infra* notes 149–155.

¹⁴⁹ *Hyde v. City of Willcox*, 23 F.4th 863, 870 (9th Cir. 2022); *see also* *Young v. County of Los Angeles*, 655 F.3d 1156, 1161 (9th Cir. 2011).

¹⁵⁰ *Hyde*, 23 F.4th at 870 (quoting *Kingsley v. Hendrickson* 576 U.S. 389, 397 (2015)).

¹⁵¹ *Id.* at 868.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 872.

¹⁵⁵ *See, e.g.,* *Alsaada v. City of Columbus*, 536 F. Supp. 3d 216, 264 (S.D. Ohio 2021); *Pekrun v. Puente*, 172 F. Supp. 3d 1039, 1044 (E.D. Wis. 2016); *Sisneros v. Off. of Pueblo Cnty. Sheriff*, No. 09-cv-01646, 2011 WL 882618, at *4 (D. Colo. Mar. 10, 2011); *see also* *Salazar v. Molina*, 37 F.4th 278, 287 (5th Cir. 2022) (“Salazar infers a rule that an officer violates clearly established law if he uses intermediate force before negotiating when a suspect is restrained, subdued, and not fleeing. This rule, even if correct, wouldn’t apply here because Salazar wasn’t restrained when he was tased . . . [and] this kind of general rule is insufficient to show clearly established law.” (citing *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018))). Even though other circuits have not explicitly adopted the intermediate force test, some implicitly use the category when applying the balancing test to fact patterns analogous to intermediate force. *See, e.g.,* *McCoy v. Meyers*, 887 F.3d 1034, 1040–41 (10th Cir. 2018) (finding that police use of a lateral vascular neck restraint to the plaintiff’s neck after the plaintiff had ceased resisting constituted excessive force).

use of a particular police tactic.¹⁵⁶ This effectively signals to the police that such force is only permissible in certain prescribed circumstances. Although courts have not yet applied the force-specific test to physical restraint, they have done so with tasers. Such stun devices “shoot electrodes a certain limited distance to hook onto an individual” and, once in place, administer several short, powerful electronic bursts that painfully shock the target so that the “individual is temporarily rendered immobile or falls down.”¹⁵⁷ Using the Fourth Amendment *Garner* test, courts have imposed more constitutional restrictions around taser use, on the ground that it constitutes “serious use of force” by causing “excruciating pain.”¹⁵⁸ Although the Seventh Circuit¹⁵⁹ and Ninth Circuit¹⁶⁰ previously curtailed the use of tasers in several use-of-force contexts, most emphatically, in 2016, in *Estate of Armstrong ex rel. Armstrong v. Village of Pinehurst*, the Fourth Circuit Court of Appeals held that police force is only proportional when a reasonable officer would perceive immediate danger.¹⁶¹ Such a ruling effectively banned taser use outside of situations posing immediate danger to police, leading police departments in that jurisdiction and elsewhere to revise their taser-related policies.¹⁶² The Section that follows turns from the federal to the state lens regarding regulation of the use of force and hand-to-hand training requirements.¹⁶³

¹⁵⁶ *Infra* notes 157–162.

¹⁵⁷ Jay M. Zitter, Annotation, *Liability of Police Officer for Assault and Battery Arising from Use of Stun Gun or Taser Device*, 52 A.L.R.6th, § 2 (2010).

¹⁵⁸ See *Est. of Armstrong ex rel. Armstrong v. Village of Pinehurst*, 810 F.3d 892, 902, 909 (4th Cir. 2016) (“A taser . . . is expected to inflict pain or injury when deployed. It, therefore, may only be deployed when a police officer is confronted with an exigency that creates an immediate safety risk and that is reasonably likely to be cured by using the taser.” (internal citation omitted)).

¹⁵⁹ *Cyrus v. Town of Mukwonago*, 624 F.3d 856, 863 (7th Cir. 2010) (denying officers summary judgment on an excessive force claim wherein police repeatedly deployed a taser against a suspect suffering from bipolar disorder and schizophrenia while resisting arrest, resulting in his death).

¹⁶⁰ *Mattos v. Agarano*, 661 F.3d 433, 446 (9th Cir. 2011) (finding that police used excessive force when repeatedly using a taser against a pregnant woman in her thigh, arm, and neck).

¹⁶¹ 810 F.3d at 903. The Ninth Circuit followed suit the following year. *Jones v. Las Vegas Metro. Police Dep’t*, 873 F.3d 1123, 1132 (9th Cir. 2017) (“[A]ny reasonable officer would have known that such use can only be justified by an immediate or significant risk of serious injury or death to officers or the public.” (citing *Scott v. Harris*, 39 F.3d 912, 914 (9th Cir. 1994))).

¹⁶² Paul A. Haskins, *Conducted Energy Devices: Policies on Use Evolve to Reflect Research and Field Deployment Experience*, NAT’L INST. JUST. J., Nov. 2019, at 1, 3. Some municipalities saw as much as a ninety-five percent drop in taser usage after that time. See *id.* at 7.

¹⁶³ See *infra* notes 164–229 and accompanying text.

B. State Statutes and Regulations

Moving beyond constitutional doctrine, the problem of physical restraint is under-specified in statutes and regulations nationwide.¹⁶⁴ Although the federal government may provide grants conditioned on state and local police training requirements,¹⁶⁵ no federal statute mandates the form and content of police engagement with civilians, nor training for all state and local police departments.¹⁶⁶ This Section thus surveys the patchwork of use of force standards¹⁶⁷ and hand-to-hand training requirements¹⁶⁸ in state statutes and regulations.¹⁶⁹

1. Use of Force

Generally speaking, state statutes do not prescribe police use of intermediate or less-than-lethal force with any granularity.¹⁷⁰ Most states merely refer, in broad terms, to the use of deadly and non-deadly force permitted to achieve a legitimate law enforcement purpose.¹⁷¹ For example, Wisconsin legislation

¹⁶⁴ As noted above, most civil actions against police officers for misconduct are filed as civil suits, alleging a violation of the Fourth Amendment of the U.S. Constitution under 42 U.S.C. § 1983. HAILES & MANALILI, *supra* note 142, at 65. However, state constitutions may play a further role in regulating certain instances of physical restraint. See generally William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (noting that state courts may safeguard federal rights). Future research should investigate the constitutions of the fifty states and state court interpretations governing physical restraint.

¹⁶⁵ Authority to Make Public Safety and Community Policing Grants, 34 U.S.C. § 10381(a) (detailing the authority of the U.S. Attorney General to make grants to state and local governments, including for the purpose of training).

¹⁶⁶ See JARED P. COLE, CONG. RSCH. SERV., R44104, FEDERAL POWER OVER LOCAL LAW ENFORCEMENT REFORM: LEGAL ISSUES 2–4 (2016) (detailing the current federal provisions related to local police activity). In March 2021, the U.S. House of Representatives passed the George Floyd Justice in Policing Act of 2021 that “restricts the use of certain policing practices, enhances transparency and data collection, and establishes best practices and training requirements.” *H.R. 1280—George Floyd Justice in Policing Act of 2021*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/house-bill/1280> [<https://perma.cc/VF4F-YG9S>]; see *H.R. 1280*, 117th Cong. (1st Sess. 2021). The Senate has not voted on the bill. See *H.R. 1280—George Floyd Justice in Policing Act of 2021*, *supra* (noting that the bill was received in the Senate on March 9, 2021).

¹⁶⁷ See *infra* notes 170–194 and accompanying text.

¹⁶⁸ See *infra* notes 197–212 and accompanying text.

¹⁶⁹ See generally Stoughton, *supra* note 7, at 561–84 (reviewing “spillage” of the Supreme Court’s Fourth Amendment framework into state law, agency policy, and police culture).

¹⁷⁰ See generally *Use of Force Standards Database*, NAT’L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/civil-and-criminal-justice/use-of-force-standards-database> [<https://perma.cc/8DMM-J6KV>] (Jan. 12, 2021) (reviewing state statutes regarding use of force). See also, e.g., WIS. STAT. § 175.44 (2022) (referencing use of force based on totality of the circumstances and deadly force as a last resort); OKLA. STAT. tit. 21, § 732 (2022) (addressing police use of deadly force under justifiable homicide laws without any reference to non-deadly force); N.H. REV. STAT. ANN. § 627:9 (2022) (differentiating between deadly and non-deadly force without much specificity).

¹⁷¹ See, e.g., *Use of Force Standards Database*, *supra* note 170 (click “Use of Force Standards Database” below the main page title). By contrast, states are more likely to regulate deadly force.

merely authorizes law enforcement officers to use force that is objectively reasonable based on the totality of the circumstances, such as “[t]he severity of the alleged crime at issue,” whether the subject “poses an imminent threat to the safety of law enforcement officers or others,” and whether the subject is “actively resisting or attempting to evade arrest by flight.”¹⁷² As another example, the Office of the Attorney General of the State of New Hampshire in its State of New Hampshire Law Enforcement Manual states that “[i]t is not possible to establish any bright-line rules about when the use of force is warranted” and that such an inquiry is highly circumstantial.¹⁷³ Rather, the guidance generally follows the New Hampshire statute on physical force in law enforcement by authorizing police to use reasonable non-deadly force when necessary to effect arrest, prevent escape, overcome resistance, or defend themselves or others.¹⁷⁴

A minority of states, however, more explicitly dictate when and how to use intermediate force. For example, Minnesota only allows the use of force by a police officer in four situations, while also limiting deadly force.¹⁷⁵ Similarly, New Jersey’s attorney general has recently implemented a more granular state-wide use of force policy that lays out general rules for determining the appropriate level and type of force for officers to use in the face of varying levels of resistance.¹⁷⁶ The policy provides guidance to law enforcement when interacting with individuals whose conduct falls into one of five categories: cooperative person, passive resistor, active resistor, threatening assailant, or active assailant.¹⁷⁷

Many states that lack even guidelines for intermediate force have binding regulations on deadly force. *Id.* For example, Connecticut allows officers to use “proportionate physical force” to address a threat or effectuate an arrest or compliance, providing only general guidance and a few prohibitions, without going into specific situations when a particular type of nondeadly force might be justified. STATE OF CONN., POLICE OFFICER STANDARDS & TRAINING COUNCIL, USE OF FORCE POLICY 6–7 (2022).

¹⁷² WIS. STAT. § 175.44(2)(b) (“When using force, a law enforcement officer is required to act in good faith to achieve a legitimate law enforcement objective.”).

¹⁷³ GORDON J. MACDONALD, N.H. DEP’T OF JUST., LAW ENFORCEMENT MANUAL 38 (2020).

¹⁷⁴ N.H. REV. STAT. ANN. § 627:5, I; MACDONALD, *supra* note 173, at 44.

¹⁷⁵ MINN. STAT. §§ 609.06, subdiv. 1, 609.066, subdiv. 2 (2022). The situations are to make an arrest, execute process, enforce a court order, or executing any other duty required by the law. *Id.* §§ 609.06, subdiv. 1.

¹⁷⁶ OFF. OF THE ATT’Y GEN., STATE OF N.J., USE OF FORCE POLICY 7, § 3.3 (2022) (“Although it is not possible to determine in advance what the appropriate level of force is for every encounter, one factor that is consistent is the amount of resistance the officer is facing at the time. The less resistance an officer faces, the less force the officer should use.”).

¹⁷⁷ *Id.* at 7, § 3.3(b) (stating, for a passive resistor, that “officers may rely on police presence, verbal control techniques, holding techniques, lifting/carrying, wrist locks and other manual pain compliance techniques”).

Furthermore, Indiana is in the process of adopting new statewide policies on what defensive tactics are acceptable for use.¹⁷⁸

Despite states' reluctance to granularly regulate intermediate force, one technique has been singled out for special regulation: chokeholds. Many states—even those states that otherwise lack significant regulation of non-deadly force—either ban chokeholds completely or limit the circumstances of their use.¹⁷⁹ Some jurisdictions even classify chokeholds as deadly force.¹⁸⁰ The effectiveness of these bans, however, has been questioned by scholars and the public alike.¹⁸¹

At the level of local police departments, some have adopted more restrictive policies and training tools regarding use of non-deadly force.¹⁸² Several departments employ incremental use of force matrices or continuums to guide officer conduct by aligning force options with types of resistance.¹⁸³ For example, the Charleston Police Department in South Carolina permits officers to use a level of force that is necessary and within the range of “objectively rea-

¹⁷⁸ See IND. CODE § 5-2-1-9(a)(2) (2022) (granting the law enforcement training board authority to adopt a “defensive tactics and training program”); Lawrence Andrea, ‘Community Should Have a Say’: IMPD Use-of-Force Policy May Again Change Under New Law, INDYSTAR (Apr. 7, 2022), <https://www.indystar.com/story/news/crime/2022/04/07/indiana-use-force-imps-policy-decided-state-training-board-police/7231385001/> [<https://perma.cc/LQT7-4HZZ>].

¹⁷⁹ See Farnoush Amiri, Colleen Slevin & Camille Fassett, *In Year Since George Floyd's Death, Some States Ban or Limit Police Chokeholds*, L.A. TIMES (May 24, 2021), <https://www.latimes.com/world-nation/story/2021-05-24/george-floyd-killing-states-limit-ban-chokeholds> [<https://perma.cc/VD8J-4NAR>] (noting that Colorado, Washington, and Massachusetts are among the states that have passed a law against police using chokeholds).

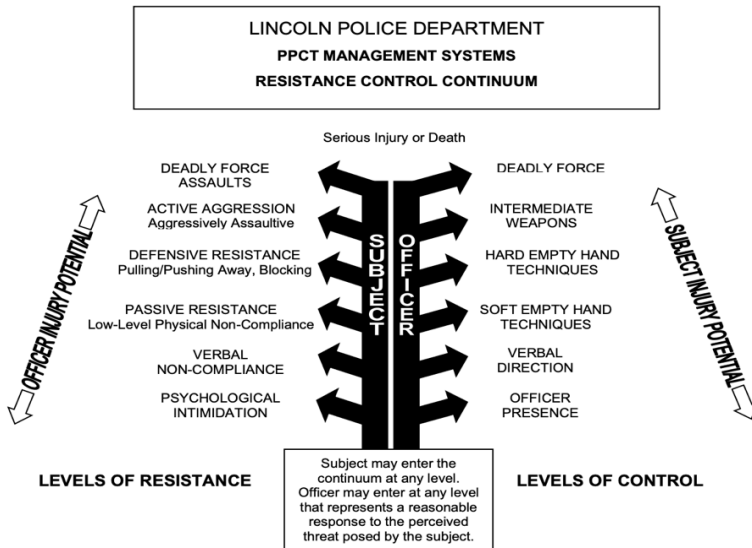
¹⁸⁰ See, e.g., MINN. STAT. § 609.06, subd. 3(1); 550 MASS. CODE REGS. 6.05(2) (2022); IND. CODE § 35-41-3-3(a)(2) (2022).

¹⁸¹ Monika Evstatieva & Tim Mak, *How Decades of Bans on Police Chokeholds Have Fallen Short*, NPR (June 16, 2020), <https://www.npr.org/2020/06/16/877527974/how-decades-of-bans-on-police-chokeholds-have-fallen-short> [<https://perma.cc/9HKT-B3RR>]. The term “chokehold” can refer to at least two techniques: one in which pressure is applied to the windpipe at the front of the neck to prevent the subject from breathing, and another in which pressure is applied on both sides of the neck to limit blood flow to the brain. *Id.* Both can subdue a subject with relative ease, but there still are substantial risks. *Id.*

¹⁸² *Use of Force Standards Database*, *supra* note 170; PHILA. POLICE DEP'T, DIRECTIVE 10.2—USE OF MODERATE/LIMITED FORCE 3–7, §§ 4–5 (2022) (explaining the department's “Use of Force Decision Chart” and stipulating the general steps in executing appropriate use of force); KNOXVILLE POLICE DEP'T, GENERAL ORDER NO. 1.6—USE OF FORCE 6–10, 18 (2021) (explaining their Use of Force Continuum, use of force authorizations and limitations, as well as describing several types of techniques the officer may employ). As one scholar vividly noted, “[d]epartments are all over the map on what constitutes a use of force for internal recordkeeping and policy purposes.” HARMON, *supra* note 102, at 394.

¹⁸³ HARMON, *supra* note 102, at 410; *Use of Force Standards Database*, *supra* note 170; LINCOLN POLICE DEP'T, GENERAL ORDER 1510—FORCE AND CONTROL TECHNIQUES 6 (2022); CITY OF CHARLESTON POLICE DEP'T, ADMIN. GENERAL ORDER 23—RESPONSE TO RESISTANCE/AGGRESSION 4 (2021); PHILA. POLICE DEP'T, *supra* note 182, at 4; KNOXVILLE POLICE DEP'T, *supra* note 182, 6–7.

sonable” options based on their force continuum.¹⁸⁴ Although not described in their written policies, the continuum presented suggests that passive resistance may warrant soft empty-hand control, and it may progress to more physical control and hard strikes (with or without intermediate weapons) as resistance becomes active or assaultive.¹⁸⁵ As another example, the Lincoln, Nebraska Police Department resistance control continuum outlines the relationship between civilian resistance and police use of force:¹⁸⁶



As shown above, low levels of subject resistance such as psychological and verbal resistance are paired with lower levels of police control that do not involve physical contact.¹⁸⁷ When subjects engage in passive or defensive resistance, the continuum guides officers to respond with physical contact, but not weapons.¹⁸⁸ Across various states, soft empty hand techniques include control holds, joint manipulation, pressure points, and other techniques used to

¹⁸⁴ CITY OF CHARLESTON POLICE DEP'T, *supra* note 183, at 4–5 (“The officer will use a level of force that is necessary and within the range of ‘objectively reasonable’ options. When use of force is needed, officers will assess each incident to determine, based on policy, training and experience, which use of force option will de-escalate the situation and bring it under control in a safe and prudent manner.”).

¹⁸⁵ *See id.*

¹⁸⁶ *PPCT Management Systems Resistance Control Continuum* (illustration), in LINCOLN POLICE DEP'T, *supra* note 183, at 6.

¹⁸⁷ *Id.*; *Use of Control Training and Statistics*, CITY OF LINCOLN NEB., <https://www.lincoln.ne.gov/City/Departments/Police/About-LPD/Transparency/Use-of-Control-Training-and-Statistics> [<https://perma.cc/A6QW-UE2Z>].

¹⁸⁸ *PPCT Management Systems Resistance Control Continuum* (illustration), *supra* note 186.

maintain compliance or facilitate control of non-compliant subjects.¹⁸⁹ In responding to higher levels of subject resistance, hard empty hand techniques generally include kicks, punches, control strikes to pressure points, and takedowns.¹⁹⁰ Finally, active aggression and deadly force assaults by the subject may warrant the use of weapons and even deadly force by law enforcement.¹⁹¹ For instance, Lincoln Police Department's General Order on use of force explains that the continuum is a non-exhaustive guide and urges officers to constantly reassess the level of force reasonable and necessary to control a subject as their level of resistance changes.¹⁹²

Still, many states simply echo the United States Supreme Court or their state's legislation dictating that officers must act reasonably.¹⁹³ The Madison Police Department's non-deadly force procedure permits physical force such as "focused and diffused strikes, pressure points, escort holds, decentralization techniques, holding or grabbing of subjects, etc."¹⁹⁴ The Providence Police Department describes similar less-lethal force options, but merely requires officers to choose and employ the minimum level of force that they believe to be

¹⁸⁹ See, e.g., PROVIDENCE POLICE DEP'T, GENERAL ORDER 300.01—USE OF FORCE 5 (2021) ("Weaponless joint manipulation, leverage, pressure point, control hold, gripping, and similar techniques aimed at inducing compliance while reducing the risk of injury to the suspect."); DURHAM POLICE DEP'T, GENERAL ORDERS MANUAL 342 (2021) ("Joint manipulations include the bent wrist and the straight arm-bar techniques, which can cause pain and enable the officer to gain physical control over a subject's movements."); GREENVILLE POLICE DEP'T, GENERAL ORDER 200A14—USE OF FORCE BY POLICE OFFICERS 9, § 6.2 (2020) ("Soft Empty Hand Control: Techniques that do not involve physical strikes of any kind and are designed to respond primarily to passive and defensive resistance from subjects.").

¹⁹⁰ PROVIDENCE POLICE DEP'T, *supra* note 189, at 5 ("Kicks, punches, weaponless striking techniques, tackling, wrestling, and similar techniques aimed at inducing compliance with only a moderate risk of injury to the suspect."); DURHAM POLICE DEP'T, *supra* note 189, 344 ("Hard empty hand techniques are typically used to stop assaultive non-compliant behavior by a subject."); GREENVILLE POLICE DEP'T, *supra* note 189, at 9 § 6.2 ("Control strikes are used to get a subject under control and include strikes targeted to pressure point areas such as the common peroneal (side of the leg), radial nerve (top of the forearm), or brachial plexus origin (side of neck)." (emphasis omitted)).

¹⁹¹ *PPCT Management Systems Resistance Control Continuum* (illustration), *supra* note 186.

¹⁹² *Id.*; LINCOLN POLICE DEP'T, *supra* note 183, at 2 § II.C.3.

¹⁹³ See generally *Use of Force Standards Database*, *supra* note 170 (reviewing state statutes governing use of force). See also, e.g., CITY OF MADISON POLICE DEP'T, STANDARD OPERATING PROCEDURE—USE OF FORCE 1 (2022) ("Officers may only use that force which is objectively reasonable, and only in furtherance of a legitimate, lawful objective. 'Objective reasonableness' is a test based on the totality of the circumstances." (citing *Graham v. Connor*, 490 U.S. 386 (1989))); FARGO POLICE DEP'T, POLICY MANUAL—USE OF FORCE 2, 4 (2021) (granting officers discretion in determining the reasonably appropriate use of force in each incident and briefly suggesting options such as de-escalation and "pain compliance" techniques); HOUSTON POLICE DEP'T, GENERAL ORDER 600-17, USE OF FORCE 3–5 (2022) (differentiating between deadly force, de-escalation, and other responses to resistance, describing the latter without any particularity).

¹⁹⁴ MADISON POLICE DEP'T, *supra* note 193, at 6.

objectively reasonable under the circumstances.¹⁹⁵ The following subsection turns its focus to what hand-to-hand training state statutory and regulatory regimes require of law enforcement.¹⁹⁶

2. Training

What do states require for hand-to-hand training?¹⁹⁷ Simply put, hand-to-hand training falls into an ambiguous zone of law enforcement regulation—both procedurally and substantively. Procedurally, the relevant institutional regulatory authority varies from state to state, resulting in inconsistent training practices. Training-related rulemaking may be codified in statute, promulgated by state-wide agencies, and/or delegated primarily to local police departments to enumerate. The clearest examples are from states that statutorily codify minimum police training requirements, but then delegate the specific frameworks, resources, and granular policies to a state agency.¹⁹⁸ For example, Vermont mandates that “no person shall exercise law enforcement authority as a law enforcement officer without completing a basic training course and annual in-service training.”¹⁹⁹ The statute, however, stops short of outlining essential subject matter and time requirements.²⁰⁰ The New Mexico state legislature delegates

¹⁹⁵ PROVIDENCE POLICE DEP’T, *supra* note 189, at 7, § II(A) (“Whenever lethal force is not authorized, officers must assess the facts and circumstances pertaining to the incident at hand in order to determine if the use of less-lethal force is objectively reasonable, and if so, which less-lethal force option will best de-escalate the incident and bring it under control in a safe manner.”). In some states, recent social movements have led to significant police reform, leading to increased criminal regulation of police use of non-deadly force. Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd’s Murder*, BRENNAN CTR. FOR JUST. (May 21, 2021), <https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder> [<https://perma.cc/L8CR-LPBX>].

¹⁹⁶ See *infra* notes 197–212 and accompanying text.

¹⁹⁷ Several initial challenges impede understanding of the nature and scope of physical law enforcement training across the nation. These challenges include inconsistency in publicly available training curricula and variation of terms used for hand-to-hand. Twenty-three states do not provide publicly available, easily accessible training curricula without a public records request. For available curricula, the varying terminology across state training resources precludes any deep analysis without auditing each state’s training program. For example, potential terms include “arrest and control,” “defensive tactics,” “use of force,” or “handling arrested persons.” No clear relationship exists between the availability of training curricula and geographic region or political majority. For instance, New York and Massachusetts are alongside South Dakota and Louisiana on the list of states that do not have publicly available, easily accessible training curricula. There is also no relationship between accessibility of training materials and inclusion of hand-to-hand; in other words, transparency does not correlate to more progressive training practices. The random nature of procedure and substance only adds to the lack of transparency and discord across state law enforcement training programs.

¹⁹⁸ Most states have a specific law enforcement state agency, such as Police (or Peace) Officer Standards and Trainings (POST), or a commission by a similar name. HARMON, *supra* note 102, at 807–08.

¹⁹⁹ VT. STAT. ANN. tit. 20, § 2358(a) (2022).

²⁰⁰ See *id.*

training requirement authority to the Department of Public Safety, which promulgated regulations outlining 672 hour “core basic training academy curriculum” for police officers, including twenty-two hours on the use of force as a defensive tactic.²⁰¹ Finally, at the municipal level, police departments have varying degrees of autonomy when articulating training requirements. Typically, local police departments are granted discretion vis-à-vis the relevant state agency in executing these trainings.²⁰² The sum total of this burden shifting is a lack of centralized authority in articulating police training standards.

Moving from procedure to substance, the broad state-level trend is that hand-to-hand training is either not required or is entirely lacking.²⁰³ Although police officers are required to re-certify their use of firearms multiple times annually in many jurisdictions,²⁰⁴ they are often required to complete only a few hours of physical training (or worse, no physical training) in a given year.²⁰⁵ Of the twenty-seven states with publicly available training information,

²⁰¹ N.M. CODE § 10.29.9.8 (LexisNexis 2022).

²⁰² In Florida, the Department of Law Enforcement does not regulate local agencies, although some units act in support of the Florida Criminal Justice Standards and Training Commission, which has oversight of officer certification statewide. *About FDLE*, FLA. DEP’T OF L. ENF’T, <https://www.fdle.state.fl.us/About-Us> [<https://perma.cc/4Q7F-YVJF>]; FLA. DEP’T OF L. ENF’T, STATEMENT OF AGENCY ORGANIZATION AND OPERATION 5 (2021), <https://www.fdle.state.fl.us/About-Us/Documents/StatementofAgencyOrg.aspx> [<https://perma.cc/7MDR-4J8P>].

²⁰³ Although it is difficult to say with certainty, states with more granular use of non-deadly force standards may have more thorough police use of force training programs at both state and local levels. *See, e.g.*, N.J. POLICE TRAINING COMM’N, BASIC COURSE FOR POLICE OFFICERS 143 (2016) (outlining the “Use of Force” unit in basic training and its reliance on the Attorney General’s more granular “Use of Force Policy” in learning to apply lawful use of force); *Reducing Use of Force by Law Enforcement*, N.J. OFF. OF THE ATT’Y GEN., <https://www.njoag.gov/force/> [<https://perma.cc/C82P-DNPR>] (“Attorney General Grewal ordered that all 38,000 state, county, and local law enforcement officers in New Jersey complete an immersive, two-day training program on de-escalation and other tactics for limiting the use of force.”). However, this observation may merely reflect the public availability of relevant materials.

²⁰⁴ *See, e.g.*, *Police Officer Standards and Training Council*, LA. COMM’N ON L. ENF’T & ADMIN. OF CRIM. JUST., <https://lcle.la.gov/programs/post/> [<https://perma.cc/6N2J-D9CH>] (“[O]fficers are required to requalify yearly on the POST firearms qualification course”); HBO, *supra* note 32; Dave Grossi, *Police Firearms Training: How Often Should You Be Shooting?*, POLICE1 (June 23, 2011), <https://www.police1.com/police-training/articles/police-firearms-training-how-often-should-you-be-shooting-RNSWpyCwLzR9Csr/> [<https://perma.cc/P8GN-X58R>].

²⁰⁵ *Frequently Asked Questions*, IND. L. ENF’T ACAD. (Jan. 6, 2022), <https://www.in.gov/ilea/frequently-asked-questions/> [<https://perma.cc/SG9T-KD2K>] (requiring twenty-four hours annually, including two hours in physical tactics/use of force); N.Y. CRIM. PROC. LAW § 2.30(3) (McKinney 2021) (discussing an annual requirement for instruction in deadly physical force and use of firearms, no hours specified); BRIAN A. REAVES, DEP’T OF JUST., NCJ-249784, BULLETIN: STATE AND LOCAL LAW ENFORCEMENT TRAINING ACADEMIES, 2013, at 1, 5 & tbl.6 (2021) (showing that police spend most time on firearms training, sixty-seven hours, compared to just twenty-one hours on use of force training that includes de-escalation tactics); Jake Horton, *How US Police Training Compares with the Rest of the World*, BBC (May 18, 2021), <https://www.bbc.com/news/world-us-canada-56834733> [<https://perma.cc/N6D7-S2BP>].

states break down into several categories. First, twenty-three of these states include hand-to-hand training during basic academy.²⁰⁶ Some of these states, however, *only* require these trainings for new recruits during basic academy, with no subsequent in-service training requirements.²⁰⁷ Second, some states have optional in-service trainings.²⁰⁸ For example, Marietta, Georgia provides a voluntary defensive tactics course derived from Gracie jiu-jitsu.²⁰⁹ Third, only seven of the twenty-seven states incorporate some form of hand-to-hand training during both basic academy and annual in-service trainings.²¹⁰ Finally, even prescribed training hours vary in structure and rigor. For example, in Indiana, the traditional curriculum has been a five-day class (forty hours total), emphasizing “on the feet” striking and weapons retention, but little to no training about what happens once individuals fall to the ground.²¹¹ The current in-service requirement is just two hours a year, but this does not have to be actual

²⁰⁶ These data are derived from a fifty state survey conducted by the author. As previously noted, for purposes of this analysis, hand-to-hand includes arrest and control, defensive tactics, use of force, or handling arrested persons.

²⁰⁷ Connecticut includes four hours of de-escalation training during basic academy, but no specific in-service requirements. #8CantWait, CSP NEWS, <https://www.cspnews.org/duty-to-intervene> [<https://perma.cc/D4AK-XMTU>]. Michigan includes at least seventy-nine hours of Police Physical Skills that incorporates mechanics of arrest and subject control, but no clear in-service training requirements. *Basic Training Curriculum Surveys*, MICH. COMM’N ON L. ENF’T STANDARDS, <https://www.michigan.gov/mcoles/meetings-td-webpage/basic-training-curriculum-surveys> [<https://perma.cc/35VW-6H3R>]. During New Jersey’s basic academy, recruits experience “[eighty] hours of defensive tactics training,” but there is no clear in-service training requirements. *New Jersey State Police Recruiting: Academy*, N.J. STATE POLICE, <https://nj.gov/njsp/recruiting/academy.shtml> [<https://perma.cc/7CYR-6G7T>].

²⁰⁸ Alaska has a limited-capacity voluntary “Fit to Fight” course that focuses on physical de-escalation. See, e.g., Alaska Krav Maga and Fitness, FACEBOOK (June 24, 2022), <https://www.facebook.com/alaskakravmaga/photos/7578202525585962/> [<https://perma.cc/TY9G-QRTP>].

²⁰⁹ Katja Ridderbusch, *Cops Are Turning to Jiu-jitsu to Curb Harmful Force, Boost Mental and Physical Health*, U.S. NEWS (Mar. 29, 2022), <https://www.usnews.com/news/health-news/articles/2022-03-29/police-turn-to-jiujitsu-to-curb-dangerous-force-boost-mental-and-physical-health> [<https://perma.cc/NL3X-ZTVA>].

²¹⁰ These states include Arizona, California, Colorado, Indiana, Iowa, Maine, and Minnesota. California requires four hours of use of force training every twenty-four months, in addition to sixteen hours of use of force training during basic academy. CAL. CODE REGS. Tit. 11, § 1005(d)(4)(A) (2023); MINIMUM CONTENT AND HOURLY REQUIREMENTS: REGULAR BASIC COURSE (RBC)—STANDARD FORMAT 1, 1 domain no. 20 (2020). Maine includes fifty-eight hours of Mechanics of Arrest, Restraint and Control during basic training, as well as requires two hours annually for de-escalation training. See *Basic Law Enforcement: Curriculum*, ME. CRIM. JUST. ACAD., <https://www.maine.gov/dps/mcja/training/basiclaw/curriculum.htm> [<https://perma.cc/EB4K-3AUD>] *In-Service Training Requirements for All Law Enforcement Officers (Full-Time and Part-Time)*, ME. CRIM. JUST. ACAD., <https://www.maine.gov/dps/mcja/training/mandatory/law.htm> [<https://perma.cc/5RJ6-ES58>]. Iowa includes Defensive Tactics during basic academy with four hours annually of de-escalation training. *Basic Academy*, IOWA L. ENF’T ACAD., <https://ilea.iowa.gov/basic-academy/> [<https://perma.cc/JWH9-NCEG>].

²¹¹ Interview with James Woestman, Police Chief, Lowell, Ind. Police Dep’t (Jan. 3, 2022).

“hands on” training and can instead be videos, a PowerPoint presentation, or even reading certain flyers.²¹²

C. Policy Dynamics: The Political Economy of Policing

Such diffuse state and local regulation both reflect and perpetuate structural obstacles preventing the development of rules of force and hand-to-hand training. Generally, the political economy of policing highlights that police departments have extremely limited tolerances for tactics that would expose officers to physical danger. Such aversion may manifest in police union activity, insurance regimes, and civil asset forfeiture.

Police unions possess the power to demand approaches that put as much physical risk as possible on laypeople while minimizing physical risk to police.²¹³ Police officers “are among the most densely unionized” groups in the United States.²¹⁴ Given their role in forming and influencing department policies, police unions have become a significant part of scholarly discourse in recent years.²¹⁵ One category of scholarship emphasizes the obstructionist critique, identifying police unions as an impediment to meaningful police reform because they oppose certain policies and constrain meaningful reform through binding terms articulated in collective bargaining agreements.²¹⁶ This has arisen, for example, in initiatives by some police department leadership to have their officers wear body cameras; in some instances, unions protest on the ground that such cameras should not be worn unless police pay increases.²¹⁷ At the extreme, this may interrelate with the trend toward the militarization of

²¹² *Id.*

²¹³ See generally HARMON, *supra* note 102, at 414 (reviewing the role of police unions).

²¹⁴ Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 716 (2017).

²¹⁵ See Levin, *supra* note 37 at 1338 (“[P]olice unions and their collective bargaining agreements . . . are becoming a bigger part of the conversation.”); see also, e.g., Fisk & Richardson, *supra* note 214, at 712; Marcia L. McCormick, *Our Uneasiness with Police Unions: Power and Voice for the Powerful?*, 35 ST. LOUIS U. PUB. L. REV. 47, 52 (2015); Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1191 (2017).

²¹⁶ Levin, *supra* note 37, at 1340. These unions “organize around mutual protection, improving wages, benefits and working conditions, gaining collective bargaining rights and obtaining professional standards.” RON DELORD & RON YORK, LAW ENFORCEMENT, POLICE UNIONS, AND THE FUTURE: EDUCATING POLICE MANAGEMENT AND UNIONS ABOUT THE CHALLENGES AHEAD 11 (2017).

²¹⁷ See, e.g., Michael Levenson & Evan Allen, *Boston Police Union Challenges Body Camera Program*, BOS. GLOBE (Aug. 26, 2016), [https://www.bostonglobe.com/2016/08/26/cameras/9TTDBCwV0reVpw315UCh1H/story.html%20\[https://perma.cc/8NLB-J3PM\]](https://www.bostonglobe.com/2016/08/26/cameras/9TTDBCwV0reVpw315UCh1H/story.html%20[https://perma.cc/8NLB-J3PM]); Nick Kotsopoulos, *New Police Contract in Worcester: 2 Percent Annual Raises, Framework for Body Cameras*, TELEGRAM & GAZETTE, [https://www.telegram.com/story/news/local/worcester/2018/12/02/new-police-contract-in-worcester-2-percent-annual-raises-framework-for-body-cameras/7960428007/\[https://perma.cc/E8YY-WMVY\]](https://www.telegram.com/story/news/local/worcester/2018/12/02/new-police-contract-in-worcester-2-percent-annual-raises-framework-for-body-cameras/7960428007/[https://perma.cc/E8YY-WMVY]) (Dec. 3, 2018).

police strategies, equipment, training, and self-conception in recent decades.²¹⁸ Given that hand-to-hand tactics notionally shift risk further toward police than, say, guns and tasers, it is thus possible that police unions have either objected to the use of hand-to-hand training in the past or the prospect of such obstruction has “chilled” innovation in this direction. It is telling that some jurisdictions, such as Marietta, Georgia, have not encountered such resistance because their departments are not unionized.²¹⁹

Recent negative trends in policing policy may overcome some police union obstruction. Other “middle ground” tactics are ineffective—tasers have recently been shown to fail forty percent of the time, and OC spray affects both the officer and the civilian.²²⁰ Furthermore, the rise of social media has presented a new form of public accountability for such forms of law enforcement—footage of militarized police and physical enforcement punching and chokeholds have provided more significant disincentive for the deployment of such tactics. This sort of “immediate feedback” from the broader polity potentially changes the incentives of policing policy.²²¹ This public shift in perception may also be drawing in other institutional actors, particularly insurance companies that have heretofore obstructed or failed to engage with hand-to-hand training.²²² As Professor John Rappaport has recently described, police departments procure robust insurance policies to protect them from liability in civil cases.²²³ As a result, insurance companies may engage in their own constitutional interpretation of use of force policies, pushing police departments to provide more granular requirements than they might otherwise.²²⁴

A final variable in this political economy is civil asset forfeiture, which provides police discretion to allocate funding toward hand-to-hand training. At the federal, state, and municipal levels, police may seize assets that they rea-

²¹⁸ See, e.g., BALKO, *supra* note 104, at 242 (documenting police militarization in the wake of the September 11th terrorist attacks); Scott A. Harman-Heath, *The Quasi-Army Law Enforcement, Value Judgments, & the Posse Comitatus Act*, 11 CALIF. L. REV. 367, 367 (2020) (“Few issues have been laid bare more clearly in the wake of the death of George Floyd than the prevalence and dangers of highly militarized police.”).

²¹⁹ Interview with Reinaldo Figueroa, *supra* note 16.

²²⁰ Ed Stannard, *Report: Tasers Fail 40% of the Time, Sometimes with Fatal Consequences*, NEW HAVEN REG. (Jan. 25, 2020), <https://www.nhregister.com/news/article/Tasers-fail-more-often-than-they-work-with-fatal-15002785.php> [<https://perma.cc/HL3J-DNWF>]; Interview with James Woestman, *supra* note 211; Interview with Chuck Wexler, Executive Director, Police Exec. Rsch. F. (Dec. 20, 2021).

²²¹ See generally Steven Arrigg Koh, “Cancel Culture” and Criminal Justice, 74 HASTINGS L.J. 79 (2022) (discussing the role of social media in dictating criminal justice decision making).

²²² See Rappaport, *supra* note 38, at 1573–94.

²²³ See *id.*

²²⁴ *Id.* at 1578–80.

sonably believe to be the product of criminal activity.²²⁵ This may include, for example, real property, other property, or even simply sums of cash obtained through drug trafficking and sale.²²⁶ In the case of illiquid assets, law enforcement may sell such property and use the proceeds for police training or other uses.²²⁷ In recent years, criticism of such cases has resurged from scholars, policymakers, and even Supreme Court justices.²²⁸ For now, it appears unlikely that such policies will meaningfully change.²²⁹ Several police departments—including Marietta, Georgia, and Weymouth, Massachusetts—have initially funded their hand-to-hand trainings through money procured from drug-related asset forfeiture.²³⁰ If these regimes were to change, this could pose problems for police training budgets at a time when broader social movements pressure police funding.²³¹ Mindful of the difficulty posed by the politics of policing and police funding, Part IV of this Article explores how police training in hand-to-hand training may be part of the answer to closing the body mechanics gap.²³²

IV. CLOSING THE BODY MECHANICS GAP: THE PARTIAL PROMISE OF POLICE TRAINING

How may we close the body mechanics gap in law and policy? The simple answer is that legal actors and policymakers must attend to the inevitability, reality, and nature of physical restraint. And yet this answer belies the reality that policing in America is a vast, fragmented, and institutional enforcement practice. The political economy of policing alone requires volumes to compre-

²²⁵ *Forfeiture*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/forfeiture> [<https://perma.cc/Q35Q-G5SM>].

²²⁶ *Id.* (“Most forfeiture activity occurs under Federal law, and most of that is connected to the traffic in illegal drugs.”).

²²⁷ *See generally Civil Forfeiture*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/civil_forfeiture [<https://perma.cc/R9DH-MMTZ>].

²²⁸ *See* Kevin Arlyck, *The Founders’ Forfeiture*, 119 COLUM. L. REV. 1449, 1450–51 & nn.1–2 (2019). In this article, Arlyck provides examples of Supreme Court Justices critiquing this issue, with views from Justices Gorsuch, Sotomayor, and Thomas. *See id.* (first citing *Sessions v. Dimaya*, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring in part and concurring in the judgment); then citing *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., respecting the denial of certiorari); and then citing Transcript of Oral Argument at 46–47, *Timbs v. Indiana*, 139 S. Ct. 682 (2019) (No. 17-1091) (Sotomayor, J.)); *Asset Forfeiture Abuse*, ACLU, <https://www.aclu.org/issues/criminal-law-reform/reforming-police/asset-forfeiture-abuse> [<https://perma.cc/EN7A-YQWN>] (Jan. 6, 2022) (discussing “[p]olice abuse of civil asset forfeiture laws”).

²²⁹ Arlyck, *supra* note 228, at 1455–56.

²³⁰ Interview with Reinaldo Figueroa, *supra* note 16; Interview with Kevin Malloy, Sergeant, Weymouth Police Dep’t (Jan. 7, 2022).

²³¹ Josiah Bates, *How Are Activists Managing Dissension Within the ‘Defund the Police’ Movement?*, TIME (Feb. 23, 2021), <https://time.com/5936408/defund-the-police-definition-movement/> [<https://perma.cc/W3AS-3HMW>].

²³² *See infra* notes 239–423 and accompanying text.

hend, let alone reform. And, as noted above, divergent reformist and abolitionist paradigms question criminal justice's future.

This Part and Part V of this Article thus call for a provisional balance between increased police training and judicial vigilance, in a broader context of deeper law and policy reforms.²³³ This Part—based on interviews with progressive police departments and law enforcement experts across the country, as well as review of hand-to-hand training curricula—will describe the nascent national trend in hand-to-hand training, drawing on original research and interviews alongside specific case examples regarding municipal and state initiatives.²³⁴ It will first consider Western cultural conceptions of violence,²³⁵ then the curriculum and specific skills that police officers learn,²³⁶ followed by institutional arrangements and data on use of force.²³⁷ Finally, it will consider the potential problems both with these trainings and their intersection with judicial categorization of intermediate force.²³⁸

Legal scholarship on police use of force has paid little attention to hand-to-hand training.²³⁹ One notable exception is Professor Cynthia Lee's aforementioned article, which notably addressed the potential of police hand-to-hand training in reducing race-related violence.²⁴⁰ In this work, based on an analysis of prior shooter bias studies, Lee argued that martial arts police training could give officers more confidence in their ability to handle volatile situations, relieve stress, and promote mental and emotional stability.²⁴¹ The other is

²³³ See *infra* notes 233–443 and accompanying text.

²³⁴ See *infra* notes 239–423 and accompanying text.

²³⁵ See *infra* notes 256–297 and accompanying text.

²³⁶ See *infra* notes 297–319 and accompanying text.

²³⁷ See *infra* notes 320–354 and accompanying text.

²³⁸ See *infra* notes 357–424 and accompanying text.

²³⁹ Legal scholarship on police training reform has focused on three general themes: training programs' inadequate ability to prepare officers for the "social work" that officers are often called to perform in the field, the war-like mentality that police training instills in officers, and the effectiveness of police training to reduce the use of force, primarily but not exclusively focusing on the role of race. See generally Megan Quattlebaum & Tom Tyler, *Beyond the Law: An Agenda for Policing Reform*, 100 B.U. L. REV. 1017 (2020) (discussing the social work in which police officers are often under-trained and not prepared to perform despite the realities of their job); Darcy R. Samuelsohn, Comment, *Educate, Don't Escalate: Reforming the Qualified Immunity Standard for Those with Mental Illnesses to Incentivize Effective Police Training*, 95 TUL. L. REV. 741 (2021) (underscoring the frequent inadequacy of mental health training for police officers); Seth Stoughton, *Law Enforcement's "Warrior" Problem*, 128 HARV. L. REV. F. 225 (2015), https://harvardlawreview.org/wp-content/uploads/2015/04/vol128_Stoughton.pdf [<https://perma.cc/R97-2H2T>] (examining in detail the warrior mentality that police officer training exposes to officers and actively cultivates); David A. Klinger, *Police Training as an Instrument of Accountability*, 32 ST. LOUIS U. PUB. L. REV. 111 (2012) (examining ways police training can be used to reduce use of force).

²⁴⁰ See generally Lee, *Reforming the Law on Police Use of Deadly Force*, *supra* note 8 (reviewing martial arts training to reduce shooter bias).

²⁴¹ *Id.*

a 2022 essay by Professor Gregory Parks, who has argued that such trainings may redress racial bias in policing.²⁴² Drawing on his expertise in psychology, Parks argues that martial arts training for police may partially mitigate the biases that police officers hold toward people of color, particularly Black Americans.²⁴³

This assertion is timely, given recent political and law enforcement trends. During the 2020 election, Democratic candidate Andrew Yang asserted that police should engage in hand-to-hand training.²⁴⁴ During one town hall, he stated: “if a police officer knew that they could actually just subdue you . . . hand-to-hand, then the odds of them escalating to lethal force would go much much down That’s the kind of thing that would actually make us safer.”²⁴⁵ Yang’s proposal is not as anomalous as it sounds, nor is it restricted to Democratic politicians. In 2021, two Republicans in Michigan introduced a bill that would obligate the Michigan commission on law enforcement to require the rank of blue belt in Brazilian jiu-jitsu.²⁴⁶ Meanwhile, in recent years, municipal police departments in California, Georgia, Indiana, Massachusetts, Minnesota, New Jersey, and at least thirty other U.S. states have experimented with increased physical training for their officers.²⁴⁷ Some have reported a decrease in use of lethal force, decrease in use of other force, and decrease in injury to officer and civilian alike. Additionally, in 2021, the New Jersey Attorney General adopted for the entire state of New Jersey a new defensive tactics training program based on Brazilian jiu-jitsu,²⁴⁸ while the California Commission on Peace Officer Standards and Training (POST) approved a state-wide jiu-jitsu curricu-

²⁴² Parks, *supra* note 8, at 52 (“While there are a range of preventative measures and interventions that can reduce violent, bias-driven outcomes, one is to require police to be skilled in martial arts . . . that equip police with the confidence, discipline, and technical skills to deal with stressful situations and safely subdue those who they deem a threat.”).

²⁴³ *Id.*

²⁴⁴ Andrew Yang (@AndrewYang), TWITTER (Jan. 19, 2020), <https://twitter.com/andrewyang/status/1219089537181396992> [<https://perma.cc/F5MP-V3NS>]; Averil Clements, *Former 2020 Presidential Candidate Andrew Yang Says “It Would Make Us All Safer” if Police Officers Were BJJ Purple Belts*, JIU-JITSU TIMES (Sept. 10, 2019), <https://jiujitsutimes.com/2020-presidential-candidate-andrew-yang-says-it-would-make-us-all-safer-if-police-officers-were-bjj-purple-belts/> [<https://perma.cc/SD2P-HFMY>]. A purple belt is the third of five belts that may be earned in Brazilian jiu-jitsu (progression is white-blue-purple-brown-black). SAULO RIBEIRO WITH KEVIN HOWELL, JIU-JITSU UNIVERSITY 11–12 (2008).

²⁴⁵ Jiu-Jitsu Times, *Andrew Yang Talks About Police Officers Should Training Jiu-Jitsu*, YOUTUBE (Jan. 25, 2020), <https://www.youtube.com/watch?v=8i7X8QJHJeM> [<https://perma.cc/8VUL-5DT3>].

²⁴⁶ H.R. 4525, 101st Leg., Reg. Sess. (Mich. 2021).

²⁴⁷ See *Gracie Survival Tactics (GST)*, GRACIE UNIV., <https://www.gracieuniversity.com/Pages/Public/Informationpages/graciesurvivaltactics2> [<https://perma.cc/YWS6-7R4G>].

²⁴⁸ Arman Fathi, *New Jersey Attorney General Adopts Gracie Survival Tactics as Approved Police Training*, JIU-JITSU TIMES (Nov. 30, 2021), <https://jiujitsutimes.com/new-jersey-attorney-general-adopts-gracie-survival-tactics-as-approved-police-training/> [<https://perma.cc/R5X2-GZBF>].

lum for all police departments in the state.²⁴⁹ A 2021 TED talk also explored this question,²⁵⁰ while *The Marshall Project* and HBO's *Real Sports with Bryant Gumbel* have recently featured this rising trend.²⁵¹

This Part does not conclusively advocate for nor claim to adjudicate the effectiveness of hand-to-hand training. That is an empirical matter that will take years for criminologists to study and understand. Rather, this Part situates such training within law, policy, and culture, while also highlighting the contours of future discourse regarding physical restraint. Section A discusses hand-to-hand training within traditional Western cultural perceptions.²⁵² Section B details hand-to-hand training curricula.²⁵³ Section C provides practical examples from police forces focusing on hand-to-hand training²⁵⁴ and Section D considers how to evaluate such trainings.²⁵⁵

A. Situating Hand-to-Hand Training in Western Cultural Perceptions of Violence and Anti-Asian Racism

Before turning to the substance of contemporary hand-to-hand training, we must situate such training in our collective American history and culture. At a deeper level, the lack of consistent, affirmative hand-to-hand training requirements may be the legacy of our Anglo-American heritage and, more recently, contemporary anti-Asian attitudes.²⁵⁶ Furthermore, the contemporary

²⁴⁹ Phil Jones, *Gracie Survival Tactics First BJJ Curriculum to Be Approved for Police in California*, JITS MAG. (Feb. 18, 2021), <https://jitsmagazine.com/gracie-survival-tactics-first-bjj-curriculum-to-be-approved-for-police-in-california/> [<https://perma.cc/AM9N-B2KK>].

²⁵⁰ Eric Rubio, *Can Jiu Jitsu Help Alleviate Tensions Between Police and Communities?*, TEDx TALKS (Sept. 2021), https://www.ted.com/talks/eric_rubio_can_jiu_jitsu_help_alleviate_tensions_between_police_and_communities [<https://perma.cc/6763-RLR4>].

²⁵¹ Jamiles Lartey, *Police Say Jiu-Jitsu Can Make Them Less Violent During Arrests*, MARSHALL PROJECT (Oct. 21, 2021), <https://www.themarshallproject.org/2021/10/22/police-say-jiu-jitsu-can-make-them-less-violent-during-arrests> [<https://perma.cc/L833-NSDR>]; HBO, *supra* note 32.

²⁵² See *infra* notes 256–296 and accompanying text.

²⁵³ See *infra* notes 297–319 and accompanying text.

²⁵⁴ See *infra* notes 320–351 and accompanying text.

²⁵⁵ See *infra* notes 352–419 and accompanying text.

²⁵⁶ While this Section primarily explores the anti-Asian dimension to cultural oversight of hand-to-hand training, other intersectionalities should be explored in future research. See *infra* notes 256–296 and accompanying text. Gender is most worthy of continued exploration. As noted below, police departments are disproportionately male and white. See *infra* note 294. Thus, much of the collective perception of violence in police departments reflects overly masculinized notions of violence. Another angle worthy of exploration is the degree to which hand-to-hand training may benefit women. On one hand, an emphasis on physical training may exclude female officers, who are generally physically smaller than male officers. On the other hand, many women engage in grappling martial arts for self-defense, on the ground that smaller opponents may use their opponents' leverage against them. See, e.g., *What Martial Arts Is Best for Small Women's Self-Defense?*, GRANITE BAY JIU-JITSU (Jan. 31, 2021), <https://gbjj.org/what-martial-arts-is-best-for-small-womens-self-defense/> [<https://perma.cc/5FZP->

movement in hand-to-hand training draws on martial arts traditions—and much of the intuitive response toward dismissing such traditions draws on anti-Asian attitudes.²⁵⁷

Historically, American policing tactics derive primarily from the English tradition, and such tradition has favored physical tools for almost two centuries.²⁵⁸ The London Metropolitan Police, often referred to as the oldest organized police department in the world, used a “short billy club” to subdue suspects.²⁵⁹ U.S. law enforcement inherited such a tactic by the mid-nineteenth century.²⁶⁰ It is reasonable to assume that this blunt force approach to policing evolved into contemporary law enforcement tactics regarding the use of force. Furthermore, policing in America arose alongside the advent of the firearm: police firearms training began as early as 1895, when then-President of the New York City Board of Police Commissioners Theodore Roosevelt authorized such training for police.²⁶¹ By contrast, hand-to-hand training has a long but intermittent history in American law enforcement. In 1927, the Seattle Police Department began training in Japanese jiu-jitsu, and later police departments in Minnesota, Michigan, New Jersey, and California followed suit.²⁶² In the wake of the Civil Rights Movement, martial artists also began training U.S. police departments.²⁶³ The Gracie family, the creators of Brazilian jiu-jitsu, have been conducting such trainings in the United States for three decades.²⁶⁴

This path dependency is more apparent in the United States when compared to East Asian history. Historically, the first attempt at systematic martial arts training occurred in sixteenth-century China, when a Ming dynasty general

NNYK]. It is possible that hand-to-hand training could thus be of particular benefit to female police officers.

²⁵⁷ See Shaun Ryan, *Jiu Jitsu Classes Build Confidence, Self-Defense Skills*, THE RECORDER (June 30, 2022), <https://pontevedrarecorder.com/stories/jiu-jitsu-classes-build-confidence-self-defense-skills,18084?> [<https://perma.cc/792K-B4NA>].

²⁵⁸ Kaminski & Martin, *supra* note 80, at 134.

²⁵⁹ *Id.* (citing BILL CLEDE WITH KEVIN PARSONS, POLICE NONLETHAL FORCE MANUAL: YOUR CHOICES THIS SIDE OF DEADLY (1987)).

²⁶⁰ *Id.*

²⁶¹ 1 MARTIAL ARTS OF THE WORLD 87 (Thomas A. Green ed., 2001).

²⁶² *Id.* An even longer trend has existed in the U.S. military that has long drawn on martial arts when training its soldiers. Since 1995, for example, the U.S. Army led the Modern Army Combatives Program, which has drawn on a wide variety of martial arts traditions in order to train soldiers in hand-to-hand combat. 1/29 INFANTRY REGIMENT, FORT BENNING, GA., UNITED STATES ARMY COMBATIVES COURSE 6 (2017), <https://www.benning.army.mil/Armor/316thCav/Combatives/content/Course%20Materials/Basic%20Combatives%20Course/History%20of%20Army%20Combatives%20July%202017.pdf> [<https://perma.cc/MR7T-M2LX>]. The U.S. Army’s course materials even begin the history of the program with the heading “HISTORY OF MARTIAL ARTS.” *Id.* The materials discuss the history of combatives training in the U.S. military from 1852, and include discussion of attempts to teach judo and jiu-jitsu during World War I. *Id.*

²⁶³ Kaminski & Martin, *supra* note 80, at 134.

²⁶⁴ Interview with Renner Gracie, Chief Instructor, Gracie Univ. (Dec. 14, 2021).

included both sword and boxing training in a military manual.²⁶⁵ Japanese police have been learning judo and kendo since 1947.²⁶⁶ The Taiwan National Police train law enforcement and corrections officers in kung fu.²⁶⁷ Of course, comparison to foreign law enforcement is limited given that many foreign jurisdictions limit private possession of firearms.²⁶⁸ And yet even a simple glance at other jurisdictions abroad shows a yawning gap in body mechanics awareness.²⁶⁹

Such historical explanation highlights a deeper contemporary cultural insight: hand-to-hand training, which draws from East Asian martial arts traditions, falls between two existing collective cultural constructions of martial arts in America. On the one hand, martial arts are seen as foreign, strange, unduly refined, and ineffective, thus laughably dismissed as detached from reality. On the other hand, martial arts exist through the prism of mixed martial arts in the televised Ultimate Fighting Championship (UFC) that many believe is unduly brutal.²⁷⁰ In interviews, police department leadership, officers, and jiu-jitsu police trainers reported combating these dual perceptions of martial arts as either ineffective or brutal.²⁷¹ A sergeant in the Marietta Police Department stated that many officers were hesitant to engage in what they believe to be silly training from 1970s kung fu movies—or, alternatively, brutal UFC techniques.²⁷² Renner Gracie, a Brazilian-American jiu-jitsu black belt who has led police trainings in recent years, interviewed a Marietta officer who noticed that “[h]ere’s where most [law enforcement] agencies get stuck: they believe they’re trying to do this special samurai ninja training that they need all these

²⁶⁵ MARTIAL ARTS OF THE WORLD, *supra* note 261, at 83.

²⁶⁶ *Id.* at 91; “*Marshaling*” an Old Art: *Martial Arts in Police Training*, FBIL ENF’T BULL., Oct. 1994, at 24, 24 (“In Japan, all police officers train in various styles of Karate and Judo.”).

²⁶⁷ See generally MAN KAM LO, POLICE KUNG FU: THE PERSONAL COMBAT HANDBOOK OF THE TAIWAN NATIONAL POLICE (2001) (reviewing techniques derived from traditional Wing Chun kung fu).

²⁶⁸ See Jonathan Masters, *U.S. Gun Policy: Global Comparisons*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/backgrounders/us-gun-policy-global-comparisons> [https://perma.cc/6YKU-KJC6] (June 10, 2022).

²⁶⁹ Such comparisons are also relevant in a time of greater cross-border law enforcement cooperation, wherein jurisdictions must manage criminal procedure constitutional rights and when prosecution may be deployed as a foreign policy tool. See generally Steven Arrigg Koh, *Foreign Affairs Prosecutions*, 94 N.Y.U. L. REV. 340 (2019) (considering cross-border prosecutions’ implications for defendant rights and foreign policy); Steven Arrigg Koh, *Core Criminal Procedure*, 105 MINN. L. REV. 251 (2020) (advancing a conception of criminal procedural rights in cross-border law enforcement); Steven Arrigg Koh, *The Criminalization of Foreign Relations*, 90 FORDHAM L. REV. 737 (2021) (considering extraterritorial law enforcement policy in the U.S. government); Steven Arrigg Koh, *Othering Across Borders*, 70 DUKE L.J. ONLINE 161 (2021), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1086&context=dlj_online [https://perma.cc/N2XF-YV7S] (considering the role of “othering” in transnational and international law enforcement).

²⁷⁰ See *History of UFC*, UFC, <https://www.ufc.com/history-ufc> [https://perma.cc/P7YM-4M4M].

²⁷¹ Interview with Reinaldo Figueroa, *supra* note 16.

²⁷² *Id.*

special requests for.”²⁷³ In the minds of many law enforcement institutions, martial arts is this image: exotic, ancient, and ultimately irrelevant for law enforcement purposes. By contrast, if law enforcement agencies were presented with the possibility of learning a highly effective and efficient way to defend oneself and reduce dependency on firearms, many police departments would likely adopt it.

To understand these two divergent collective perceptions, let us use the following thought experiment.²⁷⁴ Can you picture a boxer? You will likely think of muscularly built, shirtless fighters with tremendous grit and power. Muhammad Ali is among the most famous, as are Mike Tyson, Manny Pacquiao, and Floyd Mayweather.²⁷⁵ Now: can you picture a martial artist? You will likely think of Bruce Lee: a sleek, slender Asian man with his arms poised in a stylized way, focused and prepared to strike not with the powerful blows of a boxer, but with a flurry of light punches and kicks; this may also involve acrobatic jumping and yelling of certain strange, foreign sounds. This is the Western construction of martial arts: often viewed as “cartoonish,”²⁷⁶ very much tied up in the American notion of Asians as overly refined, physically weak, and even feminized.²⁷⁷ Consider the recent depiction of Bruce Lee

²⁷³ GracieBreakdown, *The Future of Police Training Is Here (Weekly BJJ for Cops)*, YOUTUBE (Feb. 4, 2021), https://www.youtube.com/watch?v=pDIG_SKhjUw [<https://perma.cc/Y8NK-MTBY>].

²⁷⁴ Collective or social representations may be a useful tool for exploring social meaning within communities. See Steven Arrigg Koh, *From “Stigma” and “Coping” to Social Repositioning: A New Perspective on HIV/AIDS, Identity, and Human Rights*, in *SYMBOLIC TRANSFORMATION: THE MIND IN MOVEMENT THROUGH CULTURE AND SOCIETY* 284, 284 (Brady Wagoner ed., 2010) (describing social representations in HIV/AIDS cases and their potential to inform human rights); cf. Steven Arrigg Koh, *When Should Prosecutors Indict?* 26–34 (Feb. 5, 2023) (unpublished manuscript) (on file with author) (arguing that social representations complicate the way in which communities make social meaning of criminal cases); Steven Arrigg Koh, *Indictment and Polarization*, 50 *FORDHAM URB. L.J.* (forthcoming 2023) (considering indictment’s effect on American polarization). See also generally Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 *YALE L.J.* 2054 (2017) (exploring collective understandings of police mistrust in African American communities).

²⁷⁵ Sam Morgan, *The Ten Best Boxers of All Time Ranked Sees Surprise Rating for Muhammad Ali*, *DAILY TEL.* (Aug. 16, 2019), <https://www.dailytelegraph.com.au/sport/boxing-mma/the-ten-best-boxers-o-all-time-ranked-sees-surprise-rating-for-muhammad-ali/news-story/6b6bcb9613d3fd47a192f45551599f8f> [<https://perma.cc/H7ZX-9B8W>]. In fact, the collective American view of Black athletes is more likely to have representations of them as *too* powerful. As Professor Paul Butler has noted, academic researchers have advanced a “dehumanization thesis,” wherein Black Americans are perceived of and equated with apes, gorillas, and chimpanzees. BUTLER, *supra* note 15, at 25–28.

²⁷⁶ Stephanie Hayes, *The Martial Art I Can’t Live Without*, *THE ATLANTIC* (Nov. 19, 2021), <https://www.theatlantic.com/magazine/archive/2021/12/brazilian-jiu-jitsu-gracie-breathe/620530/> [<https://perma.cc/RXQ2-MA8Y>] (“Up until then, martial arts in the American popular imagination had featured fighters in cartoonish striking mode—a bare-chested Bruce Lee sending men flying with a single kick or punch, or Ralph Macchio, as the Karate Kid, raising his limbs like a praying mantis.”).

²⁷⁷ Chiung Hwang Chen, *Feminization of Asian (American) Men in the U.S. Mass Media: An Analysis of The Ballad of Little Jo*, 20 *J. COMM’N INQUIRY* 57, 68 (1996); Andrew Kung, *The De-*

in Quentin Tarantino's 2019 film *Once Upon a Time in Hollywood*, in which Lee is depicted as exotic and distant, only to ultimately be beat up by a Hollywood stuntman played by Brad Pitt, the quintessential rugged American man.²⁷⁸ Jackie Chan, the next most famous film martial artist, is popularly conceived of as having a "slapstick acrobatic" and comedic style, not to mention being desexualized,²⁷⁹ as opposed to the rugged depiction of American boxers such as Rocky and Apollo Creed.²⁸⁰ As Edward Said has recognized, this is part and parcel of how Western countries have broadly viewed the East: mysterious but ultimately ineffective.²⁸¹

This racialized perception is starker when contrasted with the collective American perception of the UFC. In an interview, the aforementioned Renner Gracie stated that some police officers are hesitant to learn hand-to-hand skills because they fear they will learn gruesome UFC tactics.²⁸² The UFC is a combat sports league that has gained popularity over the last two decades.²⁸³ It resembles boxing insofar as two fighters engage in combat over several rounds inside a ring, but differs from it because fighters may engage in almost any martial arts technique (e.g., kicking or wrestling).²⁸⁴ For many, the collective perception of the UFC is of brutal brawlers mercilessly beating their opponents to a bloody pulp inside a locked cage.²⁸⁵ In contrast to the perception of the

sexualization of the Asian American Male, CNN (Mar. 3, 2020), <https://www.cnn.com/style/article/andrew-kung-asian-american-men/index.html> [https://perma.cc/7SG2-LT2B].

²⁷⁸ *ONCE UPON A TIME IN HOLLYWOOD* (Sony Pictures 2019); see also Antonio Ferme, *Quentin Tarantino Tells Critics of Bruce Lee Portrayal in 'Once Upon a Time in Hollywood' to 'Suck a D—'*, VARIETY (June 30, 2021), <https://variety.com/2021/film/news/once-upon-a-time-in-hollywood-bruce-lee-1235008662/> [https://perma.cc/MZL3-XNDK].

²⁷⁹ See Gary M. Kramer, "Asian Men in Media Are So Desexualized": Rising Star Jake Choi Fights the Hollywood Odds Against Asian American Actors, SALON (June 1, 2016), https://www.salon.com/2016/06/01/asian_men_in_media_are_so_desexualized_rising_star_jake_choi_fights_the_hollywood_odds_against_asian_american_actors/ [https://perma.cc/FAF4-EEQD].

²⁸⁰ Jackie Chan, WIKIPEDIA, https://en.wikipedia.org/wiki/Jackie_Chan [https://perma.cc/2UNH-5VZG] (Jan. 18, 2023); ROCKY (United Artists 1976).

²⁸¹ EDWARD W. SAID, ORIENTALISM 1 (1987) ("The Orient was . . . since antiquity a place of romance, exotic beings, haunting memories and landscapes, remarkable experiences."). Consider the scene in Steven Spielberg's 1981 film *Indiana Jones and the Raiders of the Lost Ark*, wherein Harrison Ford is faced with a Middle Eastern swordsman dressed in black: the man laughs as he swings his sword in various ways as if prepared for a battle, only for an unimpressed Jones to respond by simply pulling a gun out of his holster and shooting the man. RAIDERS OF THE LOST ARK (Paramount Pictures 1981).

²⁸² Interview with Renner Gracie, *supra* note 264.

²⁸³ See Jelani Scott, *New Report Shows That UFC Makes Over \$1 Billion per Year*, SPORTS ILLUSTRATED (June 10, 2022), <https://www.si.com/mma/2022/06/10/report-ufc-makes-over-1-billion-per-year> [https://perma.cc/8AVW-DRYK].

²⁸⁴ The UFC calls this the "octagon." Editors, *Mixed Martial Arts*, BRITANNICA, <https://www.britannica.com/sports/mixed-martial-arts> [https://perma.cc/N6DL-KF43].

²⁸⁵ When introduced in the 1990s, MMA was thought of as "barbaric and inhuman" and criticized as a sport without rules or "not a sport at all," with some critics calling for the sport to be banned and

slender, cartoonish Asian martial artist, Conor McGregor—the UFC’s best-known fighter and a white Irish national—is praised for his “stout performances” and “brash trash talk.”²⁸⁶ And yet many would be surprised to learn that most UFC fighters characterize themselves as “mixed martial artists,” with many crediting Bruce Lee as their initial inspiration.²⁸⁷ Many UFC fighters are highly accomplished and sophisticated combat sports athletes and martial artists, holding black belts in Korean taekwondo,²⁸⁸ Japanese karate,²⁸⁹ or Thai kickboxing.²⁹⁰ The main differences are that these individuals are deploying these tactics in a live match and that they are mostly not of Asian descent.²⁹¹

The racialized nature of martial arts also explains why Asian-Americans are over-represented as hand-to-hand training advocates. It is not a coincidence that the only candidate to have discussed this in our national politics is Andrew Yang, a Chinese American who practices Brazilian jiu-jitsu.²⁹² Likewise, it is not surprising that the only legal scholars to have seriously addressed this are

going so far as to claim it would inspire “violence [to] spill over into society,” threatening public safety. Jesper Andreasson & Thomas Johansson, *Negotiating Violence: Mixed Martial Arts as a Spectacle and Sport*, 22 SPORT SOC’Y 1183, 1184 (2019). The late Senator John McCain, for example, once described the UFC as “human cockfighting” and called for the ban of such a “barbaric” sport. Nick Greene, *How John McCain Grew to Tolerate MMA, the Sport He Likened to “Human Cockfighting,”* SLATE (Aug. 26, 2018), <https://slate.com/culture/2018/08/john-mccain-ufc-how-he-grew-to-tolerate-mma-the-sport-he-considered-human-cockfighting.html> [<https://perma.cc/YZD4-FEUP>].

²⁸⁶ Emmanuel Morgan, *With Conor McGregor Injured, U.F.C. Faces Big Challenges*, N.Y. TIMES (July 11, 2021), <https://www.nytimes.com/2021/07/11/sports/conor-mcgregor-injured-ufc.html> [<https://perma.cc/J9LZ-23C4>]; see Hayes, *supra* note 276 (discussing the cartoonish perception of martial artists in American film).

²⁸⁷ J.L. Seto, *Dana White, Conor McGregor, and UFC Alumni Honor Bruce Lee as the ‘Father of Mixed Martial Arts,’* SPORTSCASTING (May 23, 2020), <https://www.sportscasting.com/dana-white-conor-mcgregor-and-ufc-alumni-honor-bruce-lee-as-the-father-of-mixed-martial-arts/> [<https://perma.cc/NC83-WES8>].

²⁸⁸ Tomislav Zivanovic, *Best Taekwondo Fighters in MMA/UFC History! (Top 11)*, MEDIUM (Jan. 23, 2020), <https://medium.com/martial-arts-unleashed/top-11-best-taekwondo-fighters-in-mma-ufc-history-c61e4640e421> [<https://perma.cc/WLL9-EG3X>].

²⁸⁹ Alex McCarthy, *Stephen ‘Wonderboy’ Thompson Earned His Nickname as an MMA Prodigy Who Became a Fighter Because His Dad Loved Elvis and Went 62–0 Before Joining the UFC*, TALKSPORT (Dec. 17, 2021), <https://talksport.com/sport/mma/805154/stephen-thompson-next-fight-nickname-record-ufc-dad/> [<https://perma.cc/XS5E-JBLG>].

²⁹⁰ Johny Payne, *Valentina Shevchenko Reveals Why She Isn’t Going Back from MMA and the UFC to the Boxing Ring*, SPORTSKEEDA, <https://www.sportskeeda.com/mma/news-valentina-shevchenko-reveals-isn-t-going-back-mma-ufc-boxing-ring> [<https://perma.cc/4QW4-TUM6>] (Sept. 17, 2021).

²⁹¹ See *Athlete Rankings*, UFC, <https://www.ufc.com/rankings> [<https://perma.cc/8UJ6-6RCM>] (Jan. 24, 2022).

²⁹² Averi Clements, *2020 Presidential Candidate Andrew Yang Reveals He & His Son Do Jiu-Jitsu*, JIU-JITSU TIMES (May 2, 2019), <https://jiujitsutimes.com/2020-presidential-candidate-andrew-yang-reveals-he-his-son-do-jiu-jitsu/> [<https://perma.cc/V24E-JRSA>]. Yang’s children also practice jiu-jitsu, as reflected in a widely shared photo on social media. *Id.*

Cynthia Lee, who is also Asian American, and Gregory Parks, who trains in various martial arts traditions.²⁹³

Finally, these historical, cultural, and racial insights cast a novel light on racial dynamics within police departments. Although the 18,000 police departments in America vary widely in size, structure, and composition, police departments are disproportionately male and white.²⁹⁴ Thus, the same masculine cultures with structural and racial biases that might lead to over-policing and use of force might also trend toward excluding systems that it views as non-white and foreign.²⁹⁵ This may produce anti-Asian views. Such questions were mooted, for example, in the New York Police Department “scapegoating” an Asian American officer prosecuted for using excessive force in Brooklyn, while at the same time protecting white officers from prosecution in similar cases.²⁹⁶

B. The Curriculum

Hand-to-hand training for police has dramatically expanded in recent years.²⁹⁷ This modern movement in hand-to-hand training was sparked on or around the time of the Michael Brown killing in Ferguson, Missouri in 2014, and even more recently, the killing of George Floyd in 2020.²⁹⁸ Such training

²⁹³ Lee, *Reforming the Law on Police Use of Deadly Force*, *supra* note 8, at 50–51; Bio, GREGORY S. PARKS, J.D., PH.D., <http://gregoryparks.net/bio/> [<https://perma.cc/HQ69-A73E>].

²⁹⁴ Dan Keating & Kevin Uhrmacher, *In Urban Areas, Police Are Consistently Much Whiter Than the People They Serve*, WASH. POST (June 4, 2020), <https://www.washingtonpost.com/nation/2020/06/04/urban-areas-police-are-consistently-much-whiter-than-people-they-serve/> [<https://perma.cc/G67Q-YTS2>]; OFFICE OF CMTY. ORIENTED POLICING SERVS., FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 7, 16–17 (2015).

²⁹⁵ See Frank Rudy Cooper, “*Who’s the Man?*”: *Masculinities Studies*, *Terry Stops*, and *Police Training*, 18 COLUM. J. GENDER & L. 671, 678 (2009) (arguing that police officers’ need to stage “masculinity contests” with civilians explains certain patterns of law enforcement, such as *Terry* stops and frisks and racial profiling) [hereinafter Cooper, “*Who’s the Man?*”]; Frank Rudy Cooper, *Masculinities, Post-racialism and the Gates Controversy: The False Equivalence Between Officer and Civilian*, 11 NEV. L.J. 1, 19 (2010) (“A core aspect of the hegemonic pattern of police officer identity, as distinguished from the hegemonic pattern of U.S. masculinity in general, is the officer’s sense he must enact a command presence.”); Frank Rudy Cooper, *Cop Fragility and Blue Lives Matter*, 2020 U. ILL. L. REV. 621, 655 (arguing that police officers’ need to prove their masculinity supports the cop fragility thesis); Frank Rudy Cooper, *Intersectionality, Police Excessive Force, and Class*, 89 GEO. WASH. L. REV. 1452, 1498 (2021) (pointing out the police’s routine practice of “bullying black and brown people as a means of maintaining command presence” (citing Cooper, “*Who’s the Man,*” *supra*, at 674–75)).

²⁹⁶ See J. Weston Phippen, *Why Was Officer Peter Liang Convicted?*, THE ATLANTIC (Mar. 3, 2016), <https://www.theatlantic.com/national/archive/2016/03/peter-liang-police-shooting/471687/> [<https://perma.cc/4BVQ-AF2A>].

²⁹⁷ Interview with Renner Gracie, *supra* note 264.

²⁹⁸ Interview with James Woestman, *supra* note 211 (noting that hand-to-hand training has increased due to viral videos of police killings on social media, as opposed to specific use-of-force incidents in his jurisdiction).

may be found in some form in almost every U.S. state today.²⁹⁹ Often, hand-to-hand training occurs through collaboration between a police department and a martial arts school. It involves police officers learning tactics from grappling martial arts to restrain and control civilians safely.

What are officers learning in such trainings, exactly? The best-known and most widely adopted hand-to-hand curriculum is the Gracie Survival Tactics course (GST), designed and refined over the last three decades by members of the aforementioned Gracie family.³⁰⁰ The standard format is for a member of Gracie University, the GST creators, to spend a week in a municipal jurisdiction to train law enforcement in hand-to-hand tactics.³⁰¹ An online training course is also available to train instructors who will, in turn, train their respective police departments. From there, GST requires authentication for only active-duty military personnel, active-duty law enforcement personnel, and actively employed first responders.³⁰²

A review of the materials shows the following categories of hand-to-hand tactics. The first major category is the *escape*. In a situation where a civilian is on top of a police officer, the officer learns to use his or her body weight and leverage off of the ground to safely flip the person over without punching or kicking. The second category is the *block*, wherein police officers learn to defend against punches or chokes without responding in kind. The third category is *control*, wherein police officers use specific holds to immobilize the arm or

²⁹⁹ News articles have highlighted such programs in states such as Minnesota, Tennessee, Texas, and Washington. See, e.g., Mara H. Gottfried, *St. Paul Police Credit Jiu-Jitsu Training for Reducing Injuries—and Excessive Force Settlements*, PIONEER PRESS (Nov. 28, 2021), <https://www.twincities.com/2021/11/28/st-paul-police-jiu-jitsu-training-reducing-injuries-excessive-force-settlements/> [<https://perma.cc/JVQ7-MQSH>]; *Law Enforcement Jiu Jitsu Trainings*, ALL. HOUS. JIU JITSU, <https://www.alliancebjjhouston.com/programs/law-enforcement/> [<https://perma.cc/46DW-HEXK>]; Ryan Sparks, *Grays Harbor Brazilian Jiu-Jitsu Partners with National Law Enforcement Program*, THE CHRONICLE (Aug. 4, 2021), <https://www.chronline.com/stories/grays-harbor-brazilian-jiu-jitsu-partners-with-national-law-enforcement-program,270198> [<https://perma.cc/G2UK-UA8Z>]; Melanie Tucker, *Managing a Take Down: Maryville Martial Arts Gym Participates in National Program to Train Police Officers*, DAILY TIMES (Jan. 26, 2021), https://www.thedailytimes.com/news/managing-a-take-down-maryville-martial-arts-gym-participates-in-national-program-to-train-police/article_32150499-e116-5ff6-817b-f81e9d703838.html [<https://perma.cc/TD9N-H8NK>]. The Gracie Survival Tactics (GST) training website also notes POST certification in the following states: Alaska, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Missouri, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *Gracie Survival Tactics (GST)*, *supra* note 247.

³⁰⁰ *Gracie Survival Tactics (GST)*, *supra* note 247.

³⁰¹ See *id.*

³⁰² *Application*, GRACIE UNIV., <https://www.gracieuniversity.com/Pages/Public/Application?enc=oVnDQJwIxY8gR3XjGe8ksQ==> [<https://perma.cc/Z5FS-Q5BL>] (fill out requisite application form sections to proceed to authentication).

leg, holding the person without punching or kicking. And finally, police learn techniques within the category of *weapons retention*, where they learn to use arm restraints to prevent civilians from reaching for their gun.³⁰³ These techniques are introduced in GST Level 1 and then further refined in GST Level 2, another week-long course. Specific techniques are also reserved for GST Level 2, including *takedowns*, or the practice of using leverage and the opponent's body weight to take the opponent to the ground safely.³⁰⁴

Such hand-to-hand techniques derive from the "grappling" side of martial arts,³⁰⁵ which police departments increasingly prefer to the "striking" side of martial arts.³⁰⁶ As one sergeant in Marietta, Georgia stated, "we answer to society, and society doesn't want to see us punching people."³⁰⁷ Thus, although some departments have studied Muay Thai (i.e., Thai kickboxing), for example, the trend has been toward grappling arts.³⁰⁸ Grappling arts are potentially more effective and safer because they allow individuals to be taken to the ground and immobilized without physical damage. Judo is perhaps best known in the West given that it is an Olympic sport and has existed for longer in the United States.³⁰⁹ Derived from Japan, judo focuses on the use of the leverage of the opponent's body to take the individual to the ground.³¹⁰ Judo competitions involve no punching or kicking.³¹¹ In particular, police departments have most often drawn from the Brazilian jiu-jitsu tradition in hand-to-hand trainings. The literal translation of "jiu-jitsu" from the Chinese characters (柔 道) is "gentle art," given it self-identifies as a martial art that does not involve inflicting physical damage on the opponent.³¹² Some describe jiu-jitsu as "fighting

³⁰³ This review is based on online access to the course materials. *Gracie Survival Tactics (GST)*, *supra* note 247.

³⁰⁴ *Id.*

³⁰⁵ Such emphasis provides much needed descriptive clarity. The traditional dichotomy in law enforcement literature is between "soft hands" (e.g., guiding movements or escort holds) as opposed to "hard hands" (e.g., distraction blows, strikes, and takedowns). STOUTON ET AL., *supra* note 14, at 198–204. Often, other techniques are put into categories of various names. *See id.* (describing the categories of "Physically Holding a Subject Down" and "Chokeholds").

³⁰⁶ Interview with Reinaldo Figueroa, *supra* note 16.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *About Judo—The History of Judo*, KOHBUKAN SISU JUDO & BRAZILIAN JIU-JITSU, <https://guelphbjj.com/about-judo-the-history-of-judo/> [<https://perma.cc/42MH-YQJQ>].

³¹⁰ *See id.*; David B. Yoffie & Mary Kwak, *Judo Strategy: 10 Techniques for Beating a Stronger Opponent*, 13 BUS. STRATEGY REV. 20, 27 (2002).

³¹¹ Laura Wright, *Ju-Don't Kick or Punch, Judo Grapples Attention*, DAILY TEXAN (Sept. 14, 2012), <https://thedailytexan.com/2012/09/14/ju-dont-kick-or-punch-judo-grapples-attention/> [<https://perma.cc/MS3P-TRJJ>].

³¹² *See Jujitsu*, BRITANNICA, <https://www.britannica.com/sports/jujitsu> [<https://perma.cc/2D4L-G5TY>].

fire with water,” an alternative to “fighting fire with fire.”³¹³ This is because jiu-jitsu focuses not on punching or kicking, but instead on using arm or leg locks or various vascular neck restraints to immobilize the other person.³¹⁴ The sport of Brazilian jiu-jitsu is won without ever throwing a punch or kick.³¹⁵

Four aspects are critical to understanding the use and nature of such tactics. First, such techniques seem abstract. This should come as no surprise: the very nature of such physical techniques eludes clear description on paper. Perhaps for this reason, scholarship has largely overlooked these systems: martial arts are taught orally and are thus difficult to study systematically. Martial arts scholarship has traditionally been relegated to historians, who have noted that there are relatively few works on the subject despite its historical value.³¹⁶ Existing research has discussed training manuals,³¹⁷ history,³¹⁸ and a meta-analysis on such scholarship’s importance, emphasizing its historical value in a field where it is frequently obscured by myth.³¹⁹

Second, regardless of this descriptive challenge, hand-to-hand skills acquired through training in grappling martial arts are highly *functional* in the real world. The critical point is that a person trained in grappling martial arts is not merely good at sport jiu-jitsu or judo within the confines of a rarefied rule set of athletic competition—such a person has real-world, functional skills applicable in non-sport situations. In the same way that Olympic water polo athletes have developed real-world swimming skills, Olympic judo practitioners have a tremendous advantage when engaging in a real-world physical confrontation. Whereas our collective Western intuition views the ability to engage in physical force as essentially a matter of strength or willpower, martial arts

³¹³ Gracie Jiu-Jitsu Harrison, *Don’t Fight Fire with Fire. Fight Fire with Water.*, FACEBOOK (Oct. 16, 2020), <https://m.facebook.com/GracieJiuJitsuHarrison/videos/387636985740748> [<https://perma.cc/RQ62-NZW7>]; Gracie Jiu Jitsu, DEL. BUSHIDO ACADEMY, <https://delawarebushidoacademy.com/jiu-jitsu> [<https://perma.cc/4C4T-5D6R>].

³¹⁴ *Jujitsu*, *supra* note 312.

³¹⁵ *See id.*

³¹⁶ *See, e.g.*, Stanley E. Henning, *The Chinese Martial Arts in Historical Perspective*, 45 MIL. AFFS. 173, 173 (1981).

³¹⁷ BRIAN KENNEDY & ELIZABETH GUO, CHINESE MARTIAL ARTS TRAINING MANUALS: A HISTORICAL SURVEY 3 (2005).

³¹⁸ *See generally* Henning, *supra* note 316 (reviewing the history of martial arts in China); Barry Allen, ASIAN MARTIAL ARTS: THE LEGACY OF THE WAR MACHINE, in MARTIAL ARTS IN ASIA: HISTORY, CULTURE AND POLITICS 2, 2 (Fan Hong & Gwang Ok ed., 2018) (reviewing martial arts traditions in Northeast Asia).

³¹⁹ Stanley E. Henning, *Academia Encounters the Chinese Martial Arts*, 6 CHINA REV. INT’L 319, 319 (1999); Paul Bowman, *Making Martial Arts History Matter*, 33 INT’L J. HIST. SPORT 915, 915–16 (2016). As Brian Kennedy and Elizabeth Guo mention in their work on historical training manuals, although training has diverged from how it was historically practiced, “Chinese martial arts still can [be], if properly taught, . . . an outstanding form of self-defense.” KENNEDY & GUO, *supra* note 317, at 16 (emphasis added).

show that centuries of sustained attention to body mechanics can hone an ability to effectively defend oneself without damaging the other person.

Third, these are physical movements, some of which involve pressure or restraint on parts of a civilian's body. This constitutes a clear form of police force—triggering Fourth Amendment constitutional concern and begging the question of how such techniques function “in the field” in the broader use-of-force continuum. This will be addressed further below.

Fourth, is a reminder to resist the temptation to dismiss such tactics based on their perceived “foreignness” or “otherness.” Such tactics are designed to address the very problem discussed in Parts I–III of this Article: the body mechanics gap, which exists between physical persons, is integral to the use-of-force continuum and is largely ambiguous in the minds of the police and in the American collective consciousness. The use of Asian-language terminology “others” such techniques in the Western mind. In fact, such schools of training merely describe highly developed systems of body mechanics knowledge.

C. Case Examples and Data on Use of Force

Let us consider case examples of these trainings. The Marietta, Georgia Police Department has one of the most established hand-to-hand training programs at the municipal level. Marietta began experimenting with such training after footage went viral in 2019 of police officers violently punching one individual to subdue him.³²⁰ More specifically, the triggering event was an altercation between one Renardo Nehemiah Lewis and Marietta police officers responding to a report of threats made inside an IHOP restaurant.³²¹ Viral video of the IHOP incident shows officers shoving Lewis against the wall while trying to place him in handcuffs after he refuses to sit down.³²² In the footage, Lewis breaks free, and officers wrestle him to the ground, with one officer punching Lewis in the head several times.³²³ This served as a “wake-up call” to the police department of 145 officers, which, under Georgia law, required annual firearms training but no hand-to-hand skill training.³²⁴ Since then, the Marietta Police Department began paying for Brazilian jiu-jitsu lessons for its

³²⁰ See *BJJ Training Program—Data Summary*, *supra* note 34; Ridderbusch, *supra* note 209; HBO, *supra* note 32.

³²¹ Kristal Dixon, *Man Who Was Punched by Cop in Viral IHOP Video Released from Cobb Jail*, ATLANTA J.-CONST. (May 6, 2019), <https://www.ajc.com/news/local/man-punched-cop-viral-ihop-video-released-from-cobb-jail/00sTfaev3uaUnjtQF9F9WM/> [<https://perma.cc/Q68D-AUBU>].

³²² *Id.*

³²³ *Id.*

³²⁴ See HBO, *supra* note 32.

officers and made it mandatory for new recruits.³²⁵ Although this initially started as a four-month trial,³²⁶ ninety-five of the 145 officers have since trained in the program, attending over 2,500 classes.³²⁷ According to internal department data, since the trainings began, Marietta has observed a 53% reduction of injuries to the person being arrested when force was required, a 23% reduction in taser use, and a 48% reduction of injuries to officers using force.³²⁸ Because the Marietta police officers are not part of a union, unions posed no obstacle to such training.³²⁹ Furthermore, funding for the hand-to-hand training was secured due to Marietta Police Department's work with the Drug Enforcement Administration and related asset forfeiture, given that nearby Atlanta is a hub of drug trafficking and related law enforcement activities.³³⁰

None of the Marietta officers who began the training have stopped; they all immediately saw its obvious utility in daily law enforcement, which consistently demands physical control and restraint skills.³³¹ By one account, half of one percent of Marietta officers ever use their firearm, and yet, as soon as the first week on the street, officers will engage in some physical conduct related to policing.³³² And although officers must show proficiency in firearm training twice a year, officers only learn defensive tactics for three days during an eleven week academy training, then never train in defensive tactics again.³³³

This is not the sole municipal model; training requirements vary from department to department. Some require hand-to-hand training for new recruits but make it optional for all other officers; others have created a more flexible and optional program for officers of any level.³³⁴ In some cases, police departments or statewide police commissions pay for classes at a local martial arts school, with funding derived from a variety of sources, including sponsorship by local organizations, state and municipal channels, and asset forfeiture

³²⁵ See MARIETTA POLICE DEP'T, *Brazilian Jiu Jitsu (BJJ) Becomes Mandatory*, MARIETTA POLICE (Oct. 15, 2019), <https://www.mariettaga.gov/CivicAlerts.aspx?AID=2541> [<https://perma.cc/25MJ-Y3Q8>]; HBO, *supra* note 32.

³²⁶ Interview with Reinaldo Figueroa, *supra* note 16.

³²⁷ *BJJ Training Program—Data Summary*, *supra* note 34.

³²⁸ *Id.*

³²⁹ Interview with Reinaldo Figueroa, *supra* note 16. As Section III.C explains, *supra* notes 213–230, police unions may engage in obstruction of police reform, as has been the case with body cameras in some jurisdictions.

³³⁰ Interview with Reinaldo Figueroa, *supra* note 16.

³³¹ *Id.*

³³² *Id.*

³³³ *Id.*

³³⁴ *Id.*; Interview with James Woestman, *supra* note 211.

derived from drug-related seizures.³³⁵ Others note that, over time, some officers begin paying for training on their own.³³⁶

For example, the St. Paul, Minnesota Police Department has also engaged in such training since 2014, using jiu-jitsu to replace prior training focusing on “pain compliance,” or pressure points on the body that often led individuals to fight back harder³³⁷ and, subsequently, officers to respond with punching, kicking, knee strikes, mace, or tasers.³³⁸ Today, by contrast, the emphasis is on physical de-escalation.³³⁹ New recruits were required to undergo training in 2015, and veteran officers began quarterly training in 2016.³⁴⁰ Between 2014 and 2020, since the training started, the data showed 37% reduction in the use of force; 68% reduction in officers employing strikes; 51% reduction in use of chemical irritants; 39% reduction in the use of tasers; 44% reduction in injuries to arrestees; and 25% reduction in officers’ injuries.³⁴¹

Hand-to-hand training has been integral to more wholesale law enforcement re-evaluation in some of the most progressive jurisdictions. The most notable example is Camden, New Jersey, which has won plaudits from progressives for completely disbanding its police force in 2012 and then reconstructing a new police force based on “unity policing,” described as marshaling the collective community—which includes police, residents, businesses, organizations, government, and schools—to prevent crime, promote safety, and improve society more generally.³⁴² Overlooked in this coverage has been the role of hand-to-hand training, which is integrated into academy training daily.³⁴³ Captain Kevin Lutz, who has an extensive background in grappling martial arts, leads the trainings.³⁴⁴ The rationale for such trainings is that with greater physical competence, officers will be more likely to slow down and avoid pan-

³³⁵ See, e.g., Jennifer Jean Miller, *Long Valley Partners Collaborate for Police Jiu Jitsu*, PATCH (Dec. 6, 2021), <https://patch.com/new-jersey/longvalley/long-valley-partners-collaborate-police-jiu-jitsu> [<https://perma.cc/5WHM-SZE6>] (describing funding for hand-to-hand training through a veterans organization); Interview with James Woestman, *supra* note 211 (noting that funding for hand-to-hand training began with funding from Crown Point Community Foundation, a local organization that provides community grants for local agencies and private practice); Interview with Reinaldo Figueroa, *supra* note 16.

³³⁶ Interview with James Woestman, *supra* note 211.

³³⁷ Gottfried, *supra* note 299; STOUGHTON ET AL., *supra* note 14, at 191.

³³⁸ Gottfried, *supra* note 299.

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ *Id.* During that time, police also reported a twenty-nine percent increase in people who “demonstrated aggressive and assaultive behavior” toward officers and a fifteen percent increase of people carrying a weapon. *Id.*

³⁴² See *supra* note 33 and accompanying text (providing a comprehensive discussion of Camden’s policing model).

³⁴³ Interview with Kevin Lutz, *supra* note 33.

³⁴⁴ *Id.*

ic because officers will know how to take a civilian to the ground and hold the individual there.³⁴⁵ Camden police officers undergo continuous in-service training, including with a VirTra 300 “wraparound” simulator that simulates situations from an active shooter to de-escalation.³⁴⁶ It is also building a practical application room with padded mats on the floor commonly found in martial arts academies to refine hand-to-hand techniques such as takedowns.³⁴⁷

Hand-to-hand training is not solely happening at the municipal level; states also play a role. One developing front is state-wide certification of hand-to-hand trainings. Peace Officer Standards and Training commissions (POSTs) are “statewide bodies that govern local law enforcement agencies.”³⁴⁸ They coordinate police training programs and, in some cases, mandate which trainings may be used and which standards local police departments must meet.³⁴⁹ Although they hold the potential to be influential in police reform, state POSTs have been “largely overlooked” in legal scholarship.³⁵⁰ At time of writing, hand-to-hand training has been certified by forty U.S. states’ POSTs.³⁵¹ Most notably, on August 24, 2021, the New Jersey Attorney General’s Police Training Commission approved the use of a “defensive tactics training program based on Brazilian Jiu Jitsu.”³⁵² The initiative’s stated goal is to “allow[] for control of resistant subjects while limiting officer and subject injury.”³⁵³ In particular, the Commission approved the GST Levels 1 and 2 courses³⁵⁴ for training, stating that they conform with the New Jersey Attorney General’s Use of Force Policy. The Commission will reimburse academies training police in such techniques.³⁵⁵ Similarly, the California POST approved a state-wide jiu-jitsu curriculum for all police departments in the state.³⁵⁶

³⁴⁵ *Id.*

³⁴⁶ *Id.*; *V-300 Firearms Training Simulator: Immersive and Intense*, VIRTRA <https://www.virttra.com/simulator/law-enforcement-v-300/#:~:text=The%20VirTra%20V%2D300%C2%AE,into%20real%2Dworld%20survival%20skills> [https://perma.cc/57RB-NS47].

³⁴⁷ Interview with Kevin Lutz, *supra* note 33.

³⁴⁸ Rau et al., *supra* note 36, at 1351 (citing *About POST*, POST COMM’N ON PEACE OFFICER STANDARDS & TRAINING, <https://post.ca.gov/> [https://perma.cc/SR2U-QVY8] (Sept. 17, 2021)).

³⁴⁹ *Id.* at 1352.

³⁵⁰ *Id.* at 1353.

³⁵¹ *Gracie Survival Tactics (GST)*, *supra* note 247.

³⁵² Letter from John F. Cunningham, Comm’n Adm’r, N.J. Police Training Comm’n, to Dirs., Police Acad. Dirs. Ass’n (Nov. 24, 2021), *available at* <https://jiujitsutimes.com/new-jersey-attorney-general-adopts-gracie-survival-tactics-as-approved-police-training/> [https://perma.cc/R5X2-GZBF].

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ *Id.*

³⁵⁶ Jones, *supra* note 249.

D. Evaluating Hand-to-Hand Training

What are we to make of hand-to-hand training? This Section will consider an initial, intuitive objection: “are we really going to train police to become better fighters?”³⁵⁷ It will then more granularly address objections rooted in irrelevance, overuse, and inherent danger,³⁵⁸ as well as the potential benefits of such training.³⁵⁹

As noted above, this Article will not evaluate the empirical claim: namely, whether such training is or will be effective. Empirical research over a longer period is necessary to know what these trends represent; obviously, evidence-based policing and evidence-informed training are most desirable in policing reform.³⁶⁰ Methodologically, this Section will thus rely on pre-existing scholarly research data on policing, new data reported by police departments, and reports from interviews with given police departments. This is the best possible reconstruction of the phenomenon at this time and provides a framework for future research at the intersection of law and policy.

1. The Intuitive Objection

Before considering granular scholarly critiques, this Article addresses a central, overarching objection: “are we really going to train police to become better fighters?” For some, the mere idea of training police to be better at hand-to-hand skills may seem intuitively problematic, or even morally repugnant. In this conception, “the modern police officer is an agent of violence,”³⁶¹ and thus we must summarily dismiss the possibility of providing such officers with tools to engage in such violence.

A few reasons suggest that we must, at a minimum, check such a response as we evaluate hand-to-hand training in law and policy. The initial reason to consider this is the initial empirics. As noted above, Marietta has observed a 53% reduction of injuries to the person being arrested when force was required, 23% reduction of the use of a taser, and 48% reduction of injuries to officers using force.³⁶² Similarly, in St. Paul, Minnesota, between 2014 and 2020, since hand-to-hand training started, the data showed a 37% reduction in the use of force, a 68% reduction in officers using strikes, a 51% reduction in

³⁵⁷ See *infra* notes 361–376 and accompanying text.

³⁵⁸ See *infra* notes 382–401 and accompanying text.

³⁵⁹ See *infra* notes 403–423 and accompanying text.

³⁶⁰ This is, of course, always challenging: as one scholar noted, governing and regulating the police “require[s] data about local conditions and the costs and benefits of alternative policing strategies”—and “yet we lack that data.” Harmon, *supra* note 17, at 1121.

³⁶¹ Ristroph, *supra* note 12, at 1192.

³⁶² *BJJ Training Program—Data Summary*, *supra* note 34.

the use of chemical irritants, a 39% reduction in taser usage, a 44% reduction in injuries to arrested individuals, and a 25% reduction in injuries suffered by officers.³⁶³ To dismiss such data out of hand would itself be problematic; scholarly and policy analysis demands further analysis.³⁶⁴ As noted above, Gregory Parks argues that these outcomes may be rooted in psychological mechanisms that reduce police bias, particularly vis-à-vis perception and treatment of individuals of color.³⁶⁵

Next, this intuitive response may boil down to skepticism of police training around uses of force: why teach police hand-to-hand tactics that they will use on laypeople? This question makes two central errors. First, it assumes such use of force is not already happening. In fact, as noted above, millions of encounters annually involve some physical restraint, and the vast majority of them by untrained officers. Second, it misconceptualizes training more generally, assuming that to “give” police something is to necessarily embolden them and endanger others. Consider this question: should police discontinue all firearm training? Almost certainly, the answer to this is no; the state must regulate police use of firearms, given they are the primary tool of deadly police force. Without any training whatsoever, police would almost certainly be more reckless with their firearm use.³⁶⁶ In the hand-to-hand context, we have essentially nothing governing police knowledge.

Relatedly, such an aversion to training police cuts against the grain of the accelerating national movement for de-escalation training.³⁶⁷ A rising trend in the United States,³⁶⁸ de-escalation training is—alongside anti-bias training—most demanded by policymakers, activists, scholars, police executives, and citizens alike,³⁶⁹ and is often touted as a “widely recognized and praised solution” to many situations dealing with excessive force.³⁷⁰ But unfortunately,

³⁶³ Gottfried, *supra* note 299; *see supra* note 341 and accompanying text (describing data from St. Paul’s introduction of hand-to-hand training).

³⁶⁴ Such analysis could, for example, consider the data sources themselves to determine whether the methods of collection are flawed. For a recent, deeper discussion of this topic, *see generally* Ngozi Okidegbe, *Discredited Data*, 107 CORNELL L. REV. 2007 (2022).

³⁶⁵ *See* Parks, *supra* note 8, at 52.

³⁶⁶ A logical question is whether too much firearm training undesirably makes police more likely to use firearms, suggesting that some middle zone may be most effective. In the physical restraint context, given how little hand-to-hand training exists, we cannot even begin to ask such a question.

³⁶⁷ As discussed more in Part V, *infra* notes 427–443, de-escalation training is one of four major categories of police reform proposals, alongside funding, abolition, and bias initiatives.

³⁶⁸ *See, e.g.*, McLeod, *supra* note 99, at 1629; Lee, *supra* note 10, at 662; Tom Jackman, *National Police Groups Add ‘De-escalation’ to New Model Policy on Use of Force*, WASH. POST (Jan. 17, 2017), <https://www.washingtonpost.com/news/true-crime/wp/2017/01/17/national-police-groups-add-de-escalation-to-new-model-policy-on-use-of-force/> [<https://perma.cc/FH4B-CWXW>].

³⁶⁹ Engel et al., *supra* note 45, at 722.

³⁷⁰ Torres, *supra* note 9, at 187.

there is no universally accepted definition of de-escalation training.³⁷¹ One specific definition is:

[T]aking action or communicating verbally or non-verbally during a potential force encounter in an attempt to stabilize the situation and reduce the immediacy of the threat so that more time, options, and resources can be called upon to resolve the situation without the use of force or with a reduction in the force necessary ³⁷²

This may include creating greater separation between an officer and civilian, calming a combative civilian, waiting for backup or a supervisor, or trying to resolve situations with unarmed civilians without resorting to deadly force.³⁷³ According to some news reports, the heart of de-escalation is teaching police to speak in lower tones and act less threatening to calm a suspect down.³⁷⁴ Such training was included in the final report of the Obama Administration's Task Force on 21st Century Policing—which was established just months after the 2014 killing of Michael Brown in Ferguson, Missouri³⁷⁵ and included, as an action item by members of the Equal Justice Initiative, “[l]aw enforcement agency policies for training on use of force should emphasize de-escalation and alternatives to arrest or summons in situations where appropriate.”³⁷⁶ Hand-to-hand training offers a potential similar to other forms of de-escalation training. Officers versed in these techniques may use the tactics to diffuse a physical conflict safely. The desirable outcome is that officers ratchet down the spectrum of police use of force, instead of escalating it as officers did in the Rayshard Brooks case.³⁷⁷

Third, the intuitive response also derives from a wish that police not engage in forms of physical force. But as already noted in Part II, the problem of physical restraint is inescapable in even the most ambitious reconceptualizations of criminal justice.³⁷⁸ Police are—literally every minute in America—

³⁷¹ See Engel et al., *supra* note 45 at 724.

³⁷² *Id.* (citing INT’L ASS’N OF CHIEFS OF POLICE, NATIONAL CONSENSUS POLICY DISCUSSION PAPER ON USE OF FORCE 2 (2020), https://www.theiacp.org/sites/default/files/2020-07/National_Consensus_Policy_On_Use_Of_Force%2007102020%20v3.pdf [<https://perma.cc/55KK-XSFZ>]); see also STOUGHTON ET AL., *supra* note 14, at 178 (defining de-escalation training as physical positioning alongside verbal and non-verbal tactical communication).

³⁷³ Lee, *supra* note 10, at 662.

³⁷⁴ *Las Vegas Police Hold De-escalation Training Drills*, CBS NEWS (July 31, 2015), <https://www.cbsnews.com/video/las-vegas-police-hold-de-escalation-training-drills/> [<https://perma.cc/ZDV7-CVCA>].

³⁷⁵ THOMPSON, *supra* note 129, at 1 (citing OFFICE OF CMTY. ORIENTED POLICING SERVS., *supra* note 294).

³⁷⁶ OFFICE OF CMTY. ORIENTED POLICING SERVS., *supra* note 294, at 20.

³⁷⁷ See *supra* notes 48–50 and accompanying text.

³⁷⁸ See *supra* notes 89–105 and accompanying text.

putting “hands on” a layperson. This will emerge even if police are replaced with a bevy of community or other law enforcement actors.³⁷⁹ The question then becomes: do we provide training and regulation in this space? Or do we leave it to law enforcement to comport themselves using Western tools of violence—primarily punching and, at worst, escalating to deadly force with firearms? In either scenario, this space is completely underregulated, with virtually no guidance or training. This must be rectified.

Finally, the question itself—“are we really going to train police to become better fighters?”—exhibits the same Western cultural blind spot that characterizes the body mechanics gap. To ask this question is to assume that any hand-to-hand exchange involves “fighting,” a violent altercation involving fists, knives, or guns. In reality, another path exists, one wherein law enforcement actors are not rendered “fighters,” but are instead given physical competence to de-escalate violence once such a situation occurs.³⁸⁰

2. Three Potential Objections

Having addressed the threshold, intuitive objection, let us consider three specific objections—all valid and thus warranting further academic research—that may be levied against hand-to-hand training: the irrelevance objection, the overuse objection, and the inherent danger objection.

First, the *irrelevance objection*: hand-to-hand training may make no difference given structural aspects of police brutality, especially racism.³⁸¹ For example, scholars have noted that police killings have remained relatively static, even since the heightened collective national awareness of police violence in the wake of Michael Brown’s death in 2014.³⁸² And deeper critiques, including many noted in Part II above, describe the carceral state as so deeply embedded in American history that an abolitionist reimagining is necessary.³⁸³

Second, the *overuse objection*: police will potentially use hand-to-hand, not in place of deadly force, but to engage in excessive force that is unwarranted and/or disproportionate in a given law enforcement situation. This critique is also valid. How any tactics will be deployed, even with highly trained officers, is difficult to predict; in the field, officers balance various strategic goals, ranging from respecting individual rights to maintaining public trust and pro-

³⁷⁹ See *supra* notes 60–65 and accompanying text.

³⁸⁰ See *supra* notes 297–319 and accompanying text.

³⁸¹ See *How Do We End Racism in Policing?*, ACLU (Feb. 2, 2021), <https://www.aclu.org/news/criminal-law-reform/how-do-we-end-racism-in-policing> [https://perma.cc/T2DX-MJZ9].

³⁸² Sekhon, *supra* note 44, at 1712.

³⁸³ Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949, 2010 (2019); see *supra* notes 89–105 and accompanying text.

tecting community members from harm.³⁸⁴ Taser use may be an apt analogy, wherein officers deploy such tactics in too many situations, triggering above-noted judicial pushback and internal departmental reforms. Advocates for taser use have argued that the “effect is temporary but long enough for law enforcement officers to quickly handcuff a suspect” or otherwise control a person who is not complying with police orders.³⁸⁵ On the other hand, opponents argue that taser use has led to the death of hundreds of individuals of various ages and health conditions.³⁸⁶ At least one study from the University of Chicago found no evidence that tasers decreased police use of firearms.³⁸⁷

Finally, the *inherent danger objection*: the tactics learned in hand-to-hand trainings may pose too much risk of harm to be used in the field, regardless of the law enforcement situation. This is also valid, at least in part. Most hand-to-hand tactics pose minimal risk to civilians and officers alike. For example, the GST curriculum involves learning how to block a punch—even officers poorly trained in blocking a punch are unlikely to cause serious harm to a civilian or themselves. Or as another example, police learn how to use their arms to engage in “weapons retention,” pinning a civilian’s arms in such a way to prevent the civilian from grabbing a police officer’s firearm.

But some techniques are riskier.³⁸⁸ The “choke” has rightly become the most infamous hand-to-hand law enforcement technique, leading to the well-known death of Eric Garner at the hands of law enforcement. Largely overlooked in this discourse is that “chokes,” as popularly described, break down into two categories of tactics. An “air choke” leading to loss of breath is never taught or used in hand-to-hand training, given that loss of oxygen can quickly lead to death.³⁸⁹ A different category, however, is the vascular neck restraint, which is sometimes seen in hand-to-hand curricula and the broader martial arts world as a safe way to immobilize another person.³⁹⁰ Such restraints involve a hold for around six seconds, leading a person to briefly lose consciousness due

³⁸⁴ STOUGHTON ET AL., *supra* note 14, at 154.

³⁸⁵ Zitter, *supra* note 157, § 2.

³⁸⁶ *Id.*

³⁸⁷ Bocar Ba & Jeffrey Grogger, *The Introduction of Tasers and Police Use of Force: Evidence from the Chicago Police Department* 26 (Nat’l Bureau of Econ. Rsch., Working Paper No. 24202, 2018).

³⁸⁸ The *takedown*, for example, involves using leverage and the civilian’s body weight to take the civilian to the ground safely. It is conceivable that a badly trained officer will put civilians at risk of hitting their heads. This is likely why such techniques are introduced in GST Level 2. And the riskiest technique is likely the vascular neck restraint. Let us consider this technique with precision and granularity.

³⁸⁹ See *Gracie Survival Tactics (GST)*, *supra* note 247; Gardner & Al-Shareffi, *supra* note 15, at 115–16.

³⁹⁰ Gardner & Al-Shareffi, *supra* note 15, at 115–16; STOUGHTON ET AL., *supra* note 14, at 203–04 (distinguishing between the two categories).

to restriction on the carotid arteries.³⁹¹ After seconds, a person will wake up with no damage to their brain or body—more gentle than beating someone with fists or legs, and certainly less dangerous than shooting someone.³⁹² For example, a civilian used this restraint to safely immobilize a threatening man on the Los Angeles subway; the video went viral and earned him national and international praise.³⁹³

When, if ever, should police use this technique? As noted in Part III.B above, this question is moot in some states because the technique is legally foreclosed. State and municipal chokehold regulations vary widely, and thirty-seven states lack any chokehold policies.³⁹⁴ During the summer of 2020, police chokeholds were banned or restricted in thirty-three jurisdictions.³⁹⁵ In 2020, President Trump issued Executive Order 13,929, which required state and local police departments seeking federal funds to certify that they have banned chokeholds except in instances where deadly force is authorized.³⁹⁶ The Order, however, only addressed air chokes and left open the possibility of vascular neck restraints.³⁹⁷

For the remaining jurisdictions, three considerations will be critical. First, even if vascular neck restraints are less harmful, they may be too challenging to learn and correctly apply.³⁹⁸ Even properly applied restraints may shift into a respiratory choke or, due to an improper twist of the neck, lead to paralysis or

³⁹¹ Gardner & Al-Shareffi, *supra* note 15, at 115–16; STOUGHTON ET AL., *supra* note 14, at 203–04.

³⁹² Gardner & Al-Shareffi, *supra* note 15, at 115–16; STOUGHTON ET AL., *supra* note 14, at 203–04.

³⁹³ Veronica Rocha, *Man Called a Hero After Subduing Combative Metro Passenger with Chokehold*, L.A. TIMES (Mar. 23, 2016), <https://www.latimes.com/local/lanow/la-me-ln-viking-guy-chokehold-20160323-story.html#:~:text=Man%20called%20a%20hero%20after%20subduing%20combative%20Metro%20passenger%20with%20chokehold,-By%20Veronica%20Rocha&text=A%20Metro%20train%20passenger%20who,hero%20for%20his%20swift%20actions.> [https://perma.cc/VM4Q-WW8X]; Jimmy Nsubuga, *‘Viking Guy’ Subdues Aggressive Train Passenger with Choke Hold*, METRO (Mar. 24, 2016), <https://metro.co.uk/2016/03/24/viking-guy-subdues-aggressive-train-passenger-with-choke-hold-5773465/> [https://perma.cc/WS2E-ULCB].

³⁹⁴ Gardner & Al-Shareffi, *supra* note 15, at 129.

³⁹⁵ *Id.* at 113.

³⁹⁶ Exec. Order No. 13,929, 85 Fed. Reg. 37325, 37326 § 2(c)(ii) (June 19, 2020) (“Safe Policing for Safe Communities.”).

³⁹⁷ *Id.*; Gardner & Al-Shareffi, *supra* note 15, at 118–19. Other legislative efforts have foundered. For example, in 2015, Representative Hakeem Jefferies introduced the Excessive Use of Force Prevention Act of 2015, a bill that would have amended 18 U.S.C. § 242 to forbid the use of chokeholds nationally; the bill did not receive a vote. H.R. 2052, 114th Cong. (2015) (“Section 242 of title 18, United States Code, is amended by adding at the end the following: ‘For the purposes of this section, the application of any pressure to the throat or windpipe which may prevent or hinder breathing or reduce intake of air is a punishment, pain, or penalty.’”); *H.R. 2052—Excessive Use Of Force Prevention Act of 2015*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/2052> [https://perma.cc/W3NV-GMQX] (reflecting that H.R. 2052 was introduced but never reached a vote).

³⁹⁸ See STOUGHTON ET AL., *supra* note 14, at 204 (“The primary danger of a vascular neck restraint is that it will be applied improperly.”).

death.³⁹⁹ Second, it is highly likely the public perception of “chokes” is so negative that it is too damaging to public trust in law enforcement. Third, if permitted, police departments may narrowly circumscribe situations in which officers can deploy such tactics. Departments could restrict hand-to-hand to only lethal force situations, reasoning that officers permitted to use such holds may be less likely to use their firearm.⁴⁰⁰ Indeed, in at least one documented situation, the vascular neck restraint appears to have safely foreclosed police firearm use against a civilian. In Marietta, the current policy is that vascular neck restraints may only be used when officers are met with lethal force. In one case, an officer was pursuing a fleeing suspect, tackled him, and then the suspect reached for the officer’s gun. The officer used the vascular neck restraint to temporarily immobilize the suspect, defusing the situation without firing his gun at the individual.⁴⁰¹

3. Physical Competence and Psychological Confidence

Why might hand-to-hand training redress the body mechanics gap? First, it may close the body mechanics gap through *physical competence*. It potentially does so along all three dimensions described in Part I above.⁴⁰² First, such training emphasizes knowledge of the physical space between individuals. When this space transforms from benign to acutely physical, officers may be more prepared to resolve such situations safely. Second, such trainings may illuminate the critical intermediate space in the broader use-of-force continuum. This could replace the collective under-specification in nomenclature with the singular category of “hand-to-hand” or “physical de-escalation”; this category will then be further fleshed out as a law enforcement tool alongside verbal commands, taser, and OC spray. And third, hand-to-hand training may close the body mechanics gap by endowing individual officers across the country with the physical tools to resolve physical restraint situations.

Another promising sign for hand-to-hand training is not just physical but psychological: in interviews, all participating police departments noted an increase in *psychological confidence* that police officers feel in “hands on” situations.⁴⁰³ Some published research backs this up.⁴⁰⁴ At least one study has sug-

³⁹⁹ *Id.*

⁴⁰⁰ Scholarship critical of chokeholds notes that officers barred from using such holds may be more likely to use their firearm. Gardner & Al-Shareffi, *supra* note 15, at 131 (“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.”).

⁴⁰¹ Interview with Reinaldo Figueroa, *supra* note 16.

⁴⁰² See *supra* notes 66–87 and accompanying text.

⁴⁰³ Interview with Reinaldo Figueroa, *supra* note 16; Interview with Kevin Malloy, *supra* note 230; Interview with Kevin Lutz, *supra* note 33; Interview with James Woestman, *supra* note 211.

gested that martial arts training increases confidence in police officers because they believe that they can defend themselves when interactions with civilians become combative.⁴⁰⁵ Professor Gregory Parks has also recently suggested that this arises not just from physical and mental skills, but also because martial arts facilities may expose officers to a broader racial community.⁴⁰⁶

We might wonder if more police confidence is a good thing—don't we have a societal problem of *too much* police confidence? In fact, as Lee and Parks have noted, the story is more complicated, suggesting that moments of a lack of confidence lead to police violence. Police officers in fear may have a “flight or fight response,” misinterpreting stressors and overreacting in unnecessary ways, especially given that certain white police officers may perceive Black people as more threatening.⁴⁰⁷ Some research on police officers shows that the most significant factor in police decisions to shoot is whether the officer “feels confident in his or her ability to command respect from the subject”—this is even more determinative than racial bias.⁴⁰⁸ Research has also shown that officers who “frequently think about the possibility of injury or danger experience more stress.”⁴⁰⁹ And studies show that officers have primarily identified administrative matters and relationships with nonpolice as stressors in police work—and that police stress is significantly related to officers' acts of misconduct.⁴¹⁰

The cognitive function and psychological health benefits of martial arts training are also responsive to noted concerns about the occupation of policing more generally.⁴¹¹ Police officers worldwide are at an increased risk of devel-

⁴⁰⁴ Torres, *supra* note 9, at 195–96. Of course, other factors also contributed to confidence in “hands-on” situations. One study has shown that male officers are more confident in such situations than female officers, and that other variables relating to such confidence includes a higher body mass index, answering a large amount of high-risk calls, and working longer hours. *Id.* at 197.

⁴⁰⁵ *Id.* at 195.

⁴⁰⁶ Parks, *supra* note 8, at 49–50 (noting that the Contact Hypothesis in psychology is a means to reduce intergroup bias).

⁴⁰⁷ *Id.* at 42–46.

⁴⁰⁸ Lee, *Reforming the Law on Police Use of Deadly Force*, *supra* note 8, at 159 (citing L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115 (2014)); Richardson & Goff, *supra*, at 127, 137; L. Song Richardson, *Police Racial Violence: Lessons from Social Psychology*, 83 FORDHAM L. REV. 2961, 2966–70 (2015).

⁴⁰⁹ Laure Weber Brooks & Nicole Leeper Piquero, *Police Stress: Does Department Size Matter?*, 21 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 600, 604 (1998); Jerome E. Storch & Robert Panzarella, *Police Stress: State-Trait Anxiety in Relation to Occupational and Personal Stressors*, 24 J. CRIM. JUST. 99, 99 (1996); Torres, *supra* note 9, at 195.

⁴¹⁰ Storch & Panzarella, *supra* note 409, at 99–100; Stephen A. Bishopp et al., *Police Stress and Race: Using General Strain Theory to Examine Racial Differences in Police Misconduct*, 66 CRIME & DELINQUENCY 1811, 1820 (2020).

⁴¹¹ Sandra Origua Rios, Jennifer Marks, Isaac Estevan & Lisa M. Barnett, *Health Benefits of Hard Martial Arts in Adults: A Systematic Review*, 36 J. SPORTS SCIS. 1614, 1614 (2018); Brian Moore, Dean Dudley & Stuart Woodcock, *The Effect of Martial Arts Training on Mental Health Out-*

oping depression,⁴¹² anxiety disorders,⁴¹³ and post-traumatic stress disorder.⁴¹⁴ Martial arts athletes have reported significantly lower cognitive and somatic anxiety levels than other athletes.⁴¹⁵ One study found that the benefits of martial arts may be hormonal, specifically by increasing oxytocin levels.⁴¹⁶ Another study found that women in a Tai Chi type mindful exercise program experienced reduced mood disturbance, with less tension, depression, anger, and confusion.⁴¹⁷ Although there has been some criticism of the methodology in some studies,⁴¹⁸ the research indicates that martial arts participation is associated with a reduction in anger or assaultive and verbal hostility.⁴¹⁹ Sharper focus is needed to assess how these promising benefits from martial arts disciplines could translate to police officers, or have utility in police work.

Psychological confidence may derive from physical acclimation in hand-to-hand combat situations. As noted above, little data exists on hand-to-hand

comes: *A Systematic Review and Meta-analysis*, 24 J. BODYWORK & MOVEMENT THERAPIES 402, 410 (2020) (concluding that there is support for “martial arts training as an efficacious sports-based mental health intervention” for improving well-being).

⁴¹² Shannon Wagner et al., *Depression and Anxiety in Policework: A Systematic Review*, 43 POLICING: INT’L J. POLICE STRATEGIES & MGMT. 417, 417 (2020) (“[S]trong evidence supports the hypothesis that the prevalence of depression is elevated in police . . .”).

⁴¹³ *Id.* (finding moderate evidence that supports an elevated prevalence of anxiety in police).

⁴¹⁴ Deborah B. Maia et al., *Post-traumatic Stress Symptoms in an Elite Unit of Brazilian Police Officers: Prevalence and Impact on Psychosocial Functioning and on Physical and Mental Health*, 97 J. AFFECTIVE DISORDERS 241, 243 (2007) (stating that prevalence rates of full and partial post-traumatic stress disorder (PTSD) among police officers from an elite Brazilian unit were 8.9% and 16% respectively); Ben Green, *Post-traumatic Stress Disorder in UK Police Officers*, 20 CURRENT MED. RSCH. & OP. 101, 101 (2004) (stating that prevalence rates for PTSD in U.K. police officers may be six or more times the prevalence rates for the broader community).

⁴¹⁵ *Infra* notes 416–419 and accompanying text.

⁴¹⁶ Anna Harwood-Gross, Ruth Feldman, Orna Zagoory-Sharon & Yuri Rassevsky, *Hormonal Reactivity During Martial Arts Practice Among High-Risk Youths*, PSYCHONEUROENDOCRINOLOGY, Oct. 2020, at 1, 1.

⁴¹⁷ See David R. Brown et al., *Chronic Psychological Effects of Exercise and Exercise Plus Cognitive Strategies*, 27 MED. & SCI. SPORTS & EXERCISE 765, 772–73 (1995).

⁴¹⁸ See Jorge Delva-Tautiliili, *Does Brief Aikido Training Reduce Aggression of Youth?*, 80 PERCEPTUAL & MOTOR SKILLS 297, 298 (1995) (reviewing methodological limitations that suggest conclusions on the effect of brief Aikido training on youths’ aggressive behaviors are premature); see also Rios et al., *supra* note 411, at 1614 (“[Q]uality of the evidence is affected by the methodological weaknesses across the studies.”); Kevin Daniels & Everard W. Thornton, *An Analysis of the Relationship Between Hostility and Training in the Martial Arts*, 8 J. SPORTS SCIS. 95, 95 (1990) (finding that research results “support the need for prospective longitudinal studies on intra-individual hostility”).

⁴¹⁹ Daniels & Thornton, *supra* note 418, at 95 (discussing findings showing that martial arts may “reduce assaultive hostility rather than serve as a model for such behaviour”); Kevin Daniels & Everard Thornton, *Length of Training, Hostility and the Martial Arts: A Comparison with Other Sporting Groups*, 26 BRIT. J. SPORTS MED. 118, 118 (1992) (“[P]articipation in the martial arts is associated, over time, with decreased feelings of assaultive and verbal hostility.”); Mary Ann Egan, *The Effects of Martial Arts Training on Self-Acceptance and Anger Reactivity with Young Adults* 4 (1992) (Ph.D. dissertation, University of South Carolina) (on file with University Microfilms International).

training and police. And yet, a way around this is through consideration of research on the psychological benefits of martial arts training more generally. In the same way that it is clear that firearms training increases the accuracy of police firearms use, research shows benefits of training in martial arts in confidence, calm, and cardiovascular health.⁴²⁰ Indeed, the interrelated physical and mental health benefits of martial arts training are well documented. British research on martial arts has concluded that studies generally indicate positive psychological effects from martial arts training.⁴²¹ And a “majority of studies report[] positive effects resulting from hard martial arts practice,”⁴²² including improvement and preservation of balance, cognitive function, and psychological health, regardless of the practitioner’s age.⁴²³

V. CLOSING THE BODY MECHANICS GAP: JUDICIAL ENGAGEMENT AND OUR NATIONAL POLICE REFORM MOVEMENT

Beyond training, what is the future of physical restraint in constitutional criminal procedure and our broader national police reform movement? Section A of this Part argues that the other major prescription is judicial engagement.⁴²⁴ Section B then considers future possibilities to redress the problem of physical restraint, noting that such a future falls within complex, intersecting legal regimes of constitutional, statutory, and regulatory rulemaking, as well as the deeper political economy of policing.⁴²⁵

A. Judicial Engagement

At the judicial level, courts must circumscribe hand-to-hand tactics in the field. As the U.S. Supreme Court clarified in 2021 in *Torres v. Madrid*, a Fourth Amendment challenge is available to civilians who have been injured in physical restraint situations.⁴²⁶ At the same time, we know that courts will nev-

⁴²⁰ See Rios et al., *supra* note 411, at 1618–19; Brown et al., *supra* note 417, at 771–72.

⁴²¹ Julian R. Fuller, *Martial Arts and Psychological Health*, 61 BRIT. J. MED. PSYCHOL. 317, 317–18 (1988).

⁴²² Rios et al., *supra* note 411, at 1614.

⁴²³ *Id.*

⁴²⁴ See *infra* notes 426–438 and accompanying text.

⁴²⁵ See *infra* notes 439–443 and accompanying text.

⁴²⁶ 141 S. Ct. 989, 994 (2021). For example, plaintiffs may recover on excessive force claims when police use canines, handcuffs, hog-tying, bean-bag or pepper-ball rounds, tasers, flash-bang devices, and acoustic devices. See, e.g., *Hyde v. City of Willcox*, 23 F.4th 863, 870 (9th Cir. 2022); *Edrei v. Maguire*, 892 F.3d 525, 529 (2d Cir. 2018) (finding a Fourth Amendment violation from use of a “long-range acoustic device”); *Edwards v. Byrd*, 750 F.3d 728, 732 (8th Cir. 2014) (asserting a claim against the use of, inter alia, flash-bang grenades and bean-bag guns); *Cruz v. City of Laramie*, 239 F.3d 1183 (10th Cir. 2001) (asserting a Fourth Amendment claim based on hog-tying); *Vathekan v. Prince George’s County*, 154 F.3d 173, 178–79 (4th Cir. 1998) (succeeding on a claim of excessive

er categorically prohibit physical restraint, given that they generally reject *per se* challenges to specific law enforcement devices or methods.⁴²⁷

Qualified immunity doctrine may slow robust judicial consideration of physical restraint, particularly if novel techniques are used. Qualified immunity effectively raises the bar for plaintiffs in constitutional civil suits, meaning that even in cases where officers may have violated the Constitution, they will be granted immunity as long as they did not violate “clearly established law.”⁴²⁸ In 2009, in *Pearson v. Callahan*, the Supreme Court held that courts may rule on the latter without fully considering the former, meaning that a grant of qualified immunity effectively forecloses a merits-based analysis of police conduct in some instances.⁴²⁹ This means, as one scholar notes, that jurisprudence on “novel practices and technologies, like [t]asers and drones,” will slow because courts will, as a threshold matter, find that the caselaw does not clearly establish instances where such hand-to-hand contact violated a constitutional right.⁴³⁰ Should qualified immunity doctrine be pared back, as scholars and policymakers are increasingly calling for,⁴³¹ courts will more proactively apply Fourth Amendment balancing to such cases. In instances where courts reach the merits in a case, civilian challenges to physical restraint will be left to the aforementioned vagaries of reasonableness balancing. Courts will “slosh [their] way through the factbound morass” of the nature of police use of hand-to-hand tactics, given the totality of the circumstances.⁴³²

Courts should move toward a force-specific test of physical restraint—the furthest point in the spectrum of judicial intervention described in Section III.A above.⁴³³ Over time, courts should hone in on the precise circumstances in which such force is appropriate. This has already begun: to date, the U.S. District Court for the District of New Jersey has ruled that it would not dismiss plaintiffs’ 42 U.S.C. § 1983 claims when such plaintiffs were injured by a po-

force where a police canine bit the plaintiff); *United States v. Johnstone*, 107 F.3d 200, 205 (3d Cir. 1997) (finding excessive force where the plaintiff experienced physical force while handcuffed).

⁴²⁷ See AVERY ET AL., *supra* note 111, § 2:18 (providing examples of how courts approach *per se* challenges to police use of force).

⁴²⁸ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

⁴²⁹ 555 U.S. 223, 227 (2009); Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 318 (2020).

⁴³⁰ Schwartz, *supra* note 429, at 318.

⁴³¹ See, e.g., James E. Pfander, Essay, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1611 (2011); Jordain Carney, *GOP Senator Introducing Bill to Scale Back Qualified Immunity for Police*, THE HILL (June 23, 2020), <https://thehill.com/homenews/senate/504065-gop-senator-introducing-bill-to-scale-back-qualified-immunity-for-police> [<https://perma.cc/9EFB-LPM4>].

⁴³² *Scott v. Harris*, 550 U.S. 372, 383 (2007).

⁴³³ See *supra* notes 110–163 and accompanying text.

lice jiu-jitsu-style takedown to the ground.⁴³⁴ This opens the door to a factual inquiry of whether the use of such a tactic was in fact reasonable.⁴³⁵ Judicial evaluation of such hand-to-hand tactics should ultimately redefine what constitutes reasonable force in certain physical restraint contexts. For example, courts may curtail the use of all neck restraints, limit the use of takedowns to the ground, but find that blocking of punches and weapon retention techniques do not meet the *de minimis* force threshold.⁴³⁶

This judicial shift may also draw in other institutional actors in the political economy of policing. For example, research shows that insurers have worked with police departments to foster officer “good judgment” using training simulators.⁴³⁷ The Camden, New Jersey Police Department is already developing a new training simulator involving robust physical escalation training, using padded mats on the ground.⁴³⁸ Insurance companies may fortify this initiative and push for its incorporation in other departments.

B. Future Possibilities in Reform and Abolition

The next policy step must evaluate hand-to-hand training through the most rigorous methodologies possible. At least one recent randomized control trial—the gold standard for experimental and empirical research design—has shown that a robust system of Integrating Communications, Assessment, and Tactics (ICAT) training and implementation has reduced use of force incidents, civilian injury, and officer injury alike.⁴³⁹ Camden, for example, has been engaging in both ICAT and hand-to-hand training.⁴⁴⁰ Research focused on such departments may illuminate hand-to-hand training’s effectiveness. A critical

⁴³⁴ *Capps v. Dixon*, Civ. Nos. 19-12002, 20-1118, 2021 WL 2024998, at *3–4 (D.N.J. May 21, 2021). Furthermore, a dissenting judge in at least one state court has considered the training of an officer when evaluating use of force. *Jarrell v. City of Nitro*, 856 S.E.2d 625, 634 (W. Va. 2021) (“The majority, however, glosses over the fact that Sgt. Jarrell is a well-trained police officer and holds a second-degree black belt in judo, a second-degree black belt in jiu-jitsu, a second-degree black belt in taekwondo, a second-degree black belt in karate, and a third-degree black belt in taiho-jutsu Conversely, Mr. Hester was an intoxicated, nonthreatening, unarmed man.” (footnote omitted)).

⁴³⁵ This development, applied to physical restraint tactics, could constitute a piece in a larger tactics-oriented reconceptualization of the Fourth Amendment. See Garrett & Stoughton, *supra* note 13, at 290–301.

⁴³⁶ See *supra* notes 143–147 and accompanying text.

⁴³⁷ See Rappaport, *supra* note 38, at 1578–79.

⁴³⁸ Interview with Kevin Lutz, *supra* note 33.

⁴³⁹ ROBIN S. ENGEL, NICHOLAS CORSARO, GABRIELLE T. ISAZA & HANNAH D. MCMANUS, CTR. FOR POLICE RSCH. & POL’Y, EXAMINING THE IMPACT OF *INTEGRATING COMMUNICATIONS, ASSESSMENT, AND TACTICS* (ICAT) DE-ESCALATION TRAINING FOR THE LOUISVILLE METRO POLICE DEPARTMENT: INITIAL FINDINGS, at i, xii (2020).

⁴⁴⁰ Phaedra Trethan, *Forum Preps Police to Defuse Tense Encounters*, COURIER POST, <https://www.courierpostonline.com/story/news/2017/07/13/police-train-de-escalation-techniques-camden/471951001/> [<https://perma.cc/V4EZ-YAEV>] (July 14, 2017).

question will be how hand-to-hand skills should be deployed on the ground, attentive to the irrelevance, overuse, and inherent danger objections.

Should such hand-to-hand skills be successful in reducing use of force and injury to civilians, states could implement more robust hand-to-hand requirements, both in use of force and training.⁴⁴¹ In the short term, the aforementioned political economy concerns—police unions, insurance companies, and civil asset forfeiture regimes—may complicate adoption of such widespread legislative state mandates.⁴⁴² But state POSTs could advance hand-to-hand training, as seen in the 2021 decisions in New Jersey and California to adopt GST statewide.⁴⁴³ And at the level of individual police departments, use of force policies must continue to be revised, and hand-to-hand training must be studied in greater depth. As discussed above, police departments have wide discretion to engage in hand-to-hand training; as a result, jurisdictions vary widely in terms of curriculum, institutional arrangements, funding streams, and data retention.⁴⁴⁴ While such departments experiment with training techniques best suited for their jurisdictions, they may learn, share, and mandate best practices for developing such programs within their various departments.

Let us conclude with final thoughts regarding reformism and abolitionism. Hand-to-hand skills should continue to be conceptualized alongside broader de-escalation and other reform movements. De-escalation training is a major category of police reform proposals that exist today, alongside movements such as re-evaluating the quantity and sources of police funding, police bias, de-militarization of the police, and reduction of firearms use. Hand-to-hand training should not take away from the validity of exploring such avenues of potential reform. We may well imagine a future where every police officer comes from the local community, is de-militarized, is highly versed in verbal de-escalation, and is highly conscious of the dangers of racial bias, operating within a police department with a community-oriented, prevention-oriented focus. Such an officer would have a wide range of tools at his or her disposal. When encountering an acute law enforcement situation, such an officer would always begin to verbally de-escalate before resorting to force. If such verbal de-escalation is unsuccessful, the officer would not punch or kick, but safely use hand-to-hand skills to de-escalate the situation—and thus not reach for their firearm.

⁴⁴¹ At time of writing, it is improbable that the Yang proposal would be adopted at the federal level, and it is still too early to say that Michigan should adopt the aforementioned 2021 bill requiring police to have jiu-jitsu blue belts. H.R. 4525, 101st Leg., Reg. Sess. (Mich. 2021).

⁴⁴² See *supra* notes 213–230 and accompanying text.

⁴⁴³ See Rau et al., *supra* note 36, at 1353; see *supra* notes 248–250 and accompanying text (discussing the New Jersey and California initiatives).

⁴⁴⁴ See *supra* notes 239–423 and accompanying text.

Finally, for those envisioning the abolitionist horizon, a new law enforcement future must close the body mechanics gap. A future with reduced violence, unarmed police, or perhaps even a lack of policing altogether, must attend to the reality of situations wherein an individual must be restrained. These situations may arise infrequently, hopefully, and be necessary only after robust intervention from social work and/or individuals trained in verbal de-escalation techniques. But such a future cannot afford to overlook this critical site of state-civilian engagement.

CONCLUSION

When police lay “hands on,” they may hurt or even kill laypeople. This Article grapples with this problem of physical restraint, which is overlooked and under-specified in American law, policy, and culture. This problem is inescapable in both police reformist and abolitionist agendas because it is inherent in enforcing laws and community norms. Although data on such situations is lacking, training and judicial engagement offer the initial promise of closing a body mechanics gap in physical space, collective conceptualization, and a lack of competence for law enforcement. Redressing physical restraint is alone no panacea for the pathologies of contemporary policing, but it is critically necessary for physical restraint to be conceptualized and explored in training. As criminal justice undergoes deeper reconceptualization and reimagining, policymakers and scholars alike must attend to this critical site of state-civilian engagement.

