Restraining Police Restraint
Professor Leslie Thomas QC & Deborah Coles

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I AIN'T WELCOMED HERE NO MORE

I WALK DOWN THE STREET
AND GUESS WHO I MEET
THE MEN IN BLUE WHO SUPPOSED TO DEFEND
BUT INSTEAD THEY CHOSE TO APPREHEND
THEY SLAP, PUNCH, CHOKE ME RED
THEY WON'T STOP TILL I END UP DEAD
OH STOP! PLEASE? I CAN'T BREATHE!
I BEG OF YOU, JUST GO, AND LEAVE!
MY CRIES ALL DISAPPEAR OUT OF SIGHT
I'LL END UP DEAD IF I TRY TO FIGHT
HIS KNEE IS UP AGAINST MY THROAT
NO ONE CAN STOP HIM, THEY ALL TOO REMOTE
MY GOD, WHAT COUNTRY DO I CALL THIS
A NATION WHERE THE POPO CAN JUST GO BLISS
AT MY EXPENSE, I KID YOU NOT!
I'LL BE BEAT, STEPPED ON, OR EVEN SHOT!
THIS NONSENSE MUST STOP,
BUT COURSE IT WON'T
ALL I CAN DO IS SCREAM PLEASE DON'T!
AS I BLEED HERE LYING DEAD ON THE FLOOR
I KNOW I AIN'T WELCOMED HERE NO MORE

Ayodele Ayoola, Grade 9 Student Baltimore US[i]

"I can't breathe". In 2020, millions of people around the world heard those words as they watched the deeply traumatic video footage of George Floyd being killed by a police officer. As we all know, his death sparked mass protests against police brutality all over the United States and around the world.

But a lot of British people think that this is just an American problem. After all, our police have a softer, friendlier image. Most of them don't even carry guns. If you're a white, middle-class British person who's never had a run-in with the police, it's very easy to think of the "British bobby" as an essentially benevolent figure.

However, those of us who have been fighting for human rights for decades see it differently. In this lecture, we are going to talk about deaths during or following police restraint. Over my career, I have seen numerous cases here in the UK where people have died when they were restrained by police. A disproportionate number of those people were Black men, and a disproportionate number of them were having a mental health crisis at the time of their death. In many such cases, the bereaved

family has faced a years-long struggle for justice, truth and accountability after their loved one's death.

People often assume that we in the UK have less of a problem with policing than the US because most of our police are unarmed, and we have so many fewer police shootings. But according to INQUEST, 1,160 people died in police custody in England and Wales between 1990 and 2020. That was out of a total of 1,777 police-related deaths. So we can see that, in England and Wales, it is custody deaths, not shootings that account for the vast majority of deaths at the hands of the police. This is a fundamental problem with British policing, and we cannot remain silent about it.

I am really privileged to be joined today by Dr Nat Cary, an eminent forensic pathologist, and Deborah Coles, director of the charity INQUEST. We will look at why these deaths happen, what we can do about it, and why nothing has changed in my years of working on these cases.

Positional Asphyxia

In December 1996 I was instructed to represent the family of Wayne Douglas. This was my first really big case, and my second involving a death in custody following restraint by the police. It would also be the first of several similar cases I would work on involving the Metropolitan police and many other Police forces up and down the country. It was also notable for it was the first case in which I learned about the concept of positional asphyxia and the first case in which I was introduced and met our 2nd speaker tonight Dr Nat Cary. Now I won't go into the many different types of restraint cases I and others have done. Deb Coles will speak to that shortly. Let me start with some definitions.

What is Positional Asphyxia/Restraint Asphyxia?

First of all, I am going to talk about a medical concept called "positional asphyxia". Positional asphyxia plays a role in many deaths resulting from police restraint.

The science behind positional asphyxia was first identified in the 1980s and early 1990s. In the US, it was noticed that there was a pattern of similar deaths among people, disproportionately African American men, who were restrained by police while having a mental health crisis or while acutely intoxicated from drug use. For instance, a 1993 study by O'Halloran and Newman described 11 sudden deaths of men restrained in a prone position by police officers.

So, what is positional asphyxia? Well, I'm no doctor and I have Dr Cary here who will explain the concept in more detail and if I get anything wrong, he will put me right.

But simply put, 'positional asphyxia' or restraint asphyxia is a potential cause of death of a restrained person. It often occurs where the deceased has been placed in the prone position, namely on their front, with hands handcuffed or bound behind the back, possibly with pressure applied to the back. This is a common method of police restraint. It can also happen in the 'hog-tied' position, which is more common in the US, where the wrists are tied to the ankles and the person is placed on their front.

When placed in such a position normal breathing movement is compromised and take additional effort. Any interference with the muscles of respiration can trigger this asphyxia. The diaphragm, the muscles between the ribs known as the intercostal muscles, and the muscles in the neck and back.

If a person is held for a sustained period and particularly if they are exhausted, this additional effort may prove too much and they may succumb and die as a result of a reduction in oxygen in the

blood, which is affected by respiration. The problem is accentuated if the person has a larger body, particularly a large stomach. It is also accentuated if they are drunk or under the influence of drugs.

When a person is suffering from positional asphyxia, the key signs include gurgling or gasping sounds, cyanosis (the face turning blue), passivity, hypervigilance, and – very significantly – verbal complaints of being unable to breathe. When I saw the video footage of George Floyd's death, it was not new to me – it was horribly familiar.

Acute Behavioural Disturbance

There is also a related medical concept used by pathologists. It was originally called 'Excited Delirium', but the term 'Acute Behavioural Disturbance' or ABD is now often used instead.

The key signs of ABD are said to be delirium, psychomotor agitation, anxiety, hallucinations, speech disturbances, disorientation, violent and bizarre behaviour, insensitivity to pain, elevated body temperature, tachycardia, incoherent speech or shouting, inappropriate removal of clothes and superhuman strength.

ABD is a controversial cause of death. It is not found in the Diagnostic and Statistical Manual of Mental Disorders, or DSM, or the International Classification of Diseases, or ICD, which are the two international standards for classification of mental disorders. It's a term that's used primarily by pathologists, rather than psychiatrists, and that is primarily used in the context of restraint deaths. A comprehensive review carried out in 2015 by forensic psychiatrist Dr Maurice Lipsedge cast doubt on the idea of ED or ABD as a cause of death in its own right.

So, there is a lot of debate in the scientific community about whether ABD can stand as a cause of death on its own. This debate is often aired in inquests into police restraint deaths, with different pathologists putting forward different views.

At times, a finding of ABD can be used in an attempt to exculpate the police officers involved in the restraint by suggesting that the deceased would have died anyway. But as I say, the science behind this is highly controversial. Later on I will be handing over to Nat Cary to talk about the medical and scientific concepts involved.

What everyone agrees on, however, is that if a person is seen to be suffering from the signs of ABD, it is an acute medical emergency, and they require urgent medical attention. And in those circumstances, physically restraining them is extremely dangerous. Anyone restraining a person with these symptoms ought to be aware that there is a high risk that they will die.

Restraint Deaths in the UK

In 2015 the then Home Secretary Theresa May commissioned a review of the deaths of Black and ethnic minority people in custody by Dame Eilish Angiolini, the former top prosecutor in Scotland.

Dame Eilish published her report in 2017. I quote the following from her executive summary:

> "*This report argues that police practice must recognise that all restraint has the potential to cause death. Recognition must be given to the wider dangers posed by restraining someone in a heightened physical and mental state, where the individual's system can become rapidly and fatally overwhelmed…*
>
> *Currently there is no consistency of training in restraint techniques across the 43 police forces in England and Wales. There should be mandatory and accredited national training for police*

officers in restraint techniques and supervision of vital signs during restraint, with appropriate refresher training for officers. There should be national consistency in approaches to the use of force. In addition, the ability to de-escalate circumstances which may lead to a physical or violent encounter should be paramount in the skills set of the individual officer.

National policing policy, practice and training must reflect the now widely evident position that the use of force and restraint against anyone in mental health crisis or suffering from some form of drug or substance induced psychosis poses a life threatening risk."

I would agree with all those recommendations. But I would question whether they are enough. "More training" is an easy answer, but we have had decades of calls for "more training" and yet the same things keep happening.

Are We Holding the Police to Account?

That brings me to a discussion of what is needed to establish criminal liability for these deaths.

As established by the case of Wilkinson, a verdict of unlawful killing can only be returned if the killing amounted to murder, manslaughter or infanticide. It is not sufficient that the killing was legally wrong in some other way.

Previously, the standard of proof to secure an unlawful killing verdict was very high, beyond a reasonable doubt, the same as in criminal cases. But that changed very recently last year in a case called *R (on the application of Maughan) (Appellant) v Her Majesty's Senior Coroner for Oxfordshire*. The standard of proof in an inquest for unlawful killing is now on the balance of probabilities. The lower civil standard. Perhaps this will mean that there will be more accountability in inquests than previously, but we will have to wait and see.

There are three principal types of unlawful killing that are relevant for our purposes. Murder and unlawful act manslaughter and negligent manslaughter. I am not looking at murder in the context of this lecture, because fortunately, I have yet to do a restraint case where there has been evidence of a deliberate killing by a state agent, intending to kill. So I will only briefly look at manslaughter.

Unlawful Act Manslaughter

A defendant is guilty of this sub-category of manslaughter if they intentionally do an act which is unlawful and dangerous which inadvertently causes death (DPP v Newbury [1977] AC 500 HL).

It is not necessary to prove that the unlawful and dangerous act was aimed at any person, or in particular the person whose death was caused (R v Mitchell [1983] QB 741 CA) and see (para 14-46 Jervis on Coroners).

Neither is it necessary to prove that the defendant knew that their act was dangerous and unlawful (Newbury) (see para 14-46 Jervis).

For an act to be unlawful within the meaning of this rule it must be criminally not merely civilly wrong (R v Franklin (1883) 15 Cox CC 163).

As for dangerousness, this is determined objectively. The act must be such that all sober and reasonable people would inevitably recognise that it must subject the other person to at least the risk of some harm, even if not serious harm (R v Church [1966] 1 QB 59).

In other words the elements of unlawful act involuntary manslaughter are:-

- an unlawful and dangerous act
- which results in the death of another
- which was committed intentionally
- by one or more persons if they act together in a joint enterprise.

Gross Negligence Manslaughter

Gross negligence manslaughter is very different. As Lord Mackay LC stated in the landmark case of R v Adomako [1995] 1 AC 171 sets out the basic necessary constituent ingredients of gross negligence manslaughter,

- The existence of a duty of care (based on ordinary principles of negligence) owed to the deceased,
- A breach of that duty of care,
- The risk of death (not just the risk of serious injury: R v Misra [2005] 1 Cr App R 21 [25] (CA)) was a reasonably foreseeable consequence of the misconduct: Reeves v Commissioner of Police for the Metropolis [2001] 1 AC 360, 393 (HL),
- The breach caused the death, and
- Having regard to the risk of death involved, the misconduct was grossly negligent so as to be condemned as the serious crime of manslaughter.

The "ordinary principles of negligence" apply to determine whether a duty of care was owed, and whether it has been breached.[1]

In accordance with the ordinary principles of negligence, the duty owed by a professional is to exercise the skill, care and diligence of a competent professional of the same rank and with the same professed specialisation.[2] The fact that an officer did his "incompetent best" does not negative the existence of a breach of the duty of care that is owed. Whether the defendant fell below the relevant standard of care is assessed objectively.[3]

The law on causation is addressed in full below. In summary, it is for a jury to consider all of the medical evidence before concluding whether or not the criminal standard of proof is met. That includes the expert evidence.

Whether the misconduct was grossly negligent, the guidance as to the meaning of "gross negligence" can be found in ***Misra***. The Court of Appeal explained the gravity of the conduct required for gross negligence manslaughter. They approved Langley J's description as follows:

> *"considering the conduct of each doctor, I think you will find it most helpful to concentrate on whether or not the prosecution has made you sure that the conduct of whichever one you are considering in all the circumstances you have heard about and as you find them to be, fell so far below the standard to be expected of a reasonably competent and careful senior house officer that it was something, in your assessment, truly exceptionally bad, and which showed such an indifference to an obviously serious risk to the life of Sean Phillips and such a departure from the standard to be expected as to amount, in your judgment, to a criminal act or omission, and so to be the very serious crime of manslaughter*."

Where the jury concluded that the conduct of each medical professional in the course of performing his professional obligations to his patient was '*truly exceptionally bad'*, and showed a high degree of indifference to an obvious and serious risk to the patient's life, this was considered to be sufficient.

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[1] *Adomako,* 187B-E
[2] *Adomako*, 188C-G.
[3] *R v Price* [2014] 1 WLR 3501, §20.

Whether negligence should be characterised as gross is supremely a matter for the jury.[4] This is not a question of law, but one of fact, for decision in the individual case: Adomako.

It is also clear that such quantification of fault is purely a matter for the jury. Mr Justice Jackson in the case of Dawson at paragraph 44 said:

> "*I do not accept [the] submission that those breaches could not possibly amount to gross negligence. In my view it was pre-eminently a jury question whether or not those breaches were so serious as to amount to a criminal act. In R v Adomako Lord Mackay stressed the role of the jury in making this assessment. The coroner was correct in the present case to leave the jury to consider whether or not those various possible breaches amounted to gross negligence*."

Are We Doing Enough?

In my previous lectures I've talked about the inquest process, its successes and its failures. But even where an inquest does return a verdict of unlawful killing, or a narrative verdict which is highly critical of the police, what happens next?

As I said in my first lecture, as far as I am aware there has never been a successful prosecution of a police officer for murder or manslaughter in relation to a death in custody.

We need to ask ourselves this: out of more than a thousand deaths in custody since 1990, can it really be said that none of them would have justified a manslaughter conviction?

This is not to say that a criminal conviction is the only way of holding the police to account. But we have to ask ourselves whether the system truly values the lives of the people who are killed by police.

Aside from the criminal courts and the coroners, the other institution whose role it is to hold the police to account is the Independent Office for Police Conduct (IOPC), formerly the Independent Police Complaints Commission (IPCC). Yet the families of victims often do not feel satisfied with IOPC or IPCC investigations. As the Angiolini Review found, the IPCC does not always feel truly independent of the police or of police culture. The Review found that investigations were sometimes undermined by police officers involved in the death being allowed to confer in the aftermath of the death. And the Review also highlighted that delays in IPCC investigations and CPS decision making can leave families in limbo for long periods of time.

My own experience has been that the police disciplinary processes are often inadequate – and that the views of the bereaved family are often side-lined.

However, much training we give the police, police culture will not change unless individual officers who use unnecessary and disproportionate force are held to account.

Race and Restraint: The Elephant in the Room

The Stephen Lawrence inquiry found,

> "*6.34 Taking all that we have heard and read into account we grapple with the problem. For the purposes of our Inquiry the concept of institutional racism which we apply consists of:*

[4] *Adomako,* 187D-E; *R (Secretary of State for Justice) v HM Deputy Coroner for the Eastern District of West Yorkshire*, §61.

> *The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people.*
> *It persists because of the failure of the organisation openly and adequately to recognise and address its existence and causes by policy, example and leadership. Without recognition and action to eliminate such racism it can prevail as part of the ethos or culture of the organisation. It is a corrosive disease."*

In Counsel magazine July 2020

> "It is a flawed and outdated view on racism to believe that the racist is an individual who consciously does not like people based on race and is intentionally mean to them. Such a definition is a deflection which protects the system. When our profession recognises that racism doesn't necessarily come from individuals, doesn't need to be conscious, and doesn't need to be intentional we will be moving in the right direction. Racial injustice and racism isn't a simple binary question. The racist needn't simply be bad, ignorant, bigoted, prejudiced or old. The non-racist isn't necessarily the good person, educated, progressive, open or fair-minded, well-intended or young. This discussion goes well beyond this."

There appears to be a relationship or correlation between these restraint cases, mental health and race, that cannot be ignored.

I think Akala in his book Natives, summed it up right when he said that,

> "*despite much seeming and some very real progress, public discourse about racism is still as childish and supine as it ever was. Where we do discuss race in public, we have been trained to see racism – if we see it at all – as an issue of interpersonal morality. Good people are not racist, only bad people are. This neat binary is a great way of avoiding any real discussion at all*."

<u>What Should We Do?</u>
As I said earlier, I agree with Dame Eilish's recommendation that there should be national, consistent standards and training as regards police restraint. I believe that every police officer should be held to these standards, and that failure to follow them should be regarded as serious misconduct. There should be no excuse for officers who use unnecessary and disproportionate force on a person experiencing a mental health crisis.

But it is arguable that that doesn't go far enough. The root of the problem is that police officers are not the right people to respond to someone in mental health crisis.

In the light of the mass, worldwide protests against police brutality in 2020, a lot of people have been asking big questions about policing as an institution. Questions like these: what are the police for? Who do they protect? Whose interests do they serve? In the US and UK, these questions are asked against the backdrop of a capitalist society with a centuries-long history of racism, white supremacy and colonialism. The English legal system is not neutral, and it doesn't protect everyone equally. It was created by and for the ruling class, to protect their own interests. Many of our laws are designed to protect property and privilege rather than people. And ever since our modern police forces were created in the nineteenth century, they have been a core part of that system.

This means that people like me – lawyers who work within the legal system, and activists who campaign for policy changes – sometimes have hard questions to ask ourselves. Is this system reformable at all? Or can it only be fixed by scrapping it and starting again? When we try to secure justice through the existing system, are we just putting lipstick on a pig?

In this lecture I'm not going to give a definitive answer to that question. But I will say that, based on my experience, campaigning for legal and policy changes really does make a difference. We should not be fatalistic about our ability to improve things. In the last lecture, for example, I talked about how the Human Rights Act, and the tireless campaigning of bereaved families, have delivered material improvements in the rights of the bereaved in inquests – even though there is still much more to do. Similarly, while our society remains very racist, I have also seen real changes in attitudes to race and racism in my lifetime. But let me turn to the real experts.

I will now hand over to Dr Nat Cary. Dr Cary, firstly has there been anything I have said in terms of the science that I have got wrong? Please correct me.

[i] https://charmlitmag.org/poems-for-black-lives-matter-at-school