

REGULATING POLICE DETENTION: A CASE STUDY OF CUSTODY VISITING

by

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**A thesis submitted to the University of Birmingham
for the degree of DOCTOR OF PHILOSOPHY**

Law School
University of Birmingham
December 2016

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ABSTRACT

This thesis investigates the work of custody visiting in police stations. Custody visitors make what are supposed to be random and unannounced visits to custody blocks in all parts of England and Wales. They check on the welfare of detainees being held in police custody, and they report their findings to the local Police and Crime Commissioner. Custody visiting is an important component of the criminal justice system, but it has been almost completely ignored by police scholars, and is largely unknown among the general public. The thesis analyses the character of official policy about custody visiting since the first “lay visiting” schemes in the early 1980s, through to the operation, from 2002, of the current statutory scheme known as “Independent Custody Visiting”. Using observation and face-to-face interviews in a local case study, along with wider desk and archival research and elite interviews, and drawing on Steven Lukes’ concept of power, this thesis is an original, in-depth investigation of this phenomenon. It is the first rigorous assessment of custody visiting, and the first thorough evaluation of its independence and of its effectiveness as a regulator of police behaviour.

DEDICATION

This thesis is dedicated to the memory of Michael Meacher MP

ACKNOWLEDGEMENTS

My first debt of gratitude is to Michael Meacher. Without him, custody visiting might not have happened at all, but his contribution has been airbrushed away by the state. His ideas for how it should operate were far too radical: in so many ways, he was right. He was kind enough to give me his time and encouragement during a busy day at the House of Commons. I am very grateful to his family for allowing me to dedicate my work in his memory.

There are so many people I have to thank for helping me with this work. First I think of those who enabled me to collect the data. Because I cannot identify the location of the case study, most of them have to remain anonymous. I would want to thank the Police and Crime Commissioner; the scheme administrator; the custody visitors; lawyers; people being detained in the custody blocks; and the police officers and civilian custody staff. All these people helped me by facilitating my access, providing interviews and allowing themselves to be observed. Two named interviewees I am able to thank personally are Jane Warwick and Katie Kempen; and also Marcia Rigg, for putting me in touch with Jane Warwick.

I am grateful to the members and staff at what was then Dyfed-Powys police authority, and the police and custody staff in Newtown and Brecon police stations. The experience I gained there prompted me to embark on this study. Dr Layla Skinns gave me some initial advice. Professor Andrew Sanders then encouraged me to apply to the University of Birmingham to work on a PhD there, and Professor Richard Young and Dr Simon Pemberton were my supervisors. I owe both Richard and Simon a huge debt of gratitude, for their skilful management of this project, the insights they have shown me, their support and encouragement, their attention to detail as well as the big picture, and their infectious humour which has made the work such a pleasure. Other academic colleagues to thank are Professor Graeme Douglass, Dr Adrian Hunt and Professor Gary Thomas. I am also grateful to the University of Birmingham for access to its library and digital resources, and for grants which helped me to pay for travel, conference expenses and a digital recorder.

Many of my relatives and friends have helped, encouraged and supported me in this project. Particular thanks are due to my nieces Natasha Kendall and Emma Kendall, and to my friend Sebastian Morgan-Clare. Above all I have to thank my wife Jenny. She has proof-read my very numerous drafts, been unfailingly supportive in letting this work be the first priority, made numerous sacrifices of her time, and put up with a monomaniac author, for the second time during our marriage.

Having thanked so many people, I just need to say that the responsibility for the errors that remain is mine.

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ABBREVIATIONS

PARTICIPANTS IN THE RESEARCH

AD	Scheme administrator
C	Civilian custody staff
D	Detainee
L	Lawyer
M	Custody Manager - Inspector
S	Custody Sergeant
V	Visitor

GOVERNMENT PUBLICATIONS ABOUT CUSTODY VISITING

1986 Circular	Home Office Circular 12/1986 <i>Lay Visitors to Police Stations</i>
1991 Circular	Home Office Circular POL/90 1364/1/15 <i>Lay Visitors to Police Stations: Metropolitan Police District Revised Guidelines</i>
1992 Circular	Home Office Circular 4/1992 <i>Lay Visitors to Police Stations: Revised Guidance</i>
2001 Circular	Home Office Circular HOC 15/2001 <i>Independent Custody Visiting</i>
2003 Code of Practice	Home Office Code of Practice on Independent Custody Visiting 2003
2010 Code of Practice	Home Office Code of Practice on Independent Custody Visiting 2010
2013 Code of Practice	Home Office Code of Practice on Independent Custody Visiting March 2013

OTHER ABBREVIATIONS

ACPO	Association of Chief Police Officers
APA	Association of Police Authorities
CPR	Cardiopulmonary resuscitation
ECHR	European Convention on Human Rights
HMIC	Her Majesty's Inspectorate of Constabulary
HMIP	Her Majesty's Inspectorate of Prisons
ICV	Independent Custody Visiting or Independent Custody Visitor
ICVA	Independent Custody Visiting Association
IMB	Independent Monitoring Board
IPCC	Independent Police Complaints Commission
NPM	National Preventive Mechanism
OPCAT	Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
PACE	Police and Criminal Evidence Act 1984
PIC	Person in Custody
PCC	Police and Crime Commissioner

CHAPTER ONE

INTRODUCTION

Police custody blocks are some of the state's secret places, hidden away from public view,¹ and are very much the police's territory. Public controversies about what happens in these secret places arise only when there is a death in custody. Into this setting, under a statutory scheme, come custody visitors. They make what are supposed to be random and unannounced visits to the custody blocks in all parts of England and Wales:² they check on the welfare of detainees being held in police custody, and they report on their findings.³ Custody visiting is an important component of the criminal justice system, but it has been almost completely ignored by police scholars, and is largely unknown among the general public. This thesis is an original, in-depth investigation of this phenomenon, and the first ever rigorous assessment of its independence and effectiveness.

This introductory chapter outlines the research, examines the nature of custody, and considers the effect of the power of the police on the custody visitors. It argues that police behaviour in custody blocks should be subject to a greater degree of regulation than currently is the case, and that a reformed

¹ Mike Maguire, "Regulating the Police Station: the Case of the Police & Criminal Evidence Act 1984" in McConville M and Wilson G (eds), *The Handbook of The Criminal Justice Process* (OUP 2002) 75. The Channel Four series *24 Hours in Police Custody* has given the public more of an idea what they are like.

² There are similar schemes in Scotland and Northern Ireland, which have not been studied in this research.

³ The Police Reform Act 2002 s 51, set up the statutory scheme of custody visiting known as the Independent Custody Visiting Scheme, often abbreviated as "ICV" in the official literature. Earlier arrangements were known as lay visiting. Much of the official literature is surprisingly unforthcoming about the random, unannounced quality of the visiting: see Chapter Two, text to note 164-5. See Chapter Six, note 31, for the additional quality of visits being unexpected.

system of custody visiting could provide that greater degree of regulation. Consideration is given to what the purpose of custody visiting is by looking at its origins in the early 1980s. The proposals of Michael Meacher MP and the recommendations in the Scarman Report saw its purpose as the safeguarding of detainees and reducing the number of deaths in custody. The chapter offers a preliminary explanation of the role played by Police and Crime Commissioners in running the local custody visiting schemes, and the role played by their representative body,⁴ the Independent Custody Visiting Association. It also looks at the involvement of a custody visitor in the aftermath of one particular death in custody, and begins to consider why the official literature of custody visiting is deafeningly silent about deaths in custody.

Overview of the research

The literature on research design reminds us that a study is a product of many interlocking factors, including personal interests and the biography of the researcher, and that it is important to be reflective about one's own positioning in relation to that study.⁵ I became interested in custody visiting while working as a custody visitor. I found that I was asking myself basic questions about custody visiting. What is it? Who is it for? What should be done with it? I found that the academic literature had next to nothing to say about custody visiting,

⁴ The members of the Independent Custody Visiting Association (ICVA) are Police and Crime Commissioners, not visitors: *Visiting Times* 8/3, Summer 2002 showing clause 4 of the constitution, and ICVA articles of association, article 23. ICVA's funding comes mainly from the Home Office, as can be seen from its home page and annual accounts. *Visiting Times*, the articles of association and the annual accounts are on ICVA's website at icva.org.uk.

⁵ Jane Ritchie, Jane Lewis, Carol McNaughton Nichols, Rachel Ormiston, *Qualitative Research Practice* (2nd edn, Sage 2014) 23, where, as elsewhere in the literature, "reflexive" is the version of the word.

which made me wonder why that should be so.⁶ I decided to look for the answers to my questions by seeking to carry out the research myself.

What happens in custody makes a major impact on each criminal case.⁷ Custody visiting provides outside scrutiny of what happens in custody: the quality of that scrutiny needs careful exploration. A large number of volunteers are involved, devoting a substantial amount of time to custody visiting. There are 1,900 visitors,⁸ probably making at least one visit per month, always in pairs, which makes 45,600 visits each year, and each visit takes, say, three hours including travelling time: this amounts to over 136,800 hours of volunteers' time, not including the time spent attending training events and team meetings and travelling to them, say another 10,000 hours, making a total of some 150,000 hours. The Police and Crime Commissioners provide management and administration, pay the visitors' travel expenses, and pay subscriptions to ICVA. The police allocate some of their resources to dealing with the visitors, but the cost is not known. The amount of public money spent on custody visiting, at about two million pounds a year, is not particularly significant when set against expenditure on, for example, legal aid or the

⁶ For instance: Andrew Ashworth and Mike Redmayne, *The Criminal Process* (4th edn, OUP 2010); Malcolm Davies, Hazel Croall and Jane Tyrer *Criminal Justice* (5th edn, Pearson 2015); Tim Newburn (ed) *Handbook of Policing* (2nd edn, Willan 2008) 21 but see Chapter Six, note 200; Nicola Padfield, *Texts and Materials on the Criminal Justice Process* (4th edn, OUP 2008); Robert Reiner, *The Politics of the Police* (4th edn, OUP 2010) but see text to note 73; Andrew Sanders, Richard Young and Mandy Burton, *Criminal Justice* (4th edn, OUP 2010); Layla Skinns, *Police Custody: Governance, legitimacy and reform in the criminal justice process* (Routledge 2011); Lucia Zedner, *Criminal Justice* (OUP 2004).

⁷ See text to notes 15-27.

⁸ Figures provided by Katie Kempen of ICVA (n 4). In 2001 the Home Office said there were 3,000 visitors: Home Office Press Release 04.05.2001.

police, but one is still entitled to ask whether custody visiting as currently operating represents value for money.⁹

This thesis seeks to establish the purposes and ethos of custody visiting, and to assess its independence and effectiveness. The research is based on an empirical and analytical examination of custody visiting, and is innovative because it has gone much deeper into the subject than any undertaken before. What previous research there is has not gone much beyond whether custody visiting was running well and whether it appeared to confer any benefits. For a full evaluation of custody visiting, more fundamental issues need to be tackled: policy,¹⁰ structure, ethos, independence, effectiveness and basic purposes. Previous research has, in almost every case, been based on published information, questionnaires and telephone surveys: hardly any has been based on interviews,¹¹ and none on observation.¹² This research is based on a case study carried out at eight custody blocks in the same conurbation: this is referred to as the “area studied” in this thesis. I have used the techniques of both interviews and observation. This has produced a great deal of data for my research, and has enabled me to paint an in-depth picture of what was actually happening in the operation of the custody visiting,

⁹ This is based on figures supplied to me for the area studied. I could not find a national figure on the Home Office website.

¹⁰ Policy is described as “An essential feature of any social activity organised on a permanent and coherent basis” by Tony Jefferson and Roger Grimshaw, *Controlling the Constable: Police Accountability in England and Wales* (Friederick Muller/The Cobden Trust 1984) 18.

¹¹ Interviews were conducted by Sandra Walklate for *The Merseyside Lay Visiting Scheme First Report: the Lay Visitors* (Merseyside Police Authority 1986): only part of her report was available to me: and a small number of interviews with custody visitors, but not about visiting, were conducted by Tim Newburn and Stephanie Hayman, *Policing, Surveillance and Social Control: CCTV and police monitoring of suspects* (Routledge 2002).

¹² Except for Sean Creighton, *Dignity without Liberty*, (Bristol Centre for Criminal Justice March 1991), about the earlier period of lay visiting.

and of how participants perceived and understood it: what they did, said, thought and felt.

Along with the empirical research, I have analysed the development of policy since the origins of custody visiting in 1980. The empirical research and the history provide the material for an in-depth inquiry into custody visiting. The issues have been refined into the following research questions.

1. Could custody visiting make a more effective contribution to the regulation of police detention? This is the basic issue for this research, and it is discussed in Chapter Seven after review of all the other issues.
2. What is the relation between custody visiting and police mistreatment of detainees, including mistreatment that ends in their death? Why is this not mentioned in the official literature? This issue is discussed in this chapter, and is discussed further in Chapters Five, Six and Seven.
3. To what extent is custody visiting independent, in accordance with its branding and statutory obligation? This issue is discussed in Chapters Two, Three, Five, and Six.
4. To what extent is custody visiting effective, both as a regulator, and according to the claims made for it in the official literature? This issue raises the question of what the purposes of custody visiting are and is discussed in this chapter, and in Chapters Three and Six. This thesis sees regulation of police behaviour in custody blocks as the purpose of custody visiting. Several other purposes are claimed for custody

visiting in the official literature, notably promoting public confidence in the police.

5. Are the values of custody visiting in practice closer to the due process model or the crime control model?¹³ This is discussed in Chapters Three, Five and Six.

Those are the principal issues. At this point I want to place this enquiry in its context by explaining what detention in police custody is like.

Detention in police custody

The parts of police stations in which the police detain and interrogate people they have arrested are known as custody suites, which in some areas have been superseded by separate buildings with no other function. Both types of arrangement are known as custody blocks, and that is the expression used in this thesis.¹⁴ Police work in custody blocks is, arguably, the most important component of the criminal justice system. For most people, the expression “criminal justice system” conjures up dramatic images of courtroom trials. However, what goes on in custody blocks is of much greater importance, for the following reasons. The police have very wide powers of arrest,¹⁵ and suspects may be injured, or even lose their lives, during arrest and

¹³ See the discussion of Packer's models of criminal justice in Chapter Two, text to notes 47-51.

¹⁴ Maguire (n 1) 75 describes the expression custody suites as “euphemistic”. Only certain police stations are designated for use for detention: Police and Criminal Evidence Act 1984, s 35. This study does not cover arrangements for visiting special custody blocks for the detention of suspected terrorists, or immigration removal centres for the detention of persons awaiting deportation.

¹⁵ Sanders *et al* (n 6) 129ff, 137-8. Powers of arrest are much wider than they were 40 years ago, when suspects being interviewed at the police station were said to be “helping police with their enquiries”, but had not actually been arrested.

detention.¹⁶ It has become the usual practice of the police to interrogate suspects only when they are being detained in custody, a practice which has been given a measure of approval by the courts.¹⁷ The reason for this practice is that suspects are more likely to confess while in detention at the custody block than they are at home. The custody block, or, as some new blocks have been called, “Police Investigation Centre”, has the facilities for gathering evidence such as DNA swabs, interview rooms, and breathalyser equipment, but it also has the experience of detention, a context conducive to breaking the will of the suspect and persuading the suspect, who is now, to use the police term, the “prisoner”,¹⁸ to co-operate, and to make a confession. Detention maximises the power imbalance between detainees and the police, contrary to the ethos of what is supposed to be an adversarial system;¹⁹ inadequate legal representation in custody aggravates the typical lack of any presumption of innocence in police investigations;²⁰ what a suspect says in the police interview while in custody can determine the outcome of the subsequent court case;²¹ whether a suspect is given police bail has a marked effect on whether that suspect gets bail from a court later in the process;²²

¹⁶ As, for instance, did Sean Rigg: see text to notes 131-132.

¹⁷ *Holgate-Mohammed v Duke* [1984] 1 All ER 1054 discussed in Sanders et al (n 6) 188, 217 and *Al-Fayed v Commissioner of Police for the Metropolis* [2004] EWCA 1579. But the courts have also held that a suspect should not be arrested for the purposes of an interview unless there is evidence that the suspect would interrupt the interview and leave the police station: *Richardson v. Chief Constable of West Midlands* [2011] EWHC 773, [2011] 2 Cr. App. R 1.

¹⁸ See text to notes 49-50.

¹⁹ Andrew Sanders, “Access to Justice in the Police Station: An Elusive Dream?” in Young R and Wall D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone Press 1996).

²⁰ *ibid.*

²¹ Vicky Kemp, *Bridewell Legal Advice Study: adopting a “whole-systems” approach to police station legal advice* (Legal Services Commission 2013) 51.
<http://www2.warwick.ac.uk/fac/soc/law/research/centres/accesstojustice/usefulresources/broaderconsequences/blast-ii-report.pdf>

²² Sanders et al (n 6) 529.

many cases are disposed of in the custody block by a police caution,²³ sometimes where the case against the suspect is insufficiently strong to justify that course of action;²⁴ and some arrests are made where it is clear, from the outset, that there are no grounds for a prosecution.²⁵ Custody blocks are the places where the hundreds of thousands²⁶ of people who have been arrested each year are processed. The police have wide discretion in how they operate in custody blocks,²⁷ and what they do there is largely invisible to the outside world.

What sort of places are custody blocks? In Mike Maguire's words, they are:

“places hidden from public view, where people are held against their will by representatives of the State who possess potentially far-reaching powers over their physical welfare”.²⁸

One of the police officers interviewed for this research characterised custody blocks as

²³ Richard Young, “Street Policing after PACE: The Drift to Summary Justice” in Cape E and Young R (eds), *Regulating Policing: The Police and Criminal Evidence Act 1984, Past Present and Future* (Hart 2008) 149.

²⁴ Vicky Kemp: “PACE, performance targets and legal protections” *Criminal Law Review* [2014] 3 278, 287.

²⁵ Satnam Choongh, *Policing as Social Discipline* (OUP 1997): Kemp (n 21) 4.

²⁶ This figure allows for some people being arrested more than once. In the year ending March 2015, there were 950,000 arrests carried out by police in England and Wales. <https://www.gov.uk/government/publications/police-powers-and-procedures-england-and-wales-year-ending-31-march-2015/police-powers-and-procedures-england-and-wales-year-ending-31-march-2015#arrests-1> accessed 05.06.2016.

²⁷ Andrew Sanders and Richard Young “The Rule of Law, Due Process and Pre-Trial Criminal Justice” *Current Legal Problems* (1994) 47 125.

²⁸ Maguire (n 1).

“a very locked down environment, the police’s world, which nobody else except custody visitors really gets a view into”.²⁹

Those who are detained in these hidden places, this very locked down environment, run the risk of being abused by the police, whatever the extent of any actual abuse. Detainees are, on some occasions, neglected or mistreated by the police: and some die in or following custody. In Newham, East London, in 2013, inspectors³⁰ found that

“ ... detainees were provided with poor care or in some cases were neglected. The suite was chaotic...detainees were often denied proper respect or confidentiality. The cells were dirty... ”³¹

In 2011, at Chelsea police station, four male officers and one female custody sergeant strip-searched a disoriented and vulnerable black woman (who later thought her drink must have been spiked) and left her naked in a cell while a camera broadcast images of her nakedness on the screens in the block. According to her story, when she recovered consciousness in hospital, she spoke to the police officer at her bedside. He said she was very well spoken, and asked where she was born. When the woman said Hampstead, the officer radioed a colleague, and was overheard saying that he thought they

²⁹ S4.

³⁰ Not custody visitors, whose work is not described as inspection: this was work done by a team from the Joint Inspection of Custody Facilities. See text to notes 107-108 and <https://www.justiceinspectorates.gov.uk/hmic/our-work/joint-inspections/joint-inspection-of-police-custody-facilities/> accessed 31.01.2016.

³¹ See 2014 Joint Inspection Report <https://www.justiceinspectorates.gov.uk/hmiprison/wp-content/uploads/sites/4/2014/04/newham-police-custody-suite-2014.pdf> accessed 05.06.2016.

had “made a mistake.”³² Did they think that their mistake was only their failure to notice that the woman was middle-class?

It is true that, in general terms, recent years are thought to have seen considerable improvements;³³ for instance, Tom Milsom, a commissioner of the Independent Police Complaints Commission (IPCC), said in 2014:

“While custody is hugely challenging for the police, they get it right 99% of the time”.³⁴

However, serious concern is justified, for two reasons. First, deaths in custody are still occurring: there were 21 deaths in 2010/11, 15 deaths in 2011/12, 15 deaths in 2012/13, 11 deaths in 2013/14, 17 in 2014/15, and 14 in 2015/16, with a disproportionately high number from the Black, Asian and Ethnic minority (BAME) communities.³⁵ Uncovering information about deaths in custody cases is difficult, but even the most suspicious circumstances do not lead to unlawful killing verdicts at inquests, or to prosecutions.³⁶ An enquiry into deaths in custody was initiated by the Home Secretary in November 2015.³⁷ The other factor justifying serious concern about custody is that there

³² *The Guardian* (London 14.06.2015): <http://www.theguardian.com/uk-news/2015/jun/14/woman-strip-searched-lwins-damages-met-police> accessed 21.06.2016.

³³ This was the opinion of some of the longer-serving visitors I interviewed.

³⁴ Speaking in London at the Public Policy Exchange Conference on Preventing Deaths in Police Custody which I attended, 25.11.2014.

³⁵ Deaths during or following police contact: statistics for England and Wales 2015/2016: https://www.ipcc.gov.uk/sites/default/files/Documents/research_stats/Deaths_Report_Inquest_report.pdf <http://www.inquest.org.uk/statistics/deaths-in-police-custody> accessed 31.07.2016.

³⁶ Sanders *et al* (n 6) 223ff.

³⁷ The terms of reference include examining the procedures and processes surrounding deaths and serious incidents in police custody, and the lead up to such incidents.

is no significant external regulation of police behaviour in custody blocks.³⁸ These two issues, deaths in custody and insufficient regulation, point to the need for police conduct in custody blocks to be subject to a system of independent scrutiny. The police exercise very significant power in these hidden places. As Steve Tombs and David Whyte say:

“Indeed, it might be argued that *one of the key features and effects of power is the ability to operate beyond public scrutiny and thus accountability.*”³⁹

The central issue in this thesis is whether that scrutiny is being achieved to any meaningful extent by custody visiting, or, if not, whether it could be achieved if modifications were made to the scheme.

Another term for a hidden place is a “closed institution” or a “total institution”: while prisons are the obvious example, any police detention facility also comes into this category. There is a long history of abuse in closed institutions, which are often run by or on behalf of the state.⁴⁰ Classically, closed or total institutions have been seen as places where people, both detainees and guards, spent long periods.⁴¹ However in the Stanford Prison

<https://www.gov.uk/government/news/home-secretary-announces-chair-for-deaths-in-custody-review>: announcement 21 October: accessed 03.11.2015.

³⁸ See text to notes 74-90.

³⁹ Steve Tombs and David Whyte, “Scrutinizing the Powerful” in Tombs S and Whyte D (eds), *Unmasking the Crimes of the Powerful* (Peter Lang 2003) 4: emphasis in original.

⁴⁰ A number of recent scandals have centred on the treatment of elderly and vulnerable people in care homes and children in children’s homes: for care homes, for instance, at Braintree, Essex: <http://www.bbc.co.uk/news/uk-27229367> accessed 02.06.2014: and for children’s homes, for instance, at Wrexham, North Wales: <http://www.walesonline.co.uk/news/wales-news/long-awaited-jillings-report-details-extensive-4881290> accessed 02.06.2014.

⁴¹ Erving Goffman, *Asylums* (Penguin 1968).

Experiment the students who were assigned the role of guards became abusive as early as their second day on duty.⁴² (Incidentally, apart from the guards wearing dark glasses, the setting in the film of the experiment looks more like a custody block than a prison.) Philip Zimbardo, who ran the Stanford experiment, wrote that the parallels with the Abu Ghraib atrocity⁴³ challenged

“the traditional focus on the individual’s inner nature and personality traits as the primary - and often sole - factors in understanding human failings ... [P]eople are often in an ensemble of different players on a stage with various props, scripts and stage directions. Together, they comprise situations that can dramatically influence behaviour.”⁴⁴

A key feature of what happened at Abu Ghraib was the contempt shown to the prisoners. An echo of that contempt can be seen in the behaviour of two police officers in an English custody block in 2010. CCTV images showed that they laughed at a detainee they were viewing on CCTV, when they should have been looking after him.⁴⁵ the detainee died soon afterwards. The coroner criticised the culture of the police station, and said that she was not convinced

⁴² Craig Haney, Curtis Banks and Philip Zimbardo, *A Study of Guards and Prisoners in a Simulated Prison*, reprinted from Naval Research September 1973, 7. <http://www.zimbardo.com/downloads/1973.pdf> accessed 12.06.2014: <http://www.youtube.com/watch?v=sZwfNs1pqG0&feature=kp> accessed 15.06.2014.

⁴³ “Pleading prisoners and families outside protest at the horrors of Abu Ghraib jail” The Guardian (London 06.05.2004). <http://www.theguardian.com/gall/0,8542,1211872,00.html> accessed 05.06.2016.

⁴⁴ The Guardian (London 29.02.2008). <http://www.theguardian.com/commentisfree/2008/feb/29/iraq.usa> accessed 05.06.2016.

⁴⁵ <http://www.irwinmitchell.com/newsandmedia/2014/june/inquest-delivers-verdict-into-death-of-lloyd-butler-in-police-custody> accessed 24.04.2016. The CCTV images show, to use Goffman’s theatrical metaphor, “backstage” behaviour: Erving Goffman, *The Presentation of Self in Everyday Life* (Pelican 1971), and Simon Holdaway, “The Police Station”, *Journal of Contemporary Ethnography* 1980, 9 1 79-100 at 83: “the front, the idealization, is very different from the back region where the real practice of an organisation takes place.”

that the culture had changed since the man's death.⁴⁶ CCTV has been thought to have changed behaviour in the closed environment of the custody block.⁴⁷ However, in that case, ironically, as well as recording the officers' behaviour, CCTV provided the officers with another way to neglect and abuse detainees.

Custody blocks, as total institutions, are places where the power of the state, through its agents, the police, takes centre stage. Those who are arrested and taken to a custody block are on police "territory" and under the complete control of the police.⁴⁸ This is clearly reflected not just in the design of custody blocks but, very significantly, in the language the police use. The police refer to those they have arrested as "prisoners", which is, at the least, inaccurate: and, depending on the context, may also be contemptuous, demeaning and coarsely triumphalist. The use of the expression appears to be very deep-rooted in police culture,⁴⁹ and is a form of what is now called "othering".⁵⁰

⁴⁶ <https://www.youtube.com/watch?v=RIfncoPhaQ0> accessed 19.03.2015.

⁴⁷ Newburn and Hayman (n 11).

⁴⁸ Choongh (n 25) 81. I also observed this for myself.

⁴⁹ I have observed police officers up to the rank of assistant chief constable using the expression at custody visiting conferences: at one of these conferences, one of the visitors registered a complaint about the language. The use of this language may show that the police are insensitive to the offence the expression can cause in circles outside the police: or maybe the police do not see custody visitors as being outside the police. "Prisoners" has moved on from conversational slang to official, formal usage. Here are two instances. One of the computer programmes used by custody sergeants in Dyfed-Powys to book in newly arrived detainees referred to them as "prisoners": personal observation during annual training as Dyfed-Powys visitor in 2012. At a police station in Luton in 2013, a police officer interviewing detainees was referred to as a member of the "Prisoner Handling Unit": 24 Hours in Custody, Channel 4, 06.10.2014. In the area studied in this thesis, there are signs on the walls of custody blocks warning "prisoners" not to damage the cells: see Chapter Five, text to note 98.

⁵⁰ An example of the use of this word: "Hillsborough was a story of two things: unaccountable power colliding with 'othering': the stripping away of humanity from a group of people". Owen Jones, *The Guardian* (London 08.04.2016): <http://www.theguardian.com/commentisfree/2016/apr/28/hillsborough-could-happen-again-police-views-liverpool-fans>. accessed 21.06.2016.

However, the expression “prisoner” is no longer used in the criminal courts in England and Wales: the term used is “defendant”:⁵¹ should not the police also revise their use of language? Some detainees are released with no further action, or cautioned, or issued with a fixed penalty notice. The others are charged with an offence, and brought before a court, following which they may or may not be detained, and if they are detained, either on remand, or after sentence, it is not in police custody, but in a prison. And there is another sense in which detainees in police custody are not prisoners, in the most commonly understood sense of those who are serving sentences of imprisonment: they have not been deprived of the right to vote.

Calling people who are detained in custody prisoners therefore tends to contradict that basic tenet of the criminal law, the presumption of innocence. There are similarities with the use of the word “terrorist” by politicians. Bromwich has written how former U.S. vice-president Cheney

“ ... worked hard to eradicate from the minds of Americans the idea that there could be such a thing as a ‘suspect’. Due process of law rests on the acknowledged possibility that a suspect may be innocent; but, for Cheney, a person interrogated on suspicion of terrorism is a terrorist. To elaborate a view beyond that point, as he sees it, only involves government in a wasteful tangle of doubts.”⁵²

⁵¹ L2, and observation.

⁵² David Bromwich, “Working the Dark Side”, London Review of Books (London 08.01.2015) <http://www.lrb.co.uk/v37/n01/david-bromwich/working-the-dark-side>: accessed 23.06.2016: emphasis added.

Presuming that a detainee is guilty smoothly by-passes that wasteful tangle. For the vital period preceding a suspect being charged, both the law and the practice of the police operate on this basis.⁵³ This is illustrated by the following quote from a police video about a suspect called Ben being brought into custody:

“There’s nowhere to hide for Ben now, as his personal details and biometrics are taken, and, presented with compelling evidence, he will have to admit his crime and face the consequences of his actions.”⁵⁴

The video does not contemplate the possibility that Ben may be innocent.

Public attention has recently been focussed on one aspect of this, the police’s treatment of public figures suspected of sex crimes. The prosecution policy seemed to be, for a while, one of “automatic belief” of what complainants told them,⁵⁵ and that, combined with the massive publicity the allegations receive, has been described as a situation in which

⁵³ The presumption of innocence, as expressed in the European Convention on Human Rights, Art 6(3), is that everyone charged (emphasis added) with a criminal offence shall be presumed innocent until proved guilty by law. This principle does not apply to the stage which precedes the making of the decision whether to charge a suspect: see Chapter Six, text to notes 15-25.

⁵⁴ From *Nowhere to Hide*, the video at:
<http://www.norfolk.police.uk/newsevents/features/2011/custody.aspx>:
<https://www.youtube.com/watch?v=xQGJJWd9t7s> accessed 01.04.2016

⁵⁵ “Met police may end policy of automatic belief of sex abuse complaints”, The Guardian (London 10.02.2016): <http://www.theguardian.com/uk-news/2016/feb/10/met-police-may-end-policy-of-believing-sexual-abuse-victims-says-hogan-howe> accessed 05.06.2016.

“the presumption of innocence has been replaced by the impossibility of exoneration.”⁵⁶

But the presumption of innocence was never there to be replaced. The presumption of guilt has applied, and continues to apply, to the treatment of all suspects. What has happened is that the factors of automatic belief and massive publicity have been added to that existing *status quo* of the presumption of guilt. Herbert Packer’s classic analysis of contrasting priorities and values in criminal justice is very apposite for an examination of these attitudes and practices. His crime control and due process models will be drawn on in this research, to assist in understanding the nature of the custody environment in which visitors carry out their work; and the models will help to explain the attitudes of the custody visitors, to assess the effectiveness of their work, and to characterise the ideology of the operation.⁵⁷

Detention starts with being deprived of autonomy. While the police do have to be in control of what goes on in a custody block, there are different ways of achieving that aim. Detainees are “booked in” by a custody sergeant sitting at a desk raised above them.⁵⁸ The custody sergeant asks personal questions: everyone else in the area can listen in to the answers.⁵⁹ Detainees are fingerprinted and searched, and deprived of all their personal possessions.

⁵⁶ Zoe Williams, “How do we work out who to believe on child sex abuse?” The Guardian (London 08.02.2016).
[https://www.google.co.uk/#q=Zoe+Williams%2C+%E2%80%99How+do+we+work+out+who+to+believe+on+child+sex+abuse%3F%E2%80%9D+The+Guardian++\(London+08.02.2016\).](https://www.google.co.uk/#q=Zoe+Williams%2C+%E2%80%99How+do+we+work+out+who+to+believe+on+child+sex+abuse%3F%E2%80%9D+The+Guardian++(London+08.02.2016).)
accessed 21.06.2016

⁵⁷ See Chapter Two, text to notes 47-51.

⁵⁸ This layout does, however, prevent the close physical confrontations which apparently used to take place when sergeant and detainee faced each other at the same level across a small desk: Jane Warwick interview. For Jane Warwick, see note 135.

⁵⁹ Booking-in has a greater degree of confidentiality at some new custody blocks, as I observed for myself: see Chapter Five, text to note 97.

They soon realise that they have no privacy or confidentiality, while at the same time they are being told that they have certain “rights and entitlements”.

There are plenty of tacit reminders of the power of the police, and images of power, in the uniforms worn by the police and custody staff, and in the environment of the custody block.⁶⁰ The concept of power, and the use of that emotive word, both play a central role in defining the relationship between police and detainees. In the 1990 Strangeways prison riot, some of the prisoners used sound amplifiers to broadcast the song “We’ve got the power” from the roof of the prison.⁶¹ In the same period Fielding found that constables derived great satisfaction from “being the power.”⁶² Egon Bittner pointed out that the police alone have the right to use unrestricted coercive force, and that they are defined by that monopoly:⁶³ the clearest statement of their power.

The concept of vulnerability is another approach to the issue of power imbalance. Some detainees, juveniles and adults who are mentally disordered or otherwise mentally vulnerable are classed as vulnerable in custody, and an appropriate adult is supposed to be called to accompany them during police interviews.⁶⁴ In the view of an experienced defence practitioner:

⁶⁰ See Chapter Five, text to notes 93-102 and text after note 102.

⁶¹ “Strangeways, Britain’s Toughest Prison Riot”, BBC2 01.04.2015.

<https://www.youtube.com/watch?v=zMI-0JVw3wo> accessed 02.05.2016

⁶² Nigel G Fielding, *Joining Forces: Police training, socialisation, and occupational competence*, (Routledge 1988) 174.

⁶³ Egon Bittner, *The Functions of the Police in Modern Society*, (National Institute of Mental Health 1970): <https://www.ncjrs.gov/pdffiles1/Digitization/147822NCJRS.pdf>

⁶⁴ This protection is given only during the interviews, and not all of the adults get the protection: see *There to Help: ensuring provision of appropriate adults for mentally vulnerable adults detained or interviewed by the police* (National Appropriate Adults Network 2015): <http://www.appropriateadult.org.uk/index.php/news/9-public-articles/154-theretohelp>. The Mental Health Crisis Care Concordat is a pledge to reduce the use of police cells to ensure that people in mental health crises receive appropriate treatment : https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/281242/36353_Mental_Health_Crisis_accessible.pdf accessed 04.07.2016, but people in this condition are

“all [detainees], in the atmosphere of a police station, are vulnerable, and many are frightened and unsure.”⁶⁵

Some scholars have developed a theory that everyone is in an unequal relation to the state, and therefore every individual is vulnerable.⁶⁶ On that basis, all detainees should be classed as vulnerable, and there should be mechanisms for protecting all those who are detained in custody.

In any event, the evidence I have gathered supports the view that all detainees are vulnerable. For instance, a defence lawyer interviewed for this research said some clients found being detained in police custody:

“fairly horrendous ... very traumatic.”⁶⁷

Some of the visitors interviewed for this research stated that some detainees told them that being kept in a custody block was worse than being in prison.⁶⁸

One of the visitors described the impact of custody on detainees as:

“huge: you can see six-foot-six men crying in the corner: it’s a massive effect.”⁶⁹

still detained in police cells. More than 500 people with mental health issues in the Thames Valley were locked in police cells in the last two years due to a lack of NHS resources: <http://www.bbc.co.uk/news/uk-england-28402509> accessed 21.06.2016.

⁶⁵ Anthony Edwards, “The Role of Defence Lawyers in a ‘Re-balanced’ System”, in Cape E and Young R (eds), (n 23) 221, 243.

⁶⁶ Martha Fineman and Anna Grear (eds), *Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2014).

⁶⁷ L7.

⁶⁸ V18.

When I was observing them during this study, custody staff were not overtly hostile in their approach to detainees, and tried to be friendly: the custody staff called the detainees “mate”, and the detainees called the custody staff “boss”. The custody staff bantered and joked with the detainees, but the detainees were likely to find that the joke was on them: for instance, custody staff laughed when a detainee being booked in at the custody desk gave his occupation as “life coach”.⁷⁰ Some detainees responded to their situation by acting up and trying to provoke a reaction from the staff: but, whatever response the staff make, they have the power.

Research by Layla Skinns has shown that doctors, lawyers and drug workers working in custody blocks are subject to police dominance of the custody blocks as police territory.⁷¹ Skinns says that this dominance is tempered “to a degree” by those claiming to be professionally independent of the police: she does not say what that degree of tempering amounts to, but she mentions that some of her research participants told her that doctors colluded with the police

⁶⁹ V12.

⁷⁰ Personal observation at a custody block in the area studied.

⁷¹ Family and friends of people detained in custody may be subjected to this power, even without physically going to the custody block. On 17.12.2015 I telephoned a custody block (not in the area studied) to enquire after a friend whose solicitor told me had been arrested, and was assured by the custody sergeant that he would be told that I had telephoned, and was told the same thing when I telephoned again three hours later and spoke to a different custody sergeant. I then telephoned again five hours later, and was told by another custody sergeant that my request was “unusual”: but I was given the information that my friend had been discharged from custody. When I got to speak to my friend later, he told me that the custody staff had not passed on my messages to him. Why did the police tell me, twice, that my messages would be passed on, if they were not going to pass them on? Was their failure to pass on messages an expression of power, or just incompetence? Perhaps I was lucky that the telephone was actually answered at all: in 2009 the national average of unanswered calls in custody blocks was in excess of 25%: Vicky Kemp, *Transforming legal aid: Access to criminal defence services*, (Legal Services Commission 2010) 49: <http://eprints.nottingham.ac.uk/27833/1/Kemp%20Transforming%20CD%202010.pdf> accessed 06.06.2016.

in their assessment of the fitness of suspects.⁷² Skinns' research did not extend to consideration of whether the police exercise similar dominance over custody visitors, another group for which independence is claimed. This thesis will investigate how much, and in what ways, custody visitors are affected by the power of the police, and by the power of the Police and Crime Commissioners who organise them.

The available published research about the attitudes of police to people they encounter in their work has not included any consideration of their attitudes to visitors. The social categorisations the police have constructed, and which have been identified by Simon Holdaway and Robert Reiner, include two groups to which visitors might belong: "challengers" and "do-gooders". Challengers are lawyers, doctors, social workers, journalists and researchers: do-gooders are anti-police activists. Reiner writes that custody visiting was "an attempt to ensure regular penetration of the backstage areas of the police milieu by organized 'challengers'". He does not say whether the attempt has been successful, nor does he say whether the police see visitors as challengers.⁷³ Whether the attempt has been successful is, of course, one of the principal concerns of this study: along the way, the research will look at whether the police see visitors as challengers, do-gooders, or as members of

⁷² Skinns (n 6) 189. David Dixon claimed that increasing access by people who were not police officers had meant that control of these symbolically crucial spaces had been challenged: David Dixon, "Legal Regulation and Policing Practice", *Social & Legal Studies* (1992) 1 515-541 at 529. Choongh countered this by showing that none of these people could challenge police control and dominance of that territory, including being told when to wait, where to wait, where to stand and when to sit down: Choongh (n 25) 84-85. Dixon did not specify the "people who were not police officers", and the categories in Choongh's list are solicitors, social workers, appropriate adults, and interpreters, with no mention of custody visitors.

⁷³ Simon Holdaway, *Inside the British Police: A Force at Work*, (Blackwell 1983) 71ff; Reiner (n 6) 122ff. These categorisations appear to be still current: see Bethan Loftus, *Police Culture in a Changing World* (OUP 2009) 198ff.

some other category. It is unlikely that they see visitors as regulators, the subject to which I now turn.

The Regulation of Police Behaviour in Custody Blocks

The existing arrangements for the regulation of police behaviour in custody blocks are not adequate, as is shown in this and in the following section. The regulation is either self-regulation or regulation that is largely ineffective. This is why there is a need, as well as an opportunity that has so far been missed, for custody visiting to contribute towards the regulation of police behaviour in custody blocks. I provide the justification for categorising custody visiting as a system of regulation in Chapter Two.⁷⁴

The issues are: should the police be regulated; if so, can they be self-regulated, i.e., regulated by themselves; and, if not, how should they be regulated, and by whom? The police have considerable discretion in the way they operate with detainees, starting from the use of their powers of arrest and decisions whether or not to prosecute. They can hold suspects without charge for an initial 24 hours, and a superintendent can authorise extension of that period to 36 hours: further extensions, to a maximum of 96 hours, have to be authorised by a magistrate.⁷⁵ Often suspects receive no legal advice.⁷⁶ Police bail is used in bargaining for confessions, maybe after the suspect's lawyer has left.⁷⁷ There is little scrutiny by magistrates of police objections to

⁷⁴ See Chapter Two, text to notes 3-34.

⁷⁵ This is for all non-terrorist offences that are indictable or triable either way: PACE s 41 - 44 as amended.

⁷⁶ Sanders *et al* (n 6) 245ff.

⁷⁷ *ibid* 205-207.

bail granted by the court.⁷⁸ There is no system for the independent scrutiny of guilty pleas and no requirement for corroborating evidence.⁷⁹ The conditions of detention in the police station are regulated by codes issued under the Police and Criminal Evidence Act 1984, as amended (“PACE”). These codes do not have the force of law, which allows the police wide discretion, because breach of the regulations does not generally lead to any legal remedy.⁸⁰

So the question is whether, and if so how, the police should be regulated. The view taken, particularly by the judiciary as recently as 1968, was that the police were answerable only to the law.⁸¹ Under this approach, it is assumed that the simple fact that the rules and controls are stated as the law will ensure conformity by the police. Andrew Sanders argues that this “legalistic” approach is so naive that it hardly needs discussion.⁸² This is because the system relies so much on self-regulation. That self-regulation is provided by CCTV recording, computerised custody records, daily visits by the PACE inspector, and inspections once every six years by the Joint Inspection Team.⁸³ The police are in control of the system for recording what happens in custody blocks, so they are not likely to record abuse, or to record it as unauthorised. Sanders says one needs to understand police behaviour to work out how to regulate or control them. It is part of “cop culture” that the police believe that the naive, well-meaning majority do not know what it is like “out there”, and, if they knew, they would not make police officers work “with

⁷⁸ *ibid* 205f and 529.

⁷⁹ *ibid* 439, 317-9.

⁸⁰ *ibid* 700ff.

⁸¹ *R v Metropolitan Police Commissioner ex parte Blackburn* [1968] 2 QB 118.

⁸² Andrew Sanders, “Can Coercive Powers be Effectively Controlled or Regulated? The Case for Anchored Pluralism” in Cape E and Young R (eds), (n 23) 45, 48-49.

⁸³ PACE Inspectors: see Police and Criminal Evidence Act, s.40. Joint Inspection Teams: see note 104.

one hand tied behind their backs”:⁸⁴ i.e., by being regulated and having to fill in records. In any case, Sanders points out that custody records are memory aids and legitimating mechanisms, and not much use to suspects. As memory aids, custody records may be useful to the custody officer in refreshing recollections when giving evidence months later in court. As legitimating mechanisms, custody records are as much a way of constructing reality as a way of recording it, and they provide protection for officers as much as regulation.⁸⁵

The most serious aspect of the issue is deaths in police custody. Those deaths result from vulnerable suspects being brought into a custody block, which Sanders sees as a virtually unregulated place, where no one is present most of the time to speak up for, and to protect, the suspect. He sees that an enhanced role for custody visitors could make a contribution to countering these factors:⁸⁶ I follow up this suggestion in Chapter Seven.⁸⁷ Sanders points out that PACE fails to require expert assessment of vulnerable people: that it allows the police to exercise poor observation and care, does not allow relatives, friends or carers all-hours access; that it encourages interrogation and isolation techniques that push vulnerable people to the edge; and that it enables abuse.⁸⁸ However, these matters would not be put right by more effective regulation alone. There would need to be a reversal of the erosion of

⁸⁴ Sanders *et al* (n 6) 69.

⁸⁵ Sanders (n 82) 53-55. For the police creating false custody records, see the IPCC Report of the investigation into the circumstances of Lloyd Butler's death on 04.08.2010 whilst in the custody of West Midlands Police in December 2011, esp para 368: http://www.ipcc.gov.uk/sites/default/files/Documents/investigation_commissioner_reports/Lloyd%20Butler%20report%20redacted.pdf accessed 26.06.2014.

⁸⁶ Sanders (n 82) 70-73.

⁸⁷ See Chapter Seven, text to notes 22-29 and 50-73, and text following note 73.

⁸⁸ Sanders (n 82) 66f.

the rights of detainees.⁸⁹ To be clear, custody visiting's basic role is limited to checking on whether the police are respecting the PACE rights of detainees. PACE rights do not prevent detainees being arrested on little evidence or from being pressurised into making false confessions.⁹⁰

The link between custody visiting and the issue of deaths in custody

I now start to consider the work of those reformers who believed that opening up these hidden places, custody blocks, to outside scrutiny by visitors would benefit detainees. In 1980-81 Michael Meacher MP and Lord Scarman both proposed visiting schemes with this in mind. Mr Meacher made his proposal for custody visiting while giving evidence to the House of Commons Home Affairs Committee investigating deaths during or following police contact.⁹¹ He supported his proposal that visitors should have access to police station cells⁹² by a comparison with what were then called mental institutions, another category of the state's hidden places:

“ ... where people are in the power of the authorities and out of sight and out of hearing of members of the public”.⁹³

⁸⁹ See Edward Cape, “PACE Then and Now: Twenty-one Years of ‘Re-balancing’” in Cape E and Young R (eds), (n 23) 191-220.

⁹⁰ Sanders *et al* (n 6) 320.

⁹¹ The expression used in the report is “deaths in police custody”. Here the more precise formulation is used:

ipcc.gov.uk/sites/default/files/Documents/research_stats/death_report_guidance.pdf accessed 04.05.2016.

⁹² This was before the days of designated police stations and custody suites: see note 14.

⁹³ Third Report of the Committee, House of Commons Home Affairs Committee, Session 1979-80 HC 631, para 422.

Mr Meacher's proposal was that panels of visitors, with a lawyer in each visiting group, should have a right of access to police station cells for unannounced visits: they would investigate allegations by detainees of police violence and report on them to the Home Secretary and the police authority for the area.⁹⁴

The context for Lord Scarman's proposal for custody visiting was the immediate aftermath of the serious civil disturbances which took place in Brixton in 1981. The Scarman Report included a recommendation for a statutory system of custody visiting, with random checks by persons other than police officers, for the independent inspection and supervision of interrogation procedures and detention in police stations.⁹⁵

What did Mr Meacher and Lord Scarman think the purpose of the visiting was? Mr Meacher was giving evidence to the Home Affairs Committee investigating deaths during or following police contact. He said that he saw visiting as a deterrent against the possibility of assault against detainees in custody. He also said that the visiting could be no more than a deterrent.⁹⁶ From the reference in the Scarman Report to the recommendation of visiting made by the Home Affairs Committee, one may infer that Lord Scarman had also been considering the issue of deaths during or following police contact. In a section of his report just two sentences further on from a reference to that

⁹⁴ *ibid* memorandum D1 and para 421.

⁹⁵ Lord Scarman, *The Brixton Disorders 10-12 April 1981* (Cmnd 8427 1981) 7.7.-7.10.

⁹⁶ Third Report of the Committee, (n 93), memorandum D1. As can be seen from what follows, the Home Office and all authors of official literature certainly thought even that was far too much, demonstrating their ideological distance from Mr Meacher.

committee report, Lord Scarman wrote that random visiting to police stations would be “salutary”. The Oxford English Dictionary definition of “salutary” is:

“(especially with reference to something unwelcome or unpleasant) producing good effects; beneficial.”⁹⁷

The context and the definition strongly support an argument that Lord Scarman was thinking along similar lines to Mr Meacher. We do not know why Lord Scarman decided not to spell it out: maybe he felt the need to be diplomatic about the police.⁹⁸ Another factor may have been that although rumours of a death following police contact played a major role in the Brixton disturbances of 1981, no such death actually occurred.⁹⁹

Did anyone else at the time see concerns about deaths during or following police contact as prompting custody visiting? In their 1990 report to the Home Office, Charles Kemp and Rod Morgan say that the issue of deaths during or following police contact was one of two important concerns leading to the introduction of visiting schemes, but they offer no evidence to identify anyone who took that view, other than, rather surprisingly, the Home Office. However,

⁹⁷ Scarman (n 95) 7.9: <http://www.oxforddictionaries.com/definition/english/salutary> accessed 11.07.2014. The word is derived from the Latin word *salus*, whose meanings include health and safety: Charlton T. Lewis and Charles Short, *A Latin Dictionary* <http://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:1999.04.0059:entry=salus> accessed 29.06.2016.

⁹⁸ It may be an instance of the operation of Steven Lukes’ three-dimensional power, as discussed in Chapter Two, text to notes 36-45.

⁹⁹ Scarman (n 95) 3.29. The 1985 Brixton riots were sparked off by the police shooting and paralysing Cherry Groce: <http://www.bbc.co.uk/news/uk-england-london-28138759> accessed 03.07.2014.

the words used by the Home Office, and on which Kemp and Morgan rely, do not support that interpretation.¹⁰⁰

The principle that places of detention should be visited by independent persons is established by human rights law and international treaty obligations. The relevant rights under the European Convention on Human Rights are those in Article 2, the right to life; those in Article 3, the prohibition of torture, inhuman or degrading treatment or punishment; those in Article 5, the right to liberty and security of the person; and those in Article 6, the right to a fair trial. The link to custody visiting is found in two United Nations instruments. The first is the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.¹⁰¹ The second United Nations instrument is The Optional Protocol to the Convention against Torture

¹⁰⁰ Charles Kemp and Rod Morgan, *Lay Visiting to Police Stations: Report to the Home Office* (Bristol and Bath Centre for Criminal Justice 1990) 107. The words they rely on are as follows: "The carrying out of random checks by independent persons on the detention of suspects at police stations was first proposed by Lord Scarman's report on the Brixton disorders of 1981. The Government welcomed this as a positive suggestion for bringing the community and the police closer together". These words formed the opening paragraph of a letter dated 26.02.1986 from the Home Office to chiefs of police and clerks to police authorities. The letter enclosed Home Office Circular No 12/1986: LAY VISITORS TO POLICE STATIONS. At face value, the Home Office's words relate only to police-community relations. Kemp and Morgan's view seems to be that independent checks must, by definition, have the purpose of deterring abusive behaviour that might lead to deaths, but that purpose is not expressed, and there is nothing on which to build a case that it has to be implied. If Kemp and Morgan's proposition about the Home Office is right, the only support for it is this remarkably oblique reference. The circular in all other respects follows a very different line: see the discussion in Chapter Three, text to notes 63-74.

¹⁰¹ Principle 29 reads as follows:

"1. In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment.

2. A detained or imprisoned person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment in accordance with paragraph 1 of the present principle, subject to reasonable conditions to ensure security and good order in such places."

Adopted by General Assembly Resolution 43/173 of 09.12.1988.
<http://www.un.org/documents/ga/res/43/a43r173.htm> accessed 06.06.2016.

(“OPCAT”).¹⁰² States that ratify OPCAT are required to designate a “national preventive mechanism” (NPM).¹⁰³ An NPM has to be a body or group of bodies that regularly examine the treatment of detainees, make recommendations and comment on existing or draft legislation with the aim of improving treatment and conditions in detention. The United Kingdom’s NPM in England and Wales consists of some nine bodies, including Her Majesty’s Inspectorate of Constabulary (HMIC), Her Majesty’s Inspectorate of Prisons (HMIP), and the Independent Custody Visiting Association (ICVA).¹⁰⁴ A Memorandum of Understanding of the Joint Inspection of Police Custody Conditions in England and Wales, was entered into by the Association of Chief Police Officers (ACPO), the Association of Police Authorities (APA), HMIC and HMIP. The Memorandum of Understanding announced that ministers had agreed that the inspection of police custody conditions should be carried out jointly by HMIC and HMIP.¹⁰⁵ The teams inspect the custody blocks in each police area once every six years and publish their reports and recommendations. In 2013 the teams inspected custody blocks in seven

¹⁰² The Optional Protocol to the Convention against Torture and other cruel inhuman or degrading Treatment or Punishment: a treaty which supplements the 1984 UN Convention against Torture. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx> accessed 31.05.2015.

¹⁰³ Not to be confused with that other use of the same initials NPM, New Public Management, a “... term coined in the late 1980s to denote a new (or renewed) stress on the importance of management and ‘production engineering’ in public service delivery ...”: http://www.christopherhood.net/pdfs/npm_encyclopedia_entry.pdf accessed 15.06.2014.

¹⁰⁴ Written Ministerial Statement, Ministry of Justice: Establishment of the UK’s National Preventive Mechanism (NPM) in accordance with the Optional Protocol to the Convention Against Torture (OPCAT) by the Minister of State, Ministry of Justice, Michael Wills MP on 31.03.2009. <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090331/wmstext/90331m0003.htm> accessed 06.06.2016. For the Joint Inspection Teams for custody blocks, see: <http://www.justiceinspectorates.gov.uk/hmic/media/MOU-police-custody.pdf> accessed 31.05.2015. For ICVA, see note 4 and the text to notes 118-125.

¹⁰⁵ <https://www.justiceinspectorates.gov.uk/hmic/media/MOU-police-custody.pdf> accessed 06.06.2016. The last signature on this document is dated 12.12.2011. There must have been at least one earlier MOU about this: it is described as “updated 2011” in HMIC’s document about the joint inspections of custody facilities which started in 2008: <https://www.justiceinspectorates.gov.uk/hmic/our-work/joint-inspections/joint-inspection-of-police-custody-facilities/> accessed 31.05.2015.

police areas and made some 186 recommendations relating to the issues of respect for detainees, safety, physical conditions, detainee care and individual rights. Joint Inspection teams carry out visits after 12 months to check implementation of action plans.¹⁰⁶ The appearance of ICVA in this list of NPM bodies presumably shows that custody visiting was seen by ministers as, at least, able to play a role in monitoring and improving the treatment and conditions of detainees in police custody, at the level of the most fundamental human rights. ICVA's website states: "Under the United Nations,¹⁰⁷ ICVA is part of a co-ordinating body¹⁰⁸ which appraises [*sic*] unannounced visits to places of detention, to investigate the treatment of people deprived of their liberty in the UK. As a [*sic*]¹⁰⁹ National Preventative [*sic*]¹¹⁰ Mechanism (NPM), ICVA can provide advice on Memorandums of Understanding¹¹¹ to ensure that volunteers are appropriately trained and supported in their role".¹¹² These rather quaintly expressed remarks raise the questions of what part custody visiting plays in the UK's NPM, and how ICVA fulfils its role as one of the NPM's constituent bodies.

How this came about is as follows. Following the proposal in the Scarman Report, and starting in the mid-1980s, selected and trained volunteers, then known as "lay visitors", began, in some parts of England and Wales, to be allowed access to custody blocks, making random unannounced visits to

¹⁰⁶ <https://www.justiceinspectorates.gov.uk/hmic/our-work/joint-inspections/joint-inspection-of-police-custody-facilities/> accessed 31.05.2015.

¹⁰⁷ Presumably this is a reference to OPCAT (n 102) and the ministerial statement (n 104).

¹⁰⁸ This may be a reference to the UK's NPM, but it does not do any co-ordinating work: it is simply a group of constituent members: the work is done by its members, in this case by the joint inspection teams run by HMIP and HMIC.

¹⁰⁹ It is in fact one of the nine bodies which constitute the NPM.

¹¹⁰ Both versions of the spelling of this word are found.

¹¹¹ The MOU (n 105) is not the only one on this subject.

¹¹² http://icva.org.uk/what-we-do#National_Preventative_Mechanism accessed 31.05.2015.

check and report on the welfare of detainees. From 2002, statute has required police authorities, and since November 2012 the Police and Crime Commissioners, to make custody visiting arrangements throughout both countries, and the visitors continue to be volunteers, under the banner of Independent Custody Visiting.¹¹³

Independent Custody Visiting does not exist as a separate entity. It is found in the custody visiting schemes run by Police and Crime Commissioners in each police area in England and Wales and also in the British Transport Police, a total of 43 schemes. All the schemes are currently established under the Police Reform Act 2002 s 51, as amended, and the 2013 Code of Practice.¹¹⁴ Visitors for the local schemes are appointed to work only in the area where they live: they are not authorised to make visits elsewhere.¹¹⁵ There are differences between local schemes, for instance, in the matters on which visitors are asked to report.¹¹⁶ One rather startling example of this is that the remit of some local schemes¹¹⁷ includes responsibility for checking on the welfare of police dogs, which seems incongruous, not least because it suggests that there is some kind of equivalence between safeguarding detainees and safeguarding dogs.

¹¹³ Police Reform Act 2002, s 51(2), as amended: in London the role of Police and Crime Commissioner is performed by the Mayor.

¹¹⁴ The codes of practice and their predecessors, the Home Office circulars, are listed in the abbreviations.

¹¹⁵ 2013 Code of Practice para 17.

¹¹⁶ Unlike the report forms in the area studied, the Dyfed-Powys report forms, which I completed as a visitor, required that there should always be reports on a specified list of conditions in the custody block, e.g., whether the CCTV was working.

¹¹⁷ Not in the area studied, but e.g., in Devon and Cornwall. <http://www.devonandcornwall-pcc.gov.uk/take-part/police-dog-welfare-volunteers/> accessed 10.07.2015. A visitor in the area studied (V5) did express surprise at this.

The visitors do not have a corporate identity distinct from their local visiting scheme, and there is no national organisation for visitors. The nearest one gets to that is ICVA. But ICVA is not an organisation composed of visitors. The name “Independent Custody Visiting Association” is misleading.¹¹⁸ it suggests that it represents visitors, and sometimes the name is shown (e.g., on one Police and Crime Commissioner’s website) as the “Independent Custody Visitors Association”.¹¹⁹ The members of ICVA are the Police and Crime Commissioners,¹²⁰ and ICVA is funded by the Home Office and the Police and Crime Commissioners.¹²¹

ICVA holds two annual conferences. The first is attended by visitors, but they do not attend as delegates and there are no votes on policy, and visitors have no role in running the conference. The subjects covered at the 2014 conference, which I attended, were important custody issues, but the presentations contained hardly any of the essential detail of how custody visiting could engage with those issues.¹²² ICVA’s other annual conference is for scheme administrators only, and visitors are excluded: I asked to attend and was refused on the ground that my presence would inhibit debate.¹²³ The focus of the administrators’ conferences seems to be how to manage visitors: for instance, there was a session at the 2010 conference about how to ensure

¹¹⁸ Like other people, when I first encountered the name I read it incorrectly and was misled by it.

¹¹⁹ By contrast, individual visitors could join ICVA’s predecessor, the National Association of Lay Visitors, for an annual subscription of £5: Claire Hall and Rod Morgan, *Lay Visitors to Police Stations: An Update* (University of Bristol Centre for Criminal Justice 1993), foreword.

¹²⁰ But not all of the PCCs, according to the now retired chief executive Ian Smith in a 2014 speech I heard him make.

¹²¹ *Visiting Times* Summer 2002 showing clause 4 of the constitution, and ICVA articles of association, article 23.

¹²² The same applies to articles in ICVA’s *Visiting Times*.

¹²³ Emails to the author from and on behalf of ICVA. On gatekeepers, see Chapter Four, text to notes 30 and 47.

that visitors did not acquire employee status.¹²⁴ I was told that the administrators who attend these conferences fall into two distinct groups, the first group comprising experienced managers, and the second comprising new appointees with no experience, and that the new appointees tend to ask questions like the following:

“What do we do about visitors who think they own the scheme, when it’s the Police and Crime Commissioner’s scheme?”¹²⁵

It is not surprising that ICVA felt that my presence would have inhibited a frank debate about the sensitive “ownership” issue of whether custody visiting is independent, which is also one of my research questions. Under the governing statute, the Police and Crime Commissioners are required to perform the conjuring trick of running the schemes and, at the same time, ensuring that the visitors are independent.

The Police and Crime Commissioners are the successors to the police authorities and can be thought of, very loosely, as the local regulators of the police. ICVA provides guidance to its members, the Police and Crime Commissioners, on custody visiting. The custody visiting schemes can thus be seen as forming part of a patchwork of regulation of police behaviour in custody blocks, of which the other most significant regulators are the partnership between HMIC and HMIP who carry out the joint inspections of

¹²⁴ Summary of conference proceedings provided to me, and all visitors in that scheme, while I was a visitor in Dyfed-Powys.

¹²⁵ Identifier withheld to protect anonymity.

custody blocks,¹²⁶ and the IPCC. However, the patchwork does not overlap, and is not a perfect cover, but is actually full of holes. Using another metaphor, Dame Anne Owers¹²⁷ has said that no single regulator could fire magic bullets:¹²⁸ but, as I will show, custody visiting does not even have a gun, and so it cannot fire any bullets, magic or otherwise.

There is nothing very new about the problem of how to control people with power. The most well-known expression of it derives from Juvenal, the Roman poet of the second century CE: “*Quis custodiet ipsos custodes?*”¹²⁹ To translate literally, if inelegantly: “Who is to guard the guards themselves?” Applied to the issue of police regulation, the question could be rephrased as “who is to police the police?” or, as the police are themselves regulators of many aspects of all our lives, “who is to regulate the regulators?” Taking us back again to the subject of death during or following police contact, the question is quoted in the 2014 IPCC report about the deficiencies in their own investigation of the death during police contact of Sean Rigg in 2008.¹³⁰ The report’s summary of the affair reads as follows:

“Mr Rigg died on the evening of 21 August 2008 after a sustained period in police custody. He was apprehended, restrained, transferred

¹²⁶ See text to notes 105-106.

¹²⁷ Chair, Independent Police Complaints Commission from 2012: <https://www.ipcc.gov.uk/about/who-we-are/our-team/dame-anne-owers> accessed 06.06.2016.

¹²⁸ At Westminster Briefing Conference on Preventing Deaths and Serious Incidents in Police Custody which I attended on 17.11.2015.

¹²⁹ Not the first century, as the IPCC report says. The Latin quote, from *Satires* 6, 347-8, has travelled a long way from its original context, which was not political. I am grateful to Professor Robert Parker for helping me with this.

¹³⁰ IPCC Report, Report of the independent external review of the IPCC investigation into the death of Sean Rigg: *Review_Report_Sean_Rigg.PDF* accessed at ipcc.gov.uk 23.01.2014. Juvenal is quoted, in the original Latin, on the page preceding the executive summary.

by police van to Brixton Police Station, held in the van parked in the police station yard, then detained in the 'cage' area of the custody corridor, where he collapsed without ever having been admitted to the custody suite. During most of this time, Mr Rigg was subject to means of restraint (i.e. he was cuffed with his hands behind his back); the handcuffs were removed only after he collapsed. After police officers tried CPR¹³¹ while waiting for an ambulance to arrive, Mr Rigg was taken by ambulance to hospital, where he was pronounced dead ... The IPCC investigation triggered by his death began later that night.”¹³²

Another police regulator, in the form of the local custody visiting scheme, also played a part in the aftermath of the death of Sean Rigg. This came to light in the IPCC Report,¹³³ which stated that the “Head of Lambeth ICV” was called in to Brixton police station that night, and that she “visited the holding ‘cage’ and custody suite and asserted that she was content with what she had seen”.¹³⁴ I have established the identity of this custody visitor: Jane Warwick.¹³⁵ Ms Warwick has told me that what she actually did that evening

¹³¹ CPR stands for cardiopulmonary resuscitation. It is a first aid technique that can be used if someone is not breathing properly or if their heart has stopped: <http://www.nhs.uk/Conditions/Accidents-and-first-aid/Pages/cpr.aspx> accessed 12.06.2014.

¹³² IPCC report (n 130): part of the executive summary.

¹³³ *ibid*, 31 note 56. The report does not comment generally on the role of the Lambeth Independent Custody Visiting Scheme, and it appears that they were not consulted for the report: *ibid* Appendix C.

¹³⁴ IPCC Report (n 130) para 22 p 31. Another quote from that page reads: “The handwritten notes of one of the IPCC on-call team also include the following reference: “0.15hours – ICV – no issues”. The original document referred to, of which the IPCC supplied me a copy, is Metropolitan Police Service report 590102014141: L41 Rigg Investigation – MPS – 22.08.2008: IPCCY2254.

¹³⁵ Jane Warwick MBE, administrator of the Lambeth Community Police Consultative Group, and administrator of the Lambeth Lay Visitors Panel and its successor, from 1990 till 2003: a custody visitor in Lambeth from 1995: elected chair of Lambeth Independent Custody Visiting Panel in 2008, and still holding that position in 2016. Ms Warwick consented to my making a

was rather different, and that, in particular, she did not made the remarks attributed to her. The story is told in full in Chapter Six.¹³⁶

The IPCC Report of the 2008 incident at Brixton police station is a tantalising glimpse into the work of the custody visiting schemes at one of the state's "hidden places",¹³⁷ and it raises some of the most important issues about custody visiting. Why did the police call in a member of the local custody visiting scheme that night? What is the role of custody visitors regarding deaths during or following police contact? Could custody visitors make an effective contribution to reducing the incidence of these deaths, and if so, how would that be achieved?

Of particular interest is the fact that the visit by the senior custody visitor to Brixton police station was, unusually, not a random unannounced visit, but a visit made in response to an invitation by the police.¹³⁸ The main activity of custody visiting is random and unannounced visiting. One purpose of random and unannounced visits to custody blocks may be to deter police mistreatment and neglect of detainees and to reduce the number of deaths during or following police contact.¹³⁹ As has been shown, this was certainly

Freedom of Information Act application which confirmed that she was the custody visitor referred to.

¹³⁶ Chapter Six, text to notes 192-197.

¹³⁷ See text to notes 28-47.

¹³⁸ For visits of this kind, see Chapter Three, text to notes 128-131 and Chapter Six, text to notes 184-191.

¹³⁹ The issue surfaces in published literature - just once. A Council of Europe report in 1999 considered the question, without citing any evidence, and concluded that deterring deaths in custody was neither a purpose nor a function of custody visiting: *The Impact of External Visiting of Police Stations on Prevention of Torture and Ill-Treatment* Council of Europe 1999 http://www.apt.ch/content/files_res/External%20Visiting%20of%20Police%20Stations.pdf para 1.16. accessed 16.10.2014. The issue does not appear in places where one might expect it to appear: for instance, ICVA sits on the ministerial board of the Independent Advisory Panel on

the view taken by Michael Meacher, and maybe also by Lord Scarman, but not that of the Home Office.¹⁴⁰ The official literature used to take a very different approach to deaths in custody from the approach taken by Mr Meacher. It used to say that the role of custody visiting was to help to rebuild public confidence in the police in the aftermath of a tragic incident. However, since 2003 the codes of practice have been silent on deaths in custody.¹⁴¹ An important research issue therefore is to work out whether custody visiting is linked to the issue of deaths in custody, and, if it is, why there is nothing about it in the current official literature.

Conclusion

In this chapter I have reviewed the questions raised by this enquiry, and set out, in broad terms, my approach to researching the answers to those questions. The intention is to explain the phenomenon of custody visiting in an analytical and critical fashion. The role of the custody visitors is to make checks on the welfare of detainees and whether their rights are being observed. I have highlighted the following issues which are likely to impact on the work of the visitors: the power of the police; the weighting of conditions in custody against detainees; the police use of detention to obtain confessions; the absence of effective regulation of police behaviour in the custody block, and the potential for custody visitors to remedy this, at least in part; the national and local structures of custody visiting, in neither of which do visitors

Deaths in Custody, <http://iapdeathsincustody.independent.gov.uk/about/ministerial-council-on-deaths-in-custody/ministerial-board/> accessed 16.10.2014 but neither on this issue, nor in relation to its membership of the NPM, nor anywhere in ICVA's publications, is a connection made between custody visiting and deterring deaths in custody.

¹⁴⁰ See text to note 100, and the note.

¹⁴¹ See Chapter Three, text to notes 159-160.

have any say; the role of ICVA in purporting to fulfil the United Kingdom's international treaty obligations to safeguard detainees; the ownership of the local visiting schemes by the Police and Crime Commissioners; where custody visitors stand in relation to deaths in custody; and the apparent deletion by the authorities of the issue of deaths in custody from the list of concerns of custody visiting. In discussing these issues, I have begun to draw on the concepts of power, Packer's models of criminal justice, and independence.

The next chapter, Chapter Two, locates custody visiting in the role of regulator, and lays down the conceptual framework of the enquiry. As well as discussing the concepts already raised in Chapter One, Chapter Two explains the intersection of power with Packer's models of criminal justice; closely allied to the concept of independence, the concepts of neutrality and impartiality; and the regulatory concepts of legitimacy, accountability and effectiveness. Chapter Three provides a critical and analytical history of custody visiting, showing the effects of official policy on the independence and effectiveness of custody visiting. Chapter Four looks at research design, methodology and ethics, showing the substantial amount of observation and interviewing I have carried out in a ground-breaking empirical case study of a local custody visiting scheme, along with desk and archival research and elite interviewing about the history and policy of custody visiting on a national basis, outside the ambit of the case study.

Chapters Five and Six draw on the results of the case study. Chapter Five begins with a discussion of the concept of socialisation; explains how visitors within this scheme were recruited, trained and socialised; and sets out my findings about their attitudes to their work, and whether they were independent of the Police and Crime Commissioner and the police. Chapter Six assesses, by applying five criteria, whether custody visiting was effective as a regulator of police behaviour in custody blocks, and also considers whether custody visiting fulfilled the claims made for the scheme in the official literature. Chapter Seven reviews the answers to the research questions, and places my research in the context of research into police regulation, noting the limitations on my research and the possibility for further research. I conclude with recommendations for reform, and an explanation of why and how the state could be obliged to have regard to those recommendations.

CHAPTER TWO

THE CONCEPTUAL FRAMEWORK

This chapter explains the concepts which frame this research, and how they relate to the issues being explored in this thesis. As has been seen from Chapter One, the topics encountered in this study of custody visiting are: human rights; criminal justice; policing; detention in the closed institution of police custody; and regulation. The literatures relating to those topics provide the concepts which frame this research, and the concepts are set out and discussed in this chapter. The concepts will be drawn on to evaluate the findings from my desk research about the policy of custody visiting set out in Chapter Three, and to evaluate the findings from my empirical research, about the attitudes of the visitors in Chapter Five, and about the effectiveness of custody visiting in Chapter Six. This chapter analyses each concept, in detail, and establishes the particular relevance of each concept to the issues raised by the research questions set out in the introduction to this thesis.¹

The concepts are: power; socialisation; Herbert Packer's crime control and due process models; independence, combined with neutrality and impartiality; legitimacy; accountability; and effectiveness.² This chapter shows what can

¹ See Chapter One, text after note 12.

² The concept of "responsibilization", was considered. This is said to consist of "... a new kind of indirect action, in which state agencies activate action by non-state organisations and actors [to assist in crime control]". David Garland, *The Culture of Control* (OUP 2001) 124ff. Custody visiting has been put forward as an example of responsibilization by Layla Skinns, *Police Custody: Governance, legitimacy and reform in the criminal justice process* (Routledge 2011) 34. But, while custody visiting does conform to the concept government wants them to as an instance of delegation by government, it does not conform to the ethos of the concept, which is about government getting activists to do what the government wants them to do.

be learnt from desk research about the relevance of all the concepts to the research questions, except for the concept of socialisation which will be discussed in the introduction to Chapter Five.

In this study, the concept of power, and the topic of regulation, are both very prominent. A major strand of this enquiry is the search for ways by which the powerful, the police on their home territory of the custody block, can be most effectively regulated, and how we can judge the success of the regulation. I now seek to establish that custody visiting is a type of regulation, and then examine each concept, starting with the concept of power.

Custody visiting as a type of regulation

As has been shown,³ custody visiting forms part of the work of a regulator, the United Kingdom's National Preventive Mechanism, which is charged with monitoring the treatment of detainees. The review of regulation which follows notes that, while regulation is found predominantly in the economic sphere, it is also found in other areas of public life; discusses some definitions of regulation which can be applied to custody visiting; looks at some of the current issues about regulation and their relevance to custody visiting; and considers police behaviour in custody blocks as a subject matter for regulation.

Here government was originally persuaded by activists that a system needed to be operated. Custody visiting was not a government initiative, it had its origins in the concerns of people outside government, and government took a long time to implement it, in a heavily watered-down form: see Chapter Three. Responsibilization is therefore not being included as one of the concepts in this study.

³ See Chapter One, text to notes 101-112.

I first turn to look at generally accepted definitions of regulation, and to inquire whether custody visiting fits those generally accepted definitions. What is regulation for? Why has regulation emerged in a particular context? What does regulation cover? What does regulation do, and how does it work? And, how does the answer to each of these questions apply to custody visiting?

First, what is regulation for? Regulation exists because it is a means of government, and the justification offered by government for regulation is that it is assumed to be acting in the public interest.⁴ What is in the public interest is, of course, endlessly debated, and the debates often centre on issues which are not primarily economic. However, much of the literature on regulation is about economic activity, and speaks of correcting market failure where private law remedies do not provide a solution.⁵ But, as well as criminal justice, there are non-economic areas of public life which are regulated: examples are care homes (the Care Quality Commission): rented housing in the public sector (the Housing Ombudsman): and education (OFSTED). If regulation is about preventing failure, the concept of failure can be applied to areas where there is no market to fail: it is the state which has failed. Failure of both kinds harms individuals and society. The purpose of regulation could be said, simply, to prevent harm to individuals and society.⁶ Custody visiting could prevent harm by regulating police behaviour in custody blocks.

⁴ Robert Baldwin and Martin Cave *Understanding Regulation: Theory, Strategy and Practice* (OUP 1999) 9.

⁵ Bronwen Morgan and Karen Yeung, quoting Antony Ogus, in *An Introduction to Law and Regulation: text and materials*, (CUP 2007) 18.

⁶ This is implicit in Baldwin and Cave (n 4) 109. There appears to be plenty more harm that regulation could prevent. Steve Tombs estimates that the lack of effective regulation of pollution, food safety and workplace health and safety standards in the UK causes 29,000 deaths each year attributable to the effects of airborne pollution, some one million cases of foodborne illness each year resulting in 20,000 hospital admissions and 500 deaths, and

Next, why does regulation emerge in a particular context? Regulators have been classified according to whether they have emerged because of the public interest, because of some private interest, or because of relations between institutions.⁷ Custody visiting came on the agenda because a number of people, most notably Michael Meacher MP and Lord Scarman, thought it would be in the public interest. Mr Meacher wanted visiting in order to counter violence against detainees by police officers,⁸ and Lord Scarman said that visiting would be “salutary”⁹ in the wake of the Brixton riots of 1981. As we shall see, in the official literature, from the earliest stages, policy-makers have shifted the focus of the public interest away from safeguarding detainees to promoting public confidence in the police.¹⁰

Next, what does regulation cover? The range of subject-matter covered by regulation is vast, and encompasses the behaviour of state bodies in the public sector as well as the behaviour of businesses in the private sector. Hood *et al* have shown that regulation of the public sector is a substantial affair, considerably greater than the resources spent on regulating private utilities: but that there is no overall rationalisation, and that the public sector is regulated at best patchily. They point to the particular need in public sector regulation for there to be some degree of organisational separation between

around 50,000 deaths each year as a result of injuries or health problems originating in the workplace: “Better regulation: better for whom?”, Briefing 14.04.2016, Centre for Crime and Justice Studies: <http://www.crimeandjustice.org.uk/publications/better-regulation-better-whom> accessed 06.05.2016.

⁷ Morgan and Yeung (n 5) 16-78.

⁸ See Chapter Three, text to notes 9-10.

⁹ Lord Scarman, *The Brixton Disorders 10-12 April 1981* (Cmnd 8427 1981) 7.9, and see Chapter One, text to notes 97-98.

¹⁰ See Chapter Three, text to notes 67, 73, 128-131, 159-160.

regulator and regulatee.¹¹ Independence is a principal issue in this study, but because it does not arise solely from the topic of regulation, it is discussed later in this chapter.

The regulation of privatised utilities has been a focus of academic interest in regulation. Whether a privatised utility should be regulated, and if so how, is seen primarily as an economic question. But economic questions easily turn into political questions, and political questions are by definition areas of controversy, including controversy about whether an activity should be regulated at all.¹² And where the object of regulation is not primarily an economic activity, politics are even more likely to be the source of controversy. Controversies about regulation outside the economic sphere¹³ have, in recent years, been very prominent and very political, notably controversies relating to the press, politicians' expenses and the police. The recommendations of the Leveson Inquiry¹⁴ for regulation of the press by a body other than the press itself were hotly contested, and that controversy itself played a part in the resignation of a cabinet minister relating back to what she had done when politicians regulated themselves about their expenses.¹⁵ and there have been numerous recent controversies involving the

¹¹ Christopher Hood, Colin Scott, Oliver James, George Jones and Tony Travers *Regulation Inside Government: Waste-Watchers, Quality Police and Sleaze-Busters* (OUP 1999) 5. 8- 9.

¹² Morgan and Yeung (n 5) 3.

¹³ Some standard texts completely ignore all non-economic areas: e.g., Baldwin and Cave (n 4).

¹⁴

<http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.levesoninquiry.org.uk/> accessed 13.06.2014.

¹⁵ Maria Miller: *The Guardian* (London 09.04.2014.)

<http://www.theguardian.com/politics/2014/apr/09/maria-miller-quits-pm-sleaze> accessed 22.06.2016.

accountability of the police for their behaviour,¹⁶ which is custody visiting's remit.

What does regulation do and how does it work? It has been found easier to provide a functional definition of regulation than a definition which seeks to establish what the scope of regulation is or should be.¹⁷ Julia Black offers the following functional definition of regulation:

“the sustained and focussed attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behaviour-modification.”¹⁸

One of the purposes of custody visiting is to improve the standard of care of detainees, and this has certainly been a “sustained” attempt, if not very “focussed”: custody visiting schemes have operated over most of England and Wales since at least 2002/3, and there were “lay visiting” schemes operating in some areas from the mid-1980s. Black's definition does not require a regulator to use all or any of the three mechanisms she specifies. Custody visiting uses just one mechanism, that of gathering information. The

¹⁶ Above all, Hillsborough, <http://www.theguardian.com/uk-news/2016/apr/26/hillsborough-inquests-jury-says-96-victims-were-unlawfully-killed> accessed 17.06.2016; and the police's admission of their use of undercover police to spy on the family in the Stephen Lawrence affair <http://www.theguardian.com/uk-news/undercover-with-paul-lewis-and-rob-evans/2013/sep/19/undercover-police-and-policing-doreen-lawrence> accessed 23.10.2014.

¹⁷ Morgan and Yeung (n 5) 3.

¹⁸ Julia Black, “Critical Reflections on Regulation”, *Australian Journal of Legal Philosophy* (2002) 27 1, 26. The classic functional definition in Christopher Hood, Henry Rothenstein and Robert Baldwin, *The Government of Risk* (OUP 2001), p 23 requires regulators to have the means of standard-setting, information-gathering and enforcement. Black says that a regulator does not need to achieve all these tasks. In this case, the regulator may be said to rely on other regulators for those it does not perform itself.

formal mechanisms of behaviour modification are provided by other regulators, namely the Police and Crime Commissioners, senior police officers and Her Majesty's Inspectorate of Constabulary (HMIC) and joint inspections of custody blocks by HMIC and Her Majesty's Inspectorate of Prisons (HMIP) and the IPCC. In other words, custody visiting has to rely on other regulators to ensure that any identified deficiencies are remedied. The role of custody visitors is to make random unannounced visits to custody blocks where they check the conditions of detention and seek interviews with detainees. Following this information-gathering, what mechanisms exist to achieve behaviour modification where authoritative standards have not been met? As will be seen in Chapter Six, the only means available to custody visiting is persuasion.¹⁹

Two issues have been prominent in the debates about regulation: the role of the state, and self-regulation. First, what is the role of the state in regulation, and how does the state apply regulation? Commentators have noted a move away from "command and control" to what have been called "decentred" systems and self-regulation. A nautical metaphor has become fashionable, identifying the functions of rowing and steering. The state steers the regulators to regulate in the appropriate direction: and the regulators steer the regulatees to row in the appropriate direction.²⁰ The metaphor is extended by

¹⁹ The lowest point on the regulatory pyramid: John Braithwaite, *Restorative Justice and Responsive Regulation* (OUP 2002) 31.

²⁰ Adam Crawford, "Networked governance and the post-regulatory state? Steering, rowing and anchoring the provision of policing and security" *Theoretical Criminology* (2006) 10 4 449; David Osborne and Ted Gaebler, *Reinventing Government; how the Entrepreneurial Spirit is Transforming the Public Sector* (Plume 1993).

the expression “anchored pluralism”,²¹ which is used to mean that regulation should be provided by several institutions, each ultimately controlled by the state. The idea is that a number of different agencies can regulate the same institution or activity. Anchors can be in the plural as well. The state is not the only anchor: other anchors can be different parts of the state and/or other institutions.²² The resulting systems of accountability are much more complex than the traditional linear hierarchy. Entities subject to regulation may be accountable to several different regulators, at different levels of power and importance, and those regulators may themselves be accountable to several other institutions. The system by which various entities are held to account can be analysed in terms of intersecting networks of “interdependence” where there is no single supremely powerful central point, or of “redundancy” where more than one mechanism operates to provide the accountability.²³ Academic skills are needed to analyse these networks: the lack of clear accountability causes voters to be disillusioned.²⁴ While the custody visiting schemes form part of such a network, it is fortunately not a very complex one. The theoretical structure is as follows. The schemes regulate the police: the schemes are anchored to the Police and Crime Commissioners: and the Police and Crime Commissioners are also regulators of the police.

²¹ Ian Loader and Neil Walker, “Necessary virtues: the legitimate place of the state in the production of security” in Wood J and Dupont B (eds), *Democracy Society and the Governance of Security* (CUP 2006).

²² Julia Black, “Decentring Regulation: The Role of Regulation and Self-Regulation in a ‘Post-Regulatory’ World” *Current Legal Problems* (2001) 54 103,112.

²³ Colin Scott, “Accountability in the Regulatory State”, *Journal of Law and Society* (2000) 27 1 38; Ian Loader, “Plural Policing and Democratic Governance”, *Social and Legal Studies* (2000) 9 323.

²⁴ Steve Richards, “The reason voters feel powerless: because it’s the truth”, *The Guardian* (London 18.06.2014): <http://www.theguardian.com/commentisfree/2014/jun/18/voters-powerless-accountability-britain-nhs-schools> accessed 17.06.2016.

Those who think that only the state should, or maybe that only the state can, be the ultimate source of control for a regulator point to the state as the source of legitimacy and authority, and highlight its positive aspects in contrast to earlier attitudes that the state is a necessary evil.²⁵ Coercion is one of the instruments of correction used by regulators, and the state is the only legitimate source of coercion, but there are other instruments of correction available to regulators, one example being publicity. The “regulatory pyramid” developed by John Braithwaite starts with persuasion in the largest section at the base of the pyramid, and proceeds upwards, if necessary, to various means of coercion in the smallest sections at the apex.²⁶ Hence the state does not need to be the “anchor” of all forms of this regulation. But it is not easy to apply these points to the custody visiting schemes. First, are the schemes really in the role of an independent regulator? This study will determine whether the custody visiting schemes, which are controlled by the Police and Crime Commissioners, can fairly be characterised as independent. Second, the schemes’ powers of persuasion are limited, because the Police and Crime Commissioners do not issue critical publicity about police behaviour in custody blocks,²⁷ and because the visitors have no power to publicise anything without the agreement of the Police and Crime Commissioner.²⁸

The second prominent issue in the regulation debates has been self-regulation. It is relevant to this enquiry because police behaviour in custody

²⁵ Loader and Walker (n 21).

²⁶ Braithwaite (n 19) 31.

²⁷ At least, not in Avon and Somerset, nor the area studied, see Chapter Six, text to notes 155-158.

²⁸ 2013 Code of Practice, paras 80-82.

blocks is largely self-regulated.²⁹ Robert Baldwin and Martin Cave note that self-regulation is often found in professions and trades as a means of holding government regulation at bay: that it may (or may not) be subject to a form of governmental structuring or oversight: and that it has proved popular with governments, as it reduces costs.³⁰ Bronwen Morgan and Karen Yeung note that it is often claimed that industry has superior informational capacities, so industry self-regulation is more likely to be efficacious. Against that, they note that self-regulation may be self-serving attempts to fend off unwanted state intervention, and it reduces accountability and enforcement.³¹ These discussions are all concerned with consumer issues and the conduct of bodies other than the state, but that is no reason not to apply them to political controversies and to state bodies. In the “non-economic” cases mentioned above,³² the controversies have been about the behaviour of an institution and whether it should be allowed to regulate itself, producing the vivid image that those who regulate themselves are “marking their own homework”.³³ Adam Crawford has drawn attention to the reaction away from self-regulation, and shown how the state intervenes directly in controlling education and people’s behaviour generally and their social life.³⁴ However, custody visiting is not part of this general recent fashion for greater regulation. Custody visiting did not originate from government policy, and is not in any way typical of regulators of recent origin.

²⁹ See Chapter One, text to notes 81-85.

³⁰ Baldwin and Cave (n 4) 39f.

³¹ Morgan and Yeung (n 5) 92-96.

³² See text to notes 13-16.

³³ “In praise of ... not marking one’s own homework”, *The Guardian* (London 10.04.2014). <http://www.theguardian.com/commentisfree/2014/apr/10/in-praise-of-not-marking-ones-own-homework> accessed 17.06.2016.

³⁴ Crawford (n 20).

From this survey I conclude that custody visiting does qualify as a type of regulation, albeit an unusual one. Along with the concept of independence which derives also from other topics, the concepts of legitimacy, accountability and effectiveness, which derive from the topic of regulation, are discussed towards the end of the chapter.

Lukes' theory of power and Packer's models of criminal justice

Chapter One demonstrated the power of the police in custody blocks,³⁵ and the power of the police is a constant, whether it is exercised in their own territory or elsewhere, and whether conflict is overt or implicit. The concept of power underpins every aspect of this thesis. What follows is a very brief and highly selective introduction to the study of this concept, which is derived from the work of Steven Lukes.

In his work on power, Lukes saw A as exercising power over B where A affects B in a manner contrary to B's interests.³⁶ This is a broad concept. The use of the very general word "affects" shows that A's exercise of power over B need not be clearly visible. Interests are also given a wide interpretation. Lukes says that interests are not only what people want and prefer, whether expressed directly or indirectly:

³⁵ See Chapter One, text to notes 14-73.

³⁶ Steven Lukes *Power, a Radical View* 2nd edn (Palgrave Macmillan 2005) 30. On (much later) reflection he found this unsatisfactory. Among a number of revisions to his theory in the second edition, Lukes saw power as a dispositional concept; it does not need to be exercised, it is an ability or a capacity; and he narrowed the question down to: "how do the powerful secure the compliance of those they dominate?" which in my view fits the enquiry in this thesis; *ibid* 109ff.

“The radical, however, maintains that people’s wants may themselves be a product of a system which works against their interests, and, in such cases, relates the latter to what they would want and prefer, were they able to make the choice.”³⁷

I think it is fair to gloss what Lukes calls “the choice” as “an informed and free choice”, made by people who clearly understand clearly what is in their interests.

Lukes analysed the operation of power in three “dimensions”. One-dimensional power is getting people to do things they wouldn’t otherwise do.³⁸ Two-dimensional power is getting people not to do the things they would like to do.³⁹ Both one-dimensional and two-dimensional power relate to situations where there is overt conflict: but, as Lukes points out, power is not exercised only in situations of overt conflict: A may exercise power over B by influencing, shaping or determining his very wants. Lukes’ three-dimensional power stops demands being made and conflicts arising by controlling others’ thoughts and desires, and by keeping certain issues off the agenda:

³⁷ *ibid* 38.

³⁸ *ibid* 16-19.

³⁹ *ibid* 20-25.

“Thought control takes many ... forms, through the control of information, through the mass media and through the processes of socialization.”⁴⁰

And Lukes continued, displaying a marked degree of passion:

“...is it not the supreme and most insidious exercise of power to prevent people, to whatever degree, from having their grievances by shaping their perceptions, cognitions and preferences in such a way that they accept their role in the existing order of things, either because they can see or imagine no alternative to it, or because they see it as natural and unchangeable, or because they value it as divinely ordained and beneficial? To assume the absence of grievances equals genuine consensus is simply to rule out the possibility of false or manipulated consensus by definitional fiat.”

It is in this three-dimensional form that power is at its most effective when it is also least observable, and it prevents conflicts from arising in the first place.⁴¹

This must also be by far the most common way in which power operates.⁴²

⁴⁰ ibid 27. The concept of socialisation (UK spelling) is explained at the beginning of Chapter Five.

⁴¹ ibid 27-28. Compare Edward Gibbon, *The History of the Decline and Fall of the Roman Empire*, (1776-1789: Penguin Classics 1996) chapter iii on the first Roman emperors, Augustus and his successors: “The masters of the Roman world surrounded their throne with darkness, concealed their irresistible strength, and humbly professed themselves the accountable ministers of the senate, whose supreme decrees they dictated and obeyed.” The last part of this wonderful sentence is also apposite in this study, because of the desire of the police to appear accountable (or, as they like to put it, to have “transparency”) which I noted in several interviews I conducted with police officers, and because of the equation with the law of the wide discretion within which they exercise their power: see Andrew Sanders and Richard Young “The Rule of Law, Due Process and Pre-Trial Criminal Justice” *Current Legal Problems* (1994) 47 125.

Lukes has to argue against those who say one cannot study, let alone explain, what does *not* happen. He cites research which sought to explain “things that do not happen” on the assumption that “the proper object of investigation is not political activity, but political inactivity”. The research asked why the issue of air pollution was not raised as early or as effectively in some cities in the United States as it was in others. The research showed that, in a city where a powerful steel company had a substantial industrial and political presence, regulation of air pollution was not even discussed, and that the company did not enter the political arena on the issue; in contrast to that, air pollution regulation was introduced in a neighbouring city which was equally polluted and had a similar population; the essential difference in the neighbouring city was that the powerful company was just one of several steel companies in that city and did not have a strong political presence there.⁴³ Reviewing this and other examples, Lukes argues that unconscious inaction is a decision, and a decision may be taken because of the power of an institution.⁴⁴

Commenting on Lukes, Keith Dowding says that more account should be taken of intentions rather than having resort to what he calls the “black box” of socialisation and acquiescence. The first port of call to explain behaviour should be the reasons people give for their action. That said, he agrees with Lukes that people acquiesce in their own domination. They do so either by

⁴² For a graphic account of this sort of power, see Nick Davies, *Hack Attack: How the truth caught up with Rupert Murdoch* (Chatto & Windus 2014) 163 ff.

⁴³ Lukes (n 36) 45. It was some 13 years later when air pollution regulation was introduced in the city where the powerful company’s factory was located.

⁴⁴ *ibid* 52 ff.

actively believing the values of their oppressors, or by merely being resigned to them. That resignation may be subliminal, and people's autonomy may be affected by influences, even if those who are influenced are unaware of how it is happening, and even if those from whom the influences originate do not consciously intend it.⁴⁵

Drawing on these insights, this thesis will investigate the failure by some custody visitors to raise, or even to consider, issues where there might be conflict with the police. Where that occurs, the explanation may be that they intend the behaviour. If so, the next question is why they intended it, which could lead to an enquiry about their mindset when they were recruited and the explanation for that mindset, and/or whether they have been socialised in their training and induction. Alternatively, custody visitors might not be aware of the failure to raise certain issues, in which case a more subliminal explanation is necessary. In either case, Lukes' three-dimensional power would appear to be an important factor in keeping issues off the agenda. His theory has been applied to the relationship between a police authority and its chief constable. Brogden argued, from a case study, that the power of the chief constable normally lay in the chief constable's ability to manipulate the political agenda, to prevent potential conflict becoming overt issues: usually this was achieved, not by specific acts of oppression, but by the police authority's acceptance of the chief constable's perspective.⁴⁶ As we shall see, there are parallels in the

⁴⁵ Keith Dowding, "Three-Dimensional Power: A Discussion of Stephen Lukes' Power: A Radical View" *Political Studies Review* 2006 vol 4 136-145. For the relationship between power and legitimacy, see text to notes 105-106 and after 106.

⁴⁶ Mike Brogden, "A police authority: the denial of conflict", *Sociological Review* (1977) 25 232-25 cited in Robert Reiner, "Where the Buck Stops", in R Morgan and D Smith (eds) *Coming to Terms with Policing: Perspectives on Policy* (Routledge 1989) 198-199. See also text to

way that the Police and Crime Commissioners operate custody visiting schemes: the commissioners, and the visitors themselves, rarely stray outside the invisible boundaries established by the police through their dominance of custody blocks.

Lukes' theory of power is drawn on to assist in the understanding of the next concept, Herbert Packer's crime control and due process models of criminal justice. These models express extremes, at the opposite ends of a spectrum of attitudes about values,⁴⁷ and they provide answers to the fundamental questions of who, or what, custody visiting is for. Packer's crime control model majors on the importance of the unobstructed efficiency of the police operation, and on the factual presumption of guilt, while the due process model majors on the primacy of the individual, the normative presumption of innocence, and the need for limitations on official power. The crime control view is that the most efficient system is for the police not to be hindered in obtaining confessions. In marked contrast, the due process view insists on safeguards for suspect detainees, because of the concern that confessions are unreliable if induced by physical or psychological coercion, and that there should be limits on permissible coercion, even at the expense of losing reliable confessions.⁴⁸

Packer's models are very useful⁴⁹ in enabling us to characterise the different views held about criminal justice. Packer's models articulate attitudes which

notes 95-113 on the independence of police authorities and Police and Crime Commissioners.

⁴⁷ Andrew Sanders, Richard Young and Mandy Burton, *Criminal Justice* (4th edition OUP 2010) 21 ff.

⁴⁸ Herbert Packer, *The Limits of the Criminal Sanction*, (Stanford University Press 1968) 158 and 163.

⁴⁹ Despite their limitations, on which the literature is not cited here.

are strongly differentiated, deeply held, value-based, and ideological. Due process adherents, liberal defenders of civil liberties, have been sidelined. The crime control view has frequently been promoted by conservative, labour and coalition governments, and by some parts of the media. Criminals are seen as evil, and there need to be tough measures to deal with them: so the answers, loudly proclaimed, are to reduce the rights of suspects, convict more of them, and send more of them to prison for longer periods.⁵⁰ However, despite that, research has shown that the views of the public can be closer to due process, being more likely to support prevention and rehabilitation than punishment.⁵¹

One way of resolving the conflicts between the values of Packer's models is found in the concept of "balance". This is the notion that there is a balance to be struck between the interests of the state and the interests of suspects; that the weight given to those interests has an equal and opposite effect, like the operation of a see-saw; that the interests of the state are identical to the interests of victims; and that the rights of suspects should therefore be reduced. This idea, which has been very prominent in official discourse, has

⁵⁰ This is illustrated by widespread hostility to alleged terrorists seeking to avoid extradition and the call to "get rid of" the Human Rights Act, both favourite topics in the tabloid press: for instance, Melanie Phillips in the *Daily Mail*: <http://www.dailymail.co.uk/debate/article-1092847/The-proper-response-Human-Rights-Act-rid-it.html> accessed 05.03.2016. The responsibility of the tabloids and of the UK's adversarial political system for this is demonstrated, convincingly, in the context of reactions to the murder of James Bulger, by David Green in *When Children Kill Children: Penal populism and political culture* (OUP 2008). See also Ann James and John Raine, *The New Politics of Criminal Justice* (Longman 1998), at 73-5, and Ed Cape, "PACE then and now: 21 years of rebalancing" in Cape E and Young R (eds), *Regulating Policing: The Police and Criminal Evidence Act 1984, Past, Present and Future* (Hart 2008).

⁵¹ Mike Hough and Julian V Roberts, "Public Opinion, Crime and Criminal Justice," in Maguire M, Morgan R and Reiner R (eds) *The Oxford Handbook of Criminology*, 5th edn (OUP 2012).

attracted telling criticism.⁵² The concept of balance could be applied to the conflicting purposes of custody visiting in the following way. It would be argued that, so as to improve the rights of victims, the due process values of respecting the rights of individual detainees and safeguarding their welfare (and reducing the number of deaths in custody) should be traded off in favour of the public interest, with its crime control values of promoting confidence in the police. But the application of Lukes' three-dimensional power means that the police do not need to advance that argument: indeed, they do not have to do or say anything. Three-dimensional power secures what the dominant party wants, because that is the line that others believe is what the dominant party wants, and that is the line that the others decide that they too must follow.

I now turn from the concept of power to the regulatory concepts, and whether custody visiting has the necessary characteristics of a regulator. However, in seeking to act as a regulator, custody visiting is always subject to the power of the police.

Independence, Neutrality and Impartiality

Independence is of fundamental importance in a study of custody visiting. Its formal title in all the official literature is "Independent Custody Visiting". The legislation is headed "Independent custody visitors for places of detention", and provides that:

⁵² Michael Zander, "PACE, Past, Present and Future", LSE Law Society and Economy Working Papers 1/2012, http://www.lse.ac.uk/collections/law/wps/WPS2012-01_Zander.pdf accessed 02.03.2015; Andrew Ashworth and Mike Redmayne, *The Criminal Process* (fourth edition OUP 2010) 41ff; Sanders *et al* (n 47) 725.

“... every Police and Crime Commissioner shall make arrangements for detainees to be visited by persons appointed under the arrangements, (“independent custody visitors”); and [that] the arrangements *must*⁵³ secure that the persons appointed under the arrangements are independent of both the Police and Crime Commissioner and the chief officer of police ...”⁵⁴

Statute law gives the quality of independence emphatic prominence, using the word “independent” repeatedly.

As explained in the introductory chapter, the requirement of independence also derives from two United Nations instruments.⁵⁵ Specifically, this arises because, nationally, custody visiting schemes, through the Independent Custody Visiting Association (ICVA), are one constituent of the UK’s National Preventive Mechanism (NPM), which the United Kingdom has an obligation to set up on an independent basis.⁵⁶ Regulatory bodies are often described as “independent”;⁵⁷ no doubt with the intention of bolstering the positive connotations of independence, those who write the marketing material say the

⁵³ emphasis added.

⁵⁴ Police Reform Act 2002, s 51(2), as amended by Police and Social Responsibility Act 2011, Schedule 16, part 3, s 299.

⁵⁵ See Chapter One, text to notes 101-103.

⁵⁶ *The Optional Protocol to the Convention against Torture and other cruel inhuman or degrading Treatment or Punishment*: a treaty which supplements the 1984 UN Convention against Torture: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx> accessed 31.05.2015.

⁵⁷ For instance: the Independent Police Complaints Commission <http://www.ipcc.gov.uk/>; the Independent Reviewer of Terrorism Legislation <https://terrorismlegislationreviewer.independent.gov.uk/>; accessed 16.10.2014 and the Independent Parliamentary Standards Authority www.parliamentarystandards.org.uk/ accessed 16.10.2014.

regulatory bodies are “robust” as well as independent.⁵⁸ Independence is one of the qualities of good regulation in the Hampton Report, a government publication whose purpose was announced to be the promotion of efficient and effective approaches to regulatory inspection and enforcement.⁵⁹ The label “independent” announces that custody visiting is free from political interference; that it is working in the public interest, rather than in the interest of the body it regulates; and that custody visiting has managed to avoid being taken over by the body it regulates, a process known as “regulatory capture”.⁶⁰

Independence can be understood in various ways. One way to look at it is in structural terms. At first sight a body or person contained within another would seem to have no independence at all, but this impression may be misleading. Factors which influence behaviour may come into play, such as the surrounding circumstances and conditions, and the personalities of individuals. All these factors have the capacity to affect the degree of independence, which, like freedom, is rarely an absolute condition.⁶¹ Independence, like freedom, implies that there is someone or something to be

⁵⁸ For instance: “The chairman of the Press Complaints Commission has promised that the replacement body will be a robust, independent regulator with teeth”: *The Guardian* (London 09.03.2012). <http://www.theguardian.com/media/2012/mar/09/pcc-chairman-robust-regulator> accessed 07.06.2016. The replacement body, like its predecessor, a self-regulator, is The Independent Press Standards Organisation, IPSO: www.ipso.co.uk/ accessed 30.09.2014.

⁵⁹ Philip Hampton, *Reducing administrative burdens: effective inspection and enforcement* (2005 HM Treasury): http://news.bbc.co.uk/1/hi/shared/bsp/hi/pdfs/bud05hampton_150305_640.pdf accessed 29.05.2016.

⁶⁰ See text to notes 75-76.

⁶¹ Hartley Dean and Peter Taylor-Gooby, *Dependency Culture: The Explosion of Myth* (1992 Harvester Wheatsheaf) 172-3.

“independent of”. Independence is best seen as relational,⁶² as something which can exist only as the state of not being dependent on someone or something else.⁶³

The notion of independence, for many lawyers, centres on the doctrines of the separation of powers and the rule of law, and the great importance attached to the independence of the judiciary. There has been much discussion about whether judges are truly independent, and examining this literature briefly is helpful in the context of this study. Judges have a strong tradition of independence, of acting without being influenced by the executive branch.⁶⁴ However, John Griffith examined the attitudes of senior judges and found that they decided against government only very occasionally. His thesis was that judges see their role as supporting the institutions of government as established by law, and that judges see their role that way because of the type of people they are, with a particular social class, background, education, training and professional career path. So, for Griffith, the incorruptibility and independence of the English bench were not in issue: but he was firmly of the view that the judges were not neutral.⁶⁵

The independence question often depends on relations between different organs of the state. Here the example of the judiciary is particularly instructive. High Court judges have what is known as “tenure”, which means

⁶² See text to note 11 on “relational distance” between regulator and regulatee.

⁶³ Morag McDermont, *Governing Independence and Expertise: The Business of Housing Associations* (Bloomsbury Publishing 2010) 157.

⁶⁴ Tom Bingham, *The Rule of Law* (Allen Lane 2010) 25.

⁶⁵ John A G Griffith, *The Politics of the Judiciary* (Fontana 1977).

that it is very difficult for the state to dismiss them.⁶⁶ Tenure safeguards the independence of judges after they have been appointed: but does the state ensure that independent-minded people are appointed in the first place? Formerly operated by the Lord Chancellor, the task of appointing judges is now in the hands of an “independent” commission, and the same statute which set up the commission provides that the Lord Chancellor and other ministers must not seek to influence judicial decisions.⁶⁷ However, the executive branch does make very important decisions about judges. The government decides how many judges there are to be, which broadly determines the caseload of each judge: the government decides how much to pay the judges: the government appoints members of the judicial appointments commission: and the government requires judges to attend training and continuing education courses, and to be subject to performance evaluation.⁶⁸ This illustrates, at the highest level of the state, how the independence question applies to organs of the state which depend on other organs of the state. There is always likely to be some structural connection, and some dependency must follow. The question therefore is how to assess the extent, the degree and the effects of that dependency. At some stage, the

⁶⁶ Act of Settlement 1701, and Senior Courts Act 1981, s 11(3). But junior judges can be summarily dismissed by the executive: see “Judges sacked for watching porn” BBC news website, <http://www.bbc.co.uk/news/uk-31920906> accessed 17.03.2015.

⁶⁷ Constitutional Reform Act 2005, s 61 (the commission) and s 3(5) (no influence over judicial decisions). But ministers do make strongly worded attacks on court decisions adverse to the government. For instance: “... The Home Secretary ... has accused judges of ‘subverting’ British democracy and making the streets of Britain more dangerous by ignoring rules aimed at deporting more foreign criminals...” The Guardian (London 17.02.2013). <http://www.theguardian.com/politics/2013/feb/17/theresa-may-attacks-judges-deportation> accessed 07.06.2016.

⁶⁸ So far, this applies much more to the junior ranks: Rosemary Hunter, “Judicial Diversity and the ‘new’ Judge”, in *The Futures of Legal Education and the Legal Profession*, Sommerlad H, Harris-Short S, Vaughan S and Young R (eds), (Hart 2015) 91-2.

level of dependency makes it impossible to apply the adjective “independent” in any meaningful way. The difficulty is in identifying that threshold.

Most regulators are state bodies of one kind or another. It follows that where a regulator is appointed by the state to regulate another state body, there must be some degree of dependency on the state. The degree of the dependency will be shaped by the extent to which the dependency derives, not so much from the structure, as from the surrounding circumstances, the personalities of individuals, and other influences. For instance, is the workforce of the regulator partly comprised of former employees of the body being regulated? Are all the resources which are used by the regulator being provided by the body which is being regulated? What sort of backgrounds do the people who work for the regulator come from? What kinds of attitudes do they have? How easy is it for managers to dismiss the individuals carrying out the regulatory work? In other words, do those individuals, like judges,⁶⁹ have tenure?⁷⁰

Stephen Savage has researched these issues by asking people who worked for three police complaints bodies to define independence. Their definitions were: impartiality; distance, or separateness; and objectivity. Impartiality was seen as neutrality, being “straight down the middle”, making a choice between contested narratives.⁷¹ The (apparently undifferentiated) concepts of impartiality and neutrality are therefore seen as aspects of, or indications of, independence, rather than separate qualities. Neutrality and impartiality can

⁶⁹ See text to note 66.

⁷⁰ A point also made about the rights of members of National Human Rights Institutions appointed by governments, by Rachel Murray, “National Human Rights Institutions. Criteria and factors for assessing their Effectiveness” *Netherlands Quarterly of Human Rights* (2007) 25 2 189, 197.

⁷¹ Stephen Savage, “Thinking Independence: Calling the Police to Account through the Independent Investigation of Police Complaints” *British Journal of Criminology* (2013) 53 94.

however be differentiated. Neutrality suggests an absence of strong, decided views.⁷² Custody visitors could be required to show their neutrality by not identifying with either the detainees or the police. Tests have been developed in case law for measuring impartiality: whether there are conflicts of interest, and whether there is the appearance of bias. Judges sometimes have to disqualify themselves from hearing cases in which they have, or appear to have, a conflicting interest, and where there is a real danger of bias, they must do so.⁷³ This test has not been applied to police complaints bodies or to custody visitors. If the test were to be applied at the strictest level, it would disqualify any investigator working for a complaints body who had worked for the police, as many of them have done: the same would apply to custody visitors who had done so: and, in both cases, the test would disqualify those who had worked for detainees. The question then is whether it makes any sense that the only people who can perform these functions are people with no experience or expertise in the area, which seems a very perverse result. The qualities of both neutrality and impartiality make a direct impact on trustworthiness. In their work of making checks on the conditions of detention in police custody, custody visitors need to have the trust of detainees, so that the detainees are prepared to be candid with them, and the visitors need to have the trust of custody staff, to ensure their co-operation throughout their visits.

To return to Savage's findings, distance and separateness were seen as not being "of" the police and not being accountable to them, and in police

⁷² <https://www.oxforddictionaries.com/definition/english/neutrality> accessed 20.06.2016.

⁷³ *Pinochet, in re* [1999] UKHL 1, and *Porter v Magill* [2001] UKHL 67.

complaints it can be important, “presentationally”, to provide tactical reassurance to complainants that “we’re nothing to do with the police”. As noted as long ago as 1990, the practice has been for police to introduce visitors to detainees.⁷⁴ Savage noted that the next most frequently cited definition of independence was objectivity, in the sense of a search for the truth, being evidence-based and only evidence-based. This quality is clearly relevant to custody visiting. Visitors who relied wholly on police representations of custodial conditions, rather than inspecting the cells for themselves, would not be taking an objective or an independent stance.

Savage noted obstacles to, and restraints on, independence, in three categories: being too “close” to the police or too “soft” on them, in trying to maintain working relationships; disparity of resources, with the police having far more resources than the complaints bodies; and the obligation to rely on police support, which can cause serious delays. It is easy to see the parallels here between the complaints bodies and custody visiting. Custody visitors have to work with the police; the police have far more resources than the Police and Crime Commissioners; and custody visitors have no resources except for their time.

The theory of “regulatory capture” is also relevant here. This is the theory which seeks to explain that regulatory agencies are weak and ineffective because they are unduly influenced by, or have been “captured” by, the body they are supposed to regulate. This has been associated particularly with the “revolving door syndrome”, or “poachers turned gamekeepers”, where

⁷⁴ This was noted in 1990: see Charles Kemp and Rod Morgan, *Lay Visiting to Police Stations: Report to the Home Office* (Bristol and Bath Centre for Criminal Justice 1990) 49.

members of regulatory bodies leave to start a new job in the industry they have been regulating, or vice versa.⁷⁵ The three forms of capture identified in that research can usefully be applied to the investigation of custody visitors. Do visitors identify with the police? How much sympathy do they have with the police in having to deal with detainees? Are the visitors tough enough to challenge police practices? A case study in Australia attributed the capture of a police complaints body to a number of factors, one of which was the structural issue of there being no clear separation between the police and the regulator.⁷⁶

Another approach to the independence of public bodies monitoring the criminal justice system has been taken by Stephen Shute.⁷⁷ His objects of study include inspection bodies like HMIC and HMIP, whose joint inspection teams inspect all custody blocks every six years. Shute includes custody visiting in that category of inspection bodies.⁷⁸ Custody visiting does not have much in common with either of these inspection bodies, or with the complaints bodies reported on in Savage's article: but they are the closest bodies with which we can compare custody visiting. Shute identifies three kinds of independence, financial, political/operational, and judgmental. Shute says that judgemental independence means that inspectorates have the right to decide for themselves what form their reports should take; what content they should have; how they should be phrased and presented; and what their intended

⁷⁵ Tom Makkai and John Braithwaite, "In and Out of the Revolving Door: Making Sense of Regulatory Capture" *Journal of Public Policy* (1992) 12 1 61.

⁷⁶ Tim Prenzler, "Civilian Oversight of the Police: A test of Capture Theory" *British Journal of Criminology* (2000) 40 4 659.

⁷⁷ Stephen Shute, "On the Outside Looking In: Reflections on the Role of Inspection in Driving up Quality in the Criminal Justice System" *Modern Law Review* (2013) 76 3 494.

⁷⁸ 2013 Code of Practice para 50 does include the expression "inspection" in its description of the work of custody visitors, but does not use the word "inspect" to describe their duty in relation to the welfare of detainees, such as their treatment by the police and custody staff.

audience might be. Shute also argues that regulatory capture is prevented by the involvement of lay⁷⁹ people such as Sir Thomas Winsor, who was the first person whose career had not been in the police to be appointed Chief Inspector of Constabulary.

What is the meaning of the word “independent” in the title “Independent Custody Visiting”? We have seen how the legislation which established the scheme made repeated use of the word “independent”.⁸⁰ The legal meaning of the word “independent” could be determined by applying the rules of statutory interpretation. Statutory interpretation might be relevant if there were to be a court case on the issue, but none has so far been reported, and it is unlikely that there will be one. It is more fruitful to think about what the word “independent” may have meant to the policy-makers in the Home Office, and how their use of the word would have been understood by the wider public, as well as visitors, custody staff and scheme administrators.

The policy-makers may well have had in mind that the original practice, which was still being followed in some areas, was to appoint members of the police authority as visitors. The Home Office used the terms “independent” and “conflict of interest” in the narrow sense that people were eligible to be appointed as visitors unless they were actually working at the time in the

⁷⁹ Custody visitors have always been lay, in the sense of not being serving police officers, but very few have had professional expertise like Sir Thomas Winsor, a lawyer and rail regulator: <https://www.justiceinspectorates.gov.uk/hmic/about-us/who-we-are/tom-winsor/> accessed 03.08.2016.

⁸⁰ See text to note 54.

police, as justices of the peace or as members of the police authority.⁸¹ But people who cease to work for institutions often continue to have the same mindset afterwards: and candidates for appointment as visitors might have family or social connections with the institutions, and/or settled attitudes incompatible with keeping an open mind about custody.⁸² No consideration was given to a mechanism by which independent-minded people could be recruited: for instance, by using another organisation to carry out the recruitment.⁸³ In addition, and this is perhaps even more remarkable, the independence of the visitors was not seen as being in any way affected, let alone capable of being defeated, by the fact that every aspect of the visiting was controlled by the police authority.

My interim conclusion is that neither the visitors nor the visiting were independent of the police authority, in terms of structure and management. The next question is whether the arrangements could correctly be described as securing the independence of the visitors from the chief officer of police as well as from the police authority.⁸⁴ The answer to this question depends on the extent to which the police authority was itself independent of the chief officer of police. What was the role of the police authority?

⁸¹ Explanatory Notes to Police Reform Act 2002, s 51, para 284: <http://www.legislation.gov.uk/ukpga/2002/30/notes> accessed 09.02.2014 The 2003 Code of Practice paras 18 and 22. As is stated by another government document, this narrow definition of the expression “conflict of interest” ignores the risk that the perception of a conflict can be as damaging as an actual conflict: one example given is the perception of rewards for past contributions or favours. See *Public Appointments: probity and conflict of interest: a guide for candidates*: [https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/73247/Conflicts ofInterestDCMS](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/73247/Conflicts_ofInterestDCMS): accessed 05.02.2014.

⁸² See the concepts of distance and separateness identified by Savage: text to note 74.

⁸³ Like the Judicial Appointments Commission and judges: text to note 67.

⁸⁴ Paraphrased from Police Reform Act 2002, s 51(2), as amended by Police and Social Responsibility Act 2011, Schedule 16, part 3, s 299.

From 1964 the police authority had the power to call for a report from the chief constable, but the chief constable could withhold information if the Home Secretary agreed.⁸⁵ However, as the Patten Report on Policing in Northern Ireland observed about the system in England and Wales, the police authority seemed to have no power to follow up issues arising from the report:⁸⁶ and the report could not deal with “operational matters”.⁸⁷ The Patten Report made the radical proposal that a new, more democratic body should have the power to require the chief constable to provide explanations for operational decisions, and to follow up the report with further inquiries.⁸⁸ The government rejected these recommendations. Some commentators take the view that the reason for this failure was that the report gave insufficient attention to the role of the state and the vested interests within policing.⁸⁹ The result is that many policing issues receive no public consideration in Northern Ireland.⁹⁰ Under the Police Act 1996, which has even less to say about accountability, the role of the police authority was to maintain the local police force and to write a report showing whether policing targets have been met.⁹¹

⁸⁵ Police Act 1964, s 12.

⁸⁶ The Independent Commission on Policing in Northern Ireland, *A New Beginning - Policing in Northern Ireland* (“The Patten Report”), (1999) para 5.10. The report is known as “the Patten Report”: <http://cain.ulst.ac.uk/issues/police/patten/patten99.pdf>: accessed 05.02.2014.

⁸⁷ An attempt to rationalise the distinction between strategic and operational matters has been made, at some length, in the 2011 Policing Protocol Order, para 30, under s 79 Police and Social Responsibility Act 2011.

⁸⁸ The Patten Report (n 86), recommendations 25 and 26.

⁸⁹ Paddy Hillyard and Mike Tomlinson, “Patterns of Policing and Policing Patten” *Journal of Law and Society* (2000) 27 3 394.

⁹⁰ John Topping, “Accountability, policing and the Police Service of Northern Ireland: Local practice, global standards?” in Lister S and Rowe M (eds), *Accountability of Policing*, (Routledge 2016).

⁹¹ Police Act 1996, s 9.

A quote by a chair of a police authority writing in the early days of lay visiting throws some light on the relationship:

“ ... it is the police officers who are very much in control ... It seems ridiculous that a police authority should have to negotiate painfully and over many months to obtain the right to issue a leaflet setting out a detained person’s rights – and to obtain this right in police stations which it maintains, staffed by officers for which it pays!”⁹²

Here the police authority eventually got its way, but only after a great deal of resistance by the police. One wonders how many police authorities would have taken this line. According to Laurence Lustgarten, the police authorities were “bereft of power ... [and] ... with a few well-publicised exceptions ... pliant bodies whose members view[ed] themselves as a sort of cheerleader corps for their force”.⁹³ The fact was that the police authority could not control the police, and were effectively in the power of the police,⁹⁴ and the police could ignore the views of the police authority: in a serious crisis, the police authority was overridden by the Home Secretary and the chief constable.⁹⁵ On that basis, the police authority was not independent of the police or of central government. If some of this evidence looks rather dated, a recent survey reported that a member of a police authority said that he sometimes asked in

⁹² Gabrielle Cox, “Openness and Accountability” in Benyon J and Bourn J (eds), *The Police: Powers, Procedures and Proprieties* (Pergamon 1986) 165, 168 and 170.

⁹³ Laurence Lustgarten, *The Governance of Police* (Sweet and Maxwell 1986) 87.

⁹⁴ See Brogden (n 46) and text to the note.

⁹⁵ *R v Secretary of State for the Home Department, ex parte Northumbria Police Authority* [1987] EWCA Civ 5. See also Sarah Spencer, *Police Authorities during the Miners’ Strike* (Cobden Trust 1985). In Chapter Three, text to notes 97-102, I argue that in the development of policy about custody visiting, it was the police, in the form of ACPO, who decided what should be done, and the Home Office either anticipated their wishes or followed them.

a meeting what would happen if they voted against something, only to be told that it would go ahead anyway.⁹⁶

It will be interesting to see whether this has changed with the abolition of police authorities and the election of Police and Crime Commissioners. One important change is that statute has given the Police and Crime Commissioners the power to suspend or remove a chief constable.⁹⁷ The Police and Crime Commissioner for Avon and Somerset has used these statutory powers and removed the chief constable.⁹⁸ Police authorities had no such power.⁹⁹ However, even if the Police and Crime Commissioners do assert more independence over the police, their power derives from a populist mandate to reduce crime,¹⁰⁰ so they are unlikely to hold different views from the police about custody. Another way of approaching the question of the independence of Police and Crime Commissioners from the police would be to apply the regulatory capture theory.¹⁰¹ Former police officers have become Police and Crime Commissioners,¹⁰² and people employed by the police in various capacities have joined the staff of Offices of Police and Crime

⁹⁶ Floyd Millen and Mike Stephens, "Policing and Accountability; the working of police authorities", *Policing and Society* (2011) 21 3 265-283.

⁹⁷ Police Reform and Social Responsibility Act 2011, s 38.

⁹⁸ <http://www.bbc.co.uk/news/uk-england-somerset-33815925>; accessed 02.02.2016. In Gwent, the Police and Crime Commissioner for Gwent obtained the resignation of the chief constable <http://www.bbc.co.uk/news/uk-wales-south-east-wales-22853282> accessed 02.02.2016. The Police and Crime Commissioner for South Yorkshire suspended the chief constable over Hillsborough: <http://www.bbc.co.uk/news/uk-england-36154201> accessed 20.06.2016.

⁹⁹ Lustgarten (n 93) 84f.

¹⁰⁰ Robert Reiner, "Power to the People? A social democratic critique of the Coalition Government's police reforms", in Lister M and Rowe M (eds), (n 90) 139.

¹⁰¹ See text to notes 75-76.

¹⁰² In Gwent: <http://www.bbc.co.uk/news/uk-wales-south-east-wales-22862490> accessed 26.04.2016 and in Gloucestershire: <http://www.bbc.co.uk/news/uk-england-gloucestershire-20341918> accessed 26.04.2016.

Commissioners.¹⁰³ This very limited evidence shows the argument might have some traction.

Legitimacy

Legitimacy and accountability are seen as necessary attributes of regulators.¹⁰⁴ The concept of legitimacy combines the ideas of authorisation, acceptability and fairness. As can be seen from the discussion of independence above, custody visiting, like some other institutions, claims legitimacy by the use of the adjective “independent”.

Legitimacy needs to be distinguished from power. While legitimacy serves to clothe power with authority, it secures compliance by influence rather than coercion, and it provides the “moral glue” for the internalisation of social norms and values.¹⁰⁵ Is, therefore, legitimacy readily distinguishable from Lukes’ three-dimensional power theory? Lukes’ theory helps us to understand how organisations with a great deal of power, like the police, use their legitimacy to get people to do what they want them to do, so that they do not have to coerce them. Diarmaid Harkin has compared Lukes’ views with those of Tom Tyler, as follows.¹⁰⁶ Lukes sees people’s beliefs, consent and recognition of the legitimacy of the police as much a result of power relations as they are a cause of those power relations. He argues that ideological manipulation shapes behaviour in favour of the powerful: authority works on

¹⁰³ e.g., four members of the 16 staff of the Office of the Police and Crime Commissioner for Dyfed-Powys formerly worked for Dyfed-Powys police: <http://www.dyfedpowys-pcc.org.uk/en/work-with-me/my-team/> accessed 26.04.2016.

¹⁰⁴ Baldwin and Cave (n 4) 77-79, and Morgan and Yeung (n 5) 221.

¹⁰⁵ Adam Crawford and Anthea Hucklesby, “Introduction”, in *Legitimacy and Compliance in Criminal Justice*, Crawford A and Hucklesby A (eds), (Routledge 2013) 1-3.

¹⁰⁶ Diarmaid Harkin, “Police legitimacy, ideology and qualitative methods: A critique of procedural justice theory” *Criminology and Criminal Justice* (2015) 15 5 594.

individuals by forging ideological alignment and influencing, shaping and determining their very wants. By contrast, Tyler argues that if the police demonstrate fair procedures, there will be increased police legitimacy. It may be the case, as Harkin argues, that both the authority of the police and their use of fair procedures contribute to their legitimacy. My own view is that Lukes' theory has greater explanatory force in understanding why people see the police as legitimate.

Legitimacy and power do not necessarily go hand in hand. Custody visiting has precious little power, and cannot derive its legitimacy from power, but it does need to be legitimate. Legitimacy is vital for any regulator, because what they do has to be respected. This is particularly true in the case of custody visiting, because of the legitimacy of the object of its scrutiny, the police.

Legitimacy for a regulator derives, first, from a legislative mandate.¹⁰⁷ Custody visiting's legislative mandate¹⁰⁸ requires Police and Crime Commissioners to set up local visiting schemes, but does not say what the schemes are supposed to do.¹⁰⁹ Codes of practice which have been issued about custody visiting do provide some of the detail, although much of it is about what visitors should not do.¹¹⁰ The code does however say that visitors should attend police stations to make checks on the treatment of detainees and the conditions in which they are held, and to check that their rights and entitlements are being observed, and report on them to the Police and Crime

¹⁰⁷ Baldwin and Cave (n 4) 78.

¹⁰⁸ Police Reform Act 2002, s 51(2), as amended by Police and Social Responsibility Act 2011, Schedule 16, part 3, s 299.

¹⁰⁹ As often happens with legislative mandates set out in statutes: Baldwin and Cave (n 4), 78.

¹¹⁰ For example, not involve themselves in a police investigation: 2013 Code of Practice, paras 50 and 60.

Commissioner; there is nothing about what the Police and Crime Commissioner might then do with the reports. The visiting is said to offer protections and confidentiality to detainees and the police and reassurance to the community at large.¹¹¹ This may be being presented as a statement of fact, or as a desired outcome, or probably both at once; but the reassurance to the community is not backed by any rigorous evidence about the effectiveness of the visiting scheme.¹¹² The legislative mandate is, therefore, rather vague, and its success is very hard to measure.

A legislative mandate is not sufficient to provide legitimacy if the organisation is not also acceptable. For instance, bodies set up to deal with complaints against the police have been criticised because of the level of police involvement in investigations of the complaints, and those bodies were abolished.¹¹³ The same issue is still affecting public attitudes towards the latest body to be created for this purpose, the IPCC.¹¹⁴

There are two other sources of legitimacy for custody visiting. The first is Lord Scarman. His report is often referred to in the official literature:

¹¹¹ *ibid* paras 2, 50, 58 and 77.

¹¹² See Chapter Three, text to note 190.

¹¹³ The Police Complaints Board was set up by the Police Act 1976 s 1, and abolished by the Police and Criminal Evidence Act s 83(3). The Police Complaints Authority was set up by the Police and Criminal Evidence Act 1984 s 83(1), and abolished by the Police Reform Act 2002 s 9 (7). The Independent Police Complaints Commission was set up by the Police Reform Act 2002 s 9 (1), and is still in existence. It has been subject to much criticism, and on 22.07.2014 the Home Secretary, Theresa May, announced a review which would look at making it more independent, *The Guardian* (London 23.07.2014) <https://www.theguardian.com/uk-news/2015/jul/23/theresa-may-independent-review-deaths-police-custody-speech> accessed 17.06.2016.

¹¹⁴ e.g., "An end to 'police investigating police': Police complaints investigators not trusted and corrupt officers should have pensions docked, say MPs" *The Independent* 23.05.2014 <http://www.independent.co.uk/news/uk/home-news/an-end-to-police-investigating-police-police-complaints-investigators-not-trusted-and-corrupt-8680722.html> accessed 08.06.2016 and <http://news.sky.com/story/1045977/police-watchdog-woefully-inadequate-say-mps> accessed 23.05.2014.

“Custody visiting owes its origin to Lord Scarman.”¹¹⁵

But the words used are often more emotive than that:

“Lord Scarman believed that the independent visitor scheme would give the public reassurance that people were detained in appropriate condition [*sic*] and their welfare looked after. He was right.”¹¹⁶

At first sight this could be seen as merely providing historical background, even if it is not entirely accurate,¹¹⁷ but it is also a claim to legitimacy by recalling the name of this revered judge. The next sources of legitimacy are human rights law and the United Nations treaty about protection from torture in detention,¹¹⁸ neither of which, unlike Lord Scarman, are publicised in the official literature. This may arise from the perception of the Police and Crime Commissioners, who publish that literature, that Human Rights and the United Nations do not have the same appeal to the public as the memory of Lord Scarman.

In several major respects, these sources of legitimacy may be lending custody visiting more legitimacy than it deserves, since the design and practice of

¹¹⁵ Found in much of the official literature: e.g. Essex Police Authority Independent Custody Visiting Scheme Annual Report 2010/11, www.essex.pcc.police.uk/wp-content/uploads/.../ICV-Annual-report-2010.11-doc.doc accessed 17.06.2016.

¹¹⁶ Speech by Jane Kennedy, Merseyside PCC, on 21.09.2013, at the North West Regional ICV Conference at Haydock Park, Merseyside: <http://www.merseysidepcc.info/UserFiles/file/speech%20to%20Custody%20Visitors.pdf> accessed 08.06.2014.

¹¹⁷ Michael Meacher is never mentioned.

¹¹⁸ ECHR articles 2, 3, 5 and 6 in particular, the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and The Optional Protocol to the Convention against Torture and other cruel inhuman or degrading Treatment or Punishment, “OPCAT”: a treaty which supplements the 1984 UN Convention against Torture. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx> accessed 31.05.2015.

custody visiting does not live up to the standards originally envisaged.¹¹⁹ Does this impair its legitimacy? If the public knew about these issues, would that make a difference to the level of legitimacy?

Julia Black states that an organisation is regarded as legitimate if it is socially credible and socially acceptable. She says that this follows Max Weber's view that power (including regulatory) relations are legitimate when those engaged in them perceive or believe them to be so: other than that perception and belief, there are no other criteria to assess the acceptance. Legitimacy is not therefore necessarily a question of whether an organisation has legal validity, the "legislative mandate" discussed above. Nor is legitimacy dependent on moral acceptance. Black notes the pragmatic issue of whether the organisation meets interests or expectations, and the cognitive issue of whether what the organisation does is "taken for granted".¹²⁰ People's reasons for acceptance of any organisation, but perhaps especially a regulator, derive from what they know about the organisation. Presumably, therefore, to prove custody visiting's legitimacy, it must first be established that people have heard of it; and then one might go on to seek to ascertain their opinion about it. This research will seek to establish the levels of knowledge and acceptance of custody visiting among those who encounter it. If it turns out that very few people know about it, consideration will have to be given to what that says about the organisation's quality of legitimacy.

¹¹⁹ See Chapter Three, text to notes 191-194.

¹²⁰ Julia Black, "Constructing and contesting legitimacy and accountability in polycentric regulatory regimes" *Regulation & Governance* (2008) 2 2 137.

The final aspect of legitimacy is due process,¹²¹ i.e., having fair and open procedures, with attention being paid to equality, fairness and consistency of treatment, and allowing public participation. Custody visiting does not meet all these requirements of due process. It may display the virtues of equality and fairness in its dealings with both detainees and the police, but both those qualities are very hard to measure. Whether its operations are consistent, when there are 43 separate schemes and a large number of volunteer visitors, is impossible to say: the work of ICVA with the scheme administrators may provide a certain level of consistency.¹²² But there is no opportunity for public participation. Although the visitors are members of the public, and the public could be said to participate in that way, the visitors have no way of communicating with the rest of the public, do not liaise with any community organisations, and are not allowed independent publicity of any kind.¹²³ There is very little public access to what is going on, except by reading the bland and uncritical reports published on Police and Crime Commissioners' websites.¹²⁴

Accountability

Accountability is a concept which raises three different questions in the study of custody visiting. It is easy to confuse them. The first question is whether

¹²¹ The reality of the procedures: Packer's use of this expression is descriptive of an attitude.

¹²² I cannot verify this as I was not permitted to attend their annual conferences for scheme administrators: see Chapter One, text to note 123.

¹²³ Contrary to what Lord Scarman wanted: see Chapter Three, text to notes 39-41. In the 2013 Code of Practice, para 77, one reads that visitors' reports "must go to the PCC and other parties as determined locally". As far as I know, there were no other parties receiving the reports in either Dyfed-Powys, where I was a visitor, or in the area studied.

¹²⁴ See Chapter Six, text to notes 155-158.

accountability, as a characteristic of regulation,¹²⁵ is an attribute of custody visiting. This is the question discussed here. The second and third questions relate to the accountability of the police. They are: whether, as the official literature claims, custody visiting enhances the accountability of the police, discussed elsewhere:¹²⁶ and whether the police are accountable to the Police and Crime Commissioner, which is part of the discussion of the concept of independence above.¹²⁷

Like independence,¹²⁸ accountability has become a “hurrah” word.¹²⁹ One needs to get behind the marketing to find out what these words mean. Keith Syrett’s definition of accountability is:

“answering for, explaining or justifying one’s actions or decisions, usually to some external body which is independent of the original decision-maker/actor.”¹³⁰

Accountability requires there to be a process. As Michael Lipsky wrote:

“One is always accountable to someone: accountability is not abstract.”¹³¹

The party calling the other party to account seeks answers and rectification and may impose sanctions for non-compliance. Thus there are three steps:

¹²⁵ See fn 104.

¹²⁶ See Chapter Three, text to note 189, and Chapter Six, text to notes 207-211.

¹²⁷ See text to notes 84-103.

¹²⁸ See text to notes 57-60.

¹²⁹ Mark Bovens, “Public Accountability” in E Ferlie, L E Lynn and C Pollitt (eds), *The Oxford Handbook of Public Management*, (OUP 2005) 182, 184.

¹³⁰ Keith Syrett, *The Foundations of Public Law* (Palgrave Macmillan 2011) 160.

¹³¹ Michael Lipsky, *Street Level Bureaucrats: Dilemmas of the Individual in Public Services* (Russell Sage Foundation 1980) 160.

information, discussion and consequences.¹³² A number of other meanings have been identified. These range from the associated concept of responsibility, which does not require any accounting to be done, to the means of imposing control.¹³³ This analysis keeps to the basic meaning of external scrutiny. This relationship of external scrutiny is a communicative process, and it is the route through which pragmatic and moral/normative legitimacy claims are validated.¹³⁴ As has been shown, custody visiting's legislative mandate is far from precise. Baldwin and Cave state that regulators with imprecise mandates may nevertheless claim the support of the public, because they are properly accountable to and controlled by democratic institutions.¹³⁵

Making an analysis of custody visiting in terms of accountability requires one to search for occasions when accounting could be said to take place. A process of accounting could be discerned at two different levels. The first level is in the relations between the custody visitors and the Police and Crime Commissioner. The second level is in the relations between the custody visiting scheme, in the persona of the Police and Crime Commissioner, and the various bodies to whom the Police and Crime Commissioner may be said to account, which are: the voting public; the Police and Crime Panel which

¹³² Gijs Jan Brandsma and Thomas Schillemans, "The Accountability Cube: Measuring Accountability", *Journal of Public Administration Research and Theory* 2013, 23 4, p 953.

¹³³ Baldwin and Cave (n 4) 78-9: Bovens (n 129) argues that it should not be equivalent to control. Scott sees control and accountability operating on a continuum: Colin Scott, "Accountability in the Regulatory State" *Journal of Law and Society* (2000) 27 1 38, 39.

¹³⁴ Black (n 120).

¹³⁵ Baldwin and Cave (n 4) 69.

scrutinises the work of the Police and Crime Commissioner;¹³⁶ central government; and political sponsors.¹³⁷

The process of accounting would need to be examined in all of these relationships. At the first level, the Police and Crime Commissioner is a democratic institution, elected by voters in each area, so one could argue that custody visitors are accountable to an elected official. However, accounting is usually made to a different body: the Police and Crime Commissioner completely controls the visitors and they do not have a separate corporate identity.¹³⁸ At the second level, the only information available to the public, to the Police and Crime Panel, to central government, and to political sponsors, is a report,¹³⁹ and there is no provision for any questioning of the way that custody visitors go about their work. Each body would have different sanctions available: the public could, eventually, vote the Police and Crime Commissioner out of office; the Panel could issue advice; the government has power over Police and Crime Commissioners, but this seems to be less than they used to have over police authorities;¹⁴⁰ and political sponsors could withdraw their support. The “three-step test”¹⁴¹ can also be applied to the results of the empirical research, to establish whether there have been information, discussion and consequences.

¹³⁶ set up under Police and Social Responsibility Act 2011, ss 28-33.

¹³⁷ John Raine, “Electocracy with accountabilities? The novel governance model of Police and Crime Commissioners” in Lister S and Rowe M (eds), (n 90) 111.

¹³⁸ See text around note 84.

¹³⁹ See Chapter Six, text to notes 160-163.

¹⁴⁰ See text to notes 97-103.

¹⁴¹ See text to note 132.

Effectiveness

This thesis examines the quality of effectiveness, to establish how well it is carrying out its work of regulation. Effectiveness is defined as “the degree to which something is successful in producing a desired result”,¹⁴² or a purpose. Effectiveness is important for any regulator, simply because an ineffective regulator will fail to achieve its only purpose, that of regulation. However, not all writers on regulation adopt the language of effectiveness: for example, Baldwin and Cave use the terms “expertise” and “efficiency”.¹⁴³ The issue of efficiency is seen in terms of whether the discharge of the legislative mandate is value for money and/or whether the regulation leads to efficient results, which is measured in terms of economics,¹⁴⁴ a measurement which would present formidable difficulties, beyond the expertise of this researcher. In any case, efficiency is primarily about the use of resources, while effectiveness is about the results that are achieved, which is the issue in this thesis.

Expertise offers a much more fruitful perspective than efficiency. Expertise is relevant if the regulatory function requires the exercise of expert judgment. The downside may be that the general public have less trust in custody visiting carried out by experts simply because they are experts.¹⁴⁵ But can lay persons deal with the work of custody visiting satisfactorily? The approach to this question taken by Lord Scarman and the Home Office differs markedly from the approach taken by Michael Meacher MP and the United Nations. Lord Scarman said the visitors should be persons, other than police officers,

¹⁴² <https://www.oxforddictionaries.com/definition/english/effectiveness> accessed 20.06.2016.

¹⁴³ Baldwin and Cave (n 4) 80-82.

¹⁴⁴ *ibid* 81.

¹⁴⁵ *ibid* 80.

who were members of newly created police liaison committees in London and police authorities newly oriented to consultation elsewhere.¹⁴⁶ The Home Office did not want visitors to be criminal justice professionals, such as lawyers and probation officers.¹⁴⁷ By contrast, Mr Meacher, in his evidence to the House of Commons Home Affairs Committee in 1980, proposed that each group of visitors should include a lawyer.¹⁴⁸ The United Nations treaty requires visitors to be “qualified and experienced persons”, and people with the “necessary expertise”.¹⁴⁹ Most visitors gain the necessary experience only by carrying out the visiting work: and, to be equipped with the necessary expertise, they would need specific training.

This discussion of expertise shows how there can be conflicts between concepts, as to which should be prioritised. Visitors should have a good understanding of what is being regulated. People with professional experience of the criminal justice system should therefore be better equipped for this role than amateur volunteers, but that professional experience might reduce the degree of their neutrality. Similarly, visitors who positively identify with detainees should be better equipped to communicate with those detainees and to understand their needs, but that also might compromise their neutrality. In designing a system of regulation, choices of this sort have to be made.

As well as the volunteer/expert issue, questions of the other attributes of visitors are relevant to effectiveness. What sort of people apply, and what sort

¹⁴⁶ Baldwin and Cave (n 4) 80.

¹⁴⁷ but then seemed to change its mind: see Chapter Three, text to notes 127 and 161.

¹⁴⁸ See Chapter Three, text to note 13.

¹⁴⁹ See Chapter Six, text to notes 165f.

of people are selected? What qualities are the scheme administrators looking for? Are they careful to ensure a wide spread of types of people, spanning the differences in gender, race, religion, physical ability, age and sexual orientation? Diversity among visitors is important, because of diversity of the detainees: diversity should enhance the effectiveness of visiting by improving the quality of visitors' communication with the detainees.

The effectiveness of custody visiting as a regulator could be assessed by reference to the degree of protection it gives to detainees. But that would not be the whole story, because of the significant inherent limitations which prevent visiting from increasing its effectiveness. Visitors regulate police detention by checking compliance with PACE rights. But what do the PACE rights amount to? First, PACE allows the custody sergeant to delay the operation of the PACE rights.¹⁵⁰ Second, it will always be impossible for custody visiting to provide adequate protection to detainees against all and any breaches of PACE: visitors make occasional visits, and even if they visited much more often, they cannot always be there to prevent the police from breaching PACE. Third, some scholars take the view that PACE rights are in any event insufficient to protect detainees, so checking on the extent of compliance by the police with the PACE rights can take the protection of detainees only so far.¹⁵¹ In other words, it is possible for detainees to be

¹⁵⁰ Police and Criminal Evidence Act 1984, s 58(8).

¹⁵¹ e.g., Andrew Sanders, "Can Coercive Powers be Controlled or Regulated? The Case for Anchored Pluralism" in Cape E and Young R (eds), (n 50) 68.

subjected to inhumane treatment and pressure leading to false confessions without there having been any breaches of PACE.¹⁵²

It would be strange for any regulator to stigmatise behaviour that is not prohibited by the law, or, in this case, behaviour that is not prohibited by a code of practice which is seen as having the force of law: what legitimacy would the regulator have, and how could the regulator's criticisms be justified? There are other limitations on the potential of custody visiting to be an effective regulator. Visitors cannot check on how detainees are being treated while they are in police interview, nor on those who are being interviewed without also being formally detained, which could be at a police station not designated for custody, or indeed anywhere.¹⁵³

Subject to these limitations, how can the researcher assess effectiveness as a regulator? The purpose of regulation of the police is to ensure that the police respect the rights of detainees and safeguard their welfare. The most serious consequence of police misbehaviour in custody blocks is the death of a detainee. In assessing whether custody visiting made, or could have made, an impact on the incidence of police behaviour, the first and most basic fact to establish is whether the visiting actually took place, which can be ascertained from the statistics. If that is established, the pattern of the visiting needs to be analysed. The random quality of the visits was an important feature of the

¹⁵² Sanders *et al* (n 47) 319ff. Compare the situation visitors would be in with that of the IPCC when they found that, in a case of a death following custody, reasonable force had been used, and the only recommendation was that further training is needed: <https://www.ipcc.gov.uk/news/merseyside-police-must-improve-safety-training-its-officers> accessed 20.05.2016.

¹⁵³ Police and Criminal Evidence Act 1984, s 29.

recommendations in the Scarman Report,¹⁵⁴ but curiously neither the circulars, not the statute, nor the codes of practice use the word random to describe the visiting. In the Home Office letter covering the 1986 circular, and in the 2001 circular, mention is made of random checks being a feature of Lord Scarman's proposals, but randomness is not specified as a feature of the visiting contemplated by the circulars. Those circulars use the word "unannounced": two other circulars use no adjective at all, and neither the word "random" nor the word "unannounced" can be found in any of the codes of practice to describe visiting except once, indirectly. Both words form part of the description of visiting work in some of the local official literature.¹⁵⁵ The effect of the omission of these words is to take custody visiting further away from being a regulator, let alone an effective regulator.

Random unannounced visits are an instance of what Hood calls "contrived randomness oversight", and which he describes as a technique of public management, whereby uncertainty is deliberately introduced into a social setting to influence behaviour.¹⁵⁶ Hood *et al* give unannounced spot checks by the Prisons Inspectorate as an example of contrived randomness oversight, and report that several of their interviewees said that unannounced spot

¹⁵⁴ Scarman (n 9) 7.7-7.10.

¹⁵⁵ The covering letter for the 1986 Circular refers to the carrying out of random checks, as does the 2001 Circular, both in the context of Lord Scarman's proposals. The 1986 and 1991 Circulars use the word unannounced but not the word random. The 1991 and 1992 Circulars say that visits would normally be unscheduled, in contrast with "special" (i.e., by invitation of the police) visits: see Chapter Three Text to notes 126-128, and Chapter Six, text to notes 184-198. The 1992 Circular and the 2003 and 2010 Codes of Practice use neither the word unannounced nor the word random. The 2013 Code of Practice refers to the visits being unannounced, but only indirectly to contrast with the practice for detainees suspected of terrorist offences: see Chapter Three, text to note 180 and the note. However, the Mayor of London's handbook reads: "Once a week two visitors from a local panel attend a police station at a random, unannounced time to make an inspection and speak to detainees." <https://www.london.gov.uk/what-we-do/mayors-office-policing-and-crime-mopac/community-safety/independent-custody-visitors#Stub-162971> accessed 26.04.2016.

¹⁵⁶ Christopher Hood, *The Art of the State* (OUP 1998) 237. Randomness oversight is also known as "intermittency": Black (n 120) at 158 n 8.

checks were far more effective than visits announced in advance.¹⁵⁷ This technique is followed by the Care Quality Commission in its inspection of care home services.¹⁵⁸ Here the issue will be the extent to which the visiting really is random and unannounced, and the extent by which that quality can be eroded by habitual visiting at specific times.

The frequency of visits is another means to measure effectiveness. The current code of practice¹⁵⁹ mentions effectiveness, but the wording gives no inkling as to what level of frequency would be needed to achieve effectiveness, let alone how to assess what was meant by being effective. Some UK regulators (but not the custody visiting schemes) are obliged to fix the frequency of their visits according to a risk assessment.¹⁶⁰ This means that the amount of regulation should depend on an assessment of how well the bodies the regulators inspect score and therefore how frequently (or infrequently) they need to be inspected. Should custody visiting follow this regime? Should the local schemes apply risk assessments to determine the frequency of visits? This raises the question of what the risk is that is to be assessed. For example, is it that detainees have not been told their rights? Or is it that detainees are being mistreated?

What do visitors actually do on their visits, and what checks do they make? Summaries of the visitors' reports are published by the Police and Crime

¹⁵⁷ Hood et al (n 11) 17.

¹⁵⁸ <http://www.cqc.org.uk/content/what-we-do-inspection> accessed 08.06.2016.

¹⁵⁹ 2013 Code of Practice, para 40.

¹⁶⁰ This is implicit in the statutory principles: "(a) regulatory activities should be carried out in a way which is transparent, accountable, proportionate and consistent; (b) regulatory activities should be targeted only at cases in which action is needed:" Legislative and Regulatory Reform Act 2006, s 21. Custody Visiting, ICV and ICV Schemes do not appear in the list of bodies to which the law applies: SI 2007 No. 3544.

Commissioner. The visitors' work involves looking round the custody block, making checks on some individual issues, and checking that detainees' rights are being respected by seeking interviews with them. These checks will be reviewed in order to assess their contribution towards effectiveness. But there are a number of significant restrictions on what visitors can do. The police can delay access to the custody block, and they can deny access to particular detainees.¹⁶¹ The way visitors are introduced may cause detainees not to trust the visitors.¹⁶² Visitors are told not to get involved with the criminal investigation, and that if a detainee does talk about the investigation, the visitor must tell them that they will be passing the information on to the custody officer and that it may be disclosed in legal proceedings, which would mean that visitors could be required to give evidence in court about the content of an interview.¹⁶³ If a detainee wishes to make a complaint against the police, the visitor must not deal with the matter and should advise the detainee to address it to the custody officer: visitors may include this issue in their report which may be read by the custody officer.¹⁶⁴ In these circumstances, it is less likely that there will be meaningful communication between the visitor and the detainee.

Visitors may, at their option, view custody records, provided that the detainee consents or is intoxicated and therefore incapable of consenting: not if the detainee is merely asleep. The record may be used to check what detainees tell visitors: it may contradict what the detainees say, or it may back them up.

¹⁶¹ 2013 Code of Practice, paras 49 and 55.

¹⁶² See text to note 74.

¹⁶³ 2013 Code of Practice, para 60.

¹⁶⁴ *ibid*, paras 74-5.

How useful this really is depends on the extent to which the record system is accurate, self-serving or deliberately falsified,¹⁶⁵ and whether the visitor can understand the records.

The effectiveness of the reporting system will be seen to depend on the thoroughness of the work of the visitors, the effect of discussions of their reports with the custody sergeant, and how the reports were dealt with by the scheme administrator. The final question bearing on effectiveness, and allied to the reporting mechanism, is whether the visitors have any public voice. From the desk evidence, it would appear that they have no local or national voice.¹⁶⁶ Would visitors be more effective if they could express themselves independently of Police and Crime Commissioners and the Independent Custody Visiting Association (ICVA)?

To answer the questions raised by these issues, the following five criteria of effectiveness were developed and will be applied to the empirical research:

1. Whether the visits actually took place: the precondition of effectiveness.

¹⁶⁵ See Chapter One, text to note 85, and the note.

¹⁶⁶ Except for the following story, where the Mayor of London's Office for Policing and Crime apparently withdrew accreditation from an outspoken custody visitor. The visitor publicly criticised the treatment of two brothers, aged 11 and 14, who were both held in custody at Bexleyheath Police Station, as "inhumane": *Bexley Times* (28.01.2014): http://www.bexleytimes.co.uk/news/bishop_criticises_inhumane_treatment_of_11_year_old_boy_at_bexleyheath_police_station_1_3256801 accessed 04.07.2016. According to his blog, the custody visitor concerned was an Archbishop of the Open Episcopal Church, and his accreditation as a custody visitor was removed for allegedly failing to treat fellow Independent Custody Visitors with due respect and courtesy: <http://www.bishopjonathanblake.blogspot.co.uk/2014/07/the-pretence-of-independent-custody.html> accessed 04.07.2016.

2. Whether the police behaved differently towards detainees because they knew that custody visitors might arrive at any time, without notice, or because a visit was actually in progress.
3. Whether visits caused police behaviour to be changed/aligned, either at the time or subsequently.
4. Whether the reporting system caused police behaviour to be changed/aligned.
5. Whether custody visiting enabled the public to know what was happening in custody blocks.

The research will look into whether general changes in police behaviour were prompted by visitors' reports, given that the reports were usually likely to be about the complaints of individuals. The report of a detainee complaining about not getting a phone call could raise the questions of whether the visitor's report led to the individual who complained getting a phone call, and/or whether the complaint of the one individual led to more detainees getting phone calls.

Measuring the effectiveness of a regulator is problematic when there are other regulators at work in the same field: the Police and Crime Commissioners, HMIC and the IPCC. And there may be other factors at work. For instance, some scholars believe that the introduction of CCTV in custody blocks has had a marked effect on police behaviour.¹⁶⁷ It is difficult to attribute any particular outcome, change or effect to one or more of a multiple of possible

¹⁶⁷ Tim Newburn and Stephanie Hayman, *Policing, Surveillance and Social Control: CCTV and police monitoring of suspects* (Routledge 2002) 157.

causes. And, as will be seen, in many cases the best that can be done is to assess the likelihood of effectiveness. In the case of visitors' meetings with detainees I was able, however, to make a direct assessment of the effectiveness of their interaction.

Conclusion

This chapter has explained the relevance of regulation in this thesis, and set out the concepts, some of which derive from regulation and others from the topics of human rights, criminal justice, policing, and detention in the closed institution of police custody. These concepts underpin this research, and this chapter has explained how they will be drawn on in the examination of my research findings.

I have demonstrated that custody visiting does find its place as a regulator, which enables the analysis of custody visiting as regulation to proceed. Lukes' concept of power explains how power operates, subliminally, without needing to be exercised, and how this applies to relations with the police. Packer's models of criminal justice enable one to establish the ideology of custody visiting and the attitudes of the visitors, and the application of Lukes' concept of power explains why the orientation might well turn out to be crime control. I have shown how independence is a matter of degree, and that it depends, not only on the structure of custody visiting and whether the visitors had tenure, but also on who the visitors were, and what sort of attitudes they had towards custody. This discussion showed that the concepts of neutrality and impartiality can usefully be drawn on as allied, and distinct, qualities. These

concepts will be drawn in to assess the data I have collected about the attitudes of the visitors in Chapter Five.

The chapter then looked at the necessary attributes of a regulator: legitimacy, accountability and effectiveness. Both legitimacy and accountability were shown to turn on the extent of public knowledge about custody visiting. Measuring effectiveness is not so easy to tackle. How should custody visitors regulate the police, who hold all the power, on their home territory, and what should we expect to be the outcome of their work of visiting, checking, and reporting? The five criteria of effectiveness set out above will be the principal means by which the concept of effectiveness will be drawn on for the examination of my empirical research about the work of custody visiting in Chapter Six.

Before the explanation of the research methods in Chapter Four and the results of the research in Chapters Five and Six, Chapter Three provides an analysis, from desk and archival research, of the policies which have been followed in custody visiting since its inception in the early 1980s. The discussion in this chapter of the concepts of power, criminal justice models and independence provide the conceptual basis for this analysis of the policies.

CHAPTER THREE

POLICY

The concepts discussed in Chapter Two can now be drawn on for a critical and analytical history of custody visiting, centring on the policy issues. Particularly relevant are the concepts of power, Herbert Packer's models of criminal justice, and independence. The story begins in 1980, when Michael Meacher MP made the first proposals for custody visiting. In 1981 the Scarman Report included a recommendation for a statutory scheme of custody visiting, which the government declined to implement. Custody visiting operated from 1984 on a rather haphazard and unofficial basis, and was known as "lay visiting"; the current statutory scheme of "independent custody visiting" was initiated in 2002. This chapter analyses both the policies of the proponents of custody visiting and the policies of the government and the police, and demonstrates how, in both phases, the powerful influence of the police impacted on the original regulatory purpose and orientation of custody visiting, and on the independence of the visitors.

Michael Meacher MP

In 1980, the House of Commons Home Affairs Committee was considering deaths in police custody.¹ It was in evidence to this committee that Michael

¹ Third Report of the Committee, House of Commons Home Affairs Committee, Session 1979-80 HC 631.

Meacher MP² made his proposal for custody visiting. There had been much recent public concern stemming from the media allegations relating to three high-profile cases: the case of Blair Peach at a demonstration in 1979; the case of Liddle Towers after release from police custody in 1976; and the case of James Kelly after being arrested in 1979. The committee noted that only the death of James Kelly counted as a death in police custody under their definition.³ The definition of deaths in custody currently offered by the Independent Police Complaints Commission encompasses cases where people die both during and following police custody, and the overall categorisation is given as “deaths during or following police contact”, which would have covered all three instances.⁴ Working with that definition, the committee noted that, between 1970 and 1979, 274 people died while in the custody of the police, and that the announcement of this statistic gave rise to further public anxiety. The committee reviewed a sample of cases and considered what general lessons could be learned, and what recurrent pattern of events could be observed.⁵ For example, the committee expressed concern

² Michael Meacher MP (04.11.1939 – 21.10.2015) was a Labour Member of Parliament from 1970, initially for Oldham West, and for Oldham West and Royton from 1997 until his death in 2015. Some members of the Home Affairs Committee expressed their gratitude to Mr Meacher for his campaign: e.g., Alex Lyon and Robert Kilroy-Silk at paras 433 and 361 respectively. Mr Meacher had become interested in deaths in custody and the idea of custody visiting as a result of conversations with a retired Methodist minister, Rev. Ralph Bell, now also deceased, at Otterburn, Northumberland, where the concern had been the death of Liddle Towers, in Newcastle-on-Tyne, not far away. As well as taking a prominent role in the proceedings of the Home Affairs Committee, Mr Meacher asked parliamentary questions about deaths and injuries sustained by persons detained by the police, and about complaints against the police, on 15.11.1979, 31.01.1980, 28.02.1980, 17.07.1980 and 15.12.1982: and also on three occasions in 2009 and 2011. With Frank Hooley MP and others he presented a bill about deaths in custody to Parliament on 23.01.1980. He took part in House of Commons debates on the subject on 18.12.1979, 17.04.1980, 31.07.1980, 20.03.1981, and 09.07.1981.

³ Home Affairs Committee (n 1), Report, 1 and 2.

⁴ <https://www.ipcc.gov.uk/page/deaths-during-or-following-police-contact>: accessed 13.06.2016.

⁵ Home Affairs Committee (n 1), Report, 2.

about the welfare in police custody of intoxicated people, who were a large proportion of the people who had died in custody.⁶

Michael Meacher MP gave evidence to the committee. He called for a public inquiry⁷ into deaths in custody, as it was his view that there was a clear correlation between the numbers of complaints against the police alleging assault and the numbers of deaths in police custody.⁸ He made four proposals for reform. The first proposal was that, as a deterrent against the possibility of assault against those held in custody, the Home Secretary should set up, on an experimental basis in half a dozen areas, a panel of visitors with right of access to police station cells for unannounced visits, or with minimum practical notice, to take statements from “prisoners”⁹ who had allegations to make of police violence against them, to seek to validate the truth or otherwise of such statements; and to make regular reports to the Home Secretary and to the police authority of the area.¹⁰ The context of the visiting proposal is demonstrated by Mr Meacher’s other three proposals, which were: to review whether the powers of police committees should be extended to achieve proper public accountability; to set up an independent police complaints body; and to inquire into prosecution policy and practice.¹¹ On the last point, it is clear, from Mr Meacher’s answer to a question, that his

⁶ *ibid* 14-15.

⁷ The Home Secretary turned down Mr Meacher’s call for a public inquiry on 01.03.1980: *ibid* 117.

⁸ Home Affairs Committee (n 1), *Memorandum submitted by Mr Michael Meacher MP on Deaths in Police Custody*, B.

⁹ This was the expression used in the evidence.

¹⁰ *Memorandum* (n 8), D1.

¹¹ *ibid* D 2-4.

concern was that there had never been a prosecution of a police officer where there was an allegation of assault and where a person had died in custody.¹²

In answer to questions from the chairman of the committee, Mr Meacher said that he thought that a group of two or three visitors should always include a lawyer;¹³ and that his suggestion did not show distrust in the police, but that where people were in the power of the authorities and out of sight and out of hearing of members of the public, as was the case in mental institutions, these safeguards were valuable.¹⁴ In answer to another question, Mr Meacher spoke about an inquest relating to a man who died in hospital a few days after spending a night in custody. He had been arrested in the evening and was brought to a police station suffering from a serious head injury. The cause of that injury was itself at issue. But particularly relevant to the need for custody visiting was the police's neglect of this man's welfare. The police first said that the deceased man had been visited regularly during the night, but under questioning from the coroner admitted that they had made no visits to the man's cell between 2am and 6am.¹⁵

A member of the committee asked Mr Meacher whether he was implying that there was a systematic, consistent system of brutality at police stations. Mr Meacher denied he was suggesting that. But he did say that there was a degree of violence by the police which in any particular case might or might

¹² *ibid* minutes of evidence 478.

¹³ *ibid* 421.

¹⁴ *ibid* 422.

¹⁵ *ibid* 428.

not be justified, and that visitors could act as a deterrent.¹⁶ Another member of the committee, John Wheeler, said that he and other MPs, along with lawyers, doctors, other police officers uninvolved with a particular case and judges called at police stations unannounced: he asked whether Mr Meacher agreed that those visits were a contribution to the safeguarding of both police officers and those held in police stations. Mr Meacher's answer was that he doubted that visits of this sort were sufficiently systematic or frequent.¹⁷ Mr Wheeler also said that he did not understand how people were afraid to make complaints against the police; and he said he was amazed that, with so many people passing through, so few people died in police stations.¹⁸

The committee did not endorse Mr Meacher's visiting proposal. They said they were satisfied that the prescribed procedures could afford adequate protection to detained persons provided they were strictly adhered to. So their recommendation was that Chief Police Officers should arrange for sufficient random checks to be carried out to ensure that the procedures were properly observed:¹⁹ presumably these checks would be carried out by other police officers.

Those were the circumstances in which Michael Meacher made his proposal. Particularly interesting were his recommendations that each group of visitors should include a lawyer, and that visitors should investigate allegations by detainees that the police had assaulted them. The suggestion that each group

¹⁶ *ibid* 461-467.

¹⁷ *ibid* 446-460. This may be the only reference to this practice.

¹⁸ *ibid* 452, 378.

¹⁹ *ibid* report 13.

should include a lawyer would give the visiting work a professional edge that would make it much more effective, but this has never been official policy. As to visitors being involved with complaints, successive circulars and codes of practice issued by the Home Office have said that visitors should advise a detainee who makes an allegation of misconduct against a specific police officer to address the complaint to the duty officer in charge of the station, and earlier publications warned that visitors who took part in complaints would be in breach of their duty of impartiality.²⁰

Mr Meacher's thinking about custody visiting was firmly embedded in the need for greater police accountability, and was based on the following assumptions: that safeguards are needed because police custody is hidden from the public; that the number of injuries and deaths in police custody should be reduced; that random visiting would be a deterrent against police misbehaviour; that some at least of the visitors should be lawyers; that the police do not always tell the truth about what happens to detainees in custody; and that the police complaints system needed to be reformed, with visitors playing a role. Mr Meacher's proposal was for regulation of police behaviour. Random visiting is a recognised attribute of regulation:²¹ the effectiveness of the visitors would have been improved by some of them being lawyers. In terms of Packer's models of criminal justice,²² Mr Meacher was a due process adherent, who

²⁰ 1991 Circular para 39; 1992 Circular para 36; 2001 Circular para 90; 2003 Code of Practice para 74; 2010 Code of Practice para 55; 2013 Code of Practice para 75. 1986 Circular para 21, said only that visitors should not involve themselves in these complaints. The Dyfed-Powys police authority scheme handbook, 2008 version, (copy in my possession), para 4.9, said that if a visitor made a complaint, the police authority could suspend or curtail the duties of that visitor *in the interests of impartiality*: (emphasis added).

²¹ See Chapter Two, text to notes 156-158.

²² See Chapter Two, text to notes 47-51.

saw the need for interventions on behalf of detainees. He understood their vulnerability in the face of police power in a closed institution.²³ He parted company with the crime control view articulated by Mr Wheeler that no new safeguards were needed, that detainees did not need help to make complaints, that the death toll was no concern, and that the police should be allowed to get on with their work without interruptions.

The Brixton Riots and the Scarman Report

In 1981 there were serious civil disturbances in England, in particular in Brixton, south London, over the weekend of 10-12 April. The government reacted very quickly. The Home Secretary, William Whitelaw MP (Conservative), announced the setting up of an inquiry in the House of Commons on 13 April, and on 14 April he appointed Lord Scarman, a senior judge,²⁴ to hold the inquiry.²⁵ The terms of reference were to inquire urgently and to report with the power to make recommendations.²⁶ The report was published on 25 November 1981. It summarised the events as:

“... scenes of violence and disorder ... the like of which had not previously been seen in this century in Britain. In the centre of Brixton a few hundred young people - most, but not all of them, black - attacked

²³ See Chapter One, text to notes 40-47 and 64-69.

²⁴ Leslie George Scarman, Baron Scarman, OBE, PC (29.07.1911 – 08.12.2004) was an English barrister and judge who served as a Law Lord (the equivalent role now is a Justice of the Supreme Court) from 1977 until his retirement in 1986. He is best known for chairing the Brixton inquiry. He also chaired inquiries into the Northern Ireland riots of August 1969 (1969 - 1972), the Red Lion Square disorders (1975) and the Grunwick dispute (1977).

²⁵ Under Police Act 1964, s 32, which is no longer in force: the provision empowered the Home Secretary to cause a local inquiry to be held by a person appointed by him into any matter connected with the policing in any area.

²⁶ Lord Scarman, *The Brixton Disorders 10 - 12 April 1981* (Cmnd 8427 1981), 1.1.

the police on the streets with stones, bricks, iron bars and petrol bombs ... These young people ... brought about a temporary collapse of law and order in the centre of an inner suburb of London ... the toll of human injury and property damage was ... comparable with the aftermath of an air-raid.”²⁷

The report reviewed the social and economic conditions and the disorders in detail, and then proceeded to a section on the police. The report paid tribute to the police, but found that they had to carry some responsibility for the outbreak of disorder.²⁸ Part V of the report, headed “Policing - proposals and recommendations”, contained a section on monitoring, which said that the pattern of complaints against the police had to be kept under review, and that policy decisions had to be reviewed to avoid racial stereotyping. It went on to say that the allegations of police misconduct did not relate only to what happened in the street but extended to behaviour in police stations, particularly in the questioning and detention of suspects, and it supported the introduction of an element of independent inspection and supervision of suspects in police stations.²⁹ A subsequent section on consultation and accountability said that statutory accountability was the key to successful consultation and socially responsible policing, and that exclusive reliance on voluntary consultation machinery, which had failed in Brixton, would not do. The report found that the police were accountable, but that there was no link between accountability and consultation. The link was “tenuous to vanishing point” in London: more effective, but insufficiently developed, outside London.

²⁷ *ibid* 1.2-3.

²⁸ *ibid* 4.97.

²⁹ *ibid* 5.38-40.

In the section on consultation and accountability in London, the report recommended the formation of statutory liaison committees, and said it was essential that the local machinery should not be a “statutory talking shop” but should have “real” powers. Those powers should include both a role in the reformed complaints procedure and in the inspection of detention areas within police stations.³⁰

The report’s recommendations on custody visiting are one part of a package which contains two other linked recommendations, about the need for greater police accountability, and for the reform of the procedure for police complaints. The recommendations about visiting are found in a number of different parts of the report. The summary recommendation for law reform simply states:

“I recommend provision for random checks by persons other than police officers on the interrogation and detention of suspects in the police station.”³¹

The detail is found in earlier paragraphs in Part VIIC,³² which is headed “Lay police station visitors”. The report mentioned the Home Secretary’s current review of the “whole problem of safeguards for suspected persons under interrogation or detention in police stations”,³³ and went on to state that more needed to be done to safeguard those suspects than reforming the complaints

³⁰ *ibid* 5.55-71.

³¹ *ibid* 8.60.

³² *ibid* 7.7-7.10.

³³ *Report of the Royal Commission on Criminal Procedure: The Philips Commission 1979-81*: (Cmnd 8092, 1981).

system.³⁴ Next, the report mentioned the House of Commons Home Affairs Committee Report on Deaths in Police Custody.³⁵ This reference suggests that Lord Scarman saw the issue of deaths in police custody as an important concern. His report endorsed the Committee's recommendation for random checks.³⁶ It follows from the stipulation that visits should be random (the expression "at any time" is also used) that the visits should be unannounced, although that word does not appear. The report added that, as a safeguard, those recommendations would be greatly strengthened if the system of checks were backed by a statutory system of independent investigation and supervision of interrogation procedures and detention in police stations. The report considered a system comparable to Prison Visitors,³⁷ and rejected the view of a House of Commons Committee of Inquiry that such a system would be unlikely to have any significant effect. That committee had been inquiring into interrogation procedures, and it was the conduct of interviews that the committee thought would not be affected by visiting.³⁸

The report stated that it would be "salutary" if it were known that certain people had the right to visit police stations at any time and had the duty to report on what they observed. Those people would be, outside London,

³⁴ Scarman (n 26), 7.7-7.10. The next section of the report, at paras 7.11ff, went on to recommend major reforms to the police complaints system.

³⁵ Scarman (n 26), 7.8 The report quotes the committee's recommendation that Chief Police Officers should arrange for sufficient random checks to be carried out to ensure that the procedures were properly observed: the report, at 7.10, makes the important qualification that the checks should be carried out by persons other than police officers. The report refers to the Home Affairs Committee's report as HC 632: the correct reference is HC 631.

³⁶ See text to note 19.

³⁷ The only system that could be considered as a model: see Chapter Seven, text to note 46.

³⁸ *Committee of Inquiry into the Interrogation Procedures in Northern Ireland*, (Cmnd 7497, 1979): para 193 is part of para 27 in the summary available at: <http://cain.ulst.ac.uk/hmsa/bennett.htm>: accessed 06.02.2014.

members of police authorities freshly oriented towards consultation,³⁹ and, in London, members of statutory liaison or consultative committees.⁴⁰ It follows from the section quoted above⁴¹ that these mechanisms would provide publicity for the issues raised by the visitors and the complaints, and it also follows that the publicity would be independent of the police. Part VIIC concludes: “I do not offer a blueprint for legislation. It should not, however, be difficult to include amongst the provisions which I recommend for the strengthening of local accountability and consultation, provision for random checks by persons other than police officers⁴² on the interrogation and detention of suspects in the police station. I so *recommend*”.⁴³ As will be seen, the Government found it suited them that they had not been given a “blueprint”.⁴⁴

I can now summarise the salient issues about these proposals as follows. The contexts of the Scarman Report’s proposals for custody visiting were concern about injuries and deaths in custody, and the need for reform of the system of complaints against the police. A statutory scheme of independent supervision and inspection of the conditions of detention and of interrogation can correctly be categorised as regulation of police behaviour. The checks were to be random, another important feature of regulation, and the checks were to be made by people, other than police officers, who were members of the proposed police liaison committees in London and re-oriented police

³⁹ Scarman (n 26) 5.59-5.66.

⁴⁰ *ibid* 5.67-5.70.

⁴¹ See text to note 30 and Scarman (n 26) 5.69.

⁴² Differing on this point from what appears to have been the decision of the Home Affairs Committee: see text around note 19.

⁴³ *ibid* 7.10: italics as in the original.

⁴⁴ See text to notes 52-53.

authorities elsewhere, which would have provided a degree of independence. The involvement with local consultative machinery would have given publicity to the visitors' findings, as well as the necessary qualities of accountability and legitimacy. The publicity would have empowered the regulatory work of the visitors to be effective as a means to achieve change in police behaviour.⁴⁵ But very few of these ideas have survived in the two versions of custody visiting which have followed, lay visiting and independent custody visiting. However, the prestige of Lord Scarman's name is frequently claimed to legitimize custody visiting.⁴⁶

The Scarman Report received a great deal of media attention, which was mostly favourable.⁴⁷ The Report was debated in the House of Commons on 10 December 1981, just fifteen days after it had been published.⁴⁸ The Home Secretary welcomed the lay visitors proposal as "a constructive and positive suggestion for bringing the community and the police closer together", and said that the government would work out how best to carry it forward.⁴⁹ Roy Hattersley MP (Labour) said of Lord Scarman's recommendation for visitors to make checks on the conditions of interrogation that it would not work without a statutory code for interrogation, providing for penalties if the code were breached by the police. He challenged the Home Secretary to implement the report in its entirety by turning it into legislation.⁵⁰ In the House of Lords

⁴⁵ See Chapter Two, text to notes 26-28.

⁴⁶ See Chapter Two, text to notes 115-116.

⁴⁷ John Benyon, in "The riots, Lord Scarman, and the political agenda" in Benyon J (ed), *Scarman and After* (Pergamon Press 1984) 3 - 19. The report became a best seller: see Rod Morgan, "Talking about Policing", in Downes D (ed), *Unravelling Criminal Justice* (MacMillan 1992) 165.

⁴⁸ HC Deb 10 December 1981 vol 14, No 27 cols 1001-1080.

⁴⁹ *ibid* 1004.

⁵⁰ *ibid* 1013-14.

debate on the Scarman Report, on 4 February 1982,⁵¹ the Home Office minister Lord Belstead quoted Lord Scarman's words that he had "refrained from offering a blueprint"⁵² for legislation on custody visiting, and that the government were considering the practicalities of a scheme in the arrangements that they were following up for local liaison and consultation.⁵³

The government's remarks in these two debates did not refer to the details of the proposal for visitors, in particular the recommendation that visitors should check the conditions of interrogation, despite the reference to that point in Mr Hattersley's speech. And the government ignored another point made by Mr Hattersley, that they should implement the whole of the report by legislation. The government had its own agenda, which was to implement by legislation the Report of the Royal Commission on Criminal Procedure: this was achieved in the Police and Criminal Evidence Act 1984 ("PACE").⁵⁴ So, there was nothing in PACE about Lord Scarman's proposals for a statutory system of custody visiting or for reforming the police complaints system, although statutory liaison was introduced in the form of consultative committees.⁵⁵ The PACE codes of practice⁵⁶ were a major reform of detention standards, but they lacked the force of law and redress for breach that Mr Hattersley had

⁵¹ HL Deb 4 February 1982 vol 426 cols 1396-1474.

⁵² Scarman (n 26) 7.10: text to notes 42-44.

⁵³ HL Deb (n 51) col 1399.

⁵⁴ The original bill was lost by the calling of the 1983 general election.

⁵⁵ Police and Criminal Evidence Act, s 106. These committees were a very important part of Lord Scarman's policy: see Morgan (n 47) and Rod Morgan, "Policing by consent: legitimating the doctrine", in Morgan R and Smith D J (eds), *Coming to terms with policing: perspectives on policy* (Routledge 1989), where he comes to no conclusion as to whether this development had legitimated policing by consent beyond in local elites.

⁵⁶ Code C for detention.

argued for.⁵⁷ The codes provided detailed rules about custody, against which visitors could make their checks.

In the absence of legislation for custody visiting, the first custody visiting schemes began their work, as “lay visiting”. The Greater Manchester Police Authority, fully supported by the chief constable James Anderton, decided to go ahead with lay visitors from May 1983.⁵⁸ The visitors were members of the police committee⁵⁹ and visited police stations without notice. Similar schemes were being introduced elsewhere in the country.⁶⁰ The Home Secretary, now Leon Brittan (Conservative), announced on 6 July 1983 that lay visiting rights to police stations were

“to be extended to more areas as part of a scheme to bring the police and community closer together ... Mr Brittan announced ... that the project, operative in Greater Manchester for the past two months, and [would] be extended to include the West Midlands, South Yorkshire, Humberside, Leicestershire, and Cheshire police forces. Under the scheme, members of local police committees [could] call on police stations in the area at random and check on the wellbeing of prisoners, who [could] refuse to see [them]. One London police district, Lambeth - which [included] the Brixton area - [would] also take part in the pilot.

⁵⁷ Which still, largely, do not exist: Andrew Sanders, Richard Young and Mandy Burton, *Criminal Justice* (4th edn OUP 2010) 663ff.

⁵⁸ Benyon (n 47) 110; Gabrielle Cox, “Openness and Accountability”, in Benyon B and Bourn C (eds) *The Police: Powers, Procedures and Proprieties* (1986) Pergamon 168. See further on Greater Manchester the text to note 64 and Chapter Two, text to note 92.

⁵⁹ The Scarman Report had mentioned that members of police committees could take the role of visitors: Scarman (n 26) 7.9.

⁶⁰ Benyon, “The policing issues” in Benyon J (ed) (n 47) 110.

But as the capital [had] no police committee, the Home Secretary [intended] to appoint a panel of community representatives.”⁶¹

One of the first tasks the Community/Police Consultative Group for Lambeth set itself was to establish a scheme for lay visitors. The Group entered into negotiations with the Home Office and the Lambeth Panel of Lay Visitors started work in January 1984.⁶²

The Policy of the Home Office and of the police: the 1986 Circular

The Home Office embarked on developing a policy for custody visiting, and issued a draft circular in autumn 1984 about establishing visiting schemes nationally, but it took until February 1986, some four years after the Scarman Report, for the Home Office to issue the final version.⁶³ Two reasons are given for the delay: objections by the Association of Chief Police Officers (“ACPO”) who insisted on changes to the text, and a dispute between Greater Manchester police authority and its chief constable about whether visitors should be able to give detainees leaflets about their rights.⁶⁴

⁶¹ “More Lay Visits to Police”, *The Guardian*, (London 07.07.1983): <http://search.proquest.com.ezproxyd.bham.ac.uk/docview/186523486/D8F392C16BEC4943PQ/22?accountid=8630> accessed 20.06.2016.

⁶² Sean Creighton, *Dignity Without Liberty: A Report on Lay Visiting to Lambeth Police Stations*, (Bristol Centre for Criminal Justice March 1991). Other sources of information about Lambeth are found in the *Archives of the Lambeth Panel of Lay Visitors to Police Stations* (London Borough of Lambeth Archives 2000/70 Box 10, Folder 4).

⁶³ The Home Office had apparently issued a circular in May 1983, entitled “Lay Visitors to Police Stations: Guidelines [Provincial Forces]”, according to Charles Kemp and Rod Morgan, *Lay Visiting to Police Stations: Report to the Home Office* (Bristol Centre for Criminal Justice 1990) 5. They do not include the circular in the list of references and I have not been able to track it down.

⁶⁴ *ibid* 7. See the trenchant remarks made by the chair of the police authority about the leaflets affair: Chapter Two, text to note 92.

The Home Office circular to police forces and police authorities was entitled “Lay Visitors to Police Stations”.⁶⁵ The opening words of the covering letter referred to

“ ... the carrying out of random checks by independent persons on the detention of suspects at police stations [as] first proposed in Lord Scarman’s report ... ”

The covering letter stated that, following the establishment of pilot lay visiting schemes, enough had been learnt

“ ... to enable the Home Secretary to commend similar arrangements wherever local wishes and circumstances might make them appropriate ... ”

with a preference for urban areas.

This was the first of several circulars on the subject that the Home Office has issued from time to time over the following years. The 1986 Circular is worth examining in detail for two reasons. First, because it tells us what type of visits the lay visitors made, or were supposed to be making, despite some local variations. Second, because it is reasonable to assume that it sets out the

⁶⁵ 1986 circular. Kemp and Morgan (n 63) say that the version currently available was the one sent to the provinces, and that the version used for London apparently differed in some respects: the two amendments required by ACPO (see text to notes 67 and 82) were not included.

Home Office's policy. Significantly, the first paragraph of the guidelines reads as follows:

"The purpose of lay visiting arrangements is to enable members of the local community to observe, comment and report upon the conditions under which persons are detained at police stations and the operation in practice of the statutory and other rules governing their welfare, with a view to securing greater understanding of, and confidence in, these matters. It is emphasised that these are the only purposes for which lay visitors are permitted to visit police stations." ⁶⁶

Both of these sentences merit close attention. The first sentence shows that the visiting is not for the benefit of the detainees. Rather, the visiting is the means to secure public confidence in the detention arrangements.⁶⁷ Here one can start to trace the conflict about the purposes of custody visiting which persists to this day, and the clear choice made by the authorities for, in terms of Packer's models, a crime control purpose. Crime control's priorities are efficiency, with the police not being hindered in their work: confidence in the police will keep tighter regulation at bay. Packer's opposing, due process, model prioritises concerns for the welfare of the individual and the need for limitations on police power.⁶⁸ The second sentence was added at the insistence of ACPO.⁶⁹ The sentence might prompt the reader to wonder what

⁶⁶ *ibid* para 1.

⁶⁷ A point made in another context by Richard Young and Andrew Sanders, "The Royal Commission on Criminal Justice: A Confidence Trick?" (1994) *Oxford Journal of Legal Studies* 14 3 435.

⁶⁸ See Chapter Two, text to notes 47-51.

⁶⁹ Kemp and Morgan (n 63) 7.

other purposes ACPO had in mind for which lay visiting was not to be permitted. Two likely candidates are: checking on the conditions of interrogation as Lord Scarman had proposed,⁷⁰ and assisting detainees with complaints, as Michael Meacher had proposed.⁷¹ Both these purposes were specifically prohibited in the circular.⁷² A third likely candidate for a purpose ACPO did not want to see was deterring the police from assaulting detainees, thus reducing the number of deaths in custody. This had been included in Michael Meacher's evidence, and was implicit in the Scarman Report, but it was not even mentioned in the circular, because it was unmentionable.⁷³ This was the first of many instances of the authorities either burying this central purpose of a regulator of police behaviour in custody blocks or calling on visitors to build confidence in the police after a death.⁷⁴

For the organisation of the visits, the circular spoke of the preparation of a visiting programme within which unannounced visits could be made.⁷⁵ It will be recalled that the covering letter spoke of random visiting: one wonders why the circular did not use the word "random". As it happened, the word "random" is never used in any of the Home Office circulars and codes of practice, and the word "unannounced" is used only to differentiate visits to terrorism suspects.⁷⁶ The Home Office did not attribute regulatory qualities to custody visiting in 1986, nor have they done so at any time since.

⁷⁰ See text to note 31.

⁷¹ See text to notes 8-10, 20.

⁷² 1986 Circular paras 21 and 15.

⁷³ Meacher, text to note 8: Scarman, text to note 36.

⁷⁴ Burying the subject is discussed in the text following note 160. For confidence building, see the text to notes 129-131 and the text following note 131, Chapter Five, text to note 202, and Chapter Six, text to notes 185-197.

⁷⁵ 1986 Circular para 2.

⁷⁶ See text to note 180, and Chapter Two, text around note 155.

Let us look at how the policy-makers approached meetings between visitors and detainees. If the officer in charge establishes that a detainee wishes to meet the visitors, the detainee will be required to sign an “undertaking” to that effect. One might expect detainees at the police station to be suspicious about signing documents, so this stipulation would not have encouraged them to meet the visitors, a problem of which at least one lay visitor became aware:

“Too often, a detained person was asked to sign ‘here and here’ without being told what was printed on the lines directly above his/her signature. Very often, the detained person indicated that he/she had no idea what he/ she signed.”⁷⁷

It is unlikely that those who drafted the circular had seen things from the detainees’ point of view.

As to how the visitors’ meeting with the detainees should be conducted, the circular stipulates that visitors must meet detainees in the sight *and hearing* of the escorting police officer.⁷⁸ This would make the whole interaction between visitor and detainee immediately known to the police, and would be likely to prevent any meaningful dialogue, as the detainee would have no confidence in the integrity of the process.

At the meeting, visitors

⁷⁷ 1986 Circular para 14; Lee Bridges and Andrew Sanders, “Access to legal advice and police malpractice” *Criminal Law Review* [1990] Jul 494.

⁷⁸ 1986 Circular para 18: emphasis added.

“should ... decline to discuss more than the conditions in which persons are detained.”⁷⁹

Contrary to Lord Scarman’s recommendation, visitors were not to be allowed to attend a police interview with a detainee,⁸⁰ and they were also prohibited from meeting a detainee if the police thought that might prejudice an investigation.⁸¹ And, “*in the interests of maintaining their impartiality,*” visitors were to take no part in complaints of maltreatment or misconduct made by or on behalf of detained persons.⁸² These restrictions vividly point up the concern to limit the impact of visiting as much as possible, reinforced by the provision which was apparently also included at the insistence of ACPO: visitors acting consistently in breach of the rules could be struck off.⁸³ The circular goes on to warn about the potential consequences of breaches of confidentiality by visitors. They might incur civil liability to the detainees, and, they could be prosecuted under the Official Secrets Act 1911 for disclosing facts relating to police operations or the security of police stations.⁸⁴

This last point makes it clear that the Home Office wanted to keep firm control of what visitors said outside the visiting arrangements, and that visitors acting as whistle-blowers would not be tolerated. Merseyside visitors were reported as having felt constrained by their commitment to the Official Secrets Act from

⁷⁹ *ibid* para 22.

⁸⁰ *ibid* para 21.

⁸¹ *ibid* para 16.

⁸² *ibid* para 21: emphasis added.

⁸³ *ibid* para 25.

⁸⁴ *ibid* para 27.

contributing to the “community forums”.⁸⁵ There was an obvious conflict with the purpose of the forums, which was to improve communication between the community and the police: visitors were expected to attend the forums and identify themselves as visitors.⁸⁶ Some custody visitors were at one stage required to “sign the Official Secrets Act”, i.e., to sign a form acknowledging the operation of the Act in their work. As signing the form did not change the legal obligation, the question is what the purpose of this curious and intimidatory practice was: the most likely explanation is that its purpose was to deter whistle-blowers.⁸⁷

What sort of people did the Home Office want to become visitors? Recruitment would be in the hands of the police authority, but it would be “open” to them to recruit from outside their membership: for instance, members of local consultative groups, experienced prison visitors and those involved with young people; but not magistrates. They should be independent persons of good character, who

“ ... will be expected to make informed judgements in which the community can have confidence and which the police will accept as fair criticism when it is justified ... ”

⁸⁵ For the community forums, see the text to note 55 and the note, and for the Lambeth Community Consulting Group, the text to note 111.

⁸⁶ Sandra Walklate, *The Merseyside Lay Visiting Scheme First Report: the Lay Visitors* (Merseyside Police Authority 1986) para 3.8.

⁸⁷ <http://policeauthority.org/metropolitan/partnerships/icv/conferences/2006-03/index.html> accessed 09.06.2016. Even temporary gardeners have been obliged to sign the Official Secrets Act: see Stan Cohen and Laurie Taylor, *Prison Secrets* (NCCL/RAP 1976) 6 - 12.

but people with convictions for offences punishable with imprisonment which had not been spent under the Rehabilitation of Offenders Act 1974 might not be suitable.⁸⁸

What of the frequency of visits? In urban areas, a visit between every one to four weeks was suggested, and for rural stations, no more than *annually*.⁸⁹ The circular went on to recommend that visitors should visit in pairs, and not in larger parties, so as not to over-burden the police and produce a false picture of station routine.⁹⁰ In addition, visitors should bring urgent matters (such as injury) to the immediate attention of the officer in charge. Visitors were to complete report forms setting out what they had observed on their visit. There were to be three copies: one to be left at the police station, one sent to the chief constable, and one sent to the clerk of the police authority.⁹¹ The reports would also be sent to HMIC who would then be available to offer advice to the police authority about the visitors' findings.⁹² The one group not to have copies were the people who had originated the reports: the visitors. Presumably they would have to rely on their memory when it came to following up their concerns: and, in any case, there was no procedure for following up the concerns, or at least, no mention of any procedure in the circular. So it is hard to see how visitors could expect to be able to make specific checks that anything was being done in response to their concerns. The Home Office policy here appears to be that the security of information about police stations was more important than rectifying conditions in the

⁸⁸ 1986 Circular paras 3-5.

⁸⁹ *ibid* para 7. Emphasis added: this does seem very inadequate.

⁹⁰ *ibid* para 9.

⁹¹ *ibid* paras 28-9.

⁹² *ibid* para 31.

stations.⁹³ And the police authority were “responsible” for informing the public about the results of its programme of visits,⁹⁴ which shows that the policy was to prevent the visitors from having an independent voice.

What did visitors make of all this? A report on the Merseyside panel found that some of the visitors felt they had no power. One visitor was quoted as saying:

“The lay visitor is not equal to the station sergeant: he calls the shots.”

And, away from the custody block, the report found that the police were the exclusive providers of training for visitors.⁹⁵ This thesis investigates the power of the police over visitors, both in the custody block and through their training, and the process of socialisation, which causes them to adopt certain attitudes, or reinforces the same attitudes which they already hold. Like most power, it operates without there being any overt conflict, and is an example of Lukes’ theory of three-dimensional power.⁹⁶

If the custody sergeant was calling the shots with the visitors, who was calling the shots in developing policy: ACPO or the Home Office? The insistence of ACPO that the circular emphasise the limitations of the purposes of custody visiting,⁹⁷ and that it provided for the dismissal of visitors,⁹⁸ raises fascinating questions about the nature of the power relationship between the police and

⁹³ Follow-up procedures were provided for in later circulars and codes of practice.

⁹⁴ 1986 Circular paras 28-30.

⁹⁵ Walklate (n 86) paras 3.7 and 4.2.

⁹⁶ See Chapter Two, text to notes 36-46.

⁹⁷ See text to notes 66-69.

⁹⁸ See text to note 83.

the Home Office, and about the role of ACPO. One of the chief constables interviewed by Robert Reiner said:

“I largely feel bound by Home Office circulars. Because they are a regurgitation of what we’ve told them already, through ACPO.”⁹⁹

The chief constable is saying that he did what the Home Office told him to do, and that he did so because that was what his representatives had told the Home Office to tell him to do. Reiner described this as a “consensual process of policy formulation”,¹⁰⁰ but the word “consensual” suggests rather more give and take than a negotiation in which one party agrees to everything that the other party wants. And in this case, where there had not been a consensus, ACPO “insisted” and prevailed. ACPO was a powerful institution in its own right: Wall noted the “continued strengthening of ACPO” as one of the factors which would “effectively bypass... conventional...or... democratic [policy-making] processes”.¹⁰¹

Reiner saw the Home Office as the dominant party, but I think it was the police who had the upper hand throughout the process. That ACPO was said to have insisted on these two points suggests that they were the only points of significant disagreement about the text of this circular, of which the first draft was produced by the Home Office. The Home Office knew what the police’s

⁹⁹ Robert Reiner, *Chief Constables*, (OUP 1991) 272.

¹⁰⁰ *ibid* 271.

¹⁰¹ David S Wall, *The Chief Constables of England and Wales: the socio-legal history of a criminal justice elite* (Ashgate 1998) 316. The importance of ACPO as a campaigning group and its effectiveness in shaping policy is confirmed by the more recent assessment of Sarah Charman, “Lobbying and Representation: An Analysis of the Emergence of the ‘Senior Police Voice’ during the Late Twentieth Century” *Contemporary British History* (2011) 25 2 277.

attitude was likely to be, and, in the hope of avoiding conflict, may well have worked to produce a first draft that they thought the police would accept. It is possible that the Home Office, in all except those two points, actually *anticipated* the views of the police about custody visiting. This behaviour of avoiding conflict, by second-guessing the views of the dominant party, can be seen as evidence of the operation on the Home Office of the power of the police, and is another instance of Steven Lukes' three-dimensional power.¹⁰²

The Lambeth Lay Visitors

The 1986 Circular shows that the Home Office and the police wanted to confine the visiting arrangements as much as possible. Particularly striking is the requirement that the visitors must meet detainees in the sight and hearing of the escorting police officer. Practice had varied on this between the lay visiting schemes: at one extreme, in South Yorkshire concerns about visitor safety led to the rule being that there were to be no private conversations with detainees.¹⁰³ At the other end of the spectrum, the Lambeth Lay Visitors appear, in December 1987, to have insisted on the conversations being out of the hearing of the escorting officer, and pursued the point by suspending visits for just over a fortnight.¹⁰⁴ This stand had a much wider impact, if only for a while. The 1991 Circular for London said that, where this could be done with safety, conversations should take place, wherever practicable, out of sight of the escorting officer, but only if it could be done with safety, as well as out of hearing

¹⁰² Reiner (n 99) 271 relies on Lukes' theory to support the opposite conclusion that the Home Office was the dominant party.

¹⁰³ Walklate (n 86) para 2.2.

¹⁰⁴ Creighton (n 62).

of the officer.¹⁰⁵ The 1992 Circular for the rest of the country did not contain this provision, and it has not reappeared in subsequent circulars or codes of practice.¹⁰⁶ The Lambeth visitors also ensured that the denial by the police of a visit to a detainee should be recorded on the custody record by an officer with a rank no lower than that of inspector:¹⁰⁷ the rank was raised to that of superintendent in the 1991 and 1992 Circulars.¹⁰⁸

Beyond the points just noted, the way the Lambeth group operated seems to have been substantially, and ideologically, different, both from many of the other schemes at the time, and from the current arrangements. They even managed to counter the national trends on ethnic origin and age, and some black people in their 20s were recruited as visitors.¹⁰⁹ Here are some examples of the different approaches they took. They held their own meetings in their own venue, with the police attending part of the meeting by invitation.¹¹⁰ The Lambeth visitors' work was tied in with work of the local police community consulting group, which gave them a voice,¹¹¹ and they even used to issue press releases, for instance about the "disgraceful" conditions at a police station.¹¹² The Lambeth group was probably the only panel to produce independent quarterly reports. The reports gave accounts of

¹⁰⁵ 1991 Circular para 31.

¹⁰⁶ 1992 Circular para 28.

¹⁰⁷ Walklate (n 86) para 2.2: Creighton (n 62) 33.

¹⁰⁸ 1991 Circular para 30 and 1992 Circular para 27. Now, by Police Reform Act 2002 s 51 (4) (a), the level has reverted to the rank of inspector or above.

¹⁰⁹ Elizabeth Burney "Inside the Nick", *New Society* (London, 08.11.1985) 239-40 <http://search.proquest.com.ezproxye.bham.ac.uk/docview/1307104486/915B3329095541A7PQ/8?accountid=8630> accessed 20.06.2016.

¹¹⁰ Lambeth archives (n 62).

¹¹¹ Creighton (n 62) numerous references: Lambeth archives (n 62).

¹¹² Lambeth archives (n 62).

their visiting and of progress made towards improving conditions of custody. This led to the following rather sardonic comment by one of the visitors:

“The panel can demonstrate its influence in securing better conditions, although it must be small comfort to someone who is knocked about in the police van on the way to the station to know he will be given a hot dinner when he gets there.”¹¹³

The Lambeth visitors organised some of their own training.¹¹⁴ On their visits, the Lambeth visitors asked the custody staff how many detainees were detained in hospital, and why they had had to go to hospital, and arrangements for visiting were made with local hospitals.¹¹⁵ The Lambeth visitors advised detainees about the formal complaints procedures, but they were sensitive to some detainees not wanting the police to know about their complaints, so they reserved the right not to record them on the official visit report which would be seen by the custody sergeant.¹¹⁶ The Lambeth visitors tried to find some way of monitoring police interviews, by looking through a window in the interview room so they could observe what was happening,¹¹⁷ or by finding a break in the interview.¹¹⁸ All these instances illustrate that the Lambeth lay visitors had, in terms of Packer’s models, a due process approach to their work, prioritising the welfare of detainees, and that they operated independently from the police.

¹¹³ Burney (n 109).

¹¹⁴ Creighton (n 62) 16.

¹¹⁵ *ibid* 33.

¹¹⁶ *ibid* 52.

¹¹⁷ *ibid* 63.

¹¹⁸ Lambeth archives (n 62).

The differences between Lambeth and other schemes can be seen from Charles Kemp and Rod Morgan's studies which reported that by October 1989 all but five of the police authorities, and all but two of London boroughs, had visiting schemes, but that many of the schemes, especially those outside London, were found to be rudimentary and ineffective.¹¹⁹ In London visitors were appointed by the Home Secretary as the police authority: contrary to what one might expect, this led to the London panels having more autonomy than those in the provinces.¹²⁰ Visitors had had some chance, through community consultation, to publicise their findings: but this had never been part of the official practice, and the legislation providing for community consultation was repealed in 1996.¹²¹ Research in the London Borough of Brent in 2002 found that detainees did not recognise the term "lay visitors", generally knew nothing about them, and had not met them: however, the custody staff knew when visits were likely to be made, and the times the visitors chose were not times when the cells were most occupied.¹²²

¹¹⁹ Kemp and Morgan (n 63)16ff.

¹²⁰ *ibid* 21.

¹²¹ Police and Criminal Evidence Act 1984, s 106 was repealed by Police Act 1996, ss 103(3), 104(1), and Sch 9 Pt I.

¹²² Tim Newburn and Stephanie Hayman, *Policing, Surveillance and Social Control: CCTV and police monitoring of suspects* (Routledge 2002) 133, 137-9.

Policy in the 1990s: Deaths in Custody

In the early 1990s, the Home Office issued two further circulars, in 1991 for London,¹²³ and in 1992 for the rest of England and Wales.¹²⁴ The opening paragraph omitted the “only purposes” homily of the 1986 Guidance and substituted it with:

“These arrangements also provide an independent check on the way police officers carry out their duties with regard to detained persons.”

The principal means by which visitors would carry out that check was by satisfying themselves that detainees have had their rights explained to them and received written notice of what their rights were.¹²⁵ The requirement in the 1986 Circular that detainees sign written consents for visitors to see them was dropped.¹²⁶

These circulars contain interesting suggestions about the suitability of former special constables as visitors:

“The police authority may, however, wish to consider whether it would be appropriate to appoint an ex-special constable depending on where the person served and the length of time which has elapsed since the

¹²³ 1991 Circular.

¹²⁴ 1992 Circular.

¹²⁵ 1991 Circular para 37; 1992 Circular para 34.

¹²⁶ Kemp and Morgan (n 63) 50-51 say that requiring detainees to sign a consent form had been strongly opposed by several London panels, and that a majority of divisional police officers agreed with the panels' view, and that a force direction from Scotland Yard confirmed that consent forms should not be used.

appointment ended. In the light of their increasing involvement in the operation of the criminal justice system applications from members of the probation service would appear to be unlikely to succeed because of the possibility of a conflict of interest.”¹²⁷

The circulars make out that the position of former special constables differed from that of former police officers, but both would have had similar attitudes and similar conflicts of interest. Apart from the fact that they worked part-time, former special constables would be involved with the criminal justice system just as much as probation officers. And similar weight was not given to the factor of where applicants had been working. There was a great deal of special pleading here.

There is a section in these circulars on deaths in custody, stating that a representative of the lay visitors would, *out of courtesy*, be notified of a death, but that visitors were not allowed to view the body in the cell.¹²⁸ Because the police did not have an absolute obligation to inform visitors of a death, visitors would not necessarily know that a death had taken place, at or following detention, at the police station they were visiting. They might arrive there the next day, and not know anything about it: but every police officer would know. This has probably happened on numerous occasions. Failing to provide visitors with this information conveys a lack of trust, candour and respect for visitors and their work, regardless of whether it impairs the effectiveness of

¹²⁷ 1991 and 1992 Circulars para 6.

¹²⁸ *ibid* para 31: emphasis added. The circular did not say whose act of “courtesy” it was to pass this information on to the lay visitors. The point was dropped after the introduction of the statutory scheme: see text after note 160.

the visiting, which it surely does. This needs to be considered alongside the practice of so-called “special visits”, which had already made an appearance in the 1986 Circular.¹²⁹ The 1991 and 1992 Circulars read as follows on this:

“Visits will normally be unscheduled. There may be instances, however, when there is particular tension within the local community about the treatment or well-being of one or more persons detained at police stations within the area which a visit might help to defuse. The officer in charge of the station should therefore make arrangements with the lay visitors for special visits to take place at short notice.”¹³⁰

In one case known to me, the tension was about the death of a detainee.¹³¹ But it was for the police, not the visitors, to decide what involvement the visitors had in a case of the worst harm that a detainee can come to in custody. By this approach, the Home Office showed that what they wanted visitors to do was to help rebuild public confidence in circumstances where the police might have caused the death of a detainee, rather than empower the visitors to gain the knowledge and experience needed to make a contribution towards reducing the number of deaths of detainees. In other words, the Home Office’s priority was promoting confidence in the criminal justice system, not preventing the deaths of detainees: as noted above, a crime control orientation.

¹²⁹ 1986 Circular para 9.

¹³⁰ 1991 and 1992 Circulars para 16.

¹³¹ See Chapter Six, text to notes 192-197.

Introduction of the Statutory Scheme

In 1998 a report prepared for the Home Office showed that up to a quarter of the local schemes were not working properly,¹³² and that recruitment of visitors reflecting the local community had often not been achieved.¹³³ Lay visiting appeared to be a haphazard operation. The absence of formal legal authority for the visiting had been found to create difficulties, with police sometimes not recognising the right of the visitors to make a visit.¹³⁴

In the year 2000 a Home Office working party considered the future of custody visiting. The members of the working party were representatives of the police, police authorities, the Home Office and the Police Complaints Authority:¹³⁵ no one was there to represent either visitors¹³⁶ or detainees: they had no say and no power in the creation of the statutory scheme. This is an

¹³² Mollie Weatheritt and Carole Viera (1998) *Lay Visiting to Police Stations*, a report commissioned by the Home Office, Home Office Research Study 188 (Home Office 1989) 4. This was based on reports from triennial inspections by HMIC.

¹³³ *ibid* 21.

¹³⁴ Information provided to the author by a Dyfed-Powys police officer who had been working in Essex at the time.

¹³⁵ 2001 Circular para 2. The working party was composed of representatives from the Association of Chief Police Officers, the Association of Police Authorities, the Association of Police Authority Clerks, Her Majesty's Inspectorate of Constabulary, the Home Office, the Metropolitan Police Authority, the National Association for Lay Visiting (renamed the Independent Custody Visiting Association (ICVA), the Police Complaints Authority, the Police Federation and the Police Superintendents' Association.

¹³⁶ Despite its name, ICVA was not representing visitors (and still does not represent visitors). At that time its members were the police authorities, and its members now are the Police and Crime Commissioners or their equivalents: *Visiting Times* 8/3, Summer 2002 showing clause 4 of the constitution, and ICVA articles of association, article 23. ICVA's funding comes mainly from the Home Office, as can be seen from its home page and annual accounts. *Visiting Times*, the articles of association and the annual accounts are on ICVA's website at icva.org.uk. The Howard League for Penal Reform published a briefing paper "A Clean Slate: A new structure for lay visitors to people in custody" in 2001, but the League were not listed as having been represented at the discussions, and there is no knowing whether any of the working party read their briefing paper. In any case, having read it myself, I find it disappointing in that it completely failed to address the issues.

example of what Mick Ryan has labelled “a closed policy-making process”.¹³⁷ According to Paul Rock, criminal justice policy about victims evolved in a similar way: the Home Office created a fantasy image of victims and had no actual contact with them, and the priority was always to maintain public confidence.¹³⁸ In the case of custody visiting, there was never any need to create a fantasy picture of detainees, as they have always been demonised. But in other respects the process was the same. First, there was no consultation with detainees or anyone who could represent them; and, second, the policy-makers made confidence in the police the most important priority.

The working party decided to support the establishment of a statutory scheme for custody visiting. The reasons for this were said to be to ensure uniformity and a formal legal relationship with the police.¹³⁹ All police authorities would be required by law to organise custody visiting in their areas on similar lines.

The Home Office issued a press release¹⁴⁰ and the Home Office’s Police and Powers Unit issued a fresh circular about custody visiting, both on 4 May 2001.¹⁴¹ The press release said that independent oversight of police custody facilities was being “further enhanced” with the publication of new Home Office guidance on the operation and management of the estimated 3,000

¹³⁷ Mick Ryan, *The Politics of Penal Reform* (Longman 1983) 81. The same was almost certainly true of other occasions when policy was discussed, but for those occasions we do not have the benefit of a list, as we do here.

¹³⁸ Paul Rock, *Helping Victims of Crime* (OUP 1990) 88, 257.

¹³⁹ *Visiting Times* 7/2 December 2000. Lay visiting had already been put on a statutory basis in Northern Ireland, in 2001: Police (Northern Ireland) Act 2000, s 73.

¹⁴⁰ *Police Custody Visiting Guidance Updated Today*, Home Office News Release 04.05.2001.

¹⁴¹ 2001 Circular.

visitors, and that the visiting system, known as “lay visiting”, would be renamed “independent custody visiting” to help it become more accessible and understood by the wider community. Despite this rebranding, the expression “lay visitors” has persisted, with some police officers still using it in 2015:¹⁴² and the statute brought in an increase in the control of custody visiting exercised by police authorities, and a decrease in the degree of independence enjoyed by visitors.

The circular was much more enthusiastic about visiting than its predecessors. It said that the visiting had developed into an “essential” aspect of the scrutiny of police practice and procedures: as well as the protection it offered to detainees, it drew on the “concerned commitment” of volunteers and helped to build partnerships between the police and the communities they served: and it was strongly supported by the police as a necessary and normal part of the arrangements for securing the accountability of the police.¹⁴³ Referring to the recent implementation of the Human Rights Act, the circular said that the treatment of those in police custody was one key indicator of the extent to which we were embracing the culture of rights which the legal changes were intended to reinforce; independent custody visiting provided an important check on that treatment, and police authorities should ensure that the visiting arrangements were as effective as possible, without specifying where that effectiveness lay and how it could be assessed.¹⁴⁴ The circular did however

¹⁴² Observation and interviews.

¹⁴³ 2001 Circular para 4.

¹⁴⁴ *ibid* para 5.

note that custody visiting remained relatively little known to the public at large, and did not have a high profile, even within the criminal justice system.¹⁴⁵

The Police Reform Bill which contained these proposals started in the House of Lords, and the Lords debated the relevant clause¹⁴⁶ on 12 March 2002.¹⁴⁷ There had been nothing about custody visiting in the white paper,¹⁴⁸ but government policy was set out in the explanatory note.¹⁴⁹ It said that placing custody visiting on a statutory basis would immediately raise the profile of the whole system and provide consistent standards. The note went on to say:

“ ... police authorities, when recruiting, shall ensure that any volunteer appointed to become a custody visitor must be independent of the police authority and the chief officer of the relevant police force. This will ensure that there is no conflict of interest.”¹⁵⁰

It takes a degree of wishful thinking to write a passage like that, which says that the organisation which recruits visitors also has to ensure that the visitors are independent of that organisation.

Contributing to the House of Lords debate, Lord Elton (Conservative) said that the scheme had the one principal aim, which was either to bolster or to restore public confidence in the way that the police handle those who are

¹⁴⁵ *ibid* para 12.

¹⁴⁶ Then numbered 45.

¹⁴⁷ HL Deb 12.03.2002 cols 686-674. The issue of visiting did not feature in the House of Commons second reading debate on 07.05.2002.

¹⁴⁸ Home Office, *Policing a New Century; A Blueprint for Reform* (Cm 5326, 2001)

¹⁴⁹ Explanatory Notes to Police Reform Act 2002, s 51:

<http://www.legislation.gov.uk/ukpga/2002/30/notes>: accessed 09.02.2014.

¹⁵⁰ *ibid* para 284.

“charged with crimes”.¹⁵¹ He said that the lay visitors had become tokens rather than forces for good. Quoting the opening words of the explanatory note set out above, he pointed out that the draft bill called for “independent” visitors. He criticised the system of the police authority appointing visitors. He said that more had to be done to connect the visitors with the public rather than connect them through the police authority. The Home Office Minister, Lord Rooker, repeated points made in the explanatory note, and added two more which were not found there. His first point was that there was a “contradiction” in what Lord Elton had said about who appointed the custody visitors: once the police authority had appointed these people they would “in no way” be connected with the police or the criminal justice system. His second point was that the scheme would be governed by independent people from the local community.¹⁵²

Lord Rooker’s two points cannot be justified. Under the code of practice, yet to be published, and in accordance with the circular, already published, visitors would be working in a system run by the police authority, which cannot be described as “in no way connected with the police or the criminal justice system”. As regards the scheme being governed by independent people from the local community, if Lord Rooker meant that each local scheme would be governed by the police authority, that raises the question of the independence of the police authority from the police, where a *prima facie* case can be made

¹⁵¹ Those charged with crimes, unless released on bail, are remanded in custody in a prison. Presumably he meant to say: “those who have been arrested on suspicion of having committed crimes”.

¹⁵² HL Deb 12.03.2002 cols 701-2. Lord Elton referred to paragraph 256 of the Explanatory Note. In the version now available it is paragraph 281.

that the police authority was not independent:¹⁵³ if his remark meant that the visitors would be running the scheme, that is certainly not justified, as the police authority was going to be firmly, and solely, in control. Strictly speaking, it is the visitors who are required by the statute to be independent, not the scheme itself: but the scheme is called “independent” in all official publications.

The legislation, headed “Independent custody visitors for places of detention” provided that every police authority was to make arrangements for detainees to be visited by persons appointed under the arrangements (“independent custody visitors”); and [that] the arrangements had to secure that the persons appointed under the arrangements were independent of both the police authority and the chief officer of police.¹⁵⁴ The basic points set out were: access to the police stations, examining records, meeting detainees and inspecting facilities,¹⁵⁵ and the circumstances in which access could be denied.¹⁵⁶ Following consultation with police authorities and the police,¹⁵⁷ the Home Secretary was to lay before Parliament a code of practice about the scheme.¹⁵⁸ Once again, neither visitors, detainees or defence lawyers were to be consulted.

¹⁵³ See Chapter Two, text to notes 85-96.

¹⁵⁴ Police Reform Act 2002, s 51(1)-(2), later amended to take account of the change to Police and Crime Commissioners.

¹⁵⁵ Police Reform Act 2002, s 51(3).

¹⁵⁶ Police Reform Act 2002, s 51(4)-(5).

¹⁵⁷ Police Reform Act 2002, s 6 and s 7. S 51(7) was amended by Police and Justice Act 2006 s 6, s 53 and Schedule 4 para 16 to specify that the consultees were the Association of Police Authorities and the Association of Chief Police Officers.

¹⁵⁸ Police Reform Act 2002, s 51 (8). 2003 Code of Practice and the subsequent revisions in 2010 and 2013 were not issued as statutory instruments.

The code of practice was issued in 2003. It is in similar terms to the 2001 Circular, although the circular was over three times longer than the code of practice. One significant change was on the issue of informing visitors about deaths in custody. The 1991 and 1992 Circulars had said that the officer in charge of the station should arrange to notify visitors of a death, “out of courtesy”.¹⁵⁹ The 2001 Circular said that the police authority “must be informed as soon as possible about a death,” but without saying that the police authority had to inform the visitors.¹⁶⁰ Then the 2003 Code of Practice dropped the subject altogether, and it has not made an appearance since. So, first the visitors were not informed, and then the police authority were not informed. This is another instance of the way in which policy-makers have sought to obscure and dismantle the connection between deaths in custody and custody visiting.

The differences in the various official documents create uncertainty. Here are just a few examples, on the issue of independence: in each case the circular contained more significant detail than the code of practice. In contrast with the circular, the code of practice puts no qualifications on the eligibility of former magistrates and people who have held posts in the police, and the issue of the eligibility of lawyers and probation officers is simply omitted.¹⁶¹ The circular says that there may be some visits at the invitation of the police: the

¹⁵⁹ *ibid* para 31.

¹⁶⁰ Presumably the police had the obligation to inform the police authority. This is found in the 2001 Circular para 61, which continued as follows: “Consideration will then need to be given to whether a visit would be helpful in terms of informing and reassuring the local community. If it is agreed that a visit should be made it should be on the basis of a clear understanding as to how that feedback to the community will be achieved.”

¹⁶¹ 2001 Circular paras 33-34; 2003 Code of Practice, para 18.

code of practice does not.¹⁶² Yet another document, the ICVA national standards, says that it might be appropriate for panel members to take part in recruitment:¹⁶³ the code of practice does not. In addition to these documents, police authorities issued local scheme handbooks with their own takes on various points.

A lot of paid work must have gone both into writing these various layers of documents, and in providing training programmes based on them. As unpaid volunteers, visitors might feel bemused by the large number of somewhat different obligations, presented with varying levels of detail, and wonder which document prevailed. Working that out is no easy task.¹⁶⁴ Here are some of the considerations. The code of practice was issued pursuant to statute, but was not a statutory instrument, and therefore may come into a category known as “quasi-legislation” which is said also to include government circulars.¹⁶⁵ Laurence Lustgarten found that chief constables treated circulars as though they were binding law.¹⁶⁶ The governing statute said that police authorities and independent custody visitors had to “have regard” to the code of practice,

¹⁶² 2001 Circular para 60-61.

¹⁶³ ICVA’s website (accessed on 01.02.2014 and 16.09.2016) has no version of the standards. The version quoted from in the text was previously available on their website on 16.09.2012 and is dated 21.01.2004.

¹⁶⁴ The courts have considered the status of codes of practice and of government circulars in judicial review cases. In a case about the code for Crown prosecutors, the court said that judicial review would be available if the relevant policy was unlawful or if the prosecutor had failed to act in accordance with the policy *R (on the application of E) v DPP* [2011] EWHC 1465 (Admin). In a case about circulars about police cautions, the court said it would intervene only where there is significant and substantial breach of the guidelines: and even then the court retains a discretion not to intervene. *Lee v Chief Constable of Essex Police* [2012] EWHC 284 (Admin). One of the appeal judges said: “ ... [T]he process ... in the Home Office Circular ... is there to be complied with, not disregarded or flouted by the police. In an appropriate case this court would not hesitate to intervene.”

¹⁶⁵ Michael Zander, *The Law Making Process* (6th edn Cambridge 2004) 455-8. Zander says that in 1965 government used a circular as the legal basis of the shift to comprehensive education, which was arguably the most radical change in British education for half a century, and that judges used to be much less tolerant of the practice.

¹⁶⁶ Lawrence Lustgarten, *The Governance of Police* (Sweet and Maxwell 1986) 105.

which is weaker than an obligation to comply with it. Codes have formal and official promulgation. Circulars go only to the police and police authorities, now the Police and Crime Commissioners. The obligations which are not found in the code of practice but which are found in the national standards do not have the status or force of obligations found in the code of practice, whatever that might be; the obligations found in the national standards may, or may not, derive what status and force they have from the code of practice; but the national standards may be nothing more than a wish list. The bemused visitor might conclude that the hierarchy of the official documents is (1) statute; (2) code; (3) circular; or (2=) code and circular; (4) standards; and (5) local handbook; but the visitor would do well to remember that the handbook contained the terms of their contract for the visiting work, with provisions for sanction and dismissal in the case of breach.

Why is there all this complexity? Perhaps it results from the anxious concern of those who drafted the documents to establish precisely what visitors could not do as well as what they could do. Another reason for the complexity could be the fact that no visitors or detainees, or people representing them, or custody staff, took any part in drafting the documents. The complexity is, at the least, undesirable and it may be completely unnecessary. From the point of view of those who are directly involved, visitors, detainees and custody staff, the guidance should be simple, and it should be found in one document, not five.

Operation of the Statutory Scheme

By becoming statutory, custody visiting probably achieved much wider and more uniform coverage, but it is not easy to assess its operations. There are some very occasional newspaper items, and otherwise the information consists of the following: issues of *Visiting Times*, a newsletter sent out at least once a year by ICVA; sections in some police authorities' annual reports; and reports on custody suites by Joint Inspection Teams reports into custody suites.¹⁶⁷ None of these sources is satisfactory. *Visiting Times* and the police authority reports contain news round-ups where contributions from the police authorities will say what is going well in their area, and little that is critical is reported. The HMIP/HMIC reports rarely say much about the visiting schemes except what appears to be a standard formula to the effect that they are working well, and much more rarely to report, with slightly more detail, that they are not working well. Very occasionally something more startling emerges. For instance, visitors to a West Midlands custody block found a remand prisoner, whom local prisons had been too full to accept, slumped against the door of his cell with a ligature round his neck. The report claimed that if he had not been found when he was, there would definitely have been a death in police custody that day.¹⁶⁸

¹⁶⁷ These reports are made in compliance with the UK's treaty obligations under the Optional Protocol to the Convention against Torture, a United Nations instrument: see Chapter One, text to note 102. The obligation is to ensure regular independent inspection of places of detention. The programme of inspecting about 12 custody suites a year began in 2008, and the inspections include the independent custody visiting schemes at each custody suite inspected. <https://www.justiceinspectorates.gov.uk/hmic/our-work/joint-inspections/joint-inspection-of-police-custody-facilities/> accessed 10.06.2016.

¹⁶⁸ *Visiting Times* 8/3 summer 2002.

Two new codes of practice were published in 2010 and 2013. There were two significant changes in the 2010 Code of Practice. The first was the provision of the option that visitors could introduce themselves to detainees, rather than that the escorting police officer should make the introduction,¹⁶⁹ a practice which had been noted as a problem 20 years earlier.¹⁷⁰ The second significant change brought in by the 2010 Code of Practice was the provision for custody visits to persons detained under the Terrorism Acts (known as TACT detainees).¹⁷¹ The 2013 Code of Practice was brought in to deal with two issues: access to video and audio recordings of interviews with TACT detainees and the transfer of custody visiting from police authorities to the Police and Crime Commissioners. The issue of access to the recordings arose under a statute¹⁷² which provides for the preparation by independent custody visitors of reports of visits to TACT detainees, and the submission of the reports to the independent reviewer of terrorism legislation.¹⁷³ In some but not all cases, visitors would be able to listen to the audio recordings and view the video recordings (with or without sound) of police interviews with those detainees which have taken place during their detention at the suite.¹⁷⁴

¹⁶⁹ 2013 Code of Practice para 53.

¹⁷⁰ Kemp and Morgan (n 63) 49.

¹⁷¹ 2013 Code of Practice para 37 - 8. I have not carried out empirical research about custody visiting of TACT detainees.

¹⁷² Coroners and Justice Act 2009, s 117 (4) - (8), brought into force in April 2013 by Coroners and Justice Act 2009 (Commencement no 12) SI 2013/705.

¹⁷³ The current Independent Reviewer, David Anderson QC, is the first to operate these arrangements. See his *Report of the Independent Reviewer of the operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006*: at para 7.23 he notes the reports he receives from custody visitors:

<https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2015/09/Terrorism-Acts-Report-2015-Print-version.pdf>. accessed 10.06.2016.

¹⁷⁴ Coroners and Justice Act 2009, s 117 (7), and the 2013 Code of Practice exclude access where the police reasonably believe it is not practicable at the time, or the police reasonably believe access could interfere with the process of justice.

Why was this change brought in? The government's explanatory notes do not provide an explanation.¹⁷⁵ The reason seems to be the need to deal with human rights law.¹⁷⁶ Terrorist suspects may be held for up to 14 days, which is much longer than the 96 hour maximum for other suspects, so the length of the detention might be held to infringe a detainee's right to be brought before a judge promptly, unless safeguards are in place.¹⁷⁷ In this case the safeguards are thought to be the access to the recordings, the preparation of the reports and their submission to the independent reviewer. The code stipulates that visitors may request access to the recordings only either (i) at the request of the detainee or (ii) where they have particular concerns about the conduct of an interview. The code goes on to say that visitors can request access only to ensure that the detainee has been offered their rights and entitlements, their health and well being have been ensured throughout, and that the relevant statutory code has been followed.¹⁷⁸ It is significant that the code of practice goes beyond the statute in controlling this access, and again shows the concerns of those who contributed to the drafting of the code, in which group there were, as usual, no visitors and no representatives of the interests of detainees: the authorities exercised their power by excluding them from having any say in the matter.¹⁷⁹

¹⁷⁵ Coroners and Justice Act 2009 s 117, Explanatory Notes:

<http://www.legislation.gov.uk/ukpga/2009/25/notes/division/5/1/3/5/7> accessed 10.06.2016.

¹⁷⁶ A minister's statement on 25.03.2013, mentioning enhanced safeguards for terrorist suspects in police detention, <http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm130325/wmstext/130325m0001.htm>, leads to the answer in the Government's *Review of Counter-Terrorism and Security Powers* (Cm 8004 Jan 2011) 7 - 14.

¹⁷⁷ ECHR Article 5.1(c): *Ireland v United Kingdom* [1978] ECHR1: *Brogan v United Kingdom* 11 EHRR 117 1998.

¹⁷⁸ 2013 Code of Practice para 66.

¹⁷⁹ Summary of responses received to the Home Office consultation on the revised Code of Practice on Independent Custody Visiting March 2013:

Contrary to what one might expect, access to these recordings is still not allowed for visits to other detainees, which raises the question of why, if access to the recordings is allowed for visits to detainees suspected of terrorism, it is not allowed for visits to those who are not. The answer may simply be that the government knew that human rights law required there to be a change for TACT detainees, and that there was no similar compelling requirement to make a general change in respect of all detainees.¹⁸⁰ It is very likely that no thought was given as to whether it would be desirable and/or logical to allow access to these recordings in respect of all detainees. This would have been the point of view of Packer's due process model, concerned with safeguards for detainees, but no one who contributed to the consultation is likely to have seen that as a priority.

The code of practice introduced another change, which was to allow meetings between visitors and TACT detainees to take place in an interview room, consultation room, or some other convenient place, rather than in their cells.¹⁸¹ It is not clear to me why it was felt necessary to make this change: it may be for the same reason as for allowing access to recordings. I found that meeting detainees in a consultation room improved the quality of the

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/172845/consultation-response.pdf: accessed 05.02.2014.

¹⁸⁰ Police Reform Act 2002, s 51, as amended by Coroners and Justice Act 2009, s 117(5-8). There was a consultation about the change to the code of practice. All the points were raised by either Police and Crime Commissioners, the police or ICVA, and not by visitors, and no one raised the point about extending access to video and audio recordings.

¹⁸¹ 2013 Code of Practice para 58.

meetings.¹⁸² This would improve visitors' meetings with all detainees, not just TACT detainees: but, again this does not appear to have been addressed.

The code says that visits to terrorist suites should be arranged with the police, although unannounced visits are permitted. The code states that it is unlikely, given the low number of arrests under the Terrorism Acts, that a terrorist suspect would be in detention during visits conducted on an ad hoc basis.¹⁸³

The second issue covered by the 2013 Code of Practice was also responding to a statute: the abolition of police authorities and their replacement by the Police and Crime Commissioners in November 2012.¹⁸⁴ The code imposes on the Commissioners the same duties as used to be placed on the police authorities.¹⁸⁵

This chapter has analysed the chronological development of policy about custody visiting. One can also seek to establish the current state of policy from a review of the various claims which are made for custody visiting in the official literature, as follows:

¹⁸² See Chapter Six, text around note 110.

¹⁸³ 2013 Code of Practice para 43. This is the only use of the word "unannounced" in the 2003, 2010 and 2013 Codes of Practice. The use of the word "permitted" shows the crime control mindset of the policy-makers.

¹⁸⁴ Police and Social Responsibility Act 2011, Schedule 16 part 3.s 299: the Police and Crime Commissioner in London is the Mayor. I was told that the parliamentary draftsmen forgot that looking after custody visiting was one of the duties to be taken up by the PCCs, and the statute came close to omitting this provision altogether: source not identified, to protect anonymity. Perhaps the draftsmen, like almost everybody else, had never heard of custody visiting: see Chapter Six, text to notes 197-205.

¹⁸⁵ 2013 Code of Practice paras 8-10.

1. That custody visiting enables volunteers to attend police stations to check on the treatment of detainees and the conditions in which they are held and that their rights and entitlements are being observed.¹⁸⁶
2. That custody visiting offers protections and confidentiality to detainees and the police.¹⁸⁷
3. That custody visiting offers reassurance to the community at large.¹⁸⁸
4. That custody visiting contributes to police accountability.¹⁸⁹

It is not easy to say what official policy line emerges from this, because there are conflicts between the claims, and those conflicts amount to an essential ambiguity as to what the policy really is. On the one hand, there are the purposes in claim 1, the first part of claim 2, and claim 4 (“Purpose A”) and, on the other, the purpose in the second part of claim 2 and claim 3 (“Purpose B”). Let us call purpose A the protection of detainees, and purpose B the reassurance of the public. Reassuring the public could be achieved in one of two ways. The first way would be the success of the scheme in protecting detainees and informing the public about that success. Alternatively, the reassurance could be achieved by marketing the existence of the visiting scheme, without disclosing anything about the scheme, in particular whether it succeeded in protecting detainees. I believe the latter is the right interpretation, as it would be in line with the predominant priority for criminal

¹⁸⁶ 2013 Code of Practice para 2.

¹⁸⁷ *ibid.*

¹⁸⁸ *ibid.*

¹⁸⁹ 2001 Circular para 4.

justice policy of all recent governments, which has been to reassure the public.¹⁹⁰

Conclusion

Both Michael Meacher MP and Lord Scarman saw the need for regulation of police behaviour in custody blocks, and custody visiting as a means to provide that regulation. Scarman recommended that the visiting should be backed by a statutory system of independent inspection and supervision of interrogation and detention procedures in police stations by members of his proposed police liaison committees in London and, in the provinces, police authorities reoriented towards consultation. This would have given custody visiting a measure of the qualities regulators need: independence, legitimacy, accountability, and effectiveness. The proposals of both Meacher and Scarman showed a due process orientation, with the emphasis on greater protection for detainees.

Meacher's recommendations were forgotten, and although the Scarman Report received massive publicity, the government declined to implement it. Apart from not being a statutory scheme, the voluntary lay visiting scheme, which the Home Office later felt obliged to support, differed from Scarman in two crucial aspects: the checks were to be on the conditions of detention, with no checks on the conditions of interrogation;¹⁹¹ and the visits were not to be

¹⁹⁰ e.g., Richard Young and Andrew Sanders, "The Royal Commission on Criminal Justice: A Confidence Trick?" *Oxford Journal of Legal Studies* (1994) 14 3 435-448.

¹⁹¹ Scarman, text to note 37; lay visiting, text to note 70.

random.¹⁹² Thus departures were made from Scarman in respect of each of the very few specific stipulations he actually made about the visiting.¹⁹³ And, in general terms, so much of the tone was different. There was no privacy or confidentiality between visitors and detainees, and there were numerous restrictions on what visitors were allowed to do. Scarman had used the expression “inspection and supervision”: the lay visitors were not doing much inspecting, just making a series of checks, and they certainly were not supervising. The one exception to all this was the degree of independence obtained by lay visitors in some parts of London.¹⁹⁴

The custody visiting scheme, which finally became statutory in 2002, and the codes of practice, were prepared without any consultation with visitors or detainees.¹⁹⁵ The statutory scheme adopted much of the lay visiting scheme, but did not revive the consultation machinery which provided the means for publicity.¹⁹⁶ Custody visiting was branded “independent”, but published government policy contradicted that claim, and the visitors were put under the complete control of the police authorities, now the Police and Crime Commissioners. The codes of practice dropped the use of the word “unannounced”¹⁹⁷ to describe the pattern of visiting, and did not use the word “random” at all.¹⁹⁸ The orientation was crime control, causing the police the least disruption to their work. Most significantly, the policy-makers completed

¹⁹² Scarman, text to note 37; lay visiting, text to notes 75-76.

¹⁹³ See text to notes 39-43.

¹⁹⁴ See text to notes 103-121.

¹⁹⁵ See text to notes 135-136.

¹⁹⁶ See text to note 121.

¹⁹⁷ See text to note 183 and the note.

¹⁹⁸ See text to note 76.

the process of obliterating the notion that the purpose of custody visiting was to deter police assaults and reduce deaths in custody.¹⁹⁹

This story has some similarities with the attempted reforms of police complaints procedures. Graham Smith argues that, because the process takes such a long time and has no effective input from complainants, the reforms are never adequate. Smith also notes opposition to reform by the police, and their lobbying strength, with a number of different organisations representing their interests.²⁰⁰ While there are some differences from the story of custody visiting, there are also some telling similarities: the length of time taken to bring the reforms in;²⁰¹ the opposition to reform by the police;²⁰² the number of organisations representing police interests (five out of the ten bodies on the working party and the type of people involved in policy-making (no input from detainees);²⁰³ and, above all, the behaviour of successive governments, which either failed to implement the Scarman Report's recommendations, or neutered them when they were, finally, implemented.

This chapter has shown how the police and the Home Office have directed custody visiting away from its role as a regulator. In that process it has been possible to discern the dominant power of the police, influencing policy, at almost every stage, with little or no overt conflict: and the police got their way. This power produced a visiting scheme with a crime control orientation posing

¹⁹⁹ See text to notes 159-160 and the text following note 160.

²⁰⁰ Graham Smith, "A Most Enduring Problem" (2006) 35 *Journal of Social Policy* 121.

²⁰¹ 21 years, from 1981, the year of the Scarman Report, to 2002, the year of the Police Reform Act.

²⁰² See text to note 64.

²⁰³ See text to notes 135-136.

fewer problems for the police, but the scheme was still there, with some due process features, and the police did not seek to oppose the scheme altogether. The question arises as to why, if they had the power to do so, the police did not seek to stop the scheme at an early stage, or seek to dismantle it later. An answer to this will be offered in the final section of Chapter Seven.

Following this review of the desk research, the next chapter, Chapter Four, explains the design of the empirical research. The findings from that part of my research illustrate the effects of police and Home Office policy on custody visiting in the area studied, and those findings are set out in Chapters Five and Six.

CHAPTER FOUR

RESEARCH DESIGN

AND ETHICAL CONSIDERATIONS

This chapter sets out the researcher's background and motivation for carrying out this research, and explains how the research was designed to take account of those special factors, as well as to ensure that the approach was the most suitable for understanding the subject-matter. The research centres on a local case study, where the methods used were observation and interviews, but also, as has been seen in Chapter Three, there is an analysis, based on desk research and elite interview data, of the history and policy of custody visiting in England and Wales, and the thesis also touches on some current national issues, where the research draws on further such interview data and on conference observation.

The chapter explains the reasons for the choice of the case study method, and why interviews and observation were needed, with some use of official statistics, rather than surveys and questionnaires. The questions of selection and access are discussed, with an account of how the interviews and observation were planned and conducted. The chapter shows how problems were resolved, in establishing the locations for the case study, in interviewing a sufficient number of participants, and in finding the right way to study the operation of certain concepts, such as power and independence. The chapter explains how the data were subjected to a process of thematic analysis to

produce the research findings, and concludes with a review of the ethical considerations.¹

The principal concern in this thesis is the effect of the power of the police on all aspects of custody visiting, work which is carried out in the custody block, one of the state's hidden places, with a number of different interests in play: what might be called the micro-dynamics of power. As explained by Steven Lukes, power operates in circumstances where there is no overt conflict, and may achieve the result that those affected by the power refrain to take any action, whether the inaction is conscious or unconscious.² It was therefore essential to design a means to discover those events which did not happen, as well as those events which did happen. This arose, in general terms, from the issue of whether visitors challenged the police. For example, I observed that some visitors did not ask the custody staff why detainees had been taken to hospital from the custody block. Noticing that this had not happened, that this question had not been asked, resulted from a consideration of how the visitors, as effective regulators, would go about this work, whether they would ask this question, and what other questions they would ask. I found that I had to look beyond the standard visiting model followed by the visitors to a model that would be better suited to their role as regulators. Similar considerations

¹ For ease of reference, the research questions are set out here:

One: Could custody visiting make a more effective contribution to the regulation of police detention?

Two: What is the relation between custody visiting and police mistreatment of detainees, including mistreatment that ends in their death? Why is this not mentioned in official literature?

Three: To what extent is custody visiting independent, in accordance with its branding and statutory obligation?

Four: To what extent is custody visiting effective, both as a regulator, and according to the claims made for it in the official literature?

Five: Are the values of custody visiting in practice closer to the due process model or the crime control model?

² See Chapter Two, text to notes 36-45.

arose with the concept of independence, where I was seeking to establish the attitudes of the visitors: inaction, just as much as action, could provide evidence which could be analysed by drawing on this concept. For example, some visitors would, however unconsciously, show their closeness to the custody staff by shutting the cell door themselves at the end of a visit to a detainee, while others would show a greater degree of separateness by leaving it to the custody staff to perform this quintessentially custodial act. Also, in assessing how visitors developed their attitudes to their work, I needed to note not only what the sources of their socialisation were, but also the absence of those influences that one might have expected the visitors to encounter, if they were being trained to be effective regulators of police behaviour in custody blocks.

The same principle applied to the official literature about custody visiting. Just as I needed to look out for events which did not happen, I found that I also had to look out for words which the government did not use in its publications. I had to work out which words one would expect to find in government publications about custody visiting as a regulator, and look out for them. This meant studying the official literature and looking for these needles in that haystack, and eventually realising that very few of the needles were there to be found. Some of the words which one would expect to be used to describe the essential qualities of regulatory visiting were simply not used at all. This was a valuable discovery. It helped me to understand official policy about custody visiting, and pointed to the possibility that the authorities had never intended that custody visiting should have a regulatory function. Above all, I

found that the official literature kept right off the subject of custody visiting as a deterrent to police misbehaviour that could lead to deaths in custody.

Background and motivation

I have felt strongly motivated to carry out this research. My motives for doing this research are partly personal, partly academic, and partly social: the pursuit of a solution to what I regard as a problem in the criminal justice system that I had experienced personally, along with the desire both to contribute to knowledge, and to develop social policy. My interest in this research began while I was working as a custody visitor in rural Wales between 2009 and 2012. My only familiarity with the phenomenon arose from my own experience working as a visitor in two of the custody blocks covered by the local scheme. So my experience as a visitor was itself a kind of (very amateur) case study: my understanding of custody visiting depended almost entirely on my experience of that one instance.³ I felt that I wanted to read about custody visiting from standpoints other than those of the official literature. I found that very little had been published, and decided that my time would be better spent studying and writing about custody visiting, rather than continuing to work as a visitor. I believe that the context of detainee welfare in custody blocks and the substantial amount of volunteers' time spent on custody visiting make studying it very worthwhile.⁴ I came to the conclusion

³ With the permission of the police authority supervising the local scheme in which I worked, and the permission of the neighbouring police authority, obtained after a long delay, I visited a custody block in that neighbouring area. I met the visitor who acted as the co-ordinator for the team visiting that custody block, and noted certain differences between the two areas in the organisation of the rota and the reporting of visitors' concerns, but detected no differences in general matters of principle.

⁴ See Chapter One, text to notes 8-9.

that I would not be able to write a worthwhile book on this subject without academic help. That is why I applied to the University of Birmingham Law School to write a PhD thesis on this subject, with a view to publishing a book based on the thesis.

I have tried to assess for myself how I approach the question of the validity of this research. In general terms, I share the view that the real world does exist independently of our own individual subjective understanding, but that it is accessible to researchers only via the participants'⁵ interpretations, which may then be further interpreted by the researcher; and that to counter the inevitable degree of subjectivity, the researcher should try to be as objective and neutral as possible in the collection, interpretation and presentation of data, and to reflect on the ways in which bias might creep in.⁶ With my experience of the subject of the study I have, inevitably, developed some views about it, notably about its independence and ethos, and about who benefits from it. Had I not developed some views, I would not have been motivated to do the research. But another process has been at work. I became aware during the course of the research that, like the visitors I was studying, I too had become socialised by the experience of being a visitor, and later I found that I was socialised by the research itself. I found that I had, perhaps unconsciously, adopted attitudes which made me less ready to challenge the *status quo*. As a former visitor, I could be called a "former insider". There is an emotional element generated by the experience of having

⁵ This expression shows more respect to these people than "subjects": Gary Thomas, *How to do Your Research Project* (Sage 2013) 45. I also prefer it to "respondents".

⁶ Jane Ritchie, Jane Lewis, Carol McNaughton Nicholls and Rachel Ormston, *Qualitative Research Practice: A guide for social science students and researchers* (2nd edition Sage 2014) 22-3.

been an insider, which should be acknowledged:⁷ in my case, a strong feeling of dissatisfaction with the way the scheme operated. I have had to be aware of the need to take account of the overlay of my previous experience on every aspect of the research. Inevitably I have found myself making comparisons between what I had encountered as a visitor and what I was encountering as a researcher, some of which are useful. I also found that I needed to be aware of my status and of my feelings as a researcher in the custody block, in this instance as an *outsider*. I was affected by the power of the police as much as all the other outsiders in the custody block, including the visitors. I had to keep my reactions and behaviour under review, so as to minimise the effect of that power on the truth of my observations and the fairness of my interpretations.

Another consequence of being a former insider is that I did not have “the advantage of naivety”.⁸ Most of the visitors I observed and interviewed knew that I had been a visitor before, and may have seen me as someone who was looking at their performance with an experienced and a critical eye. I believe researchers gain much more insight and information by appearing to want to learn,⁹ and while I did want to learn, the visitors might have felt I did not, so a greater effort was required of me to seek to overcome that.

During my work as a visitor I had been aware of the barriers preventing my communicating effectively with the detainees. When I came to carry out this research I realised that this would again be a concern. The barriers were created by my identity and the detainees’ perception of my identity, and by the

⁷ This is the issue known as “positionality” or being an “insider”: see Yvonne Jewkes “An Introduction to ‘Doing Prison Research Differently’” *Qualitative Inquiry* (2014) 20 4 387.

⁸ John Conley and William O’Barr, “Rules versus Relationships” in Halliday S and Schmidt P (eds), *Conducting Law and Society Research*, (CUP 2009)122.

⁹ Keith Hawkins, “Environment and Enforcement” in Halliday S and Schmidt P (n 8), 101.

detainees' identity and my perception of their identity. I was aware that barriers of this type may inhibit good communication with detainees and other interviewees. I believe there are no short cuts to overcoming these barriers, except to seek the rapport and the trust of the people from whom data are sought.

The case study approach

Like all research design, my approach has had to be a compromise¹⁰ between the ideal method of studying this subject and the resources available. In this case the subject is a system in which there are an estimated 1,900 volunteers,¹¹ managed by staff employed by the Police and Crime Commissioners. Each visitor makes about one visit per month, and the aim is that one pair of visitors from each panel makes a visit to the local custody block once a week. The ideal method of studying the subject would include examinations of custody visiting in several, or maybe all, parts of the country: but the resources available for this study are one researcher, assisted by two supervisors, working for three years. My research design was driven by the need to capture a range of views and experiences in order to evaluate the regulatory performance of the scheme, for which qualitative design is entirely appropriate. That is why I chose the local case study approach, as I wanted to find a manageable way to make an in-depth study of a national phenomenon.

Case studies are suitable for a number of different types of investigation. A case study of custody visiting is located squarely in one the traditions of this

¹⁰ See, e.g., Alan Bryman, *Social Research Methods* (4th edn 2012 OUP) 41.

¹¹ Figure obtained from ICVA.

approach, the study of organisations and institutions.¹² Custody visiting is both an organisation and an institution, established by statute,¹³ with work being carried out by volunteer visitors and managed by the Police and Crime Commissioner. The same operation is carried out in each police area in England and Wales. I found the following definition of the case study helpful:

“ ... an intensive study of a single unit for the purpose of understanding a larger class of (similar) units. A unit connotes a spatially bounded phenomenon ... observed ... over some delimited period of time.”¹⁴

The case study I have carried out fitted this definition. A local custody visiting scheme is a single unit, and a temporally delimited study of it can facilitate the understanding of the larger class of similar schemes. As will be explained, I used multiple forms of data collection appropriate to a case study, principally observation and interviewing, over a core period of about fifteen months.

Another useful definition of the case study gives it as:

“ ... an in-depth exploration from multiple perspectives of the complexity and uniqueness of a particular project, policy, institution, programme or system in a ‘real life’ context. It is research-based, inclusive of different methods and evidence-led.”¹⁵

¹² This is one of the categories identified by Colin Robson. The others in his list, which he says only scratches the surface, are: individual case studies; sets of individual case studies; community studies; social group studies; studies of events, roles and relationships; and cross-national comparative issues. Colin Robson, *Real World Research: A Resource for Users of Social Research Methods in Applied Settings* (3rd edn Wiley 2011) 138-9.

¹³ Police Reform Act 2002 s 51.

¹⁴ John Gerring, “What Is a Case Study and What Is It Good for?” *American Political Science Review* (2004) 98 2 341, 342.

¹⁵ Helen Simons, *Case Study Research in Practice* (Sage 2009) 21.

The “real life” of custody visiting is seen in the study of the instances of its operation from multiple perspectives, the results of observation and interviews. As Robert Yin tells us:

“Whatever the field of interest, the distinctive need for a case study arises out of the desire to understand complex social phenomena.”¹⁶

Custody visiting is clearly a complex social phenomenon. The work puts the visitors, who are volunteers, into contact with three very different groups of people. The first group, the detainees, are members of the general public who are being detained, however temporarily, in a closed institution, and are in a state of crisis. The second group, the police, are agents of the state with coercive powers operating that detention, and it is their routine work. The visitors check and report on how members of the first group are treated by members of the second. The third group, the staff of the Police and Crime Commissioner, manage the visitors and discuss, with the police, the issues the visitors raise in their reports. These interactions all take place within a local custody visiting scheme, and they combine to produce various outcomes. It should be possible to attempt to make evaluations of both the quality of the interactions and the quality of the outcomes.

Yin points out that, because it uses observation and interviews, methods which are clearly suited to the subject-matter of the interaction of human beings, case study is preferable in that context to other systems, such as experiment, survey or record analysis, which do not use those methods.¹⁷ I

¹⁶ Robert K Yin, *Case Study Research: Design and Methods* (5th edn Sage 2014) 4.

¹⁷ *ibid* 8.

believe I was using the method described by Glen Bowen as “naturalistic inquiry”, where

“the investigator studies real-world situations as they unfold naturally instead of manipulating research outcomes *a priori*. Further, the researcher recognizes the existence of multiple constructed realities.”¹⁸

However, case studies do need to place the object of study into a theoretical context:

“For a ‘case’ to exist, we must be able to identify a characteristic unit, whose unity is given (at least initially) in concrete historical experiences. This unit must be observed, but it has no meaning in itself. It is significant only if an observer ... can refer it to an analytical category or theory ... If you want to talk about a ‘case’, you also need the means of interpreting it or placing it in a context.”¹⁹

Custody visiting’s “characteristic units” are its local settings. In this thesis, custody visiting is interpreted in the characteristic unit of one local custody visiting scheme. As described below, the research was carried out at seven different custody blocks in that local scheme, each with its own visiting team, and, briefly, at the new dedicated custody facility. The data about these characteristic units were then examined and analysed by drawing on the key concepts discussed in Chapter Two. This process led to findings being made, and those findings provided the bases for answers to the research questions.

¹⁸ Glen Bowen, “Naturalistic inquiry and the saturation concept: a research note”, *Qualitative Research* (2008) 8 1 137, 138.

¹⁹ Michael Wieviorka “Case studies: history or sociology?” in Ragin C C and Becker H S (eds). *What is a case? Exploring the foundations of social inquiry* (CUP 1992) 159, 160.

The concepts all derive from the topics which themselves are the context in which custody visiting operates. Each of those concepts is an analytical category or theory.

This research is an attempt to “make sense of or interpret” custody visiting “in terms of the meanings people bring to [it]”.²⁰ The people who bring meanings to custody visiting are found in all parts of England and Wales. On one view therefore, this research might be thought to require a much wider spread of information than can be obtained from parts of just one local scheme. But the only way for a lone researcher to gather data about a much larger number of local schemes would have been by the method of survey and questionnaire. The idea was rejected at an early stage. A great mass of information would have been obtained, but it would not have been useful, for the following reasons. First, it is not just the visitors one would wish to study, but all the other categories of people found in custody blocks: the police, civilian custody staff, detainees, and lawyers. It would have been difficult to reach members of these other categories by a survey, and it would have been impossible to ascertain the identity of members of that very important category, the detainees, let alone reach them. Second, the nature of the information one would wish to obtain from all these people would not fit usefully into the survey format of yes/no answers or graded expressions of agreement or disagreement. Nor would results of that kind be much help in making sense of, and/or in interpreting, custody visiting in terms of the meanings people bring to it: each result would be no more than what Ben Bowling has labelled

²⁰ Norman Denzin and Yvonna Lincoln (eds), *The Sage Handbook of Qualitative Research* (Sage 2011) 3.

a “decontextualised snapshot”.²¹ Survey material would not have been suitable for this study, whatever scale it was conducted on. The researcher needs to find out how the participants approach the answers to the questions and why they approach them in a particular way, and to have conversations with them in which ideas can be developed and incidents can be recalled.

A case study is carried out by the researcher being physically located in the place where the phenomenon operates, or, as here, where an instance, or instances, of the phenomenon operate. Time and access to fieldwork are always limited, so Robert Stake recommends selecting cases that are easy to get at and hospitable to inquiry, without too much concern about their typicality.²² The area chosen for the case study provided some diversity. My experience as a custody visitor was in an under-populated rural area, where data were scarce, distances were long, and there was little variety in the environment, so it was not surprising that the area I chose for the case studies was a much more heavily populated and largely urban area, affording a variety of locales, all within easy reach, and likely to provide me with a large quantity of data.

That left the question of whether there were specific issues arising from a rural setting which I might miss by running the case study in an urban area. This issue would affect the value of my research, because differences of principle would limit the extent to which conclusions could be drawn from my research about custody visiting in general. In the event, my experience in a

²¹ Ben Bowling, “Racial Harassment and the Process of Victimisation” in Perry B (ed), *Hate and Bias Crime: A Reader* (Routledge 2013) 61, 62.

²² Robert E Stake, *The Art of Case Study Research*, (Sage 1995) 4.

rural scheme enabled me to be reasonably confident that there were no significant differences between the operation of urban schemes and the operation of rural schemes. And there were two other issues which could limit the value of my conclusions. Custody in the whole of the chosen area was run directly by the police, not partly outsourced, as in one of the areas studied by Layla Skinns,²³ and custody visiting was run directly by the Police and Crime Commissioner, unlike in one area where some aspects have been outsourced.²⁴ These were not issues which I could take into account in selecting the area for the case study, and they could be the subject of further research.

Research beyond the case study and literature review

This research has gone beyond the confines of the local case study. I carried out desk research about the history of custody visiting from 1980. I reviewed archival material about lay visiting in the form of the archives of the Lambeth Panel of Lay Visitors to Police Stations. I have obtained interviews with the late Michael Meacher MP, who originally proposed custody visiting; with the veteran custody visitor Jane Warwick, who helped me to understand the relationship between custody visiting and deaths in custody, and enabled me to unravel the facts behind an important and misleading account in an IPCC report, where I also used the machinery of the Freedom of Information Act; and with Katie Kempen, the chief executive of ICVA. I attended a number of conferences about policing issues and deaths in custody, which enabled me

²³ Layla Skinns, *Police Custody* (Routledge 2011).

²⁴ In Dyfed-Powys, to, amongst others, PAVO (Powys Association of Voluntary Organisations): conversations with Dyfed-Powys visitor and PAVO officer.

to obtain some comparative information, as well as stimulating ideas about the case study research. These investigations have made this research much more than just a local case study, even if the case study does lie at the heart of the research design.

I have looked at several literatures in order to carry out this research, both on the topics and concepts framing the thesis, as well as the history and practice of custody visiting. Initial searches in databases made it clear that there was very little available. For the history, I found that the Scarman Report was a good place to start: it took me back to Michael Meacher and forward to commentaries about the proposals for custody visiting, and the development of lay visiting. This enabled me to find the material, including archives held in Lambeth. Five reports of research had been published between 1986 and 1999, only one of which involved any face to face interviewing, with the others all relying on telephone surveys and questionnaires. The reports did not go beyond how the schemes were running, and what evaluation there was did not consider the underlying question of whether lay visiting was framed in the right way or should be framed in some other way: in particular, whether it should, or should not, be run by police authorities, an issue which was suggested by the results of research into London panels.²⁵ There has been no published research about custody visiting since 1999, apart from the occasional page in other works. For the current picture, I read through *Visiting Times*, published by ICVA, reports by the Joint Inspection Teams,²⁶ and

²⁵ See Chapter Three, text to note 120.

²⁶ See Chapter One, text to notes 105-6.

reports and marketing material posted on the internet by Police and Crime Commissioners.

I also had to consider literature relating to the concepts in this study, power; socialisation; Packer's crime control and due process models and the allied concept of balance; independence, combined with neutrality and impartiality; legitimacy; accountability; and effectiveness. I trawled through the stock of textbooks in the university's law library, and looked through general books on criminology and criminal justice, using indexes and pursuing references which looked promising. As well as Westlaw, I used Google and Google scholar, Hein on Line and Web of Science search engines, and occasionally found that Wikipedia was able to point me in the right direction. The journals I looked at systematically were the British Journal of Criminology, Criminology and Criminal Justice, and Policing and Society, but found no material in them that was directly relevant to custody visiting, but there was material on other issues with a bearing on my research such as public confidence in the police.

Access

Access in the area chosen for the case study was not a problem, as it sometimes is with state agencies.²⁷ The initial negotiations were conducted by my lead supervisor²⁸ with the Police and Crime Commissioner, from whom permission was obtained and with whom a confidentiality agreement was signed, and permission was also obtained from senior police officers who

²⁷ Steve Tombs and David Whyte, "Scrutinizing the Powerful" in *Unmasking the Crimes of the Powerful*, Tombs S and Whyte D (eds), (Peter Lang 2003) 3, 32-36.

²⁸ My lead supervisor tells me that it is fairly normal for someone of perceived higher status than a doctoral student to take the lead in opening the initial door.

required information about the research project to be filed with them. Detailed discussion with the scheme administrator (a member of the Office of the Police and Crime Commissioner) provided the necessary information with which to plan the research. The scheme administrator facilitated access to the visitors, initially by allowing me to attend meetings and training sessions, and then putting me in touch with them so I could make arrangements for accompanying them on visits and arranging interviews. I was security vetted by the Association of Chief Police Officers (ACPO) and issued by the police with an identity tag of the type issued to custody visitors. Local custody inspectors were also helpful in facilitating my access to custody sergeants, custody staff and detainees, although on one occasion an inspector sought to make this access subject to the unacceptable condition that the visits were announced in advance.²⁹

Another gatekeeper, encountered in the research beyond the case study discussed in the next paragraph, was the Independent Custody Visiting Association (ICVA), who declined to let me attend scheme administrators' annual meetings, but did allow me to attend their national conference. ICVA told me that my attendance at the scheme administrators' meetings might inhibit debate. One inference that could be drawn from the resistance of ICVA was that there were aspects of the administration of custody visiting that they did not want me to observe. What I was allowed to observe, what I was not

²⁹ Another reason these visits did not go ahead was a safety consideration: see text to note 67. For the scheme administrator, see Chapter Five, text to notes 34-37.

allowed to observe, and who made the decisions, were important forms of data in their own right.³⁰

The fieldwork: data collection

The fieldwork was largely carried out in the second year of the three year study, as is the usual practice. There were three stages in the fieldwork: familiarisation, the pilot study, and the actual case study. Alongside that, for the work beyond the case study, there were three interviews with named people, attendance at conferences and archival research. The three stages enabled me to progress from a general appreciation of the operation of the local scheme to close contact with all the participants and each of the custody blocks. The familiarisation stage took place between January and June 2014. The pilot study stage was conducted in July and August 2014. The greater part of fieldwork for the case study was carried out between September 2014 and June 2015. The relatively small amount of fieldwork which could not be carried out earlier took place between 1 July 2015 and 15 March 2016, after which no more was done. The fieldwork extended into this period for two reasons: effective opportunities to interview detainees did not arise until August 2015, and it was during this period that a new style of custody block was opened.

The familiarisation fieldwork took the form of observation: visitor team meetings, visitor induction, training sessions, and annual meeting. These observations provided valuable background understanding of the organisation

³⁰ A point made by Victor Jupp, *Methods of Criminological Research* (Routledge 1996)148-9: and see Chapter One, the text to notes 123-125.

of custody visiting, its language, and its ethos, and were very useful preparation for the later stages.³¹

A pilot study is recommended by Yin, on the basis that it helps to refine the data collection plans with respect to both the content of the data and the procedures to be followed.³² So the next stage was a pilot study, in which the fieldwork consisted of the same combination of methods as for the actual case study: observation at a custody block, accompanying visitors on visits, and interviews with visitors. Preparing for the pilot study included selecting venues which could be used for the actual case studies as well as for the pilot. Various possible locations were considered. Those originally selected for the actual case study were three very different locales: one city centre location, one location which combined a prosperous suburb with a deprived estate, and one inner-city area. The pilot study was conducted at one of the custody blocks which had not been selected for the case studies, located in another prosperous suburb.

In the pilot study I extended my observation to three-hour sessions in police stations (during which, as it happened, no custody visits were in progress) and to accompanying visitors on visits. These three-hour sessions were also part of visitors' training, so they enabled me to stand in the shoes of visitors and to experience what they might have experienced and to observe what they might have observed. It also enabled me to get a better understanding of the world of the custody block. I did two shifts, one daytime and one late night,

³¹ as recommended by Richard Sparks, Anthony Bottoms and Will Hay *Prisons and the Problems of Order* (OUP 1996) 346.

³² Yin (n 16), 96.

in each of the seven custody blocks. Accompanying visitors is discussed in more detail below.

The pilot was particularly useful in alerting me to the fact that it was not sufficient to contact visitors by email sent to them on my behalf by the scheme administrator, as few of them responded. In the pilot just one visitor had responded, so I approached the others through that visitor. A balance had to be struck between not pressurising the visitors on the one hand and not getting sufficient data on the other. I decided that, for the actual case studies, I would attend a visitor team meeting and explain the project in detail before asking for their help. For the pilot I had set this out in emails, but it became apparent that not all the visitors had read the emails, and that some of them thought my research was about checking up on their performance or that of their team. I therefore had to explain to them that this simply was not so.

The pilot also enabled me to think about the most effective way of collecting data from the visitors. I thought it would be best to accompany each visitor on a visit first, with the option of spending a few minutes debriefing immediately afterwards. The interview with each visitor should then take place on a separate occasion, a few days later, and the questions could be angled towards issues that had arisen from what happened, or did not happen, on the visit.³³ While this would have been ideal, I found that it could be followed only very rarely, because of the difficulties involved in making arrangements.

The first category of data that I collected was observation of people in the context in which the activities of interest occurred. This encompassed

³³ See text around note 2.

observation of: custody blocks in three-hour sessions during daytime and late night shifts, accompanying visits by visitors to the custody blocks, visitor team meetings, visitor training sessions, and visitor regional and national conferences. The second category of data is my interviews, with visitors, detainees, police officers and civilian custody staff, lawyers, and, outside the case study, Michael Meacher MP, a veteran custody visitor in London, and a prominent figure in custody visiting's national organisation ICVA. Observation and interviews are both methods clearly suited to studying interactions between human beings, and to understanding the "complex social phenomenon"³⁴ created by those interactions: how and why people behave in that context. Observation allowed me to see for myself: interviews enabled me to obtain people's views and to hear their stories. The third category of data is statistics and documents. I have not been involved in the collection of statistics, and find that those which are published reveal no more than very basic information, little of which is useful for evaluation purposes, except for ascertaining the timing of visits.³⁵

The initial plan was to concentrate on three visiting teams to create three case studies. I attended the team meeting for what was then to have been the first case study to ask the visitors for their help. In the event no visitors at all attended that meeting, which took place at the height of the holiday season: the scheme administrator told me that it was unprecedented for there to be no visitors attending a team meeting. The visitors had not been forewarned that I would be there asking their help, so that was not the reason for their non-

³⁴ Yin (n 16) 4.

³⁵ See Chapter Six, text to notes 34, 43, 50 and 155-158.

attendance. The police did not attend either. So I communicated with the members of that team via the scheme administrator and was able to reach some of them. I then decided to take on a fourth location for a case study where I had already attended two team meetings, but only three visitors attended the meeting which I attended to make my formal request for assistance. Again, the scheme administrator wrote to the rest of the team about my request. Gradually, the numbers of visitors I was reaching built up, partly through the messages sent out by the scheme administrator, and partly through the “snowball” effect: visitors whom I had met and accompanied on visits and/or interviewed recommended my research to other visitors.

In another attempt to increase the number of visitors participating, I went to a regional conference run for the area studied and three neighbouring areas, at which I started to seek access to the custody visiting schemes in those areas. The Police and Crime Commissioners in two of those neighbouring areas did not respond to my enquiry: an approach by my supervisor might have made a difference. In the third, the Police and Crime Commissioner referred me to a senior police officer. That officer sought to impose conditions on my access that I was unwilling to accept. The conditions were that he had sight of my interview schedules, and that I wrote him a report on the custody facilities in their area.

I decided that I should seek access to a larger number of custody blocks in the chosen area, and I should treat that area as one case study, rather than as a number of individual case studies. I gradually increased the number of visiting teams in the chosen area from three to seven. This not only increased

the number of visitors and custody blocks, but it also widened the scope of the research into four further areas, enabling me to interview a much wider range of participants: not only visitors, but also detainees, police and custody staff, and lawyers. This led to my being able to investigate custody visiting in seven different custody blocks in a variety of locales: city centre, inner city, and suburbs, both prosperous and deprived. I have therefore treated my thesis as a single case study based on research at seven locations in the one area, rather than multiple case studies based on research at multiple locations.

Widening the scope of the study also gave me access to a substantial number of participants. I observed and/or interviewed 33 visitors, interviewed 24 of them, and accompanied 29 of them on visits, some on more than one visit, on 21 different occasions. I met other visitors at training sessions and team meetings, but they are not included in this discussion of the profile of the visitors. Of the 33 visitors, 18 were men, and 15 were women: 22 were white, five black, four Asian, all of them Indian,³⁶ and two mixed heritage. As regards their ages, no visitor was under 20, two were in their 20s, two were in their 30s, four were in their 40s, 11 were in their 50s, 12 were in their 60s, and two were in their 70s, with none over 80. About half of the visitors had university degrees and/or professional backgrounds, in science, law, healthcare, social work and education. There were no manual workers. A sample that was more representative of the general population in the area studied would have had an equal number of men and women, fewer white people, a wider spread of Asians, more people under the age of 50, some manual workers, and some

³⁶ One of whom told me he was fluent in two languages and in two dialects of those languages, as well as in English.

unemployed people. As regards marital status and sexual orientation, while some visitors told me they were married, the information I obtained about these issues is far from complete. I did not put any questions about personal matters to the interviewees, nor did I give them a form to complete anonymously. As well as not being representative of the general population in the area studied, the sample of visitors is not representative of the visitors in the local scheme, as the only qualification for inclusion in the sample was being prepared to participate in the research. There was no way of avoiding this. Some of the visitors simply did not respond to my requests for their help. One visitor whom I had already met at two team meetings told me, during our discussions after an accompanied visit, that there would be no interview: this visitor has since resigned from the scheme as well.³⁷ My research demanded that I capture a wide range of views: the selection of interviewees was as purposively heterogeneous a sample as it was possible to obtain in the circumstances.³⁸

In the case study, interviews were extended to the police, other custody staff, detainees, and defence lawyers, and the scheme administrator. The aim was to gain the largest possible number of different perspectives.³⁹ Some of the custody staff were told by their custody inspector to give me an interview, others agreed when I approached them myself. I tracked most of the lawyers down through the local law society. The interviews with the detainees were all conducted in a consultation room in the custody block where they were

³⁷ Information from AD.

³⁸ Ritchie *et al* (n 6) 114.

³⁹ Carolyn Hoyle, "Being a 'nosy bloody cow': ethical and methodological issues in researching domestic violence" in *Doing Research on Crime and Justice*, King R D and Wincup E (eds) (OUP 2000) 385, 398ff.

currently being detained. I arranged to meet all the other interviewees in venues with which they were comfortable: their homes, places of work, hired meeting rooms, cafes. There were also three named interviewees. The table which follows sets out the statistics for my interviews and observation.

FIELDWORK TABLE

INTERVIEWS: ALL FACE-TO-FACE

Interviewee type	Number	Average length	Total hours
Visitors	23	1 hr	23 hrs
Detainees	17	20 mins	5 hrs 40 mins
Police and civilian staff	24	30 mins	12 hrs
Lawyers	7	30 mins	3 hrs 30 mins
Scheme Administrator	2 sessions	1 hr 30 mins	3 hrs
Michael Meacher	1	1 hr	1hr
Jane Warwick	1	2 hrs	2 hrs
Katie Kempen	1	1 hr 30 mins	1 hr 30 mins
Grand Total	76		51 hrs 40 mins

OBSERVATION

Observation type	Number	Average length	Total hours
Accompanied visit	21	1 hr 10 mins	24 hrs 30 mins
Team meeting	21	1 hr 30 mins	31 hrs 30 mins
Training	3	5 hrs	15 hrs
Custody block	14	3 hrs	42 hrs
ICV conferences	2	5 hrs	10 hrs
Grand Total	61		123 hrs

The interviews were “semi-structured”, a format which enabled the process to be both consistent and flexible. I had prepared a schedule split up into the issues that I wanted to cover,⁴⁰ and for each issue there was a series of questions. These issues were different aspects of custody visiting, such as questions to the visitors about their training, rather than direct questions about the concepts of the research. Some of the questions could appear under a number of different issues, so care had to be taken not to go over the same ground twice.⁴¹ I tried to keep to the schedule, but some of the interviews took a different tack. Where that happened, I went back to my schedule to ensure that as many of the questions as possible had been answered. With the visitors, where issues had come up during a visit, I raised those issues during the interview. A technique which I found very helpful was the use of a “vignette”. A vignette can be either an account of an actual event, or a hypothetical, but nevertheless concrete and realistic, scenario.⁴² I chose a hypothetical vignette and explained it to each interviewee, so that each of them could comment on how they would deal with the particular situation posited. I believe that this produced more focussed answers than unspecific general questions about the same issues,⁴³ and that it enabled me to collect a number of different perspectives based on the same proposition. The questions changed over the period. For instance, visitors could never think of anything worth mentioning when I asked them to tell me about the strangest thing that had ever happened on a visit, so I stopped asking the question. The

⁴⁰ As recommended by Robson (n 12) 286: Ritchie *et al* (n 6) 149 use the expression “Topic Guides”. I was able to give the schedule I had prepared for interviewing police and custody staff a trial run on a friend who had, in a previous life, been a custody sergeant.

⁴¹ Ritchie *et al* (n 6) 149.

⁴² *ibid* 165f.

⁴³ Hoyle (n 39) 399.

interviews were preserved on the digital recordings made of them. The only parts of the interviews that were typed up were anonymised summaries and extracts.

Both for the pilot study and for the actual case studies, there were four types of observation. The first observation method was to accompany visitors, who always visit in pairs, on their visits, which were, like all visits by custody visitors, not by appointment with the custody sergeant but arranged between the visitors: for this research the visitors then contacted me to complete the arrangement. I accompanied visitors on 21 visits. The second observation method was by observation at team meetings, for which the scheme administrator gave me the venues, dates and times. I attended 21 team meetings lasting about 90 minutes each. The third observation method was by observation at training sessions, each lasting between four and six hours. The fourth method was attendances at custody blocks on different days at different times: on each occasion I worked from a fixed position near the custody sergeant's desk for a period of about three hours. This enabled me to gain an understanding of the work of the custody block in a way that cannot be achieved in the course of a visit, as visits rarely last longer than about 90 minutes. These sessions were by prior arrangement with the custody inspector and/or the custody sergeant. I carried out 14 of these observations. Outside the case study, I attended two visitors' conferences and three conferences run by commercial conference organisers, the latter not strictly observation: each of these conferences lasted about five hours.

All the observations were carried out overtly, but with the aim of obtruding as little as possible. I did not use electronic recording devices, nor did I use specially designed complex observation sheets which can be a serious distraction,⁴⁴ but I did make as many notes as I could. Inevitably, not everything can be covered, and the note-taking distracted my own attention and the attention of the participants, but the aim was to provide as much information as possible about what I observed. The observations began with descriptions of the locations.⁴⁵ Custody blocks were described in great detail as they are not places with which many people are familiar. The older blocks can be all or any of the following: dark, too cold or too hot, noisy and smelly. Essentially I was recording events, conversations and behaviour. The participants were described, and their actions related, including my own. My own actions in the fixed observation were very few. When accompanying visitors I explained my role to detainees and others we encountered, observed the visitors' interaction with detainees, and made notes about those interactions. The observations were unstructured: no regular observations were made of specific incidents, situations or activities, but I did use certain headings to remind me to check instances of not only what did happen, but also what did not happen: for example, visitors challenging the police, and failing to challenge them. As much as possible, quotes were verbatim.⁴⁶ The observations were then typed up from the notes, with some general comments about issues arising and occasional notes of my own feelings about what I had observed.

⁴⁴ Benjamin Goold, *CCTV and Policing: Public Area Surveillance and Police Practices in Britain* (2004 OUP) 47 says complex recording sheets are impractical and tend to make police officers nervous.

⁴⁵ Robson (n 12) 325.

⁴⁶ Ritchie *et al* (n 6) 259.

During the third year of my research there were two important developments. I was able, for the first time, to interview detainees at one of these police stations. There had been two obstacles to this. First, it was ethically unacceptable to interview detainees, as vulnerable people, without any notice: the question was how to ensure that some notice could be given. Second, an interview conducted with a detainee, under the same conditions as the visitors met the detainees, i.e., in their inadequately furnished and denigrating cells, would not be likely to produce a useful result. I raised the issue at a team meeting, and the custody inspector, whom I had interviewed for the research and with whom I had built a relationship of trust over the previous twelve months, himself suggested a solution to this problem. The solution was that I accompanied visitors on Sunday afternoons, when some of the detainees had been interviewed and charged and were being detained pending their appearance at the magistrates' court the next day: I could then give them one hour's notice of the interview, which gave them more time to consider whether to consent to my request. I obtained, by negotiation, the concession that I could interview the detainees in the relative privacy of a consultation room furnished with tables and chairs. My failure to gain access in the other police areas, and my success in finally gaining satisfactory access to detainees, both re-emphasise the importance of gatekeeping in this research.⁴⁷ The second development was that a new dedicated 60-cell custody facility was opened. This marked a fundamental change in the management of custody. Almost all of my investigation has been related to the old style of block. The question

⁴⁷ See text to notes 27-30.

therefore arises whether my investigation remains valid despite those changes. I went on a guided tour with a group of custody visitors, and accompanied two of them on a visit. From these observations, I deduce that the issues of principle for custody visiting are the same in the new blocks as in the old. In some ways, matters have got worse: access by lawyers to the custody block has been restricted, and their access to detainees has been made more difficult, with lawyers being required to be locked in consultation rooms with their clients. The same unsatisfactory and potentially dangerous conditions were offered to me for interviewing detainees at the new site, so I chose not to interview detainees there.

One issue which I needed to investigate, for which methods other than observation and interviewing, such as a survey, might have been the answer, was whether the public have heard of custody visiting. But a survey would have been problematical, because obtaining a sufficiently large sample would have been prohibitively expensive. The solution was to put the question to all the interviewees.

I have carried out a large number of observations and conducted a large number of interviews. I re-interviewed only one participant, the scheme administrator. I believed that those large numbers of observations and interviews would be sufficient for this study to reach what is known as “saturation”: i.e., that no more data are required. I had selected what I believed to be a “cohesive” sample from one visiting scheme. The principal indicator of saturation was simply that I found that I was observing, hearing

and then reviewing data about the same things several times over.⁴⁸ In any case, as a practical matter, it would have been difficult for me to find more time for these data collection activities: as noted above, all research design is a compromise.⁴⁹ However, evidence of one aspect of custody visiting did not appear until during an accompanied visit which I made at a very late stage. That aspect related to the concept of power, and how power operates in the relationship between custody visitors and the police. It was fortunate that I had been obliged to conduct a larger number of accompanied visits than I had planned.⁵⁰ It was on the 21st accompanied visit that I saw, for the first and only time, the power relationship between visitors and police spelled out in overt conflict. I had not expected to see this, as I had come to believe that the relationship was one where power operated subliminally and without overt conflict, and I had found that this had been confirmed by my observation on all previous 20 accompanied visits. This experience demonstrates that it is impossible to be certain that other important data may not be lurking in the next observation or interview. What happened in this case allowed me to establish that overt conflict did occur very occasionally, and it enabled me to draw inferences, from my observation of the overt conflict, about the usual situation where I believed conflict was latent.

⁴⁸ Janice M Morse, "The Significance of Saturation", *Qualitative Health Research* (1995) 5 2 147.

⁴⁹ Bryman (n 10).

⁵⁰ This arose because I did not, until a late stage in the fieldwork, gain access to detainees for interviews as part of accompanied visits.

Data analysis

The purpose of the analysis of the data was to provide answers to the research questions. I used a system known as thematic analysis, which:

“involves discovering, interpreting and reporting patterns and clusters of meaning within the data.”⁵¹

The analysis involved the following stages: familiarisation, summarising, interpretation, and explanation.⁵² I started the process by compiling a list of codes relating to issues arising from the topics and concepts. Organising the data was assisted by using the computer-assisted data analysis software package *NVivo*. Although these packages are described as data analysis, they are aids to analysis, not the analysis itself.⁵³

The data were reviewed to see which code they related to, and whether the data produced other issues which needed to be added to the list. For instance, I was not able to interview detainees until a late stage. I was aware that visitors did not give feedback to detainees about the outcomes of the requests that visitors passed on to the custody staff. However, it was only after listening to the detainees that I realised the importance that I should attach to this, and that it was an example of crime control orientation, because it showed that the visitors, however unconsciously, did not value the welfare

⁵¹ Ritchie *et al* (n 6) 271.

⁵² *ibid* 295ff.

⁵³ *ibid* 290.

of detainees sufficiently to take the extra time and trouble to let them know the outcomes.

The codes I worked with initially went through several changes. They started with a list of the key concepts and the factual issues. This list had to be expanded to take account of fresh issues, and then collapsed so as to group them under key headline issues: model of visiting and visitors' rights of access, visitors' interviews with detainees, reporting, police accountability, whether visitors should have a wider role, management and institutions, and other miscellaneous topics. The codes were then collapsed again to be grouped as much as possible under the key concepts. Because it took place at a late stage, interviewing detainees led to the setting up of a whole new set of codes.⁵⁴ I inputted the data with those codes, and was thus able to retrieve the data relating to each theme/issue to compile the evidence. This process was applied to both the written accounts of the observations and the digitised recordings of the interviews. I have found it necessary to listen to the interviews and read the written data more than once. Re-listening to the interviews was very useful, as it enabled me to hear the nuances. Reading transcripts would not have given me that advantage, and having to deal with transcripts would have been a huge burden.

The manner in which I marshalled the data enabled me to review the evidence on each point and then make my findings. I was able to establish the views and modes of behaviour of the majority, as well as noting significant

⁵⁴ See text to note 47.

instances of dissent. Looking at their views in this way provided a check against the possible effects of my own bias. I looked for explanations of both the majority view and the views of the dissenters. My explanation for the majority of visitors following the lines taken by the Police and Crime Commissioner was that it arose from their mono-cultural socialisation, and that the dissenters had resisted the effects of that process. I appreciate that this is a subjective analysis, and that the data might make different impacts on other researchers.

Ethical considerations

The principal ethical issue in research involving contact with people is to ensure that they are not harmed by the research or caused stress or anxiety.⁵⁵ The approach I took on ethical issues was based on the Socio-Legal Studies Association's ethical statement.⁵⁶ In particular, the research complies with their first principle of accurate and truthful reporting for the benefit of society.⁵⁷ Clearance was obtained from the University of Birmingham's Ethics Committee on the basis that I followed certain procedures, as documented below.

To recap, the participants were visitors, police officers, civilian custody staff, detainees, defence lawyers, the scheme administrator, and three named individuals. I considered what I was asking each of these various participants

⁵⁵ Robson (n 12) 194.

⁵⁶ *Statement of Principles of Ethical Research Practice*: http://www.slsa.ac.uk/images/slsadownloads/ethicalstatement/slsa%20ethics%20statement%20_final_%5B1%5D.pdf accessed 20.05.2016.

⁵⁷ *ibid* 2.1.

to do, whether they were vulnerable, and how to protect them. I was asking for their help in allowing me to observe and interview them. With the obvious exception of the detainees, almost all the participants in the case studies were not vulnerable, and all were adults. Special consideration had to be given to dealings with the detainees. But all participants could have been rendered vulnerable had I failed to respect the confidentiality of their personal data, some of which was sensitive. At no point did I conceal the purpose of the research from the participants or deceive any of them or put them at risk.⁵⁸ In the observation, and in particular in the interviewing, it was necessary to use social skills to develop rapport with the participants. Some scholars have pointed out the dangers of “faking friendship” in creating power imbalances: to counter that tendency, the researcher needs to use experience and reflexivity to be clear about the boundaries of the role.⁵⁹ From the pilot I realised that it was vital, to avoid misunderstandings, that the interviewees were given full information about my background, the reasons for doing the research, the self-funding, the role of the Police and Crime Commissioner and the police, and my independence from them both.

All participants whom I interviewed were treated in accordance with the “Participant Map of Research Ethics” which is a guide to the ethical principles that should be observed before, during, and after the interview. Amongst its principles for the time before the interview are unpressurised decision-making about taking part; and openness, honesty, and being able to correct misunderstandings. For the interview itself, the principles include that the

⁵⁸ Thomas (n 5) 45.

⁵⁹ Ritchie *et al* (n 6) 84.

interviewee should feel valued and respected; and that s/he should be asked questions that are relevant, not repetitive, and clear. After the interview, the principles include the right to privacy and anonymity, and that the research is used for social benefit.⁶⁰

I realised that ethical dilemmas might arise during the fieldwork. Ritchie *et al* say that the researcher needs to develop an ethical conscience and to use reflexivity and discussion with others, and that thinking issues through from the perspective of a participant is fundamental.⁶¹ For instance, there is the potentially life and death issue of ligature points. I noticed that visitors did not generally make checks for ligature points. In the event, I did not notice any ligature points myself that they did not report. Had I noticed ligature points which they did not report, I would have had to draw them to the visitors' attention, as matters that should be reported to the custody sergeant, or reported them myself to the custody sergeant, which would have been difficult to do without the visitors knowing. Taking that action might have damaged my relationship with the visitors, because they would have seen me as checking up on them, an impression I had found it necessary to try to dispel from an early stage. I would have been forced to choose between reporting a potentially life and death issue and making my research less valuable. In the event, I was not obliged to choose between these two options. A solution could have been to telephone the custody sergeant about the ligature point later, although it is not always easy to get through to them.⁶²

⁶⁰ From J Graham, I Grewall and J Lewis *Ethics in Social Research: the Views of Research Participants*, (Cabinet Office 2007) 6, reprinted in Ritchie *et al* (n 6) 83.

⁶¹ Ritchie *et al* (n 6) 108.

⁶² Vicky Kemp, *Transforming legal aid: Access to criminal defence services*, (Legal Services Commission 2010) 49.

Funding

I told all the participants, and mention here, that this research was entirely self-funded, except for some small grants from the University of Birmingham towards travel, conference and equipment costs. There is, therefore, no sponsor of this research: by contrast, three of the reports about lay visiting were funded by the Home Office.⁶³ Self-funding removed one of the barriers to this kind of research, that government would have been unlikely to fund it:⁶⁴ and it enables this research to claim its independence, a quality so central to this study.

Visitors

During the familiarisation phase, I had met some of the visitors at one of the visitor team meetings and/or an induction and training session or the annual meeting. I informed the visitors about the research project by a brief presentation, and I asked them if they wished to participate on the basis of the terms set out in participant information sheets. These information sheets explained the nature of the research, mentioned its authorisation by the Police and Crime Commissioner and the University of Birmingham, and what the research issues were. The information sheets stated that I wished to attend team meetings and training sessions, to accompany pairs of visitors on their

<http://eprints.nottingham.ac.uk/27833/1/Kemp%20Transforming%20CD%202010.pdf>
accessed 06.06.2016.

⁶³ Charles Kemp and Rod Morgan, *Behind the Front Counter: Lay Visitors to Police Stations* (Bristol and Bath Centre for Criminal Justice 1989), an earlier version of the next publication; Charles Kemp and Rod Morgan, *Lay Visiting to Police Stations: Report to the Home Office* (Bristol Centre for Criminal Justice 1990); Claire Hall and Rod Morgan, *Lay Visitors to Police Stations: An Update* (The Bristol Centre for Criminal Justice 1993), and Mollie Weatheritt and Carole Vieira, *Lay Visiting to police stations*, a report commissioned by the Home Office, Home Office Research Study 188 1998.

⁶⁴ Tombs and Whyte (n 27), 29-32.

visits to the custody block and to interview them about the work: all with a view to using the information gained in seeking answers to the research questions. The information sheet informed visitors that the results of the research would be published, but that this would be done in a way which ensured that all the information they provided would be kept confidential and that each of them would remain anonymous and unidentifiable: any data collected for the research would be used strictly in compliance with data protection legislation. The visitors were put in direct email and mobile phone contact with me. This was done so that the arrangements could be made without the involvement of the scheme administrator, who was thus prevented from knowing the details of the timings of the visits. It was for the visitors, not myself, to initiate each arrangement. This meant that visitors were not under any pressure to participate and that they were opting into the research on an entirely voluntary basis. I informed them that if, after this stage, they decided that they did not want to be involved with the research, they would be free to withdraw by a specified date, and that if they did, none of the information involving them would be used in the research and all such data would be destroyed. The special arrangements for visiting when I could also interview detainees meant that I had to approach visitors and ask them if they could visit on specific Sundays,⁶⁵ but, by the stage when this took place, the visitors were used to me and felt able to refuse, and some did refuse.

At the start of each interview, I sought the visitor's consent and captured the response by the digital recorder. This enabled the genuineness of the consent given, and the level of understanding of the participant, to be open to

⁶⁵ See text to note 47. Sunday visits were not popular with visitors.

subsequent review in a way that is not true of written consent forms. It was most unlikely that any of the visitors or staff managing them would lack the competence to consent, and none of them did lack that competence, but I would not have interviewed those I perceived to be lacking that competence.

I started by assuring the interviewee that s/he would remain completely anonymous and that no records of the interview would be kept with their name on them; and that nothing identifying them would be passed on to the Police and Crime Commissioner or the police. I said they could bring the interview to an end at any time if they wished, and that in that case I would not use any of the information they had given me. I asked if on that basis they were happy for the interview to proceed.

Consent to observation at team meetings and training sessions and other similar occasions was obtained in the following way. Those attending were given a chance to object by having seen the participant information sheet before the start of the meeting or session: I confirmed my presence at the start of the meeting, thus providing an opportunity for questions about the research: and I then checked that no one objected to being observed.

Other participants

The ethical considerations for the other categories of people being observed and/or interviewed were as follows. Observation of these people took place only in custody blocks, where participants were either being detained, or working. The professionals present would not expect privacy. As in studying

crowd behaviour, the researcher could not be expected to obtain consent from every participant. Where possible, an explanation was given, and the custody staff had been notified of times when I would be carrying out observation from a fixed point and that I would be accompanying visitors on their visits.

As regards the detainees, they are vulnerable simply by virtue of their detention: and those under 18, or under the influence of drink or drugs, or otherwise perceived by me to lack understanding, were excluded. Written consent forms were not used because, as legal documents, they would have been viewed with suspicion by the detainees and would have created a barrier to communication, as they had long ago been found to do for visiting, by both visitors and the police.⁶⁶ As cells are cramped spaces for three extra people, I initially tried listening from outside the cell. I soon realised this was unsatisfactory, as I could not see what was happening, and sometimes I could not hear what was being said either. I then tried accompanying the visitors into the cell where visitors asked for consent to the meeting and explained my role. I relied on that as implied consent. Later, on reflection, I realised I should also have been asking for explicit consent, and I did so from then on. When it came to interviewing detainees, I asked for their consent and let them have a participant information sheet when first meeting them during my visit to them with the visitors, and, somewhat later, I sought and obtained their consent before commencing the interview. When seeking interviews with other participants, I handed them a participant information sheet and followed the same procedures for interviews as those used for the visitors. For all the interviews, confidentiality was preserved by the use of a password protected

⁶⁶ See Chapter Three, text to note 77, and text to note 126, and the note.

digital recorder from which the recordings were deleted on being transferred to storage. The storage was on a password protected “iron key” and a double-protected computer. After the submission of this thesis, the main participants are to be provided with a summary of the findings, and the means to obtain a fuller account.

My own safety and the safety of others

In the course of the fieldwork I had to travel to and from unfamiliar locations, sometimes in the middle of the night. I planned the travel accordingly to ensure the safest practicable means of travel to and from each location at the particular time of day or night. I conducted interviews in the homes of people whom I had not met before, or sometimes only once or twice before, and in other places with which I was unfamiliar. I always carried a mobile phone with me and, for evening and late night appointments, let a family member know where I was going, whom I was meeting, and when I would be expected back,⁶⁷ and made a phone call afterwards to confirm all was well.

There was one setting in which I believed I would be putting my personal safety at risk. For the purpose of interviewing detainees at the new custody facility, I would have been locked in a consultation room, so I did not conduct any interviews there.⁶⁸

As a visitor, I had never found myself in a situation where I felt concern about my personal safety, nor had I witnessed harm being inflicted by the police on a detainee. However, these things do happen. I decided that if, during the

⁶⁷ Thomas (n 5) 53.

⁶⁸ See text following note 47.

fieldwork, I found myself observing harm being inflicted on someone in a custody block, ethical considerations would impel me to step out of the researcher role, and I hoped I would have the courage to try to do something to stop the harm. At no time did a situation like that arise.

Conclusion

Despite the initial difficulties, I was fortunate in being able to carry out a large amount of interviewing and observation to carry out this research, as set out in the table above.⁶⁹ This has provided me with a wealth of data for the case study, some of it certainly repetitious, but all containing a wide range of views and experiences, and I was lucky to gain a compelling insight into the operation of police power on the visitors in the final accompanied visit.⁷⁰ I was also able to carry out substantial desk and archival research, and elite interviewing, into the history and policy of custody visiting, both nationally and in the London borough of Lambeth.

I found it was useful for me to write a draft of this chapter at an early stage, as it helped me to think systematically about research design issues, while still being prepared to adapt and make creative use of opportunities as they arose during the fieldwork. I was encouraged to pursue a gradualist approach to obtaining access and ethical approval as the ambit of the project expanded. Three applications were made to the university's ethics committee for ethical approval, and I applied to the police to increase access on two further

⁶⁹ See the table set out after the paragraph following note 39.

⁷⁰ See text after note 50.

occasions. I believe, with the police in particular, that this gradualist approach enabled me to build up trust and to obtain what I needed when I needed it. Just one portmanteau application made at the start would have been unlikely to produce the same favourable result.

Reviewing my research with the benefit of hindsight, I find that there are some things that I would have done differently. Access: I should have asked my lead supervisor to approach Police and Crime Commissioners in neighbouring areas, although in the end I did not need more data from those areas. Detainees: I should have sought permission from detainees to observe visitors' meetings with them from the outset, although no harm was done by my not having done so, and I should have tackled access to detainees for interviews earlier: it was a combination of luck and a good relationship with a custody manager that enabled me eventually to obtain this access.

Following this review of the research design and the ethical issues, the next two chapters, Chapters Five and Six, set out the results of the empirical research, which are my findings, from interviews and observation, about the attitudes of the visitors and about the effectiveness of the visiting work.

CHAPTER FIVE

THE INFLUENCES ON VISITORS AND THEIR ATTITUDES TO THEIR WORK

This chapter starts to set out the findings of my case study. It provides a description and an analysis of the influences on the visitors at all the various stages of their work, and examines the characteristics of the people who applied to become visitors, and the effects on their attitudes of their orientation, training, and experiences as visitors. In Chapter Three I explained how official policy had been developed in accordance with the wishes of the police resulting in custody visiting having a crime control orientation. Custody visiting was given the branding of independence in the statutory scheme introduced in 2002, where statute specifically stated that the visitors had to be independent, but also, paradoxically, established that there was no structural independence for them in the local schemes. This will be tested against the findings of the empirical research in this chapter. Chapter Two showed that the quality of independence is not defined only by reference to structure but is also determined by the attitudes of the visitors.¹ This chapter seeks to assess the extent of the visitors' independence by examining their attitudes and comparing them with those of the Police and Crime Commissioner and the police.

¹ See Chapter Two, text to note 61.

How individuals form attitudes is heavily affected by power relationships. In Chapter One I said I would seek to explore whether visitors were affected by the power of the police. For a definition of this power, I relied on Steven Lukes' concept of three-dimensional power. His one-dimensional power gets people to do things that they would not otherwise do, and his two-dimensional power gets people not to do things that they would like to do. Both those dimensions operate in a context of overt conflict. Operating in contexts where there is no overt conflict, Lukes' three-dimensional power stops demands being made, and conflicts arising, by controlling others' thoughts and desires, and by keeping certain issues off the agenda: these outcomes can be achieved by the control of information and what is known as "socialisation".² This chapter investigates whether, and if so how, socialisation enables the Police and Crime Commissioner and the police to achieve these outcomes in the visitors.

Socialisation

The word "socialisation" is used to refer to the process by which people are subjected to influences from their social environment on their attitudes and behaviour.³ The process can be explained by Erving Goffman's very influential theory of the presentation of self in social interactions, where the individual, in dealing with the various situations encountered, plays various roles, like an actor on a stage in different dramas. An important component of

² See Chapter Two, text to notes 40-45.

³ Gloria Luong, Antje Rauters and Karen L Fingerman, "The Multi-Faceted Nature of Late-Life Socialisation: Older Adults as Agents and Targets of Socialization" in Grusec J E and Hastings P D (eds), *Handbook of Socialization*, (The Guilford Press 2015) 109, 110.

Goffman's argument is that participants (or actors) accept the same definition of the situation in which each of them is playing a role, because acting out of place would cause embarrassment.⁴ How do new recruits to custody visiting find what the definition of their work is, and are stronger pressures than the desire to avoid embarrassment brought to bear on them to accept the definition? How do those pressures operate through the socialisation process? This chapter will set out the influences operating on new recruits to custody visiting, and show that they are likely to have caused almost all of them to learn and accept the definition of their work.

Anthony Giddens *et al* provide a useful overview of how sociologists use the word "socialisation", describing it as:

"the process whereby ... children learn the ways of their elders, thereby perpetuating their values, norms and social practices ... Although cultural learning is much more intense in early childhood than later, learning and adjustment go on through the whole life cycle ... In [later childhood and maturity], other agents of socialisation, such as schools, peer groups, organisations, the media, and the workplace, become socialising forces. Social interactions in these contexts help people to learn the values, norms and beliefs of their culture."⁵

Giddens *et al* mention the "workplace" as one of the socialising forces. This chapter will explain the meaning of this term, and demonstrate the socialising

⁴ Erving Goffman, *The Presentation of Self in Everyday Life*, Pelican 1971, 83.

⁵ Anthony Giddens, Mitchell Duneier, Richard P Applebaum, Deborah Carr, *Introduction to Sociology*, (Norton 2000) 84-5.

effect of the workplace on the custody visitors. The focus of socialisation theory and research has been on childhood and adolescence.⁶ In this study we are looking at adults, but similar principles apply where the workplace is the context of their socialisation. The workplace is a setting where much significant socialisation takes place: people spend a lot of time there, both physically and virtually; it is where they meet others who are engaged in the same work, including their bosses; it is the setting for their employment and their careers.

Similar effects of socialisation have been observed in the context of voluntary work.⁷ Custody visiting is voluntary, it is not employment,⁸ and it is very much part-time, but what the visitors do is certainly a form of work.⁹ The visitors agree to carry out some tasks, on certain terms, for the Police and Crime Commissioner. The visitors' principal workplace is the custody block, even though they spend just a few hours there each month. It is of course very significant for the issue of the effect of police power on visitors that the custody block, the part-time workplace of the visitors, is the full-time workplace, and the territory, of the police and custody staff. Other places where the visitors work occasionally, at meetings or for training, are generally either police or Police and Crime Commissioner buildings. Many visitors

⁶ Jeffrey Jensen Arnett, "Socialization in Emerging Adulthood: From the Family to the Wider World, from Socialization to Self-Socialization" in Grusec J E and Hastings P D (eds) (n 3) 85, 86.

⁷ Sibylle Studer and Georg von Schnurbein, "Organizational Factors Affecting Volunteers: A Literature Review on Volunteer Coordination", *Voluntas: International Journal of Voluntary and Nonprofit Organizations* (2013) 24 2 403.

⁸ It has been a concern of ICVA and the scheme administrators that visitors do not gain the legal status of employees: see Chapter One, text to note 124.

⁹ V4 described it as a "hard job".

referred to the scheme administrator¹⁰ as their boss. They might meet him in person only quite rarely, but they received frequent emails from him. So, as is the case with many other workers, the visitors' workplace is physically split between several locations, and some of the contact is remote and virtual: but, wherever contact is made, the dominant influence is the Police and Crime Commissioner and/or the police.

Academic research into socialisation in the workplace sees it as a learning process where newcomers are in transition from the status of organisational outsider to the status of organisational insider. Socialisation is seen as a key factor in transmitting an organisation's cultural norms and values to newcomers. The recruitment process is seen as important as the start of the newcomer's relationship with the organisation. Orientation,¹¹ the next stage of the socialisation process, has been found to be more effective if done by in-person attendance, where the newcomers are made to feel comfortable and welcome. Socialisation continues by training: this may be done collectively or individually, with fixed sessions or at random. The training may involve using experienced members of the organisation as role models, which has been found to be a very effective practice.¹² Newcomers become aware that it is important to build relationships with leaders and mentors. The outcomes of the adjustments achieved for newcomers by this process of socialisation should be: clarity and confidence about one's role in the organisation: feeling accepted in the organisation: knowledge of the organisation's culture,

¹⁰ See text to notes 34-37.

¹¹ or "Onboarding": see Howard J. Klein, Beth Polin and Kyra Leigh Sutton "Specific Onboarding Practices for the Socialization of New Employees" *International Journal of Selection and Assessment* (2015) 23 3 263

¹² *ibid* para 5.4.

including its politics, language, values and traditions: and, ultimately, job satisfaction.¹³ These issues, which have been identified by researchers, are all relevant to the socialisation of custody visitors, as will be seen in the following analysis.

This chapter's account of how the visitors were socialised has been compiled from my observations and interviews for this research. Some of the visitors I interviewed had been working as visitors for over ten years. They therefore would have received much of their socialisation in earlier years, and it would not have been the same "training" as the session I observed and describe below.¹⁴ However, all the visitors had received their orientation from the same official, the scheme administrator. It is likely therefore that the orientation that all the visitors received was broadly similar.¹⁵ The interviews given to prospective visitors played an important role in educating applicants about the values of the custody visiting scheme. New recruits thus learned the importance of the "leader" (the scheme administrator).

In his study of the police, Fielding noted the important distinction between formal and informal socialisation. Formal socialisation is found in the planned efforts of the organisation to transform recruits into novice members.¹⁶ For the new recruits this comprised the orientation/training sessions, induction and team meetings. The visitors' informal socialisation arose from contact, not

¹³ Allison M Ellis, Talya N Bauer, Berrin Erdogan, "New-Employee Organizational Socialization: Adjusting to New Roles, Colleagues, and Organizations", in Grusec J E and Hastings P D (eds) (n 3) 301, 314-5.

¹⁴ See text to notes 63-83 and the text following note 83.

¹⁵ Confirmed by AD.

¹⁶ Nigel Fielding, *Joining Forces: Police training, socialisation, and occupational competence*, (Routledge 1988), 1.

only with the other visitors, but also from the contact they made with police, who have been found to have a strong occupational culture¹⁷ and also to be very effectively socialised.¹⁸ The civilian staff, with whom the visitors had more contact on their visits than with the police, were also a source of socialisation for the visitors.¹⁹

Other sources of socialisation influenced the visitors. They were themselves influencing their own development in their choice of part-time work.²⁰ They were also subject to the socialising influences of other agents, such as their peers, and the media.²¹ It would be very difficult to assess the strength of these influences on the visitors: but as all the visitors were subject to similar socialisation by the Police and Crime Commissioner and the police, that process is accessible to the researcher.

One of the influences on custody visiting might be thought to be the visitors themselves: did they have an influence on the scheme, on the Police and

¹⁷ e.g., Malcolm Young, *An Inside Job*, (OUP 1991), 59.

¹⁸ Fielding (n 16) 15-16.

¹⁹ There is so far no detailed study of the culture of the civilian custody staff. Skinns has researched the relations between civilian custody staff and the police. One of her interviewees said there was “a them and us thing with the police and the civilian staff, and the civilian staff aren’t allowed to join the Police Federation”. She found a variety of views about how well the two groups worked together as a team, with some police officers pulling rank on the civilian staff. She suggested that the custody block remained police territory in which civilian staff were the deputies, not the equals of the police: Layla Skinns, *Police Custody: Governance, legitimacy and reform in the criminal justice process* (2011 Routledge) 146-150. My own view is that the civilian staff I observed did feel under the power of the police, not least because of their subordinate employment status: they were the ones who made the tea. A detailed study has been made about conflicts between the cultures of the investigating staff and the sworn officers: *Beyond cop culture: the cultural challenge of civilian intelligence analysis in Scottish policing* by Colin Atkinson (2013): PhD thesis, University of Glasgow: <http://theses.gla.ac.uk/4662/> accessed 03.08.2015. Atkinson’s thesis shows that in Scottish policing the arrival of predominantly young and more academic female investigating staff presented a challenge to “cop culture”.

²⁰ Luong *et al* (n 3) 110.

²¹ Robert Reiner, *The Politics of the Police*, (4th edn, OUP 2010) 177-102.

Crime Commissioner and on the police? Socialisation theories about the family used to be based on the process being only one-way: parents setting the agenda, children as the passive absorbers. More recently some theorists have argued that, in families, the process of socialisation should be seen as two-way,²² incorporating the influences of both parents and children.²³ The study of socialisation in the workplace has not taken the same line, and has kept to the one-way model, where influences are imparted by the organisation and received by the newcomers. The significant interaction has been found to be the socialisation applied by management to whatever range of newcomers they recruit.²⁴ Perhaps this is because workplaces are very different from families, with power much more firmly rooted with managers than has become the case with parents. As will be demonstrated, the socialisation of the new recruits to custody visiting followed this general rule. The visitors did not influence the scheme, the Police and Crime Commissioner or the police.²⁵

Fielding called socialisation a process of “identity transformation”.²⁶ While that expression may be apt to describe the effects on people in their early twenties starting on a career as police officers, it is not apt to describe what happens to visitors, mature adults, working part-time as volunteers. A filtering process

²² Eleanor E Maccoby, “Historical Overview of Socialization Research and Theory” In Grusec J E and Hastings P D (eds) (n 3) 17.

²³ Leon Kuczynski, C Melanie Parkin and Robyn Pitman, “Socialization as Dynamic Process: A Dialectical, Transactional Perspective”, in Grusec J E and Hastings P D (eds) (n 3) 135, 135-6.

²⁴ Ellis *et al* (n 13).

²⁵ This is not to deny that significant improvements in the conditions of custody were achieved by the Lambeth Lay Visitors, which would have been accompanied by some measure of change in the attitudes of the police and maybe also of the then police authority for London, the Home Secretary: see Chapter Three, text to note 112-113. In the area studied, I know of only two minor practical improvements prompted by visitors’ reports, and where visitors’ reports prompted a change in the behaviour of the custody staff, the change would be no more than was needed to restore established practice: see text to note 188.

²⁶ Fielding (n 16) 1.

had worked on the profile of the recruits, which both preferred certain types of applicant and eliminated other types, but, despite that, the applicants were not a homogeneous group. What this chapter will show is that the majority of visitors who had been working in the scheme were found to hold the same kind of values as each other; and that those values were largely the same as those held by the Police and Crime Commissioner and the police.

Profile and Background of the Visitors

This investigation starts by looking at the types of people who applied to become visitors. Fielding emphasises the importance in the socialisation process of prior life styles and contacts.²⁷ The researcher seeks to know: what sort of people applied to be visitors; what their attitudes were to criminal justice; and whether they had any previous experience of the police, and, if so, what kind of experience.

A description of the visitors participating in the research is set out in Chapter Four.²⁸ Some of the visitors told me that they had had significant prior life experiences relating to policing or the criminal justice system before becoming visitors. Two of them, one black and one mixed heritage, had relatives who had been in trouble with the police. The first visitor told me about a relative who had hanged himself while detained in a “remand home”, while the second visitor said a relative’s life had been “ruined” by the actions of the police. An Asian visitor told me how the police had beaten up an Asian friend in custody.

²⁷ *ibid* 17.

²⁸ See Chapter Four, text to notes 36-38, and the fieldwork table which follows.

I also encountered the following. One white visitor was a retired magistrate: another white visitor was a retired prison governor: another white visitor had been heavily involved with Neighbourhood Watch: two white visitors had worked alongside the police in other state agencies: an Asian visitor had had very close relations with the police through his work: two white visitors had sons in the police; and the father of one white visitor had been in the police for 30 years.²⁹

The types of people who applied to become visitors came from a fairly narrow spectrum. They were older than the average, from a number of racial backgrounds, but with Asians under-represented and whites over-represented; predominantly middle class; and about half were professional and/or had university degrees. At the times when they had applied to become visitors, they had various different attitudes to criminal justice. Where their attitudes were known or could reasonably be inferred, the visitors fell into two principal groups. The first group of visitors had had negative experiences of the effects of police and the criminal justice system on relatives and friends.³⁰ The work and family backgrounds of the second group of visitors strongly suggested that they were likely to be favourable to the police.

The scheme administrator told me that he thought there were four categories of motivation to volunteer as custody visitors: doing something that would look good on a CV, “putting something back”; filling spare time in retirement; and curiosity. None of the visitors I interviewed fell into the first category: those

²⁹ Identifiers not provided in this paragraph in order to preserve anonymity.

³⁰ But not of the negative effects on themselves, because if they had had a criminal record, they probably would not have passed the vetting: see text to notes 60-61.

who had joined for this reason had left soon after the training.³¹ I found that the visitors' motivations generally came into one or more of the other three categories, and within those categories, there was quite a range of motivations. Some said they thought that the visiting work would be of benefit to them beyond just satisfying their curiosity, but one visitor candidly admitted that a tour of a mothballed custody block at a police Christmas party had made him feel "intrigued" to see the real thing, and another had been attracted by the sense of mystery about what one would find in these places that very few other people went to. One wanted to use the opportunities that visiting would provide to persuade detainees to "come off crime". Another visitor said, in terms, that the motivation sprang from a belief that our institutions should not be taken for granted, and that checks on behalf of the community were vital to counter any abuse by the police.³²

Who were allowed to be visitors?

As required by statute,³³ the custody visiting scheme in the area studied was operated by the Police and Crime Commissioner. The management of the scheme was entirely in the hands of a relatively junior official, referred to in this study as the scheme administrator.³⁴ The fact that no one else in that office did any work on custody visiting, apart from line managing the scheme administrator, suggests that custody visiting was not regarded as important.

³¹ AD at a team meeting.

³² Identifiers omitted to preserve anonymity.

³³ Police Reform Act 2002, s 51.

³⁴ In at least one part of England and Wales this function has been outsourced: see Chapter Seven, text to note 48. The cost of the scheme was about £35,000 per annum: based on figures supplied by AD.

However, the scheme administrator was experienced, enthusiastic, and dedicated to his vision of custody visiting: he saw its purpose as reassuring the public about the police.³⁵ He received guidance from the Independent Custody Visiting Association (ICVA) which is a body whose only members are Police and Crime Commissioners,³⁶ and from the Home Office, both in their codes of practice and, I believe, through ICVA. The scheme administrator did not receive guidance from any other sources. His own socialisation was, therefore, as mono-cultural as the socialisation that he imparted to the visitors, discussed later in this chapter. The Office of the Police and Crime Commissioner was, alongside the police, a very small operation, and for custody visiting, it used the resources of the police for public relations, technical support such as computers, vetting, and security.³⁷ The Police and Crime Commissioner's remit for the local custody visiting scheme was therefore partly fulfilled by the police.

Visitors are managed, hired, and can be fired, by the Police and Crime Commissioner. The extent of this control is starkly illustrated by a comment made to me by the scheme administrator. He told me that, in a scheme in another area, one group of the visitors were refusing to let their scheme administrator attend team meetings, and that his advice to the scheme administrator was to dismiss all the visitors in that group.³⁸ One of the indices

³⁵ AD interview and observation.

³⁶ AD interview. For ICVA, and the scheme administrators' conference see chapter 1, text to notes 118-125.

³⁷ Personal observation: AD interview. Savage identified this question of resources as indicators of independence, or the absence of that quality: see Chapter Two, citation in note 71, and para following text to note 74.

³⁸ AD interview.

of independence is “tenure”, enjoyed by senior judges:³⁹ clearly visitors have no tenure. Nor is any thought given to whether another body should recruit and appoint visitors, as is the case with judges.⁴⁰

The statutory requirement was that *visitors* (not *visiting*) were to be

“independent of both the Police and Crime Commissioner and the chief officer of police of the police force maintained by the Police and Crime Commissioner”.⁴¹

However one distinguishes between visitors and visiting, neither custody visitors nor custody visiting schemes have ever had structural independence from these bodies, especially since the introduction of the statutory scheme; and police authorities were not independent of the police, which may be also true for Police and Crime Commissioners.⁴² Thus the police influenced the visitors on two fronts. The visitors, in being managed by the body charged with supervising the police, were indirectly subject to the power and influence of the police as it affected the Police and Crime Commissioner: and the visitors were also more directly subject to the power and influence of the police in the course of their work, in the custody block and at team meetings, as discussed below. As Lukes has explained, those who feel another’s power, which may be by the means of socialisation, take, or omit to take, actions in

³⁹ See Chapter Two, text to note 66.

⁴⁰ See Chapter Two, text to note 67.

⁴¹ Police Reform Act 2002, s 51, as amended by Coroners and Justice Act 2009, s 117, and Police and Social Responsibility Act 2011, Schedule 16 part 3 s 299(1).

⁴² See Chapter Two, text to notes 85-103.

accordance with what they believe that power is directing, without any actual exercise of the power.⁴³

The next question is whether visitors were independent, in terms of the mindset and behaviour: whether, despite the structure and their lack of tenure, they exercised independent judgment.⁴⁴ Account must be taken of two very significant contexts: the narrow socialisation of the visitors, and their relationship to that very powerful institution, the police. Management of the visitors was a major component of this narrow socialisation, and its narrowness was very much bolstered by their orientation, induction and working practices described below: management excluded all other influences. The role of visitors was to monitor a powerful institution, but that institution played a completely dominant role in their socialisation, which would be likely to compromise their ability to think and act independently.

In order to recruit visitors, the scheme administrator sent out press releases to local papers and postings on social media.⁴⁵ Another source of recruits was the “Key Individual Network”,⁴⁶ a list kept by the police of people who had expressed an interest in policing issues.⁴⁷ One visitor got to know about custody visiting from meeting police officers through work.⁴⁸ others heard

⁴³ See Chapter Two, text to notes 36-45.

⁴⁴ See Chapter Two, text to and following notes 71-74.

⁴⁵ V9 said that a press release which said that applicants had to have “a good reputation in the community” had been a discouragement, as the visitor interpreted it as a requirement that applicants were members of a profession.

⁴⁶ For an example of the Key Individual Network, see (not from the area studied) parishes.lincolnshire.gov.uk/Files/225/Heckington_NPT_Model.doc accessed 10.06.2016.

⁴⁷ AD: none of the visitors I interviewed had been referred this way.

⁴⁸ V8, who, because of the approach, originally thought that a background in security was a qualification for becoming a visitor: compare the impression V9 obtained (n 45).

about it through Neighbourhood Watch:⁴⁹ some had been involved with other neighbourhood policing initiatives.⁵⁰ There was no evidence of referrals through organisations which promote the interests of suspects, such as Liberty, Nacro or Inquest.

Some categories of applicant were excluded, but others that one might expect to be excluded were allowed to apply. Neither serving police officers nor former police officers, including special constables, could apply to become visitors. Only one police officer had ever been appointed visitor, and at the time he applied he had already been retired from the police for 20 years. But there was no bar on applications from close relatives of serving police officers.⁵¹ No applications were accepted from serving magistrates⁵² or from retired magistrates until they had been 10 years off the bench.⁵³ Serving probation officers were excluded.⁵⁴ No defence or Crown Prosecution Service lawyers had ever applied, and no applications would have been considered from them if they had served in those capacities within the previous five years.⁵⁵ Two applicants who had been working alongside the police on prosecutions for other state agencies were not excluded.⁵⁶ Here, the question arises as to whether the syndrome known as “regulatory capture”⁵⁷ could be said to have occurred. This arises where the people who work for a regulator were formerly employed by the body which they are now charged with

⁴⁹ V13 and V10.

⁵⁰ V7, V20, and V23.

⁵¹ 2013 Code of Practice para 22.

⁵² *ibid.*

⁵³ AD interview.

⁵⁴ Local handbook.

⁵⁵ AD interview.

⁵⁶ Two visitors, not identified in order to protect their anonymity.

⁵⁷ See Chapter Two, text to notes 75-76.

regulating, and the effect is that the regulator has been taken over by those it is supposed to be regulating, rendering the regulator ineffective. Here the evidence does not support the argument that custody visiting in the area studied had formally been captured by the police and those associated with them.

One might however argue for some kind of informal, ideological capture. The evidence about referral routes, about the visitors' previous significant experiences of criminal justice, and about their motivation for applying, does point in that direction. In terms of Packer's models of criminal justice,⁵⁸ there was a minority of applicants with a due process orientation who one would expect to show more concern for detainees, and a majority with crime control orientation who one would expect to prioritise the efficient operation of police work.

Applicants were interviewed by the scheme administrator. Applicants whose answers stereotyped detainees as criminals and "hoodies" were not rejected, but the scheme administrator took the opportunity to provide them with some "education". The scheme administrator did reject an applicant who expressly approved the original actions of the police in framing suspects in a notorious miscarriage of justice case. Applicants were asked to disclose offences they had committed even when they were teenagers, which could have been several decades earlier. Applicants who were found to have lied, particularly

⁵⁸ See Chapter Two, text to notes 47-51.

about criminal convictions, were rejected.⁵⁹

The vetting was carried out by the Association of Chief Police Officers (ACPO). Applicants were rejected automatically if they had been convicted of an offence punishable with imprisonment in the previous five years. The Police and Crime Commissioner could exercise discretion where the vetting reports raised questions about applicants' earlier history with the police, including cautions, or other matters, such as whether close family members had criminal convictions, and the scheme administrator mentioned two occasions when that discretion had been exercised in favour of allowing an application to proceed. This policy was tougher than the code of practice, which sets no specific threshold, and says simply that the circumstances must be considered, and that past offending is not an automatic barrier to acceptance.⁶⁰ The scheme administrator agreed with me that the local policy excluded applicants who might relate well to detainees, but he said that it was "a fine line".⁶¹

The scheme administrator made formal appointments after the six months' probation, and renewals every three years. Visitors could be warned, suspended or dismissed for misconduct or poor performance: this was very rare. Some visitors served for as long as 15 years. Very few resigned. One visitor's resignation was prompted by fundamental issues:

"I don't know whether we're there to help the process of the detainees

⁵⁹ AD interview.

⁶⁰ 2013 Code of Practice, para 21.

⁶¹ AD Interview.

being looked after, or if we're there to report back ... I don't think either is particularly efficient, because ... there's always some sort of issue which probably could be sorted out if someone had the time to speak to them; and with the reporting you never get the feedback as to whether issues were being dealt with or not.”⁶²

This visitor had not accepted the terms of the arrangement, was discontented with its ambiguity of purpose, and believed that it could be much more effective if it were organised differently.

Through the scheme administrator, the Police and Crime Commissioner was in complete control of whether visitors were recruited and whether they continued in post, except for those who resigned voluntarily. It is difficult to see how one could justify the use of the word “independent” to describe the visitors in that relationship.

Orientation and Training

Academic studies of socialisation in the workplace stress the importance of what is called “new employee orientation”,⁶³ and say that it should be aimed at helping the new recruit to feel comfortable and welcome: it should provide the basics, such as where to get additional information, rather than focussing on paperwork. The scheme administrator provided the new custody visiting recruits with this orientation, although it was called training: more experienced

⁶² V12.

⁶³ Ellis *et al* (n 13) 306-307.

visitors provided the actual training⁶⁴ during the visitors' induction.

I attended one of these first sessions for recruits: it took about six hours on a Saturday. The session was held in a room in the Police and Crime Commissioner's offices, which formed part of the police headquarters building. On display were large publicity photos of police, including shots of women and BAME people, both as police and as members of the public: the same photos are displayed in the public areas of police stations.⁶⁵ The new recruits were therefore receiving positive messages about the police from these images.

The session was delivered solely by the scheme administrator. This was the first time the new recruits heard about custody visiting in detail in a group, corporate, workplace setting. The new recruits were more likely to be influenced by what they saw and heard in a presentation, given by someone in authority over them, than by what they might read in the scheme handbook.⁶⁶ Some of the new recruits might not have read the handbook, and some might never read it: only one visitor⁶⁷ ever referred to the handbook in my presence. The scheme administrator was the boss,⁶⁸ and that position of authority, and his charm and skill in delivering the training, enabled him to achieve a considerable degree of socialisation in the new recruits. What he said, what he did not say, and the absence of speakers with other points of

⁶⁴ *ibid*, where they say that kind of training should follow orientation.

⁶⁵ UK police forces spend £36m per year on PR and communications: Press Gazette 01.05.2015. <http://www.pressgazette.co.uk/uk-police-forces-spend-more-than-36m-a-year-on-pr-and-communications/> accessed 11.06.2016.

⁶⁶ Local custody visiting schemes publish their own handbook.

⁶⁷ V5, who had held a senior professional position.

⁶⁸ See text to note 10.

view, all reinforced his power over the proceedings. His aim was to get the new recruits to commit to the local scheme in order to secure its future. This was a very significant stage in the socialisation process, and it is reasonable to infer that the scheme administrator intended that this session would assist in the fulfilment of the purposes which academic studies assign to effective socialisation: lowering the turnover of personnel, laying the groundwork for a committed and productive workforce, and transmitting the organisation's cultural norms and values.⁶⁹

The scheme administrator had an easy, approachable manner. He sought to convey the reassuring message that the work was not technical:

“visiting and PACE⁷⁰ are mainly common sense.”

As will be shown in this and the next chapter, there are many aspects of custody visiting which are technical and for which training is needed; and the numerous provisions of PACE and its codes cannot be boiled down to common sense, whatever that means. The scheme administrator's approach was to take short cuts through the material, on the basis that it did not matter very much. I found it was a commonplace attitude among visitors and police officers that the standards to be applied to custody by visitors should be those of the man in the street, not those of a lawyer.⁷¹

⁶⁹ Ellis *et al* (n 13) 302.

⁷⁰ The Police and Criminal Evidence Act 1984.

⁷¹ e.g., S4, who said visitors should be “people like my Mum and Dad”, which also says something about the age profile.

The scheme administrator told the new recruits that the Police and Crime Commissioner had shown his independence from the police, without saying how he had done so, and he told them that custody visiting was part of how the Police and Crime Commissioner held the police to account.⁷² He claimed legitimacy for custody visiting, first from Lord Scarman, and then from the principal criminal justice statute, the Police and Criminal Evidence Act 1984 (“PACE”). He said that the Scarman Report’s recommendations about custody visiting were included in PACE. This was seriously misleading. No part of the recommendations in the report was enacted until some 18 years later, and some of the recommendations have never been enacted or put into practice.⁷³ PACE’s main purpose was to implement the recommendations of the Royal Commission on Criminal Procedure.⁷⁴

The scheme administrator observed that the only two changes that had to be made in custody arrangements in order to comply with the Human Rights Act⁷⁵ were about special food for people with particular religious beliefs and changes of clothing. This made human rights law seem trivial. An important change in human rights law, which the scheme administrator omitted to mention, was the National Preventive Mechanism, under which custody visiting plays a part in fulfilling this country’s international treaty obligations about the inspection of the conditions of detention in police custody.⁷⁶

The scheme administrator made a Powerpoint presentation. The slides in the

⁷² But later, in interview, he told me that no visitors’ reports had ever been used in that way.

⁷³ See Chapter Three, text to notes 191-199.

⁷⁴ See Chapter Three, text to notes 54-57.

⁷⁵ The Act of 1998.

⁷⁶ See Chapter One, note 102, and Chapter Six, text to notes 165-178.

presentation said that the primary objective of custody visiting was to secure public confidence in the police: safeguarding the welfare of detainees seemed to be an afterthought.⁷⁷ The image of a team was used, composed of visitors, the Police and Crime Commissioner and the police. This researcher did not find it difficult to spot the power imbalances in this team, and its incompatibility with the independence of custody visiting, but most visitors seemed to buy into the approach.⁷⁸

The scheme administrator did mention deaths in custody, including one that had taken place locally, but he did not explain how custody visiting related to the issue. He mentioned a Home Office “Learning the Lessons” committee on “Near Misses” (i.e., people in custody who came close to death) but did not say what the lessons were. There were a number of life-and-death issues here which he omitted to mention, such as the value of visitors challenging the police about whether intoxicated detainees should be in hospital rather than in custody. The scheme administrator did not mention challenging the police as one of the procedures that visitors might sometimes follow.

The scheme administrator warned the recruits about over-familiarity with detainees:

“Don’t shake hands with detainees. If they have scabies, the whole block has to be closed down.”

⁷⁷ The same impression is conveyed by the statement about custody visiting on the Police and Crime Commissioner’s website in the area studied.

⁷⁸ See text to notes 103, 124, 125 and 204 and Chapter Six, note 124.

The scheme administrator's warning about scabies was guaranteed to socialise them away from detainees. The scheme administrator did not mention the pitfalls arising from over-familiarity with the police and custody staff: the risk was that detainees could get the impression that the visitors were colluding with the staff.⁷⁹ No training was given in this session (or any other session) about how visitors should build rapport with the detainees in the interviews conducted in their cells. This is surprising, given the importance the scheme administrator attached to these interviews, way above any other checks made during the visit. Role-play might have been useful here, but it was not used. No presentations were made by police officers,⁸⁰ and none by defence solicitors, probation officers or experienced visitors, let alone former detainees.⁸¹ Some ten years earlier, visitors had been taken to magistrates' courts to help them understand that part of the criminal process:⁸² this had been discontinued. The visitors' training was mono-cultural, all given by the scheme administrator, socialising the new recruits into seeing things from one point of view: his own.

Two essential pieces of information, which would have enabled the new recruits to gain a much better understanding of custody, were missing. These are: that the ambit of arrest has been greatly increased; and that the police

⁷⁹ See text to notes 170-176.

⁸⁰ Police officers helped with the initial training in a previous year: V9, and they help with advanced training.

⁸¹ AD interview, who said it was not always possible for him to secure the attendance of the visitor he would choose for this. The much smaller number of visitors who attend regional and national conferences do hear from a wider range of speakers, but not, in my observation, from defence lawyers or detainees. V5 said that a defence lawyer had addressed visitors in training in an earlier year, and V8 said that an experienced custody visitor attended an earlier initial training day and answered questions with the practical guidance which the scheme administrator could not give. V23 said that former detainees should give training.

⁸² L6.

use arrest and detention for investigation purposes. There was no mention of the fact that some of the detainees were innocent, that some of them were not a danger to anyone, and that some of them had been wrongly arrested, and that some of them are released “NFA” - with no further action. The scheme administrator’s failure to make these points led to many of the new recruits thinking that all detainees “must have done something bad to be in there”, or it reinforced their existing view on those lines, as can be seen later in this chapter.⁸³

The session did not deal with many practical issues that arise during a visit, which were left to the induction stage, discussed next. As a training course, which was how it was billed, the day was superficial. But as orientation, it was very effective. The scheme administrator was telling the new recruits that dealing with the work would not be difficult; that they did not need to worry about the law; that the work would not involve them in confrontations with the police; that they would be working with the police as members of a team; that detainees were people to keep your distance from; and that the principal purpose of custody visiting was to promote confidence in the police. The orientation was universally crime control, and the day was a powerful exercise in socialisation.

Socialisation continued with a round-up session for new recruits three months later. For all visitors there was an annual meeting with the Police and Crime Commissioner with pens awarded for ten years’ service; an annual “advanced

⁸³ See text to note 154.

training” session: and a very small number of visitors attended regional and national conferences. Training sessions often included demonstrations of restraint techniques. My impression was that the managers thought that visitors liked watching these demonstrations, and that they would be reassured by them: a pleasant way for the visitors to absorb the crime control message that the police can be trusted to use these techniques safely. Generally, the presentations at these training sessions and conferences provided interesting background information about custody, but little of the material was of much direct help to visitors in how they went about their work, and there were no critical reviews of the work of custody visiting, nor of how it was carried out.

Probation and Induction

The probation period ran for six months from the initial training session. During that time the new recruits gained experience of the world of the custody block in three ways. They accompanied experienced visitors on their visits,⁸⁴ and they carried out three-hour observations from behind the custody sergeant’s desk, both of which are discussed in this section. They also attended team meetings, which are discussed separately below.⁸⁵

The custody block is the visitors’ principal workplace, and its special qualities made a huge impact on the new recruits. They were unlikely ever to have

⁸⁴ A visitor (identifier omitted to preserve anonymity) told me that during one year, in one area, there had been no experienced visitors available to fulfil this role, so some new recruits were left to work out all these matters for themselves. AD denied the allegation.

⁸⁵ See text to notes 103-117.

seen the inside of a custody block before except on television,⁸⁶ and many of them said how apprehensive they had been on their first visit about meeting detainees:

“I was nervous, I was unsure, I didn’t know what to expect ... I was very apprehensive about seeing someone who’s been arrested: it’s some kind of an ogre or demon? But it wasn’t, it was a normal human being like us, very polite, answering our questions.”⁸⁷

While the orientation session had not conjured up images of detainees as ogres and demons, there had been nothing to counter those images. The new recruits tended to see the custody block from the point of view of the scheme administrator and of the experienced visitors who accompanied them. While some adjustment was taking place, as shown by the quote above, the new recruits would not take the point of view of a detainee. Only three visitors told me that they were acquainted with people who had been detained in a custody block,⁸⁸ and no visitor had ever been detained in one.

New recruits became familiar with the way visits were arranged. Some visits did not appear to be unannounced, because the police would have some degree of advance warning of their arrival. This would occur in the following three circumstances. The first was when visitors arranged to meet, not outside the police station, but near the front desk, thus giving more notice of the visit

⁸⁶ The exception, V20, had been to custody blocks before as a social worker, and was apprehensive of both custody sergeants and detainees.

⁸⁷ V8.

⁸⁸ V16, V19, V20.

during the wait for the arrival of the second visitor, as the front desk staff could let the custody staff know about the first arrival. The second was when the arrangement was for a visit to take place after a visitor team meeting held in the same police station; the custody manager could inform his staff about the time of the team meeting and the potential for a visit taking place. The third was when the arrangement was for successive visits to two different police stations on the same evening. Custody staff would get used to the pattern routinely followed by some visitors of visiting two stations in succession on the same evening; visitors might, in the course of their conversation,⁸⁹ tell the staff at the first station that they were going on to the next station; and the police at one station could phone ahead to the next station to warn their colleagues that visitors were on the way. Visitors did not see a problem with any of these practices. One of them said:

“The whole point is that we turn up unannounced ... ”

and then went straight on to refer to the practice of making successive visits on the same evening.⁹⁰ Socialisation seemed to impair the ability of visitors to take a critical approach. As George Orwell put it, phrasing a paradox in characteristically everyday language:

“To see what is in front of one’s nose needs a constant struggle.”⁹¹

⁸⁹ I did not observe this, but believe it is quite likely that it took place.

⁹⁰ V4.

⁹¹ George Orwell, “In Front of Your Nose,” *Tribune* (22.03.1946): *The Collected Essays and Journalism and Letters of George Orwell, Volume 4, In Front of your Nose*, (Penguin 1970) 150.

Not many people put up any kind of struggle, constant or otherwise, particularly against the pressures of socialisation, and they do not even realise that there is any need to do so. The whole point of the scheme was being lost without the visitors being aware of what was happening.⁹²

Visitors made their visits at three different types of custody block. The first two types were within police stations: six modern blocks with about 15 cells, and one much older block with about 40 cells. The third type was a brand new purpose-built custody facility with 60 cells. From my previous work as a visitor in Dyfed-Powys, I was familiar with the smaller type of custody blocks, but did find myself thoroughly disoriented by the large block in the much older building. That block seemed to be dark, cramped, and confusing. The landings, with open metal stairs and metal netting, recalled images of Victorian prisons.⁹³ The cells were very small, some so small that the standard issue mattresses could not be laid flat. The toilets inside the cells could be flushed only from outside, by the staff: one visitor to this station said it was undignified for detainees not to be able to flush their own toilets.⁹⁴ There was little ventilation in the open areas, and none in the cells, and the heating was inadequate, so the block was hot and smelly in the summer, and cold and smelly in the winter.⁹⁵ One visitor, who had already visited other custody blocks, described the first visit there as “absolutely terrifying”.⁹⁶

⁹² Myself included. I became accustomed to hearing visitors telling me that they made successive visits on the same evening, and it took me some time to realise that the second visit might not be unannounced, or at least not unexpected.

⁹³ One visitor with experience of prisons, not identified here to preserve anonymity, observed that some of the fittings still being used in this block had ceased to be used, many years earlier, in prison buildings.

⁹⁴ V8.

⁹⁵ The evidence for this and the preceding paragraph is my own observation.

⁹⁶ V12.

The 60-cell block is a huge, anonymous new building. There is a barrier at the entrance to the car park, which means that the custody staff will know when visitors have arrived, even if they come on foot. The block is a complex building on two stories. On the ground floor there is a high point from which a member of the civilian staff keeps a panoptical eye on the whole floor, and custody sergeants' desks like booths which give detainees more privacy for booking-in, each looking towards one of the five wings, with twelve cells in each wing. The cells are larger than those in the older blocks. Also on the ground floor are interview rooms, consultation rooms, and evidence recovery rooms. The first floor is for the staff. The consultation rooms are locked during interviews between solicitors and detainees: the local solicitors found this unacceptable, but were told it was standard Home Office design. Solicitors were also kept out of all other areas in the block except a waiting room near the main door.⁹⁷

In the older locations, the central area is dominated by the custody sergeants' raised desk which faces towards the holding cage where detainees waited with their arresting officers until they could be booked in. Notices read, in block capital letters:

"Notice to all prisoners. If you damage a cell you will be prosecuted."

The wording of these notices brought the culture of the police to the

⁹⁷ L1: email to the author.

immediate attention of anyone who read them. It was a strong reminder that the police word for detainee is inaccurate and demeaning.⁹⁸ The new recruits saw (and heard) the word “prisoner” used to refer to detainees on several occasions on every visit, and became socialised by the familiarity of the usage.

Each cell had a mattress covered in blue plastic on a raised level (lower, for their own safety, for detainees who were intoxicated) and a pillow, also with a blue plastic cover. There were no televisions or radios in the cells: reading material might sometimes be provided. In a corner or an alcove, there was a toilet with a small supply of toilet paper, but no wash hand basin except in the new 60-cell facility. There was a CCTV camera in most cells. The camera could not transmit images of the detainee using the toilet, but not all the detainees, or all the visitors, knew that. There was a buzzer in each cell to call the staff.⁹⁹ Detainees’ shoes were kept outside the cell doors, to prevent the detainees using the laces to hang themselves. I often heard detainees shouting, swearing and screaming, either trying to communicate with each other, or making a protest. Parts of the blocks sometimes stank of toilet smells and of stale sweat. One detainee told me that he became aware of the availability of showers only after he had heard about it from a visitor.¹⁰⁰

The new recruits became accustomed to the crime control orientation which

⁹⁸ See Chapter One, text to notes 49-51.

⁹⁹ As far as I could tell, the staff did not routinely deactivate the buzzers, as observed in Satnam Choongh, *Policing as Social Discipline*, (OUP 1997) 80.

¹⁰⁰ D1. On an observation, I heard custody staff say that they could think of no reason why one of their detainees would want to brush his teeth except that his girlfriend was coming to visit him in the block.

resulted from the deficiencies in the way they worked, or were allowed to work, including: delays in being admitted; the brevity and poor quality of the interviews; the proximity of the escorting officer during the interviews; and the absence of feedback by visitors to detainees about the response of the custody staff to their requests and concerns; the haphazard approach to checks on matters such as whether all the staff were carrying ligature knives on their belts and whether the CCTV was working; the weakness of the reporting system; the rarity of challenges by the visitors; and the restrictions on the ambit of the work of the visitors.

On their three-hour observations, new recruits would, as I did, see much more than on the visits. Custody blocks are, for the custody staff, places of work, where, just as in other places of work, there are hourly rounds of tea with each member of staff having their own personal mug,¹⁰¹ cakes for birthdays, and a lot of banter. I saw that banter is shared with many of the other regulars who call, such as investigating officers, drug referral officers, and arresting officers, but not with the detainees' lawyers. Detainees who happened to be in the public area at the time were generally ignored in the banter, unless, of course, it was about them.¹⁰²

I saw the custody sergeant booking in detainees and asking them what were, inevitably, personal questions, in front of everyone else who happened to be in that public area. I saw the new arrivals being relieved of their mobile

¹⁰¹ One of the custody sergeants I observed had a Monopoly "Go to Jail" mug with a police officer blowing a whistle: which is, I suppose, a crime control image. Detainees' drinks were served in plastic cups, on the grounds of health and safety.

¹⁰² See Chapter One, text to note 70.

phones and all their other possessions. I saw that it was impossible for some detainees to have a phone call made on their behalf: the detainees could not remember the number, because it was stored under the person's name on their mobile phone, and the mobile had been seized to obtain evidence. I saw, and could not avoid overhearing, the telephone calls detainees made to their solicitors or their family members, because the calls had to be made in the public area near the custody sergeants' desk. These experiences would have reinforced the new recruits' impressions of how detainees were treated by the police and custody staff, and socialised them into expecting the treatment as the norm. The new recruits were on police territory, which coloured the whole experience. Every moment in the custody block was controlled by this powerful institution.

Undoubtedly, visiting with a mentor and the three-hour observation would be valuable experiences in understanding the work of a custody block. But the responses to those experiences were likely to follow the paths already laid down by the scheme administrator and by their mentors, and the responses of the visitors were also very likely to be heavily influenced by the police and custody staff. It is very unlikely that new recruits would see things from the detainee's point of view.

Visitor Team Meetings

Meetings were held for each local panel of visitors: they usually lasted just over one hour. At first sight, the "team" seemed to mean the group of visitors working at one or more local police stations, but the word "team" also recalls

the image of the team used in the initial session for recruits; as well as the visitors, the team comprised the Police and Crime Commissioner and the police,¹⁰³ both of whom were represented at these meetings, respectively by the scheme administrator and the custody inspector. The venue was usually a conference room in the police station where the group visited:¹⁰⁴ the visitors I interviewed did not think this was a problem. In my view, the venue was police territory, which confirmed that the police held the power. At none of the meetings which I observed did the visitors seek to discuss matters in the absence of the police and the scheme administrator.¹⁰⁵ Either they did not think there was any call for that, or they were afraid to do so: or both.

The meetings were held once every four months. Because of declining levels of attendance, the scheme administrator was considering holding them just once every six months. The scheme administrator convened all the meetings, and he chaired most of them as well.¹⁰⁶ He said he preferred it that way, to keep the meetings shorter.¹⁰⁷ another explanation could be that it reinforced his control over other aspects of the meetings, as well as their length. Usually between four and ten visitors attended. Most of the visitors I interviewed did attend the meetings, and said they thought the value of the meetings was impaired by the poor attendance.¹⁰⁸ One visitor remarked that:

¹⁰³ See text to note 78.

¹⁰⁴ The only other location used was a room in the Police and Crime Commissioner's offices, part of the police headquarters building.

¹⁰⁵ By contrast, in the lay visiting era of the 1980s and 1990s, the meetings of the Lambeth group took place in their own meeting room, not in the police station, and the police attended only part of each meeting: see Chapter Three, text to note 110.

¹⁰⁶ Meetings at two of the locations were chaired by visitors.

¹⁰⁷ AD interview.

¹⁰⁸ e.g., V9.

“It’s usually the same people that turn up all the time: there’s only a few of us, probably about three or four.”¹⁰⁹

Several visitors said they thought the meetings were useful, but they did not give that opinion with much enthusiasm. Some wanted to hear from the police, and thought that the police should always be present to answer questions, but noted that they did not always provide answers. Only three visitors thought that they were inhibited by the presence of the police.

The scheme administrator distributed an agenda and a report at each meeting. He did not send these documents to the visitors by email in advance of the meeting, or afterwards, prioritising attendance over the provision of information.¹¹⁰ There were no minutes of the meetings.¹¹¹ The agenda was always the same: apologies, visit issues/performance, custody visitor roster, force custody update, and any other business. In the visit issues/performance section, the scheme administrator reviewed the statistics for the number and frequency of visits, checking that targets for visiting were being met, and noting that the recently introduced system of self-introduction was increasing the number of detainees being interviewed by visitors. He highlighted the type of report which he wished to encourage the visitors to emulate. He was looking for detailed narrative about the visits to the detainees, rather than, at the other extreme, a report which said only: “5 PICs:¹¹² no issues.” He asked visitors to obtain and record positive feedback from detainees as well as the

¹⁰⁹ V19.

¹¹⁰ Observation and AD interview.

¹¹¹ except at one panel, where the visitor chair compiled minutes, and the practice ceased during my period of observation.

¹¹² Persons in custody.

negative feedback. The reports which I read show that some visitors complied with both requests.

The force custody update section was for the police representative to provide information. This often consisted of progress reports about the forthcoming change to the much larger custody blocks, and improvements in dealing with people with mental health issues. The police sometimes took the opportunity to send out pro-police messages, including about deaths in custody.¹¹³ The police also commented sometimes about criminal justice issues at team meetings. On one occasion, an inspector said it had been wrong for a lawyer to advise a detainee to say “no comment” in police interview. Lawyers were never invited by the scheme administrator to explain their role to visitors, so there was no chance of visitors appreciating why lawyers sometimes advised detainees to respond in that way.

The team meetings were not a forum for debate. The reports distributed at the meetings did not generate much discussion. One visitor said he thought some of the visitors were reticent at team meetings because the police were there, or because they felt intimidated by the longer serving visitors.¹¹⁴ The team meetings failed to be part of the reporting process, mainly because of the deficiencies in that process.¹¹⁵ And, when visitors did raise an issue, the police would have an answer that closed off further discussion. For instance, at one team meeting, a visitor raised concerns about a detainee with a broken

¹¹³ See text to note 202.

¹¹⁴ V4, who thought the more experienced visitors could be “intimidating”.

¹¹⁵ See Chapter Six, text to notes 146-154.

leg in a full length plaster. The inspector responded by saying that the leg would have been supported on a pillow. There was no further discussion about why the police had found it necessary to detain this suspect in a cell, rather than just arrange an appointment for an interview.

Visitors were aware of the delays which extended the time detainees had to spend in custody. Custody sergeants told me that the delays were routinely caused by interviewing not being done outside office hours. However, the subject was not discussed at team meetings. One visitor would have liked to have participated in the debates about these types of questions, but knew it would not happen:

“It might be good to be in on a few police meetings when they’re discussing operations around custody. I don’t think they’d want us to be there.”¹¹⁶

That visitor could see the value of debating these issues, but had accepted that, because of the power of the police, there was no way of doing so.

There were no coffee breaks, and usually no coffee either, at these meetings. One visitor observed that this deprived visitors of the chance to have informal, private chats with each other.¹¹⁷ Also, the meetings were never attended by “outsiders”, people like ward councillors, probation officers, and defence solicitors. Who was there, and who was not there, made a big contribution to

¹¹⁶ V9.

¹¹⁷ V5.

the socialisation of the visitors into a generally passive, pro-police, stance.

At two team meetings which I observed, in different areas, police officers praised the independence of the custody visiting scheme, and police officers often made the same point to me in interview. The police could argue that the existence of the scheme, and the fact that the scheme did not make criticisms of the police, demonstrated, independently, that all was well on the custody front. But both the theory and the practice of the team meetings always pointed away from the visitors being independent. The meetings confirmed the mono-cultural socialisation of the visitors, and reminded them that the police had the power. Visitors were told what to do, and what to think. What they were being told to do was to carry out their work in the way the Police and Crime Commissioner and the police wanted. What they were being told to think was crime control.

Visitors' attitudes from interviews and observation on visits

This section looks at the attitudes of the visitors, as expressed to me in interviews and observed on accompanied visits, on all matters except deaths in custody, which is dealt with later in the chapter.

I asked visitors whether they thought that the visiting scheme was independent, whether the scheme should be managed by a body other than the Office of the Police and Crime Commissioner, and whether they felt independent of the Police and Crime Commissioner and of the police. Most visitors did not feel any lack of independence, and thought the Office of the

Police and Crime Commissioner was the right body to manage the scheme.

One member of the minority said the scheme was:

“A system within a system ... someone’s pulling the strings from somewhere else.”¹¹⁸

This quote displays considerable unease with the lack of independence as it resulted from the structure, which made the “string-pulling” inescapable. Some visitors realised that the Office of the Police and Crime Commissioner and the police were closely connected, and that the distinction was not understood by the general public, or by the detainees;¹¹⁹ some visitors were themselves confused between the Police and Crime Commissioner and the police;¹²⁰ and some did not know that the Police and Crime Commissioner had replaced the police authority.¹²¹

Two visitors said that there was too much association with the police and custody staff for their work to be wholly independent.¹²² One visitor made this comment about the scheme administrator:

“He knows a lot of policemen, he’s friends with them, it must be quite hard for him to maintain that [independence].”¹²³

¹¹⁸ V19.

¹¹⁹ V2, V3.

¹²⁰ e.g., V10.

¹²¹ e.g., V18.

¹²² V2, V12.

¹²³ V9.

Maybe that was a way of saying that he did not maintain his independence, and that he should have done so. Visitors were certainly aware of his pivotal importance in the scheme. Some visitors distinguished between, on the one hand, their dependence on the organisational role of this official on behalf of the Police and Crime Commissioner and, on the other hand, their independence in making decisions as individual visitors, but none of them said they might be influenced by the Police and Crime Commissioner in how they made those decisions. Visitors found that they had no public voice. However, some did say that they would go over the head of the Police and Crime Commissioner to their MPs if they found they were unable to get anything done about a really serious concern: but this had never happened.

All the visitors thought they were independent of the police, including the visitor who said:

“I do the job best knowing [the police] accept me as part of a team.”¹²⁴

This visitor both wanted to be accepted by the police, and adopted the key image of the team.¹²⁵ This image was reified by the practice of some visitors shutting the cell doors on the detainees after their interviews.¹²⁶ The practice may well have given the detainees the impression that visitors were members of a team whose purpose was to confine detainees, albeit with some degree of humanity.

¹²⁴ V1.

¹²⁵ See text to note 78.

¹²⁶ Observation.

Of the three visitors whose relatives were police officers, only one of them seemed to think these relationships might raise conflicts of interest or questions about impartiality.¹²⁷ Most visitors said they were neutral: a neutral visitor should feel neither on the side of the detainees nor on the side of the police. Some said that they took the point of view of the detainees,¹²⁸ but a larger number were on the other side of the spectrum. Of those, one visitor's level of neutrality was "70/30" on the side of the police, partly because of predisposition, and partly because of familiarity with custody staff.¹²⁹ Another said that both visitors and the Police and Crime Commissioner saw custody from the point of view of the police.¹³⁰ Another thought that a belief that there was no need for visitors to check on the police was consistent with the neutrality of visitors.¹³¹

One visitor, without any sense of irony, expressed neutrality in these terms:

"If I can help the police I will, if I can help the criminal I will."¹³²

This showed this visitor's crime control orientation in the assumption that all detainees were guilty. Visitors were not there to help detainees who were innocent, as innocent detainees did not exist.

Visitors were asked who they felt responsible to, and one mentioned only

¹²⁷ Identifiers omitted to preserve anonymity.

¹²⁸ V6, V19.

¹²⁹ V8.

¹³⁰ V12.

¹³¹ V10: see text to note 151.

¹³² V13.

“police officers” in answer to this question,¹³³ and another only “detainees”.¹³⁴ However, most visitors said they thought they were responsible to the Police and Crime Commissioner, and most of them saw the responsibility as also being owed to the detainees, the police, and the general public, and one visitor included those sectors of the public who did not trust the police.¹³⁵ One visitor saw the Home Secretary as the person to whom visitors were ultimately responsible.¹³⁶ Almost all the visitors said that they thought the work was important and useful,¹³⁷ and some mentioned Scarman,¹³⁸ following the scheme administrator’s lead.¹³⁹

I sought to categorise visitors’ attitudes in terms of Packer’s analysis. One due process adherent said that two other visitors should not continue to act as visitors, because they thought that all detainees were in custody because they had done something wrong and should be punished.¹⁴⁰ In fact, most visitors were crime-control oriented. The narrow socialisation the visitors received had played a large part in developing and confirming these attitudes. One visitor told a detainee:

“The more you co-operate, the sooner you’ll be out.”¹⁴¹

The detainee might well have heard that as advice to make a confession. This

¹³³ V10.

¹³⁴ V9.

¹³⁵ V21.

¹³⁶ V7.

¹³⁷ except V12.

¹³⁸ e.g., V8.

¹³⁹ Observation on several occasions, including during the training, for which see text to note 73.

¹⁴⁰ V17.

¹⁴¹ Identifier omitted to preserve anonymity.

is a very clear illustration of the crime control attitude of some visitors. It ran also contrary to the remit that visitors should not to get involved in any part of the investigation.¹⁴²

Visitors did not however share the Police and Crime Commissioner's line that the principal purpose of custody visiting was to build public confidence in the police. Most of them saw it as promoting police accountability and transparency.¹⁴³ One visitor said, emphatically, that the purpose was to safeguard detainees.¹⁴⁴ Some visitors said that there had been mistreatment of detainees in the past, and that custody visiting had been brought in to deter neglect and abuse, but that things had improved, partly because of the visiting.¹⁴⁵ When I asked one of the visitors whether random unannounced visiting deterred mistreatment of detainees because they know you might turn up at any time, the visitor replied:

"I think it's good for the detainees, but I haven't heard of this idea."¹⁴⁶

This is further evidence of how the original purpose of custody visiting has almost vanished into total obscurity.¹⁴⁷ Another visitor, in a minority of one, made the perceptive observation that while the "whole reason" for the visiting scheme was to prevent incidents in custody and to protect the welfare of detainees, the scheme was not sufficiently related to that as a purpose, and

¹⁴² 2013 Code of Practice, para 60.

¹⁴³ e.g., V15. From my interviews with the police, it seemed that "transparency" was the term they preferred to use, so maybe the visitors who used the term had picked it up from them.

¹⁴⁴ V14.

¹⁴⁵ V3, V17.

¹⁴⁶ V2.

¹⁴⁷ See Chapter Three, text to notes 73-74, 128-131, and 159-60.

visitors were not made to think they had a real duty.¹⁴⁸ Most visitors saw the purpose as “to keep the police on their toes”.¹⁴⁹ But some visitors failed to see any connection between their work and protecting detainees. For instance, one visitor said:

“I trust the police would carry out their duty to the best of their ability.”

I asked this visitor what, in that case, the point of the visiting was. This was the answer:

“Well, it does beg the question if I believe that, why do we have custody visits, if I’m prepared to trust the behaviour of the police? I suppose there always [have] to be checks in place, no matter how reliable the system is, and the sporadic nature, the random nature of the inspection, the visits, perhaps does influence...I’ve never thought of it in those terms. I suppose, because I’ve never found anything extraordinarily out of order, that I just expect the whole thing to be running like a Swiss watch all the time.”¹⁵⁰

Here is an edited extract from an interview with another visitor with similar crime control attitudes, unable to see the need for intervention:

JK: Do you think the scheme has any effect on how the police behave, knowing you could turn up at any time?

¹⁴⁸ V12.

¹⁴⁹ e.g., V8, V15.

¹⁵⁰ V1.

V10: I would hope not, I would hope they would behave, no matter what ... they are professional people and, OK, and sometimes it's going to be difficult, when it's all kicking off down there, to remain calm. But I firmly believe that they do a good job, and that they don't overstep the mark.

JK: Does that mean you think the visiting isn't necessary?

V10: No, I think it's still necessary because it offers the detainees somebody neutral to talk to, so it's necessary for them, it's not necessary to check up on the police.¹⁵¹

This visitor saw the visiting work as providing the detainees with company. The visitor clearly trusted the police to behave properly at all times, and did not see that visitors had any role to play in checking on their behaviour. The visitor thought that all the visitors had to do to be neutral was not to be police or civilian custody staff.

Some visitors felt it was important to reassure detainees that they would be looked after, particularly those who were in custody for the first time.¹⁵² They did not seem to have any qualms that an unqualified reassurance might be misleading. Exceptionally, one visitor, rather than giving a reassurance, tried, unsuccessfully, to intervene. Here is an edited extract from the visitor's report:

“Officers explain[ed] the PIC was having mental health issues and was violent, self harming ... they were awaiting the crisis team. [Later t]he

¹⁵¹ V10.

¹⁵² e.g., V3 and V11.

PIC was much calmer, and pleaded to be allowed to call their solicitor ... The PIC suggested the call be made in the cell with officers holding the phone. The [escorting officer] said that was not an option. The tearful and frustrated PIC claimed the only reason now that they were agitated and self-harming was because they could not get to call their solicitor. I did ask the [escorting officer if] an officer [could] make [the] call for the PIC ... I already knew the answer, but felt I had to ask anyway. [The answer was no.] ... Couldn't help feeling quite inadequate.”¹⁵³

Visitors rarely saw custody from the detainee's point of view, and tended to have stereotyped views about detainees. One visitor I interviewed said that one had to keep an open mind, but at the same time the detainees were potentially “bad people ... the extremes of society”.¹⁵⁴ Another said, first, that detainees were “not people one would associate with normally”, and then, in the next breath, that sometimes they were “just normal people who ended up in a bad situation”.¹⁵⁵

Some of the police I interviewed stereotyped detainees as liars.¹⁵⁶ At one team meeting, the scheme administrator said that detainees did not always tell the truth, and visitors agreed.¹⁵⁷ When a detainee made an allegation which was disputed by the police and custody staff, one way of checking it was to look at the custody record. Visitors felt the custody record settled the

¹⁵³ An extract from reports distributed at a team meeting.

¹⁵⁴ V23.

¹⁵⁵ V12.

¹⁵⁶ e.g., S2.

¹⁵⁷ Observation.

matter: they did not seem prepared to entertain the possibility that the police might have falsified the record,¹⁵⁸ as they have been found to do on occasion.¹⁵⁹ Again, this attitude could be attributed to their socialisation: they never encountered anyone who might tell them that the police sometimes falsify records.

On all the occasions when I accompanied visitors, a member of the custody staff always remained close to the cell door, usually able to hear the meeting, if not able to see it as well. Very few visitors were concerned about the effect on the detainees and on the quality of their meetings with the detainees.¹⁶⁰ Most visitors thought that the extra work for the short-handed custody staff would rule out interviews in a consultation room where detainees would feel more able to talk, so they never raised the idea: an example of Lukes' three-dimensional power keeping issues off the agenda.

I asked visitors how they would cope with being detained in custody, and most of them said they would hate it. However, on a guided tour of the new 60-cell block, one of the visitors, said, not as a joke, that the new facility was so nice that the police were spoiling the detainees. Another visitor said one of the older custody blocks was like a three-star hotel.¹⁶¹ Few visitors appeared to share these views. No three-star hotels confine guests to a small cell, where the only furniture is a bench; the only bedding a plastic-encased mattress and

¹⁵⁸ e.g., V3 and V19, and discussion at the team meeting.

¹⁵⁹ See Chapter One, note 85.

¹⁶⁰ V5, V9.

¹⁶¹ V1.

plastic-encased pillow,¹⁶² with one blanket (sometimes more on request) but no sheets; the only television screen is one that watches the occupant; the switch for the only light is operated from the other side of a locked door; and the only bathroom equipment is a toilet with a very limited supply of toilet paper, and no wash hand basin.¹⁶³

Most visitors said that the police and civilian staff did a very good job, and looked after the detainees, in what were sometimes quite difficult circumstances, coping both with abuse from some of the detainees, and with the effects of staff shortages. A minority of visitors held rather different views. One visitor made the point that detainees were treated properly while visitors were in the block, and another pointed out that people behave differently when they are being observed.¹⁶⁴ Some visitors said that the treatment of detainees did depend on how the detainees behaved and whether they were compliant.¹⁶⁵ One visitor opined that the detainees always felt they were being fobbed off, and that they were probably right to think so.¹⁶⁶ Some visitors said they disliked the way some custody sergeants made fun of detainees, but conceded that they did not challenge them.

The police and the civilian staff often referred to the detainees as prisoners.¹⁶⁷ Some visitors used the word, others were very careful not to use the word,

¹⁶² At a team meeting, I heard a custody manager say that he used to think he would never see the day when detainees were given pillows.

¹⁶³ The absence of a wash hand basin offends basic standards of hygiene. It also makes it impossible for Muslims to wash before praying, as V7 noted. Wash hand basins have been installed in the cells in the new 60-cell block: see text to note 97.

¹⁶⁴ V11, V14.

¹⁶⁵ V4, V9.

¹⁶⁶ V12.

¹⁶⁷ See text to note 98, and Chapter One, text to notes 49-51.

and some did not think it mattered. Another enduring aspect of police culture is what Bethan Loftus calls its “masculine ethos”.¹⁶⁸ A female visitor, younger than the average, said she had been patronised on visits by the custody staff, subjected to sexist treatment, and not taken seriously. She went on to say that she had received even more of this kind of treatment from other visitors.¹⁶⁹ Some visitors, therefore, either adopted this aspect of police culture, or had already been behaving in this way.

Some years ago there were bars in police stations, and visitors used to have a drink with the police after visiting at one of the police stations in the area studied.¹⁷⁰ Times have changed. None of the visitors said they had a social relationship with the custody staff outside the block, but they did get to know some of them.¹⁷¹ As one visitor said:

“If you know [them] you can have a banter with them, a bit of a chat.”¹⁷²

This visitor showed no concerns about the relationship. Another visitor said that the familiarity was superficial, and that if they had shared a joke, and then the visitor found something wrong, there would be no reticence in raising it.¹⁷³ However, getting friendly with the police and custody staff could convey the impression to the detainees that the visitors were in collusion with them, but

¹⁶⁸ Bethan Loftus, *Police Culture in a Changing World*, (OUP 2009) 120.

¹⁶⁹ Identifier not given, to preserve anonymity.

¹⁷⁰ AD interview.

¹⁷¹ A point made by S9, noting that some visitors act as appropriate adults, and therefore spend a great deal more time in the block than visitors. Two of the visitors I interviewed acted as appropriate adults.

¹⁷² V10.

¹⁷³ V4.

only one visitor was concerned about this:

“If the person in custody sees you being over-friendly with the custody staff, then they assume you’re police officers as well, and they probably won’t talk to you ... we have to act in a way that gives the detainee confidence that we are separate from the police.”¹⁷⁴

This is an important recognition of the need for the quality of separateness, of not being too close, as part of independence,¹⁷⁵ which only one visitor expressed. However, it is not easy to appear to be aloof from a person one has got to know.¹⁷⁶ This underlines the importance of proper training in the first place.

Another aspect of independence is how “soft”¹⁷⁷ the visitors were in their dealings with the police, coupled with how much the visitors were affected by the power of the police, in Lukes’ three-dimensional version of the power relationship: the visitors behaved in the way they thought the police wanted them to behave. Only one visitor said that the police were very much in control of each visit, and that they used safety concerns to justify their decisions about what the visitors could and could not do. This visitor felt that the visitors should be stronger in insisting on making some kind of visual checks on all the detainees.¹⁷⁸

¹⁷⁴ V3 and V22.

¹⁷⁵ See Chapter Two, text to note 71.

¹⁷⁶ On one occasion I allowed myself to appear too friendly when greeting a police officer in the presence of detainees in the custody block.

¹⁷⁷ See Chapter Two, text in para after note 74.

¹⁷⁸ V12: I think the visitor meant that it was rare for visitors to be stronger in this way.

Visitors did not confront the police, and challenges were very rare.¹⁷⁹ One visitor said:

“I think if you see something that needs challenging you’ve got to say so.”

But, when asked for an example, the visitor answered, after a pause for thought:

“I don’t think I have challenged them, but I think that’s mainly because there hasn’t been anything to challenge them about.”¹⁸⁰

But there certainly were things to challenge the police about: for instance, delays in admission to the custody block. On one occasion the custody block staff said that they were busy and that the visitors would not be allowed in the custody block for at least an hour. The visitors did not challenge this, and they left, and did not return later, so the purpose of the visit failed completely.¹⁸¹ One, untypical, visitor felt suspicious about delays but did not challenge the staff about the reasons they gave for them,¹⁸² and some did not even ask to be told the reason.¹⁸³ The only action visitors took was to report that there had been delays.¹⁸⁴ Visitors showed a general reluctance to ask questions: for

¹⁷⁹ Observation.

¹⁸⁰ V7.

¹⁸¹ V9.

¹⁸² V19.

¹⁸³ e.g., V1.

¹⁸⁴ Visitor reports.

instance, several said they would not enquire why a detainee who had been in the custody block had gone to hospital:¹⁸⁵ it may be right to draw the conclusion that some visitors could not contemplate the possibility that the reason for a detainee having to go to hospital could be neglect or abuse by the police or custody staff. In the case of denial of access to certain detainees, visitors did not ask whether an officer of the rank of inspector had made the determination, as required by statute.¹⁸⁶ These failures showed a lack of concern for the truth and for objective reporting, concerns that are characteristic of independence.¹⁸⁷

A key time for challenge was the moment when the visitors presented their report to the custody sergeant towards the end of their visit. On the only occasion when I observed a challenge being made at this stage, the challenge was not effective, and it was really about something else. The visitors had reported what they believed were inconsistencies in a custody record, for which the custody sergeant had given an explanation which the visitors did not accept. However their real complaint was that the custody sergeant had kept them waiting for two separate periods totalling about 45 minutes. In my experience, and in that of the visitors, being kept waiting after admission to the custody block was very unusual. One of the visitors said that the sergeant was showing his power by sending visitors off to wait in the consultation room, like naughty children, and that it was the worst way he had been treated in 17 years. The visitors became progressively more annoyed, while the sergeant remained cool and detached throughout. The visitors

¹⁸⁵ V8.

¹⁸⁶ Police Reform Act 2002 s 51(4).

¹⁸⁷ See Chapter Two, text after note 74.

asked to see the duty inspector, and they raised the issue about the report with the inspector, but they said nothing about the custody sergeant keeping them waiting. The inspector persuaded the visitors to rewrite their report in a form which the custody sergeant signed. The ineffectiveness of this shows the power of the police over visitors. I believe the visitors were subject to the power of the police in all circumstances, including the very numerous occasions when there was no overt conflict. Here, where there was overt conflict, the visitors were still affected by the power of the police in Lukes' three-dimensional form: they could not bring themselves to complain about what had really annoyed them, so they picked on something else, which was too technical for them. So the visitors achieved nothing.

These visitors told me they did not expect to make any headway by including the matter in their report. I did not discuss this incident with the scheme administrator, but he did tell me during interview that his policy was to approach these problems by speaking to the custody manager. He gave the following example. On one occasion, before the days of self-introduction, custody staff told detainees that visitors were waiting outside the cell to check on their welfare; the staff asked the detainees if they were OK; the detainees answered that they were; and there was then no meeting between visitors and detainees. Visitors raised this with the scheme administrator, he mentioned it to the inspector, the inspector spoke to the staff, and the staff stopped behaving that way.¹⁸⁸ The scheme administrator would, no doubt, have argued that in this instance his policy was effective, because it achieved the

¹⁸⁸ V11: V8 told me a similar story.

right result for future visits. However, I heard of no other instances of this kind, an impression reinforced by the low expectations of the experienced visitors in the previous example.

I observed some, but not all, visitors recommending detainees to get a solicitor: they did not always mention that the legal advice would be free. Most of the visitors did not seem to be impressed by solicitors. On one occasion at a team meeting, I heard this comment from a visitor: “solicitors are against the police”.¹⁸⁹ Legal advice was often given to detainees by telephone, and the calls had to be made near the custody sergeants’ desk.¹⁹⁰ Most of the visitors did not think this was a problem, and one visitor said:

“I think it’s probably right, because we don’t know what type of offence they’ve committed.”¹⁹¹

Packer’s crime control adherents want to stop, rather than just inhibit, lawyers advising suspects, because they see it as outside interference, making it less likely that the suspect will provide a confession. This visitor’s remark also shows uncritical support for that most basic crime control tenet, the presumption of guilt. Visitors did not understand the role of the lawyers, as no lawyer had ever made a presentation to them, from which they might have gained some idea of the arguments for the due process model of criminal justice.

¹⁸⁹ Identifier not given to preserve anonymity.

¹⁹⁰ On the need for private booths, see *Skinns* (n 19) 215.

¹⁹¹ V11.

Socialisation and the changes in visitors' attitudes

The attitudes of the visitors after socialisation can now be compared with the attitudes they held when applying to join. Before doing so, it is worth emphasising that the fundamental element of the socialisation of the visitors was that it was firmly anchored to the Police and Crime Commissioner and to the police. The visitors did not meet representatives of other groups who work in custody and in the criminal justice system, which would have helped to give them a more comprehensive and balanced view. Visitors received all their information and socialisation from the Police and Crime Commissioner, the police, and from the more experienced visitors, who had themselves been socialised in the same way.

The following table sets out: what the issues were; what attitudes the police and the Police and Crime Commissioner would like the visitors to take about each issue; what attitudes the visitors took on each issue; whether the attitudes the police and the Police and Crime Commissioner wanted were the attitudes adopted by the visitors; and where the views were not aligned, whether the visitors challenged the police and the Police and Crime Commissioner in any way.

VISITORS' ATTITUDES TABLE

ISSUE	POLICE/POLICE AND CRIME COMMISSIONER VIEW	VISITORS' VIEW	VIEWS ALIGNED?	CHALLENGE?
Visitors' attitude to the police	Favourable	Agreed	Yes	No
Whether promoting confidence in police a primary objective of visiting	Visitors should see it that way	No agreement	No	No
Whether safeguarding detainees a primary objective	It is not	No clear view	No	No
Whether visiting independent	It is	Agreed, mostly	Yes, largely	No
Whether visiting promotes police accountability	It does	Agreed	Yes	No
Whether visiting legitimate	It is	Agreed	Yes	No
Whether visitors need to know about the law, including the Human Rights Act	They do not need to	Agreed	Yes	No
Whether stereotyping detainees a concern	It is not	Agreed, mostly	Yes, largely	No
Whether detainees are treated well in custody	They are	Agreed	Yes	No
Whether visitors should worry about adopting police culture	They should not	Agreed, mostly	No	No
Whether visitors need training for interviewing	They do not	Agreed, mostly	Yes, largely	No
Whether visitors need to tell detainees the staff response to their issues	They do not	Agreed, mostly	Yes, largely	No
Whether chatting with the police and custody staff a problem	It is not	Agreed, mostly	Yes, largely	No

ISSUE	POLICE/POLICE AND CRIME COMMISSIONER VIEW	VISITORS' VIEW	VIEWS ALIGNED?	CHALLENGE?
Whether visitors should challenge the police	They should not	Agreed, mostly	Yes, largely	Very rarely
Whether detainees should be able to phone lawyers/ family in private	They should not	Agreed, mostly	Yes, largely	No
Whether visiting is just a reporting function	It is	Agreed	Yes	No
Whether visitors should have a public voice	They should not	Agreed, mostly	Yes	No
Whether visitors need training from others	They do not	Disagreed	No	No
Whether it is right to assess visiting only statistically	It is	Not clear, but only one found it a concern	Not possible to say	No
Whether visitors should have any other role	They should not	Mixed views	No	No
Whether visitors should be able to track concerns	They should not	Most agreed	Yes, largely	No
Whether visitors should discuss wider issues	They should not	Mixed views	No	No

The table shows that visitors' attitudes on the general issues were in line with what the Police and Crime Commissioner and the police wanted them to be, and that where they were not aligned, visitors very rarely made a challenge. Some of that might have arisen from their background and their attitudes on arrival, and some might have resulted from their socialisation. However their attitudes towards criminal justice and the police were very likely to have been affected by the narrow socialisation they received, by the constant message that the police and the Police and Crime Commissioner were in charge, and by the persistent crime control orientation. The visitors did not have a clear idea of the purpose of the visiting scheme. This may reflect the conflict between the various different purposes that are put forward,¹⁹² and the fact that the issue had never been properly discussed with them.¹⁹³

It is easier to assign the visitors' attitudes to their socialisation where the attitudes relate to the specifics of the visiting scheme. Most visitors were uncritical of the system. They carried out their work in the way they had been trained, and they accepted the way the scheme was run, with all its limitations. As none of them knew anything about those details before they applied, their acceptance of the way the scheme was run can have originated only from the socialisation they received. That conclusion suggests that they would also be susceptible to influences from the same sources on a broader range of issues.

¹⁹² See Chapter Three, text to notes 186-190.

¹⁹³ See text to note 77.

The research identified two groups of visitors with contrasting experiences of the police and the criminal justice system.¹⁹⁴ One way of evaluating the strength of the socialisation could be to examine whether the attitudes of the members of the group with negative experiences appeared to have changed after socialisation. Of the three members of this group, the views of the first appeared to have become generally more favourable to the police. The second was seeing custody more from the police's point of view, but otherwise that visitor continued to feel on the side of detainees. The third visitor was pleased to see improvements in how people with mental health problems were treated, and sympathised with the police being short-staffed and under pressure. This shows some movement in this group towards being more favourable to the police, and all three of the visitors seemed generally happy with the scheme.

I now look back at the outcomes of the adjustments that the process of socialisation should achieve.¹⁹⁵ My assessment is that most of the visitors felt clarity and confidence about their role in the organisation; that most of them felt accepted in the organisation: that most of them knew the organisation's culture, including its politics, language, values and traditions; and that, ultimately, most of them derived job satisfaction from their work as visitors.¹⁹⁶ There was a much smaller group of just two visitors, who might be called "deviants". One of these visitors resigned,¹⁹⁷ and the other was questioning

¹⁹⁴ See text to notes 28-32.

¹⁹⁵ See text to notes 3-26.

¹⁹⁶ Ellis *et al* (n 13) 86.

¹⁹⁷ V12.

the practices of custody.¹⁹⁸ Both these visitors were glaring exceptions from the norm, which showed the strength of the effects of socialisation on all the others.

In any event, whatever attitudes they had at the time of recruitment, most visitors went with the flow. The widespread alignment of the visitors' attitudes to those of the police and the Police and Crime Commissioner shows that their attitudes moved, on a broad front, from the less determined mindsets they had held on arrival, to predominantly crime control mindsets. Some of the visitors thought they were independent in the decisions they made, but this analysis supports the view that they were heavily affected, both by their socialisation, and by other effects of the power of the police operating in Lukes' three-dimensional form. This is particularly apparent when one sees what this meant for the issue of deaths in custody.

Socialisation about deaths in custody

A key question for this research is the relation between deaths in custody¹⁹⁹ and custody visiting.²⁰⁰ The following account traces the principal events relating to the role of custody visitors who visited the custody block where a particular death had taken place some years earlier: this was one of the blocks in the area studied. The story begins with the death. It seems likely that visitors were not told about it at the time, when they were making visits soon after the death, and when the police officers and custody staff would have had

¹⁹⁸ V4.

¹⁹⁹ or rather: deaths during or following police contact, the IPCC wording: <https://www.ipcc.gov.uk/page/deaths-during-or-following-police-contact>.

²⁰⁰ See Chapter One, text to notes 91-141.

it fresh in their minds. Indeed, I believe that they did not find out about it until some considerable time afterwards.²⁰¹ And, as often happens, the inquest was not arranged until several years later. A team meeting took place at the station where the death had occurred, a few months before the date fixed for the inquest. The custody inspector told the visitors that, because of the man's medical condition, the police had not been responsible for the death, and he asked the visitors to put over that line to people who asked them about it.²⁰²

At the inquest, the jury found that the police did have some responsibility for the death, and the coroner was critical of the police. Neither the Police and Crime Commissioner nor the police informed visitors about the inquest result. They might have heard about it from some other source, but the remarks of the inspector, whom they knew and presumably trusted, would remain uppermost in their minds, and might even have prejudiced them against accepting the jury's verdict and the coroner's criticism of the police.

At the next team meeting, the inquest was not on the agenda, the police officer did not mention it, and no visitor raised the issue. A few months later, there was an annual training day for visitors. There was no reference to the inquest. One visitor told me in interview about having wanted to raise the subject of the inquest at this session, but having felt unable to do so.²⁰³ Two months later, at a team meeting, the scheme administrator distributed a paper based on the facts of this death, without mentioning that it was based on

²⁰¹ This impression is gained from the visitor interviews, and from one interviewee in particular, where the identifier is not given to preserve anonymity.

²⁰² I was present and recorded this remark in my field-notes. I later heard that a similar request was made by a different inspector at another team meeting: AD interview.

²⁰³ V18.

those facts.

So, to summarise: visitors did not hear about the death until some time after it took place; when the police felt the visitors had to be told, they gave them the line that the police had not been to blame; that version of events blotted out the impact of what actually happened at the inquest; the visitors did not raise the inquest with the custody inspector at the next team meeting; the inquest was not mentioned at training sessions: and the scheme administrator did not mention that some training material which he gave to visitors was based on this local case. This demonstrates the ideology of crime control, where the drive for efficiency supersedes due process concern for the welfare of individuals, even their right to life, and the powerful effect on the visitors of their socialisation. The police sought to neutralise a potentially toxic issue, and they succeeded in getting almost all the visitors “on side”, to continue with the team metaphor.²⁰⁴ The scheme administrator appears to have been ambivalent on the issue: he did mention this death at a training event I attended,²⁰⁵ but was silent about it on all the other occasions, when it just so happened that the police were present: perhaps this was another instance of the operation of Lukes’ three-dimensional power.

Simon Pemberton has argued that there is a discourse of “state talk” about deaths in custody which legitimises what the state has done to a detainee, neutralizing empathy for their victim, the detainee. Pemberton sees this as being achieved by the police in a number of ways, including by arguing that

²⁰⁴ See text to notes 78, 124 and 125.

²⁰⁵ Text following note 78.

deaths in custody are caused by inherent physiological weakness.²⁰⁶ This approximates to what happened in this case. The police sought to enlist the visitors to spread their version of events: an instance of “state talk”.

In interviews, I asked visitors a series of questions about deaths in custody. First, they were asked about their feelings on hearing of a death in custody. Naturally, they were saddened. One reaction was:

“it’s always a bit worrying, a bit disappointing to think that, in spite of your best efforts [to check on people’s welfare], there’s still been a death in custody.”²⁰⁷

This visitor saw custody visiting as part of the safeguards. More typical was another visitor who said the feeling of disappointment would arise because:

“normally, they’re very good”.²⁰⁸

“they” being the police and custody staff: no role for visitors.

Visitors did not think there was any problem with the way the authorities handled these deaths, with the sole exception of this visitor, who had been studying a university course on related issues:

²⁰⁶ Simon Pemberton, “Demystifying Deaths in Police Custody: Challenging State Talk”, *Social & Legal Studies* (2008) 17 2 237.

²⁰⁷ V17.

²⁰⁸ V7.

“It’s quite bad that you could be arrested and die, and there are no repercussions, no outcome for the family, no prosecution.”²⁰⁹

No other visitor took this line: and none of them had received any training about the issue as visitors, which accounts for their naivety.

Visitors were asked whether they felt custody visiting had anything to do with deaths in custody. There were those who thought it did, but not in any very precise way.²¹⁰ Most of the visitors thought that they were kept informed by the scheme administrator about deaths in custody, but it became clear that this was far from prompt.²¹¹ Only one visitor could recall correct information about the death in custody described above,²¹² and, if visitors could recall anything, it tended to be the line the police had given them at team meetings.

I asked visitors whether they would feel at a disadvantage if they visited a station soon after a death in custody had occurred there and they did not know about the death. Many thought they would feel at a disadvantage. They said they would want to check whether a custody visit had taken place while the person who had died had been at the block.²¹³ They said they would want to know what had happened and who was to blame. But none of them seemed to realise that no information of that kind sees the light of day until the

²⁰⁹ V9.

²¹⁰ See text to notes 145-151.

²¹¹ V2.

²¹² V16 the exception.

²¹³ e.g., V17.

inquest, which can be years later.²¹⁴ Only one visitor thought a senior officer should explain the death at the next team meeting.²¹⁵

However, two visitors said they would not be at a disadvantage making a visit without knowing about a recent death. The first said:

“No, I think it would be a disadvantage to know ... My opinion is that our role is to turn up and, regardless of what’s gone on ... we should turn up as neutrals that have to take into account the atmosphere and what’s happening as we know it at that time. I think if we were to know about it before that would colour our perception ... we should be completely independent of the new set of circumstances we see as we walk in that door.”²¹⁶

This visitor thought that a person who is being neutral and independent should also not be in possession of the facts. Another visitor said:

“I think it is for the sergeant in charge to inform me if there’s anything they think I ought to know which is material to my visit, for example if there was a particularly disruptive prisoner, but the fact that they’ve had an incident yesterday, is that material to my visit today? No.”²¹⁷

This visitor took a very narrow view of what information was material.

²¹⁴ 11 years in one case: <http://www.bbc.co.uk/news/uk-wales-north-west-wales-27887355>: accessed 14.07.2015.

²¹⁵ V16.

²¹⁶ V22.

²¹⁷ V15.

I found both of these comments very puzzling. Perhaps these visitors, by appealing to concepts of neutrality, independence and materiality, were trying to rationalise their lack of knowledge, consistent with the socialisation they had received and with the controls imposed on the information they were given.

Another visitor said he would expect the police to tell him about a recent death:

“I have always found the police to be reliable and honest folk ... If an incident had happened the day before, frankly I would expect the custody sergeant to make a visitor aware of that.”²¹⁸

This visitor trusted the police to provide information of this kind. The problem was that no one had the obligation to tell the visitors what had happened, promptly or at all.²¹⁹

I asked visitors if they would change their visiting practice after a death in custody at the station they visited. Some said they would increase the number of visits and be more rigorous, but whether they did so would depend on what the reasons were for the death. One visitor said that the police should come up with a plan to deal with the issues.²²⁰

²¹⁸ V1.

²¹⁹ See Chapter Three, text to notes 128-131 and notes 159-160.

²²⁰ V8.

Finally, visitors were asked to consider a vignette. They were asked to imagine that, on a visit, they saw a detainee holding his head, moaning, and otherwise unresponsive. They tell the custody sergeant they think he should call an ambulance. The custody sergeant refuses, repeatedly, to do anything about it. Several visitors said they couldn't imagine this happening.²²¹ Five visitors said they would do no more than just report it: here is an edited extract from the interview with one of them:²²²

Visitor: We'd have to make a report about that, had they seen a nurse, a GP, had they been assessed, any diagnosis, and the condition of the person we'd seen before we left.

JK: You would report on this: would you take any other action?

Visitor: The custody staff would have to comment on what we put in our report and say what they were going to do.

JK: And if they still didn't do anything?

Visitor: I don't think there's anything we could do on the night. Maybe we could call [the scheme administrator].

JK: Supposing his phone was on answer?

Visitor: All we can document is that we've gone through the process in stages and we have made a comment, we didn't have a response from the inspector [*sic*] of the custody suite, and that we called the head of the scheme and we reported it.

²²¹ e.g., V5.

²²² Identifiers omitted to preserve anonymity.

JK: But his phone had been on answer. I was wondering if you would have felt you should leave the station and go and call an ambulance, or go and speak to the police superintendent.

Visitor: Could we go over the head of the custody sergeant?

[JK said it was neither envisaged nor prohibited]

Visitor: It is a difficult situation, but as I said we could speak to the sergeant and put the details down of what he commented at the time, and then *maybe just*²²³ forward the information on to [the scheme administrator] to say that we've seen this and we went through the stages, we recommended this, this wasn't done, we informed the custody sergeant, and what was our recommendation at the time to be done, and we didn't know if it was followed up or not.

The visitors who took this attitude were clinging to the task of reporting, and missing the bigger picture. Zygmunt Bauman characterised this as bureaucracy. He highlighted bureaucracy's propensity to dissociate the means from the moral evaluation of the ends, substituting technical for moral responsibility.²²⁴ The bureaucratic visitors wanted to confine the task to reporting, thus discharging the technical responsibility: they would have declined to take other steps, safeguarding, which might have saved the detainee's life, and appeared to have no sense of moral responsibility for that decision. However, these visitors were in the minority: all the others said they would go beyond the custody staff to ensure some action was taken, at least by contacting the superior officer at the station, and four visitors said that they

²²³ Emphasis added.

²²⁴ Zygmunt Bauman, *Modernity and the Holocaust* (Polity 1989) 98.

would take the initiative and call an ambulance.²²⁵

This review demonstrates that, whatever their background, the concerns of most of the visitors about actual cases of deaths in custody seemed somewhat muted, even when a death had taken place in the station they visited: and this majority included those visitors who had had negative experiences of the police and the criminal justice system.²²⁶ However, it cannot be assumed that the visitors with those negative experiences took a more active interest in actual cases of death in custody before they applied to become visitors, so their attitudes did not necessarily undergo fundamental change. One can say that the socialisation these visitors had received had stunted whatever interest they might ever have had in the issue. They exhibited the same attitude to actual deaths in custody as most of the rest of the visitors. If there had been variations in visitors' attitudes, socialisation had flattened them out.

This review also demonstrates that visitors generally showed no understanding of deaths in custody. They had naive expectations that they could be told, soon after a death, what had happened and whose fault it was. They had, of course, received no training about the subject. Visitors were uneasy about some aspects of deaths in custody, but where those attitudes were expressed in the actions that the visitors actually took, or rather, the actions that they failed to take, almost all the visitors found no fault in the conduct of the authorities. The Home Office, the Police and Crime

²²⁵ V4, V6, V7 and V23.

²²⁶ See text to notes 28-32.

Commissioner and the police had suppressed the connection between custody visiting and the issue of deaths in custody, and they had, in particular, suppressed the idea that one of the purposes of custody visiting was to deter neglect and abuse by the police. Visitors found that, if they had any role, it was to let the public know that the deaths had not been the fault of the police.²²⁷ That same socialisation had also rendered some of the visitors incapable of doing anything to safeguard detainees from paying the ultimate price.

Conclusion

This chapter has shown that custody visiting in the area studied was completely controlled by the Police and Crime Commissioner. As well as the scheme having no structural independence, the visitors' attitudes also showed their lack of independence, and their attitudes fell largely in line with the views of the Police and Crime Commissioner and the police, a crime control orientation. Particularly noticeable is their failure to challenge the police: and, on the one occasion when I observed a challenge, it was ineffective.²²⁸ All the visitors except two showed a largely uncritical acceptance of the local scheme, and seemed to have bought into the idea being part of a team,²²⁹ and those with earlier negative experiences of the criminal justice system moved to a more favourable view of the police. Some, at least, of this can be attributed to the impact of three very significant factors: the mono-cultural socialisation they received, the crime control ethos, and the power of the

²²⁷ See text to note 202.

²²⁸ See text following note 187.

²²⁹ See text to notes 78, 103, 125, 204.

police operating on them, in Lukes' three-dimensional form.

It was disturbing that no visitors had an understanding of the issues involved in deaths in custody. This is a startling illustration of the inadequacy of the training, but on reflection it is not surprising, since the subject had such a low profile in the scheme. In the case of some of the visitors, this led, as was shown by their reaction to the hypothetical case put to them, to the adoption of a bureaucratic approach to the potential plight of a seriously ill detainee in the custody block. The others who had a more humane approach were still handicapped by their ignorance of how the system works. And the police sought to conscript visitors to promote "state talk"²³⁰ about a death in custody.

The attitudes of most of the visitors were not based on a perception of their role as regulators of police behaviour in custody blocks. Naturally, those attitudes had a profound effect on how effectively they carried out their work. If they did not see themselves as regulators, they would be unlikely to act like regulators. They would not see the obstacles that were laid in their path, and, even if they could see those obstacles, they would not see the point of trying to overcome them. It is for these reasons that these issues have been considered in this chapter, ahead of the assessment of the effectiveness of their work, which is the subject of the next chapter and is also devoted to the results of the case study.

²³⁰ See text to note 206.

CHAPTER SIX

THE EFFECTIVENESS OF CUSTODY VISITING

In Chapter Five I analysed the findings of my empirical research about the attitudes of the custody visitors, by drawing on some of the key concepts in this research. This chapter continues with the case study, and employs a similar process to assess the effectiveness of the work of custody visiting, mainly as it operates as a regulator. The chapter starts by reviewing the concept of effectiveness; looks at how the other key concepts assist in assessing effectiveness; and explains the impact of the context of custody on the ability of the visiting work to be effective. The criteria for effectiveness as a regulator are applied to my findings about the work of custody visiting. The chapter also investigates whether custody visiting fulfils the purposes that are claimed it in the official literature.

The principal concept: effectiveness

Effectiveness is defined as “the degree to which something is successful in producing a desired result”:¹ whether it achieved its purpose, or, as we shall see, its purposes. This thesis argues that custody visiting should provide more regulation of police behaviour in custody blocks.² That is why the main thrust of this chapter is to assess the effectiveness of custody visiting in providing that regulation. As discussed in Chapter Two, effectiveness of

¹ <https://www.oxforddictionaries.com/definition/english/effectiveness> accessed 20.06.2016.

² See Chapter One, text to notes 74-90.

custody visiting as a regulator of police behaviour in custody blocks is assessed by reference to the following five criteria:

1. Whether the visits actually took place, the precondition of effectiveness, and the frequency and pattern of visiting.
2. Whether the police behaved differently towards detainees because they knew that custody visitors might arrive at any time, without notice, or because a visit was actually in progress.
3. Whether visits caused police behaviour to be changed/aligned, either at the time or subsequently.
4. Whether the reporting system caused police behaviour to be changed/aligned.
5. Whether custody visiting enabled the public to know what was happening in custody blocks.

Where the third and fourth criteria are applied, change could occur at the level of individuals, such as where a complaint by a detainee leads to that detainee getting a phone call, or on a general level, such as where one such complaint leads to the police realising that detainees are entitled to a phone call and offering it to all detainees. In the case of the third criterion, it was very unlikely, although theoretically possible, that visitors might bring about general change during their visits. The reporting system, subject to the fourth criterion, could realistically work only at the general level, as the individuals referred to in the reports would have been released long before the reports could be acted upon.

Performance according to each of the five criteria should have an impact on the ultimate measure of effectiveness: that is, whether visiting could contribute, or actually did contribute, to reducing the number of deaths in custody. The effectiveness of custody visiting in achieving the other purposes which are claimed for it in the official literature is assessed according to the terms in which those claims are expressed.

My assessment of the effectiveness of custody visiting has generally had to be limited to showing whether the work was likely to be effective, not whether the work actually was effective. An exercise to show the actual effectiveness of the work would have to find some way of measuring the effects of all the elements of each visit. It would be very difficult to measure those effects,³ and it certainly could not be achieved within the confines of this doctoral project. So the likelihood of effectiveness of custody visiting is examined by reference to the manner in which the work is done, where the effects of socialisation discussed in Chapter Five can be seen: and how well the individual tasks were performed, whether they were performed thoroughly and rigorously, and whether the necessary expertise was applied to the tasks. Other issues considered in the assessment of the likelihood of effectiveness include: the effects of delays and restrictions at the custody block; communication skills; and whether the detainees, police and the public

³ It may be equally difficult to assess whether research makes any difference to policy. See Richard Young and Andrew Sanders, "The Forester's Dilemma: The Influence of Police Research on Police Practice", in *The Criminological Foundations of Penal Policy*, Zedner L and Ashworth A (eds) (OUP 2003).

respected custody visiting.

However, I was able to make an assessment of whether at least some of the work was actually effective. This came about because in some cases I was allowed to observe visitors' meetings with detainees and then interview the detainees later that day. My principal object was to find out from the detainees what they thought about the visitors' interactions with them. I was given the right conditions (i.e., some privacy) in which to interview these detainees myself, and I was able to take considerably more time on my interviews with the detainees than the very brief time the visitors spent with them. The accounts of their experience, and their views, are important. It is likely that detainees have never been asked about these issues before; if they have been asked, their answers have not been published.

The secondary concepts

The concept of power, and the concept of Herbert Packer's crime control and due process models of criminal justice will be drawn on in this chapter to assist in the assessment of the effectiveness of custody visiting, and the concepts of legitimacy and accountability will be drawn on where those concepts relate directly to effectiveness, and where they are necessary attributes of regulators.

The concept of power is basic in any study of the police, particularly in the context of the custody block, which is the setting for the purest expression of

their power.⁴ Chapter Five used Steven Lukes' concept of three-dimensional power as the lens through which to examine the power of the police, exercising control by socialisation.⁵ In this chapter I will seek to draw on Lukes' concept to show that the power of the police operated on the visitors and caused them to carry out their work in the way that they thought the police wanted them to follow. I will show how this affected the work of custody visiting in two distinct ways: first, how the work was carried out, with the power of the police affecting the attitudes and working practices of the visitors, and preventing the visitors from making challenges; and, second, how the ambit of their work was restricted, with the power of the police keeping certain tasks off the agenda.

Packer's models of criminal justice are used to assess the work that was done, the manner in which it was done, and the effect of the restrictions. Did the visiting work further the cause of due process, by providing checks on police behaviour and safeguards for detainees, and prioritising their rights? Or did the work further the cause of crime control, by allowing the police to operate without interference, prioritising efficiency over the welfare of detainees? The application of Packer's models provides useful insights into the ideology of custody visiting,⁶ and the ideology of an activity is a key to what its purposes are. If the ideology of custody visiting is oriented towards crime control, its purpose is not safeguarding detainees.

⁴ See Chapter One, text to notes 14-73.

⁵ See Chapter Two, text to notes 36-45, and Chapter Five, *passim*.

⁶ See Chapter Two, text to notes 47-51.

Legitimacy as a regulator is the quality of being authorised, accepted, seen as fair, and respected by those involved and the wider public.⁷ This will turn on whether the public had any knowledge of custody visiting which could enable them to form a view. Whether custody visiting had the quality of accountability will be found to depend on whether the visitors were separate from the Police and Crime Commissioner, and whether sufficient information was available to enable their work to be scrutinised.⁸ The concepts of independence, impartiality and neutrality play a less important role here than in Chapter Five.

The power dynamics of custody

The effectiveness of any regulation depends on the context in which it is carried out. Custody is essentially a place where one group of people coercively detains and investigates another group, some of whom are classified as vulnerable, although arguably every detainee in custody is vulnerable.⁹ The police control every aspect of custody, and the power they exercise in custody blocks affects all those who are not police, including the custody visitors.¹⁰ The police use custody to facilitate their investigation of suspects¹¹ and to obtain confessions, which need not be corroborated by other evidence.¹² The outcome of most criminal cases is determined by what happens in custody.¹³ Custody visiting is the only outside agency acting as a

⁷ See Chapter Two, text to notes 104-124.

⁸ See Chapter Two, text to notes 125-141.

⁹ See Chapter One, text to notes 64-69.

¹⁰ See Chapter One, text to notes 71-72; Chapter Five, note 19, and text following note 187.

¹¹ See Chapter One, text to note 17.

¹² Andrew Sanders, Richard Young and Mandy Burton, *Criminal Justice*, (4th edn OUP 2010) 255ff, 317ff.

¹³ See Chapter One, text to notes 18-27.

regulator of police conduct in custody blocks: and it is outside only in the sense that the visitors are not police officers.¹⁴

The complete control exercised by the police, and the inadequacies of the legal advice available to detainees, discussed below, defeat two principles which are generally thought to be essential attributes of the criminal justice system. The two principles, very much on the due process side of Packer's spectrum, are adversarialism and the presumption of innocence.¹⁵ however, neither of these two principles can be found to apply to investigations made in the custody block. The adversarial theory of justice is that the truth emerges through a battle in which the prosecution's and the defence's competing versions of events are put forward and tested by an impartial adjudicator.¹⁶ This principle should apply as much to that part of the criminal process which is conducted in the custody block as to that part of the process which is conducted in a courtroom.¹⁷ The presumption of innocence is that everyone *charged*¹⁸ with a criminal offence shall be presumed innocent until proved guilty by law:¹⁹ again, this principle should be expressed as applying just as much to the stage which precedes the making of the decision whether to charge a suspect. Unfair practices, carried out through coercion during that earlier stage, undermine the principle of the presumption of innocence.

¹⁴ I do not regard the Joint Inspection Teams (see Chapter One, text to notes 105-106) as outside agencies, nor do I think that defence solicitors have much chance of regulating police behaviour in custody blocks, particularly in view of the way their access is restricted in the new dedicated custody facilities: see text to notes 22 and 24, and Chapter 5, text to note 97.

¹⁵ Andrew Sanders, "Access to Justice in the Police Station: An Elusive Dream?" in Young R and Wall D (eds), *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty* (Blackstone 1996).

¹⁶ Richard Young and David Wall, "Criminal Justice, Legal Aid and the Defence of Liberty" in Young R and Wall D (eds) (n 15) 5.

¹⁷ European Convention on Human Rights (ECHR) Art 6(3), and Andrew Ashworth, "Legal Aid, Human Rights and Criminal Justice" in Young R and Wall D (eds) (n 15) 68.

¹⁸ Emphasis added.

¹⁹ ECHR Art 6(2).

Historically, the courts said that the police had no right to interrogate detainees.²⁰ the recognition of the police practice of interrogation as a right was supposed to be balanced by the provision of legal advice.²¹ Yet we know that the provision of legal advice is inadequate for this task, for a number of reasons, including the continuing reductions of funding for legal aid,²² the disappointing performance of some lawyers,²³ and the (mis)conduct of the police, some of which influences detainees not to seek legal help:²⁴ and some detainees have their own reasons for not calling for a solicitor.²⁵

The law requires that arrest is necessary and based on reasonable suspicion, that people are held in custody for no longer than is necessary, that they be told and repeatedly reminded of their right to free legal advice, and that if adjudged vulnerable an appropriate adult be summoned to assist them.²⁶ These considerations about custody raise issues that one would expect would be investigated by any regulator of police behaviour, such as the following. Why has a person been arrested? How is the investigation being carried out? How long will the investigation take before there is a decision? Is the detainee receiving legal advice, and if not, why not? Have the police appointed an appropriate adult for a vulnerable detainee, and if not, why not? As will be

²⁰ Satnam Choongh, *Policing as Social Discipline* (OUP 1997) 7-11.

²¹ Sanders (n 15) 255.

²² e.g., Vicky Kemp, *Bridewell Legal Advice Study: adopting a "whole-systems" approach to police station legal advice*, (Legal Services Commission 2013) 20: <http://www2.warwick.ac.uk/fac/soc/law/research/centres/accesstojustice/usefulresources/broaderconsequences/blast-ii-report.pdf> accessed 10.06.2016.

²³ Daniel Newman, *Legal Aid Lawyers and the Quest for Justice* (Hart 2013).

²⁴ e.g. Vicky Kemp, *Transforming legal aid: access to criminal defence services*, Legal Services Research Centre 2010, 36-7: <http://eprints.nottingham.ac.uk/27833/1/Kemp%20Transforming%20CD%202010.pdf>. accessed 10.06.2016.

²⁵ Research has found that many detainees make their own decision not to obtain legal help: Michael McConville, Jacqueline Hodgson, Lee Bridges and Anita Pavlovic, *Standing Accused*, (OUP 1994) 76: Kemp (n 24) 37.

²⁶ Sanders et al (n 12) chapter 4.

shown, visitors did not concern themselves with any of these issues, except (usually) to check whether detainees had been told that they could get free legal advice. Visitors were not allowed to look into the other issues, and they were socialised not to consider why those issues are fundamental.²⁷ Visitors did not have the professional understanding of custody, detainees' rights and the limits on what the police are allowed to do. With that professional understanding visitors could ask more meaningful questions of both the police, including in relation to detainees who were not willing to speak to them, and the detainees. But there are a number of restrictions, imposed by the law, on the ability of custody visitors to carry out their work effectively. In particular, visitors are not allowed to monitor the most significant element of a detainee's stay in the custody block, the police interview.²⁸ In any case, even if visitors could monitor police interviews, their ability to act as an effective regulator of the interviews would be limited.²⁹

This review of the dynamics of police custody shows the context in which effectiveness is to be assessed. The five criteria for effectiveness are now applied to the data collected in this research. Some of the criteria could be applied to more than one topic, but I have restricted this account to applying one criterion to each topic. I have set out this discussion so that it keeps where possible to the order of events followed on a visit.

²⁷ See Chapter Five, text to notes 83 and 116.

²⁸ 2013 Code of Practice para 50: and by para 60, "ICVs must remain impartial and must not seek to involve themselves in any way in the process of investigation".

²⁹ See Chapter Two, text to notes 150-151.

First criterion of effectiveness: whether the visits took place, and the frequency and pattern of visiting

Whether the visits took place is established quite easily from published statistics. Regulatory authorities do not specify a level of frequency. The Hampton Report took the view that the level should be determined by risk assessment, to lessen the economic burden of regulation.³⁰ As regards a pattern of visiting, visits should be random, unannounced and unexpected.³¹ One of the important techniques of regulation of public management is said to be the element of uncertainty achieved by random unannounced visits,³² and Lord Scarman thought that visits made “at any time” would be “salutary”.³³

Measured against this criterion, custody visiting in this study was found to lack effectiveness in the following ways. No consideration, by way of risk assessment or otherwise, was made to determine the frequency of visits, and the visits were probably not sufficiently frequent. The visiting followed too predictable a pattern, with the result that the visiting was not random and some of the visits were not unexpected; and, because notice had been given of some of the visits in various ways, those visits lost the quality of being unannounced.

³⁰ See Chapter Two, note 59.

³¹ See Chapter Two, text to notes 154-158, and Chapter Three, text to notes 197-198. Jane Warwick (Chapter 1, note 135) told me that the word “unexpected” should be added: I agree with her.

³² See Chapter Two, text to notes 156-158.

³³ See Chapter One, text to note 97.

Arrangement of the visits

The statistics published by the Police and Crime Commissioner in the area studied show that, in a recent year, nearly 600 visits were made; about 2000 detainees were present; and about 1,200 interviews with detainees took place, with the remainder being either unavailable or refusing to be seen, the latter being a somewhat smaller proportion.³⁴ In common with some other schemes, the frequency target was set at one visit per station per week.

Every month the scheme administrator sent out a rota to all the visitors. This let each visitor know the five day period³⁵ during which the visit was to be made, and the name of the other visitor with whom to make the visit. It was then for each pair of visitors to arrange between themselves when the visit would take place, within the days allocated to them on the rota. The five day arrangement made it more likely that the target of one visit per week to each station would be met, but overall the target was not quite met: and there was a variation between the stations of nearly 100%. One visitor thought the rota should provide for one visit every three days.³⁶ One detainee I interviewed expressed surprise that visits took place only once a week, and thought visits should be more frequent:

“The officers are always nice to me and care for me, but I always think: what if they don’t? So I value the visitors coming round to check on me.”³⁷

³⁴ Only approximations can be given here, to avoid revealing the identity of the area studied.

³⁵ The five day periods ran consecutively without a break.

³⁶ V5.

³⁷ D14.

This detainee, who had been in custody on several occasions, had never been treated badly by the police, but thought that the visits were for the protection of detainees; that, however well the custody staff behaved, there was always a risk they might not treat detainees properly; and that the visits should be more frequent. We do not know what considerations informed a decision on the frequency of visits, nor why it should be the same in all custody blocks. There may have been a greater need to safeguard detainees, at particular times, in particular custody blocks, but no consideration seems to have been given to these issues. Risk assessments could look into the levels of police behaviour giving cause for concern, for instance that detainees had not been told their rights, or were being mistreated, and into the length of time during which no checks would be made or expected.

However there was a factor that we do know was considered: the importance of not creating extra work for the police. The code of practice says:

“Visits must be sufficiently regular³⁸ to support the effectiveness of the system, but not so frequent as to interfere unreasonably with the work of the police.”³⁹

This wording leaves wide open the questions of how much visiting would be effective, how much would amount to interference, and how much

³⁸ The use of the word “regular” is confusing: presumably the writer meant “frequent”. A visit made on the same date once in each year would have the quality of regularity but not the quality of frequency, and would profoundly lack the qualities of being random, unannounced and unexpected.

³⁹ 2013 Code of Practice para 40, following similar wording used in both previous codes, 2003 Code of Practice para 32 and 2010 Code of Practice para 32, and the 2001 Circular para 57. Earlier wordings in the 1986 Circular, para 9, 1991 Circular para 13 and 1992 Circular para 13 avoided the confusion created by the use of the word “regular”.

interference would be unreasonable. The Home Office seem to have been trying to support the visiting work and, at the same time, acknowledging that it would create extra work for the police, and they were appealing to the notoriously subjective concept of reasonableness to provide a balance between these two competing priorities. That balance lies on the spectrum between Packer's two models of criminal justice. Crime control looks to a smoothly running assembly line of detainees being booked in and processed, and due process looks to that process being interrupted to allow the rights of the detainees to be safeguarded.

A clearer orientation towards crime control emerges from an examination of the incidence of the visits. Visits should be random, unannounced, and unexpected.⁴⁰ No visit was actually announced, except for the "special visits" discussed below.⁴¹ However, visitors experienced delays on arrival at the station, and some visits took place after team meetings in the station or as successive visits to custody blocks at different stations on the same evening.⁴² these factors detracted from the quality of those visits as unannounced. Visits were not random either: they were patterned. For the visits to be random, each time slot should have had an equal chance of being selected by a team of visitors, and that is clearly not the case. The visits took place mostly on weekdays, early in the evening in the city centre, and later in the evening in the suburbs; never, anywhere, later than 10:30pm; and, at weekends, only in the mornings.⁴³ At some of the stations the front desks

⁴⁰ See text to note 31, and the note.

⁴¹ See text to notes 184-197.

⁴² See Chapter Five, text to notes 89-92.

⁴³ Observation, statistics from the annual report in the area studied and remark by AD.

were closed during the night, so the visitors would not have been able to gain admission to the custody blocks at that time. This presumably resulted in the custody staff expecting visits at the usual times, and knowing that visits were extremely unlikely at other times: the visits were not unexpected. Custody visitors were the only outsiders who visited custody blocks with a general remit to check on the welfare of detainees. The consequence is that there was little regulation of the behaviour of custody staff during many “unsocial” hours. One might argue that random visiting should not be a desirable criterion anyway. If the visiting is based on risk assessments, a patterned series of visits might be more desirable, and could be established by team co-ordinators. The pattern should, however, be different from the one that visitors had established. One model might be for fewer visits to take place in the early evening, but plenty between 6pm and 6am, and on weekend afternoons and evenings, which would be the opposite of the pattern I observed. Another model (the two could run side by side) would be to visit at what were found to be the busiest times, or the times when the rules were most likely to be breached. However, there would be a limit to how much visitors would accept directions about the times of their visits, and it would be essential that the police were not told about the pattern.

Arrival at the police station

Each pair of visitors usually met outside the police station. This practice did not appear to be based on the concern that the first visitor to arrive, waiting for the other visitor by the front desk, would give the police more notice of the visit. The visitors’ apparent lack of sensitivity to this issue was demonstrated

by the occasional practice of arranging visits to take place immediately after the visitors had attended a visitor team meeting in the police station:⁴⁴ the custody staff might well learn of the meeting and therefore expect a visit.

Visitors then put on their identity tags and presented themselves at the front desk of the police station. The code of practice states:

“ICVs must be admitted to the custody area immediately. Delay is only permitted when immediate access may place the visitors or another individual within the custody area in danger. A full explanation must be given to the visitors as to why access is being delayed and that explanation must be recorded by the visitors in their report.”⁴⁵

However at some of the stations visitors often had to join a queue and wait for, say, fifteen minutes, before the front desk staff were able to deal with them. When they got to the front of the queue, visitors asked the front desk staff to contact the custody staff. The front desk staff then telephoned the custody staff. Usually the call was answered, but sometimes the custody line was engaged, or the staff were too busy to answer the phone, and/or a visiting arresting officer picked up the receiver and then forgot to pass on the message. Subject to that, the custody staff responded either by coming to the front desk within, say, two to five minutes, or by letting the front desk staff

⁴⁴ This happened on two of the occasions when I accompanied visitors.

⁴⁵ 2013 Code of Practice para 49.

know that there would be a delay, and the front desk staff then passed this information on to the visitors.

The average length of time taken to gain admission on the visits when I accompanied visitors was seven minutes, with the longest wait being 20 minutes. The annual report showed that, in the vast majority of cases, admission was within ten minutes, and in about 3% of cases there were delays of more than 30 minutes. The report gave reasons for why delays tended to take place, but provided no specific explanations for any of the actual delays. Sometimes the custody staff gave the reason for the delay, such as a violent situation, staff shortages, change-over of shifts, or any combination of those factors: but at other times no reason was given. In a few cases the visitors were kept waiting for longer than half an hour, after which visitors tended to leave the station and abandon the visit.⁴⁶ On one occasion visitors were kept waiting for an hour, because, as they found later when they were eventually admitted to the custody block, a serving police officer who had been arrested was being detained there: the officer, they were told, did not want to see them.⁴⁷ At the least, this delay was very long and hard to justify.

⁴⁶ C3 said that the block was sometimes so busy with violent detainees that they asked the visitors not to come that day, or to give them at least a couple of hours. There was no other evidence of visitors being asked to wait that long.

⁴⁷ V9: after the visitors finally gained admission to the custody block, they were told that the officer being detained did not want to see them.

Where there were violent detainees, some visitors thought that, subject to safety considerations, they should see for themselves what was happening.⁴⁸

One of the custody sergeants took the same view:

“There’s no reason [for delay] unless there’s a safety issue, and even then you [i.e., the visitors] could go to [other parts of the block]. There’s basically no excuse for not admitting you within a couple of minutes. [Delay] doesn’t reflect good [sic] and is totally unnecessary.”⁴⁹

This sergeant thought that no reason, including safety, could justify delaying the visitors’ admission to the custody block, and realised that delays created suspicion of cover-ups. However, most custody staff disagreed with this view, and visitors did not challenge being delayed for safety reasons. It is impossible to say whether there were satisfactory reasons for most of these delays: but the effect in all cases was that the police had more time to get ready for the visit.

The lengthy delays, noted in the Police and Crime Commissioner’s annual report were relatively few in number, but they cried out for an explanation, and the absence of explanations gave rise to suspicions of cover-ups. In any case, waiting for an hour makes it impossible for visitors to carry out what is supposed to be a random unannounced visit. However, visitors did not challenge the police about delays,⁵⁰ and limited themselves to reporting the delays and failures to visit to the scheme administrator.

⁴⁸ e.g., V18.

⁴⁹ S1.

⁵⁰ See Chapter Five, text to notes 181-184.

These factors enabled the police to prepare for the arrival of the visitors, enabling them to conceal what they would not wish the visitors to see. One cannot know whether the police ever did conceal anything, but the delays created the potential for concealment, and demonstrated the weakness of the visitors in the face of police power, which they generally felt unable to challenge. This is Lukes' three-dimensional power: the visitors just know, almost instinctively, what the police allow them to do, and they know not to cross that boundary.

Second criterion of effectiveness: whether the police behaved differently towards detainees because they knew that custody visitors might arrive at any time, without notice, or because a visit was actually in progress

I now attempt to assess whether the police behaved differently towards detainees because they knew that custody visitors might arrive at any time, without notice, or because a visit was actually in progress. This section reviews what happened when the visitors arrived in the custody block, which detainees they were allowed to see, and which checks they were allowed to make. The sections that follow will demonstrate that restrictions on its ambit led to the visiting work being unlikely to have an effect on important aspects of police behaviour. Visitors could not enquire into the arrests of the detainees, nor could they visit all of the detainees. Visitors were not allowed to make checks on the conditions of interrogation, nor to make checks on detainees kept in holding areas rather than in cells, or on other suspects in the police

station. I conclude this section by showing that it is likely that the police and custody staff do not respect the work of custody visiting.

Admission to the custody block and access to the detainees

Visitors were escorted by a civilian custody staff member to the custody block. They spoke briefly with a custody sergeant if the sergeant was not busy with, for instance, booking in the latest newly arrived suspect brought in by arresting officers. A custody sergeant, or a more junior member of the custody staff, told visitors how many detainees were in the cells, sometimes mentioning that a detainee had been taken to hospital: visitors did not always ask why the detainee had been taken to hospital.⁵¹ The civilian staff member provided the visitors with some very basic information about the detainees, including whether they were male or female, adult or juvenile, but the visitors were not supposed to be told the offence the detainees were suspected of having committed, or any aspect of the arrest, or the grounds for detention.

Recent research by Vicky Kemp has shown that the police in the Bridewell study have been seeking to reach targets set by managers for the number of arrests, by “rounding up the usual suspects” when there is no evidence against these people.⁵² This increased the length of the time that these detainees spent in custody, because there were long delays before the police were ready to conduct an interview.⁵³ The research also found that the police often made arrests when only trivial offences were alleged. Some custody

⁵¹ See Chapter Five, text to note 185.

⁵² Kemp (n 22) 6-7.

⁵³ Vicky Kemp, *Bridewell Legal Advice Study: an innovation in police station legal advice - interim report* (Legal Services Commission 2012) 6.
<http://eprints.nottingham.ac.uk/28246/1/Kemp%20BLAST%20Interim%20Report.pdf>

sergeants were reported as having commented on the failure of legal advisers to challenge these practices.⁵⁴ Only a small minority of visitors would have wanted to raise an issue of this kind, and my observations of visits, interviews, attendance at team meetings, and scrutiny of reports submitted to the Police and Crime Commissioner indicate that even that small minority did so very rarely indeed. In general, if visitors wanted to raise an issue, but thought that the police would not want the issue to be raised, the visitors did not raise it. Very occasionally visitors were not silent at team meetings: the police responded by justifying their practices, and the visitors' representations would make no impact, let alone lead to any change in the practice.⁵⁵ The scheme administrator gave no encouragement to the visitors to raise these issues, and they were not covered in the training.

Why did the visitors not raise these issues? There may be several explanations, and all could be true at the same time of at least some of the visitors. One explanation could be that the visitors had been socialised into not seeing these issues as being any of their business. Another could be that they were discouraged by the responses of the police when they did raise the issues, feeling the power of the police in Lukes' second dimension: and another could be that police power in Lukes' third dimension prevented the visitors from ever raising the issues at all. Lukes' theory has been invoked by Julia Black in her proposal of the use of discourse analysis to assist in understanding the relationship between regulator and regulatee, in the terms of what language can say about power. Black calls her subject "regulatory

⁵⁴ Kemp (n 22) 31.

⁵⁵ See Chapter Five, text to note 116.

conversations”.⁵⁶ Discourse can be framed by powerful organisations to exclude some issues, as has been demonstrated about the media treatment of the *Bulger* case,⁵⁷ and the same principle can be applied to how regulatory discourse is framed by a powerful regulatee. Black’s expression “regulatory conversations” should cover not only what is included in the conversations, but also what is omitted from them, when regulators fail to say something one might expect them to say. To make the point crystal clear, these omissions could be termed “regulatory silences”. One could then identify the issues that regulators are silent about and investigate the reason for the silences: in the case of custody visiting, whether the silences were the result of the regulatee, the police, using their power to frame the discourse so that it could never threaten their interests.

Some detainees were not available to be seen, because of temporary absence from their cell for some reason, such as DNA recording. I observed visitors not waiting until their return, so no check was made on their welfare. There were certain detainees whom the custody staff advised the visitors not to visit. Visitors could not actually be denied access to any detainee except by order of an officer of the rank of inspector or above.⁵⁸ The custody staff usually advised against a visit on the grounds that the detainee was violent or

⁵⁶ Julia Black, “Regulatory Conversations”, *Journal of Law and Society*, 2002 29,1,163, 191.

⁵⁷ See David Green, *When Children Kill Children: Penal Populism and Political Culture* (OUP 2012) 173ff, where, in discussing the discourse framed by the media and the police (and, elsewhere in his book, by politicians) he points out that in the UK, unlike in Norway, it was impossible to excuse children for lying: “... the ability to lie ‘unnaturally’ increases culpability and the evilness of the perpetrators. In Norway lying when facing accusations from adults seems to be something to be expected from children caught doing wrong.” The expression “Overton Window” is used in a similar sense to describe the range of policies that politicians can support without risking electoral defeat: Joseph Lehman, “A Brief Explanation of the Overton Window”, Mackinac Center for Public Policy: <http://www.mackinac.org/12887> accessed 25.07.2016.

⁵⁸ Police Reform Act 2001, s 51(4).

subject to mental health issues, and the visitors always took the advice without inquiring whether a senior officer had made an order. There was, on average, one detainee whom visitors did not see for this reason⁵⁹ for every 2.5 visits, where the number of detainees in each block might vary from 1 to 15. Visitors could have asked to check the custody records of the detainees whom they were advised not to see, but rarely did so. However the visitors were aware that they did need to make some kind of check on each detainee, so they almost always ensured that they did at least look in on the detainees they were not visiting, either through the hatch or the spyglass. Making the check this way did not always enable the visitors to be sure whether detainees were actually breathing, particularly when they were lying face down, or when their faces were covered by a blanket.⁶⁰ The advice of the scheme administrator was that visitors should always ask the custody staff to rouse, in the presence of the visitors, those detainees to whom access had been advised against, to check whether the detainees were still alive, as whether they were alive was more important than whether they were getting enough sleep;⁶¹ but I did not observe this advice being followed.

One expert has stated that visitors should challenge the advice provided by custody sergeants against visiting these detainees, by asking for a fresh risk assessment,⁶² but the visitors I observed did not ask for fresh assessments. The detainees in this category would often be vulnerable people with mental health issues or intoxicated with drugs or alcohol. There was nothing to stop

⁵⁹ i.e., not including detainees in police interview.

⁶⁰ e.g., V20.

⁶¹ Observation at team meeting.

⁶² Heather Hurford, speaking at the 2014 ICVA national conference.

the visitors from raising the potentially life-and-death question of whether these detainees should be in custody at all, or whether, for their own safety, they should be in hospital,⁶³ but the visitors did not do so.

These restrictions can be compared with the way police restrict the access of lawyers and appropriate adults to detainees in custody blocks. The Bridewell study has shown that arresting officers and custody sergeants did not encourage detainees to seek legal advice and sometimes positively discouraged them from doing so. When lawyers did get to the station, they were found to have encountered difficulties in simply gaining admission to the custody block or certain parts of it.⁶⁴ Research has also shown that the police enable far fewer appropriate adults to assist vulnerable detainees than should be the case.⁶⁵ The police would have been even less able to justify restricting visitors' access, but the imposition of restrictions gave the visiting a crime control orientation, in its failure to prioritise the safeguarding of all the detainees. Even with the detainees the visitors were able to meet, the effectiveness of their work was again marred by crime control features of the encounters, which are discussed under the third criterion of effectiveness.

⁶³ An issue I saw debated between two custody sergeants during observation in a custody block.

⁶⁴ Kemp (n 53) 9. Apparently this exclusion did not apply to custody visitors: information from Vicky Kemp. On the access of lawyers being restricted and the unacceptable arrangements for interviews at the new 60-cell block, see Chapter Five, text to note 97.

⁶⁵ *There to Help: ensuring provision of appropriate adults for mentally vulnerable adults detained or interviewed by the police* (National Appropriate Adults Network 2015): <http://www.appropriateadult.org.uk/index.php/news/9-public-articles/154-theretohelp> accessed 03.07.2016.

Checks visitors were not allowed to make

Police interviews of suspects are the central activity of the police in custody blocks. Lord Scarman wanted custody visitors to check the conditions of interrogation as well as those of detention,⁶⁶ but checking the conditions of interrogation has never been part of the visitors' work, nor has there ever been any publicly recorded discussion about the reasons for and against its inclusion, and no one actually gives any thought to it at all.⁶⁷ I would suggest that the power of the police, in Lukes' three-dimensional form, has kept the issue completely off the agenda. The custody managers and custody sergeants I interviewed were very opposed to visitors checking on police interviews: they said the checks would interrupt the flow of the interview, and cause extra work for the custody staff. They pointed out that interviews with detainees were all recorded on audio, and some on video as well,⁶⁸ and the detainees all had the right to have lawyers with them, and appropriate adults if they were classified as vulnerable. One of the lawyers I interviewed estimated that between 66% and 75% of detainees in the area studied did not have a lawyer with them.⁶⁹ Even those who did see a lawyer might not see them beyond the first interview: Kemp's research indicates that lawyers do not attend any second or third interviews because it would eat into their fixed fee.⁷⁰ As regards appropriate adults, research has shown that custody sergeants do not appoint them in many cases where the vulnerable detainees

⁶⁶ Lord Scarman, *The Brixton Disorders 10-12 April 1981* (Cmnd 8427 1981), 7.7-7.10. The Scarman Report did not deal with the issue of the recording of police interviews. We cannot tell whether the late Lord Scarman would still have advocated that visitors should check on formal police interviews, now that they are being recorded.

⁶⁷ The chief executive of ICVA Katie Kempen told me in interview that she had never considered the issue before I asked her about it.

⁶⁸ But this is not a foolproof safeguard: see Sanders *et al* (n 12), 277-281.

⁶⁹ L6.

⁷⁰ Kemp (n 22) 29.

are adults.⁷¹ However, I never saw visitors taking any action about a detainee who was not getting legal advice, or about a vulnerable detainee who was not being accompanied by an appropriate adult.

Many detainees were therefore alone with the police in the interview room. Some of the lawyers interviewed thought that custody visiting could be improved by visitors taking a role in checking the conditions of interrogation.⁷² One told me why, graphically:

“It’s a battle ... I’ve had an officer raise his voice at me, I’ve had an officer tell the co-accused of my client that there was clearly more than a professional relationship between myself and the client ... They can be very obstructive, very unreasonable, and we’re on our own in their domain ... I’ve had a door closed in my face by an officer, in the middle of me speaking to him, simply because I pointed out to him that he had no right to tell my client he couldn’t go home when he was there on a voluntary basis: he said, well I’ll lock him up then, and closed the door in my face. That’s the way they treat us, so goodness knows how they treat the suspects when we’re not there.”⁷³

That lawyer was being harassed as much as the clients. Some police officers see nothing wrong with harassing suspects. One custody sergeant told me:

⁷¹ National Appropriate Adults Network (n 65) 2.

⁷² e.g., L6.

⁷³ Edited extracts from interview with L2.

“It’s quite OK to harass suspects in interviews, depending on their background.”⁷⁴

The sergeant presumably thought that the police should harass suspects if they came from the wrong background.⁷⁵ Kemp found that the police arrested and detained some people with that as the only purpose.⁷⁶

For the detainees, what really mattered was when they would be getting out of custody: that depended on when the police interview would take place, and how long after the interview the decision on how to proceed would be taken. Detainees found that they could not get information about these matters, and the visitors were equally unable to help them to find out what was going on, as the custody staff often said that the investigating officers kept them in ignorance about these matters. One of the visitors commented as follows:

“A lot of the time you can’t help them with what they actually want the help with. They want their case progressing, they want updates; they want to go home.”⁷⁷

It is not surprising that this is what detainees wanted. They faced the prospect of being locked up, in the power of the police, for up to 36 hours, which is “boring, scary, uncertain, isolating, disorienting and humiliating”,⁷⁸ during

⁷⁴ S2.

⁷⁵ For what some police see as the wrong background, see Chapter One, text to note 32.

⁷⁶ Kemp (n 22) 6-7.

⁷⁷ V12. My own observation, both as a visitor and as a researcher, supports this.

⁷⁸ Sanders *et al* (n 12) 219-220.

which time they might be pressured into making confessions.⁷⁹ Research has shown that when police have told detainees that they would have to wait in the custody block until legal advice was available, the detainees wanted to go home so much that they waived their right to legal advice.⁸⁰

Not all suspects found in custody blocks are kept in cells. Many suspects attend by appointment at police stations, whether the stations are designated for custody or not,⁸¹ for interviews and other investigations, or to be cautioned. While their attendance has not been procured by arrest, these suspects may find that they do get arrested if they try to leave before the police want them to, as the quote from the lawyer above nicely illustrates.⁸² These detainees are not visited by custody visitors, and they should be.

Another exclusion from the visitors' remit is making checks on detainees on their arrival at the custody block. There could be a delay, with a queue of suspects waiting to be booked in. Custody visitors do not check on the conditions of detention in the holding areas. Suspects waiting there are just as likely to have, for instance, medical needs, as any other detainees. Or matters may be much, much worse, as it was in the holding area known as the "Cage"

⁷⁹ *ibid* 287 ff.

⁸⁰ Layla Skinns, " 'I'm a detainee, get me out of here': Predictors of Custodial Legal Access in Public and Privatised Police Custody Areas in England and Wales" *British Journal of Criminology* (2009) 49 3 399, 413, citing previous research.

⁸¹ Police and Criminal Evidence Act 1984, s 29.

⁸² See text to note 73.

at Brixton police station where Sean Rigg died, following restraint applied by the police with an unsuitable level of force.⁸³

These restrictions can be seen as further demonstrations of the operation of Lukes' concept of power. The power of the police affects the Home Office, the Police and Crime Commissioner, the scheme administrator and the visitors. It is probably their perceptions of that power which are responsible for restricting the scrutiny of the police's work, and for keeping issues from even being discussed. Monitoring police interviews had been a major plank in the Scarman Report's recommendations. The argument against monitoring is that the interviews are recorded, but the evidence of the lawyer above, and the remark of the custody sergeant, show what can happen even when interviews are being recorded.⁸⁴

Whether the police and custody staff respect custody visiting

If custody visiting were to have a salutary effect on their behaviour, the police and custody staff would have had to accept it as legitimate. Most of them appeared to respect the scheme. However, some were prepared to admit that they did not respect it. For instance, this custody sergeant said:

⁸³ See Chapter One, text to note 132, and "Sean Rigg death in custody: police used unnecessary force, jury finds," The Guardian 01.08 2012:

<https://www.theguardian.com/uk/2012/aug/01/sean-rigg-police-used-unnecessary-force> accessed 23.06.2016.

⁸⁴ See text to notes 73 and 74.

“...very busy day [on the block]: custody visitors came to visit us – no problem. But the comment that was left [in their report] was ‘very busy block: sergeant appears to have it in hand.’ The thing that always sticks in my mind is: how do you know I’ve got it in hand? As a layperson, what qualifications, what policing experience are you drawing on, to know that I’m complying with everything that I ought to? ... I think it would help to have someone who knows the ins and outs, and [the visitors] don’t ... People who’ve got a background in law, qualified to make a comment, like about phone calls being withheld ... I don’t know whether visitors were trained about that.”⁸⁵

Some of the police interviewees doubted whether custody visiting had any serious purpose at all. For instance, in answer to my question about the desirability of lawyers being appointed as visitors, one custody sergeant laughed at the suggestion, and said:

“I’d be concerned ... if a lawyer was being paid to see whether a detainee wanted a hot chocolate.”

This sergeant saw the role of visitors as passing on catering orders.⁸⁶ If that was all custody visiting amounts to, it is hardly likely to be a salutary influence on police behaviour.

⁸⁵ S11. A phone call to let someone know the detainee is being detained can be delayed if, for instance, it would tip off others who might be arrested in the same connection: PACE Code C 5.2.1.

⁸⁶ S3, who also could not imagine lawyers working as visitors unless they were being paid: see text to note 177.

I believe these two sergeants were giving me the true picture. It is therefore very unlikely, in terms of the list compiled by Holdaway and Reiner of the categories police give to outsiders, that the police would see visitors as challengers: they might not even see them as do-gooders.⁸⁷

Third criterion of effectiveness: whether visits caused police behaviour to be changed/aligned, either at the time or subsequently

The sections which follow look at the visitors' meetings with detainees and the other checks that the visitors made. Visitors' meetings with detainees were found to be very brief and not private; and the other checks the visitors made were haphazard. The visiting was therefore unlikely to identify problematic issues and achieve changes, whether for individual detainees or generally.

Meeting detainees

The civilian custody staff member escorted the visitors to the cells. At each cell, the civilian custody staff member opened the hatch and asked the detainee whether s/he would like to see some visitors, and if the detainee said yes, the civilian custody staff member unlocked and opened the cell door, and the visitors entered the cell. One of the visitors then said to the detainee something along the lines of the following:

“We’re ordinary members of the public, nothing to do with the police,

⁸⁷ See Chapter One, text to note 73.

here to look after your welfare. Is it OK to have a few words?”

This practice of “self-introduction” had started recently, and resulted in a larger number of detainees seeing visitors than under the old system. Sometimes the way in which the custody staff used to introduce visitors suggested that they wanted to prompt the detainees to refuse a meeting.⁸⁸ This recalls the practice of some custody officers, observed by Kemp, of dissuading detainees from making or maintaining a request for legal advice.⁸⁹ The scheme administrator, and most visitors, thought that seeing a larger number of detainees was a good result of the adoption of self-introduction.⁹⁰ This was an easy statistic to collect, but it said nothing about the quality of the meetings.⁹¹

A crucial quality of the meetings was privacy, or rather the lack of privacy. The code of practice provides:

“Discussions between detainees and ICVs must, wherever practicable, take place in the sight, but out of the hearing, of the escorting police officer. Where this is not possible, the police officer will not take any

⁸⁸ As was observed by Tim Newburn and Stephanie Hayman, *Policing, Surveillance and Social Control: CCTV and police monitoring of suspects* (Routledge 2002) 137-8; and see Chapter Five, text to note 188.

⁸⁹ Kemp (n 22) 18. The importance of the language used in the custody context is covered in depth in Frances Rock, *Communicating Rights* (Palgrave Macmillan 2007).

⁹⁰ AD at team meetings.

⁹¹ One visitor was concerned that self-introduction made it more difficult for a detainee to refuse a meeting, as the visitors were already in the cell: but I did observe some detainees refusing a visit.

active part in the conversation. Police officers should not actively listen to conversations between ICVs and detainees.”⁹²

The code has a police officer acting as the escort: it was usually a civilian member of the custody staff who acted as the escort on my accompanied visits. The homily against “active listening”⁹³ signally fails to solve the problem. It was, as one custody sergeant said,⁹⁴ usually impossible for the escorting officer not to overhear the conversation, as the publicity photograph reproduced in the text to note 108 illustrates. One visitor put it this way:

“The escorting officer is supposed to be out of sight: no, out of hearing but in sight: if someone can ever explain that to me, it would be amazing. Nine times out of ten, they’re stood right outside the door, which just makes the whole thing pointless. And most of the time the detainees are asking us a question, they’re actually asking it to us ... and then more often than not, it’s not their fault, the escorting officer will answer the questions.”

This visitor thought that the proximity of the staff member destroyed the confidentiality of the visitors’ relationship with the detainees and, with it, the whole purpose of custody visiting.⁹⁵ The quote also illustrates how the staff often started answering the detainee’s points and dealing with their requests

⁹² 2013 Code of Practice para 58.

⁹³ This expression is usually encountered as a technical term for a skill used in conflict resolution: <http://www.colorado.edu/conflict/peace/treatment/active1.htm> accessed 10.06.2016.

⁹⁴ S2.

⁹⁵ V12.

straight away.⁹⁶ Whilst perhaps good for the detainee, this interrupted the flow of the conversation between visitors and detainee, and marginalised the visitors, as they were not the people sorting things out. Visitors did not challenge the interruptions. It is also illuminating to look at this from the following angle: visitors were not allowed to attend police interviews, but, if they had been, it is unlikely that the police would have reacted passively when a visitor interrupted in this way.

I now turn to the interchanges directly between visitors and detainees, and set out an edited extract of a specimen interview, with a black male detainee about 30 years old. The visitors were both white males, one over 60 years old, and the other over 70 years old.

Visitors (talking across each other): We're members of the public, volunteers, nothing to do with the police, and we're here to see that you're being treated fairly. You should know your rights and entitlements: have you seen the leaflet?

[The detainee showed them his copy.]

Visitor: It's a complicated system, I hope you understand it. Does someone know you're in custody?

Detainee: I haven't been allowed a phone call the previous night when I was arrested and brought to the station. I'm going to see the solicitor of my choice.

Visitor: We'll look into the phone call.

⁹⁶ Observation.

Detainee: I wasn't given water on arrival and they turned off the "radio" [the call buzzer?]. I had food and drink later, but I still hadn't had the phone call.

[later] Visitor: We've spoken to the [civilian staff member] about the phone call.

This was a very brief interchange, lasting less than three minutes in all, excluding the interlude during which the visitor spoke to the civilian staff member. Apart from the extreme brevity of the interview, a number of features call for comment. The first is that both visitors started talking to the detainee at once. This was not typical, but points to the failure of the scheme administrator to train visitors about how to conduct a meeting. The same lack of training is very apparent from the attempt at a check on whether the detainee knew his rights. The way this was handled, with the use of the cumbersome, incomprehensible jargon "rights and entitlements",⁹⁷ and the casual expression of opinion that it was a complicated system, probably left the detainee feeling even more daunted and baffled than he had been before the meeting.

When the detainee reminded the visitors about his concerns, the visitors spoke to a civilian staff member about one of the concerns, the phone call, but not about the other, which may have been the call buzzer being turned off, but they did not clarify or investigate this. Moreover, they did not find out whether

⁹⁷ See Rock (n 89) 258-60, who notes how this phrasing is confusing to detainees, some of whom understood "entitlements" as "their possessions which have been taken from them on arrival" and others as "what you're not allowed". The distinction made in custody jargon between "rights" and "entitlements" is bizarre: see PACE Code C 5.2, where one reads of, for instance, the *right* to free legal advice, and the *entitlement* to food and drink.

the phone call was going to be allowed, nor did they clarify with the detainee whether the concern was about a phone call being made by a custody staff member to someone about the detainee being in custody, or about a phone call being made by the detainee himself.⁹⁸ The detainee raised the issue of legal advice. And, unlike on most other visits I observed, these visitors made no enquiries about whether the detainee had medical issues or “other concerns”. Medical issues, including whether detainees have access to regular medication, which they are very unlikely to have been carrying with them when arrested, can of course be matters of life and death.⁹⁹

Most of the interviews I observed were conducted rather better than this, but in all the interviews there were many barriers to effective communication. I was able to establish this more securely by speaking directly with 17 detainees about meetings visitors had held with them, on each occasion about an hour after I had observed the meetings. The detainees I saw were selected by the police, apparently on the basis of risk assessment of my safety or whether they were intoxicated, and the group was also self-selected, in that some detainees refused to see me. The types of detainees that I interviewed were, therefore, similar to those seen by the visitors, and my sample was as unrepresentative as theirs.

⁹⁸ Respectively, the right to an “intimation”, that the custody staff inform a person nominated by the suspect about the suspect’s detention at the police station, and the right for a detainee to make a phone call: PACE Code C para.5.2.1. Incidentally, the former is described as a right, the latter as an entitlement.

⁹⁹ The police at Newtown station, Powys, did not check whether Nicholas Wootton was carrying medication when arrested. Having not taken the medication, he died after leaving custody: <https://www.ipcc.gov.uk/news/ipcc-investigation-death-powys-man-concludes> accessed 23.05.2016.

Most of these detainees told me that they did not see much benefit in meeting the visitors. For instance, one commented:

“The only reason I talk to [the visitors] is because I’m here, you know, I’m a captive audience.”¹⁰⁰

“Captive” is a very appropriate description for an audience which is both detained in custody and suddenly confronted by a visitation in a cell. And the meetings were sudden confrontations. Arrest and custody had put some of the detainees into a profound state of shock and disorientation, and they were all bored and depressed. It is not surprising that some of the detainees had dozed off: often the light had been switched off.¹⁰¹ The detainees had no notice of the visitors’ arrival.¹⁰² The detainees might wonder what the custody staff had told the visitors about them. The visitors did not look like people who had been in trouble with the police. Although the visitors had introduced themselves as “independent members of the community, nothing to do with the police”, they carried police-issued identity tags. One detainee thought that the visitors were like the police, asking the same questions.¹⁰³ The veteran London visitor, Jane Warwick, told me that she concealed her identity tag during meetings with detainees.¹⁰⁴ Most detainees were suspicious: one of them said:

¹⁰⁰ D12.

¹⁰¹ By the staff from outside the cell.

¹⁰² Unlike the police, who did get notice of their arrival.

¹⁰³ D10.

¹⁰⁴ Jane Warwick interview.

“I wouldn’t trust them, because I had only just met them.”¹⁰⁵

This would not be surprising in any event,¹⁰⁶ and is even less surprising in this context. On top of the visitors being strangers, there is the custody staff member, waiting just outside the cell door, as can be seen in the photograph reproduced in the text to note 108:

“I wanted to tell the visitors I was annoyed because I had asked the guards [i.e., the civilian custody staff] questions two hours ago and had got no answers, but couldn’t tell them [the visitors] because they [the civilian custody staff] were standing there.”¹⁰⁷

This detainee could not tell the visitors about the failure of the custody staff to deal with his requests, because the staff would hear him criticising them. He went on to say that this would also have prevented him from mentioning much

¹⁰⁵ D3. This is confirmed by the evidence of visitors and, by analogy, the evidence of lawyers. V4 said that he thought that detainees did not trust him, and that he would be sceptical about a stranger who had just come in saying the sort of things visitors say. L5 said that detainees were mistrustful of people turning up and asking them questions, when they have not met before, and that detainees had all sorts of paranoias and/or genuine concerns about how legitimate the lawyer was, and whether the meeting was definitely confidential.

¹⁰⁶ See note 137.

¹⁰⁷ D5. Compiled from an exchange.

A VISIT TO A DETAINEE



Getty images: reproduced with permission.

more serious matters. Some detainees said they would have been frank with the visitors in those circumstances, but they also said that they understood how other detainees might find that difficult.¹⁰⁸ Even those who could be frank with the visitors doubted that their frankness would achieve anything:

“I wouldn’t have been confident that they would have been able to do anything ... Because when the police do certain things, they do it to make sure they can get away with it, so sometimes it’s not worth even trying.”¹⁰⁹

This comment highlights the deep mistrust many detainees feel about the police, and their recognition that they are completely in their power. Sometimes visitors could help with serious issues which did not involve criticism of the custody staff, but which detainees had not mentioned to the custody staff: for instance, that the arrest had rendered them unable to collect their children from school. Some detainees who found it hard to talk to the custody staff did find that they could talk to a custody visitor. This would be an argument for more frequent visits.

Detainees said they would have preferred the interviews to take place in a consultation room, where there would have been more time, dignity and privacy, but they also said they wanted visitors to see the state of their cells. They noticed that the meetings in the cells were very brief, and most thought

¹⁰⁸ e.g., D6.
¹⁰⁹ D12.

the meetings should have been longer. One detainee compared the brevity of the visits in the custody block with the half-hour visits he had received from Independent Monitoring Board Members in prison.¹¹⁰ My own meetings with detainees for my interviews took place in the relative privacy of a consultation room, and it was evident that detainees were far more forthcoming in that setting. It is thus easy to conclude that it would have been much better if the visitors had met detainees in a consultation room. However, arranging for that would have routinely made extra work for the police and custody staff, and visitors would likely believe that the police would oppose it, so the power of the police may have prevented visitors from even raising the question: or maybe they just accepted the *status quo* unthinkingly.

Cells were a cramped space for a meeting, with no table and chairs, and in that cramped space visitors were trained to keep some distance between themselves and the detainees, so the visitors stayed close to the door. One detainee said he felt ashamed,¹¹¹ and another put it this way:

“It’s a bit awkward, having two people in your cell, when you haven’t had a shower for two days.”

Being obliged to hold a conversation with people you have only just met, without any warning, is not made any easier by having to worry about your

¹¹⁰ D8.

¹¹¹ D5.

personal hygiene. The custody staff had not told this detainee he could have a shower: he found this out from the visitors.¹¹²

Some detainees were uncertain about what the visitors were there for.¹¹³ Some detainees welcomed what they saw as a pleasant chat with nice people who cared about their welfare,¹¹⁴ and one said that the visitors speeded up getting things done, like being allowed to make a telephone call.¹¹⁵ However, most detainees said they did not think the visitors were able to help them, even if that was supposedly what they were there for:

“They want to help, but they can’t, but it’s nice that they want to.”¹¹⁶

This group thought the visitors meant well, but saw them as ineffective. Others found the visitors’ attentions less welcome, and seemed to think that the visitors were voyeurs:

“I didn’t think [the visitors] were there to help me, [they were there] just to ask questions to find out what it’s like inside.”¹¹⁷

This is hardly a promising context for meaningful communication, where detainees would feel able to tell the visitors about anything that mattered. One

¹¹² D7.

¹¹³ Unsurprisingly, one of the detainees I interviewed, D10, thought that the visitors were researchers, because of what I said when introducing myself after the visitors had introduced themselves.

¹¹⁴ e.g., D4.

¹¹⁵ D6.

¹¹⁶ e.g., D9, who said he was very depressed, and that he found the visit “uplifting”.

¹¹⁷ D8.

detainee, when I asked him what he thought he was going to get out of the meeting with the visitors, replied simply, “Nothing!”,¹¹⁸ and another detainee described the visit as:

“Pretty pointless, asking me loads of questions ... you can’t do nothing, you can’t change nothing, you’re wasting my time.”¹¹⁹

Most of the detainees were not motivated to co-operate in the interview with the visitors. And the interview was all over in about three minutes, which must have added to the dazed feeling most of them had started with.

The detainees’ impression that visitors were not there to help them was confirmed by the visitors’ failure to report back to the detainees on the responses of the staff to their requests.¹²⁰ For example, I observed a detainee telling visitors that he had told the staff that he had a food allergy, but that the staff had taken no notice. The visitors checked the detainee’s custody record, which showed that the allergy had been noted. They asked the staff if the detainee was receiving food which did not contain the ingredient that would trigger the allergy. The staff told them the food did not contain the ingredient. The visitors did not report back to the detainee on this.¹²¹

The lack of feedback might have discouraged detainees with previous experience of visitors from being candid. And their lawyers might have

¹¹⁸ D3.

¹¹⁹ D2.

¹²⁰ D1 and D2.

¹²¹ Observation.

explained to them that legal privilege did not attach to visitors' communications with detainees. As one of the lawyer interviewees said:

“ It seems a bit unfair. You're there to help someone, and he makes an unsolicited comment ... 'I've done it, but they're not going to be able to prove it', and you go straight to the custody officer and [tell him].”¹²²

The absence of privilege in communications between detainees and appropriate adults creates similar problems.¹²³ As well as there being no privilege, there is no confidentiality in the relationship between custody visitors and detainees: there have been similar findings in research into the prison medical service.¹²⁴

One of the main points of these interviews was to check on whether detainees' rights were being observed. To make those checks effectively, visitors would need to know what those rights are. However, I never saw visitors in training sessions being given a copy of the standard leaflet as given

¹²² L4.

¹²³ Chris Bath, “Legal Problems with Appropriate Adults”, *Criminal Law and Justice Weekly* (2014) 178 27 404. Visitors in the area studied have, very occasionally, been ordered to give evidence in court about incidents they have witnessed in custody blocks, but not about matters arising during interviews: information from V2 and AD.

¹²⁴ For comparative material about the lack of confidentiality of communications between prisoners and prison doctors, see Joe Sim, *Medical Power in Prisons: The Prison Medical Service in England 1774-1989* (OUP 1990); House of Commons Social Services Committee, Session 1985-1986, Prison Medical Service, Minutes of Evidence, Wednesday 4th December 1985, Royal College of Psychiatrists 63, summary para 7 (“Historically, the prison medical officer's role has developed into that of a referee who could be relied on to support the home team.”); C Shaw, “Prison Medicine”, *Open Mind* (1987) 26 April/May 15; Tim Newburn and Stephanie Hayman, *Policing, Surveillance and Social Control: CCTV and police monitoring of suspects* (Routledge 2002) 135-6, and Layla Skinns, *Police Custody: Governance, legitimacy and reform in the criminal justice process* (Routledge 2011) 182-3. At a conference connected with the custody visiting scheme in the area studied, I heard a director of a company supplying medical care in custody blocks voice concern about the pressures on doctors' independence, the pressures being both commercial and a function of the power of the police.

out to detainees on booking-in:¹²⁵ they were just told which questions to ask the detainees. Most of the visitors seemed to be familiar only with the right to have someone informed and the right to legal advice, and they did not always remember to say that the legal advice was free.¹²⁶ However, on one accompanied visit, I did observe one of the visitors telling a detainee about the right to make a telephone call. The custody sergeant who was escorting the visitors overheard this, and said that the right was just to have someone informed. The rather tortuous position is that detainees are said to be *entitled* to make a telephone call, but that fact need not be communicated orally by the custody officer, although the detainee would find out about it by reading the leaflet, or PACE Code C, which the detainee had a *right* to see.¹²⁷ Two factors impaired the visitors' effectiveness here. First, the visitors were ignorant of what the detainees' rights (and entitlements) were, as the scheme administrator had not given them the information. Second, the visitors were under the power of the police who misled them, maybe unwittingly. If the visitors had been properly informed, and if they had been trained to challenge the police, they might have stood up to the police, and they might have made a better job of helping the detainees. When neither visitors nor detainees have a clear understanding of the rights of detainees in custody, the police's power is enhanced by their superior knowledge.

¹²⁵

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/332266/CodeC-NoRE.pdf accessed 11.10.2015.

¹²⁶ This is significant because research has shown that the take-up of legal advice increased when custody sergeants informed detainees that legal advice was free: David Brown, Tom Ellis, and Karen Larcombe, *Changing the code: police detention under the revised PACE Codes of Practice* Home Office Research Study 129 (HMSO 1992).

<http://library.college.police.uk/docs/hors/hors129.pdf> accessed 11.06.2016.

¹²⁷ Sanders *et al* (n 12) 200; Pace Code C para 5.6.

Visitors were given no training about how to conduct these interviews. They were encouraged to have a conversation with detainees, rather than adopt a “tick-box approach”, about the issues concerning their rights and welfare: this encouraged visitors to be more natural, but did create the risk that some important questions, such as whether the detainee was on medication, might be forgotten.¹²⁸ Visitors were not trained in communication skills, as the ICVA standards say they should be.¹²⁹

The visitors sometimes asked detainees for permission to view their custody records. Custody records were occasionally used to settle an argument about whether the custody staff had dealt with a detainee’s request.¹³⁰ Some detainees could not be asked for permission to inspect their records: for instance, those who were intoxicated and those who were asleep. Visitors were allowed to inspect the records of detainees who were intoxicated. However, it was uncertain whether visitors could view the records of detainees who were asleep: yes, according to ICVA, no, according to the Home Office.¹³¹ In any event, I did not see visitors seeking to inspect the records of those detainees who were asleep. The visitors’ work would be that much more effective if they could check the custody records of all detainees they had not been able to see and to talk to, including those who were in police interview and those detainees the staff had advised the visitors not to

¹²⁸ See note 99. The report form used in the area studied, unlike the form I filled in as a visitor in Dyfed-Powys, did not in fact have boxes to tick.

¹²⁹ ICVA National Standards E1:

http://icva.org.uk/uploads/publications/11National_standards_PDF.pdf accessed 19.07.2016.

¹³⁰ See Chapter Five, text to notes 156-159.

¹³¹ 2014 Speech by Ian Smith, then chief executive of ICVA, at a location that cannot be disclosed as it would identify the area studied.

visit. To enable the visitors to understand the records, training would be required. As one inspector admitted to me:

“I think you need a degree in custody records to be able to understand them ... I know [the visitors] look at them, but I don’t think they ... you know, it takes me all my time to study a custody record and understand it, and even then sometimes you don’t understand it totally.”¹³²

Properly carried out, custody visiting is technically demanding work. The scheme administrator gave visitors no idea of what custody records looked like, let alone how to analyse them.

Turning now to more general considerations relating to meetings between detainees and visitors, I believe the following factors are likely to impair communication in this context: the misunderstanding of language: lack of trust; prejudice, stereotyping, discrimination; and the unreliable nature of first impressions in forming accurate personality judgments.

The misunderstanding of language about rights in custody between police and detainees has been investigated by Frances Rock. Visitors tend to use some of the confusing language the police use, such as the expression “rights and entitlements”, so her research is relevant to communication between visitors and detainees.¹³³ She also observed police officers frequently misunderstanding what detainees were saying. She gives the example of an

¹³² M1.

¹³³ See text to notes 97-98.

officer asking a detainee about whether to call a solicitor, and taking the answer “I don’t know” as a definite “no”. Later in this exchange, the officer asked the detainee for confirmation that the interchange had not affected the detainee’s decision: the purpose of the officer’s question was self-protection, rather than the communication of rights.¹³⁴ Rock calls this the “multi-functionality of human interaction” and argues that this factor makes the communication problem deeper, beyond people misunderstanding their rights or feeling unable to invoke them.¹³⁵ For the visitors, one of the functions of their interaction with the detainees was to gather material for a report, which may have made them more interested in obtaining answers than in what the answers told them. Similarly, some of the detainees thought that the function of the visitors was just to ask questions, and that made them unco-operative and less than candid.¹³⁶ Thus the functions of reporting and questioning obstructed the function of helping detainees.

For there to be effective and candid communication in these meetings, it was essential that the detainees trusted the visitors and felt able to be candid with them. But an immediate barrier to trust was that the detainees had never met the visitors before. Most people have been brought up not to trust strangers.¹³⁷ One way of understanding trust is to see it as a relational concept, the quality of trust being dependent on the quality of relationships.¹³⁸ But detainees have no relationship with visitors, except in the case of those

¹³⁴ Rock (n 89) 3, 4, 9. The detainee had, of course, not made the decision not to have a solicitor: the officer had misunderstood.

¹³⁵ *ibid* 138.

¹³⁶ See text to notes 116-123.

¹³⁷ For “stranger danger” see e.g., <http://www.nbcnews.com/id/8331335/#.VxXrJnrh4r8>, accessed 19.04.2016, which shows how deeply embedded this is.

¹³⁸ Russell Hardin, *Trust* (polity 2006) 16ff.

very few detainees who had met visitors before. Hence, in the absence of a relationship, even those detainees who had not been socialised into mistrusting strangers were unlikely to trust the visitors. Those who designed the scheme do not seem to have thought about this point, or if they did, they discounted its importance. The elements of mistrust, on both sides, were likely to have been exacerbated by other factors, such as prejudice.

The leading academic authority on prejudice, Gordon Allport, wrote that prejudice was a world-wide phenomenon, and described it as “an averted or hostile attitude towards a person who belongs to a group, simply because he belongs to that group, and is therefore presumed to have the objectionable qualities ascribed to that group”.¹³⁹ Categorisation in a group is said to be inevitable: the effect of categories is to engender meaning upon the world, resulting from the principle of least effort: this categorisation is rapid and automatic, and stereotyping, prejudice and discrimination all have automatic aspects. The visitors’ attitudes to detainees were found to be stereotyped, and some visitors assumed that detainees must have done something wrong;¹⁴⁰ and there were detainees who thought the visitors were close to the police.¹⁴¹ With discrimination following that prejudice, visitors treated detainees not on the basis of who they were, but on the basis of how they had been socially constructed: and the way the detainees saw the visitors was probably subject to similar distortions. Arguably prejudice can be ameliorated over time by exposure to the reality of an individual’s experiences, character and views.

¹³⁹ Gordon W Allport, *The Nature of Prejudice*, 26th anniversary edition (Perseus 1979) 4, 7: but prejudice is not universal: 74.

¹⁴⁰ See Chapter Five, text to note 140.

¹⁴¹ See text to note 103.

The meetings between visitors and detainees were overwhelmingly likely, however, to be the first time they had met. David Funder's research into the fallibility of first impressions shows that snap judgements of personality are almost never correct.¹⁴² Those visitors and detainees who were not prejudiced were still likely to make unfavourable snap judgments. Those unfavourable judgments, on vital issues like trustworthiness, prevented effective communication.

For a whole range of reasons, the visitors' meetings with detainees were not effective. The visitors had been able to make certain basic checks, but the detainees may not have seen the point of answering all the visitors' questions fully or correctly, and their view was confirmed by the absence of feedback from the visitors later. The outcome, which was potentially very harmful, was that the detainees could not discuss important issues with the visitors. The visitors seemed unconcerned about the poor quality of their interaction with the detainees.¹⁴³ The practice adopted for the meetings was one which suited the police: no notice, short, inconsequential, in the cell, the staff present, and no follow-up visit.

Checks on other matters

If there were no detainees to visit, or only a small number, visitors sometimes made checks on the physical state of the block. Some of these checks can be about matters of life and death and should be made on every visit. The physical state of a building can be dangerous, because of ligature points or

¹⁴² David C Funder "Accurate Personality Judgment", *Current Directions in Psychological Science* 2012, 21, 177.

¹⁴³ See Chapter Five, text to note 160.

loose sharp edges that can be used for harming oneself or others; and, if a staff member is not carrying a ligature knife, a detainee may succeed in hanging her/himself during the vital seconds it takes to retrieve a knife from some other location. CCTV evidence may be essential for an inquest, but I never saw visitors checking that the CCTV was working properly. Staff shortages could create serious safety concerns: but visitors were discouraged from making these comments because they thought they would make no impact, at a time of deep cuts in the police budget.¹⁴⁴ The general failure to make these other checks, and/or to report on them, except on a completely haphazard basis, seriously compromised the effectiveness of the visiting.¹⁴⁵

Fourth criterion of effectiveness: Whether the reporting system caused police behaviour to be changed/aligned

The final part of a visit was the writing of reports by the custody visitors, for discussion with the custody sergeant and onward transmission to the scheme administrator. The report form that the visitors had to fill in dictated that they should write something about each detainee visited or visually checked, with a space left for all other issues. As Richard Ericson and Kevin Haggerty argue, knowledge available in a report always depends on, and is secondary to, the format.¹⁴⁶ I found in this study that visitors used the reports primarily to say

¹⁴⁴ e.g., V 4.

¹⁴⁵ Sometimes visitors checked and reported on matters of stunning triviality, such as, on one occasion, a ring mark on a countertop where a mug containing a hot drink had been placed without a mat underneath it: S8.

¹⁴⁶ Ericson R V and Haggerty K D (eds) *Policing the Risk Society* (OUP 1997) 357-387.

something about each detainee visit, and that they paid little attention to “other issues”.

Below are set out examples of the types of reports sent in.¹⁴⁷ They all use the abbreviation PIC (person in custody) for detainee. Except where stated, they are set out in full, and quoted verbatim.

Here is a typical example:

“PIC requested and provided with reading material. PIC stated they had no issues and could not have been treated more fairly. PICs no issues.”

So, a visit which probably lasted some 30 minutes is reduced to a text of 24 words. As was often the case, this report concerns only visits to detainees. There is no evidence that any other checks were made: if they were, they were not reported on. The overall tenor of the report is clearly positive, and it is worth noting that visitors were encouraged by the scheme administrator to report when detainees praised the custody staff.¹⁴⁸ In contrast, another report contains the quote from a detainee that he was being “treated like a dog”. No details are given of that treatment, and no details about whether, and if so in what respect, the visitors agreed with the detainee’s opinion that it was like treatment that might be given to a dog; whether the visitors thought it

¹⁴⁷ AD compiled these documents and handed out them out in hard copy form at team meetings, so they are all from the area studied. I have not attributed them to specific visitors here, and some of them were based on reports sent in by visitors whom I did not meet.

¹⁴⁸ Observation at team meeting.

necessary to take any steps to get anything done about it; if they did think it necessary, whether they actually did so, and with what results; and whether they informed the detainee of the outcome.

The next example is rather alarming to read, although the visitors do not seem to have been alarmed:

“All areas clean and tidy. PIC did not raise any issues. PIC requested a drink and fresh air. A nurse had assessed his cut finger. PIC did not raise any issues. Had been offered food and refused. What appeared to be blood was all over the wall and door.”

We are not told whether the nurse had taken any action following the assessment. There would seem to have been more blood about than would be shed from a cut finger. But there is no record of an investigation by the visitors about the blood; where it had come from; why it was there; whether the visitors thought the detainee should be moved to a clean cell; whether a request was made to move the detainee; whether the request was complied with; and whether visitors informed the detainee.

These reports are typical, both for their brevity, and for the absence of any contextual information and details of any inquiry. An example of a very untypical report, set out in Chapter Five, related a difficult situation and the

visitor's frustrations.¹⁴⁹ Here are extracts from another report, again untypical, this time for the wealth of information it conveys:

"Boiler in the staff room needs to be replaced. Staff have been waiting for over a week.

PIC was annoyed that his prayer beads have been taken away and stated he will self-harm by banging his head against the wall if he doesn't receive them. PIC said he has been using the prayer beads to pray for his recently murdered brother. Custody Sgt said that the PIC has been told he can have the prayer beads when praying. Custody Sgt informed that PIC has requested to speak to Duty Inspector.

PIC in custody for 24 hours and requested fresh air in the exercise yard: will be allowed weather permitting and staff availability.

PIC needs somebody to collect her key as she has left her dog in the flat on its own. Also said that she needs methadone. Custody Sgt said that PIC can arrange for key collection to look after the dog and that the Doctor will be called regarding the methadone request."

This is a much fuller report than the average. The point about the boiler may show that the custody staff thought they might get repairs done more quickly if they were reported by custody visitors.¹⁵⁰ The report conveys interesting insights into the predicament of some of the detainees, and it may be that the custody staff first heard about the dog and the methadone from the visitors.

¹⁴⁹ See Chapter Five, text to note 153.

¹⁵⁰ V5.

We are not told whether visitors told the detainees about the outcomes of their requests.

The report was then countersigned by the custody sergeant or some other member of the staff. This brought the visitors further under the power of the police. This power, as explained by Lukes, was likely to make the visitors reluctant to include critical material in the report and thus risk a confrontation with the police.¹⁵¹

The system for filing the report was changing to digital, which caused some problems for the visitors. It took them a special effort to keep a copy of their reports.¹⁵² Visitors found the reporting a chore, and several said they found it was the least attractive part of their work. Visitors were seriously handicapped in trying to follow up points they had made in the originals. Most of them did not keep copies of their reports, and only the scheme administrator dealt with the information they had provided. The effectiveness of the reporting by the visitors depended on what the scheme administrator did with the reports. He compiled composite reports covering the visiting done for each team with statistics. Copies of these reports were provided only to the visitors who turned up at team meetings, and the reports were not publicly available. The scheme administrator contacted the inspector about issues visitors had raised in the reports, a very small number of which were discussed, weeks or months later, at team meetings. The visitors were told little about the communications which had passed between the scheme administrator and

¹⁵¹ See Chapter Five, text to notes 179-187 and following note 187.

¹⁵² Something done only by V8.

the police, or what the result had been.¹⁵³ I identified just one example of where a visitors' report achieved a change in police behaviour, where the scheme administrator brought about a change in police behaviour.¹⁵⁴ But only the scheme administrator could assess the extent to which the reporting brought about general changes in police behaviour. The closed world remained closed.

Fifth criterion of effectiveness: whether custody visiting enabled the public to know what was happening in custody blocks

The application of this criterion provides an assessment of whether the work of custody visiting enabled the public to know what was happening in custody blocks. The scheme administrator used the visitors' reports as the raw material for a very general summary, with examples, published in the annual report on the Police and Crime Commissioner's website.¹⁵⁵ These cannot be set out without disclosing the area studied. As a means of reviewing the type of information that is available I have looked at a similar report published in the Avon & Somerset Police and Crime Commissioner's Annual Report for 2013-2014, and made some comparisons with the report published for the

¹⁵³ See Chapter Five, text to note 62, where a visitor complained about never getting feedback. However, V8, one of the minority of visitors who did keep copies of reports, expressed satisfaction with the way the reports were dealt with by the scheme administrator. Many of the police and custody staff, except the inspectors, also complained that they received no feedback.

¹⁵⁴ See Chapter Five, text to note 188.

¹⁵⁵ A provision that the identity of custody visitors should be published by Police and Crime Commissioners was hastily amended to say that the requirement was just to publish reports about the operation of the scheme: Elected Local Policing Bodies (Specified Information) (Amendment) Order SI 2012/2479, Article 6.

study area.¹⁵⁶ Some of this was considered under the first criterion. The Avon & Somerset report states that the issues raised by the visitors were “primarily” related to cleanliness of cells, delays in medical assessment, out of date meals, access to toilet paper and shortages of blankets.¹⁵⁷ By contrast, the report in the study area gives no details at all about issues that were raised.

The next subject in the Avon & Somerset report is delays in access to the custody block. Like the report in the area studied, this fails to explain actual delays. Could the delays have been caused by deliberate attempts by the custody sergeants to delay the arrival of the visitors? Or were these delays caused by a serious disturbance? The lack of explanation gives the impression that the Police and Crime Commissioners, for both Avon & Somerset and for the area studied, did not know, or care, what the actual causes of the delays were; and that, if they did know, they were not telling the public about it. Other public sources of information are even less informative.¹⁵⁸

Persuasion was the only means available to custody visiting to act as a regulator in enforcing alignment to standards. Regulators may use publicity, or the threat of publicity, to back up their attempts at persuasion. Custody visiting

¹⁵⁶ <http://www.avonandsomerset-pcc.gov.uk/Document-Library/2014/ICV-Annual-Report-2013-2014.pdf> accessed 18.09.2014. Presumably this report is intended to be read not only by professionals but also by the general public, so it is disappointing that its authors made the assumption that all readers know what a “s 136 order” is. Under Mental Health Act 1983, s 136, the police may take a person who appears to be suffering from mental disorder and to be in immediate need of care or control from a public place to a place of safety: this has in the past usually been a police station, and sometimes still is: see Chapter One, note 64.

¹⁵⁷ The reader is left wondering what the secondary issues were.

¹⁵⁸ HMIC/HMIP publish reports of their joint inspections of custody blocks, but they do not assist in evaluating the work of custody visiting according to any of the five criteria. And, despite the proliferation of official publications, there is no document by which the performance of custody visiting can be measured.

made no use of publicity or the threat of publicity in its work of regulation,¹⁵⁹ and persuasion seemed to be limited to private communications from the scheme administrator. There is no way of measuring the effectiveness of this as a means of enforcing alignment. There were no contexts in which visitors could have, or did have, a public voice. The message of the scheme administrator was that the scheme enabled the public to be confident that the police were doing a good job. It was not just a matter of a regulator deciding not to use publicity as the means of persuasion: one needs to understand the motivation for that choice. The Police and Crime Commissioner's decision not to use publicity is arguably another demonstration of power as conceptualised by Lukes: the Commissioner was doing what the police wanted.

Next, the question of whether the reporting gave custody the regulatory qualities of accountability and legitimacy. As argued in Chapter Two, accountability is a tangible process of accounting, with three stages, information, discussion and consequences, including the essential component of external democratic scrutiny. In custody visiting this process might be located in any of five different relationships.¹⁶⁰ The first relationship is that between the visitors and the Police and Crime Commissioner. In this case the scrutiny is being undertaken by the visitors' line manager, which cannot qualify as external. The remaining four relationships are between the custody visiting scheme, in the persona of the Police and Crime Commissioner, and:

¹⁵⁹ Contrast the naming and shaming by Australian food regulators: <http://www.foodauthority.nsw.gov.au/> accessed 02.04.2016, or the England and Wales "National Food Hygiene Rating Scheme" - where a 1-5 rating has to be displayed: e.g., <http://www.bathnes.gov.uk/services/environment/food-safety/food-hygiene-rating-scheme/national-food-hygiene-rating-scheme-safe> accessed 04.04.2016.

¹⁶⁰ See Chapter Two, text to notes 136-140.

the voting public; the Police and Crime Panel which scrutinises the work of the Police and Crime Commissioner;¹⁶¹ central government; and political sponsors.¹⁶² In these four relationships there is no process of scrutiny by a non-police body: just the provision of a bland report, with insufficient information on which to form a judgment, with custody visiting constituting a very minor element in the Police and Crime Commissioner's work. There was therefore no chance of anyone questioning the way that custody visitors go about their work and calling for more challenging behaviours on the part of those visitors: in terms of the three-step test,¹⁶³ next to no information, no opportunity for discussion, and no consequences. As regards legitimacy, the vast majority of the general public is extremely unlikely to have heard of custody visiting.¹⁶⁴ It is therefore impossible to say what the public thought about it, and impossible to say whether it was legitimate or illegitimate.

This concludes my assessment of the effectiveness of custody visiting by reference to the five criteria. I now turn to assess its effectiveness by reference to standards laid down in international human rights law.

¹⁶¹ set up under Police and Social Responsibility Act 2011, ss 28-33.

¹⁶² John Raine, "Electocracy with accountabilities?" in Lister S and Rowe M (eds), *Accountability of Policing*, (Routledge 2016) 111-13.

¹⁶³ See Chapter Two, text to notes 132 and 141.

¹⁶⁴ See text to notes 198-206.

United Nations standards and the requirement of expertise

The United Nations have laid down broad principles for visitors to people in detention:

“1. In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment.

2. A detained or imprisoned person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment in accordance with paragraph 1 of the present principle, subject to reasonable conditions to ensure security and good order in such places.”¹⁶⁵

Some of these requirements are met, and the Police and Crime Commissioner is, technically, distinct from the police. But custody visitors are not qualified, and detainees cannot communicate with the visitors freely and in full confidentiality, because the conditions that are imposed rarely, if ever, allow this to happen. I therefore conclude that, on the evidence from the area studied, the United Kingdom is in breach of this principle.

¹⁶⁵ Principle 29. Adopted by General Assembly Resolution 43/173 of 09.12.1988. <http://www.un.org/documents/ga/res/43/a43r173.htm> accessed 06.06.2016.

The United Nations have laid down specific criteria for bodies charged with regulating the conditions of detention, in an instrument known as OPCAT.¹⁶⁶ Each state is required to establish a “national preventive mechanism” (NPM), with certain qualifying characteristics. An NPM has to be a body or group of bodies that regularly examine the treatment of detainees, make recommendations and comment on existing or draft legislation with the aim of improving treatment and conditions in detention. The UK’s NPM is composed of several constituent bodies, including the Independent Custody Visiting Association, ICVA.¹⁶⁷ We can examine some aspects of the performance of custody visiting by applying the criteria for an NPM to the findings about custody visiting in the area studied.

Each NPM must satisfy certain requirements. First, an NPM must be independent of government and the institutions it monitors. Elina Steinerte has written that the independence requirement is very important, because it is:

“hard to imagine how the NPM would be able to achieve anything if it did not have the trust of those deprived of their liberty.”¹⁶⁸

¹⁶⁶ The Optional Protocol to the Convention against Torture and other cruel inhuman or degrading Treatment or Punishment, a treaty which supplements the 1984 UN Convention against Torture. The United Kingdom had signed the convention in 1985 and ratified it in 1988. The United Kingdom signed and ratified the protocol in 2003, and the protocol came into force in 2006. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx> accessed 31.05.2015.

¹⁶⁷ See Chapter One, text to notes 118-121.

¹⁶⁸ Elina Steinerte, “The Jewel in the Crown and its Three Guardians: Independence of National Preventive Mechanisms under the Optional Protocol to the UN Torture Convention” *Human Rights Law Review* (2014) 14 1-29.

This comment is telling when considered in the light of my finding that most detainees did not trust visitors.¹⁶⁹ Steinerte goes on to say that there is supposed to be a:

“transparent process of selection and appointment of members who are independent and do not hold a position which could raise questions of conflict of interest.”¹⁷⁰

She points out that in the UK there was no transparent process: the Ministry of Justice just decided which institutions should be part of the NPM. ICVA’s members are the Police and Crime Commissioners, which manage the visitors: as has been shown, Police and Crime Commissioners are not independent of the police, nor are the visitors: hence, this requirement is not met.¹⁷¹

Next, the NPM must have certain powers. It must have the power to access all places of detention: custody visiting in the area studied did appear to have access to all such places, within its remit, except for holding cages and locations used for police interviews of suspects who were not formally detained. The NPM must be able to conduct interviews in private with detainees and other relevant people. As has been shown, not every detainee could be interviewed, and no interview was conducted in private: no other category of person was interviewed: visitors’ discussions of their reports with

¹⁶⁹ See text to and following notes 137-138.

¹⁷⁰ Steinerte cited this as recommended by the Subcommittee on Prevention of Torture, First Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 14.05.2008, CAT/C/40/2, at para 28(c).

¹⁷¹ See Chapter Two, text to notes 97-103, and Chapter Five, text to note 229.

custody staff, and visitors' conversations with custody staff could not be called interviews: hence, this requirement is not met. The NPM must be able to choose which places it wants to visit and who it wishes to interview. Visitors could choose which places to visit, but might not be admitted to those places except, in some cases, after long delays, and interviews with detainees could be denied: similarly therefore, this requirement is not met.¹⁷² The NPM must be able to access information about the number of people deprived of their liberty, the number of places of detention and their location; and to access information about the treatment of and conditions for detainees. This requirement is met: as far as we know, there are no secret police stations, and visitors can visit even the police stations which are set aside for terrorist suspects. Finally, NPM personnel should have the necessary expertise and be sufficiently diverse to represent the community in which the NPM operates. The training of visitors was superficial and one-sided,¹⁷³ but the visitors' diversity did go some way to representing the community.¹⁷⁴

The official UK government line is found in the annual reports of the NPM, where one reads that all the bodies constituting the NPM are independent, and that all places of detention are independently monitored.¹⁷⁵ Neither statement is true: ICVA is not independent, nor are the visiting schemes, and there is no other body taking these roles. The reports have nothing to say about all the other issues set out above. I therefore conclude that custody

¹⁷² Delay: see text to notes 45-50. Denial of access: see text to notes 58-63.

¹⁷³ See Chapter Five, text to notes 63-83.

¹⁷⁴ See Chapter Four, text to notes 36-38, and Chapter Five, text to notes 28-30.

¹⁷⁵ *Monitoring Places of Detention: Sixth Annual Report of the United Kingdom's National Preventive Mechanism 1 April 2014 – 31 March 2015* Cm 9160.
<http://www.nationalpreventivemechanism.org.uk/wp-content/uploads/2015/12/NPM-Annual-Report-2014-15-web.pdf> accessed 16.12.2015.

visiting in the area studied failed to fulfil most of the requirements for the characteristics of an NPM, and that, on the evidence from the area studied, the United Kingdom is in breach of OPCAT.

The United Nations' requirement that those examining custodial institutions should have expertise raises the important question of how custody visitors should be trained, and whether they would have been more effective in their work if, say, they had been lawyers who had worked in the criminal justice system. Michael Meacher MP proposed that each group of visitors should include a lawyer:¹⁷⁶ this idea has never been pursued. The ethos is very much against lawyers being involved: many visitors and police officers thought that lawyers would be unwilling to act without pay, and that they would be unable to restrain themselves from touting for business.¹⁷⁷ None of the visitors was, or had been, a lawyer with experience of criminal defence work, and few visitors had had any previous experience of the criminal justice system. The training the visitors received certainly did not make them experts in this area.¹⁷⁸ The result was that visitors were generally unaware of the legal and regulatory framework in which custody operates, and they were also unaware of the wide range of discretion enjoyed by the police and how they deployed this to achieve their goals. This assessment falls rather short of the picture painted by Katie Kempen, appointed chief executive of ICVA in 2015, who told me:

¹⁷⁶ See Chapter Three, text to note 13.

¹⁷⁷ See text to note 86, and Chapter Five, text to notes 189-191.

¹⁷⁸ See Chapter Five, text to notes 63-83.

“[The custody visitors] need to be confident that they can challenge anything they’re not happy [about] with custody staff ... [to] do that, they need to be able to challenge those professionals.”

This language suggests that this is an aspiration, not a description of the reality. The aspiration was not met in the custody visitors in the area studied. Visitors did not have training and understanding of the professional issues, and few had the confidence to make challenges.¹⁷⁹

Wider functions of custody visiting

Claims are made in the official literature that custody visiting achieves outcomes which are beneficial to society. This section seeks to assess whether these claims can be justified.

The first of these claims is that custody visiting enables volunteers to attend police stations to check on the treatment of detainees and the conditions in which they are held, and that their rights and entitlements are being observed.¹⁸⁰ Clearly, the scheme does facilitate this. But the extent and the reliability of the information obtained are seriously compromised by the numerous defects set out in this chapter.

¹⁷⁹ See Chapter Five, text to notes 179-187.

¹⁸⁰ 2013 Code of Practice para 2.

The next claim is that custody visiting offers protections and confidentiality to detainees and the police.¹⁸¹ Whatever protections custody visiting does give detainees, that protection is compromised in the same way as was noted in the previous paragraph. The detainees' confidentiality is protected by the rules of the scheme, and seems to have been respected by visitors.¹⁸² The "protections offered to the police" may mean the scheme's provision of defences against allegations of poor custodial practices, and reassurance to the public, discussed next. The confidentiality afforded by the scheme to the police is secured by the visitors being prohibited from making public statements except with the approval of the scheme administrator, and from participating in making official complaints about the police.

The next claim is that custody visiting offers reassurance to the community at large.¹⁸³ The reassurance could be in the form of general information about the scheme, letting people know that independent people visit custody blocks, and reassurance also used to be said to be needed at times of "tension in the community", for instance when there has been a death in custody, when the police may invite visitors to a station.¹⁸⁴ Before reviewing whether this purpose of reassurance can be achieved, it is worth looking in more detail at these "special" visits, as they are sometimes known. They are different from other visits, because they are made at the invitation of the police, and are

¹⁸¹ 2013 Code of Practice para 2. In this paragraph (following the 2001 Circular and the 2003, 2010 and 2013 Codes of Practice) independent custody visiting is described as "a well established system", which may be the nearest those drafting the official literature can get to making a claim that the scheme is well known.

¹⁸² There is only one instance in the area studied where this confidentiality was known to have been broken, many years earlier: AD interview.

¹⁸³ 2013 Code of Practice para 2.

¹⁸⁴ 1992 Circular para 16.

therefore neither unannounced, random nor unexpected.

There has been an occasional practice of visits made at the invitation of the police in the area studied. However, none of the visits took place during the period covered by this research, so I was not able to observe them for myself. Jane Warwick told me how this used to happen in Lambeth until 2008. She was called in by the police when there were demonstrations outside a police station about how a suspect was being treated. She went into the custody block and saw the suspect, and then reported on the condition of the suspect to the people outside the police station. The police hoped that this would calm the demonstrators down.¹⁸⁵

Special visits were made in the area studied in August 2011 when a large number of arrests were made during the country-wide riots that erupted that month.¹⁸⁶ Research has shown that the criminal justice system was put under considerable strain by those events, and that a substantial decision about prosecution policy appeared to have been made at speed and without consultation.¹⁸⁷ Arguably, there is a greater need for checks when the system is under strain, when one might expect the worst abuses to occur: but the motivation was public reassurance. It was the scheme administrator who made the decision for these special visits: he told me he thought that the

¹⁸⁵ Jane Warwick interview: the last occasion was in 2008. I was told about a recent instance in the area studied, but I was unable to investigate it. Simon James gives brief accounts of visits made in London at the request of the police in the 1980s in "Guarding the guardians: Lay visitors to police stations" *Public Law* [1988] Aut 432: the author was secretary to visitors' panels in Westminster. Mr James says that the visits were successful in defusing tension.

¹⁸⁶ taking place there at the same time as elsewhere in the country.

¹⁸⁷ Carly Lightowlers and Hannah Quirk, "The 2011 English 'Riots': Prosecutorial Zeal and Judicial Abandon" *British Journal of Criminology* (2015) 55 1 65.

police would have requested them, but had not yet done so.¹⁸⁸ He telephoned visitors and asked them to do visits “lite”, which meant observation only, and no detainee interviews. The scheme administrator was not able to find the reports sent in by the visitors at that time, so I have not seen them. He did say that the work of the visitors had not featured in the reporting of the riots, partly because of the low profile kept by the police authority, which ran the scheme at that time. He said that police officers were grateful for these visits; they thought that the visits gave the public confidence in the police, and that visitors took that message back to their communities.¹⁸⁹ How much of the message reached those communities, and which the communities were, are both unknown, as there was no machinery for conveying the message to communities and visitors lack the status of representatives of the community in any meaningful way. As one custody sergeant said:

“If visitors are supposed to represent the public, the public should have heard about what they do, but they don’t.”¹⁹⁰

Neither the public nor its communities see the visitors as their representatives: as I seek to demonstrate, hardly anyone has heard of the scheme.¹⁹¹

¹⁸⁸ AD interview.

¹⁸⁹ e.g., S12, M3. Some publicity was given in London to the work of reassurance done by custody visitors during the 2011 riots: “Independent Custody Visitors have been making extra visits to custody suites across London to ensure that detainees are being properly treated and we are reassured that no problems have arisen to date.” <http://www.communitybarnet.org.uk/news.php/125/london-riots> accessed 04.01.2016.

¹⁹⁰ S7.

¹⁹¹ See text to notes 198-206.

Jane Warwick also told me about the special visit she made to Brixton police station after the death of Sean Rigg on 21 August 2008, which has enabled me to complete the account of this that I began in Chapter One.¹⁹² Ms Warwick was telephoned by the borough commander, who asked her to come to Brixton police station, as there had been a really serious incident. Ms Warwick made the visit alone. On arrival she was asked to view the area where Mr Rigg had died. She saw what was known as the “Cage”, an area just outside the custody block, where there were items of resuscitation equipment, and she also saw a corridor where more equipment, packaging, and London Ambulance Brigade materials were strewn around. Ms Warwick said that the commander told her that the equipment had been used in the great efforts they had made to save Mr Rigg’s life. She knew that there had been a death, but she was not told how it had happened. She did not meet any of the family, and Mr Rigg’s body had already been taken away: he had died about two hours before she arrived. Ms Warwick saw a Police Federation representative talking with the officers who had been involved. She found that the whole place was in lockdown, and that all the other detainees had been moved away.

Ms Warwick told me that she believed the police had called her to the station as part of what the police called their “openness and transparency”: and she realised that the police knew that there was going to be huge public concern. I asked Ms Warwick if she felt there was anything else she could have done

¹⁹² See Chapter One, text to notes 130-136.

that evening. She told me that, because she had no power, there was nothing else she could have done.

Ms Warwick told me that she did send a report on her visit to the scheme organisers,¹⁹³ but that she had not kept a copy. I showed her the words attributed to her in the Metropolitan Police Service report of the incident,¹⁹⁴ which was referred to in the IPCC report,¹⁹⁵ where she was quoted as having said she was “content with what she had seen” and that there were “no issues”. Ms Warwick told me she did not use expressions like that. The report failed to state what it was that Ms Warwick was alleged to have seen and been content with: all she had seen was equipment and packaging. As far as she knew, neither the police, nor anybody else in authority, publicised the fact that she had made the visit and made a report. The first published reference to her visit was the note in the IPCC report. Ms Warwick was not asked to take part in either of the IPCC investigations.

Why did the police call in this custody visitor? The visitor thought that the police were trying to reassure her that everything had been done to save a detainee’s life. But she could not confirm that contention, because all she saw was the equipment that the police told her had been used, and its packaging. However, the police report of her visit,¹⁹⁶ which she did not see until I showed it to her, conveyed the message that she thought that all had been well.

¹⁹³ At that time, the Metropolitan Police Authority.

¹⁹⁴ 590102014141: L41 Rigg Investigation – MPS – 22.08.2008: IPCCY2254 received from the IPCC, not available on the internet.

¹⁹⁵ IPCC Report R3, Report of the independent external review of the IPCC investigation into the death of Sean Rigg: Review_Report_Sean_Rigg.PDF accessed at ipcc.gov.uk on 23.01.2014.

¹⁹⁶ Report cited at note 194.

Unless one takes the view that Ms Warwick is mistaken about what she said on that occasion, which I personally doubt, given the clarity of her recollections and remarks on the matter, it appears that someone invented remarks that Ms Warwick was supposed to have made, which were thoroughly misleading about her reaction to the aftermath of Mr Rigg's death.

In the terms of Packer's criminal justice models, the police called in the visitor, and maybe also invented Ms Warwick's remarks, in order to put a crime control spin on the evening's events, i.e., to reduce criticism of the police about the death. The police were trying to achieve the same result, about the same subject, deaths in custody, with visitors at team meetings in the area studied.¹⁹⁷

I now turn to the more general application of the claim that the scheme reassured the public. As with the special visits, this must depend on whether the message got through. Publicity about the scheme was very sparse. All the visitors I interviewed told me that there was very little public awareness of custody visiting. Some defence solicitors said they had never met custody visitors, and one of them said:

"For the five years I was in custody suites, a number of times a week, I bumped into visitors once, maybe twice."¹⁹⁸

¹⁹⁷ See Chapter Five, text to note 202. This also brings to mind the doctoring of statements by the police in the Hillsborough affair. Report of the Hillsborough Independent Panel (HMSO 2012) Chapter 11.

http://hillsborough.independent.gov.uk/repository/report/HIP_report.pdf accessed 15.06.2016

¹⁹⁸ L6.

This quote shows how far below the radar custody visiting was. Some of the custody staff told me that they first found out about custody visiting when visitors turned up at the station during their shift. An arresting officer told me during an observation at a custody block that he had done the work for six years, and never before met a custody visitor.¹⁹⁹ Solicitors, custody staff and arresting officers are people one might expect to know about custody visiting, but they knew little or nothing about it. *A fortiori*, it is very unlikely that members of the general public, who did not have a special interest, knew anything about custody visiting, and therefore it is hard to see how custody visiting could have reassured the general public about conditions in custody, or how it could have affected their views in any way. In any case, little information is available about what the public think about custody. Criminal justice textbooks do not cover the issue of public confidence in custody or in custody visiting.²⁰⁰ Specialist books, articles and reports do not address the issue either.²⁰¹ Where surveys do address these issues, the respondents are

¹⁹⁹ For good measure, he added that too much was done for the “prisoners” anyway.

²⁰⁰ For instance, there is nothing in: Andrew Ashworth and Mike Redmayne, *The Criminal Process* (4th edn OUP 2010); Malcolm Davies, Hazel Croall and Jane Tyrer, *Criminal Justice* (5th edn Pearson 2015); Nicola Padfield, *Texts and Materials on the Criminal Justice Process* (OUP 2008); Robert Reiner, *The Politics of the Police* (4th edn OUP 2010); Sanders et al [n 101], Skynns (n124); Lucia Zedner, *Criminal Justice* (OUP 2004). Tim Newburn (ed) *Handbook of Policing* (2nd edn Willan 2008) 27 does place lay visitors “among attempts to allay public concern by providing ... ‘independent’ scrutiny of police stations”, but gives no detail about the issue and no evidence of the outcome of the policy.

²⁰¹ For instance: Ben Bradford and Andy Myhill, “Triggers of change to public confidence in the criminal justice system: Findings from the Crime Survey for England and Wales panel experiment”, *Criminology and Criminal Justice* 2015 15 1 23; Katy Sindall, Patrick Sturgis and Will Jennings, “Public confidence in the police: A time-series analysis”, *British Journal of Criminology* (2012) 52 4 744; Jonathan Jackson, Ben Bradford, Betsy Stanko and Katrin Hohl, *Just Authority? Trust in the Police in England and Wales*, (Routledge 2013); Jonathan Jackson and Ben Bradford, “Crime, policing and social order: On the expressive nature of public confidence in policing”, *British Journal of Sociology* (2009) 60 3 493; Ben Bradford “Voice, neutrality and respect: Use of victim support services, procedural fairness and confidence in the criminal justice system”, *Criminology and Criminal Justice* (2011) 11 4 345; Office for National Statistics, *Crime Survey for England and Wales FAQs*: <https://www.ons.gov.uk/surveys/informationforhouseholdsandindividuals/householdandindividualsurveys/crimesurveyforenglandwales/crimesurveyforenglandandwalesfaqs>. accessed 21.06.2016.

asked how *they* would feel about being detained in custody.²⁰² For this enquiry, the question would need to be how respondents think people who are actually detained in custody feel about the arrangements. I suspect that very few of the respondents to these surveys expect to be detained, and that even fewer of them have actually been detained in custody: they probably do not identify with people who are detained in custody,²⁰³ and the typical respondent tends to see detention in custody as something that only happens to other people,²⁰⁴ like AIDS or bankruptcy. As one custody sergeant put it to me:

“I think the public don’t care what the police do until you call 999. I think the custody visitors’ scheme is pretty much along the same lines really.”²⁰⁵

Whether they care or not, we do not know what the public think about the conditions of detention in custody. We know nothing about what people used to think about it, and we do not know whether they have changed their minds since hearing about custody visiting. There is, therefore, no evidence to support the claim that custody visiting reassures the community about custody, except for the very occasional instances of demonstrations at police stations.²⁰⁶

²⁰² Appendix 4, question 3, in Vanessa Stone, Deborah Agulnik, Catherine Grant and Alice Fitzpatrick, “Measuring public confidence in the Police” BRMB 2005 Report prepared for the Home Office:
<http://tna.europarchive.org/20100413151426/rds.homeoffice.gov.uk/rds/pdfs08/measuring-pub-conf-police05.pdf> accessed 20.10.2015.

²⁰³ AD told me that a typical response to his tweets about custody visiting was that detainees were being treated too well.

²⁰⁴ A point made by S8.

²⁰⁵ S2.

²⁰⁶ See text to note 185.

Finally, it is claimed that custody visiting contributed to police accountability.²⁰⁷ The scheme administrator told new recruits that the visitors provided information to the Police and Crime Commissioner, which the Commissioner used to hold the police to account,²⁰⁸ but he also told me in interview that the Commissioner in the area studied had never used visitors' reports for this purpose,²⁰⁹ and I have not seen anything published by the Commissioner in connection with custody visiting that could remotely be described as holding the police to account. The public therefore had no way of finding out about any of this, and the process of accountability could not be described as democratic, beyond the stark fact that the Police and Crime Commissioner is an elected official. The scheme administrator, a member of the Police and Crime Commissioner's office, did use some of the information privately to correct behaviour by the police.²¹⁰ To that undetectable extent, and to that extent only, the police were being held to account.

In more general terms, the Police and Crime Commissioner and the police liked to point to visitors as independent observers of police conduct, providing what they called "transparency". Whether visitors were independent is very doubtful, and their socialisation led them to adopt police values, or confirmed them in that mindset.²¹¹ The quality of transparency was therefore being filtered through a lens which transmitted an image which never changed, an

²⁰⁷ 2001 Home Office Circular para 4.

²⁰⁸ See Chapter Five, text to note 72.

²⁰⁹ AD interview. Katie Kempen asked a colleague to provide me with evidence of this from another area, but it has not been produced.

²¹⁰ See Chapter Five, text to note 188.

²¹¹ See Chapter Five, text to notes 228-229.

image which was always positive about the police, and an image which never contained any significant detail.

Conclusion

The scrutiny carried out by custody visitors centred on meeting detainees. We have seen how those meetings failed on many levels. But what of the detainees the visitors did not see, either because the police prevented the visitors from seeing them, or because the detainees did not want to see the visitors? These detainees could have things to complain about, but may have felt too vulnerable to speak out. Detainees were not able to evaluate whether their rights were being respected, because many of them had little idea what those rights were, and equally little idea of the limits on what the police were allowed to do. And their discussions with visitors were not likely to be fruitful, because the visitors were not well versed in those rights either, as a result of their socialisation, the lack of proper training, and the restrictions on what they can do. If the restrictions were lifted, and the visitors were properly trained, they could communicate better with detainees, and ask more meaningful questions of both the police about all the detainees, including those they do not speak to. That would be a great improvement on what I observed. Visitors would need to be strongly motivated and brave enough both to ask the questions and to report their findings: and they would need to be confident that their reports would be acted on effectively.

I have shown that custody visiting was either likely to be ineffective, and that, in some of the cases where I had interviewed detainees, it actually was ineffective. This ineffectiveness can be highlighted further by revisiting the power dynamics of custody in the light of my findings. Visitors were unable to achieve satisfactory results with the tasks that they were allowed to perform. There were many tasks they were not allowed to perform. They could achieve nothing at all about issues such as finding out why an arrest had been made and when the charge or release decision might be made, let alone the much more difficult question of whether the police were carrying out an investigation fairly. The visiting was a function of crime control, in that it made no impact on how the police ran custody; and custody itself is a crime control environment.

This systematic failure was not produced by piecemeal lack of attention to the welfare of detainees. It is much more likely to have been the result of deliberate policy, driven by the strong forces of crime control ideology and the power of the police. To draw on Lukes again, the power of the police allowed the visitors to do just so much and no more, prevented them from carrying out proper scrutiny, and kept many important issues off the agenda. Other research shows that the police were quite ready to use arrest and detention in custody to harass people against whom there was no evidence, leading to lengthy periods of detention and of police bail; to restrict access to detainees by lawyers and appropriate adults; and to discourage detainees from consulting lawyers. The police, it seems, generally seek to undermine due process mechanisms where they are perceived to be getting in their way, and there is no reason to expect the police to treat visitors any differently. In any case, the design of custody visiting has never been in the hands of people

with a due process approach.²¹² The people who run custody visiting now are the Police and Crime Commissioners, who have been elected on a populist mandate to reduce crime,²¹³ and are therefore not over-concerned with how the police treat detainees.

Custody visiting was ineffective as a regulator, and it also failed to achieve most of the purposes claimed for it in the official literature. But the claim that custody visiting reassures the public does throw the operation of crime control ideology and police power into vivid relief. We have seen how the police seek to conscript the visitors to spread the police line about a death in custody.²¹⁴ This is the exact opposite of the role that custody visitors should play as regulators, which is to hold the police to account. The primary purpose of that regulation would be to reduce the incidence of the worst consequence of police misconduct, deaths in custody. None of the police and custody staff I interviewed thought that police behaviour was altered by custody visiting, or that it needed to be, and some visitors took the same view.²¹⁵ The evidence, such as it is, makes it impossible to say whether custody visiting actually did contribute to reducing the numbers of deaths in custody, or whether it was likely that it contributed to a reduction. One interpretation of the evidence could be that the ineffectiveness of custody visiting, with its existence providing an argument against the need for greater regulation, has made deaths in custody not less likely, but more likely.

²¹² See Chapter Three, text to notes 135-136 and 179.

²¹³ Robert Reiner, "Power to the People", in Lister M and Rowe M (eds), (n 162) (Routledge 2016) 132ff.

²¹⁴ See Chapter Five, text to note 202.

²¹⁵ See Chapter Five, text to notes 145-151.

Neither detainees, the police and custody staff, or lawyers, saw custody visiting as legitimate, and the general public knew so little about it that they could not form a view. That leaves just the managers and the visitors thinking that custody visiting is doing some good, which gives it, at least for them, a veneer of legitimacy. If those few people do not see that it is actually achieving next to nothing, and if nobody else either knows or cares, the consequence is that custody visiting is actually counter-productive to the purposes that it should be serving. That thin veneer of legitimacy disguises the need for fundamental reform, which I discuss in the next, and final, chapter.

CHAPTER SEVEN

CONCLUSIONS AND RECOMMENDATIONS

Custody visiting has been neglected in the study of criminal justice, and very few members of the general public have ever heard of it. This thesis seeks to provide an understanding of this curious phenomenon. Custody visitors enter one of the state's secret places, and there they observe the interaction between detainees and the police. There is uncertainty about the real purpose of the visits, and there is no publicity about the details of the visitors' reports. I embarked on this enquiry after working as a visitor myself. I have analysed the history of the scheme by desk research and carried out a detailed case study of a local scheme, and I have gone further afield for some of the research, accumulating a very large amount of data, including archival research into the distinctive Lambeth lay visitors scheme, and interviews with the key figures of Michael Meacher and Jane Warwick. This has enabled me to make findings about custody visiting from the angles of state policy, visitors' attitudes, and the effectiveness of their work, drawing on the concepts of power; socialisation; Herbert Packer's crime control and due process models and the allied concept of balance; independence, combined with neutrality and impartiality; legitimacy; accountability; and effectiveness. I have shown how state policy has neutered custody visiting over the last 35 years;¹ how the visitors were not independent, and that their attitudes were aligned to those of the Police and Crime Commissioner and the police;² and how the

¹ Chapter Three, *passim*.

² Chapter Five, text to notes 228-229.

work of custody visiting was ineffective, in that it did not fulfil any of its various purposes, at least not to a degree discernible by the current study.³

This chapter sets out the answers to the research questions; reviews where this research sits in the wider literature on police regulation; notes the limitations of this research and the scope for further research; and discusses whether, and if so how, the current system could be rebuilt to provide effective regulation, identifying the radical changes that would be necessary. The chapter concludes by explaining how, politically, those reforms could be achieved.

Answers to the research questions⁴

I first sought to establish the need for independent scrutiny and regulation of police behaviour in custody blocks. Custody is a pivotal part of the criminal justice system, but the presumption of innocence, which is thought to be one of the key features of criminal justice, does not apply in custody blocks,⁵ and the power of the police is paramount.⁶ Power is the single most important concept identified in this research. The power of the police operates on all

³ Chapter Six, conclusions.

⁴ The research questions are set out here again:

Research Question One: Could custody visiting make a more effective contribution to the regulation of police detention?

Research Question Two: What is the relation between custody visiting and police mistreatment of detainees, including mistreatment that ends in their death? Why is this not mentioned in the official literature?

Research Question Three: To what extent is custody visiting independent, in accordance with its branding and statutory obligation?

Research Question Four: To what extent is custody visiting effective, both as a regulator, and according to the claims made for it in the official literature?

Research Question Five: Are the values of custody visiting in practice closer to the due process model or the crime control model?

⁵ See Chapter One, text to notes 48-57, and Chapter Six, text to notes 15-25.

⁶ See Chapter One, text to notes 14-73.

those who visit their territory, the custody block, including the custody visitors. This is Steven Lukes' three-dimensional power, which operates to influence people's behaviour, often through the means of socialisation, without any exercise of that power, and without there being any overt conflict.⁷

Regulation of police behaviour in custody blocks is largely provided by self-regulation, which is simply not adequate.⁸ I believe that some of the independent scrutiny and regulation needed could be provided by custody visiting. Indeed, in the form in which it was born in 1980, custody visiting was rather a good idea, and it could have provided just that. But while some of the earlier models of custody visiting had a regulatory purpose, governments and the police have prevented it from having that function. For the state, the principal purpose of custody visiting is to promote confidence in the police, not to safeguard detainees.⁹

As is clear from the findings I made from my observation and interviewing, there are very serious, if not fatal, deficiencies in the scheme. The visitors were not independent, as they needed to be, and are required by statute to be. The visitors tended to start with attitudes more favourable to the police, and were subjected to completely mono-cultural socialisation by the Police and Crime Commissioner and the police. Custody visitors were not professionally trained to understand the world of custody, and as a result they were unable, as well as unwilling, to challenge the police.¹⁰ The police have

⁷ See Chapter Two, text to notes 36-45.

⁸ See Chapter One, text to notes 74-90.

⁹ See Chapter Three, text to notes 67-74 and 190.

¹⁰ See Chapter Five, text to notes 228-229. This is the answer to Research Question Three.

all the power in the custody block, and the visiting work was not effective to achieve either the purposes of regulation or those other purposes claimed for it in the official literature. There were restrictions on what the visitors could see and do, and those restrictions, and the practices they followed, reduced their chances of achieving any regulatory purpose, let alone of making any impact on the death in custody figures.¹¹ As regards the official claims, there was simply little or no evidence to substantiate them.¹² In terms of Packer's models of criminal justice, the scheme's orientation was crime control. The scheme did not prevent the police from operating as they wished, and, by default, giving priority to police efficiency in processing suspects over concern for their welfare.¹³ The implications of how criminal justice values operated in custody visiting are discussed further in the concluding section of this chapter.

I have shown that what should be the principal purpose of custody visiting, the safeguarding of detainees from mistreatment by the police, has been downgraded, and that the issue of police mistreatment that can culminate in the death of detainees has been almost completely obliterated, both in the official literature and in the minds of the visitors.¹⁴ My explanation for this is that the scheme is dominated by the police, and that they sideline the issue as much as they can. Their policy on how to deal with custody visitors about deaths in custody is demonstrated by the evidence I have gathered about the aftermath of the death of Sean Rigg¹⁵ and my observation of team meetings.

¹¹ See Chapter Six, conclusions. This is the answer to Research Question Four.

¹² See Chapter Six, text to notes 180-211.

¹³ See Chapter Five, text to note 228 and Chapter Six, conclusions. This is the answer to Research Question Five.

¹⁴ See Chapter Three, text to notes 159-160 and Chapter Five, text to notes 144-150 and 226.

¹⁵ See Chapter Six, text to notes 192-197.

The police say as little as possible about the subject. When they do have to say something, they claim that deaths are not their fault, ignoring the judicial process and the conclusions drawn by coroners and juries, and they ask visitors to help them put over their case.¹⁶ It is not surprising that the police do not wish the subject to be mentioned any more than is absolutely unavoidable, and that when it does have to be mentioned, the story is that they are not the ones to blame. In the context of custody visiting, where they have so much influence, it is not difficult for them to get their way.¹⁷ Inquests provide a brief interlude of an approach towards due process, but the police's orientation is always crime control.¹⁸

Where this research sits in the wider literature on police regulation

There have been no recent studies of custody visiting by scholars, for whatever reason. The academic literature on police regulation is the wider context where the subject can find its place. Throughout this thesis I have linked my empirical study to that wider literature. The focus has been on how custody visiting operates, why it operates in that way, and with what effects. In this concluding chapter, where I am seeking to chart a way forward for

¹⁶ See Chapter Five, text to notes 201-202.

¹⁷ When I was a visitor in Dyfed-Powys, the scheme administrator there asked me to write an article about my work as a visitor for publication in the local papers. I included in my draft a reference to the issue of deaths in custody. The draft was considered by the communications department of the police, who provided that service for the police authority. The police communications department deleted the reference to deaths in custody. I did not agree to publication in that form, so the article never appeared.

¹⁸ Inquests will be truly due process only when families are entitled to legal aid. The Hillsborough affair has confirmed the lengths to which the police pursue crime control policies about deaths for which they may be responsible:
<http://www.theguardian.com/uk-news/2016/apr/26/hillsborough-inquests-jury-says-96-victims-were-unlawfully-killed>. This paragraph has given the answer to Research Question Two.

custody visiting, it is helpful to engage with literature which considers the potential for greater regulation of policing, and practical proposals for achieving this. In their introduction to the collection of essays under the title *Regulating Policing*¹⁹ Ed Cape and Richard Young note the increase in the powers given to the police, and the need for regulation of the exercise of those powers. Young's chapter shows how many more penalties are now imposed by the police, rather than by a judge. Often these penalties, such as cautions and penalty disorder notices, are imposed after a spell of detention in custody, a setting where the evidence-gathering process is not subject to the safeguards of criminal procedure.²⁰ Cape's chapter is a wide-ranging survey of how the power of the police has increased: it has become lawful for the police to make an arrest in respect of any offence, where previously this had been the case only in respect of more serious offences; every arrest is validated by the custody sergeant; and all suspects are detained in custody for investigation. This massive expansion of the use of custody justifies the call for more, and more effective, regulation.²¹ In his chapter in the same book, Andrew Sanders points out that police behaviour in custody blocks is largely self-regulated, and in his view therefore unregulated, and that deaths in custody continue to occur. He sees the benefits that could come from more regulation, with greater dispersal of regulatory powers, and thinks that custody visitors could contribute to providing some of that dispersed regulation.²²

¹⁹ Ed Cape and Richard Young (eds), *Regulating Policing: The Police and Criminal Evidence Act 1984, Past, Present and Future* (Hart 2008).

²⁰ Richard Young, "Street Policing after PACE: the Drift to Summary Justice" in Cape and Young (eds) (n 19).

²¹ Ed Cape, in Cape E and Young R (eds) (n 19) "PACE Then and Now: Twenty-one Years of 'Re-balancing'".

²² Andrew Sanders, in Cape E and Young R (eds) (n 19) "Can Coercive Powers be Effectively Controlled or Regulated? The Case for Anchored Pluralism", 45, and Chapter One, text to notes 74-90.

In assessing what changes in the regulation of police behaviour in custody blocks might achieve, Sanders follows Adam Crawford's definition of regulation as monitoring behaviour against a standard ("goal") and enforcing that standard ("realignment").²³ Sanders notes that it is the police who do most of the monitoring, and that it is the police who operate most of the realignment mechanisms: and while coercive police powers are not usually used wrongly, there has to be a system for dealing with the wrongful behaviour which does occur.²⁴ In looking for a solution, Sanders²⁵ favours "anchored pluralism"²⁶ on the basis that the best way of making regulation more effective would be to disperse it among those who have an interest in making it more effective. Sanders would favour a network of intersecting regulatory mechanisms, but still anchored to the state, as had been suggested, but not followed, in the Patten Report for Northern Ireland.²⁷ He suggests the following groups for this role: legal advisors, appropriate adults, those he calls "watchdogs", social services, custody visitors, family and friends. He notes that these groups would have to be empowered, and would propose that they should be able to be present in the custody block whenever they wished, subject to some challengeable limits. And he would want greater empowerment of legal advisors, who should be there at the custody block, and immediately available. As Vicky Kemp has shown, the effectiveness of

²³ Sanders (n 22) 50, and Adam Crawford, "Networked governance and the post-regulatory state? Steering, rowing and anchoring the provision of policing and security" *Theoretical Criminology* (2006) 10 4 452.

²⁴ Sanders (n 22) 70.

²⁵ *ibid* 70-73.

²⁶ See Chapter Two, text to note 21.

²⁷ The Independent Commission on Policing in Northern Ireland, *Policing in Northern Ireland – A New Beginning* ("The Patten Report") (1999).
<http://cain.ulst.ac.uk/issues/police/patten/patten99.pdf> accessed 12.06.2016.

defence lawyers continues to decline, under the pressures brought to bear on them by the police and by government policy.²⁸ Even so, I agree with Sanders that custody visitors, educated to understand the role of lawyers, and working in a radically reformed system as set out below, could work effectively with lawyers.²⁹

Police regulation has also been discussed in the collection of essays *Accountability of Policing*.³⁰ Here, John Raine gives a cautious, provisional welcome to the new regime of Police and Crime Commissioners.³¹ However, Robert Reiner argues that the Police and Crime Commissioners have a populist mandate, which is to reduce crime. It is clear from his analysis that the mandate does not include concern for the welfare of detainees,³² and that one should not look to these commissioners for this sort of regulation. My findings about the role played in custody visiting by the Police and Crime Commissioner in the area studied are in tune with the view taken by Reiner.

In his chapter in *Accountability of Policing*, Richard Young shows the close connection between accountability and regulation, and the ideal should be that the regulatee should provide an honest and useful explanation for a decision taken.³³ He argues that self-regulation by the police has not worked

²⁸ Vicky Kemp, *Bridewell Legal Advice Study: adopting a "whole-systems" approach to police station legal advice* (Legal Services Commission 2013) 20: <http://www2.warwick.ac.uk/fac/soc/law/research/centres/accesstojustice/usefulresources/broadconsequences/blast-ii-report.pdf> accessed 10.06.2016.

²⁹ See text to note 61.

³⁰ Stuart Lister and Michael Rowe (eds), *Accountability of Policing* (Routledge 2016).

³¹ John W Raine, "Electocracy with accountabilities? The novel governance model of Police and Crime Commissioners" in Lister S and Rowe M (eds) (n 30) 111.

³² Robert Reiner, "Power to the people? A social democratic critique of the Coalition Government's police reforms" in Lister S and Rowe M (eds) (n 30) 132, 139.

³³ Richard Young, "The rise and fall of 'stop and account': lessons for police accountability" in

for “Stop and Account”. Looking for alternative sources of regulation, and in the light of the remarkable consequences of the mobile phone recording by a member of the public of the events leading up to the death of Ian Tomlinson, Young argues for the need for regulation by citizen-recording, with footage uploaded to a variety of media and regulatory platforms.³⁴ This could not be achieved by detainees, who are relieved of their mobiles on being booked into custody, a practice which is unlikely to change: but visitors could use their phones in this way. So, for example, visitors’ footage might be uploaded direct to a website run by the new national organisation I propose for them, and that new body could make use of the footage in its regulatory work.³⁵ The footage should not be immediately available to the public, because of data protection concerns about detainee privacy and the security of police custody blocks.

Another issue in police accountability, the handling of complaints against the police, is discussed by Tim Prenzler and Louise Porter in their chapter in *Accountability of Policing*. They write:

“Complaints can ... be used as a key learning tool to inform policing practices by modifying training and procedures in response to patterns of allegations ... ”³⁶

Lister S and Rowe M (eds) (n 30) 18, 18-21. This author also notes the use of regulation to make the most of good practice: see the text at note 55.

³⁴ *ibid* 38.

³⁵ See text before note 62.

³⁶ Tim Prenzler and Louise Porter, “Improving police behaviour and police-community relations through innovative responses to complaints” in Lister S and Rowe M (eds) (n 30) 49.

They stress the need for greater independence in the investigation of complaints. The link with custody visiting is that Michael Meacher MP suggested that visitors should have a role in pursuing police complaints, an idea which has been firmly rejected by policy-makers ever since.³⁷ I believe this would fit well with the visitors' work of regulation, and include it in my recommendations for reform below.³⁸

Limitations on this research and the scope for further research

The access to the area studied for this research was generally very open, and the work has been carried out on an in-depth basis. However, the research has been conducted in one area by one researcher. I have had to be careful to keep this project within manageable limits. One aspect which I have excluded is the consideration of visiting at custody blocks where people suspected of having committed terrorist offences are detained. Research about the effects of the special arrangements which have been made for visits by custody visitors³⁹ to these special blocks would be useful.

The Independent Custody Visiting Scheme operates throughout the United Kingdom. I have worked in one scheme in Wales and studied another in England. I noted that there were some differences between them, but the

³⁷ See Chapter Three, text to notes 10, 71-2.

³⁸ See text following note 65.

³⁹ See Chapter Three, text to notes 171-174.

differences were not about issues of principle. I have been told,⁴⁰ in very general terms, that there are wide differences between schemes. The question arises as to how much the findings of this research are likely to be true of other schemes. A starting-point is that the same statutory framework⁴¹ and the same code of practice⁴² apply to all the schemes. It is therefore likely that there are no differences between schemes about issues of principle. But it would be useful to have comparative material, not only from other parts of England and Wales, but also from Scotland and Northern Ireland, where similar schemes are operated. Beyond the United Kingdom, custody visiting is also found in some other countries,⁴³ and I have not looked at those: similarly, they could be subjects of further research. It could also be useful to look at and make comparisons with Joint Inspection Teams which inspect custody blocks,⁴⁴ lay observers who inspect the conditions in which detainees and prisoners are escorted and held in custody by contractors,⁴⁵ and the members of Independent Monitoring Boards who make inspections in prisons and immigration removal centres.⁴⁶ Beyond the criminal justice system,

⁴⁰ By Katie Kempen of ICVA.

⁴¹ Police Reform Act 2002 s 51.

⁴² 2013 Code of Practice.

⁴³ Schemes in the Netherlands, Hungary and South Africa were reviewed, along with those in the United Kingdom, in *The Impact of External Visiting of Police Stations on Prevention of Torture and Ill-Treatment*, (Council of Europe 1999). That information is somewhat dated now, and I have not seen any further information about the schemes in those countries. The Independent Custody Visiting Association (ICVA) has delivered training programmes about custody visiting in some countries, but I do not know whether this has led to schemes being set up in those countries.

⁴⁴ See Chapter One, text to notes 105-106.

⁴⁵ <http://layobservers.org/about-us/> accessed 26.05.2016. This webpage uses the term “prisoner” indiscriminately to refer to detainees as well as prisoners: see Chapter One, text to notes 48-50.

⁴⁶ <http://www.imb.org.uk/> accessed 21.06.2016. There is some useful literature about Boards of Visitors, the predecessors of the Independent Monitoring Boards, showing strong similarities in matters of structure, remit, ethos, accountability, independence and effectiveness: Mike Maguire and John Vagg, *The “Watchdog” Role of Boards of Visitors* (Home Office 1984); John Vagg, “Independent Inspections: the Role of the Boards of Visitors” in Maguire M, Vagg J and Morgan R (eds), *Accountability and Prisons: Opening up a Closed*

comparisons could be made with inspections carried out in environments with similar features, such as the arrangements for children who are looked after by a local authority, and residential homes providing care for the elderly.⁴⁷

As well as looking at custody visiting in different locations, research could also usefully be conducted in locations in the United Kingdom where there are known differences in the arrangements from those encountered in the area studied, with a view to studying the effects of those differences. The first difference of which I am aware relates to the organisation of the custody visiting schemes. In at least one part of the country, managing the volunteering aspects of the local scheme has been outsourced by the Police and Crime Commissioner to a voluntary organisation.⁴⁸ It would be interesting to know what effect that has on the ethos and effectiveness of the scheme. A second opportunity for comparison arises from differences in the organisation of the workforce in custody blocks. In the area studied, civilian custody staff have been hired by the police to act as detention staff and to carry out all the functions in the custody block except those of the custody sergeant, a process known as “civilianisation”, but these civilians continued to be managed by the police. In some other areas, the role of the provider of those staff members has been outsourced, a process known as “privatisation”. Layla Skinns noted that legal advice was more readily available in custody blocks where this

World (Tavistock 1985); and *Review of the Boards of Visitors: A Report of the Working Group chaired by the Rt Hon Peter Lloyd MP* (Home Office 2001).

⁴⁷ The Care Quality Commission hires and pays people known as “Experts by Experience” to inspect care homes: they have personal experience of caring and spend much more time on their visits. <http://www.cqc.org.uk/content/involving-people-who-use-services>: accessed 12.06.2016.

⁴⁸ In Dyfed-Powys, to, amongst others, PAVO (Powys Association of Voluntary Organisations): conversations with Dyfed-Powys visitor and PAVO officer,

privatisation had taken place than in custody blocks where it had not taken place.⁴⁹ It would be useful to find out whether privatisation had any effect on visiting. It is the detention staff with whom the visitors have to deal for most of the time during their visits, although the custody sergeant very much sets the tone.

Finally, there are the usual notes of caution about this kind of qualitative study. First, my observational work suffers from the same kind of limitations of custody visiting itself, in that I could not be everywhere at once, my observation periods were relatively brief, and the police (and others) may have altered their behaviour in my presence. Second, while the interviews provided many useful insights into the views and attitudes of the participants, it is unwise to assume that claims made in interviews are always reliable, or that interviews can ever nail down precisely what someone thinks and believes. Third, the sample of visitors interviewed was subject to a high degree of self-selection and cannot be regarded as representative: the way I see them is as providing insight into a range of experiences, attitudes and beliefs. Despite those notes of caution, there is no doubt that this study has collected far more empirical evidence on which to base its conclusions and recommendations than anything previously undertaken in this area.

Recommendations for Reform

The research question which remains to be answered is whether custody visiting could make a more effective contribution to the regulation of police

⁴⁹ Layla Skinns, *Police Custody: Governance, legitimacy and reform in the criminal justice process* (2011 Routledge) 114.

detention.⁵⁰ I believe that, with fundamental changes, custody visiting could achieve this, but before setting out my reform programme I will return to the issue of how to provide better regulation in custody suites, for which I have been drawing on the work of Andrew Sanders.⁵¹

My proposals for the reform of custody visiting which would fit it for this role involve fundamental change. There would need to be a careful reassessment of the basic principle of outsiders making random unannounced visiting, and the benefits of a patterned system, with a view to ensuring that the visitors' scrutiny could be as effective as possible. The basic principle is for the visits to be random, which means that any time and day has the same chance of being picked by the visitors. The other solution would be to seek to get the visits to conform to a pattern which resulted in the visits taking place at the times when they would be most effective. In the case study, visitors were found to visit whenever they like, and they preferred certain days and times. Their choices could not be interfered with if the random principle were followed. However, if the visits were patterned, some direction could be given to the visitors to achieve either true randomness or a pattern designed to ensure true effectiveness.⁵²

Establishing how to build on the principle of unannounced visits (whether patterned or random) would depend on a fundamental reconsideration of policy. The broad policy issues would be: how to deal with the power of the police; the purpose of the scheme, which depends on its ethos; the

⁵⁰ This is Research Question One.

⁵¹ Sanders (n 22).

⁵² See Chapter Six, text following note 42. The direction would be given by the new body, not the Police and Crime Commissioner: see text to note 67.

independence of the scheme; the recruitment and training of the visitors; better rights of access for visitors to the custody blocks and to the detainees; clear channels for reporting and publicity; having effective sanctions, and whether that could be achieved by publicity alone; and the overall effectiveness of the scheme as a regulator.

How to deal with the power of the police would be a key question in designing a new scheme. In the same way that power has been the most important concept in this research, dealing with that power would be the most important, and the most difficult, issue in the design of a new scheme. And the issue would have to be faced squarely and openly, as is certainly not the case at present, and it would have to be kept under constant and rigorous review. One would need to devise a scheme which the police would take seriously. I found that I only had to scratch the surface to find that the police have little respect for custody visiting.⁵³ To get the police to take custody visiting seriously, the visitors would need to be taken seriously by the state as regulators, and they would need to be given substantial statutory powers. This would in its turn enable the visitors to take themselves seriously, and to be prepared to challenge the police.

The ethos of the scheme should be focussed, in Packer's terms, on due process, the rights of the detainees, not on the crime control orientation, the convenience of the police. The purpose of the scheme would need to be firmly tied to its role as regulator of police behaviour. Its remit should be seen as the

⁵³ See Chapter Six, text to notes 85-87.

safeguarding of the welfare of detainees, and respecting them as suspects, not following police culture and denigrating them as “prisoners”,⁵⁴ and visitors should challenge that abusive culture. There should be open and honest acknowledgment that the ultimate purpose of custody visiting is to reduce the number of deaths in custody. The purpose of the scheme would not be to promote confidence in the police and reassure the community, unless the scheme’s findings backed that point of view: but, if the findings were favourable, they should be made use of and applied elsewhere where practices are found to be deficient. As Richard Young says, citing John Braithwaite *et al*:

“effective regulation requires not just critique and enforcement when things go wrong, but sharing and reinforcing of good practice where things go right.”⁵⁵

Full knowledge of the facts, derived from rigorous regulatory activity, would be the right basis from which to reassure the public about custody, in contrast with the current scheme, where the authorities seem to believe that the mere existence of the scheme is sufficient to reassure the public.⁵⁶

Custody visiting would have to be detached from the Police and Crime Commissioners. They are too close to the police, and they are not sufficiently focussed on the welfare of detainees. A new body would need to be set up, to operate nationally and locally. Visitors would be recruited by an independent

⁵⁴ See Chapter One, text to notes 49-52, and Chapter Five, text to notes 98 and 167.

⁵⁵ Young (n 33) 21.

⁵⁶ See Chapter Six, text to notes 198-206.

agency with a remit to find a genuine cross-section of people, without any short cuts via organisations well-disposed towards the police.⁵⁷ Custody visitors should have expertise, and they could gain that expertise from work in, or experience of, the criminal justice system. That work or experience would not disqualify them on the grounds of lack of independence and a more sophisticated means would have to be found to assess that quality. Lawyers could be recruited with an understanding of the custody issues, as has occasionally been done, with the agreement of the police, to monitor demonstrations.⁵⁸

The trainee visitors would need to be given a full briefing about custody by a range of the professionals who are involved, including defence lawyers and the police, and by those with experience of custody, former detainees. Visitors would in particular need to be fully briefed about deaths in custody and their aftermath, and the long delays before inquests are held.⁵⁹ I found that visitors do not have a high opinion of defence lawyers:⁶⁰ this probably arises from the fact that they do not understand their role. In a reformed system, the role of defence lawyers would be properly explained to visitors. Visitors would be able to work with defence lawyers in safeguarding detainees: visitors could telephone detainees' lawyers to update them after a visit.⁶¹ Generally, the training would be much more detailed, and a much more rigorous approach to the visiting style would be inculcated. Visitors would be expected to take a lot

⁵⁷ See Chapter Five, text to notes 46-50.

⁵⁸ See Liberty's *Report on legal observing at the TUC March for the alternative March 2011*: <https://www.liberty-human-rights.org.uk/sites/default/files/libertys-report-on-legal-observing-at-the-tuc-march-for-the-alternative.pdf>.

⁵⁹ See Chapter Five, text to note 214.

⁶⁰ See Chapter Five, text to notes 189-191.

⁶¹ A suggestion made by L6.

more time and care over the visits, particularly with the interviews with detainees. Visitors' reports would be fully detailed, and where possible accompanied by audio or video footage.⁶² Consideration would have to be given to paying visitors for the work. Visitors would need to have some kind of tenure: at present they have none at all.⁶³ In contrast with the current scheme, arrangements could be made enabling visitors to make visits to custody blocks in areas other than where they are members of a particular scheme, accompanied by a local visitor. The observations made by the visitors from a different area about the operation of the local scheme, and the discussions of those observations with the local visitors, would be passed on to the new national organisation, and would be useful in developing policy and best practice.

An important provision would be that visitors must be given pass codes or pass keys to custody blocks, with the right of the visitors to take the matter to a judge for immediate attention if access was delayed or denied. Another provision would be needed to give visitors the right to meet each detainee, subject only to an order of a superintendent⁶⁴ setting out the reason for the denial of access. Each meeting should take place in a safe, private consultation room, without the staff being able to overhear the conversation or watch the meeting. Information given by detainees to visitors would be subject to the same protection from forced disclosure as that given to lawyers.⁶⁵ If

⁶² See the suggestion of Young (n 33) at text to note 34.

⁶³ Chapter Five, text to notes 38-39.

⁶⁴ rather than as present, an inspector: L4 said that denial of access should be the responsibility of this more senior officer, and that it should be made as hard as possible to prevent visitors from seeing detainees.

⁶⁵ Another point made by L4.

detainees did wish to make complaints against the police, it should be the role of the custody visitors to facilitate the process. This can be contrasted with the present regime, where visitors have to refuse to get involved; they may, at best, advise the detainee to talk to a lawyer when many of them do not have lawyers; and visitors are then supposed to tell the custody sergeant that the detainee had spoken to the visitor about wanting to make a complaint.

The independence issue could be tackled by setting up, by statute, a new nationwide body to be run by visitors, with local schemes operating from their own premises, each with their own administrative support. The new nationwide body and the local schemes would have to be funded by the state, but they could be made more independent of the state than, for instance, the Independent Police Complaints Commission, by reporting to a House of Commons committee, rather than to ministers.⁶⁶ The new national body would publish its own reports based on thorough investigations by visitors. High-profile publicity could be a sufficient sanction, with effective means being found to bring these matters to public attention, including the prominent display of notices at the custody block, similar to the notices about hygiene which food outlets are required to display.⁶⁷ but the effectiveness of this would need to be kept under review. The Independent Custody Visiting Association, ICVA, would need to be dissolved, as its members, the Police and Crime Commissioners, would no longer be responsible for custody visiting. Those employed by ICVA and the Police and Crime Commissioners to operate custody visiting schemes might apply to work for the new national and local

⁶⁶ A suggestion made by Lord Harris of Haringey at a lecture at the University of Birmingham on 08.10.2015.

⁶⁷ See Chapter Six, note 159.

bodies: care would have to be taken to prevent the new bodies being taken over by those who would not sympathise with the change in policy and ethos, avoiding regulatory capture.⁶⁸ As the scheme would be democratically accountable to Parliament, a national accountability mechanism would be in place, and there would also be machinery providing local accountability, by reporting to local government committees. Visitors, and their national and local organisations, could contribute to debates about how custody is used, the numbers of people detained, the length of their detention, in what sort of cases arrest and detention are necessary, and how legal advice can be made much more available to detainees, for instance by contributing to inquiries by relevant Parliamentary committees, and by responding to government consultations.

That is how I would like to rebuild custody visiting. Primary legislation would be needed to set up the new arrangements, and, for the detail, there should be statutory instruments which would give the detail the force of law which is absent from the current code of practice and has been absent from all previous circulars and codes.⁶⁹ Thought would have to be given to funding. My impression is that the current arrangements are run so as to be as cheap as possible: the total national expenditure on custody visiting appears to be about two million pounds.⁷⁰ However, in the current climate it is unlikely that any more money would be found. It might be possible to set up improved arrangements with the support of a voluntary organisation rather than paid officials.

⁶⁸ See Chapter Two, text to notes 75-76.

⁶⁹ See Chapter Three, note 164-165, and text to note 165.

⁷⁰ Based on figures from the area studied.

That leaves the key question of whether all these improvements would give custody visiting the effectiveness and regulatory clout it would need to make an impact on police behaviour and reduce the number of deaths in custody. Here it may be helpful to think about just some of the findings in my empirical research regarding the absence of effectiveness. All of the following would need to be reversed. The police did not worry that a visit might take place while they were on duty, and at least one did not think the visitors were able to assess what was going on in their block. The police could predict the likely times when visitors might arrive,⁷¹ they could delay the visitors' admission to the custody block,⁷² and they could deflect the visitors from seeing certain detainees.⁷³ Neither the visits nor the reporting system caused police behaviour to be changed or aligned. Custody staff could overhear the visitors' conversations with the detainees, making it very unlikely that detainees would dare to disclose any significant criticism of the staff. The staff could see and hear for themselves how ineffective the visitors' meetings with the detainees were, which the custody sergeants, with their experience and understanding of what was happening on their block, also knew. They knew which aspects of custody were beyond the visitors' remit, and they found that the visitors made no challenges. They knew that no information critical of the police ever reached the public as a result of the visiting scheme. They attended meetings with custody visitors on their own territory. The cumulative effect of these deficiencies being remedied, and the fundamental change in the management, orientation and ethos of custody visiting, would, I believe, go a

⁷¹ See Chapter Six, text to note 42.

⁷² See Chapter Six, text to notes 45-50.

⁷³ See Chapter Six, text to notes 58-63.

long way to making it more effective as a regulator of police conduct in custody blocks.

Final Remarks

To conclude this thesis, I want to give some thought to the role the state takes in custody visiting, and why the state allows it to continue. In Chapter Three I noted that the police gave custody visiting, in terms of Packer's models of criminal justice, a crime control orientation. I questioned why the police did not oppose custody visiting altogether, when it appeared to retain some due process features.⁷⁴ In the case study I confirmed that some due process features were found in the appearance of custody visiting, but that its reality was crime control. The existence of the scheme, and the fact that visitors make checks on the conditions in custody, give custody visiting the appearance of due process. The reality of custody visiting as crime control is exposed by the attitudes of the visitors and the ineffectiveness of the work. Custody visiting never makes any waves, never criticises the police, does not cost very much, and never causes the state any problems. Custody visiting poses no threat to the state institution it should be regulating. The state has made a thorough job of neutering custody visiting. This suggests that the state keeps custody visiting in operation because it sees no need to get rid of it.

The argument can be taken a step further. Andrew Sanders, Richard Young and Mandy Burton analyse the effect on the police of due process values in the criminal justice system. They say the effect can either be inhibitory or

⁷⁴ See Chapter Three, para in text following note 203.

presentational. If the effect is inhibitory, due process values prevent the police from doing something. If the effect is presentational, due process values do not stop the police from doing something; but they do have the very significant effect of legitimising police conduct.⁷⁵ Custody visiting is not effective to inhibit the police in their treatment of detainees, but at the same time it gives the false impression that it inhibits the police. Custody visiting therefore achieves one highly significant result: that of helping to legitimise everything that goes on in custody blocks.

The most likely explanation is, therefore, that the state allows custody visiting to continue not only because it does not want to get rid of it, but because of a positive reason: it actually wants to keep it. Behind and beyond the official purposes of reassuring the public about custody and promoting confidence in the police, which custody visiting fails to achieve anyway,⁷⁶ the state has found that its legitimising function fulfils its deeper purpose, something to be taken very seriously: the purpose of justifying the absence of further regulation. The state can point to the custody visiting scheme, and the state can say that, because of the scheme, there is no need for more regulation of the police, those powerful agents of the state, operating in the state's secret places, custody blocks.

However, this analysis attributes to the state an irrational and malevolent personality, and treats it like a monolith. Scholars have looked at the dispersal

⁷⁵ Andrew Sanders, Richard Young and Mandy Burton, *Criminal Justice*, (4th edn OUP 2010) 67-8, and, on the gap between due process rhetoric and crime control reality, 741ff.

⁷⁶ See Chapter Six, text to notes 198-206.

of the means of delivery of the state's policy,⁷⁷ and seen this pluralism as going beyond the mere modes of delivery and constituting a new form of state, as a process, with contradictions as well as convergences, and

“a site (or series of sites) where claims for social justice are forged, fought over, resisted and sometimes implemented.”⁷⁸

One part of the state can hold another to account: for instance, Parliamentary Select Committees summon ministers. So, parts of the state other than the government could look at custody visiting and possibly with different eyes: but only if the subject is brought to their attention. Members of Parliament have never been informed about custody visiting, and do not know that the system's pretensions to being legitimate,⁷⁹ or, at best, to not being illegitimate, are unjustifiable.⁸⁰ The legitimising effects of custody visiting erect a barrier to the greater regulation of police behaviour in custody blocks. Those legitimising effects depend on the survival of what I believe I have shown is a false picture of custody visiting. E P Thompson made many trenchant criticisms of the operation of the law in the eighteenth century, but he also wrote:

⁷⁷ See Chapter Two, text to notes 20-24.

⁷⁸ Roy Coleman, Joe Sim, Steve Tombs, David Whyte, “Introduction: State, Power, Crime” in Coleman R, Sim J, Tombs S, Whyte D (eds) *State Power Crime* (Sage 2009) 9, 14.

⁷⁹ Being accepted, taken for granted, is sufficient to be legitimate : see Chapter Two, text to note 120.

⁸⁰ See Chapter Six, text around note 164.

“If the law is evidently partial or unjust, then it will ... legitimize nothing. It cannot be seen to be [just] without upholding its own logic and criteria of equity: indeed, on occasion, by actually *being* just.”⁸¹

Similarly, the state institution of custody visiting cannot legitimize anything if it is not effective in ensuring that the police respect the rights of detainees and safeguard their welfare. But its ineffectiveness is not something that Members of Parliament or the wider public could know about, because it operates in the state’s hidden places, and custody visitors themselves are prohibited from publicising how it really works. As has been shown, it is unlikely that any visitors would have wanted to publicise it in that way, largely because of their socialisation: and, until now, no in-depth research has been carried out and published. So the appearance of the legitimacy of custody visiting has been maintained without there being any substance. My research has revealed the lack of substance, and publicising the research will cause it to lose the appearance of legitimacy as well. The loss of legitimacy could lead to Parliament, maybe through the Home Affairs Committee, holding the government to account about the issue, and that might lead to the reform of custody visiting. My proposals may meet the same fate as those made by Meacher and Scarman, and be watered down, postponed and neutered, but if my thesis is brought to the attention of Parliament, that would at least open a window for the consideration of some measure of progressive reform.

⁸¹ E P Thompson, *Wigs and Hunters: The Origin of the Black Act* (Breviary Stuff Publications 2013) 205. The emphasis is in the original.

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