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Custody visiting: The watchdog that didn't bark

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Abstract

This article argues that in qualitative research into the work of a regulator, it is as important to watch out for that regulator's omissions and silences as it is to examine what the regulator does and says. The argument is illustrated by data drawn from a study of the Independent Custody Visiting Scheme, the purpose of which is (or should be) to safeguard detainees and to deter police from misconduct which might lead to deaths in custody. Research into the scheme included using the technique of watching out for what the visitors did not do and did not say. The data obtained by this method are interpreted through the lens of Lukes' theory of power to suggest that this watchdog has been debarked as a result of the power of the police.

Keywords

Custody visitor, observation, omissions, police, power, regulator

Gregory (Scotland Yard detective):	Is there any other point to which you would wish to draw my attention?
Holmes:	To the curious incident of the dog in the night-time.
Gregory:	The dog did nothing in the night-time.
Holmes:	That was the curious incident.
	(Sir Arthur Conan Doyle, *The Adventure of Silver Blaze*)

Introduction

Qualitative research typically focuses on observing what happens: what people do, and what they say. This article champions the use of the technique of observing, or rather

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watching out for, what does not happen, what people do not do, and what they do not say.[1] It illustrates this technique by evaluating the work of a police regulator, the Independent Custody Visiting Scheme. This methodological approach requires the researcher to start by thinking through systematically what ought to be happening and what ought to be done and said, as it is harder to spot significant absences if the researcher is not sensitised beforehand to watch out for these absences. A first step, then, is to construct an ideal model of custody visiting.

An ideal model of the custody visiting scheme

The essence of the Custody Visiting Scheme is that lay volunteers make visits to police custody blocks in order to check on the conditions under which detainees are held. In constructing an ideal model of the scheme, it is important not to be confined to its officially stated aims or procedures as laid down by the Home Office or in legislation. This is because, as we shall see, these sources of norms are themselves riddled with significant omissions. Rather, the ideal model developed here is based on the intentions of its original proponents, Michael Meacher and Lord Scarman.

Custody visiting was first publicly promoted by Michael Meacher MP in evidence to the House of Commons Home Affairs Committee during their investigation into deaths in custody in 1979–1980 (Home Affairs Committee, 1980). Meacher's proposal was that members of the public, including lawyers, should make random unannounced visits to police stations and report on the welfare of detainees. Meacher's ideas were adopted by Lord Scarman in his report on the Brixton Riots (Scarman, 1981). Both Mr Meacher's proposals and those of Lord Scarman were made in the context of concern about deaths in custody. The government declined to implement Scarman's recommendations and, five years later, established instead an informal scheme known as 'lay visiting'.

The current system of custody visiting, known as the Independent Custody Visiting Scheme, is statutory and was established in 2002. It operates in all parts of England and Wales, with similar schemes in Scotland and Northern Ireland. Each local scheme is run by the Police and Crime Commissioners (Police Reform Act 2002, s 51, as amended). Guidance is provided by the Independent Custody Visiting Association (ICVA) whose only members are Police and Crime Commissioners. Each Police and Crime Commissioner is elected locally to secure the maintenance of the police force for that area, to secure that the police force is efficient and effective, and to hold the relevant chief constable to account for the exercise of their duties (Police Reform and Social Responsibility Act, 2011, s1). Police and Crime Commissioners therefore perform the function of one of the regulators of the police. The Home Office are the key sponsors of custody visiting; they devised the original scheme, and they have maintained and updated it.

The scheme is not labelled a regulator in the official literature, but it clearly is a regulator inasmuch as it forms part of governance aimed at ensuring that the police adhere to standards set for the safeguarding of detainees. Indeed, custody visiting forms part of the regulatory system known as the National Preventive Mechanism (NPM), which is established under the United Nations Treaty known as OPCAT, the Optional Protocol against Torture and other Cruel, Inhuman or Degrading Punishment. It is also said to provide Police and Crime Commissioners with the information needed to enable them to hold the police to account for what happens in custody blocks.

Custody blocks constitute some of the state's secret places and are very much the police's territory. Custody visitors are the only outsiders who routinely see detainees in their cells. Regulation of police conduct in custody blocks is largely self-regulation. Deaths in custody continue to occur, with 20 or more per year from 2014 to 2018 (INQUEST, 2020),[2] and there were 63 apparent suicides after police custody in the twelve months to 31 March 2019 (Independent Office for Police Conduct, 2019). These statistics, and the research done, in particular by Kemp (2010, 2012, 2013, 2014) and Skinns (2011), show that all is not well in custody, with significant evasions and breaches of detainee safeguards, such as the right to see a legal adviser and to be detained only so long as is necessary. In terms of Packer's models of criminal justice, while the custody block is very much a crime control area focused on building a case against detainees, the visiting scheme in theory imports some element of due process (Kendall, 2016; Packer, 1968, 2018). Safeguarding the welfare of detainees should therefore be the core purpose of the Independent Custody Visiting Scheme, and the scheme should make a significant contribution to police regulation.

The ideal model of custody visiting was accordingly derived from the purposes of custody visiting as being to safeguard detainees and to deter police misconduct, with those purposes expressed in desired outcomes and the tasks necessary to achieve those outcomes.

The basic contours of this model were fed into the design of the data collection instruments. For instance, the prompts used in preparing for each observation of visitors included a reminder to watch out for failures of visitors to challenge the police where there were grounds for making a challenge. The ideal model was then further refined iteratively in the light of periodic reviews of the data.

Researching custody visiting

Despite its potential importance, there is little discussion of custody visiting from standpoints other than those of the official literature. Previous research has, in almost every case, been limited to assessing whether the scheme was working well on its own terms (focused, for example, on whether unannounced visits were taking place reasonably frequently), not whether it was effective in contributing to the safeguarding of detainees. Earlier studies (there have been none since 1998) were based on published information, questionnaires and telephone surveys, only one (Walklate, 1986) on face-to-face interviews, and none on observation. The need for an in-depth contemporary exploration of custody visiting is therefore clear.

The case study

Custody visiting is a complex phenomenon, which puts the visitors, who are part-time 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 group. 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, which this study sought to evaluate. The qualitative research design adopted was driven by the need to capture this complex range of interactions with a view to informing an evaluation of the regulatory performance of the scheme.

The resources available for this study were one doctoral researcher working for three years. A case study approach, with the focus on one local visiting scheme operating alongside a major and very diverse urban police force located in England, was therefore the most realistic way to carry out an in-depth study. Interviews and observation were the key methods deployed. Data about a much larger number of local schemes could have been gathered only by the method of survey and questionnaire. It would have been difficult to contact all the categories of people found in custody blocks for a survey, particularly the detainees. It was especially important to listen to detainees, as the visiting scheme is supposed to be for their benefit, and their views about the visiting scheme have never been heard before; and, as it turned out, detainees had very significant evidence to give. Surveys also have some obvious limitations in that they usually prompt yes/no answers or graded expressions of agreement or disagreement with propositions. It was important in this study to find out how the interviewees approached the answers to the questions and why they approached them in a particular way, and to have conversations with them in which ideas could be developed and incidents recalled, and, in the case of police officers, to find out what their real views were, rather than the party line. This method also made it easier to watch out for what the interviewees did not say and to investigate those silences.

It would be a mistake to see this as a purely localised case-study. Rather, custody visiting was theorised and studied as embedded within a national regulatory context. To that end, the history and politics of the scheme were thoroughly investigated, including through observation of national ICVA conferences and interviews or discussions with some key individuals operating beyond the local level. Here too omissions and silences were investigated. Post-doctoral work extended this aspect of the study by examining the reception of the main research findings by the authorities. The Fieldwork Table documents the interviews and observation carried out during the main data collection period between January 2014 and March 2016.

Fieldwork table

Interviews.

Interviewee type	Number	Average length	Total hours
Visitors	23	1 hour	23 hours
Detainees	17	20 minutes	5 hours 40 minutes
Police and civilian custody staff	24	30 minutes	12 hours
Lawyers	7	30 minutes	3 hours 30 minutes
Scheme Administrator	2 sessions	1 hour 30 minutes	3 hours
Michael Meacher	1	1 hour	1 hour
Jane Warwick (veteran visitor)	1	2 hours	2 hours
Katie Kempen (ICVA)	1	1 hour 30 minutes	1 hour 30 minutes
Grand Total	76		51 hours 40 minutes

ICVA: Independent Custody Visiting Association.

Observation.

Observation type	Number	Average length	Total hours
Accompanied visit	21	1 hour 10 minutes	24 hours 30 minutes
Team meeting	21	1 hour 30 minutes	31 hours 30 minutes
Training	3	5 hours	15 hours
Custody block	14	3 hours	42 hours
ICV conferences	2	5 hours	10 hours
Grand Total	61	–	123 hours

ICV: Independent Custody Visiting.

The sample of visitors was drawn from all the visitors in the scheme in the custody blocks studied. The scheme administrator put out calls to all the visitors for cooperation: some responded positively, others did not. Similarly, I approached custody staff at the custody blocks I was studying, some of whom were prepared to be interviewed, others not. Detainees in those custody blocks who had been risk-assessed were asked if they wished to meet me for interview: some did, others not. Lawyers were approached through the local law society, and at the custody blocks, in the same way, with the same results. All participants were provided with an information sheet in advance of the interview to ensure informed consent, and the procedures adopted in the research received prior approval by the relevant research ethics committee at the University of Birmingham.

Observation was carried out in three different kinds of custody block at eight different sites: one large and antiquated police station in the city centre, smaller police stations located in inner city and suburban areas, both prosperous and deprived, and one very large dedicated modern facility. I observed the work of the custody blocks in 3-hour sessions, both daytime and late night, in order to familiarise myself with the context in which the visiting took place. I accompanied visitors on their visits, attended the 'review meetings' of visitors' panels with the police and the scheme administrator, an official in the Office of the Police and Crime Commissioner, and attended training sessions where visitors were inducted and given annual refresher sessions, as well as regional and national conferences.

Analysis of the data started with compiling a list of codes relating to issues arising from the topics and concepts I had identified, using the computer-assisted data analysis software package *NVivo*. 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. The codes were developed from a list of the key concepts and the factual issues but were modified as fresh points emerged. The coded data relating to each theme/issue were then analysed. The views and modes of behaviour of the majority were noted, as were significant instances of dissent. Much fuller information than can be provided here about the methodology used in the research, the approach to the ethical issues and the literature reviewed is set out in (Kendall, 2016: 143–165).

Findings

The following presentation of the main findings begins at the local level before widening the lens to take in the national regulatory context.

Custody visits

An uncritical observer of the custody visiting scheme studied would report, accurately, that visitors entered custody blocks, spoke with detainees in their cells, and made reports to custody staff of issues raised with them. The focus below, however, is on what did not happen.

First, visits were not made at random and unannounced times but rather were patterned and predictable. One of the visitors (V4) said, 'The whole point is that we turn up unannounced', and then went straight on to refer to the practice of making successive visits to different blocks on the same evening each month, a routine the police would have got used to. Visits were also not sufficiently frequent, as, for instance, D14, one of the detainees, and one of the visitors, V5, noted.

Second, visitors did not challenge being delayed by the police before being admitted to the custody block, despite some of them (e.g. V18) expressing concern to me about this, and they did not question the police's explanations of the delays. On one accompanied visit, the custody sergeant had provisionally admitted the visitors into the block but then kept them waiting for a long time for no apparent good reason. One of the visitors told me that the custody sergeant was showing his power by sending him and his colleague off to wait in the consultation room like naughty children, and that it was the worst way he had been treated in 17 years of visiting: despite that, the visitors did not address this issue in their report, presumably because they did not want another confrontation with the sergeant (observation of accompanied visit). Only one police officer (custody sergeant S1) disagreed with the practice of not admitting visitors straight away.

Third, when they were told that a detainee had been taken to hospital, visitors never asked the reason, and some (e.g. V8), when asked about this in interview, said they would never ask that question. Similarly, visitors did not raise the issue of whether seriously intoxicated detainees should be taken to hospital.

Fourth, visitors rarely challenged the police as to why access to certain detainees was being denied: only one visitor (V12) made such challenges.

Fifth, no visitor ever questioned the way that meetings with the detainees were organised. The meetings were extremely brief and with no notice given to the detainees. Visitors never challenged the custody staff overhearing what was said during their meetings with detainees, and only two visitors (V5 and V9) showed any concern that this prevented the detainees giving the visitors confidential information. As one detainee, D5, told me: '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'. (The justification for this practice was safety, but all the detainees were risk-assessed.) Visitors did not ask for arrangements to be made to enable them to hold longer meetings with detainees in private spaces (as I was able to do when interviewing them).

Sixth, the visitors failed to act in a way which would gain the trust of detainees. D3 said: 'I wouldn't trust them, because I had only just met them': and this was D2's opinion of the visitors: 'Pretty pointless, asking me loads of questions, can't do nothing, can't change nothing, wasting my time'. When detainees asked visitors to make enquiries on their behalf, the visitors failed to report back on the outcomes (D1 and D2: personal observation).

Seventh, visitors did not see themselves as independent regulators upholding the welfare and rights of fellow citizens. As one visitor (V1) said: 'I do the job best knowing [the police] accept me as part of a team'. Some visitors did not leave it to the custody staff to shut the cell door at the end of a visit to a detainee, as a regulator should, and shut the door themselves, which is a quintessentially custodial act. Similarly, visitors were observed to be not holding attitudes different from those held by the police, and to be prejudiced against detainees. Visitors tended to assume that the detainees must have done something to be held in custody and were, therefore, guilty. V13, 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', and he also said that he wanted to use the opportunities that visiting provided to persuade detainees to 'come off crime'. For him, innocent detainees did not exist. Some visitors used the police term 'prisoners' to refer to detainees. Only one visitor (V3) expressed concern about visitors being too close to the police.

The research noted many other significant silences. For example, visitors never asked whether an appropriate adult had been appointed to assist a vulnerable detainee, and if not, why not. They never asked why a detainee was not receiving legal advice. Visitors rarely checked that custody staff were carrying ligature knives at all times, which is best practice: delay in cutting down the ligature of a suicidal detainee can make the difference between life and death.

Another thing to look out for was the police not respecting the work of the visitors. The police generally behaved respectfully towards the visitors, and the party line was that the visiting was a good thing. But the respect was skin deep. One custody sergeant (S11) said the visitors did not have the expertise necessary to report on their work, and another custody sergeant (S3), only half in jest, saw the role of visitors as being limited to passing on detainees' requests for hot drinks.

The scheme did not allow visitors to monitor police interviews with detainees, nor to monitor the welfare of detainees waiting to be booked in (the location of Sean Rigg's death: (Independent Police Complaints Commission, 2014) so there was no point in looking out for those not happening, and they never did.

Reporting

Here the things to watch out for not happening were effective reporting by visitors to the scheme administrator, effective discussion of those issues by the scheme administrator with the police, and the Police and Crime Commissioner using the visitors' reports to hold the police to account. The visitors' reports tended to be very brief and uninformative, such as the following, typical example: 'PIC [person in custody] requested and provided with reading material. PIC stated they had no issues and could not have been treated more fairly. [Other] PICs no issues'. So, a visit which probably lasted some 30 minutes is reduced to a text of 24 words. Where visitors did raise issues, the scheme administrator said that he discussed them with the custody inspectors, but he declined to show me copies of his communications with the police. All but one visitor failed to keep copies of their reports, which meant that it was difficult for them to follow things up. The scheme administrator told visitors that their reports were used by the Police and Crime Commissioner to hold the police to account, but

he also told me that this had never actually happened. One regulatory method open to the Police and Crime Commissioner would have been to publicise problematic treatment of detainees as revealed in visitors' reports in the hope that this would shame the police into changing their procedures or behaviour. However, there was no such publicity, and not even, so far as can be known, any threat of publicity. The scheme administrator used the visitors' reports as the raw material for a summary published in the annual report on the Police and Crime Commissioner's website. The information provided was, however, very bland and generalised. The annual report was the only means, other than reports of inquests, by which the public could be informed about what was happening in custody blocks, and the annual report gave very little away. Visitors were prohibited from independently publicising their views: at one time they were threatened with prosecution under the Official Secrets Act if they breached confidentiality (Kendall, 2018: 42–43).

Review meetings

Review meetings in theory provided a way for visitors to raise more general points about conditions in custody than would have been appropriate in specific reports in relation to a particular visit. Review meetings were attended by visitors, a police inspector and the scheme administrator. The venue was usually a conference room in the police station where the group visited. At these meetings, the visitors never sought to discuss matters in the absence of the police and the scheme administrator.

The review meetings were not a forum for debate. Notably, the reports distributed at the meetings did not generate much discussion. One visitor (V4) said he thought some of the visitors were reticent at these meetings because the police were there, or because they felt intimidated by the longer serving visitors. There were very few questions and no challenges. At one observed meeting, the inspector noted a visitor's concerns about the welfare of a detainee with a broken leg in a full-length plaster, and he said 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. One visitor, V9, commented: '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'. That visitor could see the value of debating these issues, but she also realised that the police would not want the visitors to debate the issues with them. The only issue the police would discuss in the case of the detainee with the broken leg was how to manage the detention, not whether it was necessary.

Training

Training was provided by the scheme administrator and the police. Because the visitors were volunteers with no expertise in criminal justice, the things to watch out for not happening were visitors being well trained by criminal justice professionals. The quality of the training was poor, and it was not delivered by criminal justice professionals. The training had nothing to say about the visitors' role as regulators. The scheme administrator did not tell recruits that they should challenge the police but rather advised them not

to do so, but to report to him following which he would take up the matter with the police. There was no mention of the fact that in any cohort of detainees some would be innocent, some would not be a danger to anyone, some had been wrongly arrested, and some would be released 'NFA' – with no further action. This left recruits thinking that all detainees must have committed some offence. No training was given on communication skills, how to conduct an interview, how to read custody records, and the legal and practical ramifications of custody.

Deaths in custody

The principal purpose of custody visiting should be to deter police misconduct which could lead to deaths in custody. The research looked out for practice, training and statements to this effect, and no instances could be found. There is nothing about it in the official literature, and the issue played no part in the training or the practice of the scheme in the case-study area. It is therefore not surprising that visitors did not see prevention of deaths in custody as a purpose of the scheme. I asked the visitors whether random unannounced visiting deterred the police from mistreatment of detainees because the police knew they might turn up at any time, V2 replied: 'I think it's good for the detainees, but I haven't heard of this idea'. At the other end of the spectrum, but in a minority of one, V12 observed 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 visitors were not made to think they had a real duty. Visitors did not think there was any problem with the way the authorities handled deaths in custody, with the sole exception of V9, who had been studying a university course on related issues: 'It's quite bad that you could be arrested and die, and there are no repercussions, no outcome for the family, no prosecution'.

At an inquest into a death at a police station visited by a group of visitors, the jury found that the police bore some responsibility for the death, and the coroner was critical of the police. However, at the next review meeting, some three months later, the inquest was not even on the agenda, and no visitor raised the point (author's fieldnote). On the contrary: the police had asked the visitors at a meeting before the inquest to promote the line that the death had not been the fault of the police: a police practice noted in other contexts by Pemberton (2008).

The Independent Custody Visiting Association

The research looked for the absence of effective guidance enabling the scheme to fulfil the purpose of safeguarding detainees, and the absence of a national organisation giving a voice to visitors. One might expect these roles to have been played by the Independent Custody Visiting Association, ICVA. However, neither is the case. As noted earlier, the members of ICVA are all Police and Crime Commissioners. Liaising with the Home Office, ICVA provides guidance to scheme administrators, through briefings and national standards (ICVA.org), and through two annual conferences, one for visitors and another for the scheme administrators. Visitors have no role in organising or debating the agenda at their national conference. Some of the guidance given at the administrators' conference

is about how to manage the visitors, who sometimes raised awkward questions about the independence of the scheme (information from scheme administrator), showing that they had seen through the rhetoric to the reality. More recently ICVA has sought to improve the conditions of detention for female detainees, which is a very welcome initiative (https://icva.org.uk/sanitary-custody). But ICVA does not seek to improve the experience of custody from the broader perspective of regulating police behaviour, and does not allow visitors to have a voice about their work.

The Home Office

The Home Office have, from the outset, been responsible for establishing official policy for custody visiting and for designing, setting up and maintaining both the lay visiting scheme and its statutory successor the Independent Custody Visiting Scheme. Accordingly, the research looked to see whether the Home Office has failed to design, establish and maintain a scheme directed to the fulfilment of the regulatory purpose of safeguarding detainees.

The first failure was the Conservative government deciding not to institute a statutory scheme of custody visiting, as called for by Lord Scarman in his 1981 report on the Brixton riots, and by the Labour opposition. Responding to pressure from some activists, particularly in Lambeth, the government then set up the non-statutory 'lay visiting' scheme in 1986 (Kendall, 2018: 38–40). The lay visiting scheme was not an effective regulatory scheme, and was designed by the Home Office to cause the police the least trouble. A key point that had been made by Scarman was that visitors should check the conditions of interrogation as well as of detention (Scarman, 1981: 89.1): and another proposal, this time by Michael Meacher MP, was that visitors should assist detainees with complaints against the police (House of Commons, 1979–1980, memorandum D1). The first Home Office Circular on custody visiting specifically prohibited both activities (Home Office, 1986). There was a complete absence of words that one would one expect to find in government publications about custody visiting as a regulator, for instance 'regulator', 'random', and 'unexpected'. This circular, and all the subsequent official literature, steered well clear of the notion that custody visiting might act as a deterrent to police misbehaviour that could lead to deaths in custody.

In the year 2000 the Home Office organised a working party to draft a statutory scheme of custody visiting (Home Office, 2001). The working party was dominated by the police, with no representation of the interests of detainees. Either it did not cross the Home Office's mind that those interests should be represented, or the Home Office deliberately excluded them. The Home Office followed the same policy in drafting the codes of practice. The design and maintenance of this regulatory scheme has been dominated by the institution which the scheme was intended to regulate.

Each local scheme was to be run by the police authority, now the Police and Crime Commissioner, who also has the statutory duty to ensure the independence of the visitors. Exercising complete control of the visitors is incompatible with preserving their independence from that same institution which controls them. There is no way of resolving the conflict between these two duties, and the scheme has failed to provide visitors with the independence which statute said they must have.

There has also been a failure to comply with OPCAT. This UN treaty requires that detainees must be safeguarded according to specific standards. For instance, it must be possible to conduct interviews in private with detainees and other relevant people. In reality, visitors were not allowed to interview every detainee, no interview was conducted in private, and no other category of person was interviewed. Another requirement is that the personnel should have the necessary expertise: as we have seen above, the visitors' background and training left them a very long way short of being experts. Amateur volunteers without professional help are unlikely to be able to carry out this sophisticated work properly, and may do more harm than good (Corcoran and Grotz, 2016: 93–116; Kendall, 2018: 9–10). In short, custody visiting in the area studied failed to fulfil most of these requirements for the characteristics of an NPM, and, on the evidence from the area studied, it is arguable that the United Kingdom is in breach of OPCAT in this regard.

The response of the authorities to the above findings

The research set out a number of proposed reforms to the scheme, including: training of visitors by the range of the professionals who are involved in custody, including defence lawyers; access to all detainees; and no supervision by custody staff of meetings with detainees. Yvette Cooper MP, Chair of the House of Commons Home Affairs Committee, was approached by the author, and she suggested the reforms could be piloted in a police area. A list of reforms which could be trialled without a change in the law was suggested to a Police and Crime Commissioner. At this point ICVA became involved. ICVA consulted the Home Office and the Association of Police and Crime Commissioners: as usual, no representative of detainees was consulted. ICVA concluded that the proposed pilot would not be effective in solving the issues it aimed to address and were unable to support it. Despite that, ICVA also stated that much of their work would address some of the issues that the research had highlighted. Those issues would of course have been addressed in the pilot, had it been allowed to take place.

The Home Office's response to the research (in a letter to me that was neither signed nor dated) was that the most effective means of ICVA delivering change was through ICVA's grant agreement with the Home Office which allowed a 'strategic overview' of improvements. The Home Office went on to say that they found that many of the new approaches and improvements that ICVA and Police and Crime Commissioners were implementing as part of their current business plan addressed issues highlighted by my research, and that ICVA would consider my work, along with other research concerning independent custody visiting, in developing its future business plans. However, ICVA have not published any information about this. ICVA and the Home Office have declined either to comment on the specific issues raised by my research or to discuss those issues with me.

Explaining the findings: Police power

Custody blocks are effectively closed institutions. A police officer who had formerly worked as a custody sergeant and was interviewed for this research characterised the

custody block as 'a very locked-down environment, the police's world, which nobody else except custody visitors really gets a view into'. In that 'locked-down environment' it is hardly surprising that police power dominates everyone else in the block. Research by Skinns (2011: 189) has shown that doctors, lawyers and drug workers working in custody blocks are subject to police dominance because custody blocks are police territory: my research showed that custody visitors are affected in the same way. This article argues that the scheme administrators, the Police and Crime Commissioners, ICVA and the Home Office are also affected by police power. How police power operates can be illuminated by the theory of power developed by Lukes (2005).

Lukes' 'three-dimensional' power theory explains the nature of the relationship between a stronger and a weaker party where no force is applied and there is no overt conflict. Without the dominant party applying force or even doing anything at all, the behaviour of the weaker party is affected by the power of the dominant party. This power stops conflicts arising and stops demands being made by the weaker party. This effect is achieved by controlling the weaker party's thoughts and desires, by keeping certain issues off the agenda, and by the processes of socialisation (Lukes, 2005: 27). Socialisation helps people to learn the values, norms and beliefs of their culture, and operates in the workplace as much as anywhere else, including where the work is part-time and voluntary, as is the case with custody visiting (Giddens et al., 2014: 84–93; Studer and von Schnurbein, 2013)

Lukes addresses cases where the effect of the power of the stronger party is not that the weaker party takes some action which it does not want to take, but that the weaker party does nothing when, acting in its true interests, it would have taken action in opposition to the stronger party. Lukes has to argue against those who say one cannot study, let alone explain, what does *not* happen. He cites research which seeks to explain things that do not happen on the assumption that 'the proper object of investigation [in political studies] is not political activity, but political inactivity' (Lukes, 2005: 44–45). While Lukes' interest is in politics, there is no reason why his theory should not be applied to the study of a regulator. Regulators, as part of their job, have to decide whether, and if so how, to act in opposition to powerful parties.

Lukes's three-dimensional power is a somewhat different concept from soft power, where the more powerful party gets their way through engineering desired forms of cooperation (Skinns et al., 2017). Three-dimensional power operates on others without the dominant party having to do anything at all. Lukes mentions briefly how the researcher is to go about watching out for what does not happen:

> This third dimension of power is usually hidden from direct observation; it has to be inferred via the postulation of relevant counterfactuals, to the effect that but for the exercise of the power in question those subject to it would have thought and acted otherwise, in accordance with their 'real' interests. (Hayward and Lukes, 2008)

In the case of an ineffective regulator, it is not difficult to establish the relevant counterfactual: it is performing the regulatory function properly, which, presumably, is what a regulator would wish to do.

The research produced a large number of instances of the various agents of the scheme failing to act in a way that would enable it to perform its regulatory tasks. In

order to be in a position to propose realistic reforms of the custody visiting scheme, one needs to know why people behaved in the way they did. The research accordingly considered explanations for this behaviour. In the Sherlock Holmes story *The Adventure of Silver Blaze*, a potential guard-dog did not bark while a theft took place, suggesting the clue that the thief was a person known to the dog. Custody visitors did not bark, in that they did not perform their regulatory function. Why not? Perhaps because there was nothing wrong in police custody for them to bark about? But since research shows that much is wrong in police custody, we need an alternative explanation. And the explanation that seems most to fit the facts is, in very general terms, Lukes' three-dimensional power of the police, which manifests itself in various ways, principally as a kind of informal, ideological, regulatory capture, or as over-identification with the police, and not just at the local level. The research found that the visitors felt that they had become part of the team, seeing the police as colleagues and not as objects of observation, and the other agents (ICVA, the Home Office, etc), at the least, did not see police custody as needing a greater degree of regulation.

Lukes' theory has been invoked by Julia Black in her proposal that discourse analysis be used to assist in understanding the power dynamics in the relationship between regulator and regulatee. Black (2002) calls her subject 'regulatory conversations'. Discourse can be framed by powerful organisations to exclude some views, as has been demonstrated in relation to the media treatment of the *Bulger* case (Green, 2008), and the same principle can be applied to how regulatory discourse is framed by a powerful regulatee. What the analysis of custody visiting suggests is that analysis of 'regulatory conversations' should encompass 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. These omissions could be termed 'regulatory silences'.[3] One could identify the issues that regulators are silent about and investigate the reason for the silences. In the case of custody visiting, the silences appeared to be about a range of custody issues which one would have thought should be within the remit of the scheme. The reason for the silences is likely to have been that the power of the regulatee, the police, enabled the police to frame the discourse so that it could never threaten their interests.

Is it legitimate to generalise from this research?

The research underpinning this article has been criticised on the basis that it is unsafe to generalise from one local scheme (Dehaghani, 2018; Wooff, 2018). The reasons why it is legitimate to generalise from the local study are as follows. The research was conducted in eight different sites: as described above, those sites differed in terms of size, atmosphere, age, physical layout and accessibility, and there were big differences between them in terms of the social ambience of each location. As well as conducting the case study, I had worked for three years as a visitor to two custody blocks in a different scheme, and I attended training sessions with visitors at other blocks both as a visitor and as a researcher. While there are differences between all these various settings, I have not found that those differences were accompanied by markedly different attitudes and practices. Academic research has noted some differences in the ways in which custody blocks are staffed and managed (Skinns, 2011; Skinns et al., 2017), but

there is no evidence of these differences affecting custody visiting: and they do not appear to have affected police culture (Loftus, 2009).

Another point that the reviewers have failed to take into account is that the research also assessed the work of ICVA and the Home Office, which applies to the scheme throughout England and Wales: the validity of that research does not depend on the findings made in the local study. All local schemes are affected by the way in which custody visiting has been set up by the Home Office with ICVA's help and administered by Police and Crime Commissioners, and all of them are heavily influenced by the police. By exerting power on policy making as well as on the scheme's day-to-day operation, the police have neutered the threat posed by custody visiting to their power within the largely hidden world of the custody block. This research has demonstrated serious defects which are likely to affect the visiting scheme in every location. One can happily concede, however, that more research should be carried out at other locations to test this hypothesis.

Conclusion

In researching an ineffective regulator, watching out for what does not happen and what is not said and done is crucial. The researcher identifies the tasks which the regulator should perform in order to fulfil the regulatory purpose and notes those tasks which the ineffective regulator fails to perform. This research found that the Independent Custody Visiting Scheme failed to carry out many of those tasks, and accordingly failed to fulfil any of the desired regulatory outcomes. Custody visitors only very rarely challenged the police. The training organised for the visitors by the Police and Crime Commissioner failed to enable the visitors to understand their regulatory function. The responses of the Police and Crime Commissioner to the visitors' reports neither held the police to account nor provided the public with useful information about the work of the scheme. ICVA failed to provide guidance directed to enable the scheme to achieve its regulatory purpose. In breach of international human rights obligations, the Home Office did not design, set up or maintain a scheme capable of safeguarding detainees. The issue of deterring deaths in custody was kept firmly off the agenda. In line with Lukes' theory of three-dimensional power, where the powerful party influences the behaviour of the weaker party without actually having to do anything, every part of the visiting scheme appeared to be affected, consciously or unconsciously, by the power of the police, and this was very likely to be the principal reason why custody visiting was unable to achieve any meaningful regulation.

Applying the research technique of watching out for what does not happen enabled the scheme to be properly evaluated, and also points the way towards how it could operate for the public good. Fundamental statutory reforms would be needed, to give the visitors effective rights and powers, and to secure a greater degree of independence, along with a complete change of ethos. Reform would come about only through much greater public understanding of custody and the inadequacies of the custody visiting scheme. What the police do in the custody block is important and needs more regulation, and custody policy should be open to public debate. As part of the means to achieve that aim, custody visiting should be overseen by Parliament, and not by the Home Office. As

matters stand, the power of the police obstructs not just custody visiting but also democratic debate about the treatment of detained citizens.

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Notes

1. I have looked for discussions of the technique of watching out for what does not happen and for what is not said, and not found any, in the following standard works on qualitative research: (Denzin and Lincoln, 2011; Halliday and Schmidt, 2009; Jupp, 1989; Ragin and Becker, 1992; Ritchie et al., 2014; Robson, 2011; Simons, 2009; Stake, 1995).
2. All websites referenced were re-visited on 16 May 2020.
3. Thanks to Richard Young for this point.

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Author biography

John Kendall, previously a commercial solicitor and mediator, worked in retirement as a custody visitor. He undertook research about custody visiting and was awarded a PhD. His research is set out in Regulating Police Detention, Policy Press 2018. He is a Visiting Scholar at Birmingham University and lectures about custody visiting.