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# **What's wrong with the Independent Custody Visiting Scheme? A theoretical perspective**

by John Kendall



**CENTRE FOR CRIME  
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## About the author

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## Introduction

Under the statutory Independent Custody Visiting Scheme, members of the public are supposed to visit custody suites, on a random and unannounced basis, where they check and report on the conditions of the detention of people who have been arrested by the police. People are generally aware of what custody suites are from TV, such as the Channel Four series *24 Hours in Police Custody*, but knowledge is limited because there is no focus on the conditions of detention: custody suites should therefore be seen as one type of the state's secret places. Public controversies about what happens in custody suites arise only when there is a death in custody, and not always then. Custody visiting is an important component in the criminal justice system, but it has received little attention from police scholars and is largely unknown among the general public. What goes on in the custody suite, where the presumption of innocence does not apply, maximises the power imbalance between suspects and the police. The intervention of custody visitors could go some way towards correcting this imbalance and protecting detainees, but, as this working paper explains, it fails to do so. The ultimate purpose of the scheme should be to reduce the incidence of deaths in custody, but this aspect of the scheme has been completely airbrushed out of official documents about the scheme. As can be seen from the summary which follows, this has always been in line with official policy.

Custody visiting was introduced following recommendations to the House of Commons Home Affairs Committee in 1980 by Michael Meacher MP and by Lord Scarman in his report on the Brixton riots of 1981. The police were severely criticised for racism and their conduct in custody suites in Brixton. Custody visiting was forced on a reluctant Conservative government by activists in Brixton, and started operating in the mid-1980s. However, the scheme was designed by the Home Office and the police specifically to cause the least trouble to the police, and that has been the policy ever since.

The scheme is examined in detail in my book *Regulating Police Detention* (Kendall, 2018) where all the issues in this paper are discussed. The book also sets out the evidence that demonstrates the scheme's failure to be either independent or effective. A detailed in-depth case study was carried out in one particular location in England, with in-person interviews and observation rather than internet or telephone surveys. The use of these methods facilitated detailed qualitative research into the rather complex institution of custody visiting. The interactions making up this phenomenon involve three very different groups of people: detainees, the police, and the visitors themselves. The research evaluated the quality of these interactions and their outcomes. There were two particular focuses: the independence of the custody visitors and their effectiveness. The findings of the research were that the visitors lacked both independence and effectiveness. The visitors were very much influenced by pro-police attitudes, and some of them started from that position. They saw themselves as helping the police rather than as neutrals between the police and the detainees. They were completely controlled by the Police and Crime Commissioner. Their effectiveness was assessed as minimal: they had no effect on police behaviour. The central event of each custody visiting visit is meeting the detainees in their cells. These meetings were not seen as occasions that encouraged detainees to pass confidential information to the visitors. Hence if anything needed to be reported, the visitors did not hear about it. I was able to observe this myself and to verify my impressions by private and confidential interviews with some of the detainees.

This essay explains the theories which assist in the understanding of the scheme and of its failure. The two most important theories are Steven Lukes' theory of power (Lukes, 2005) and Herbert Packer's theory of the ideology of criminal justice (Packer, 1968).

## Power

Lukes' theory enables one to understand the relationship between the stronger power, the police, and the weaker power, the custody visitors, and to see the visitors' lack of independence and effectiveness in doing their work. Some have suggested that power may work in more complex ways than Lukes appears to allow. However, for the purposes of this policy-oriented survey, Lukes' theory is a useful device for drawing attention to the way in which the police have shaped understandings of what custody visiting is and should be. Lukes asks how the powerful secure compliance, willing or unwilling, of those they dominate. He analyses this in three dimensions. One-dimensional power is getting people to do what they would not otherwise do. Two-dimensional power is getting people not to do things they would like to do. 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 what B really wants. Three-dimensional power stops demands being made and conflicts arising by the process known as socialisation. As Lukes says, 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?"*

(Lukes, 2005: 28)

Because of the effects of socialisation described below, it is in this three-dimensional form that power is at its most effective, when it is also least observable, and when it prevents conflicts from arising in the first place. This also must be the most common way in which power operates. 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. Lukes cites political examples where the power of the stronger party leads to the weaker party deciding, even unconsciously, to take no action. He argues that unconscious inaction is a decision, and that a decision to do nothing may be taken because of the power of an institution. Lukes' argument about inaction is equally valid when applied to other instances of power imbalance, such as a regulator taking no action. The principle can readily be applied to the relationship between the police, a very powerful party, and the custody visitors, who have little or no power. The custody visitors are volunteers, amateurs, are given very little training and have little knowledge of the criminal justice system. Each visitor visits a custody suite for an hour or two perhaps twice a month. The custody suites are the police's place of work and very much their territory. The power difference between the police and the visitors means that the visitors are in a weak position to make any impact on the conduct of the police. It explains why visitors rarely challenge the police. The visiting scheme causes no trouble to the police and fails to protect detainees from police misconduct.

Custody visitors are a species of regulator under the National Preventive Mechanism, which was established under the United Nations treaty known as OPCAT (Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Punishment) and their role is to regulate police conduct in custody suites. The only other mechanisms of regulation are by the police themselves. The purpose of regulators can be simply summarised as the prevention of harm to individuals and to society. The purpose of custody visitors as regulators should therefore be to prevent harm to detainees in custody suites. It is my observation that the scheme is a weak regulator and quite unable to regulate its much more powerful regulatee, the police. Lukes' theory is applied to custody visiting to help one to understand the general failure of custody visitors to raise, or even consider, issues where there might be conflict with the police. Where that occurs, the explanation may be that the omissions are deliberate. If so, the next question is why they behave in this way, which leads to an inquiry about their mindset when they were recruited and the explanation for that mindset, and/or whether their mindset is the product of their training and induction. Alternatively, custody visitors might not be aware of their failure to raise certain issues, in which case a more subliminal explanation of unconscious inaction is necessary. In either case, Lukes' three-dimensional power would appear to be the decisive factor in keeping issues off the agenda. Lukes' theory has been applied to an aspect of criminal justice not so different from custody visiting – the relationship between a police authority and its chief constable (Brogden, 1977). The case study showed that the dominance of the chief constable was usually achieved not by the specific exercise of power, but by the police authority's acceptance of the chief constable's perspective. The successors of police authorities, Police and Crime Commissioners, and the visitors themselves, rarely stray outside the boundaries established by the police themselves by their dominance of custody suites. This is why this study's observation technique focused on what does not happen as well as on what does happen.

Supportive of the theory of power is the theory of socialisation. As Lukes says, three-dimensional power stops demands being made and conflicts arising by the process known as socialisation (Giddens et al, 2014). Socialisation arises from the social interactions which form each individual's experiences and help them to learn the values, norms, and beliefs of their culture. The process can be explained by Goffman's very influential theory that the individual, in dealing with the various situations encountered, plays various roles, like an actor on a stage in different dramas (Goffman, 1971). An important component of Goffman's argument is that the 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. The research looked at how new recruits to custody visiting find what the definition of their work is, and what pressure, including the desire to avoid embarrassment and pressures stronger than that, are brought to bear on them to accept the definition. This research showed how the culture was very much in favour of the police and unsympathetic to detainees, and it was almost all one-way. This was the case where the training failed to look at the detainees from any point of view other than that of the police, and it was also apparent from the mentoring of new recruits by more experienced visitors. The visitors also met the custody staff frequently. The research found that their views and attitudes were generally aligned with those of the police. This is the way that the power of the police bears down on the visitors and prevents conflicts arising. It explains why the visitors only very rarely challenged the police, and on the one occasion which I myself observed, it was ineffective.

## Ideology

Next, the theory of ideological approaches to the criminal justice system. This theory also has a profound effect on the independence and effectiveness of custody visiting. There are two principal attitudes to the criminal justice system, respectively characterised by Packer as crime control and due process models. These models express extremes, at the opposite ends of a spectrum of attitudes about criminal justice values. Packer's crime control model focuses on the importance of the unobstructed efficiency of the police operation, and on the factual presumption of guilt, while his due process model focuses on the primacy of the individual, the normative presumption of innocence and the need for limitations on official power. Crime control is for letting the police get on with their work unhindered, and for letting the police obtain confessions freely: a confession gives the police all they need for a conviction. As Packer put it, the focal device of the crime control model is the plea of guilty; no courtroom battle is necessary because of what happens in the custody suite. In marked contrast, the due process view insists on safeguards for suspect detainees, partly out of the belief in the importance of treating individuals with respect, and partly because of the concern that confessions are unreliable if obtained by coercion. Due process says that lawyers must be allowed to protect detainees. So, the question is whether custody visiting is a system for the protection of detainees; or is it to promote confidence in the police so that they can pursue their goals unhindered?

At first sight custody visiting would appear to be a due process idea, as it allows checks on what the police are doing, and that is the rhetoric it is given to present itself. For instance, the Code of Practice (Home Office, 2013) says that the scheme is the 'well established system whereby volunteers attend police stations to check on the treatment of detainees and the conditions in which they are held'. However, the reality is that custody visiting is a crime control phenomenon, because it is ineffective in achieving its professed aims. 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, and the state has made a thorough job of neutering it, as demonstrated above.

The effect on the police of due process values in the criminal justice system can be either inhibitory or presentational. If the effect is inhibitory, due process prevents 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. Custody visiting does not inhibit the police in their treatment of detainees, but at the same time it gives the false impression that it does so inhibit them. Custody visiting therefore achieves one highly significant result – that of helping to legitimise everything that goes on in custody suites. It has been transformed from a mechanism to protect suspects into a mechanism to protect the police. This suggests that the state allows custody visiting to continue not only because it lacks the motivation to get rid of it, but because of a positive reason: the state 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, the state has found that its legitimising function fulfils the deeper purpose of justifying the absence of further regulation. The state can claim that, because of custody visiting, there is no need for more regulation of the police operating the state's secret places – custody suites.

Packer's ideas, or rather a distortion of them, have given rise to the concept of balance. The idea is 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 interest of victims; and that the rights of suspects should therefore be reduced. The concept of balance is misleading for two reasons. First, one has to take the crime control view that all suspects are guilty to see the interests of the state as being opposed to the interests of suspects. Second, while reducing the rights of suspects increases the rights of the state, it does not follow that it also increases the rights of victims. This concept of balance could be applied to custody visiting in the following way. It would be argued that, so as to improve the rights of victims, the purported benefits of custody visiting should be discarded. These benefits are due process values of respecting the rights of individual detainees, safeguarding their welfare and reducing the number of deaths in custody. These, the argument would go, should be traded off, or balanced away, in favour of the public interest, with its crime control values of efficiency and promoting confidence in the police. In the event, the police have not had to advance this unattractive argument, because of the application of Lukes' theory of power, and because of the window-dressing about the due process values of custody visiting.

## Conclusions

This paper applied Lukes' and Packer's theories to the evidence collected in my research on custody visits, and the combined effect justifies the conclusions that the Independent Custody Visiting Scheme fails to be either independent or effective, and that the scheme actually covers up the inadequacy of the regulation of police conduct in custody suites. The scheme should be examined thoroughly by the House of Commons Home Affairs Committee and shown for the sham it is, and rigorously reformed. For custody visiting to work well, radical changes would be necessary. Recruits should be properly trained to have a full, professional knowledge of the criminal justice system, including deaths in custody and the inquest system, by a range of people, including former detainees and defence lawyers. The visits would have to be properly random, unannounced and unexpected, including taking place during the night, a time when things often go wrong; but that never happened during the research. Statutory powers would need to be given to visitors to enable them to act as regulators. For instance, they would need to have the right to be admitted immediately to a custody block, and to be able to use their mobile phones to record what they find. This would force the police to take the visitors seriously, and it would go some way to dealing with the most difficult issue, the power imbalance between the visitors and the police. Custody visiting should be detached from the Police and Crime Commissioners, who are generally not concerned with the welfare of detainees, but in getting value for money. There should be a new national organisation dedicated to safeguarding detainees, and it should have a visitor membership, unlike the current supervising body, the Independent Custody Visiting Association. These are some of the reforms which could turn a watchdog which doesn't even bark into an effective regulator of police behaviour, and it could save lives.

In the meantime, if this is not done, there will be less protection for detainees and more deaths in custody and other police misconduct in our custody suites.

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