Monitoring prisons in England and Wales: who ensures the fair treatment of prisoners?

Nicola Padfield¹

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Part I: Introductory

It is difficult to say whether prison life is ‘well’ supervised by judicial and other legal authorities in England and Wales. This article explores a number of important bodies which all have a role in monitoring what goes on in prisons: HM Chief Inspector of Prisons, Independent Monitoring Boards, the Prison and Probation Ombudsman, NGOs as well as the formal courts (including coroners’ inquests). It is particularly difficult to ensure the fair treatment of prisoners within a system which gives wide and discretionary powers to those who run prisons. The challenge is all the greater at a time when prisons are increasingly privatised, and services are subject to increasing competition. Prisons are run behind substantial walls, both solid and metaphorical. The subject is under-explored in the literature – little has been written on the effectiveness of prison monitoring, especially in the academic literature, and empirical studies are even rarer. This article seeks to question what effective monitoring might look like, questioning how ‘visible’ prisons and prisoners are to the outside world. There are many eyes looking inside the prison: but what do they see, and what are they meant to do about what they see?

The article explores the variety of structures and institutions in place, and concludes that the closed world of the prison needs both complex accountability mechanisms and clearer rules if high standards are to be effectively enforced¹. Before discussing the many individual mechanisms, three introductory issues are raised. First, the UK’s ‘National Preventative Mechanism’ (NPM), established under the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT). We need to consider whether this has been an effective

¹See also an earlier discussion: Padfield [11]. My thanks to Amy Ludlow, Gaetan Cliquennois, Yves Cartuyvels and other anonymous reviewers for comments on earlier drafts of this paper.

✉ Nicola Padfield
nmp21@cam.ac.uk

¹ University of Cambridge, Cambridge, UK

addition to (umbrella over?) the many accountability mechanisms. We return at the end to consider whether the NPM has made a useful contribution. The second preliminary issue considered before we look at individual mechanisms is the changing face of English prisons: namely, the increased use of ‘competition’ and privatization, both of prison and probation services. The third and introductory question is defining the boundaries of the ‘prison’.

The NPM

First, the NPM which is required to carry out a system of regular visits to places of detention in order to prevent torture and other cruel, inhuman or degrading treatment or punishment. Twenty different organizations have been designated to fulfill the UK’s obligations under OPCAT². This is in part because of the complexity of the United Kingdom’s constitutional structure, but even if one excludes those bodies which look only at prisons in Scotland and Northern Ireland, we are still left with a significant number³. Constitutional and statutory controls in England are, in many ways, weak. The UK has no formal written constitution, and Parliament has not chosen to create strong legislative safeguards. But the main inspection bodies have fought hard to maintain their ‘independence’ of Government. Of course, ‘independence’ is not necessarily a driver of effective monitoring: too much ‘independence’ can mean a body is isolated and ineffective⁴. Without more evidence it is impossible to conclude whether or not the institutions we are reviewing are ‘effective’ and whether or not a stronger legislative framework would help them to be more ‘effective’. Nor is it easy to find hard evidence that European institutions⁵ have had any effect in driving up standards. Despite academic work⁶ underlining the important role of the Council of Europe, it is difficult to see its practical or significant impact in England. Politicians remain, and indeed are becoming increasingly, sceptical about ‘Europe’. Following the ‘Brexit’ vote of June 2016, the pressure for change coming from European institutions is increasingly likely to be resisted. And standards in prison have generally been declining in recent years, not improving.

² The UK ratified OPCAT in December 2003, and the UK NPM was established only in 2009. See <http://www.nationalpreventivemechanism.org.uk> and <http://www.justiceinspectorates.gov.uk/hmiprison/wp-content/uploads/sites/4/2014/07/NPM-Annual-Report-2014-15-web.pdf> for the NPM’s latest (sixth) Annual Report. An independent comparative and critical analysis of implementation across jurisdictions would be useful.

³ This paper looks only at England and Wales, and indeed only at the main inspection bodies. There is a vital role for the Office for Standards in Education (Ofsted) in raising educational standards in prisons and for the Care Quality Commission (CQC) in raising health care standards. See <http://www.ofsted.gov.uk/furthereducationandskills> for useful data.

⁴ Anyone studying this subject in England should also compare the ‘effectiveness’ of other ‘independent’ criminal justice institutions such as the Independent Police Complaints Commission, which oversees the police complaints system, or the Criminal Cases Review Commission, the independent body which investigates suspected miscarriages of justice.

⁵ Such as the European Committee on Crime Problems (CDPC), the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), even the European Court of Human Rights (ECtHR). These bodies do not seem to be taken as seriously by either politicians or the media in the UK as I would want.

⁶ See in particular van Zyl Smit and Snacken [18].

Privatisation

The picture is complicated by the increasing privatisation of prisons. Can conditions be adequately monitored in private prisons⁷? Of course, many services in prisons have long been ‘privatised’. Prison medical services were only brought into the National Health Service some ten years ago, but with the growing use of ‘markets’ within the health sector, local health trusts and providers increasingly ‘contract out’ services to the private sector. Education, so obviously useful to the rehabilitation and reintegration of offenders, is also ‘contracted out’. Education (in particular, the delicate business of teaching vocational and employment skills to a population who have often rejected mainstream education in the past) should not simply be provided by the cheapest provider. The increasing involvement of OFSTED is encouraging⁸. If a prison is to be assessed and evaluated on the basis of the education it provides, the governor of the prison should be surely accountable for the quality of education and training. In a recent lecture, Matthew Coffey of OFSTED focused on “stubbornly high reoffending rates that are nearly 50% for adult prisoners and 72% for juveniles”. He said:

It is unacceptable that Ofsted judged only 35% of prisons good for their education and training provision. If these figures related to our schools there would be a national outcry. The aim is to reduce the number of reoffenders by focusing on rehabilitation in prisons through better employer engagement and better teaching and training.

Far too many prisoners leave prison without employability skills, meaning they are less likely to find a job. Research shows that being in employment is one of the key factors that can reduce the risk of reoffending by between 30-50%. However, examples of good training provision in prisons were all too scarce. In fact, we haven’t judged a single prison to be outstanding for their education and training provision in the last four years⁹.

But today we are not now looking just at the privatisation of key services, but at the management of entire prisons. There are currently 14 privately run prisons in England and Wales, containing about 15% of the prison population. The first privately managed prison, The Wolds, opened in 1992¹⁰. Several more prisons were then built under the ‘Private Finance Initiative’, with contracts awarded for the design, construction, management and finance of a prison under 25 year contracts. Now we have the ‘market testing’ of existing public sector prisons – after several ‘tests’, the first to be transferred to the private sector was Birmingham in 2011¹¹. Private prisons have additional forms of accountability, notably the contracts under which the standards are set. But these contracts are not publicly accessible, on grounds of their commercial confidentiality. Each prison has a Government ‘Controller’

⁷ See Padfield [12].

⁸ See fn 3 above.

⁹ <http://www.ofsted.gov.uk/news/65-cent-of-education-and-training-prisons-not-good-enough>

¹⁰ See Padfield [12] for more details

¹¹ Ludlow [7] *Privatising Public Prisons: Labour Law And The Public Procurement Process* (Hart).

who supervises the way the contract is being carried out. But little is known about the effectiveness of the role. Although originally envisaged as the ‘eyes and ears’ of the State in the prison, they appear now to be more focused on contract management than on the rights of individual prisoners. Not all private prisons have been successful. Ashfield Prison, which opened in 1999, has been the subject of immense criticism¹², and Buckley Hall was returned to the public sector in 2000 after six years in the hands of a private company.

Properly regulated, fully accountable, private prisons might lead to improved prison conditions, and indeed to improvements within the public sector. As Harding [3] wrote, “If privatization worked in such a way as to enable the private sector to allocate punishment, there would be a profound and irreparable fissure in the balance of the modern democratic state and the corresponding fealty which it could expect of its citizens” (at page 27). The private company has a crucial influence in many decisions which affect the allocation of punishment: not least, the allocation of individual prisoners to courses and programmes, and the granting of early release under the Home Detention Curfew (HDC) scheme and in temporary release decisions. The private sector not only manages the prison, but it influences the prison experience of the prisoner, both the ‘quality’ and ‘quantity’ of punishment. Harding identifies what he calls ten ‘tenets of accountability’, essential for productive cross-fertilization and success. They provide a checklist against which to evaluate privatisation:

- (i) The distinction between the allocation and the administration of punishment must be strictly maintained, with the private sector’s role being confined to administration.
- (ii) Penal policy must not be driven by those who stand to make a profit out of it
- (iii) The activities of the private sector and their relations with government must be open and publicly accessible
- (iv) What is expected of the private sector must be clearly specified.
- (v) A dual system must not be allowed to evolve in which there is a run-down and demoralized public sector and a vibrant private sector.
- (vi) Independent research and evaluation, with untrammelled publication rights, must be built into private sector arrangements.
- (vii) Custodial regimes, programmes and personnel must be culturally appropriate
- (viii) There must be control over the probity of the private contractors
- (ix) There must be financial accountability
- (x) The state must in the last resort be able to reclaim private prisons

I would suggest that the current system in England fails against several of these measures. The private prisons appear to be amongst the ‘best’ and the worst’ performing prisons¹³.

¹² See <http://www.justice.gov.uk/publications/inspectorate-reports/hmi-prisons/prison-and-yoi/ashfield> and <http://www.bbc.co.uk/news/uk-england-bristol-22755787>.

¹³ Hulley [5] ‘Respect in prisons: Prisoners’ experiences of respect in public and private sector prisons’ 12 *Criminology and Criminal Justice* 3–23.; Liebling (2012) ‘Values, Practices and Outcomes in Public and Private Sector Prisons’, in Helyar-Cardwell, V. (eds.) *Delivering Justice: The role of the public, private and voluntary sectors in the prison system*. Criminal Justice Alliance publications. We need a great deal more discussion of the moral, political and economic advantages and disadvantages of privatization: see Sandel and Standing [17].

The boundary of the ‘prison’

Another difficult conceptual issue arises from the definition of ‘prison’ and ‘prisoner’. When does a prison sentence really end? In England and Wales, prisoners serving fixed term sentences are likely to be released at half time, or even earlier on Home Detention Curfew, when they will be monitored both by the private company running the monitors and by probation services. There have been many attempts in recent years to ‘join up’ prison and probation services, but not with great success. Gelsthorpe et al. [2] analysed data on people dying under probation supervision, which revealed a stark contrast between the concern shown by the authorities when someone dies in prison, and the seemingly more cavalier attitude to those who die under the supervision of the probation services. There are particular problems which arise in Approved Premises, residential units which house offenders in the community. Approved Premises are often perceived by offenders as difficult places in which to live, having more rigorous rules than those enforced in ‘open prisons’. Prisoners required to live in Approved Premises on release will often be the ‘dangerous’ offenders who have spent many years in prison, most recently in ‘open prisons’. Paradoxically, on release they are required to live in premises which feel more punitive than prison. Many of those who are recalled to prison from this community part of the sentence ‘fail’ under the weight of the supervision conditions [14]. Many ex-prisoners continue to be closely supervised for the rest of their lives: a ‘life sentence’ means that even once released, an ex-offender remains on license. There are many civil protective orders which hang over ex-offenders for many years post release (see [13]). Those who seek to explore the effectiveness of prison ‘monitors’ should concern themselves too with monitoring post-prison licenses, and the longer-term effects of imprisonment. Here too the challenges of effective monitoring will become more difficult as probation services are increasingly privatized¹⁴.

Part II: The key monitoring institutions

We now turn to review the role and legal framework which surrounds key monitoring institutions:

HM inspectorate of prisons (HMIP)

The role of the Chief Inspector of Prisons is governed by s 5A of the Prison Act 1952 (inserted into the 1952 Act by s. 57 of the Criminal Justice Act 1982):

- (1) Her Majesty may appoint a person to be Chief Inspector of Prisons.
- (2) It shall be the duty of the Chief Inspector to inspect or arrange for the inspection of prison in England and Wales and to report to the Secretary of State on them.
- (3) The Chief Inspector shall in particular report to the Secretary of State on the treatment of prisoners and conditions in prisons.

¹⁴ See Padfield [15] ‘The magnitude of the offender rehabilitation and “Through the Gate” resettlement revolution’ *Criminal Law Review* 99–115

- (4) The Secretary of State may refer specific matters connected with prisons in England and Wales and prisoners in them to the Chief Inspector and direct him to report on them....

As well as prisons¹⁵, the Inspectorate inspects court cells¹⁶ and vehicles used to transport prisoners¹⁷. A vision of the Inspectorate's role can be gained from its statement of purpose. The current version (see [4]) is:

To ensure independent inspection of places of detention, to report on conditions and treatment, and promote positive outcomes for those detained and the public.

This statement of purpose has varied considerably over time: for example, the Annual Report 1999–2000 stated that it was

To contribute to the reduction in crime, by inspecting the treatment and conditions of those in Prison Service custody, and Immigration Service detention, in a manner that informs Ministers, Parliament and others and influences advances in planning and operational delivery.

Today's "promotion of positive outcomes" seems somehow both more realistic and vaguer than the aspirations of 1999–2000.

The Inspectorate carries out its work in a number of ways, but mostly by way of both announced and unannounced inspections:

- Full inspections: All prisons holding adults are inspected once every five years. Establishments holding juveniles (those under the age of 18) are inspected every three years. Each inspection lasts for a week, whilst the Inspectorate collects information from various sources, including staff, prisoners and other people such as visitors. Inspection findings are reported back to the prison's managers and reports are published within 18 weeks of the inspection¹⁸. The prison is then expected to produce an action plan, based on the recommendations made within the report, within a short time-frame.
- Follow-up inspections: These are unannounced and "proportionate to risk"¹⁹. They may involve in-depth analysis of areas of serious concern identified in the previous full inspection, particularly on safety and respect.

¹⁵ The use of the term 'prison' here includes young offender institutions, secure training centres, immigration detention facilities, police and court custody suites, customs custody facilities and military detention.

¹⁶ This duty was added by the Public Bodies (Abolition of Her Majesty's Inspectorate of Courts Administration and the Public Guardian Board) Order 2012/2401: see <http://www.justice.gov.uk/publications/inspectorate-reports/hmi-prisons/court-custody-facilities-inspections>.

¹⁷ Contracts to transport prisoners to and from prison have been issued to private sector companies for more than 20 years. Known curiously as "Prisoner Escorting and Custodial Services" (PECS), there is, as we go to print, a scandal about alleged fraud in the management of some of these contracts: see <http://www.bbc.co.uk/news/uk-england-23868222> and www.gov.uk/government/news/moj-audit-of-serco-contracts-prison-escort-services. See also <http://www.justice.gov.uk/publications/inspectorate-reports/hmi-prisons/court-custody-facilities-inspections>.

¹⁸ These are available on line at <http://www.justice.gov.uk/publications/inspectorate-reports/hmi-prisons/prison-and-yoi>

¹⁹ See <http://www.justice.gov.uk/about/hmi-prisons/inspections-guidance/full-followup>

Since 2001, HMIP have published their 'Expectations', the standards against which they inspect all prisons²⁰. This document sets out the criteria the Inspectorate uses to appraise and inspect prisons. The starting point remains outcomes for prisoners, not the management of prisons. They follow a 'healthy prison' model which rests upon four key tests:

safety: prisoners, even the most vulnerable, are held safely
 respect: prisoners are treated with respect for their human dignity
 purposeful activity: prisoners are able, and expected, to engage in activity that is likely to benefit them
 resettlement: prisoners are prepared for release into the community, and helped to reduce the likelihood of reoffending

The reports all follow this format, leading to a summary and recommendations, housekeeping points and examples of good practice. For the outsider, they provide fascinating glimpses inside the prison. But as we shall note, it is difficult to comment on the 'effectiveness' of these inspections. The Inspectorate also carries out thematic reviews with other bodies: for example, *Examining Multi-agency responses to children and young people who sexually offend* (2013), *Remand Prisoners* (2012) or *Court Custody* (2015). Over the years, thematic reviews of Prison Service healthcare, women in prison, lifers and on young offenders have all turned a spotlight onto particular areas of concern (though tangible outcomes are difficult to measure).

Strong 'personalities' have held the post of Chief Inspector: a retired diplomat, Sir James Hennessy, from 1982 to 7; a retired judge, Judge Stephen Tumin, from 1987 to 1995; a retired General, Sir David (now Lord) Ramsbotham, from 1995 to 2001; the ex-chair of an influential human rights organization, Dame Anne Owers from 2001 to 2010, and Nick Hardwick from 2001 to 2016, who previously chaired the Independent Police Complaints Commission and before that the Refugee Council. The newly appointed (2016) Chief Inspector is Peter Clarke, a retired police officer. Thus, there has been a tradition of external appointments to the position, which suggests a certain independence (though it is the Minister of Justice who appoints the Chief Inspector²¹). Amongst the Inspectorate staff will be those who have worked within the prison system, but I would suggest that this enhances their credibility, by strengthening their expertise, rather than weakening their independence²². Inspections are concerned particularly with the conditions in establishments, the treatment of prisoners and the facilities available to them, but the Minister may direct the Inspector's attention to other matters. But the Chief Inspector only has the power to recommend²³.

²⁰ The fourth version was published in 2012. See <http://www.justice.gov.uk/downloads/about/hmipris/adult-expectations-2012.pdf>.

²¹ And, worryingly, their websites have now been brought under the Ministry of Justice's 'umbrella'.

²² There is a tension here, of course, between being 'close' and being 'independent': Cliquennois and Champetier [1] suggest that a 'cognitive union' (cosiness?) between different stakeholders (at p. 407) may explain shared risk management thinking and increased punitiveness in France.

²³ Nor does he deal with complaints from individual prisoners, although similar complaints from a number of sources might alert him to a problem; nor will he enter into correspondence with MPs, other organisations or the public.

Compared with other criminal justice Inspectorates²⁴, HM Chief Inspector of Prisons has over the years often been more outspoken, and perhaps more influential, certainly in the public domain. The other inspectorates have more often appeared as 'in-house' management monitors, though this is changing. The reports of the Prisons Inspectorate, perhaps inevitably, often focus more on the fabric of prisons, or the general standards to be found, not the treatment of prisoners, as such. And it is easy for some of the Chief Inspector's complaints to be ignored. As Morgan concluded many years ago, the Chief Inspectors' critiques

have sometime lacked policy bite because it is not always clear by what standards he concludes that provisions are 'impoverished', 'degrading', 'unacceptable' and so on' ([10] at page 1172).

The use of 'expectations' is a clear advance on the situation in 1997, but the Inspectorate can still be criticized for a lack of 'bite' which may result from the difficulty of fixing clear standards.

Independent monitoring boards (IMB)

Every prison has an Independent Monitoring Board which is independent both of the Inspectorate and of the Prison Service. Formal visiting committees developed from the sixteenth century onwards. The Prison Act 1898 required every convict prison to have a Board of Visitors consisting of magistrates and members of the public, and by 1971 every penal institution had a Board of Visitors. The name was changed in 2003 better to reflect their function. The duties of Boards are prescribed by the Prison Rules 1999 (as amended²⁵), and include:

• **Rule 77.- General duties of Boards**

- (1) The independent monitoring board for a prison shall satisfy themselves as to the state of the prison premises, the administration of the prison and the treatment of the prisoners.
- (2) The board shall inquire into and report upon any matter into which the Secretary of State asks them to inquire.
- (3) The board shall direct the attention of the governor to any matter which calls for his attention, and shall report to the Secretary of State any matter which they consider it expedient to report.
- (4) The board shall inform the Secretary of State immediately of any abuse which comes to their knowledge.
- (5) Before exercising any power under these Rules the board and any member of the board shall consult the governor in relation to any matter which may affect discipline.

²⁴ For example, Her Majesty's Inspectorate of Constabulary (HMIC), Her Majesty's Crown Prosecution Service Inspectorate (HMCPSI), Her Majesty's Inspectorate of Probation.

²⁵ Although the Government decided to change the name in 2001, the formal change did not happen until a late amendment added to what became the Offender Management Act 2007. The formal changes to the name in the Rules were made by the Prison (Amendment) Rules 2008/597 and came into force on 1 April 2008.

• **Rule 78.— Particular duties**

- (1) The independent monitoring board for a prison and any member of the board shall hear any complaint or request which a prisoner wishes to make to them or him.
- (2) The board shall arrange for the food of the prisoners to be inspected by a member of the board at frequent intervals.
- (3) The board shall inquire into any report made to them, whether or not by a member of the board, that a prisoner's health, mental or physical, is likely to be injuriously affected by any conditions of his imprisonment.

The Board of each prison is made up of unpaid volunteers, selected by way of advertisement and local interview, but appointed by the Minister of Justice. There is no longer a requirement to have magistrates on the Board. Any member of the Board has the right to enter the establishment at any time and to have free access to every part of it and to every prisoner (s. 6 Prisons Act 1952, as amended). Each Board is thus a sort of lay Inspectorate, but with responsibilities for dealing with individual prisoners' treatment and complaints which the Inspectorate itself does not do²⁶. Each IMB provides an annual report on their prison²⁷. From these, the National Council for IMBs provides an Annual Report, which provides another useful insight into the abuse of power in prison²⁸.

Until 1992 Boards also discharged quasi-judicial duties in dealing with the more serious disciplinary charges²⁹. As a result many prisoners saw them as part of the prison administration, rather than as impartial providers of safeguards against maltreatment. Little research has been done to explore whether they are now seen as any more independent of the Prison Service. In some ways it seems unlikely: the secretariat of the IMB is within the Ministry of Justice, and the annual reports of each IMB follow a fixed template required by the Secretariat. Maguire, writing in 1985, suggested that "virtually all the evidence available about the work of Boards of Visitors suggest they have consistently failed to fulfill their potential" ([8], page 143; see also [9]). A little more recently, Robinson-Grindley [16] echoed this, questioning whether Boards were carrying out their duties appropriately. Yet anecdotal evidence would suggest that many prisoners do find it useful to speak to the IMB members, and many governors value the insights that are reported back to them by the IMB. The ears and eyes of the public are present on prison wings, especially at times of crisis (whenever a prisoner is placed in segregation, for example).

Yet there is also anecdotal evidence of poor working relationships and of the limited impact of IMBs. If they do not have the trust of staff and management, they will have little impact. Although a system of lay monitors, free to drop in on prisons at any time, remains attractive, the reality may be that the level of commitment expected of Board members deters potential new recruits. The typical IMB member is retired and middle class. Is it appropriate to rely on unpaid volunteers to be the watchdog on prison malpractice? It is important to ensure that these volunteers feel that they are

²⁶ See <http://www.justice.gov.uk/about/imb>.

²⁷ All publically available at <http://www.justice.gov.uk/publications/corporate-reports/imb/annual-reports-2013>.

²⁸ www.justice.gov.uk/downloads/about/imb/behind-closed-doors-2012.pdf

²⁹ Changed after the decision of the Grand Chamber of the European Court of Human Rights in *Ezeh v UK* (2004) 39 EHRR 1.

‘empowered’ to make a difference in order that high quality volunteers continue to come forward. They must also themselves be effectively monitored.

The prisons and probation ombudsman

A Parliamentary Ombudsman (technically, the Parliamentary Commissioner for Administration) was appointed to investigate complaints of maladministration in 1967, but he was much criticised for being ineffective in his influence on prison administration (in the Report by Lord Woolf into the prison riots of 1990: see [19]). The Government accepted Lord Woolf’s recommendation that there should be a separate and independent Complaints Adjudicator, but preferred the title ‘Prison Ombudsman’. The first Prison Ombudsman, Sir Peter Woodhead, was appointed in 1994. He was a retired Admiral who took his independence seriously, having some public arguments with the then Home Secretary, Michael Howard. He was replaced by Stephen Shaw, who held the post from 1999 to 2010. He had previously been director of the NGO *Prison Reform Trust*, and was clearly too an independent critic of the system. Nigel Newcomen, the current post-holder, is criticized in some quarters because he was a Prison Service ‘insider’, but there is no evidence that he is any less rigorous than his predecessors in dealing with complaints. No enabling legislation has been passed, so the Ombudsman still has no specific legislative powers, for example to award compensation. Nor can he consider complaints made by prisoners’ friends or families. The Prison Ombudsman’s first Six Month Review in 1995 pointed out, ‘some initial problems in defining the interface with the Prison Service still need to be overcome’. Judging by recent Annual Report³⁰ matters have changed little. In 1997 the Ombudsman received 1960 letters from prisoners wishing to make a complaint. Only 553 were eligible: the majority appear either not to have known of, or to have had no faith in the Prison Service’s internal request/complaints system. However, they must use this before the Prison Ombudsman can get involved. In 2014–15, the PPO received 4879 complaints. Of these 4438 (91%) were about the Prison Service, 375 (8%) were about the Probation Service and 66 (1%) were about immigration detention. Only 2111 were accepted for investigation³¹. It must be immensely frustrating for prisoners to be told that their complaint is ineligible because, for example, they have not exhausted the prison’s internal complaint mechanism. Prisoners are often vulnerable, and all are vulnerable to the abuse of power: complaining within a prison is often challenging. Unsurprisingly, adults and long-term prisoners are prepared to complain more than other prisoners: they are the prisoners with more time and more confidence. If one compares the areas of complaints over the last 15 years, sadly the same issues dominate: lost property and disciplinary adjudications still head the list, and money issues, transfers and allocations between prisons, general conditions, security categorisations and regimes activities all feature significantly³².

³⁰ Available at <http://www.ppo.gov.uk/docs/ppo-annual-report-2012-13.pdf>

³¹ See http://www.ppo.gov.uk/wp-content/uploads/2015/09/PPO_Annual-Report-2014-15_Web-Final.pdf#view=FitH

³² See Annual Report (footnote 20 above) for details.

In 2004, the Ombudsman's remit was expanded to cover investigations into deaths in custody. When someone dies in prison, the prison must inform the PPO. The PPO (or rather one of his investigators) then carries out an investigation. Their report not only outlines the investigation findings, but also may make recommendations to improve the quality of care provided in prisons. The investigation is separate from any internal investigation, and from that of the coroner (see below). There have been well over 1000 investigations so far – 419 reports were added in 2014–15, for example. As well as publishing the report of the investigation the PPO also publishes 'Learning Lessons' bulletins. Thus in 2013 they published a bulletin on learning from the investigations into three recent deaths of children in custody. This concluded with a summary of 8 lessons to be learned:

- 1 Busy YOIs³³ struggle to give the individual attention necessary to care for the most vulnerable. Accordingly, allocation to an STC³⁴ or specialist unit within YOIs, such as the Keppel Unit at Wetherby, needs to be considered and pursued.
- 2 There are problems sharing information and a lack of shared understanding of vulnerability which can hinder co-ordinated care of the children across agencies.
- 3 Assessments of vulnerability and risk of self-harm did not adequately weigh static risk factors against presentation or fully take into account the complex ways children can show emotional distress.
- 4 ACCT³⁵ processes were insufficiently child-centred, and the involvement of senior managers, families and outside agencies in care planning was too limited.
- 5 Managing risk, treating mental health, and the wider operation of YOI processes, particularly disciplinary procedures, need to be better integrated to ensure children are treated holistically and consistently.
- 6 YOIs need to ensure a more robust response to bullying and that reports of bullying are acted upon.
- 7 Personal officers offer an important point of contact and support. They should be assigned quickly upon reception and regular contact with the child or young person fully documented.
- 8 Sources of external support, including but not limited to families, can be extremely important. Enhanced access to this support at times of crisis and for those at particular risk of self-harm should be facilitated wherever possible.

Another recent publication has sought to analyse the impact of their recommendations. The three largest categories of complaint - 'health provision', 'emergency response' and 'ACCT'- together make up over half of all recommendations made. The current PPO appears determined to disseminate lessons from investigations, giving priority to ensuring that the recommendations coming from his office are as 'effective' and 'influential' as possible. We return to this at the end of this paper.

³³ Young Offender Institutions, holding offenders from 15 to 20: there are currently 10 YOIs run by the Prison Service and two are privately run (Parc by G4S and Ashfield by Serco).

³⁴ Secure Training Centre: there are 4 STCs holding boys and girls aged 12–17. They are run by private companies (Serco and Rebound, owned by G4S), and include a mother and baby unit (at Rainsbrook STC) with space for three girls and their babies.

³⁵ ACCT stands for Assessment, Care in Custody & Teamwork. It is the process used when individuals have self-harmed or are perceived to be at risk of self-harm and suicide. See PSO 2700.

Non-governmental organisations (NGOs)

There are a number of influential NGOs which highlight issues and concerns, often bringing test cases before the courts. They are funded by voluntary donations. Thus, we might identify:

- the *Howard League for Penal Reform*, which was established in 1866 and is a national charity working “for less crime, safer communities and fewer people in prison”. It offers legal advice to young people in custody and runs a number of well-publicized campaigns and inquiries, as well as seeking to lobby politicians³⁶.
- *Liberty* was founded in 1934 (as the *National Council for Civil Liberties*) and works to “promote the values of individual human dignity, equal treatment and fairness as the foundations of a democratic society” by public campaigning, test case litigation, parliamentary lobbying, policy analysis and the provision of free advice and information³⁷.
- *JUSTICE* is a broader law reform and human rights organization, founded in 1957, which promotes improvements to the British legal system – through research, education, lobbying and interventions in the courts. It is the UK section of the *International Commission of Jurists*³⁸.
- The *Prison Reform Trust* was set up more recently, in 1981, to campaign to reduce the prison population and work towards a just, humane and effective penal system. They too campaign largely by holding inquiries, doing research and by informing the wider public about their work. Their Bromley Fact Files are a well-respected source of prison data³⁹.
- *Inquest* is another influential charity founded in 1981 which provides a free advice service to bereaved people on contentious deaths and their investigation, with a focus on deaths in custody. They do casework, research, parliamentary campaigning and policy work.⁴⁰
- *Penal Reform International*, formed in 1989, is another international penal reform organisation.⁴¹

There are many other NGOs working within prisons, such as the *Prisoners Education Trust* which funds educational opportunities in prison, and theatre groups such as *Cleanbreak*, *Playing for Time theatre*, *Synergy theatre* and so on. These are invaluable not just for the services that they provide, but because they in some sense break down the prison walls, by involving ordinary members of the public inside the prison. They are useful therefore in educating the public about what goes on behind the prison wall. There are, though, concerns about whether what might be considered to be ‘core’ services should be provided by voluntary organisations. And whether NGOs, charities reliant on

³⁶ See www.howardleague.org.

³⁷ <http://www.liberty-human-rights.org.uk/about/index.php>

³⁸ <http://www.justice.org.uk/pages/about-us.html>

³⁹ www.prisonreformtrust.org.uk; <http://www.prisonreformtrust.org.uk/Publications/Factfile>.

⁴⁰ www.inquest.org.uk

⁴¹ www.penalreform.org

the voluntary services of trustees, are themselves adequately accountable. It is interesting too to consider the extent to which individual NGOs have influence according to the personality and leadership skills of their own directors and management.

The courts

Of course, a prisoner should be able to rely on the courts to uphold his/her legal rights. 'The rule of law' is a fundamental constitutional principle. According to Dicey, the classic constitutional theorist of the nineteenth century,

... the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint. It means ... the absolute supremacy or predominance of regular law as opposed to the influence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of the law, but he can be punished for nothing else (Dicey, pages 188 and 202).

To what extent does this concept of the rule of law apply in prisons? One difficulty lies in identifying the 'law'. Parliament has been inactive in this area. The most recent Prison Act was enacted as long ago as 1952, and was essentially a consolidation of earlier enactments relating to prisons. It has little internal consistency and grants broad powers to the Secretary of State (see section 1), including, for example, the power, with the approval of the Treasury, to alter, enlarge or rebuild any prison and to build new prisons (section 33) and the power to 'make rules for the regulation and management of prisons...and for the classification, treatment, employment, discipline and control of persons to be detained'. The power to make prison rules is exercisable by statutory instrument (section 52), and the Prison Rules made under this section are therefore delegated legislation. Although the Act specifies that every prison shall have 'a governor, a chaplain and a medical officer and such other officers as may be necessary' the powers and duties of these officers are not spelled out⁴².

The courts supervise what goes on in prisons by means of 'judicial review', the common law power of the High Court to stop other legal bodies from acting outside their powers. The vast majority of decisions (those on allocation, categorization, transfer, privileges etc) taken in prison are not 'appealable' to the courts. 'Judicial review' is not an appeal on the merits of a decision, but merely a way of reviewing the legality of decision-making. Thus a decision-maker's decision must not be biased; it must not be vitiated by illegality, irrationality or procedural impropriety⁴³. There are many important examples of the courts safeguarding rights of prisoners under judicial review proceedings: this is the essence of judicial protection under the common law. Thus, simply by way of example, *R v Secretary of State for the Home Department, ex parte Simms and O'Brien*; *Same, ex p Main* [1999] 3 WLR 328 where the House of Lords allowed the prisoners' appeals against the banning of oral interviews in prisons with journalists, and *R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26 where the House held that a policy requiring that prisoners

⁴² See Loucks and Padfield [6] for a fuller discussion of the Prison Rules.

⁴³ See *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374).

be absent when privileged legal correspondence held by them in their cells was examined by prison officers was unlawful⁴⁴.

There are other ways that events in prisons may be aired in the courts: the prison authorities may be sued in civil law (most obviously for a breach of the tort of negligence) or even prosecuted for a criminal offence, perhaps health and safety regulations. There have been a depressing number (only a few, but any number is depressing) of killings in prisons in recent years, of prisoners by other prisoners – these are prosecuted in the criminal courts. It remains to be seen whether the creation of the new offence of ‘corporate manslaughter’ in the Corporate Manslaughter and Corporate Homicide Act 2007, under which companies and organisations may be prosecuted for the offence of corporate manslaughter, has any impact. Serious management failures must be proved to have resulted in a gross breach of a duty of care. It seems unlikely that this new offence will improve safety and conditions; indeed it may make prisons more defensive and risk-averse.

The impact of the jurisprudence of the European court of human rights

Even before the Human Rights Act 1998 brought the European Convention on Human Rights into domestic law, there were numerous decisions of the European Court which had an impact on the development of English law. But the enactment of the Human Rights Act 1998 blew fresh air into the question of prisoners’ rights. When Tony Blair’s ‘New Labour’ Government won the General Election of 1997, after some 18 years of Conservative Government, their election pledges included a commitment to ‘Bring Rights Home’. Although the Human Rights Act was swiftly enacted in 1998 it was not brought into force for two years as the Government became only too aware that they had to check that prison (and other) practices were ‘human rights compliant’. The Convention has indeed been much used by prisoners to enforce their claims against the prison authorities⁴⁵. But equally, the Government continues to feel free to resist some decisions of the Court, such as the rulings of the Grand Chamber in *Hirst v UK* (2006) 42 EHRR 41 and *Scoppola v Italy* [2013] 1 Costs LO 62, which have made it clear that a general ban on prisoners voting infringed Art. 3 of Protocol 1 of the Convention. Indeed, in *Chester v Secretary of State for Justice* [2013] UKSC 63, the Supreme Court refused to get further involved in this ‘stand-off’ between the UK Government and the European Court. As Lord Mance put it, there is “no prospect of any further meaningful dialogue between United Kingdom Courts and Strasbourg” (at para 34).

The thorny subject of prisoners’ votes is not the only politically contentious area: the legality of life sentences without possibility of release (except on the very narrow grounds of compassionate release) is another area of ‘stand-off’. In *Vinter v UK*⁴⁶, the

⁴⁴ The list could be a long one: many prisoners’ rights have evolved through successful litigation. An example that I like to discuss with students is *R (P) v Secretary of State for the Home Department* [2001] 1 WLR 2002 where the judges decided that the Prison Service’s mother and baby policy was too rigid: were the judges meddling too much in policy issues? I think not.

⁴⁵ An early dramatic example of the impact was the House of Lords decision to declare the Home Secretary’s role in fixing the ‘tariff’ that those sentenced to a mandatory life sentence for murder must serve as a minimum term to be incompatible with the European Convention on Human Rights in *R (Anderson) v SSHD* [2002] 2 WLR 1800.

⁴⁶ (2016) 63 EHRR 1 (decided July 2013).

Grand Chamber of the ECHR upheld a complaint, concluding that a ‘whole life’ prisoner is entitled to know what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought. By a majority of 16–1, they held that this applies from the moment the sentence is imposed. The majority said (at para 122):

Although the requisite review is a prospective event necessarily subsequent to the passing of the sentence, a whole life prisoner should not be obliged to wait and serve an indeterminate number of years of his sentence before he can raise the complaint that the legal conditions attaching to his sentence fail to comply with the requirements of Article 3 in this regard. This would be contrary both to legal certainty and to the general principles on victim status within the meaning of that term in Article 34 of the Convention. Furthermore, in cases where the sentence, on imposition, is irreducible under domestic law, it would be capricious to expect the prisoner to work towards his own rehabilitation without knowing whether, at an unspecified, future date, a mechanism might be introduced which would allow him, on the basis of that rehabilitation, to be considered for release. A whole life prisoner is entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought. Consequently, where domestic law does not provide any mechanism or possibility for review of a whole life sentence, the incompatibility with Article 3 on this ground already arises at the moment of the imposition of the whole life sentence and not at a later stage of incarceration.

Disappointingly the Court of Appeal did not agree. In *Attorney General's Reference (No 69 of 2013)*⁴⁷, a strong five-judge court held that whole-life sentences were not incompatible with the European Convention on Human Rights 1950 Art.3. Judges could continue to impose them in exceptional cases. The compassionate release scheme provided for by s.30 of the Crime (Sentences) Act 1997 was compatible with Art.3, in that it provides offenders serving whole-life sentences with the possibility of release in exceptional circumstances. And in *Hutchinson v UK*⁴⁸, the Fourth Chamber of the European Court of Human Rights, by a majority⁴⁹, appeared to climb down: they accepted the reasoning of the Court of Appeal

that it was of no consequence that the Lifer Manual⁵⁰ had not been revised, since it was clearly established in domestic law that the Secretary of State was bound to exercise his power under section 30 in a manner compatible with Article 3. If an offender subject to a whole life order could establish that “exceptional circumstances” had arisen subsequent to the imposition of the sentence, the Secretary of State had to consider whether such exceptional circumstances justified release on compassionate grounds. Regardless of the policy set out in the Lifer Manual, the Secretary of State had to consider all the relevant circumstances, in a manner compatible with Article 3. Any decision by the Secretary of State would have to be reasoned by reference to the

⁴⁷ [2014] EWCA Crim 188.

⁴⁸ (2015) 61 EHRR 13.

⁴⁹ Note the wise and witty dissenting judgment of the about-to-retire Judge Kalaydjieva, of Bulgaria.

⁵⁰ Prison Service Order (PSO) 4700 used to be known as the Lifer Manual but is now known as the Indeterminate Sentence Manual.

circumstances of each case and would be subject to judicial review, which would serve to elucidate the meaning of the terms “exceptional circumstances” and “compassionate grounds”, as was the usual process under the common law. In the judgment of the Court of Appeal, domestic law therefore did provide to an offender sentenced to a whole life order hope and the possibility of release in the event of exceptional circumstances which meant that the punishment was no longer justified (at para 23).

It remains unclear when or indeed whether the Government might consider releasing a ‘whole life’ sentence prisoner on rehabilitative grounds, rather than on grounds of terminal ill-health⁵¹. But, for our purposes, these examples illustrate the tension between the English courts and the European Court of Human Rights, exacerbated by the political mood which seems to be turning determinedly against ‘Europe’. But the courts are keen to stress that the common law is alive and well. Interestingly, the Supreme Court in *Osborn and Booth v The Parole Board* [2013] UKSC 61 unanimously allowed the appeals of three prisoners who were challenging the refusal of the parole authorities (two cases in England, the other in Northern Ireland) to allow them an oral hearing. The judgment is explicit that the removal of the ‘right’ to an oral hearing in the Parole Board (Amendment) Rules 2009 (SI 2009/408) was not lawful and Lord Reed is clear that the decision is grounded in the common law, and not on the European Convention on Human Rights. It is “common law standards of procedural fairness” which mean that the Parole Board should hold an oral hearing whenever fairness to the prisoner requires such a hearing in the light of the facts of the case and the importance of what is at stake:

The values underlying both the Convention and our own constitution require that Convention rights should be protected primarily by a detailed body of domestic law. The Convention taken by itself is too inspecific to provide the guidance which is necessary in a state governed by the rule of law ... The importance of the [Human Rights] Act is unquestionable. It does not however supersede the protection of human rights under the common law or statute, or create a discrete body of law based upon the judgments of the European court. Human rights continue to be protected by our domestic law, interpreted and developed in accordance with the Act when appropriate. (para 56–57)

Thus, should the UK Government withdraw from ‘Europe’, the common law will continue, in theory, to protect the rights of prisoners. In practice, the reality is that it is not easy for prisoners to access good quality and free legal advice. The Government is keen to save money on legal advice for prisoners. Legal advice and advocacy services are surely an essential part of fair procedures.

Coroners’ courts⁵²

Coroners’ courts have existed since the Middle Ages, with a duty to investigate deaths: an inquest must be heard whenever a death occurs in custody, and the coroner then sits with a

⁵¹ As the Court said in *Vinter*, it is surely capricious (or simply unfair?) to expect the prisoner to work towards his own rehabilitation without knowing whether, at an unspecified, future date, a mechanism might be introduced which would allow him, on the basis of that rehabilitation, to be considered for release?

⁵² Perhaps the best practical guides to coroners’ courts are Thomas et al. *Inquests: a practitioner’s guide* (Legal action group) and *Inquests* (Hart)

jury⁵³. The current version of the law is to be found in the Coroners Act 1988, as amended, and the Coroners Rules 1984, also much amended⁵⁴. A coroner's inquest can be a powerful tool – families may be re-assured by the public exploration of issues, including the cross-examination of witnesses. But the process also has significant limitations: it is often slow, and it may well be adjourned if criminal proceedings are initiated⁵⁵. Perhaps most useful for those who want to learn lessons to prevent future deaths in custody, are the 'Rule 43 reports' which coroners publish when they wish to draw issues or concerns to the attention of those who have the power to take action. These Reports⁵⁶, and the responses to them, are copied to all properly interested persons and to the Lord Chancellor and a summary of them is published twice a year, by the Ministry of Justice⁵⁷. These explored such issues as the need for training in resuscitation and first aid; the importance of transferring records (particularly medical records) between prisons; of psychiatric services in prisons; of arrangements for auditing night patrols and for transferring prisoners both within prisons, and to other prisons. A recurrent theme is the need to improve communications systems.

Part III: Conclusions

There are thus a plethora of accountability mechanisms in England and Wales. The Chief Inspector of Prisons (and his team) are, I would argue, vital as a body which gets a certain publicity for their often hard-hitting reports⁵⁸. The PPO is a useful final step in the complaints ladder. The IMBs are also important – walking around the wings, dealing with prisoner's applications (which are usually 'complaints') – a visible face of the 'public' behind the wall. It may be that the PPO is more useful not as a complaints reviewer, but in his different role of investigator into deaths in custody. It is difficult to tease out the different role of (and indeed resources available to) the PPO from that of the coroner's jury. One is clearly a more investigative inquiry, the other a public forum for challenging evidence.

It would be useful to have a clear analysis of the inter-relationship of these various monitoring and investigative bodies. This article started with three introductory issues. The first was an introduction to the work of the 'National Preventative Mechanism'

⁵³ Coroners are different to 'ordinary' judges: they may have a medical as well as a legal qualification, and they mostly work part-time as coroners. The coroner's jury is also different to an 'ordinary' criminal jury, made up of only 8 members as opposed to 12. They may reach a variety of different verdicts (from accidental death to suicide, unlawful or lawful killing, open or narrative verdict) and not just the simple, 'guilty' or 'not guilty' of the criminal trial. The procedure at an inquest is less adversarial than that of a criminal trial, with the coroner taking an active role in questioning witnesses. Several different parties (prison officers or bereaved families) may be represented at the hearing: not simply the state and the defendant as in a criminal trial.

⁵⁴ A guide is to be found at <http://www.justice.gov.uk/downloads/burials-and-coroners/guide-charter-coroner.pdf> rule 43 reports coroner

⁵⁵ See Coroners Statistics 2015 at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/525916/coroners-statistics-annual-2015-england-and-wales.pdf.

⁵⁶ So-called since the power is to be found in Rule 43 of the Coroners Rules 1984

⁵⁷ <http://www.justice.gov.uk/coroners-burial-cremation/coroners/rule-43>

⁵⁸ Empirical research should explore which 'monitor' in fact has most impact on those who run prisons 'on the ground'. It may well be that the arrival of a team of inspectors without any prior announcement is unsettling and does little to encourage a more 'humane' system: staff may well become more defensive. Not many of us welcome criticism!

(NPM). Whilst it is clear that the UK NPM fulfils the UK's legal obligations under OPCAT, it is not clear to what extent it has contributed to the fairer treatment of prisoners. The UK government designated HM Inspectorate of Prisons (England and Wales) to coordinate the NPM. It would appear that internally, HMIP is working with the 19 other 'mechanisms' to strengthen the protection of those in detention through coordinated and collaborative work on relevant issues. Co-ordination and collaboration come at a price. Without a careful analysis of cost, impact and role, it is difficult to conclude more specifically than to comment that, in England and Wales, a complex variety of checks on the use and abuse of powers in prison exist. To me, this complexity is to be welcomed⁵⁹. If the relationship between different 'monitors' is unclear and even uncomfortable, there may be increased vigilance and accountability. Accountability should not be comfortable.

Our second introductory issue was privatization. The growing use of private, and potentially not for profit organisations, in the running of prisons adds a new level of complexity. The 'closed' world of the prison is rightly monitored by a variety of bodies, contributing 'checks and balances' to safeguard prisoners against the abuse of power. Perhaps the monitoring bodies described in this article would be less vital if more was done internally to deal with complaints and grievances⁶⁰. But this paper simply concerns the role of external monitors. Our third introductory issue was the boundary of the 'prison': penal sanctions hand over prisoners for many years after release. I would suggest that we should monitor the way punishments in the community are carried out quite as stringently as we monitor what goes on in prisons.

I offer only two small conclusions. The first concerns the existing legal structure, which is too loose to provide adequate guidance or constraints upon the Prison Service, and indeed the main constraints on privatized companies are often unpublished contracts. Despite the major changes in prison policy over the last few decades, there have been few significant changes to the legal framework. It is not surprising that many of those who examine the prison system have concluded with a call for enforceable standards in prisons (for example, Woolf [20]). There must be a 'rudder by which overseers can steer' ([10], p 1171). Although the incorporation of the European Convention on Human Rights into domestic law by the Human Rights Act 1998 has, in the eyes of many, had an important impact on the culture of public decision-making, which is now more openly tied to the standards of the European Convention⁶¹, this positive interpretation of the role of the European Court is not supported by a majority of the media or politicians.

The second conclusion is that we need a great deal more research, particularly qualitative research, to understand the inter-relationship of the various external monitors and their impact on those who work and live in prisons. There are two prior

⁵⁹ A PhD student at the Law Faculty in the University of Cambridge is currently seeking to evaluate the various mechanisms of accountability for deaths in custody.

⁶⁰ Given the dramatic changes to the rules on the provision of free legal advice, it is particularly important that the internal complaints system is robust and effective. Nor should we forget that a fundamental key to decent prisons is effective and moral internal leadership. The financial cuts imposed on the prison service in recent years have inevitably damaged standards.

⁶¹ See Lord Irvine, then Lord Chancellor, who wrote in 'The Impact of the Human Rights Act: Parliament, the courts and the executive' [2003] PL 308 that the HRA "represents one small manageable step for our courts; but it is a major leap for our constitution and our culture...It has moved public decision-making in this country up a gear by harnessing it to a set of fundamental standards" (at p. 324).

challenges. It is difficult to assert what ‘effective’ monitoring might look like without exploring the purposes of punishment and the purposes of the prison system. Attempts to ‘break down the closed walls’ of the prison, to allow in the eyes of the public, in order to provoke a more informed debate are to be welcomed. But even if we were agreed on the purposes of the prison, we would still have to understand the reality of the impact of these various monitoring bodies. It is easy to assert that, for example, the Chief Inspector of Prisons provides an excellent service by arriving unannounced to inspect prisons. It keeps prison staff ‘on their toes’. But what evidence do we have that this actually drives up standards? Might some forms of critical intervention make prison staff more defensive, less open to dialogue? It is easy to assert that the Independent Monitoring Board is an excellent system whereby ordinary people wander freely around a prison, keeping the staff and management on their toes. But unless they have the trust of the Governor and his/her senior management team, their interventions may be quite ineffective. Let’s “break down the walls of the prison” to allow greater debate and significant research.

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