4 Risk, Responsibility, and Pre-Trial Detention

RA Duff

4.1 Introduction: Pre-Trial Detention and the Presumption of Innocence

When we think about our prisons, we might think of them as populated by convicted offenders serving terms of imprisonment. However, a substantial number of prisoners are on remand awaiting trial: 8,304 (10.5%) of the total population of 79,092 in English prisons, for instance, on December 31, 2021;[1], 2,002 (26.7%) out of a total population of 7,502 in Scottish prisons at February 4, 2022.[2] For many of them, their detention is relatively short; in Scotland, for instance, the median time on pre-trial remand in 2019–20 was 21 days.[3] But for some it exceeds a year: in England, at December 31, 2021, 4,185 had been awaiting trial for over six months, of whom 1,710 had been detained for more than a year, 480 of them for more than two years.[4] Many in pre-trial detention are then convicted and sentenced to imprisonment, but many are not: in England, about 15% are acquitted, and about 30% receive a non-custodial sentence after conviction.[5]

Pre-trial detention is frequently harsh and damaging. Prison conditions are often, at best, austere; remand prisoners do not have access to the kinds of training, education, or work that are available to sentenced prisoners; they may find it hard to consult their lawyers, or to keep in touch with their families; their relationships are likely to be damaged; they might lose their jobs or their homes. But they have not been proven guilty of the crimes for which they face trial: the courts must, supposedly, presume them to be innocent. How could such detention be justified, given its apparent inconsistency with the presumption of innocence and the right to liberty enshrined in the European Convention on Human Rights?[6] Why does this practice not provoke more of a public outcry from defenders of liberty than it now does (at least in the UK)? One depressingly plausible answer is that it is tempting to assume that those remanded in custody are (probably) guilty as charged; their status is not so much that of "unconvicted"

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as that of "not yet convicted"; the presumption of innocence is tacitly assumed to have been defeated by their arrest and charge.

The formal grounds for such detention have nothing to do with punishment (the person has not been convicted),[7] and everything to do with preventing risk. Under English law, for instance, a defendant should be detained if the court is satisfied that there are "substantial grounds for believing" that, if released, he would "fail to surrender to custody"; or "commit an offence while on bail"; or "interfere with witnesses or otherwise obstruct the course of justice"; or "be likely to cause physical or mental injury [or the fear of it] to an associated person".[8] The main grounds for detention thus concern the risk that the defendant would, if released, commit an offense – either connected to his trial, such as absconding, or interfering with the trial process, or any offense at all. How could such detention be justified? If it can be justified, what kinds of consideration should courts take into account in assessing such risks?

To focus on the question of principle, we should not take it that what is to be justified is pre-trial detention as currently practiced in, for example, England or the US. Such destructive detention, imposed on so many people, cannot be justified, but we can imagine improvements that would at least significantly mitigate that destruction.[9] We could tighten the criteria for detention, and improve the process by which decisions on detention are made; we could ensure proper legal representation and advice for defendants, to resist courts' tendency to accede too quickly to prosecutors' requests for detention; we could put more resources into alternatives to custody – although if they constrain defendants, they raise issues of principle akin to those raised by detention; we could improve conditions of detention and ensure that those who are detained have access to useful activities; we could improve connections to the outside world, including families and lawyers; we could shorten the time spent in detention and mitigate its effects on housing and employment. Such improvements would be expensive and politically unpopular, but they would weaken the more contingent objections to pre-trial detention, allowing us to focus on the principled objections to any such detention, however "civilized" it is made.

One familiar, simple answer is that pre-trial detention is in principle unjustified: the court must presume the defendant to be innocent of the crime charged; and a core liberal principle dictates that we must not detain innocent people to prevent crimes they might commit if left free. A liberal state should respect the freedom, the autonomy, of its responsible citizens; it should therefore not detain them (which denies their freedom) merely on the ground that they might exercise that autonomy to wrong others. It can warn them of the consequences of doing so and intervene to prevent them carrying through a criminal enterprise on which they have embarked, but

it must not seek to pre-empt the exercise of their autonomy. However, such an answer is too quick: for we do sometimes detain innocent people for preventive reasons and think that we are justified in doing so without compromising liberal principles;[10] and once we enter the criminal process, as suspects or defendants, the presumption of innocence must be to some degree qualified, or else there could be no criminal process.

As to the first point, we should note three common practices: the detention of those who are mentally disordered, to prevent harms that they might otherwise cause to themselves or to others;[11] the detention of suspected terrorists;[12] and the compulsory quarantine of those who might be infected with a dangerous disease. We should also note the ways in which those who have been convicted of criminal offenses might be subjected to detention or other kinds of restriction that look preventive rather than punitive – for instance, to detention beyond the term that is required as punishment on the grounds that they present a continuing danger to others.[13] These all, however, differ in significant ways from the pre-trial detention of criminal defendants. First, crucial to the justification of detaining the mentally disordered is that they lack the rational capacities necessary for responsible agency, but the liberty that liberals value (and that pre-trial detention infringes) is the liberty to live an autonomous, responsible, life. Second, the detention of suspected terrorists is highly controversial, but can be most plausibly justified (if it is justifiable at all) as an emergency measure in a context normatively akin to war, since we could see terrorists as engaged in a war against the polity; although the wartime detention of suspected enemies is itself controversial, it is a different controversy from that concerning the routine peacetime pre-trial detention of defendants. Third, those subjected to compulsory quarantine are detained, if they are detained at all,[14] because they might directly endanger others as soon as they come into contact with them, whereas those detained pre-trial are dangerous only in virtue of crimes they might voluntarily commit if left free; their detention is likely to be so short that there is no danger of serious impact on their lives; and it does not reflect suspicion of criminal proclivities.[15] As for those convicted of criminal offenses, there is much to be said about the (un)justifiability of preventive detention that lasts beyond what is justifiable as deserved punishment,[16] but my concern here is with the preventive detention of those who have been charged with but not yet tried for an alleged crime: the question is not whether a criminal conviction makes a normative difference that could legitimize preventive detention, but whether being charged with a crime can make such a difference.[17]

As to the second point, about the presumption of innocence, it plays its most familiar role within the criminal trial: the court that tries the defendant must begin with no assumption that he might be guilty but must treat him as innocent of the charge until the prosecution proves his guilt.[18]

There is controversy about whether we can usefully talk of the, or a, presumption of innocence outside the confines of the trial – as applying to the wider criminal process, or to the state's dealings with its citizens:[19] but the key point here is that it cannot apply in its strict form to police and prosecutorial activities in investigating crimes and bringing charges. The police must be able to treat someone as a suspect – someone whose innocence has been brought into doubt; otherwise, they could have no good reason to investigate or question him. Prosecutors cannot be expected to bring charges only if they are satisfied that the suspect's guilt has been proved (let alone proved beyond reasonable doubt): such proof is a matter for the court and will depend on what emerges during the trial. The most that can be demanded is something like the English "evidential" test; is there "sufficient evidence to provide a realistic prospect of conviction?"[20] If they had to presume everyone who came to their attention to be innocent, they could never charge anyone: how could it be right to charge with a crime someone whom I presume to be innocent of that crime? In any functional system of criminal law, there must be room for a distinctive normative role of suspect: even if we are generally to be presumed innocent,[21] it must be legitimate for the police to suspect us of committing a crime, given evidence to make such suspicion reasonable, and to investigate and question us; and for a prosecutor to charge us and bring us to trial. In acquiring that role, we acquire new responsibilities and liabilities: even if we have no duty to assist the police or play an active role in our trial,[22] we are liable to be arrested and questioned by the police, we are required to appear for our trial; our normative position changes, because the presumption of innocence is qualified.

We therefore cannot simply assert that pre-trial detention is unjustifiable because it is not consistent with the presumption of innocence: we must ask more carefully what difference(s) being charged with a criminal offense can make to our normative position – and whether one of those differences is that we can justifiably be detained pending our trial, given our status as suspect and defendant. In the remainder of this paper, I will take for granted (without trying to further explain or justify) the liberal principle that generally forbids the preventive or pre-emptive detention of responsible agents, and ask whether it can be qualified in its application to those awaiting trial as criminal defendants. In Section 4.2, I will reject three suggestions about how the fact of being charged can bear on the justifiability of pre-trial detention. In Section 4.3, I will offer a different, more plausible suggestion, based on the distinctive responsibilities that define the role of criminal defendants: these can, I will argue, justify imposing special constraints, even including preventive detention, on those who are awaiting trial. Finally, in Section 4.4, I will discuss the kinds of evidence that can properly ground a detention-justifying prediction of risk.

4.2 The Normative Significance of Being Charged?

We have noted the familiar liberal slogan that a state must not detain a responsible citizen simply on the grounds that he is judged to be criminally dangerous – likely to commit even a serious crime. Does the fact that someone has been charged with, and faces trial for, a crime make a normative difference: can it defeat or qualify that slogan? One answer is that the fact of being charged has no normative significance in this context: if we are justified in detaining a defendant on the basis of a prediction that there is an N% chance that he will commit a crime (or a serious crime) if left free, we would also be justified in detaining someone who is not a defendant of whom a similar risk assessment is true. We might then argue, as I once argued (Duff 2013), that such pre-trial detention is therefore unjustified in the same way as any other kind of preventive or pre-emptive detention of responsible agents; or, as Mayson, for instance, argues (2018, 2022), that we should be ready to detain both defendants and non-defendants for preventive reasons. However, my interest here is in attempts to show that that fact does have normative significance for what we may demand of or impose on defendants – and that that difference might ground a justification for pre-trial detention.

First, we might note that that fact does make a contingent difference in predictions of future crime. For in a properly functioning criminal justice system, most who are charged are in fact guilty: if someone has been charged, it is therefore likely that he committed the crime; and since past criminal conduct is a predictor of future criminal conduct, the fact of having been charged increases the likelihood that the person will offend in future. But that is not to say that a charged defendant is more likely to offend than anyone not currently facing charges: if the prediction is based only on (probable) past criminal conduct, we have the same reason to suspect that anyone with a prior criminal conviction will commit further crimes.

That is true, at least, if we think only about crimes in general, or of the same type as that with which this defendant is charged; it is not true if we focus on the other typical grounds for pre-trial detention – the (perceived) risk that the defendant will fail to appear for trial or will interfere with the course of justice (for instance by threatening or bribing witnesses). For it is the fact of facing trial that makes such crimes possible and gives the defendant reason to (be tempted to) commit them. Indeed, it can give such a reason and create such a temptation, even for a defendant who knows she is innocent: trials are burdensome affairs and can result in the conviction even of an innocent person. Furthermore, the motivation for such offenses obtains only for the defendant (and those who care for her, or whom she might employ) and lasts only until the trial (though there might be a motive to commit revenge or threat-fulfilling attacks on unfriendly witnesses

after the trial): the court therefore has reason to ask, of any defendant, whether some preventive restrictions could be justified; and any such restrictions need last only until the trial. By contrast, if the issue is simply the commission of offenses in the future, it is not clear why defendants should be particularly liable, or why any preventive restrictions should last only until the trial. If the defendant is convicted and imprisoned, he will be prevented from committing many kinds of offense against people outside the prison,[23] whilst if he is acquitted that will preclude basing a prediction of future crime on his alleged commission of the offense charged, but there are other grounds on which we can predict future offending, by those who are but also by those who are not currently defendants, and detention based on such predictions should presumably be indefinite, until the predictions are revised, rather than ending with the trial. Thus, if the concern is with future offending in general, it is hard to see why the fact of being charged is normatively significant; it is just one kind of evidence among others.

I will discuss detention aimed at preventing trial-related offenses (absconding, interfering with the course of justice) in the following section but will focus here on detention to prevent the possible commission of other kinds of offense. A second possible reason for allowing the preventive detention of defendants awaiting trial, without seeking also to detain criminally dangerous agents in general, can be seen if we think about what such a more general practice of preventive detention would involve.

An important contingent fact about defendants is that they are available – available not just for trial, but for various kinds of assessment, including assessments of dangerousness.[24] If the state was to try to identify and detain criminally dangerous citizens in general, it would need an institutional mechanism for doing so; if we think about what that mechanism might be, we will see that it would have to involve various very disturbing kinds of intrusive official investigation, monitoring, and assessment of ordinary citizens. Focusing official assessments of criminal dangerousness on defendants can then be seen as a kind of "occasionalism":[25] the state does not try to seek out dangerous individuals in the general population, but if someone comes within the reach of the law for reasons related to criminal dangerousness (that he is charged with an offense), the state can take advantage of this "occasion" to assess whether he is dangerous.

It is hard to assess this argument. Are the criminal courts, whose primary task is to decide whether a person committed a specified offense, well equipped to assess that person's future-oriented dangerousness? Should we not instead create special tribunals whose task would be to determine dangerousness? Are there other (not unreasonably intrusive or oppressive) ways in which the potentially dangerous could come to the state's attention? But this argument can point us toward a third rationale for taking

the fact of a criminal charge as significant – as opening the door to assessments of dangerousness, and detentions based on that assessment, to which citizens are not normally liable: that what is significant about the criminal charge is not that it reveals something important about the defendant's potential dangerousness, but that it makes a difference to the state's responsibilities.

Consider, for instance, Laudan and Allen's (2010) argument for a system of preventive pre-trial detention. They recommend a practice that detains, pending trial, "serial offenders (persons with more than one felony conviction within the last three years)" (2010, 34). They suggest that in the US, given plausible empirical estimates, this would result in an additional 5,671 person years of detention suffered by innocent defendants but would also prevent the commission of at least 87,000 violent crimes, which looks like a reasonable trade-off. So far, this displays a familiar style of consequentialist reasoning, which invites the equally familiar charge that the state is not entitled to "use" defendants in this way as means to the prevention of crime. But Laudan and Allen offer a further argument. The state has a responsibility to protect citizens against various evils, including crime. We must therefore weigh defendants' right to bail against the right of "innocent citizens in the community … to be protected from criminal victimization."

> Given that, if the state – having in its custody someone it believes committed a crime and who is known to have a history of criminal proclivity – nonetheless releases an individual into the community while he awaits trial, then the state bears a direct responsibility for such harm as that individual wreaks.
>
> (2010, 39)[26]

When the court releases a defendant on bail, it (and therefore the state whose agent it is) is not merely omitting to take steps to identify dangerous members of the population at large: it has been put on notice that *this* person might be dangerous; thus, the question is not whether to go out and arrest someone, but whether to release someone already in custody.

Insofar as this argument depends on an appeal to the act-omission distinction, it is not persuasive. Firstly, it is controversial whether or how it applies to the state's activities in discharging its positive responsibilities of care for its citizens.[27] Second, it is anyway unclear whether releasing a person on bail counts as an active intervention in the world to set him free (an "act") or as a refusal to continue his detention (an "omission"). But yet, there does seem (or feel) to be some intuitive force to this complaint: "You released him, even though you knew (or should have known) that he might offend." We notice similar responses when someone released from

prison on parole then commits a heinous crime: the parole board should, critics complain, have been more careful. However, an analogy with parole (anyway a controversial practice) is unhelpful. A parole board is deciding whether someone serving a sentence for a crime should be released early, before the formal end of his sentence; it should release him only if it is persuaded that his release would not pose a non-trivial "risk of serious harm to the public" (Rodin 2019);[28] the presumption is that the person should remain in prison for the full term of his not undeserved sentence, unless there is persuasive evidence that he can be safely released. By contrast, in deciding whether to remand a defendant in custody, the court must presume that he should be released unless there is persuasive evidence that it would be dangerous to do so; nor can his continued detention be said to be not undeserved.

What then can we make of the thought that if a court releases a defendant who goes on to commit a (serious, violent) offense whilst on bail, it (or the state) has failed in its protective, crime-preventive, responsibilities? Not enough, I think, to justify pre-trial detention. The state has a responsibility to protect citizens from various kinds of evil, including crimes, but we must add the qualification "by legitimate means" and ask whether detaining someone who is thought to be "dangerous" is a legitimate means.[29] The state has particular responsibilities in relation to those who are within its direct control, as criminal defendants certainly are, but we must still ask what powers over those people it should have – do they include the power to detain them on the grounds that they might offend if left free? A person who is convicted of an imprisonable crime has made himself liable to imprisonment and can be detained pending his sentencing,[30] but that cannot justify detaining someone who has not been convicted or show such detention to be a "legitimate means" of preventing crime, and I have already noted the familiar liberal objection to such preventive detention: that it denies the detainee the basic liberty to which all responsible agents are entitled unless and until they forfeit it by committing an offense.[31] A defendant might well have committed the offense charged and thus forfeited that entitlement, but that has not yet been proved.

Another way to put the point is to note that in detaining a person on the grounds that they might commit crimes if left free, we are saying to them, in a drastically coercive way, "We do not trust you." We deny them that trust, that presumption of future innocence, to which citizens are entitled: to which the detainee can reply "I have done nothing to warrant such loss of trust." That reply is certainly available to one who is innocent of the crime charged, but it should also be available to the guilty person whose guilt has not yet been proved: for what warrants the removal of trust is not the very fact of offending, but the knowledge, or justified belief, that the person is guilty, and such warrant is lacking before the trial. So, we

still face the question of whether and how the fact of being charged with a crime can so qualify the defendant's entitlement to be trusted – to be presumed innocent – that we can justifiably treat him as untrustworthy.

There surely is something significant in the fact of being charged with a criminal offense: significant not just for the state's responsibilities, but for the responsibilities and liabilities of the accused person; it bears on what can be demanded of her or imposed on her as she awaits her trial. I will discuss this in the following section, before discussing what kinds of evidence could ground the judgment of risk that would warrant pre-trial detention. First, however, we should note two pointers toward an answer to the question of principle.

The first pointer is found in the common idea that there is something especially heinous about crimes committed whilst on bail.[32] One explanation of that idea is that in releasing the defendant on bail, the court puts him on trust not to offend: though there was reason to suspect that he might offend, the court was ready to trust him (perhaps given the assurances provided by specified conditions of bail); in committing the crime, the defendant betrayed that trust.[33]

The second pointer lies in the suggestion that we should ask not just what we, or a court, can justifiably impose on a defendant, but what can be justifiably demanded of her: not just what can be done to her, but what she can be required to do. This suggestion reflects a wider concern to emphasize citizens' agency in relation to criminal law – to see the law not just as something imposed on us by a sovereign in relation to whom we are merely subjects, but as an enterprise that is ours, in which we have an active part to play.[34] We can see both why pre-trial detention is problematic and how it might nonetheless be justifiable, if we focus on the active duties and responsibilities that we acquire in becoming defendants in a criminal court.

4.3 Defendants and the Duty to Assure

I have argued previously (Duff 2013) that in becoming a defendant in a criminal trial, I acquire a new role, which brings with it a new set of responsibilities and burdens (as well as rights). I am now not simply a citizen who must be presumed innocent both of past crimes (except for any of which I have been convicted and for which I have paid my penal debt), and of future-directed criminal intentions:[35] I am a citizen about whose presumed innocence there is now a well-grounded doubt; for (in any decent legal system) I will have been charged and summoned to trial only if there is good evidence of my guilt. As a citizen, living under a law that is my law, I incur responsibilities to play my part in the criminal process: a legal duty to appear for my trial, and not to hinder the course of justice;

and a civic, if not a legal, duty to play my part in the trial by answering to the charge. These responsibilities are burdensome, but they are burdens I should be willing to bear, even if I am innocent of the crime charged: I must be ready to answer to my fellow citizens for my alleged criminal conduct, and thus to assist the law's enterprise of calling criminal wrongdoers to public account.

However, such burdens also create temptations. Those accused of crimes, facing trial and possible conviction and punishment, have an incentive to abscond, or to try to interfere with the criminal process: this is true both of those who are guilty, and of the innocent, if they fear the risk of mistaken conviction, or the further burdens of a trial. Their fellow citizens might therefore reasonably fear that they might try to abscond, or to pervert the course of justice; that fear will reasonably be greater the more serious the charge that the defendant faces. We can therefore now require defendants to reassure us that they will appear for trial and will not interfere with the criminal process: it is a familiar feature of our social lives, especially when we are dealing with relative strangers, that we might need to (re)assure each other of our bona fides. Such reassurance might initially be merely verbal: I promise the court that I will appear for my trial, and will not interfere with witnesses.[36] But words are notoriously cheap; at least when the alleged crime is serious, the stakes accordingly high, and the temptation to abscond or interfere accordingly stronger, it might be reasonable to require something more.

The most familiar "more" that we might require is monetary bail: the defendant must put up a sum of money that will be forfeited if she does not appear for trial (or a friend might put up the money for her). This provides an obvious disincentive to flight and is an obvious way in which defendants can provide further assurance: I put my (or my friends') money where my mouth is. The equally obvious objection to monetary bail is that it discriminates against the poor and indigent, who cannot raise the necessary funds; many of those who are in prison awaiting trial are detained simply because they cannot afford bail.[37] Could we operate a more equitable bail system that calibrated bail to the defendants' means? Perhaps not: those who are most indigent might well not be able to raise even a very modest amount. But this is one among several issues that I cannot pursue here; I will instead look briefly at some other kinds of requirements that might be rationalized as matters of assurance.

Defendants might be required, as a condition of bail, to report to the police regularly, or to surrender their passports, or to stay away from particular people or locations where they might seek to interfere with the course of justice.[38] By imposing such conditions, the court seeks to make it less likely that the defendant will succumb, or be able to succumb, to the temptation to flee or to interfere; by accepting such conditions, defendants

assure the court and their fellow citizens of their readiness to play their proper part in the criminal process. I cannot discuss the range of bail conditions that can be justified in this way, but we should note some considerations that bear on their justifiability. We must ask how constrictive or intrusive they are – how far they impinge on the defendant's normal life; how important it is to secure such assurances (which depends in part on the seriousness of the charge); whether other, less restrictive conditions would be as efficient.[39] They will be most easily (which is not to say easily) justified if they do not seriously constrict the defendant's life and activities, and if they are at least relatively indiscriminate – if they do not say to the particular defendant "We do not trust *you*, in particular, to appear for trial and not to interfere with the course of justice."[40]

Suppose we can get this far and justify a system of pre-trial requirements and constraints that apply to all defendants – or to all those facing charges of a certain seriousness; that for a limited period impinge on their freedom, but leave them largely able to continue with their ordinary lives; and that can be justified to them as proportionate burdens which they should accept (whether guilty or innocent) as being necessary to reassure their fellow citizens that they will respect the criminal process. We now face three further questions –

- Can we in the same way justify pre-trial detention for certain types of defendant?
- Can we be justified in making detention, or other constraints, more selective?[41]
- Can such constraints be justified not only in the way we have discussed so far, as means of assuring the defendant's attendance at trial and non-interference with the process, but also as means to prevent his commission of offenses unrelated to the trial?

Though I will focus on detention, we must bear in mind that requirements that do not involve physical detention behind prison walls can still be just about as constricting as being locked up (see Noorda 2015).

The two obvious problems with detention are, first, that even if its conditions are vastly improved, it still radically separates detainees from their normal lives. Second, even if we can mitigate the first problem by making the walls of the place of detention more porous, the fact remains that in locking someone up, we display a more radical lack of trust in them, and thus a more radical infringement of their responsible agency. Other pre-trial requirements short of detention say to the defendant "We trust you to behave ['behave' as a shorthand for 'appear for trial and not try to interfere with the process'] so long as you accept and undertake these precautionary provisions"; pre-trial detention says "We do not trust you

to behave," which is a serious insult – at least to defendants who intended to behave anyway. So our first question is whether there are kinds of crime that, given their seriousness, could warrant such mistrust: could we say, for instance, that the temptation to abscond or to interfere when charged with murder is likely to be so strong that the only adequate assurance will be detention? But even under our present law, those charged with murder can be given bail;[42] we must remember that although a murder defendant's innocence has been put into doubt, he has not been convicted, proved guilty, of the crime; nor, therefore, can we say with the requisite certainty that he has done anything to give us reason to mistrust him (for the evidence that justified charging him might not have included any suspicion-arousing conduct on his part). It is of course true that allowing those who have been charged with serious crimes to remain free pending their trial involves risk – a risk that they will fail to "behave": but that is just the kind of risk that we think we must accept as a necessary feature of a polity that treats its members as responsible agents.[43]

However, my remarks in the previous paragraph were disingenuous, since they assumed an indiscriminate, non-selective practice of detaining all those who had been charged with a serious crime. Actual practices of pre-trial detention are selective: they detain only those who present a high risk of flight or interference. Even if we cannot, for the reasons noted above, justify the pre-trial detention of *all* those charged with sufficiently serious crimes, perhaps we can justify the selective detention of "high risk" defendants; perhaps, indeed, we could argue that it would be irresponsible, a betrayal of the state's responsibility to protect its citizens and its criminal process, to fail to do so. To see whether any such practice could be justified, we must look at the criteria for detention: what could legitimately ground a detention-justifying assessment of risk? A key distinction is, I will argue, that between "There is a risk that *A* …" and "*A* presents a risk."

4.4 Criteria for Detention

Two kinds of factors are typically taken to bear on decisions about detention. In English law,[44] the court is to attend, first, to relevant facts about the defendant's prior conduct: most obviously, to his "record as respects the fulfilment of his obligations under previous grants of bail"; it is also to attend, second, to other features of the defendant's circumstances: to his "character, antecedents, associations and community ties": his "character" might be taken to consist primarily, if not exclusively, in criminal record (see Redmayne 2015); "associations and community ties" can include such matters as whether he has a job, a home, and a stable family life.

Both kinds of factor are obviously empirically relevant to assessments of the risk that a defendant will not "behave": the presence of either kind increases the probability that he will not behave. On one view, the two kinds of factor are relevant in just the same way, as bearing on the likelihood that the defendant will not behave: we are looking for an empirically well-grounded prediction of risk; we should therefore attend to all and only those factors that make it empirically more likely that he will not behave, giving each of them a weight proportionate to the degree to which it makes that more likely. This suggests an algorithmic approach: an attempt to find sound actuarial, or statistical, bases for risk assessments. Now if the purpose of pre-trial detention is to prevent the commission of offenses unrelated to the defendant's impending trial,[45] we will find no normative magic in the fact that the person being assessed is facing a criminal charge; that fact will be contingently relevant if and only if it is correlated with a higher incidence of a relevant kind of offending. However, if the court's concern is to prevent trial-related offending (absconding, interfering), the fact of being charged is clearly crucial: only a defendant can fail to appear for trial, and although others can interfere with the process on a defendant's behalf, it is the defendant who has the strongest motive to do so. But the question now is whether we should see both the kinds of factor noted above as relevant, and as relevant in the same way.

Here is a significant difference between them. We are asking whether this person can, or should, be trusted to behave. When the first kind of factor obtains, he himself has by his own prior misconduct given us reason not to trust him now: he was trusted before and betrayed that trust by misbehaving; so why should we trust him now? With the second kind of factor, we cannot say this: the fact that he is homeless, single, or unemployed may give us empirical reason to think it more likely that he will misbehave than it would be absent that factor, but it is not his misconduct, or his betrayal of trust, that gives us reason to doubt him. Whichever factor we appeal to, as the basis for a risk assessment that is to justify detaining him, we are refusing to trust him to exercise his responsible agency appropriately – we are denying him the chance to do so: but in the former case, our mistrust is grounded in his own, presumably responsible, prior failure to exercise that agency properly; in the latter case, this is not so.[46] In the former case, but not the latter, we can say that he has shown himself to be untrustworthy. In both cases, we can say that there is a risk that he will not behave, but only in the former case can we say that he presents a risk, since only then is the risk grounded in his own wrongful conduct.[47] If the latter kind of factor is highly correlated with failures to appear for trial, the answer should not be to detain the defendant, but to offer him help. If we are then asked why we should offer help (with housing, employment, or financial support) that is not available to others who are not facing criminal

charges, one answer is that these are kinds of help that the polity ought to offer all its citizens; the other is that since we demand that he appear for trial, we have a responsibility to enable him to satisfy that demand.

This is not to say that any defendant who previously misbehaved when free on bail must now be detained: we must ask how serious (and recent) that past misconduct was, as bearing on how seriously it undermines present trust; how important it is that the defendant be tried in person (which will depend in part on the seriousness of the offense charged); what damage he might do to the criminal process, in particular to people involved in his case as witnesses. It is also true, of course, that if the fact of relevant prior misconduct can make a difference to what the court can now demand of a defendant, it could justify imposing special requirements short of detention – requirements more restrictive than those generally imposed on defendants.

We must be clear about the logic of the argument here. Citizens are generally entitled to a kind of civic trust: a presumption of future as well as past innocence.[48] The commission of an offense threatens that trust, but by undertaking or undergoing punishment, paying one's penal debt, that trust is taken to be restored. However, there are contexts in which a special kind or degree of trust is required, given the risks or pressures involved; one of those is the period in which a defendant is awaiting trial. The court should still usually be ready to trust defendants, if necessary subject to the kinds of requirement noted above: but prior misconduct in relation to previous trials gives the court reason to withhold that trust or to grant it only given certain special precautionary conditions. By way of partial analogy, consider driving, an activity that involves distinctive risks of serious harm. We are permitted to drive, we are trusted to drive safely, if we fulfill various legal conditions (obtaining a license, respecting traffic laws …), but we can forfeit that trust by serious (and persistent) misconduct in driving and can then lose our license to drive. Analogously, a defendant can forfeit the (conditional) trust that is normally granted to defendants by his prior betrayal of that trust – at least or especially if that betrayal was recent or persistent.

We can see the logic of this argument more clearly by turning to the other familiar bases for pre-trial detention: the risk that the defendant will commit non-trial-related offenses if he is freed on bail. One question is whether this kind of risk could ever justify detention; another is what kind or degree of risk should suffice, if we could justify such detention in principle. Some American risk assessment instruments count a person as "high risk" if there is an 8%, 10%, or 16% risk that defendants with the relevant characteristics will be arrested for a (violent) crime within six months.[49] If that degree of risk is to justify detention, it implies that we should detain about nine "innocents," who would not commit a (violent)

crime if left free, to prevent one person committing such a crime – a striking inversion of Blackstone's dictum that it is better that ten guilty people go free than that one innocent person is convicted and punished (Blackstone 1753, Bk IV, ch. 27). But the question that concerns us now is about the appropriate grounds for any such risk assessment.

A first question concerns the nature of the risk to be assessed. It has to do with "danger," or "dangerousness," but just as there are, as we saw, two kinds of judgment of risk that we can make, so there are two different kinds of judgment of "danger" or "dangerousness" that might be made: that "*A* is dangerous because he might commit a violent crime if left free"; or that "There is a danger that *A* will commit a violent crime if left free." We can illuminate this difference by noticing that the second kind of judgment could also be expressed by saying "There is a danger that *A* is dangerous."

To explain. Suppose I find an object that looks very like an unexploded bomb. I might at first say "That's dangerous," meaning that it is liable to explode – that it would explode under some specifiable circumstance (it's being moved or kicked, for instance). But suppose I find that it is actually a theatrical prop: I must withdraw my claim that it is dangerous, because it clearly is not, but I can still say that there was a danger, a risk, that it would explode – that it was an actual bomb and thus dangerous.

Analogously, suppose we find a range of circumstantial factors that are correlated with a higher incidence of violent crime: these might include, for instance, gender, age, employment status, and domestic situation. We can then say that if those factors apply to *A*, there is a risk, or a danger, that he will commit a crime of violence: it is more likely that an unemployed single man of 21 will commit a crime of violence than that an elderly widow will. But this does not justify a judgment that *A* is dangerous. To say that someone is dangerous is to say that he has some disposition such that he would probably engage in the relevant conduct (in this case, commit a violent crime) in certain circumstances: but *A*'s age or employment status is not a disposition of that kind; an unemployed man of 21 might be of a peaceable, non-violent nature such that he presents no danger to others at all.[50] This point is significant because what seems intuitively plausible is that we might have reason to detain "dangerous defendants" (the title of Mayson 2018), but purely algorithmic risk assessments might show only that there is a danger that this defendant is dangerous – a less plausible ground for detaining him.

The conclusion of the previous paragraph was of course disingenuous, because central to standard risk assessments is the defendant's prior record: an important factor in justifying the conclusion that he is "dangerous" is that he has himself committed violent crimes in the past or more specifically has committed such crimes while on bail; that factor is more

significant to the extent that he has thus offended more often or recently. But why is this an important factor? One answer, from advocates of algorithmic assessments, will be that it is statistically important, since it does more than other factors to increase the likelihood that this defendant will offend. But the more relevant answer is that it is important – indeed, that it provides the only legitimate kind of basis for detention-justifying assessments of risk – because it bears on whether the defendant is criminally dangerous: if we can see his prior crimes as manifesting a disposition to criminality, we can say not just that they show him to be dangerous, but that he has shown himself to be dangerous. There would of course be further empirical questions to be asked about the predictive strength of this kind of factor, but I am more interested here in its normative significance.

The mere fact of a criminal record cannot help justify pre-trial detention, for the reasons given earlier: it would be relevant if we were contemplating a practice of detaining dangerous *potential offenders*, but it does not bear particularly on those awaiting trial. What might bear on defendants awaiting trial is the fact that they had previously committed offenses whilst on bail: but this could be relevant, in line with the argument offered above about the risk that the defendant will abscond or interfere, only if release on bail requires a distinctive, enhanced, kind of trust – a trust that is betrayed, showing the defendant to be untrustworthy, not only by his absconding or interfering, but also by his commission of offenses not related to the trial. We trust you, the court must be taken to say to the bailed defendant, to behave; and "behave" is now to be taken to include not just conduct in relation to my impending trial, but a broader notion of "good behavior" (i.e., of refraining from crime).

We thus come back to the intuition that there is something distinctively heinous about a crime committed whilst on bail – perhaps because it is taken to display an especially flagrant disregard or contempt for the criminal law (though much would then depend on the particular circumstances and character of the crime): you were accused of a (serious) crime, and your response was to go out and commit another crime. I am honestly not sure whether this is an appropriate perspective, but if it is, it could help to justify pre-trial detention for those who are accused of appropriately serious crimes who have committed such crimes (or any serious crimes?) whilst on bail in the past.

4.5 Conclusion

I have argued that whilst there must, given liberal principles about respecting citizens as responsible agents, be a strong presumption against detention for those charged with criminal offenses, we can find an in principle justification for a limited practice of preventive or pre-emptive pre-trial

detention. The purpose of such detention is to guard against the risk that the defendant will commit offenses (either offenses related to her trial, or any serious offense) if left free while awaiting trial, but it cannot be justified merely by an algorithmic assessment of risk. Its justification must rather start with the normative difference that being charged makes to a defendant's position, in particular with the way in which defendants acquire a particular responsibility to assure their fellow citizens that they can be trusted in this risk-laden context not to abscond or to try to interfere with the criminal process (and, perhaps, not to commit other kinds of crime whilst awaiting trial). Normally, such assurance should be accepted, they should be trusted, either without further conditions ("on their own recognizance"), or subject to certain conditions that limit but do not radically interfere with the defendant's freedom: we trust defendants to "behave" conditionally on their fulfilling those conditions. However, if a defendant has in the (recent) past shown himself to be untrustworthy, by "misbehaving" or by violating his bail conditions (or, perhaps, by committing other crimes while on bail), we have good reason to mistrust him now – to refuse to accord him even the conditional trust that we must normally accord defendants. We therefore have legitimate reason to detain him, on the grounds that he cannot be trusted (more precisely, that we cannot be expected to trust him). That reason is not by itself sufficient, but it removes the main principled objection to pre-trial detention and thus renders it in principle justifiable.

Notes

1 See https://www.gov.uk/government/statistics/offender-management-statistics-quarterly-july-to-september-2021; https://questions-statements.parliament.uk/written-questions/detail/2022-02-10/122646/
2 See https://www.sps.gov.uk/Corporate/Information/SPSPopulation.aspx (but this figure includes those who are detained pending deportation). For the US, see Sawyer and Wagner (2020).
3 See https://www.gov.scot/news/supplementary-prison-population-statistics-2019-20/.
4 https://www.fairtrials.org/articles/news/one-ten-remand-population-england-and-wales-have-been-prison-more-year/. See also Campbell, Ashworth, and Redmayne (2019, 250).
5 See Campbell, Ashworth, and Redmayne (2019, 250). The figure for non-custodial sentences might be misleading: one reason for imposing such a sentence might be that the offender has spent time in prison on remand.
6 See ECHR Articles 5, 6(2). However, Article 5(1)(c) allows for detention "for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence."
7 But the likelihood of a prison sentence following conviction is relevant to an English court's decision on whether to remand in custody: see Bail Act 1976, Schedule 1, paras 1, 1A.

8 Bail Act 1976, Schedule 1, paras 2, 2ZA, 3; on similar American provisions, see Mayson (2018).
9 Although the mitigation would be significant only if it also addressed the ways in which current provisions for pre-trial detention have especially harsh, and discriminatory, impacts on the poor and on disadvantaged ethnic minorities.
10 See, e.g., Mayson (2022); on prevention in relation to criminal law, Ashworth and Zedner (2014, ch. 1).
11 For instance, in England, under the provisions of the Mental Health Act 1959.
12 See, e.g., Cole (2009) and the provisions of s. 23 of the English Anti-Terrorism, Crime and Security Act 2001. Those provisions were finally replaced by the Terrorism Prevention and Investigation Measures Act 2011, which do not involve detention as such, but restrictive measures that do not involve physical detention can drastically constrain freedom of movement: see Noorda (2015), on "exprisonment."
13 On English provisions, see Ashworth and Kelly (2021, chs. 9.8, 14.4). See also the case of Anders Breivik, convicted in 2012 of murdering 77 people: he received the maximum sentence of 21 years' imprisonment – which caused controversy in Norway and surprise elsewhere; but Norwegian law also provides for the continued detention, beyond their punishment, of those judged to be highly dangerous.
14 If, that is, they are kept behind locked doors, rather than being instructed to stay at home on pain of being liable to punishment if they do not: but this distinction is far from sharp – consider, for instance, so-called quarantine hotels with no locked doors, but with security personnel patrolling.
15 Further, in many cases (as with quarantine for those entering a country), the judgment is not that this person is dangerous (because infected), but that there is a risk that he is dangerous; and in such cases, the detention is non-discriminatory – *everyone* entering the country is quarantined. See further at n. 40 below.
16 For an interesting suggestion, see Walen (2011).
17 This is oversimplified: as we will see, a defendant's criminal record can bear on the decision of whether he should now be detained; those prior convictions might thus have an ongoing normative effect.
18 Compare the wording of ECHR Article 6(2): "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."
19 See e.g., Netherlands Journal of Legal Philosophy (2013); Lippke (2016).
20 Crown Prosecution Service (2018, para. 4.6); see also para. 5 on charging when there are only "reasonable grounds to suspect that the person to be charged has committed the offence."
21 See, e.g., Floud and Young (1981, 44), on the "right to be presumed free of harmful intentions"; Nance (1994), on the "principle of civility"; Ashworth and Zedner (2014, 130–2), on the "presumption of harmlessness."
22 I cannot discuss such putative duties here, although I am inclined to argue that in a tolerably just polity we would have civic, though not necessarily legal, duties of these kinds.
23 Only many kinds, because some crimes can be committed from within prison; those favoring incapacitation also often ignore the fact that crimes are committed inside prisons against fellow inmates or officers.
24 There are plenty of kinds of dangerousness other than a propensity to commit crime; and it is misleading to talk of, for instance, a persistent shoplifter as "dangerous." Though we must be cautious about the rhetoric of dangerousness, for the sake of convenience I will still talk of "dangerous" people, meaning simply those who are likely to commit serious crimes.

25 On "occasionalism" in penal theory, see Walker and McCabe (1973, 102–3).
26 Compare Ashworth and Zedner (2014, 69–70), on the "assumption that the state has a responsibility to prevent offences being committed by persons who are already formally 'in the system'."
27 For this kind of argument, see e.g., Sunstein and Vermeule (2005).
28 And see Crime (Sentences) Act 1997, s. 28(6)(b).
29 Compare Mayson (2018, 541–4).
30 I am assuming throughout this discussion that imprisonment can be justified as a mode of punishment. We should certainly not simply assume that to be true: but this is not the place to discuss prison abolitionism.
31 If the court could assume that he is guilty, he could be detained pending his formal conviction, just as, once convicted, he can be detained pending his sentence. That assumption clearly informs some attitudes to pre-trial detention: hence, the frequent talk of the risk that the defendant would commit "further offences" while on bail. Even the Crown Prosecution Service's guidance on bail issues, used to talk in these terms (see now https://www.cps.gov.uk/legal-guidance/bail on "[a]ny express or implied intention to continue to offend"). Compare Lippke (2014, 118), on whether a defendant "is 'reasonably likely' to commit further, imprisonable offenses pre-trial." But that assumption is clearly illegitimate.
32 See Sentencing Act 2020, s. 64: the fact that an offense was committed whilst on bail is an aggravating factor.
33 Bail is thus seen as a kind of parole in the classic sense: release on a promise of good behavior.
34 See Duff and Marshall (2016).
35 See at n. 21 above.
36 Thus, a defendant might be released "on his own recognizance" pending his trial – on the basis of a promise (perhaps written) to appear for trial. Note, however, that to talk of being released in this way suggests that the default would be detention – but that is just what is at issue.
37 For some alarming US statistics (in one study 90% of remanded felony defendants had had bail set, while in another, 40% of defendants whose bail was set at $500 or lower were detained), see Mayson (2018, 492).
38 See Sprack (2020, ch. 7. 26–33); Campbell, Ashworth, and Redmayne (2019, 244).
39 Whether, that is, they are strictly "proportionate" to the importance of the end (the proper functioning of the criminal process) they are to serve. On the "proportionality principle," see Barak (2012, Introduction).
40 Analogously, preventive measures such as airport security checks, or requirements during a pandemic to stay at home, are easier to justify if they apply to everyone; they become more problematic when they are focused on members of particular groups identified not by the way in which their conduct is suspicious, but because they fit a certain profile: see further s. 4 below.
41 The question of selectivity applies to all kinds of constraints, but for reasons of space, I'll focus on detention. We should distinguish selectivity from making equitable exceptions. Non-selective rules may bear harshly on particular defendants, and courts should be able to make exceptions in such cases.
42 See, e.g., Bail Act 1976, Schedule 1, para. 6ZA.
43 Note too that if we tried to guard against that risk by detaining defendants pending trial, we would expose ourselves to a heightened risk of suffering such detention.

44 Bail Act 1976, Schedule 1, para. 9. Compare the frightening lists of factors used in American algorithmic risk assessments quoted by Mayson (2018, 512, 568)
45 See at nn. 48–9 below; Hamilton (2021).
46 In the latter case, it might be his "character" that supposedly gives us reason to mistrust him: but the fact that he committed crimes unrelated to "the fulfilment of his obligations under previous grants of bail" does not give us reason to believe that he will now commit such bail-related offenses.
47 See further at nn. 49–50 below. The same is true if he issued threats against potential witnesses – another factor that can help to justify pre-trial detention: see Campbell, Ashworth, and Redmayne (2019, 241–2).
48 See at n. 21 above.
49 For these examples, see Mayson (2018, 494–5); contrast Campbell, Ashworth, and Redmayne (2019, 264); they suggest that a court deciding whether to detain a defendant should have "to determine whether it is more likely than not that this defendant will commit an offence likely to result in imprisonment if granted bail."
50 Compare the difference between "it is likely that *A* will do *X*" and "*A* is likely to do *X*" (Duff and Marshall 2021): the former might be a matter simply of statistical likelihood; the latter must be based on something particular to A's dispositions.

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