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Automatic authorisation: an exploration of the decision to detain in police custody

Abstract: The Police and Criminal Evidence Act (PACE) 1984 was implemented in 1986 to, inter alia, routinise police powers and procedures in England and Wales, and to improve protection for those suspected of committing a criminal offence. Yet, in the thirty years since its inception, various provisions within PACE have attracted fervent criticism for their ineffectiveness. Drawing upon empirical data collected at two custody suites in England, this paper illustrates, in line with previous studies, that custody officers are still failing to act as a ‘check’ on police powers and are routinely authorising detention. Perhaps more problematically, custody officers may go beyond authorisation and may assist arresting officers in finding sufficient grounds for detention. As such, in the thirty years post-PACE, s 37 is still having little to no impact on custody practices. This paper explores the factors which influence the authorisation of detention and offers tentative conclusions about how the refusal or authorisation of detention may be regulated.

Introduction and background

The Police and Criminal Evidence Act 1984 (PACE), which came into force in 1986, aimed to overhaul investigative procedures by regulating police powers and suspects’ rights. Prior to its introduction, the Judges’ Rules and the accompanying Administrative Directions governed the treatment of suspects¹ during police investigation. However, the Judges’ Rules lacked enforceability and thereby failed to adequately protect individuals undergoing police investigation, as highlighted by the ‘Confait’ case.² The Fisher report³ on the ‘Confait’ case and the earlier report of the Criminal Law Revision Committee⁴ culminated in the establishment of a Royal Commission for Criminal Procedure,⁵ which in turn led to the implementation of PACE. The purpose of these reforms were to ensure ‘fairness, openness and workability’⁶ through regulation of police powers and procedures. However, the reaction to PACE has

¹ For the purpose of this paper, the terms ‘suspect’ or ‘detainee’ can be used to refer to someone who has been detained in police custody – the former is detained under suspicion of a criminal offence, whereas the latter is more general and can include someone detained in police custody under suspicion of a criminal offence or otherwise. The term ‘arrestee’ refers to someone who has been arrested but is not yet detained in custody. These terms are, of course, not problem-free, in particular the term ‘suspect’ has attracted criticism as individuals are often detained where reasonable suspicion has not been established – see Mike McConville and Jacqueline Hodgson, *Custodial Legal Advice and the Right to Silence* (RCCJ research study no. 16) (HMSO 1993) 198.

² See Christopher Price and Johnathan Caplan, *The Confait confessions* (Marion Boyars 1977).

³ Henry Fisher, *Report of an Inquiry by the Hon. Sir Henry Fisher into the Circumstances Leading to the Trial of three persons on Charges arising out of the death of Maxwell Confait and the fire at 27 Doggett Road, London SE6* (HC 1977/78 90) (Home Office 1977/78).

⁴ Home Office, *Criminal Law Revision Committee Eleventh Report, Evidence (General)* (Cmnd 4991) (HMSO 1972).

⁵ Home Office, *Royal Commission on Criminal Procedure, The Investigation and Prosecution of Criminal Offences in England and Wales: The Law and Procedure* (Cmnd 8092-1) (HMSO 1981). (Hereafter RCCP).

⁶ David Brown, *PACE Ten Years On, A Review of the Research* (Home Office Research Study No 155). (Home Office 1997) 1.

been varied – it has attracted criticism for ‘non-impact’⁷ on police practices, yet has also been described as the ‘single most significant landmark in the modern development of police powers’.⁸

PACE, inter alia, established the role of custody officer an officer of at least the rank sergeant who is responsible for the detainee’s rights and welfare whilst the detainee is in police custody.⁹ His role is regulated by PACE and the Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers,¹⁰ and is guided by the College of Policing guidance on Detention and Custody;¹¹ he must ensure that the Act and the Codes are complied with¹² and must provide certain pieces of information to the detainee upon arrival (such as the reason for detention and the detainee’s rights and entitlements).¹³ These duties must be performed as soon as practicable; failure to do so could result in a breach of PACE. The custody officer is also responsible for considering whether detention¹⁴ should be authorised; he may deprive a suspect of his or her liberty, at least in the first instance, for 24 hours.¹⁵ However, he may only do so where there is insufficient evidence and detention is therefore necessary to ‘secure or preserve evidence relating to an offence for which [the arrestee] is under arrest or to obtain such evidence by questioning him’;¹⁶ or where there is sufficient evidence for the purposes of obtaining a prosecutorial decision from the CPS.¹⁷ The custody officer must be sure that he ‘has reasonable grounds for believing that detention is necessary for these purposes’.¹⁸

The consensus of the RCCP was such that ‘many suspects who were arrested and charged could be reported and summonsed instead’¹⁹ and therefore there should be a determination as to whether detention was necessary. As Sanders, Young and Burton have noted, Douglas Hurd (the then Home Secretary) urged that custody officers consider whether ‘detention was necessary – not desirable,

⁷ Mike McConville, Andrew Sanders and Roger Leng, *The Case for the Prosecution: Police Suspects and the Construction of Criminality*. (Routledge 1991) 189.

⁸ Robert Reiner, *The Politics of the Police* (OUP 2010) 212.

⁹ PACE requires that one or more custody officers be present at a ‘designated police station’ (s 35), however the custody officer’s role may be carried out by an officer of any rank provided he or she is not involved in the investigation should the custody officer be unavailable (s 36(4)). See PACE s 36 generally.

¹⁰ Code C (n 13).

¹¹ College of Policing, *Authorised Professional Practice on Detention and Custody* (College of Policing 2013) <www.app.college.police.uk/app-content/detention-and-custody-2/?s=> (accessed 5 November 2016) [original emphasis].

¹² PACE s 39.

¹³ See PACE ss 37(2), (3), (5) & (6)).

¹⁴ As this affords the police with considerable power, it was ‘balanced’ by the right to legal advice – see David Dixon, *Law in Policing: Legal Regulation and Police Practices* (OUP 1997) 283. There are of course problems with the right to legal advice. For some discussion of the issues herewith see Andrew Ashworth and Mike Redmayne, *The Criminal Process* (4th edn, OUP 2010) 93-4.

¹⁵ Thereafter an officer of rank of superintendent or above can authorise an extension of 12 hours (PACE s 42) after which time a ‘warrant of further detention’ can be granted by the magistrates’ court (PACE s 43).

¹⁶ PACE s 37 (2).

¹⁷ PACE s 37(1) – (3)) and (7).

¹⁸ PACE s 37 (2) and (3).

¹⁹ Andrew Sanders, Richard Young and Mandy Burton, *Criminal Justice* (4th edn, OUP 2010) 215.

convenient or a good idea but necessary'.²⁰ During the time at which PACE was being considered, there were concerns raised regarding the extent of police powers and there was an emphasis to balance police powers with individual rights. The necessity principle, as Brittan highlighted, was integral to the proposals of the Royal Commission and formed the basis of the Bill; there was a need to ensure that the police were conferred the powers required to do their job (i.e. fight crime) and that safeguards would off-set these powers. There were concerns, however, that the balance was being tilted towards the police.²¹ Indeed, in both the Commons and the Lords, there was fervent debate regarding the issue of detention in police custody and the impact it would have on individual liberty. The power of the custody officer to detain was, nonetheless, enshrined within the law, subject to the necessity criterion. Recent guidance, provided by the College of Policing, stresses the necessity requirement:

Detention is always the last resort and custody officers should authorise detention only when it is **necessary** to detain rather than when it is convenient or expedient. The decision should not be seen as a rubber-stamping of the necessity to arrest but as a separate independent decision'.²²

The courts have engaged with the issue of necessity and reasonableness of detention in a small number of cases. In *DPP v. L*²³ the court accepted that detention could be authorised routinely: the custody officer need not ascertain whether the arrest was lawful; he is entitled to assume as much. This decision was endorsed in *Al-Fayed v. Commissioner of the Police of the Metropolis*²⁴ where the court 'held that there was no reason to think that the custody officer did not have reasonable grounds for believing that detention was necessary'.²⁵ More recent decisions appear to further endorse this approach. In *Richardson v. The Chief Constable of West Midlands Police*,²⁶ the courts seemed unwilling to interfere with the custody officer's decision: the court stated that the custody officer's role was to decide whether detention is necessary and not whether the arrest was necessary; his decision is independent of the decision to arrest and could not cure any defect in the arrest.²⁷ The approach in *Richardson* was endorsed in *Hayes v. Chief Constable of Merseyside*²⁸ where the court held that the victim's withdrawal of a complaint did not by itself mean that there were no grounds to detain for the purposes of interview.²⁹ The decision in *Richardson* was also endorsed in *Hanningfield v. Chief Constable of Essex*³⁰ where it

²⁰ HC Official Report SC E 16 Feb 1984, col 1229, as cited in Sanders, Young and Burton (n 19) 216.

²¹ HC Deb 16 May 1984, vol 60, cc378-415.

²² College of Policing (n 11).

²³ [1999] Crim LR 752.

²⁴ [2004] EWCA Civ 1579.

²⁵ Sanders, Young and Burton (n 19) 217.

²⁶ [2011] EWHC 733.

²⁷ *ibid* at para 57.

²⁸ [2011] EWCA Civ 911.

²⁹ *ibid* at para 45.

³⁰ [2013] EWHC 243.

was held that ‘the lawfulness of the custody officer's acts must be judged in the light of his knowledge at the material time. He may or may not know the same facts as his colleague(s) who carried out the earlier arrest’.³¹

The intended role of the custody officer is to ensure independence, however, the reality is that the custody officer is nevertheless a police officer³² with both ‘institutional and collegial ties with other officers’.³³ Whilst some researchers felt that the custody officer was sufficiently independent from the investigation,³⁴ others, such as McConville, Sanders and Leng, pointed towards the lack of independence of the custody officer.³⁵ The RCCJ similarly recognised that it was difficult for the custody officer to be independent from his colleagues (they nevertheless felt that the role of custody officer should continue to be performed by a police officer).³⁶ Bound-up with his lack of independence, the custody officer does not necessarily thoroughly consider the necessity for detention but instead adopts a ‘rubber-stamping’ approach.³⁷ For example, in McConville, Sanders and Leng’s study, custody officers felt that anything other than an automatic authorisation of detention would be unusual. Indeed, ‘for [custody officers], it was not a separate decision: a person lawfully arrested would be detained’.³⁸ Custody officers understood ‘their role in terms of ensuring that the individual had been arrested for an offence known to the law and *then [would authorise] detention*’.³⁹

Such attitudes have not changed with time. Within this paper, I will explore the factors affecting the authorisation of detention, drawing upon empirical work conducted as part of a broader doctoral project. The findings, it should be noted, are unsurprising, particularly in light of previous studies conducted since the inception of PACE. As with previous studies, it is illustrated, herewith, that the custody officer does not provide an independent check on the police and, contrary to s 37, authorises detention routinely. Moreover, in addition to mere authorisation, the custody officer may also actively assist the arresting officer (AO) in establishing grounds for detention. Within this paper I will also offer tentative

³¹ *ibid* at para 32.

³² McConville, Sanders and Leng (n 7) 42.

³³ *ibid*.

³⁴ See Mike Maguire, ‘Effects of the P.A.C.E. provisions on detention and questioning: some preliminary findings’ (1988) 28 (1) *British Journal of Criminology* 19; Barrie Irving and Ian McKenzie, *Police Interrogation: The Effects of the Police and Criminal Evidence Act 1984* (The Police Foundation, 1989).

³⁵ McConville, Sanders and Leng (n 7).

³⁶ Home Office, *Royal Commission on Criminal Justice Report* (Cm 2263) (HMSO 1993) 30.

³⁷ Vicky Kemp, ‘PACE, performance targets and legal protections’ (2014) 4 *Crim LR* 278; Coretta Phillips and David Brown, *Entry into the Criminal Justice System: A Survey of Police Arrests and their Outcomes* (Home Office Research Study No 185) (Home Office 1998) 49; Brown (n 7); McConville, Sanders and Leng (n 7) 44; Ian McKenzie, ‘Helping the Police with Their Inquiries: The Necessity Principle and Voluntary Attendance at the Police Station’ [1990] *Crim LR* 22, 24; Keith Bottomley, Clive Coleman, David Dixon, Martin Gill, and David Wall, *The Impact of PACE: Policing a Northern Force* (Centre for Criminology and Criminal Justice, University of Hull 1989) 89.

³⁸ McConville, Sanders and Leng (n 7) 44.

³⁹ *ibid*.

recommendations regarding how the ‘rubber-stamping’ of detention may be counteracted, based upon empirical data.

Methods

The data explored within this paper was gathered as part of a larger doctoral project, focusing on vulnerability and implementation of the appropriate adult (AA) safeguard.⁴⁰ As decisions on the AA safeguard are made after detention is granted, it was imperative that I record whether detention was indeed granted. Non-participant observation was conducted in two sites for approximately three months at each (with in excess of 200 observations across the two sites). The custody suites were chosen on the basis of size and practicality (at Site 1 through informal links with a senior gatekeeper; and at Site 2 through an opportune meeting with another senior gatekeeper) and ethics approval was granted prior to research commencing on the basis that informed consent was obtained from the officers. Consent was obtained from a total of 31 custody officers (from Site 1, 20 custody officers (CO1-20) and from Site 2, 11 custody officers (CO21-24, 27-31, 33)) to observe them at the booking-in desk and at any other relevant points within the police custodial process.⁴¹ Semi-structured interviews were conducted with 15 officers from Site 1 and 8 from Site 2 towards the end of the observation period, and lasted an average of 41 and 43 minutes at Sites 1 and 2 respectively. This paper uses both observational and interview data (although it should be noted that the authorisation of detention was not explicitly discussed in every interview) and the data was analysed through computer-assisted qualitative data analysis.⁴² Within the interviews I did not ask questions on the authorisation of detention. Instead, custody officers offered much of this information unprompted (for example, when discussing their role). The findings below are, therefore, tentative. However, through triangulation, i.e. combining what was observed with what was discussed at interview, I am able to offer a robust exploration of the detention decision, yet also offers some new insights to the question of how and why custody officers authorise or refuse to authorise detention.

The role of the custody officer in authorising detention

As noted above, the custody officer must decide whether detention should be authorised, pursuant to s 37 PACE. Further, as also noted above, custody officer are nevertheless police officers. During observations, it was clear that custody officers were acutely aware of their role within the organisation: whilst they knew they had to be independent, they were nevertheless police officers:

⁴⁰ Home Office, *Revised Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers. Police and Criminal Evidence Act (PACE) 1984, Code C.* (Crown 2014). (Hereafter Code C).

⁴¹ I spent most, if not all, of my time at the booking-in desk.

⁴² The data was collected and analysed initially through a grounded theory approach – Kathy Charmaz, *Constructing Grounded Theory* (SAGE 2006). However, for this paper thematic analysis was used.

I'm sure in time there will be a change and it won't be police or custody sergeants or a police officer who does a custody sergeant's job but [someone who is] independent of the police service and all those things (CO27 Interview, June 2015).

As noted above, this lack of independence impacts upon whether the custody officer is able to effectively perform his role. In relation to detention, this lack of, or reduced, independence can influence the custody officers approach to authorisation. The authorisation of detention was, according to some custody officers, part of the role. During this project, I observed not one single refusal to detain when the arrestee has been brought to the booking-in desk. Moreover, detention was typically authorised with little or no deliberation. Authorising detention (rather than considering the necessity of detention) was seen as integral to the role of the custody officer. For example, when asked about his role at interview, CO28 explained:

I'm a trained custody sergeant. I've been on a four-week custody course which gave me the qualification to come into police custody and act as a custody sergeant i.e. authorise detention and all the powers that go with it (CO28 Interview, June 2015).

CO11 also stated that his 'role [was] to authorise detention for people that's been arrested for various offences, make sure that the arrest has been necessary in the first place, if it is then I authorise detention' (CO11 Interview, February 2015). The question for CO11 was not whether detention was necessary, but whether he felt the arrest was necessary.

Institutional (in)dependence?

As aforementioned, the custody officer has both 'institutional and collegial ties with other officers'.⁴³ These institutional ties are particularly binding when the custody officer is considering whether to authorise detention. It is not simply that he feels a bond with other officers; it is that he is structurally disadvantaged by virtue of his position in the organisational hierarchy. Put simply, he may be overruled by someone more senior than he.⁴⁴ As CO13 noted (when discussing his past refusals to authorise detention):

They'll say, 'Well I'll contact my sergeant'. It's often the CID [Criminal Investigation Department] – this idea that I'm one particular part of the organisation that I fall for it, and I quite often come up

⁴³ McConville, Sanders and Leng (n 7) 42.

⁴⁴ See also Kemp (n 35). See PACE s 39(6).

against one particular branch of the CID – and then they want to refer things to their DI [Detective Inspector] and their DI then will then talk to me [and] then refer it onto their DCI [Detective Chief Inspector] and, at the end of the day, it goes up to superintendent and the superintendent can overrule me, if he or she wants (CO13 Interview, February 2015).

Whilst custody officers felt that they were very much distinct from other areas of policing, they also felt that they could be easily overruled by more senior officers. This in turn produced a conflict – they felt a tension between complying with the law and complying with the orders of their superiors:

The arguments that will ensue because you wouldn't authorise detention for something. Because we ... we're separate from divisional officers, so we're seen as the enemy to some extent, sometimes... We should be on their side, but we've got to stick to the law as well. I mean, I'm not saying that they're breaking laws by making arrests but we've got to be totally independent of it so we can't side with them. Just because a person's a criminal, don't mean they should be arrested. And we know that sometimes we say 'I'm not authorising detention on this' but they're onto the sergeant, who's on to their DI, who's on to their superintendent, who's phoning us, explaining, asking us, demanding from us why we've not done it (CO11 Interview, February 2015).

The institutional structure undermines the custody officer's ability to say 'no'; he cannot be independent because he is not allowed to be. The issue of support in relation to decision-making was also raised at interview:

I think that if I made decisions for the right reasons then I would be supported and I'd like to think I'm supported there. I get into trouble with refusing to authorise detention. I've got into trouble with that in the past and I've not been particularly well supported but at the end of the day there's been no kickback from it. I've expected to be hung and quartered for it when I came on duty and they've thought, they've looked at it, and they've thought that 'he's right'. They've just left it, nothing's happened (CO13 Interview, February 2015).

That custody officers may be challenged or may face criticism for their decisions merely serves to undermine their (already fragile) independence. They are in a particularly difficult position: authorise detention contrary to s 37 and therefore breach the PACE provisions, or refuse to authorise detention and thereby infuriate their colleagues, and potentially face overthrow or denunciation.

However, the custody officer may go beyond rubber-stamping the decision and may actually collude with the AO to ensure that there are sufficient grounds to detain, as the following example illustrates:

Arrestee is suspected of aggravated burglary. AO states that arrestee fits the 'description' and was suspected of an offence on a particular (unspecified) day and then the following day. AO seems unsure about what he is saying. CO15 feels that the grounds are quite weak and indicates discomfort with authorising detention. AO does not bolster his account and reiterates the information already provided. CO15 seems unwilling to accept this and asks a detention officer to take arrestee away. CO15 then turns to AO and said 'we need to have a chat; you're not convincing me that he needs to be booked in at the moment'. AO again explains alleged offence. CO15 advises AO that the information provided, as it stood, was not enough to 'nick' the arrestee. CO15 suggests, however, that AO could 'link' the offences as this would strengthen the case for detention. CO15 states "I'm all for booking him in but we need more information". AO still is not presenting enough information for CO15 to detain. CO15 then suggests that they go somewhere else to talk.⁴⁵ CO15 and AO chat for a few minutes. AO is overheard giving the same account and CO15 is overheard guiding AO on what would be sufficient to detain the arrestee. CO15 and AO return to the booking-in desk and the arrestee is brought back. CO15 explains to arrestee that the law requires that detention is authorised on reasonable grounds and necessity should be established before detention is granted. CO15 explains to arrestee that the custody officer must be satisfied that there are sufficient grounds for detention but the custody officer does not have to explain to arrestee how the decision is made. Detention was authorised. (Site 1, Interaction 90, December 2014).

In this instance, CO15 is not acting as an independent check on the AO but instead enabling the AO to construct a plausible account so that detention could be granted. As McConville, Sanders and Leng have highlighted, the question for the custody officer is not so much whether detention should be authorised but rather how it could be justified.⁴⁶ This interaction illustrates this.

PACE, pressure and performance targets⁴⁷

One must also consider the wider context within which these decisions are made. One particular impact on the 'rubber-stamping' of detention has been the enduring impact of the, now abolished, 'offences brought to justice targets', which have since been replaced, in some forces, with institutional performance measures.⁴⁸ The effect of performance targets has placed AOs under pressure, which, in turn, has impacted negatively upon custody officers:

⁴⁵ There is both CCTV and audio-recording in operation at the booking-in desk. CO15 undoubtedly wanted to evade the audio-recording.

⁴⁶ McConville, Sanders and Leng make the point that PACE is not evaded by the police but instead used by them (n 7) 43.

⁴⁷ For an excellent discussion of the effect of performance targets on police custody see Kemp (n 37). As noted, the 'offences brought to justice' targets were abolished in 2010 but it seems that old habits die hard in some police forces.

⁴⁸ See Kemp (n 37).

There is a volume to it. But the response officers are under pressure from their sergeants to go out and make arrests. I'm told they don't do performance figures anymore but I think they still do. And the response sergeants are under pressure from their own command teams, from superintendent outwards. The easiest one to look at is domestic violence, yes it is a serious crime and should be investigated; but does every single domestic violence case need to be arrested? It's down to the officer's discretion whether they arrest but they have to jump through so many hoops... to explain why they haven't [arrested] that the simplest thing to do is to arrest every single time and quite a few times they don't need to arrest that person. It's the same with shop theft and every other offence. They just make the arrest rather than think outside the box and do it [in] other ways. They're supposed to have discretion; I think the age of discretion for a lot of things is gone. And it's probably gone more because of a back-covering thing rather than anything else. They're worried if they don't make the arrest, they got to try to cover their back another way. So they should make the arrest, I'm done. And when they get to us, if we refuse to authorise detention that's our fault, not their fault, they've done their bit (CO11 Interview, February 2015).⁴⁹

The lack of discretion exercised during arrest means that many more individuals are entering the custody suite than perhaps should be. This, in turn, creates a busy environment where the custody officer is placed under extreme pressure. As noted above, custody officers may face opposition from senior officers if they refuse to authorise detention. Yet, it also takes time to raise an objection, and time is something that staff in the custody suite do not always have in great abundance:

On a daily basis, you're put under this immense pressure of having this huge queue of people waiting to be dealt with, whilst being responsible for the ten or so people behind your doors and be responsible for anything that might happen to that person and sometimes you might not even know where that person is at for six or seven hours because you've been so busy with other things... You keep saying to yourself 'I'm going to deal with this one and that's it' and you've constantly got someone in your cells who's kicking off so you've got to go down to him but you're still in the middle of this and you've still got that waiting from earlier... and it just descends into mad chaos (CO11 Interview, February 2015).

The custody officer may also have other issues to contend with. Their role is not simply to decide upon detention – they must also risk-assess the detainee upon booking-in (sometimes taking up to 40-50

⁴⁹ As Hoyle has highlighted, mandatory or pro-arrest policies may be contrary to the victim's wishes and may actually place the victim in greater danger. Further, victims may not necessarily want the perpetrator to be prosecuted but often an arrest gives the victim some much needed respite – see Carolyn Hoyle, *Negotiating Domestic Violence* (Clarendon Press 1998).

minutes per detainee);⁵⁰ comply with procedures such as the CPS Charging Guidance and procedures contained within the Mental Health Act (MHA) 1983;⁵¹ and, if required, call an AA for a vulnerable suspect,⁵² obtain a legal representative upon request from the suspect,⁵³ obtain a healthcare professional (HCP) or forensic medical examiner (FME),⁵⁴ or contact the suspect's nominated person.⁵⁵ These demands, whilst not excusatory, may explain why the custody officer does not carefully consider whether it is indeed necessary to detain. These issues may be further compounded by the fact that the custody officer may have received merely minimal training⁵⁶ and some may not frequently act as custody officers.⁵⁷

The capacity of the custody suite

Capacity posed a particular problem at Site 1. As CO9, when discussing the size of the suite, stated, 'It's too big, in my opinion. You know, you can't run a suite effectively with that number of cells' (CO9 Interview, February 2015). Not only can the capacity of the custody can increase the pressure which the custody officer faces, it may also impact upon the custody officer's ability (or rather lack thereof) to refuse detention:

I think the other problem that this place has got is that nobody ever rings to say, 'We're up, we're coming in', they just turn up... [whereas] other suites, in the county do that; they'll ring to say. The method that they enter the suite is via a door, which is controlled by the custody staff (CO9 Interview, February 2015).

Pressures within the custody suite then culminate to undermine the 'independence' of the custody officer:

⁵⁰ See John Coppen, 'PACE: A View From the Custody Suite' in Ed Cape and Richard Young (eds) *Regulating Policing: the Police and Criminal Evidence Act 1984 – Past, Present and Future* (Hart 2008) 85. The element of the booking-in procedure that involved face-to-face interaction between the custody officer and the detainee typically took 5-15 minutes (except where language line was being used). Where the custody officer had to contact an AA, a legal representative, an HCP, or an FME this process could take much longer.

⁵¹ Coppen (n 50) 85-8.

⁵² Code C (n 40).

⁵³ PACE s 58.

⁵⁴ Code C (n 40); College of Policing (n 11).

⁵⁵ PACE s 56.

⁵⁶ See Coppen (n 50) 82-3. Custody officers in the suites studied had been provided with an initial custody officer training course (but for some this was close to 20 years ago). At Site 1, there was regular training on detainee safety and welfare, and some additional online training. At Site 2 most of the training seemed to be conducted through online modules.

⁵⁷ See Michael Zander, *Zander on PACE: The Police and Criminal Evidence Act 1984* (5th edn, Sweet and Maxwell 2005) 136. In this two suites studied all custody officers were performing this role permanently, for at least a period of 6 months at time of study. Some had been custody officers for around 20 years.

Sometimes it's the easy way out just to go 'I'll authorise detention' because I'll save all that battle. Because I've got this big queue waiting and I've still got to do this and I've still got to do that and sort the queue. I just haven't got the time to fight (CO11 Interview, February 2015).

The above discussion provides reasons as to why detention is often authorised. It must, however, be recognised that detention is not always authorised: there may indeed be instances where the custody officer refuses to authorise detention. In the discussion below I explore these reasons. It is also worth noting that these reasons can be considered when deliberating how best to regulate detention.

Weak grounds and welfare considerations⁵⁸

The discussion thus far has centred on detention being routinely authorised. Whilst the above example (CO15) indicates that custody officers may act so as to justify detention where the grounds are weak, there may be others who are unwilling to do so. This is particularly the case when:

The grounds aren't there... I think the grounds for arrest are really spurious, there's no evidence that would realistically link this person to the crime. I say, 'I'm not doing it, I'm sorry, I'm not doing it' (CO13 Interview, February 2015).

At interview, CO11, CO13, and CO28 discussed refusing to authorise detention: CO28 suggested that it could be refused, hypothetically, if the arrestee had learning difficulties or if he did not feel the requirements were met (CO28 Interview, June 2015), CO11 felt he would refuse if it was 'blatant that they shouldn't be here' (CO11 Interview, February 2015), and CO13 stated that he *had* refused to authorise detention in the past.⁵⁹

Detention may be (and should be) refused where the grounds are not satisfied, however, it may also be refused for other reasons. These refusals hold important lessons when exploring how we may potentially 'rectify' the blanket authorisation of detention by police custody officers. The one occasion that detention was refused is noted below:

Custody officer is overheard speaking to an AO over the phone. As I can only hear CO29's side of phone call could be heard, I decide to speak to him when he is finished with his call. I ask him to explain what had happened and he tells me that the AO had arrested a 15-year-old for possession of cannabis and had asked whether he could bring the suspect in for questioning. CO29 informed AO

⁵⁸ On the issue of welfare and detention see Dehaghani (online).

⁵⁹ CO13 did not seem to mind conflict with other officers provided he felt he was justified in making his decision.

that he was refusing to authorise detention because ‘we shouldn’t have a 15-year-old overnight in a cell’. CO29 suggested that street bail and, potentially, a cannabis caution would be a more appropriate response (Site 2, Observation and Discussion with CO29, May 2015).

There are a number of noteworthy elements here. The first concerns the characteristics of the arrest and the individual under ‘arrest’ – there has been a drive to reduce the numbers of young people entering, and spending time in, police custody,⁶⁰ and disposal options were available to the AO by virtue of the offence (possession of cannabis) and the ‘arrestee’ (young suspect, first offence). Moreover, and perhaps more importantly, the AO *asked* CO29 if he could bring the 15-year-old into custody *and* the interaction did not occur *face-to-face* in the custody suite (by which time the AO would have made the decision that he wanted to detain the individual) but instead over the telephone. It is therefore plausible to suggest that the same approach may not have been adopted in respect of an adult or in respect of a young suspect who had been brought into the custody suite. The custody officer, in this instance, was not undermining the authority or questioning the judgment of his co-worker.⁶¹ It is undoubtedly more difficult to refuse a request in person and, moreover, the approach was more conversational (i.e. can I bring him in?) rather than transactional (i.e. book this ‘prisoner’ in, please).

The interaction above illustrates that a different approach to detention (i.e. refusal rather than rubber-stamping) may be taken where there are welfare considerations.⁶² Yet, this was not always the case. For example, the nature of the offence might impact upon whether the young person is detained in custody:

If you get a juvenile that comes into custody at eleven o’clock at night and they’re fit for interview and there’s no family member that will come out, then you’ve got to make a decision. Do we keep them in custody or do we bail them to come back in the morning when we can get an appropriate adult? Well, depending on the nature of the offence, more often than not, they’re kept in custody (CO9 Interview, February 2015).

Perhaps what was therefore important about the above interaction (Site 2, Observation and Discussion with CO29, May 2015) was that a disposal option was available. Yet, what was ostensibly more

⁶⁰ See BBC News (2013), ‘Overnight child custody must end, says charity’ < www.bbc.co.uk/news/uk-24513085 > (accessed 18 February 2016); College of Policing, *Children and young persons* (College of Policing 2013) <www.app.college.police.uk/app-content/detention-and-custody-2/detainee-care/children-and-young-persons/> (accessed 18 February 2016).

⁶¹ McConville, Sanders and Leng (n 7) 43.

⁶² ‘From a welfare perspective, [police custody] can be an opportunity to intervene in someone’s life when they are in crisis, directing them to helping agencies and perhaps even diverting them from the criminal process altogether’ – see Layla Skinns, Andrew Wooff and Amy Sprawson, ‘Preliminary findings on police custody delivery in the twenty-first century: It is ‘good’ enough?’ (2015) *Policing and Society*, DOI: 10.1080/10439463.2015.1058377, 1.

important was the approach of the AO. The following example further exemplifies the importance of ‘welfare’ and the agreement of the AO when refusing to authorise detention:

CO33 discusses the example of 75-year-old man who was brought in for drunk driving. CO33 decided, along with AOs, not to detain the man overnight as it was ‘too traumatic’. He was charged even though he was intoxicated, and was taken home and left in the care of his wife (Site 2, Discussion, May 2015).

Within this interaction, it is worth noting that, not only was there a welfare consideration, i.e. the officers did not want to detain this man overnight as it would be ‘traumatic’ for him, there was also a risk consideration, i.e. that detaining an elderly individual who is drunk might increase the risk of harm, serious injury, or death.⁶³ Moreover, as with the scenario above (Site 2, Observation and Discussion with CO29, May 2015), the custody officer was not questioning the AO’s decision – in this case they decided together that taking the man back home to his wife would be the best option.

Welfare is not, however, always a consideration. As CO11 noted at interview (above), cases involving domestic violence require action. The following interaction illustrates this:

CO2 is booking-in an arrestee who has undergone a tracheotomy, is alcohol dependant, and is dying from terminal cancer. He was allegedly the perpetrator of a domestic dispute (although it appears that it has since been resolved, as his wife has arrived at the custody suite and is concerned for her husband’s welfare). The, now detained, individual is struggling to breathe and speak and, as a result, the booking-in procedure is taking quite some time (around 50-60 minutes of face-to-face interaction). When asked whether he has self-harmed in the past, he answers ‘yes’ but claims to be no longer suicidal now that he is facing death. During the risk assessment, he brings out a mirror and a pair of tweezers and starts fidgeting in the tracheotomy. It appears that something has lodged in the tracheotomy pipe whilst he was answering the custody officer’s questions. He appears to be exhausted at the end of the booking-in procedure. He is deemed fit to detain and fit for interview by the HCP (Site 1, Interaction 47, November 2014).

Although welfare, in the above instance, did not result in a refusal of detention, CO2 did mention, at interview, that welfare considerations may result in refusals in the future:

⁶³ Both those who have consumed alcohol and those who are elderly are deemed to be at greater risk in police custody – see College of Policing (n 11).

Offences that were summary offences where they had no power of arrest, it made them all of a sudden that they had got a power of arrest. I've now seen, it probably is Safer Detention driven, but more Code G driven. Because officers use it as a blanket to 'Let's just nick everybody' as we were discussing earlier, for them to resolve everything. I've now seen the beginning of a sea change and whether that's going to change things massively over the next few years; not just the necessity to arrest but now we've seen an adoption of an attitude, is it necessary to detain? We automatically detain people just because they've been arrested, a few years ago... Because someone's arrested, it's just natural that you as a custody sergeant just book them in. You did it without question or a great deal of thought. And now, we're into these realms of, an officer might have deemed that it is necessary to arrest and I sit there and think, 'Does this person really need to be here? Do they actually need to be under arrest for us to go through this process?' (CO2 Interview, February 2015).

The opportunity to observe officers for close to three months enabled me to ascertain that they are not yet, at least on the occasions that I observed, refusing to authorise detention. However, as noted above, some policies and procedures, particularly those with a welfare or risk focus, are having a positive impact on whether custody officers refuse to authorise detention. This will be discussed in greater detail below.

The unworkability of necessity

Perhaps it is also worth noting, before exploring the tentative recommendations, that necessity, as a criterion, is not necessarily workable. Sanders, Young and Burton have briefly explored the problem with an interpretation of 'necessary' and have contrasted this with 'convenient or desirable'. They argue that necessity equates to there being 'no other practicable way of gathering, securing or preserving evidence in relation to the offence in question'⁶⁴ whereas convenience or desirability connotes cost-effectiveness or increasing 'the probability of confession'.⁶⁵ If custody officers were to grant detention on the basis of necessity:

there should be proportionately few authorisations of detention [because] a determination that there was insufficient evidence to charge would ordinarily be coupled with a decision that such evidence could be obtained in ways that did not require the detention of the arrestee.⁶⁶

⁶⁴ Sanders, Young and Burton (n 19) 216.

⁶⁵ *ibid.*

⁶⁶ *ibid.*

Accordingly, ‘the presumption in s 37(2) would then apply, and the custody officer would then be obliged to release the arrestee on bail or unconditionally’.⁶⁷ The reality would be such that a ‘large number of perfectly lawful arrests [would be] negated by custody officers refusing to authorise detention’.⁶⁸ This would, in turn, render s 37 PACE, as a rule, somewhat impractical. Perhaps it is then understandable that custody officers do not take ‘necessity’ into consideration when detaining individuals.⁶⁹ The courts have condoned the rubber-stamping approach⁷⁰ thereby sending the signal that the necessity criteria is, essentially, unnecessary.

Counteracting the rubber-stamping approach: recommendations

As noted above, the necessity criteria is somewhat unworkable – if it were deployed accurately, i.e. by being given its natural meaning, then there would be few authorisations of detention. A breach of s 37 is inevitable if one wishes not to challenge one’s co-workers or irritate one’s superiors. Yet, there are a number of reasons why detention may be refused. The first is that the grounds for authorisation are simply not present. Given the institutional restraints on refusal and the unwillingness to challenge a co-worker, it is perhaps only the boldest of custody officers who will refuse to detain. Detention may also be refused on welfare grounds i.e. that risk assessment and ‘Safer Detention’⁷¹ exert greater influence over custody officers’ decisions than PACE:

The bigger impacting thing on a day to day basis, for me, is Safer Detention rather than PACE; not in the investigation of detainees but of how we supervise and look after them. That’s the biggest change that has happened in custody within the last eight and a half years. There was a lot of onus on complying with PACE to make sure that we didn’t lose investigations and that things were done properly. And I would argue now that the greater focus and greater priority is care of these people whilst they’re in detention (CO2 Interview, February 2015).

The problem with relying on the welfare argument is that officers may decide to interview outside of the (albeit minimal) custodial safeguards:

⁶⁷ *ibid.*

⁶⁸ *ibid.*

⁶⁹ For the impact of rules on police decision-making see Richard V Ericson, ‘Rules in Policing: Five Perspectives’ (2007) 11(3) *Theoretical Criminology* 367.

⁷⁰ Sanders, Young and Burton (n 19) 216.

⁷¹ See Association of Chief Police Officers, *Guidance on the Safer Detention and Handling of Persons in Police Custody*. (ACPO NPJA 2006); Association of Chief Police Officers *Guidance on the Safer Detention and Handling of Persons in Police Custody*. (ACPO NPJA 2012). This has since been superseded by College of Policing (n 11).

It might be an officer's attitude now, with us clamping down on the necessity to detain and should this person really be in a police station, police officers are more likely not to bring in vulnerable mental health issues and are we going to miss things because of that? (CO2 Interview, February 2015).

It is therefore unclear whether a greater focus on welfare would discourage automatic authorisations of detention and thereby encourage greater use of the 'voluntary' interview (which is usually anything but voluntary), or whether officers would seek evidence through other means (i.e. without resorting to interviewing the arrestee).

Another factor that may impact upon whether detention is authorised is the capacity of the custody suite. One notable difference between Site 1 and Site 2 was the number of cells – the former had well over 80 (with 'spill-over' there were in excess of 100 cells) and the latter had under 40. This meant that there would always be room for arrestees at Site 1, however, particularly on Friday and Saturday evenings, there would not be enough room at Site 2. Both the extra room in the suite and the busyness of the suite may impact upon whether the custody officer is willing to refuse detention:

If it was in a smaller suite maybe I'd have the time to fight, you'd think 'I'm not having it'. But here you just are under massive pressure, I haven't got the time to fight so it's just easier to go 'Yeah, come on' and you just chuck out the blatant ones (CO11 Interview, February 2015).

The issue of capacity impacted particularly upon the approach taken by the AOs. As noted earlier, AOs simply turned-up at the custody suite at Site 1 (see CO9 Interview, February 2015) but at Site 2, by contrast (and as noted in Observation and Discussion with CO29, May 2015), calls would sometimes be made to the custody suite before the arrestee was brought in. This meant that officers would *ask* whether they can bring the arrestee into custody and this interaction would not be *face-to-face* (so as not to affront the AO). Further, the AO has not yet made the decision to bring the arrestee into custody and, as such, the custody officer is not challenging his authority (as he would be if the officer had brought the arrestee to the custody suite) but instead replying 'yes' or 'no' to a question. Upon this basis, it could be suggested that the internal policies on refusing or granting detention could be changed so as to ensure that fewer individuals are entering the custody suites and so that custody officers feel more comfortable when refusing to authorise detention:

It's a cultural thing, especially within this force, that empowerment for the officer to make that decision or have the courage to ring through and be directed by the custody officer, because they don't take it as an affront. And a lot of the calls, we don't even get calls because they've made the decision. Or during the investigation their own sergeant has said 'there's no way we're going to nick

them and take them into custody'. Now, it may be they've done that because they're high maintenance and they don't want to be lumbered with that – that may play a part of it – or because the offence was so low level that actually, we have got other disposals for this... But now, officers have got the confidence to ring through and be questioned. And even sergeants on the scene have said 'Nick those two and bring them in' but, once I've heard the circumstances, I've said 'no, I'm not authorising. I'm going to say something'. But I don't know about other forces (CO28 Interview, June 2015).

Conclusions: the conflict for a custody officer

Particular elements of PACE, and most notably the necessity criteria, have been 'easily absorbed by the police'⁷² and PACE has operated in a manner which is largely presentational.⁷³ A number of challenges face the custody officer – he may not want to question his co-workers⁷⁴ and may therefore grant detention. He may face other pressures within the custody suite such as high numbers of detainees or short-staffing,⁷⁵ and may therefore find it easier to simply rubber-stamp detention. And, whilst the custody officer may view himself as independent, the organisation does not necessarily always treat him as such – he must work under the direction of, or under threats or intimidation from, his superiors.⁷⁶ It is therefore not simply his collegial ties which compromise his autonomy; his institutional ties may be those which provide the greater bind.⁷⁷ The custody officer is, in some instances, *forced* into facilitation. Therefore, whilst PACE requires that detention must be carefully considered (and granted only if necessary and on reasonable grounds), in reality it is authorised automatically.⁷⁸

Within this paper I have explored how authorisation, in line with earlier studies, is routinely authorised, also illustrating, perhaps only anecdotally, how the custody officer may facilitate the AO in constructing a likely story so that detention can be authorised. Whilst the observational data suggests that requests are unlikely to be refused at the custody suite, the interview data suggests that some officers may refuse to authorise detention. Further, the observations and interviews suggest that there are (albeit only a small number of) refusals prior to arrival at the custody suite.

⁷² McConville, Sanders and Leng (n 7) 189.

⁷³ Reiner (n 8); Dixon (n 14) 94; McConville, Sanders and Leng (n 7); McKenzie (n 37). See generally Policy Studies Institute, *Police and people in London*; iv, David J. Smith and Jeremy Gray, *The police in action* (Policy Studies Institute 1983).

⁷⁴ McConville, Sanders and Leng (n 7) 43.

⁷⁵ See Bottomley, Coleman, Dixon, Gill and Wall (n 37) 116.

⁷⁶ See Kemp (n 37).

⁷⁷ See McConville, Sanders and Leng (n 7) 42.

⁷⁸ Kemp (n 37); Philips and Brown (n 37) 49; McConville, Sanders and Leng (n 7) 44; McKenzie (n 37) 24; Bottomley, Coleman, Dixon, Gill and Wall (n 37) 89.

Changing policy and procedures,⁷⁹ as well as pressure from outside groups, such as the Howard League for Penal Reform,⁸⁰ may have encouraged, and may continue to encourage, the exercise of greater caution when authorising detention. For example, when discussing detention (although initially in reference to how the police pick up the ‘slack’ for the NHS), CO2 noted that there was perhaps ‘the beginning of a sea change’ whereby there is an ‘adoption of an attitude, is it necessary to detain?’ (see CO2 Interview, February 2015 above).

Adoption of practices, such as making a call through to custody to *ask* the custody officer if he is able to detain, may ensure greater compliance with the spirit, if not also the letter, of PACE. A reduction or adaptation may be further facilitated by reducing the number of cells in the custody suite so that AOs are *required* to ask if detention in custody is possible. This, of course, will not ensure that detention is refused where the grounds are not met but it may reduce the numbers of individuals brought into custody.⁸¹ Regulation may not occur through PACE but could be achieved through other means.⁸²

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⁷⁹ See College of Policing (n 12); see also ACPO (n 71).

⁸⁰ Layla Skinns, *The overnight detention of children in police cells* (Howard League for Penal Reform 2011) <www.howardleague.org/fileadmin/howard_league/user/pdf/Research/Overnight_in_police_cells_final.pdf> (accessed 5 November 2016).

⁸¹ This, of course, introduces more problems in that ‘voluntary’ interviews may instead become the norm.

⁸² As the PSI Report (n 73) suggested, rules are utilised in different ways by the police. Those rules which have greater influence in terms of police accountability or increased likelihood of sanction may be more effective in regulating police actions.

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