A SOCIO-LEGAL STUDY OF NON-DEFENDANT CHARACTER EVIDENCE IN CRIMINAL TRIALS

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ABSTRACT

This thesis presents a socio-legal analysis of the use of non-defendant character evidence in Crown Court criminal trials. Combining an in-depth doctrinal analysis of s.100 of the Criminal Justice Act 2003 and s.41 of the Youth Justice and Criminal Evidence Act with original qualitative empirical methods (interviews with trial counsel and observations of real Crown Court trials), the thesis explores the real-life practical operation of these two rules of exclusion and their associated inclusionary exceptions, and how these rules influence the pre-trial process and eventual trial tactics of counsel. The findings suggest that: confusion as to the scope of s.100 and s.41 are causing problems in practice; most character evidence is admitted via agreement following negotiations between the adversarial parties; and funding cuts combined with increased time pressures result in a lack of procedural compliance. The thesis concludes by setting the findings in a broader context of increasing managerialism throughout the criminal process.

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Non-defendant bad character (BC) and sexual history (SH) evidence (collectively: 'character evidence'), regulated by s.100 of the Criminal Justice Act (CJA) 2003 and s.41 of the Youth Justice and Criminal Evidence Act (YJCEA) 1999 respectively, have much in common. They share identical theoretical foundations concerning their potential to be relevant to a multitude of issues in a criminal trial, and both s.100 and s.41 have at their heart the aim of protecting non-defendant witnesses from having their characters attacked at trial.[1]

This thesis provides an in-depth, critical, socio-legal examination of these two rules of evidence, situated in their procedural and practical contexts. This introductory chapter provides a brief examination of the current literature, and the perceived problems that commentators and researchers have found with s.100 and s.41, from which the research questions for this current project were formed. The justification for, and description of, the empirical socio-legal methods used to investigate those questions will then be given.

1.1. Context and Critical Commentary

Critiques of the current statutory regimes which regulate the admissibility of BC and SH will be examined here.

1.1.A. Problems with Bad Character

The BC reforms contained within the CJA 2003 were not initially popular amongst legal commentators. Tapper argued that although one aim of the reforms was simplification of the law, the provisions in the CJA 2003 are anything but simple. Moreover, the inclusion of non-defendant BC evidence ultimately diluted the principles behind, and overriding objective of, the reforms which were primarily focussed on defendant BC.[2] Further attacks concerned the nebulous term 'reprehensible behaviour', evidence of which is considered BC for the purposes of the CJA.[3]

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[1] *Miller* [2010] EWCA Crim 1153, [2010] 2 CrAppR 19 [20] (Pitchford LJ); JD Jackson, 'Re-Visiting Evidentiary Barriers to Conviction and Models of Criminal Procedure' in B Ackerman, K Ambos and H Sikirić (eds), *Visions of Justice: Liber Amicorum Mirjan Damaška* (Berlin: Duncker & Humblot, 2016).

[2] C Tapper, 'Criminal Justice Act 2003: Part 3: Evidence of Bad Character' [2004] *Criminal Law Review* 533.

[3] R Munday, 'What Constitutes "Other Reprehensible Behaviour" Under the Bad Character Provisions of the Criminal Justice Act 2003' [2005] *Criminal Law Review* 24, 43. See also A Waterman and T Dempster, 'Bad character: Feeling Our Way One Year On' [2006] *Criminal Law Review* 614; J Goudkamp, 'Bad Character Evidence and Reprehensible Behaviour' (2008) 12(2) *International Journal of Evidence and Proof* 116.

Not all responses were negative. Spencer was one of a minority who were largely in favour of the reforms immediately after they were enacted.[4] Once the BC provisions had developed through case law, Roberts and Zuckerman concluded that much of the immediate response from the legal community was a little harsh (although criticisms of complexity were well founded).[5] Similarly, Redmayne argues that when one assesses the CJA 2003 on its own merits, it is a vast improvement over the previous common law rules.[6] Although Hunter cautioned against heralding the CJA 2003 as a turning point, arguing that 'embedded cultural norms and practices will not be altered by isolated statutory interventions',[7] Birch argues that one of the greatest impacts of s.100 has been to shift adversarial culture away from using 'wink and nudge' tactics.[8]

Other than Durston, who thought that s.100 would have relatively little impact on the ground,[9] and recently Birch,[10] the academic focus on BC evidence almost exclusively relates to defendants.[11] A second failing of the research literature is the dearth of empirical research to substantiate critics' theoretical and doctrinal concerns with the provisions. To date, the only empirical research project on the BC provisions of the CJA 2003 was undertaken in 2006.[12] Court staff at three different Crown Courts and 3 Magistrates' Courts were asked to record applications to adduce BC evidence, and some[13] interviews were conducted with lawyers, court staff and the police. Ultimately, the report focused primarily on defendant BC, with 731 of the 767 applications concerning s.101.

The findings related to the remaining 36 applications are of some interest. Applications were made in writing 93% of the time for defendants, but only 51% of the time for non-defendants. Of the 36 s.100 applications, 26

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[4] JR Spencer, *Evidence of Bad Character* (1st edn, Oxford: Hart, 2006), Ch1. See also J McEwan, 'Previous Misconduct at the Crossroads: Which "Way Ahead"?' [2002] *Criminal Law Review* 180.
[5] P Roberts and A Zuckerman, *Criminal Evidence* (2nd edn, Oxford: OUP, 2010), 658-661.
[6] See §2.2.; M Redmayne, *Character in the Criminal Trial* (Oxford: OUP, 2015).
[7] J Hunter, 'Battling a Good Story: Cross-Examining the Failure of the Law of Evidence' in P Roberts and M Redmayne (eds), *Innovations in Evidence and Proof* (Oxford: Hart, 2007), 264.
[8] D Birch, 'A Credible Solution? Non-Defendant's Bad Character and Section 100 of the Criminal Justice Act 2003' [2019] *Criminal Law Review* 841.
[9] G Durston, 'Bad Character Evidence and Non-Party Witnesses Under the Criminal Justice Act 2003' (2004) 8(4) *International Journal of Evidence and Proof* 233.
[10] Birch, 'A Credible Solution?' (n8); Birch's analysis only relates to non-material purposes of BC evidence.
[11] See: Tapper (n2); G Durston, 'The impact of the Criminal Justice Act 2003 on Similar Fact Evidence' (2004) 68(4) *Journal of Criminal Law* 307; Waterman and Dempster (n3); S Brown and B Steventon, 'The Admissibility of Bad Character Evidence' (2008) 13(1) *Coventry Law Journal* 1; R Munday, 'Misconduct That "Has to Do with the Alleged Facts of the Offence with Which the Defendant Is Charged"...More of Less' (2008) 72(3) *Journal of Criminal Law* 214; P Mirfield, 'Character and credibility' [2009] *Criminal Law Review* 135; Redmayne (n6).
[12] Morgan Harris Burrows LLP, *Research into the Impact of Bad Character Provisions on the Courts* (Ministry of Justice Research Series 5/09, 2009).
[13] The number is not disclosed: ibid, 4.

concerned previous convictions, five concerned reprehensible behaviour, and the remaining data was missing. Gateway (a) ('important explanatory value') was used in 14 of the applications, (b) ('substantial probative value') was used for 15 applications, whilst three were admitted following parties' agreement under (c). It is unfortunately not specified in the report which applications under which gateway were successful or not, however it is stated that 15 of the 36 applications were denied, of which eight were refused due to an 'adverse effect on fairness', whilst another four were excluded due to case management concerns.[14] Very little can be concluded from this very small dataset, in which court staff had to fit BC evidence and the reasons for admissibility or exclusion into pre-determined categories which did not use the statutory language.

More weight can be given to the interviews, where confusion was found amongst all criminal justice professionals regarding the woolly concept of 'reprehensible behaviour',[15] so that they did not know when exactly s.100 (and s.101) CJA 2003 applied. However, the general tenor of responses was that the BC provisions of the CJA 2003 were an improvement over the previous law and were relatively clear and simple to understand.[16]

This report was dated even when it was first published (three years after the research was conducted), and due to the low number of courts involved, and lack of transparency regarding the number of interviewees, caution must be employed when interpreting the findings.[17] The headline message for non-defendant BC is that the notice requirements, and accompanying time limits set out in s.100(4) CJA 2003 and Rule 21 of the Criminal Procedure Rules (CrimPR), were commonly ignored and that there was inconsistency in the use of judicial discretion to alter the time limits.[18] More positively, Spencer and Birch offer anecdotal evidence (casual conversations with judges and barristers), that the CJA 2003 has led to a significant change in the way that cross-examination of witnesses is conducted.[19]

1.1.B. Problems with Sexual History

Section 41 has sparked a great deal more scholarly interest and controversy than s.100. Spencer's comment is representative of the legal community's immediate response: 'For Parliament to pass a law prohibiting a defendant

[14] For the remaining 3 applications, the reason for refusal was listed as 'other'; ibid, 16 (fn26).
[15] Ibid, 5, 18-19.
[16] Ibid, 35.
[17] JR Spencer, *Evidence of Bad Character* (3rd edn, Oxford: Hart, 2016), para 1.86-1.88.
[18] See Morgan Harris Burrows (n12), 8.
[19] Spencer, *Evidence of Bad Character* (3rd edn) (n17), para 1.89; Birch, 'A Credible Solution?' (n8), 844-845.

from producing cogent evidence that tends to show his innocence is nothing short of monstrous.'[20]

The most widespread criticism of s.41 was that a lack of Parliamentary scrutiny had resulted in evidence of a complainant and defendant's prior sexual relationship ('relationship evidence') being included within its scope.[21] Despite the 'truly controversial'[22] inclusion of relationship evidence here, calls to remove it have not been heeded.[23] A further target of criticism was the '[d]raconian'[24] pigeonhole format of s.41 which requires evidence to be forced into specific admissibility gateways. Unlike the Scottish system,[25] s.41 has no residual discretion to admit evidence if it would be in the interests of justice. This attempt by the legislature to pre-empt and pre-categorise all of the situations in which SH evidence could be relevant and admissible has been described as 'folly'[26] by Birch, who voiced worries that the admissibility gateways may not accommodate SH evidence relevant to a complainant's specific credibility or a motive to lie.[27] Other criticism of s.41 focuses on its lack of consistency with admissibility rules for BC and hearsay evidence (both of which, in general, became more readily admissible under the Criminal Justice Act 2003),[28] and the existence of the 'at or about the same time' gateway in s.41(3)(b).[29]

Kibble[30] and Young's[31] predictions that s.41's onerous admissibility requirements may lead to breaches of a defendant's right to a fair trial under Article 6 of the European Convention on Human Rights (ECHR) were soon realised in *A (No 2)*[32] where the House of Lords used some creative statutory interpretation to widen the similarity gateway in s.41(3)(c) to admit evidence

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[20] JR Spencer, '"Rape Shields" and the Right to a Fair Trial' (2001) 60(3) *Cambridge Law Journal* 452, 454.
[21] See §2.1.C.; N Kibble, 'The Relevance and Admissibility of Prior Sexual History with the Defendant in Sexual Offence Cases' (2001) 32 *Cambrian Law Review* 27.
[22] D Birch, 'Rethinking Sexual History Evidence: Proposals for Fairer Trials' [2002] *Criminal Law Review* 531, 534. See also D Birch, 'A Better Deal for Vulnerable Witnesses?' [2000] *Criminal Law Review* 223; D Birch, 'Untangling Sexual History Evidence: A Rejoinder to Professor Temkin' [2003] *Criminal Law Review* 370.
[23] L Kelly, J Temkin and S Griffiths, 'Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials' (Home Office Online Report 20/06, 2006), 76.
[24] Birch, 'Rethinking Sexual History Evidence' (n22), 532.
[25] Criminal Procedure (Scotland) Act 1995, s.275(c); *Speaking Up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable and Intimidated Witnesses in the Criminal Justice System* (London: Home Office, 1998) paras 9.72.
[26] Birch, 'Rethinking Sexual History Evidence' (n22), 534.
[27] Ibid, 550-551.
[28] Birch, 'Untangling Sexual History Evidence' (n22), 374.
[29] N Kibble, 'The Sexual History Provisions: Charting a Course Between Inflexible Legislative Rules and Wholly Untrammelled Judicial Discretion?' [2000] *Criminal Law Review* 274, 285.
[30] Kibble, 'The Relevance and Admissibility of Prior Sexual History' (n21), 58-63.
[31] G Young, 'The Sexual History Provisions in the Youth Justice and Criminal Evidence Act 1999 - A Violation of the Right to a Fair Trial?' (2001) 41(3) *Medicine, Science and the Law* 217, 227-228.
[32] *A (No 2)* [2001] UKHL 25, [2002] 1 AC 45 (HL), [2001] 2 WLR 1546.

where not doing so may lead to breaches of Art 6.[33] When interviewing judges, Kibble found that most would have had great difficulty utilising s.41 had it not been for the decision in *A (No 2)*.[34]

There are some supporters of s.41, especially those who had been fierce critics of its predecessor, s.2 of the Sexual Offences (Amendment) Act 1976. Both Lees[35] and Temkin,[36] for example, saw s.41 as a step forward for the protection of sexual assault complainants. For them, s.41 is not restrictive *enough*, as s.41(3)(a) created a loophole whereby SH evidence may be admitted as relevant to a defendant's belief in consent;[37] although Temkin has acknowledged that the modification of this defence to one of 'reasonable belief' in the Sexual Offences Act 2003 has tightened (though not closed) this loophole.[38]

Empirical research on s.41 is inconsistent. Early research found that: pre-trial notice requirements were not being complied with;[39] sometimes SH evidence was admitted at trial with no reference to s.41 at all;[40] and judges were slow to interfere if the prosecution and defence agreed that admitting SH was fair.[41] On the other hand, Kibble's interviews with members of the judiciary found that judges were careful and thorough in making admissibility decisions under s.41,[42] and that they try not to use the discretion granted them in *A (No 2)* unless necessary.[43]

More recently the amount of empirical research conducted on s.41 has exploded; caused, in large part, by the widely publicised controversy surrounding the Ched Evans case.[44] Most of these (trial observation) empirical studies have found that s.41 is not operating as intended in that SH evidence is being routinely admitted at trial, and that procedural

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[33] Ibid, [45] (Lord Steyn).
[34] Kibble N, 'Judicial Discretion and the Admissibility of Prior Sexual History Evidence Under Section 41 of the Youth Justice and Criminal Evidence Act 1999: Sometimes Sticking to Your Guns Means Shooting Yourself in the Foot: Part 2' [2005] *Criminal Law Review* 263, 264, 273-274.
[35] S Lees, *Carnal Knowledge: Rape on Trial* (London: Women's Press, 2002), xxvi-xxxiii.
[36] J Temkin, *Rape and the Legal Process* (2nd edn, Oxford: OUP, 2002), 204; J Temkin, 'Sexual History Evidence – Beware the Backlash' [2003] *Criminal Law Review* 217.
[37] Lees (n35), xxx-xxxi; Temkin, *Rape and the Legal Process* (ibid), 210-211; Temkin, 'Sexual History Evidence' (ibid), 227; J McEwan, 'Proving Consent in Sexual Cases: Legislative Change and Cultural Evolution' (2005) 9(1) *International Journal of Evidence and Proof* 1, 13-16.
[38] Temkin, 'Sexual History Evidence' (n36), 240-242.
[39] Kelly *et al* (n23), 23, 32.
[40] Ibid, Ch6.
[41] Ibid, 54-55. Cf. Dennis urges caution about reading too much into the external validity of these findings; I Dennis, 'Sexual History Evidence: Evaluating Section 41' [2006] *Criminal Law Review* 869.
[42] Kibble N, 'Judicial Perspectives on the Operation of s.41 and the Relevance and Admissibility of Prior Sexual History Evidence: Four Scenarios: Part 1' [2005] *Criminal Law Review* 190.
[43] Kibble N, 'Section 41 Youth Justice and Criminal Evidence Act 1999: fundamentally flawed or fair and balanced?' (2004) 8 *Archbold News* 6, 7.
[44] *Evans* [2016] EWCA Crim 452, [2016] 4 WLR 169, [2017] 1 CrAppR 13, [2017] Crim LR 406.

requirements are not being complied with.[45] However, these studies have methodological defects: the lack of legal knowledge of the trial observers, leading to some erroneous findings; their failure to earnestly engage with doctrine; and their analysis of s.41 is abstracted from wider trial and procedural contexts.[46]

The findings of these studies have been strongly challenged by two other empirical projects. The first is a statistical analysis of Crown Prosecution Service case files which found that s.41 applications are rare, though these findings are limited as the methodology employed would be unable to consider applications made on the day of trial.[47] The second is a wide-ranging study conducted by Hoyano on behalf of the Criminal Bar Association (CBA).[48] CBA members (n=166) responded to an in-depth survey which requested the details of any and all s.41 applications advocates had made in the prior 24 months. In short, the study found that s.41 applications are not routine, but when made they are given detailed scrutiny by the trial judge and prosecution. Though there was agreement with the trial observation studies that procedural requirements are rarely complied with, Hoyano's methodology allowed the reasons for this failure to be explored – finding that these breaches are rarely the fault of trial counsel.[49] The methods employed by this study remedy many of the failures of the trial observation studies, though the survey format also has limitations in that responses were retrospective and could not be followed up for clarifications[50] or to probe deeper.

Though practitioner opinions of s.41 are now more positive,[51] there is still much criticism of s.41 from both academics and politicians. Media outcry following the Ched Evans case led to Parliamentary proposals to further

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[45] J Temkin, JM Gray and J Barrett, 'Different Functions of Rape Myth Use in Court: Findings From a Trial Observation Study' (2016) 13(2) *Feminist Criminology* 205; R Durham, R Lawson, A Lord and V Baird, *Seeing Is Believing: The Northumbria Court Observers Panel. Report on 30 rape trials 2015-16* (Northumbria Police and Crime Commissioner, 2017); LimeCulture Community Interest Company, *Application of Section 41 Youth Justice and Criminal Evidence Act 1999: a Survey of Independent Sexual Violence Advisors* (September 2017); O Smith, *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths* (Basingstoke: Palgrave MacMillan, 2018).

[46] See for more detailed criticism: L Hoyano, *The Operation of YJCEA 1999 Section 41 in the Courts of England and Wales: Views from Barristers' Row* (Criminal Bar Association, 2018), paras 9-42.

[47] *Limiting the Use of Complainant's Sexual History: Section 41 of the Youth Justice and Criminal Evidence Act 1999: The Law on the Admissibility of Sexual History Evidence in Practice* (Cm. 9547, London: Ministry of Justice, 2017).

[48] Hoyano (n46).

[49] Ibid, paras 94-99.

[50] In particular, Hoyano had to employ some guesswork concerning the number of complainants in some cases described by respondents: ibid, paras 68-69.

[51] Ibid, paras 52-65; N Dent and S Paul, 'In Defence of Section 41' [2017] *Criminal Law Review* 613.

tighten s.41 which may return in future.[52] These arguments are supported by commentators who consistently argue that SH evidence should never be admitted as it is always irrelevant.[53]

1.1.C. Problems with Overlaps

Evidence of SH can simultaneously be evidence of BC, and vice versa, creating problems of overlap between s.100 and s.41. The main issue identified in the literature concerns prior false sexual allegations made by sexual offence complainants.[54] Depending on whether the 'false' part of the prior allegation concerns sexual contact (complainant claimed she was assaulted but no contact occurred) or consent (complainant claimed she was assaulted but in fact consented), the evidence could be SH, BC, or both. This has caused a great deal of confusion[55] and has significant implications for the admissibility tests to be applied, especially as s.41 is generally considered to the more difficult one to pass.[56] Further practical difficulties compound the confusion here, as case law has mandated that there must be an 'evidential basis'[57] for asserting that the prior allegation was false, which is seemingly difficult to satisfy.[58] Though criticisms of this overlap are common, there has yet to be any empirical research which has specifically examined how this overlap is dealt with in practice.

1.1.D. Summary

Bringing the two literatures together, the following general issues can be identified:

- The BC of non-defendants has been neglected by researchers (doctrinally and empirically).
- There is uncertainty regarding the scope of both s.100 and s.41 (individually and collectively).

[52] C McGlynn, 'Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence' (2017) 81(5) *Journal of Criminal Law* 367; C McGlynn, 'Challenging the Law on Sexual History Evidence: A Response to Dent and Paul' [2018] *Criminal Law Review* 216

[53] S Easton, 'The Use of Sexual History Evidence in Rape Trials' in M Childs and L Ellison (eds), *Feminist Perspectives on Evidence* (London: Cavendish, 2000), 174-180; A McColgan, 'Common Law and the Relevance of Previous Sexual History Evidence' (1996) 16 *Oxford Journal of Legal Studies* 275; McGlynn, 'Rape Trials and Sexual History Evidence' (n52). See further §3.3.

[54] N McEnvoy-Cooke, D Wolchover and A Heaton-Armstrong, 'Two Aspects of the Statutory Restriction on Introducing a Complainant's Sexual History' in P Radcliffe, GH Gudjonsson, A Heaton-Armstrong and D Wolchover (eds), *Witness Testimony in Sexual Cases: Evidential, Investigative and Scientific Perspectives* (Oxford: OUP, 2016); C Saunders, 'The Truth, The Half-Truth, and Nothing Like the Truth: Reconceptualizing False Allegations of Rape' (2012) 52(6) *The British Journal of Criminology* 1152.

[55] Some commentators appear to be unaware of the applicability of s.100 to evidence of false allegations: McGlynn, 'Rape Trials and Sexual History Evidence' (n52); LimeCulture (n45).

[56] Law Commission, *Evidence of Bad Character in Criminal Proceedings* (Law Com No 273, 2001), para 9.45.

[57] *T and H* [2001] EWCA Crim 1877, [2002] 1 WLR, 632, [2002] 1 All ER 683.

[58] B Brewis and M Stockdale, 'False Allegations: The Limitations of the "Evidential Basis Test"' (2014) 78(6) *Journal of Criminal Law* 453.

- There are concerns about the use of, and compliance with, both substantive and procedural aspects of s.100 and s.41.
- We know little about why counsel seek the admission of non-defendant BC or SH, and how these decisions factor into wider trial tactics.

1.2. The Research Questions

This research project poses the following basic question: *What role does evidence of non-defendant character play in criminal trials?* This can be broken down into the following four subsidiary research questions:

1. *What evidence is subject to the exclusionary rules in s.100 and s.41?*
2. *How do s.100 and s.41 interact?*
3. *How do the exclusionary rules and 'gateways' in s.100 and s.41 operate?*
4. *How, why, and to what extent does the availability of character evidence influence counsel's pre-trial decision-making and trial tactics?*

1.3. Socio-Legal Empirical Research Methodology

To address these research questions, a socio-legal approach was selected. Specifically, the study combines an in-depth doctrinal analysis of the two exclusionary rules and related procedural requirements with a qualitative empirical analysis examining how those rules are utilised in real trials. The project therefore takes seriously both the 'law in the books' and the 'law in action'.[59]

1.3.A. Planning and Implementing Empirical Methods

As the research questions require an exploration of how the exclusionary rules in s.100 and s.41 are understood and applied in real cases, it was decided that qualitative empirical methods would be most appropriate.[60] Two particular empirical methods were chosen: observations of real Crown Court criminal trials, and interviews with legal professionals.

1.3.A.i. Trial Observations in Theory

The use of trial observations as a research method is relatively rare amongst legal scholars. The overwhelming majority of trial observation research has focussed on the 'social world' of courtrooms and the various power dynamics

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[59] C McCrudden, 'Legal Research and the Social Sciences' (2006) 122 *Law Quarterly Review* 632.
[60] See Silverman on there being no 'right' or 'wrong' methods: D Silverman, *Doing Qualitative Research* (5th edn, London: SAGE, 2017), 13; L Webley, 'Qualitative Approaches to Empirical Legal Research' in P Cane and HM Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford: OUP, 2010), 928-932.

found within.[61] Trial observation research which engages with the legal context is now either very old,[62] or woefully deficient in doctrine.[63] This is somewhat surprising, as observations of trials are surely an ideal research method for evidence scholars – how better to understand how these rules are used and applied in real life cases? Moreover, observations of trials are an ideal method of triangulation[64] for interviews with legal professionals.[65] Observations of cases also make the exclusionary rules 'real' by observing the role they play in the wider context of a full trial. As such, my observations needed to involve *full* trials from start to finish so that any and all mentions of character evidence are observed, and so that the evidence can be fully contextualised in the case as a whole.

The trial observational method is rooted in ethnography.[66] In general, purely observational research requires the researcher to take as unobtrusive position as possible in order to have the minimal effect on the phenomena under observation (the 'reactivity effect').[67] Observations of criminal trials are relatively unproblematic in this regard, as the existence of myself (or anyone else) in the public gallery is unlikely to affect the decision-making of trial counsel and judges. Moreover, note-taking is unlikely to distract counsel and judges as they are accustomed to regular note-takers such as the press, family members, and university students.[68]

In determining whether I needed to obtain the informed consent of those under observation, other trial observation research was of little assistance.[69] Earlier researchers appeared to have sought the approval of the Home Office and Lord Chancellor,[70] or at least the relevant Resident Judge,[71] in order to

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[61] See: P Rock, *The Social World of an English Crown Court* (Oxford: Clarendon Press, 1993); Z Adler, *Rape on Trial* (London: Routledge & Keegan Paul, 1987); Lees (n35); NG Fielding, *Courting Violence: Offences Against the Person Cases in Court* (Oxford: OUP, 2006); T Scheffer, *Adversarial Case-Making: An Ethnography of English Crown Court Procedure* (Leiden: Brill, 2010); J Jacobson, G Hunter and A Kirby, *Inside Crown Court* (Bristol: Policy Press, 2015).

[62] P Carlen, *Magistrates' Justice* (London: Robertson, 1976); AE Bottoms and JD McClean, *Defendants in the Criminal Process* (London: Routledge, 1976); E Burney, *Magistrate Court, and Community* (London: Hutchinson, 1979); DJ McBarnet, *Conviction* (London: Macmillan, 1981).

[63] Durham *et al* (n45); LimeCulture (n45); Smith, *Rape Trials in England and Wales* (n45).

[64] Young argues that trial observations in conjunction with interviews are the best methods available to study courtroom dynamics; R Young, 'Exploring the Boundaries of the Criminal Courtroom Workgroup' (2013) 42 *Common Law World Review* 203, 223.

[65] Particular concerns include selective memories, bias, or being purposely misled by (elite) interviewees: Webley (n60), 937; O Smith, 'How Rape Myths Are Used and Challenged in Rape and Sexual Assault Trials' (2017) 26(4) *Social & Legal Studies* 441; Temkin *et al* (n45).

[66] K O'Reilly (2012), *Ethnographic Methods* (2nd edn), London: Routledge, 29-30.

[67] M Angrosino and J Rosenburg, 'Observations on Observation: Continuities and Challenges' in NK Denzin and YS Lincoln (eds), *Collecting and Interpreting Qualitative Materials* (4th edn, London: SAGE, 2013), 151.

[68] M Hammersley and P Atkinson, *Ethnography: Principles and Practice* (4th edn, Abingdon: Routledge, 2019), 154-155

[69] Especially as much trial observation research does not mention access or ethics at all: Adler (n61), Lees (n35); M Levi, *The Phantom Capitalists* (Revised edn, Aldershot: Ashgate, 2008).

[70] Bottoms and McClean (n62), 7; Burney (n62), Ch1.

[71] Rock (61), 5-6.

conduct the research, though this does not appear to have been done in any trial observation research since 1990. More recently, opinion is split between researchers who consider trial observations to be highly ethically problematic due to consent issues,[72] and those who argue that trial observations are one of the *least* ethically problematic research methods.[73] The former argument addresses the fact that obtaining the informed consent of every single individual under observation – the judge, counsel, solicitors, ushers, clerks, defendants, security guards, police officers, witnesses, witness support, intermediaries, jurors, press, and any family and friends in the public gallery – during a trial is impossible. Due to this, Smith sought the consent of the judges in her observed trials, though she notes that most judges were disinterested.[74]

The latter argument finds a wealth of support in generalist research methods and research ethics textbooks, where it is seen as axiomatic that observational research in public spaces does *not* require the consent of anyone under observation.[75] Relevant here is the fact that criminal trials are not merely open to the public, but that there is a normative commitment to publicity for criminal trials, underpinned by the principle of open justice.[76] Applying this, other researchers did not seek the consent of anyone, including the trial judge, when conducting trial observation research.[77]

Because of the lack of consensus amongst prior trial observers, I decided to err on the side of caution. In the process of seeking access to interview the judiciary, [78] I requested clarification from the Ministry of Justice concerning whether approval was required for conducting trial observations. The Ministry confirmed that though I technically did not need permission to observe trials, they requested that I sign a Privileged Access Agreement (PAA) as I was observing trials *for research purposes*.

1.3.A.ii. Trial Observations in Practice

Though it would have been preferable to observe trials at several locations,

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[72] Smith, *Rape Trials in England and Wales* (n45), 13-14.
[73] Fielding (n61), 10; Scheffer (n61), xxii-xxvii; Jacobson *et al* (n61), 17-19.
[74] Smith, *Rape Trials in England and Wales* (n45), 13-14.
[75] RT Bower and P de Gasparis, *Ethics in Social Research: Protecting the Interests of Human Subjects* (New York: Praeger, 1978), 34-35; R Homan, *The Ethics of Social Research* (London: Longman, 1991), 117; E Murphy and R Dingwall, 'Informed Consent, Anticipatory Regulation and Ethnographic Practice' (2007) 65 *Social Science & Medicine* 2223, 2229-2230; G Gobo (Belton A (tr)), *Doing Ethnography* (London: SAGE, 2008), 108, 144; Angrosino and Rosenburg (n67), 158-161; SJ Taylor, R Bogdan and ML DeVault, *Introduction to Qualitative Research Methods: A Guidebook and Resource* (4th edn, Hoboken: Wiley, 2016), 46-47.
[76] See *Scott* v *Scott* [1913] AC 417; *Attorney-General v Leveller Magazine* [1979] AC 440 (HL), (1979) 68 CrAppR 342; *Reporting Restrictions in the Criminal Courts* (Judicial College, 2016) <https://www.judiciary.gov.uk/wp-content/uploads/2015/07/reporting-restrictions-guide-may-2016-2.pdf> Accessed 25/03/2020.
[77] Fielding (n61), 9-10; Scheffer (n61), xxii-xxvii; Jacobson *et al* (n61), 17-19, 63-65.
[78] Which ultimately failed, see below §1.3.A.iii.

time and resource limitations meant that all of the observations were undertaken in one (large) Crown Court centre. Over a period of nine months, I went to court almost every single day. For effective trials, court would usually operate 10.30am-1pm, and then 2pm-4.30pm, resulting in a maximum five-hour observational period each day. In total, 22 cases are included for analysis in the study.[79] This consisted of observations of approximately 450 hours of full trial hearings, and at least another 150 hours watching pre-trial hearings, sentencings, and the beginnings of trials which cracked.[80]

Two weeks prior to my first day at court, I contacted administrative staff at the selected court in order to inform them of my research and my PAA, to request they circulate this court personnel, and to notify me if there were any concerns.[81] Due to this prior notice, and the public nature of trials, I did not seek consent from each judge observed. Once court staff and counsel became more familiar with me and my purpose, some would assist me by tipping me off to relevant cases, or in convincing the judge that I be allowed to sit on the press bench.[82] Concerns that my presence would potentially lead to a reactivity effect, or would lead to restrictions on my note-taking, were not realised, and I was treated by most judges with curious indifference.[83] Similarly, barristers would usually enquire as to who I was, and why I was there, before I could volunteer the information. By the third or fourth month of observations, most judges and court-regular counsel knew who I was, even if I had not yet met them.

My methodology required me to observe *full* cases from start to finish for two reasons: so that any character evidence could be fully contextualised in the trial as a whole, and so that I did not miss any references to character evidence.[84] Combining this with the fact that the court's listings team could not help me identify relevant cases to observe (s.100 and s.41 applications are rarely made in advance of the day of trial),[85] case selection was a particular difficulty. Much of the time, there simply was no choice; though there might have been several cases listed for trial on a given Monday, the

[79] Further details of the case sample are at §1.3.B.ii.
[80] A 'cracked trial' is one which is listed for trial but ultimately does not proceed, for example because the defendant changes their plea, or the prosecution drops the case.
[81] I received a thankful response from the administrative staff for notifying them, and that there were no queries.
[82] A similar benefit of becoming friendly with clerks and ushers has been noted by both Sheffer and Smith: Scheffer (n61), xxii-xxvii; Smith, *Rape Trials in England and Wales* (n45), 14.
[83] One judge took a particular interest and invited me to his chambers for a conversation about my research.
[84] For example, in discussions between counsel immediately preceding the trial or in prosecution opening speeches.
[85] See §§7.2.C-D.

vast majority 'cracked' and so I could observe only the one effective trial. The few times I did have a choice, I tended to favour selecting sex offence cases as s.41 applications can only be made in these.

Having chosen a case to observe, I sat in the public gallery for the full duration of all hearings and anything in-between. As audio or visual recording in courtrooms is illegal under s.9 of the Contempt of Court Act 1981 and s.41 of the Criminal Justice Act 1925, observations were recorded in the form of contemporaneous handwritten notes.[86] Notes were taken of everything said in open court. So that the notes were not merely a transcript, observations were also be taken of, for example: witness demeanour, descriptions of real evidence, and jury reactions.

Although the principle of open justice may justify my notetaking during the court hearings, there remain ethical question marks over my taking notes at other times. Though notetaking in these situations can be seen as taking full advantage of the ethnographic roots of the trial observation method, Smith felt it unacceptable to take notes of barrister interactions during breaks in proceedings.[87] Three potential justifications may be offered in reply. The first is that some of the most useful data for the study – barrister negotiations over the admissibility of character evidence – could only be gained by taking notes of these interactions,[88] and so the aims of the research (and potential public good it may bring) could override the lack of consent of the participants. Secondly, for observations taken in the courtroom when not in session, the court's official audio-recording equipment[89] remained active, and so all professionals in the courtroom were aware that their behaviour and speech was being monitored anyway. Finally, in most cases the barristers knew why I was present and could physically see me taking notes – therefore suggesting I had their implied consent.

In breaks I would add to my contemporaneous notes other observations from memory. In addition, I asked counsel during these breaks for clarifications and their rationales for taking certain actions. Lengthy extracts of the data are not reproduced in this thesis.[90] The notes are not direct transcripts, and providing extracts of reported speech would break up the textual narrative. In addition, there is an anonymity concern that individuals may be identified if accurate extracts are given. Instead, 'thick', detailed

[86] On note-taking, see; Hammersley and Atkinson (n68), 154-156.
[87] Smith, *Rape Trials in England and Wales* (n45), 14.
[88] Especially given difficulties in sourcing interviewees (see §1.3.A.iv.), and as counsel were unwilling to let me sit in on private meetings.
[89] Used for the purposes of creating transcripts for any appeals.
[90] Though this is often desirable in ethnographic research: Silverman, *Doing Qualitative Research* (n60), 397.

descriptions of events taken from my observational notes will be incorporated into the main text, with direct quotes used where possible.

1.3.A.iii. Interviews in Theory

Trial judges and trial counsel (including: independent barristers, solicitor advocates, and CPS in-house counsel and reviewing lawyers)[91] were initially chosen as the primary research participants because answering the research questions requires: the analysis of judicial and counsel understandings of s.100 and s.41, how these rules are used in specific cases, and how they influence pre-trial and eventual trial decision-making. Unfortunately, despite lengthy negotiations with both the judiciary and the CPS, I was unable to achieve access to either. Potential interviewee targets were therefore limited by necessity to independent trial counsel.

The intended sample size of interviewees was guided by both data saturation and feasibility. Silverman and Webley argue that when interviewing one should interview people until one stops discovering new things.[92] Considering this, along with the time and resource constraints on a sole PhD researcher, it was intended that approximately 10-15 individuals would be interviewed.

One potential difficulty identified in the methodological literature concerns 'interviewing up'. The greater power elites (such as trial advocates) hold in relation to those who research them has been argued to cause difficulties in that interviewees can attempt to seize control of the interview, or can refuse to answer sensitive questions.[93] It has also been noted that elites can act condescendingly to researchers if they perceive them to lack specialist knowledge in their area.[94] Together, these can negatively impact the interviews in terms of both quality and content. Vital for my interviews, then, was prior research concerning the relevant law and procedure, and the building of a rapport in order to establish a relationship within which interviewees felt able to express their views honestly.[95]

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[91] Reviewing lawyers would usually be the individuals making decisions about pre-trial applications.

[92] Silverman, *Doing Qualitative Research* (n60), 269; Webley (n60), 934; G Guest, A Bunce and L Johnson, 'How Many Interviews are Enough? An Experiment with Data Saturation and Variability' (2006) 18 *Field Methods* 59.

[93] I Seidman, *Interviewing as Qualitative Research* (4th edn, New York: Teachers College Press, 2013), 107-108.

[94] N King, C Horrocks and J Brooks, *Interviews in Qualitative Research* (2nd edn, London: SAGE, 2019), 86-87. Cf. M Burton, 'Doing Empirical Research: Exploring the Decision-Making of Magistrates and Juries' in D Watkins and M Burton (eds), *Research Methods in Law* (Abingdon: Routledge, 2013), 62-63.

[95] Seidman (n93), Ch7.

1.3.A.iv. Interviews in Practice

Significant recruitment issues limited 'full' interviews to ten barristers.[96] In total, I emailed approximately 80 Chambers, as well as dozens of solicitor advocates, across England and Wales. These 80 emails led to four interested barristers, which ultimately led to two interviews. Though a call for participants on Twitter received a great deal of attention, and I received ten promising leads for interviews, only three interviews were ultimately conducted.

After spending the first month at court familiarising myself with the surroundings and procedure, I began to approach counsel in almost every observed case. This method led to five interviews, and I achieved no further interviews through snowballing. My interview requests were frequently turned down. Some counsel would initially say yes, but then disappear at the agreed time. When reasons were given there were three common responses. Firstly: barristers are extremely busy, and so simply had no time for me.[97] Second, some prosecutors refused on the basis that they were directly employed by the CPS. This was frustrating as these barristers were often very willing to talk to me subject to CPS approval (which never came). The third reason concerned recently published trial observation research on s.41, which was highly critical of the role of counsel.[98] As my research also partly concerned s.41, this prior research had two contrary effects. It made many barristers suspicious of researchers, such as myself, who they suspected may also be highly critical of them. Equally, it made some barristers more willing to talk to me in attempt to 'set the record straight' against what they saw to be highly flawed research – though most of these individuals would only let me record some general comments rather than agree to a full interview. The notes of these conversations will also be referred to throughout the thesis, and proved to be valuable points of corroboration for points raised by counsel in the full interviews.

Consent to record the interviews on a dedicated voice-recorder (for later transcription) was sought for each individual interviewee.[99] Interviews were semi-structured, following a broad interview protocol which allowed interviewees to explore issues concerning character evidence which were relevant to them.[100] Five interviews were conducted in-person in private

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[96] Further details of the sample are at §1.3.B.ii.

[97] This reason could not be swayed by my offering several different times for interview, or that it could be done over the phone.

[98] Durham *et al* (n45).

[99] Taylor *et al* (n75), 130-131.

[100] Ibid, 102; Webley (n60), 936-937; Seidman (n93), 9.

locations, while the other five took place over the phone.[101]

Despite warnings in the methodology literature about interviewing elites, especially as a young researcher, I found that I was taken seriously by all barristers. Due to the recent, highly critical, report on s.41;[102] some barristers seemed to initially 'test' my legal knowledge before opening up.[103] As I had already completed the doctrinal component of the study before entering the field, I was always able to convince barristers of my legal credentials.

Two common critiques made of interviews concern the accuracy of interview responses: memories can be fallible, and interviewees may have purposefully deceived me (thought to be more likely with elites).[104] Little can be done about these at a general level, however some practical steps were taken to minimise the risks. Firstly, 5/10 interviews primarily concerned trials which I had just observed. Memories would therefore be fresh, and I was able to triangulate their responses with what I had observed. Other interviews concentrated on recent cases which counsel had appeared in; partly due to concerns about memory, but also because older cases would anyway not reflect recent case law and changes to the CrimPR. Moreover, many interviewees would check their laptops for information on recent cases under discussion so as to make sure they did not misremember key aspects or mislead me.[105] It is also worth noting that several interviewees refused to speculate on older cases which they could only half-remember, suggesting that the cases they *did* tell me about were ones that they thought they could remember accurately.

Extracts from my interviews will be utilised throughout the thesis. Where there are significant similarities in responses between several barristers, representative quotes will be used with footnotes highlighting other counsel who agreed. To minimise charges of anecdotalism (as a result of the relatively low number of interviewees) and that I am only referring to data which support the arguments made, outliers and contradictory opinions are explicitly included in the analysis.[106]

1.3.B. Data and Analysis

Collected data were written up in anonymised form in preparation for

[101] My experience generally aligns with the research literature which argues that telephone interviews are often more difficult due to the inability to pick up on visual cues: Seidman (n93), 112-114; King *et al* (n94), 115-123.
[102] Durham *et al* (n45).
[103] A not uncommon situation when interviewing elites: King *et al* (n94), 87.
[104] Seidman (n93), 26-27.
[105] Some even invited me to view their laptops while doing so.
[106] Silverman, *Doing Qualitative Research* (n60), 391-392.

analysis.

1.3.B.i. Anonymity

All individuals in the thesis are anonymised, as is the location of the Crown Court centre in which the observations took place. In observational research of public places, where informed consent is unnecessary, the key ethical consideration is anonymity.[107] Anonymity is a particular concern for this study as it involves the analysis of sexual offence trials which are subject to reporting restrictions under ss.1 and 2 of the Sexual Offences (Amendment) Act 1992. Anonymity was also seen by many interviewees as a reassurance that they could air 'unpopular' views without fear of reprisal.

Interviewees, all of whom were barristers,[108] are referred to throughout in bold type with a numerical identifier, e.g. **Barrister 1**. The observed trials are similarly labelled, e.g. **Case 1**. Whether interviewed or not, all barristers are referred to as female, while all judges are referred to as male.[109] When a particular observed trial is being described in the thesis, individuals are usually referred to by their role (complainant/C, defendant/D, complainant's mother etc.) except where this would be confusing and so pseudonyms have been substituted. As a further safeguard, some non-material distinctive facts of observed trials and those discussed in interviews have been altered.

1.3.B.ii. The Research Sample

The chosen Court centre contained many courtrooms and served a wide area. Though there was a strong local community of criminal barristers, cases were covered by counsel from across England, including many from London. The high turnover of barristers from around the country goes some way to fend off the criticism that the study has limited generalisability. Moreover, conducting observations in a single region enables the research to explore concepts such as 'communities of professional interest', which are thought to arise where court actors are familiar with one another.[110]

Ten of the cases involved allegations of a sexual nature,[111] two of which were charged under the old law (pre-Sexual Offences Act 2003).[112] The remaining cases involved a variety of offences involving drugs,[113] violence,[114]

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[107] CD Davies, *Reflexive Ethnography: A Guide to Researching Selves and Others* (2nd edn, London: Routledge, 2008), 65; Taylor *et al* (n75), 112.
[108] Attempts to interview solicitor advocates were unfruitful.
[109] The interviewed barristers were in fact evenly split: five male and five female.
[110] See further §5.3.A.
[111] **Case 2**, **Case 3**, **Case 4**, **Case 5**, **Case 8**, **Case 9**, **Case 11**, **Case 12**, **Case 17** and **Case 21**.
[112] **Case 5** and **Case 8**.
[113] **Case 1** and **Case 13**.
[114] **Case 10**, **Case 14**, **Case 18** and **Case 19**.

dishonesty,[115] harassment,[116] and driving.[117] All cases concerned a single defendant except for **Case 1** (13 defendants) and **Case 10** (two defendants).

For reasons of anonymity only vague details can be given about the interviewees. The majority were based in London, but all practiced around the country. Only one barrister had the rank of Queen's Counsel,[118] and the experience of the 'juniors' ranged from seven to 37 years' call.[119] Four of the barristers took only defence work,[120] while the other six took both prosecution and defence briefs. In terms of areas of practice, five of the barristers specialised in sex offences,[121] and two barristers also took civil work.[122] Two barristers also worked (at the time of interview) as part-time Recorders,[123] though neither were willing to discuss these roles in any depth due to my lack of Judicial Office approval. The trials in which five of the interviewed barristers appeared is set out below:

Barrister	Case
Barrister 1	**Case 2** (defence) and **Case 12** (defence)
Barrister 2	**Case 4** (defence)
Barrister 3	**Case 5** (defence)
Barrister 7	**Case 5** (prosecution), **Case 8** (prosecution) and **Case 12** (prosecution)
Barrister 8	**Case 13** (prosecution)

1.3.B.iii. Transcription and Analysis

My handwritten trial observation notes and interview audio were subsequently typed up in full, totalling approximately 130,000 words across the 22 cases, and 50,000 words of interview data. Digitally transcribing both sets of data in full was important for two main reasons. Firstly, to assist later analysis, as Word documents are much easier to manipulate than paper and audio files. Secondly, selective transcripts might have imposed my own theoretical framework onto the data prematurely.[124]

The analytic technique adopted for this study is informed by Temkin et

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[115] **Case 7**, **Case 15**, **Case 16** and **Case 20**.
[116] **Case 6**.
[117] **Case 22**.
[118] **Barrister 7**.
[119] Only **Barrister 5** and **Barrister 10** had fewer than ten years' call.
[120] **Barrister 1**, **Barrister 2**, **Barrister 3** and **Barrister 4**.
[121] **Barrister 1**, **Barrister 2**, **Barrister 7**, **Barrister 8** and **Barrister 9**.
[122] **Barrister 4** and **Barrister 5**.
[123] **Barrister 2** and **Barrister 7**.
[124] Seidman (n93), 118-119.

al's trial observation research.[125] Their 'inductive thematic analysis' involves elements of both grounded theory and thematic analysis:[126] it acknowledges the imposition of a legal framework prior to analysis, but still allows themes to arise naturally within that framework. In practice, this led me to code my data initially according to the statutory structures of s.100 and s.41. Subsequently, a more grounded approach was taken whereby themes could arise from the data itself.

1.4. Overview of Chapters

Chapter 2 provides a contextual historical overview of character evidence in criminal trials in England and Wales over the past 200 years, and the reasons for the character evidence admissibility reforms contained in the CJA 2003 and YJCEA 1999. Questions of admissibility arise only if the evidence in question is *relevant*. Chapter 3 adopts a theoretical approach in order to analyse the potential relevance of non-defendant BC or SH to material and collateral issues in criminal trials.

Having set character evidence in its historical and theoretical context, Chapters 4-7 combine a doctrinal analysis of s.100 and s.41 with my empirical data in order to get as detailed a picture as possible of how non-defendant character evidence is used in criminal trials. Chapter 4 explores the legal scope of both exclusionary rules, and any overlaps between the two. Chapters 5 and 6 examine s.100 and s.41 respectively, particularly focusing on how the admissibility gateways are used in practice, and how they factor into counsel's trial tactics. Finally, Chapter 7 examines three character-related procedural matters: prosecution disclosure of character evidence, procedural requirements for s.100 and s.41 applications under the CrimPR, and the framing of character evidence for the jury through judicial directions and speeches of counsel.

Chapter 8 considers the implications of the study's findings across three more general themes: increasing managerialism in the criminal process, reduced funding and resources throughout the criminal process, and the importance of studying the operation of rules of evidence in their real-life practical context.

[125] Temkin *et al* (n45).
[126] D Silverman, *Interpreting Qualitative Data* (5th edn, London: SAGE, 2014), 118-125; Hammersley and Atkinson (n68), Ch9.

2. A LEGAL HISTORY OF CHARACTER EVIDENCE IN ENGLAND AND WALES

The treatment of witnesses in Crown Court criminal trials in England and Wales has undergone a seismic shift following the passing of the Youth Justice and Criminal Evidence Act (YJCEA) 1999. In addition to environmental improvements for 'vulnerable' witnesses,[1] s.41 introduced a strict limitation on attacks on the sexual history (SH) of sexual offence complainants. Only a few years later, the Criminal Justice Act (CJA) 2003 introduced a further limitation, in s.100, on the ability of trial advocates to attack the character of opposing witnesses through the use of 'bad character' (BC) evidence.

This chapter provides an overview of the legal precursors of these statutory reforms. As the BC reforms in the CJA 2003 postdate the reforms of SH in the YJCEA 1999, SH will be addressed first.

2.1. ANTECEDENTS OF SEXUAL HISTORY EVIDENCE

The current statutory regime regulating the admissibility of SH evidence has antecedents. Prior to s.41, SH evidence was regulated by s.2 of the Sexual Offences (Amendment) Act (SOAA) 1976, and prior to that admissibility was determined using common law principles.

2.1.A. Sexual History and the Common Law

The use of SH evidence relating to complainants in sexual offence trials has a chequered past. Under the common law, the position on admissibility varied depending on whether the defence was adducing the evidence for a material issue (such as consent) or to impeach the complainant's credibility. This distinction was important because of the collateral finality rule: a witness's answer to a question on a collateral issue (such as credibility) may not be rebutted with further independent evidence.[2] Strategically, it was thus in the defence's interest to argue that the SH evidence went to a material issue as the complainant's statements could then be rebutted if they denied any sexual behaviour put to them.

Regarding material issues, the defence was permitted to adduce evidence that a rape complainant was 'a woman of notorious bad character for want

[1] YJCEA 1999, ss.16-17, 23-29.
[2] See *Harris v Tippit* (1811) 170 ER 1277; affirmed in *Attorney-General v Hitchcock* (1847) 154 ER 38.

of chastity or common decency'[3] as evidence of consent.[4] In most cases, the evidence concerned the complainant's occupation as a prostitute, which was thought to make her inherently more likely to consent to sex.[5] For third party SH which fell short of being 'notorious bad character' the position was unclear. Adler cites *Hodgson*[6] as authority for the proposition that the defendant could adduce evidence of any 'immoral behaviour' of the complainant with other men as evidence of consent.[7] However, in *Riley*[8] it was stated that third party SH evidence should 'be rejected, not only upon the ground that to admit it would be unfair and a hardship to the woman, but also upon the general principle that it is not evidence which goes directly to the point in issue at the trial.'[9] In the years immediately preceding the SOAA 1976, there were some *dicta* that third party SH may be relevant, and therefore admissible, to material issues. The sexual revolution of the 1960s and 1970s was leading to more women to engage in extra-marital sex; as such, evidence of this promiscuity could be admissible for consent in the same way as evidence of prostitution.[10] With regards to evidence of the complainant's SH with the defendant (or 'relationship evidence'),[11] the position was more certain, as this was generally admissible either as relevant to consent or as background.[12]

Although third party SH (other than prostitution) was not generally admissible as going to consent, it was admissible as going to credit.[13] This was founded in the belief that unchaste and immoral women were less likely to tell the truth.[14] However, evidence going to collateral issues is subject to the collateral finality rule. Though this prevented complainants' responses being contradicted, it did not prevent defence counsel from asking the complainant numerous questions, in detail, about their SH in front of the jury

[3] Z Adler, *Rape on Trial* (London: Routledge & Keegan Paul, 1987), 22 citing *Barker* [1829] 3 C&P 589; *Tissington* [1843] I Cox 48; *Greatbanks* [1959] Crim LR 450.
[4] *Report of the Advisory Group on the Law of Rape* (Cmnd. 6352, 1975) (Heilbron Report).
[5] *Clarke* [1817] 2 Stark 241; *Clay* [1851] 5 Cox 146; *Riley* [1887] 18 QBD 481; *Bashir* [1969] 3 All ER 692.
[6] *Hodgson* [1812] R&R 211.
[7] Adler (n3), 22.
[8] *Riley* (n5).
[9] Ibid, 483-484 (Lord Coleridge CJ).
[10] *Krausz* (1973) 57 CrAppR 466, 474 (Stephenson LJ).
[11] As termed by Redmayne: M Redmayne, 'Myths, Relationships and Coincidences: The New Problems of Sexual History' (2003) 7(2) *International Journal of Evidence and Proof* 75, 86-87.
[12] *Cockcroft* (1870) 11 Cox 410; *Riley* (n5).
[13] JF Stephen, *Digest of the Law of Evidence* (1st edn, London: Macmillan, 1876), 127; G Durston, 'Cross-Examination of Rape Complainants: Ongoing Tensions Between Conflicting Priorities in the Criminal Justice System' (1998) 62 *Journal of Criminal Law* 91, 93; N Kibble, 'The Relevance and Admissibility of Prior Sexual History with the Defendant in Sexual Offence Cases' (2001) 32 *Cambrian Law Review* 27, 30.
[14] JH Wigmore, *The Principles of Judicial Proof as Given by Logic, Psychology, and General Experience, and Illustrated by Judicial Trials* (Boston: Little, Brown, 1913), 367-368; Adler (n3), 94-101

in an attempt to undermine their credibility.[15]

Furthermore, the collateral finality rule could be bypassed if counsel could argue that there was some material relevance to the evidence, even if its primary purpose was to undermine credibility.[16] Although a theoretical line may be drawn between material and collateral issues, in sexual offence cases where it is the defendant's word against the complainant's the issue/credit distinction 'is reduced to vanishing point'.[17]

It is not difficult to see why many judged the law unsatisfactory. Cases varied as to whether third party SH was admissible for material issues, the issue/credit distinction was not clearly defined for the purposes of the collateral finality rule, and SH evidence was freely admissible to undermine a complainant's credibility despite the lack of logical relevance.[18] Left to its own devices, the common law had facilitated 'degrading, diminishing and functionally deficient cross-examination',[19] and had failed to evolve with the changing sexual morality of the 1960s and 1970s.

2.1.B. Reform Agenda 1: The Sexual Offences (Amendment) Act 1976

The impetus to reform the rules governing the admissibility of SH evidence grew out a wave of high-profile rape cases in England and Wales throughout the 1960s and 1970s,[20] coupled with broader dissatisfaction with the substantive law of rape which intensified in 1975 following the House of Lords' decision in *DPP v Morgan*.[21] Combined outcry from media and pressure groups led to the Home Secretary in July 1975 appointing The Advisory Group on the Law of Rape, chaired by Heilbron J. The Advisory Group not only focussed on the decision in *Morgan* but looked at many other aspects of how rape is treated by the criminal justice process, including the use of SH evidence.

The Heilbron Report[22] asserted that 'all relevant and proper cross-examination, even though it distresses, must be permitted in order to ensure a fair trial',[23] but that some restrictions may be necessary to prevent

[15] S Easton, 'The Use of Sexual History Evidence in Rape Trials' in M Childs and L Ellison (eds), *Feminist Perspectives on Evidence* (London: Cavendish, 2000), 169; J Hunter, 'Battling a Good Story: Cross-Examining the Failure of the Law of Evidence' in P Roberts and M Redmayne (eds), *Innovations in Evidence and Proof* (Oxford: Hart, 2007), 283-285.
[16] Durston (n13), 93.
[17] *Funderburk* [1990] 1 WLR 587, 597 (Henry J).
[18] See §3.3.B.
[19] Hunter (n15), 262.
[20] Durston (n13), 94; Adler (n3), 26-32.
[21] *DPP v Morgan* [1976] AC 182 (HL), [1975] 61 CrAppR 150.
[22] Heilbron Report (n4).
[23] Ibid, para 91.

questioning which 'does not advance the cause of justice'.[24] Following a review of the common law position, the Report concluded that a blanket ban on adducing SH would go too far, but that there should be statutory principles to guide admissibility. The centrepiece of these principles would be a test of 'striking similarity' where evidence of the complainant's prior sexual conduct could be admitted only if it was 'strikingly similar' to conduct pertaining to the current charge. Imported from the law of BC,[25] this test would also be subject to the further requirement that the evidence only be admissible if 'it would be unfair to the accused to exclude it'.[26] Significantly, these stipulations were confined to the offence of rape and to third party SH. For other sexual offences and for relationship evidence, the existing common law rules would still apply.[27]

This recommendation was included in the subsequent Sexual Offences (Amendment) Bill, and was heavily amended due to criticisms during Parliamentary debates.[28] As enacted, s.2 of the SOAA 1976 stated that evidence of a rape complainant's sexual experience was inadmissible unless the judge 'is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked'. The 'striking similarity' test was thus abandoned leaving only the 'unfair' test. The meaning of 'unfair' was quickly questioned in *Lawrence*[29] where May J stated that the exclusion of SH would be unfair to the defendant if the evidence 'might reasonably lead a properly directed jury to take a different view of the complainant's evidence from that which they might otherwise take'.[30] This test was quoted with approval in subsequent Court of Appeal decisions[31] and then further elaborated in the leading case of *Viola*[32] where it was held that s.2 SOAA 1976 was principally aimed at preventing SH evidence being used for credibility purposes. Any SH evidence relevant to a material issue such as consent was 'likely to be admitted'.[33]

These judicial interpretations of the 'unfairness' test were heavily criticised for effectively equating unfairness with relevance.[34] Temkin further

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[24] Ibid, para 91.
[25] See §2.2.A.
[26] Heilbron Report (n4), para 137.
[27] Ibid, para 134.
[28] HC Deb 21 May 1976, vol 911, cols 1980-2003.
[29] *Lawrence* [1977] Crim LR 492.
[30] Ibid, 492 (May J).
[31] *Mills* (1979) 68 CrAppR 327, 329-330 (Roskill LJ); *Viola* [1982] 1 WLR 1138, 1141-1142 (Lord Lane CJ).
[32] *Viola* (ibid).
[33] Ibid, 1143 (Lord Lane CJ).
[34] Ibid, 1143 (Lord Lane CJ); J Temkin, 'Sexual History Evidence – The Ravishment of Section 2' [1993] *Criminal Law Review* 3, 3; Durston (n13), 96; J Temkin, *Rape and the Legal Process* (2nd edn, Oxford: OUP, 2002), 198-199.

argued that the situation went from 'bad to worse'[35] with the Court of Appeal in *Viola* stating that SH evidence going to consent was 'likely to be admitted' against the Advisory Group's conclusion that third party SH evidence was 'only rarely likely to be relevant to [material] issues'.[36] In addition to doctrinal criticism, trial observation studies found that there was a great deal of variance between judges who waved through SH applications and those who were more rigorous.[37] Adler found that barristers, absent any s.2 application, were not prevented by judges from cross-examining complainants about their SH.[38] She concluded that s.2 was usually either ignored or very easily bypassed, which she attributed to the drafting of s.2. Judges had too much discretion but too little guidance.[39]

Alternative research methods were employed by Temkin, who conducted interviews with ten experienced barristers.[40] When discussing s.2 applications, opinions varied between the interviewees concerning the relevance and probative value of SH evidence.[41] Despite general agreement that judges took s.2 applications very seriously, Temkin found that none of the barristers had experienced difficulties in making a successful application.[42] Taken together, these studies suggested that although s.2 succeeded in making practitioners and judges more aware of the issues surrounding SH evidence and the treatment of rape complainants, it failed in its primary aim of restricting the admissibility of SH evidence.

2.1.C. Reform Agenda 2: The Youth Justice and Criminal Evidence Act 1999

Growing academic and public dissatisfaction with the operation of s.2 fed into the publication of *Speaking up for Justice*,[43] a report from a Working Group set up by the Home Office. This report, along with the later *Justice for All*,[44] set out a series of reforms which were designed to put the interests of 'victims at the heart of the [criminal justice system]'.[45] The more recent SH

[35] Temkin, 'Sexual History Evidence' (ibid), 3.
[36] Heilbron Report (n4), para 131.
[37] Adler (n3), 81-87; S Lees, *Carnal Knowledge: Rape on Trial* (London: Women's Press, 2002), 150-155.
[38] Adler (n3), 81-87.
[39] Ibid, 152-154.
[40] J Temkin, 'Prosecuting and Defending Rape: Perspectives from the Bar' (2000) Journal of Law and Society 219.
[41] Ibid, 234-235.
[42] Ibid, 235.
[43] *Speaking Up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable and Intimidated Witnesses in the Criminal Justice System* (London: Home Office, 1998).
[44] *Justice for All* (Cm. 5563, 2002).
[45] Ibid, para 2.10.

reforms were set within this wider victim-centric context.[46] Perhaps as a result of the scale and breadth *Speaking up for Justice*, SH evidence was not given the depth of treatment it received in the Heilbron Report (two pages in contrast to eight).[47] In summary, the Working Group endorsed the policy objectives set out in the Heilbron Report (SH evidence going to credit should effectively be barred, and third party SH going to material issues should be limited to situations of 'striking similarity') and proposed that s.2 should be amended in furtherance of those objectives.

The Youth Justice and Criminal Evidence Bill contained a variety of special measures to improve the treatment of complainants and vulnerable witnesses at trial.[48] Clauses 40-42 would create a general exclusionary rule for evidence of any extraneous 'sexual behaviour or other sexual experience' of the complainant with three inclusionary exceptions: evidence relevant to a material issue which is not consent (cl.40(3)(a)), evidence relevant to consent and the prior sexual behaviour occurred within 24 hours of the event subject to the current charge (cl.40(3)(b)), and evidence relevant to rebut or explain prosecution evidence (cl.40(5)). In addition, cl.40(4) explicitly stated that SH evidence should not be admissible if its purpose (or main purpose) would be to undermine the complainant's credibility. Clause 40(2)(b) set out a further requirement that any evidence which falls within a gateway may be admitted only if not to do so may lead to an unsafe conviction. Unlike s.2 SOAA 1976, cls.40-42 would apply not only to rape but all sexual offences, and to relationship evidence (previously unaffected by s.2).

Throughout the Bill's journey through Parliament, references were made to the recent Canadian case of *Seaboyer*[49] and the 'twin myths' denounced by McLachlin J in her judgment: 'unchaste women… [are] more likely to consent to intercourse and in any event… [are] less worthy of belief'.[50] Despite consistent agreement that the removal of these alleged myths from judicial reasoning was a valuable goal,[51] the Bill did not have a smooth ride

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[46] J McEwan, 'In Defence of Vulnerable Witnesses: the Youth Justice and Criminal Evidence Act 1999' (2000) 4(1) *International Journal of Evidence and Proof* 1; I Jones, 'Problem of the Past? The Politics of 'Relevance' in Evidential Reform' (2012) 11(4) *Contemporary Issues in Law* 277.
[47] *Speaking Up for Justice* (n43), paras 9.56-9.72; Heilbron Report (n4), paras 93-138. Birch is particularly critical of this, suggesting either a more specialised report should have been commissioned, or that SH should have been included in the Law Commission's BC consultations; D Birch, 'A Better Deal for Vulnerable Witnesses?' [2000] *Criminal Law Review* 223, 248; D Birch, 'Rethinking Sexual History Evidence: Proposals for Fairer Trials' [2002] *Criminal Law Review* 531, 547.
[48] Youth Justice and Criminal Justice Bill, clauses 16-32, enacted in ss.23-30 YJCEA 1999.
[49] *Seaboyer* (1991) 83 DLR (4th) 193, [1991] 2 SCR 577.
[50] Ibid, [604f] (McLachlin J).
[51] HL Deb 23 March 1999, vol 598, cols 1218-1219.

through Parliament, particularly from judges and lawyers.[52] Lord Bingham,[53] Lord Ackner[54] and Lord Thomas[55] each felt that the proposals unduly restricted the discretion of trial judges, producing several amendments. Most significantly, following an elaborate example offered by Baroness Mallalieu,[56] an additional inclusionary exception was added where SH evidence is relevant to consent due to the 'extreme[] similar[ity]' of the complainant's prior conduct and their conduct during the alleged assault (cl.40(3)(b)(ii)). An exception along these lines is exactly what was initially proposed in the Heilbron Report, but was removed owing to its suggested alleged complexities. Further worries about the form of the 'extreme similarity' test led to the clause eventually being amended so that the enacted provision in s.41(3)(c) states that the prior sexual behaviour has to be 'so similar… that the similarity cannot reasonably be explained as a coincidence'.

The distinction between relationship evidence and third party SH was not referred to at all in any of the Parliamentary debates, and as such may have been an unintended oversight. The relevance of relationship evidence was explicitly recognised in the Heilbron Report and was left outside of its proposed reforms on that very basis. Kibble argues that although *Seaboyer* influenced the drafting of s.41 and the debates in Parliament, it is doubtful that the Supreme Court of Canada intended to place relationship evidence and third party SH on the same footing.[57] As such, *Seaboyer* is dubious authority for this aspect of the legislation.

2.2. ANTECEDENTS OF BAD CHARACTER EVIDENCE

The admissibility of BC evidence was regulated by the common law (in conjunction with miscellaneous legislative interventions) for centuries, until the rules were given a complete overhaul in the CJA 2003. This section reviews the old common law treatment of BC evidence for both defendants and non-defendants, before addressing the impetus for reform culminating in the CJA 2003.

2.2.A. Bad Character and the Common Law

Prior to the statutory definition in ss.98/112 CJA 2003, there was no verified juridical conception of 'bad character' evidence. Rather, the term encompassed a variety of types of evidence: prior convictions, evidence of

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[52] See for an overview: M Baber, 'The *Youth Justice and Criminal Evidence Bill*' (House of Commons: Research Paper 99/40, 1999), 44-56.
[53] HL Deb 15 December 1998, vol 595, cols 1271-2.
[54] HL Deb 8 March 1999, vol 598, cols 12-16.
[55] HL Deb 8 February 1999, cols 49-51.
[56] Ibid, col 45. See further at Chapter 3, fn 132.
[57] Kibble (n13), 43-46.

reputation in the community, evidence of the commission of certain acts, and evidence which suggested the individual had a disposition (or propensity) to act in a certain way.[58]

In relation to defendants, the exclusion of BC evidence was considered to be one of the hallmark exclusionary rules of common law trials, justified on the grounds that juries would be too ready to convict if they discovered that the defendant was of BC.[59] As with most exclusionary rules, there were exceptions. The most significant exception was for 'similar fact evidence', the classic formulation of which may be sourced to *Makin v Attorney General of New South Wales*.[60] In *Makin*, a husband and wife were accused of murdering an infant child whom they had adopted for the price of £3. On investigating the couple's house and previous properties, the bodies and skeletons of twelve further children were found. At trial, several women gave evidence that they had given their children to the Makins along with money to pay for their upkeep, but they never saw their children again. On appeal, the defendants argued that the evidence of the women should not have been admitted. In denying the appeal, Lord Herschell LC set out an exception to the standard exclusionary rule for BC evidence:

> 'It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused'.[61]

As Lord Hoffman explained extra-judicially, the rule in *Makin* does not actually prevent reasoning by propensity (or 'forbidden reasoning'), rather it sets a high bar for admissibility linked to the probative value of the evidence.[62] Later judicial comments on the rule tended to take the form of distinct 'catchphrases'[63] (e.g. BC evidence was admissible if there was a

[58] C Tapper, 'Criminal Justice Act 2003: Part 3: Evidence of Bad Character' [2004] *Criminal Law Review* 533, 535.
[59] MR Damaška, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study' (1973) 121 *University of Pennsylvania Law Review* 506; JD Jackson, 'Re-Visiting Evidentiary Barriers to Conviction and Models of Criminal Procedure' in B Ackerman, K Ambos and H Sikirić (eds), *Visions of Justice: Liber Amicorum Mirjan Damaška* (Berlin: Duncker & Humblot, 2016).
[60] *Makin v Attorney General of New South Wales* [1894] AC 57 (PC).
[61] Ibid, 65 (Lord Herschell LC).
[62] LH Hoffmann, 'Similar Facts After *Boardman*' (1975) 91 *Law Quarterly Review* 193, 197-200.
[63] P Roberts and A Zuckerman, *Criminal Evidence* (2nd edn, Oxford: OUP, 2010), 583.

'striking similarity',[64] 'striking resemblance', 'close similarity' etc.), however these were dispensed with in the final pre-CJA House of Lords case on similar facts.[65] Effectively, the rule was simplified so that BC evidence was admissible if its probative value outweighed its potential prejudicial effect.

Other exceptions could also be utilised to admit defendant BC evidence.[66] Under s.1(f)(ii) of the Criminal Evidence Act 1898, a defendant could be cross-examined about their BC if they themselves attacked the character of a prosecution witness (known as 'tit-for-tat').[67] However, its effectiveness in deterring attacks against prosecution witnesses was clearly limited if the defendant was of good character, and it did not constrain the prosecution's attacks on the character of other defence witnesses. In addition, there was some judicial support for an exception for 'background evidence' of misconduct which, although caught by the exclusionary rule, could be admitted if the misconduct formed part of the same continuous transaction of conduct leading up to the events of the current charge.[68]

Apart from the restrictions on SH evidence contained in the SOAA 1976, the common law had very few restrictions concerning non-defendant BC, especially where the evidence was said to go to a material issue.[69] The primary criterion for admissibility was common law relevance. Additionally, character under the common law was 'indivisible',[70] in that it was assumed that if one had engaged in *any* prior misconduct whatsoever, then this was sufficient to brand someone as being of 'bad character' and undermine their credibility and moral standing.

In *Hobbs v Tinling*,[71] it was held that a witness may be asked any questions 'if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies'.[72] Trial judges also had a residual discretion to disallow irrelevant, vexatious or overlong cross-examination.[73] These guidelines afforded counsel a great deal of

[64] *DPP v Boardman* [1975] AC 421 (HL).
[65] *DPP v P* [1991] 2 AC 447 (HL), [1991] 3 WLR 161, (1991) 93 CrAppR 267.
[66] For an overview of all exceptions to the general rule of exclusion, see Law Commission, *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant* (Law Com CP No 141, 1996), Chs 2-4.
[67] Ibid, paras 4.33-4.58.
[68] *Ellis* (1826) 6 B&C 145, 108 ER 406; *Williams* (1986) 84 CrAppR 299; *Fulcher* [1995] 2 CrAppR 251.
[69] Stephen (n13), 123; R Pattenden, 'The Character of Victims and Third Parties in Criminal Proceedings Other Than Rape Trials' [1986] *Criminal Law Review* 367; Law Commission, *Evidence of Bad Character in Criminal Proceedings* (Law Com No 273, 2001), paras 9.3-9.4; JR Spencer, *Evidence of Bad Character* (3rd edn, Oxford: Hart, 2016).
[70] *Winfield* (1939) 27 CrAppR 139, 141 (Humphreys J).
[71] *Hobbs v Tinling* [1929] 2 KB 1 (CA).
[72] Ibid, 51 (Sankey LJ).
[73] *Kalia* (1974) 60 CrAppR 200; *Maynard* (1979) 69 CrAppR 309.

leeway, but if the witness denied the assertion made by the advocate in cross-examination, the 'collateral finality' rule prevented rebuttal.[74]

Collateral finality rests on the distinction between material and collateral issues, which is often difficult to maintain in practice.[75] There are also exceptions. The first is that a witness may be contradicted on a collateral matter if doing so would reveal bias, such as if the witness is in a relationship with the complainant.[76] Following *Rowton*,[77] a second witness who is well acquainted with the first witness could be called to comment (negatively) on the ability of the first witness to tell the truth (their 'reputation for untruthfulness'). Thirdly, evidence could be called to contradict a witness concerning their mental or physical health.[78] In addition to these common law exceptions, the Criminal Procedure Act 1865 covers two further situations: ss.4-5 allowed a witness to be contradicted if they denied making a previous statement, and s.6 allowed evidence of a witness's prior convictions to be admitted if they denied having any.

Restrictions on the cross-examination of the character of non-defendant witnesses may also be found in the Code of Conduct of the Bar of England and Wales. Various versions of the Code have stated that the cross-examination of witnesses should not include questions which are 'merely scandalous or intended or calculated only to vilify, insult or annoy',[79] and questions should not 'humiliate… a witness'.[80] However, the courts have refused to accept the Code of Conduct as prescriptive,[81] and so its evidential effect is severely limited.

2.2.B. The Reform Agenda: The Criminal Justice Act 2003

The Criminal Justice Act (CJA) 2003 completely overhauled the admissibility regimes for both defendant and non-defendant BC evidence. The genesis of those reforms may be sourced to a Report of the Royal Commission on Criminal Justice, which in the 1980s was tasked with investigating the reasons behind a number of miscarriages of justice.[82] The RCJ noted that the law surrounding the admissibility of (defendant) BC evidence was

[74] *Harris v Tippit* (n2).
[75] S Seabrooke, 'The Vanishing Trick – Blurring The Line Between Credit and Issue' [1999] *Criminal Law Review* 387; Roberts and Zuckerman (n63), 358-363.
[76] *Thomas v David* (1836) 7 C&P 350.
[77] *Rowton* (1865) L&C 520, affirmed in *Brown and Hedley* (1867) LR 1 CCR 70.
[78] *Toohey v Commissioner of Police of the Metropolis* [1965] AC 595, [1965] 2 WLR 439, (1965) 49 CrAppR 148.
[79] The Code of Conduct of the Bar of England and Wales, para 708(g) as cited in Law Com No 273 (n69), para 9.7 fn15.
[80] The Code of Conduct (4th edn, Bar Standards Board, 2019), rC7.1.
[81] *McFadden* (1976) 62 CrAppR 187.
[82] Spencer (n69), paras 1.13-1.20; M Redmayne, *Character in the Criminal Trial* (Oxford: OUP, 2015), 280.

unprincipled and complex, and referred the matter to the Law Commission.[83] Owing to the terms of their referral, the Law Commission considered the admissibility of non-defendant BC beyond the scope of its Consultation,[84] a decision which attracted criticism.[85] The Consultation nonetheless contained a detailed analysis of the relevance and probative value of character evidence to material and collateral issues,[86] as well as the potential for such evidence to prejudice the jury.[87] Additionally, the Consultation engaged with psychological research challenging the common law assumption that character was unitary and indivisible.[88]

The Law Commission's final Report accepted that the admissibility of BC evidence against non-defendants could be included in proposed reforms.[89] The first major overhaul to the law concerned a new conceptualisation of evidence of 'bad character', defined as:

> Evidence which shows or tends to show that—
>
> (a) he has committed an offence
>
> (b) he has behaved, or is disposed to behave, in a way that, in the opinion of the court, might be viewed with disapproval by a reasonable person.[90]

Whilst concluding that the general rule of exclusion should be retained,[91] several significant inclusionary exceptions (or 'gateways') were proposed. Regarding non-defendants, the first gateway would admit evidence which has 'substantial probative value'[92] to a matter in issue which is itself of 'substantial importance in the context of the case as a whole'.[93] The second gateway proposed stated that BC evidence may be admissible if it has 'substantial explanatory value'.[94] In addition, BC evidence would be admissible if the adversarial parties agree to it being admitted.[95] In formulating these gateways, Birch argues that the Law Commission was

[83] Royal Commission on Criminal Justice, *Report* (Cm. 2263, London: Home Office, 1996), Ch8 paras 29-34.
[84] Law Com CP No 141 (n66), paras 1.45, 12.91-12.100.
[85] P Roberts, 'The Law Commission Consultation Paper on Previous Misconduct: Part 1: All the Usual Suspects: A Critical Appraisal of Law Commission Consultation Paper No.141' [1997] *Criminal Law Review* 75.
[86] Law Com CP No 141 (n66), Ch6.
[87] Ibid, Ch7.
[88] Ibid, paras 6.23-6.29.
[89] Law Com No 273 (n69), paras 1.3, 9.8-9.13.
[90] Ibid, 210.
[91] Ibid, Ch6.
[92] Ibid, para 9.41.
[93] Ibid, para 9.41. See Birch for criticism of the use of this test for non-defendants; D Birch, 'A Credible Solution? Non-Defendant's Bad Character and Section 100 of the Criminal Justice Act 2003' [2019] *Criminal Law Review* 841, 850-851
[94] Law Com No 273 (n69), para 9.42.
[95] Ibid, para 8.29.

aware of the recent challenge to s.41 and its compatibility with Art 6 ECHR,[96] and so carefully drafted the rules so that evidence which was necessary for the defendant to have a fair trial would not be excluded.[97] In relation to defendants, two gateways were proposed with similar wording to the two contested gateways already described, and three further inclusionary exceptions were added: 'tit-for-tat', [98] evidence to correct a false impression,[99] and evidence which has substantial probative value to an issue between co-defendants.[100]

Before considering the proposed Bill's[101] passage through Parliament, several other policy documents and reports should be mentioned. Firstly, The Auld Report argued that there should be a shift towards 'trusting judicial and lay fact-finders to give relevant evidence the weight it deserves',[102] and that there should be a more inclusionary approach to the BC of defendants.[103] In addition, the New Labour Government published two significant policy documents: *The Way Ahead*[104] and *Justice for All*.[105] The first of these similarly promotes trusting juries to handle more evidence.[106] Specifically, it was thought that defendants with long criminal records were escaping justice because their prior criminality could not be admitted as evidence. It was intended that a more inclusionary approach should be adopted.[107] The same policy is put forward in *Justice for All*, proposing that the same approach, when applied to the BC of non-defendants, would lead to *less* evidence being adduced rather than more.[108]

It is also important to acknowledge the 'victims rights' aspect (non-defendants include 'victims' or complainants) of the debate.[109] Empirical studies conducted in the 1980s and 1990s had found that witnesses were often subject to harsh and humiliating treatment during cross-examination, where their personal lives were picked apart by counsel in an attempt to undermine their credibility.[110] Apart from the legitimate concern for the

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[96] *A (No 2)* [2001] UKHL 25, [2002] 1 AC 45 (HL), [2001] 2 WLR 1546.
[97] Birch (n93), 844. Birch refers to Law Com No 273 (n69), paras 9.36 and 9.40.
[98] Law Com No 273 (ibid), Ch12.
[99] Ibid, Ch13.
[100] Ibid, Ch14.
[101] Ibid, 209-233.
[102] R Auld (LJ), *Review of the Criminal Courts of England and Wales,* (The Stationery Office: London, 2001), para 11.78. See also M Coen, 'Hearsay, Bad Character and Trust in the Jury: Irish and English contrasts' (2013) 17(3) *International Journal of Evidence and Proof* 250.
[103] Auld (ibid), paras 11.112-11.120.
[104] *Criminal Justice: The Way Ahead* (Cm. 5074, 2001).
[105] *Justice for All* (n44).
[106] *The Way Ahead* (n104), 11.
[107] Ibid, paras 3.48-3.52; Roberts and Zuckerman (n63), 585.
[108] *Justice for All* (n44), paras 4.52-4.59.
[109] Birch (n93), 844.
[110] See for examples: W Bennett and MS Feldman, *Reconstructing Reality in the Courtroom* (London: Tavistock Publications, 1981); Adler (n3); P Rock, *The Social World of an English*

personal integrity of complainants and witnesses throughout the criminal justice process, there was also a practical concern that this sort of 'shabby treatment'[111] would deter prospective witnesses and complainants from coming forward.[112] The general thrust is that the Government favoured a more inclusionary regime for the BC of defendants,[113] and a more restrictive one for non-defendants.[114]

These competing aims were to the fore when the Law Commission's Bill was ultimately presented to Parliament. Provisions concerning the admissibility of non-defendant BC evidence emerged almost entirely unscathed from the Parliamentary process. However, the definition of 'bad character', particularly the 'might be viewed with disapproval by a reasonable person' test, was more contentious.[115] Concerns were expressed that this definition was too wide and would catch activities such as fox hunting[116] or listening to rap music.[117] As a result, the definition of 'bad character' was modified so that the concept encompasses prior convictions and evidence of 'other reprehensible behaviour'. Controversy surrounding the definition of 'bad character' was attributable to the fact that it had to serve two contradictory purposes. For non-defendants, a wide definition was preferable as it would lead to more evidence being caught by the general exclusionary rule and so further the aim of protecting witnesses and complainants during cross-examination. However, a wide definition might lead to more defendant BC evidence being excluded, contrary to the Government's intention.[118]

2.3. Concluding Remarks on Character Reform

Both s.41 and s.100 were enacted with the primary purpose of preventing complainants and witness from being attacked in cross-examination, without good reason, with their past actions. But while BC underwent rigorous and thorough examination by the Law Commission, it is argued here that SH was not given nearly the same level of scrutiny. Perhaps as a result, the BC

Crown Court (Oxford: Clarendon Press, 1993); Lees (n37).

[111] Roberts and Zuckerman (n63), 348.

[112] J Jackson and M Wasik, 'Character Evidence and Criminal Procedure' in D Hayton (ed), *Law's Future(s)* (Oxford: Hart, 2000); E Whitehead, *Witness Satisfaction: Findings from the Witness Satisfaction Survey 2000* (Home Office: London, 2001); J Jackson, 'Putting Victims at the Heart of Criminal Justice: The Gap Between Rhetoric and Reality' in E Cape (ed), *Reconcilable Rights? Analysing The Tension between Victims and Defendants* (London: Legal Action Group, 2004).

[113] See also Government Minister Paul Clark 'Redressing The Balance: The Criminal Justice Bill 2002' in E Cape (ed), *Reconcilable Rights? Analysing The Tension between Victims and Defendants* (London: Legal Action Group, 2004), 21.

[114] Essentially flipping the old common law rules; Birch (n93), 843.

[115] HL Deb 19 November 2003, vol 654, cols 1985-1986; J Goudkamp, 'Bad Character Evidence and Reprehensible Behaviour' (2008) 12(2) *International Journal of Evidence and Proof* 116, 121.

[116] SC Deb (B) 23 January 2003, col 532.

[117] HC Deb 2 April 2003, vol 402, col 1012.

[118] Goudkamp (n115), 120-121.

reforms were enacted with minimal Parliamentary editing, whereas the SH reforms had a very rough time. As will be argued in Chapters 4-7, this contrasting prior scrutiny has had knock-on effects to the development of doctrine and use of the rules in practice.

3. IS CHARACTER RELEVANT?[1]

This chapter considers the relevance of character evidence. Before evidence of bad character (BC) or sexual history (SH) can be admissible, it must jump a prior 'hurdle':[2] it must be *relevant*. Relevance is not a concept which makes sense in a vacuum:[3] relevance describes a particular relationship between two or more propositions, or items of evidence.[4] This relationship is a probabilistic one, in that for x to be relevant to y, x must in some way make the probability of y more or less likely. But for character evidence x to be relevant to y, we must know what y is. There are many possibilities for y, most of which are contentious both in law and in the wider scholarly literature. This chapter explores these possibilities in order to determine whether they are logically sound in terms of relevance. In doing so, accounts of how people (and fact-finders) reason about relevance, and the influence of common sense generalisations, will be central.

Following a brief account of how relevance is understood in both logic and through the common law, the potential for character evidence to be relevant to material and collateral issues, as well as 'background' issues, will be analysed. Specific issues thought to arise concerning SH evidence will also be directly examined.

3.1. RELEVANCE, PROBATIVE VALUE AND REASONING

It is first necessary to reflect on what is meant by relevance more generally; both in the wider context of logic and philosophy, and also in the context of Crown Court criminal trials in England and Wales. As the law (in)famously 'furnishes no test for relevancy',[5] relevancy in law is a matter of logic.

3.1.A. Relevance, Relationships and Inference

Arguably the most influential[6] definition of relevance may be sourced to Stephen who, in his *Digest of the Law of Evidence*, explains:

> 'any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself

[1] Parts of this Chapter appear in modified form in: MJ Thomason, 'Previous Sexual History Evidence: a Gloss on Relevance and Relationship Evidence' (2018) 22 *International Journal of Evidence and Proof* 342.
[2] P Roberts and A Zuckerman, *Criminal Evidence* (2nd edn, Oxford: OUP, 2010), 97.
[3] GB Roberts, 'Methodology in Evidence — Facts in Issue, Relevance and Purpose' (1993) 19 *Monash University Law Review* 68, 71.
[4] GF James, 'Relevancy, Probability and the Law' (1941) 29 *California Law Review* 689, 690.
[5] JB Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Boston: Little, Brown, 1898), 265.
[6] See citations to Stephen's definition in: C Tapper, *Cross and Tapper on Evidence* (12th edn, Oxford: OUP, 2010), 65; Roberts and Zuckerman (n2), 100; I Dennis, *The Law of Evidence* (5th edn, London: Sweet & Maxwell, 2013), 65; R Munday, *Evidence* (10th edn, Oxford: OUP, 2019), para 1.9.

> or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other'.[7]

Relevancy is therefore a *relationship* between facts (or propositions, or pieces of evidence). In assessing relevance, one must be aware of the wider social and cultural contexts, as well as the underlying purpose of the exercise. In the context of a criminal trial, the relevance of an item of evidence to some issue would also be influenced by all other evidence available to the factfinder. Despite the slightly artificial nature of considering relevance in the abstract, doing so exposes the particular reasons and reasoning processes which underlie determinations of relevance: what exactly is it that makes one proposition relevant to another, and what logical assumptions or generalisations are involved in making the inferential leap in logic? In order to understand relevance, it is therefore necessary to examine 'inference'.

We use inferential reasoning every day, in drawing conclusions about the weather by looking outside, or a person's mood from their facial expressions and demeanour. In order to do this, we use a stock of prior-existing background inferences drawn from personal experiences and known experiences of others, and it is these background inferences which make up our 'general knowledge' or 'common sense'.[8] Stephen makes explicit reference to this in his definition by noting that the relevance between two or more facts depends on what we consider 'the common course of events'.[9] Setting aside for the moment the question of whether those background inferences are justified or have a basis in fact, we can see that when '[f]actual uncertainty is a chronic condition of human existence',[10] generalisations are the 'glue that hold[s] our arguments together'.[11]

Although generalisations are necessary, they are not without drawbacks. Generalisations can be ill-founded, indeterminate, impressionistic, value-laden, speculative, and prejudiced.[12] They are not merely formed from one's own personal experience, but also from the reported experiences of friends, empirical scientific enquiry, fictional stories (including movies, television and books) and the media. One of the largest areas of controversy in the area of SH evidence, for example, is the influence of sexist stereotypes and beliefs concerning rape complainants (some of which constitute so called 'rape

[7] JF Stephen, *Digest of the Law of Evidence* (12th edn, London: Macmillan, 1948), 4.
[8] T Anderson, D Schum and W Twining, *Analysis of Evidence* (2nd edn, Cambridge: CUP, 2005), xvii, 46-48; Roberts and Zuckerman (n2), 142.
[9] Stephen (n7), 4.
[10] Roberts and Zuckerman (n2), 145.
[11] D Schum, *The Evidential Foundations of Probabilistic Reasoning* (New York: Wiley, 1994), 82.
[12] See Anderson *et al* (n8), 276-277.

myths') which are allegedly erroneous generalisations.[13]

The extent to which we should worry about ill-founded generalisations depends largely on their influence in our reasoning processes. Here there appears to be a divergence in opinion. Some legal scholars, such as Twining, believe that although generalisations are commonly used to fill gaps in knowledge, the basis of reasoning remains with 'specific, concrete evidence'.[14] However, psychologists and sociologists have questioned this. Employing script theory, they propose that generalisations (or 'scripts') and heuristics[15] play a much more fundamental role in reasoning.

A script is 'a kind of story grammar that defines the type of characters that are necessary for the plot to proceed and the relationships between the characters and the accompanying circumstances'.[16] Script theory, then, is very closely aligned with theories of reasoning which centre around narratives and stories. Narrative theory came to prominence following a number of empirical studies which found that jurors reason about cases and evidence through a process of story construction,[17] and it is now generally accepted that story construction plays a very significant role in explaining how jurors (and people more generally) reason using facts.[18]

Returning to the meaning of 'relevance', we must always be wary of how the influence of narratives, and its associated problems, might bear on determinations of relevance in jurors' minds. However, we must be careful to distinguish between what *might be* considered relevant by jurors, and what *is* logically relevant. Indeed, one justification for excluding certain types of evidence in criminal trials is to guide jurors to reason better, while limiting the potential dangers of narrative reasoning processes.[19]

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[13] Though the definition of 'rape myths' has evolved, from being an empirical claim about the factual inaccuracy of certain beliefs, to a normative judgment about those beliefs; MR Burt, 'Cultural Myths and Supports for Rape' (1980) 38(2) *Journal of Personality and Social Psychology* 217, H Reece, 'Rape Myths: Is Elite Opinion Right and Popular Opinion Wrong?' (2013) 33(3) *Oxford Journal of Legal Studies* 445; J Conaghan and Y Russell, 'Rape Myths, Law and Feminist Research: 'Myths About Myths'?' (2014) 22 *Feminist Legal Studies* 25; H Reece, 'Debating Rape Myths' (LSE Law, Society and Economy Working Papers 21-2014).

[14] W Twining, 'Anchored Narratives: A Comment' (1995) 3 *European Journal of Crime, Criminal Law and Criminal Justice* 106, 111.

[15] J McEwan, *The Verdict of the Court: Passing Judgment in Law and Psychology* (Oxford: Hart, 2003), 16; D Menashe and ME Shamesh, 'The Narrative Fallacy' (2005) 3(1) *International Commentary on Evidence* Article 3, 15-18; J Temkin and B Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Oxford: Hart, 2008), 49-50.

[16] McEwan, *The Verdict of the Court* (ibid), 14.

[17] W Bennett and MS Feldman, *Reconstructing Reality in the Courtroom* (London: Tavistock Publications, 1981); N Pennington and R Hastie, 'A Cognitive Theory of Juror Decision Making: The Story Model' (1991) 13 *Cardozo Law Review* 519; N Pennington and R Hastie, 'The Story Model for Juror Decision Making' in R Hastie (ed), *Inside the Juror* (Cambridge: CUP, 1993).

[18] Anderson *et al* (n8), Chs 7 and 10; Roberts and Zuckerman (n2), Ch4; McEwan, *The Verdict of the Court* (15), 118. Cf. RJ Allen, 'The Nature of Juridical Proof' (1991) 13 *Cardozo Law Review* 373; Menashe and Shamesh (n15).

[19] Menashe and Shamesh (ibid).

3.1.B. Probability

Stephen's definition proposes that one fact must 'prove[] or render[] probable the past, present, or future existence or non-existence of the other'.[20] In particular, the phrase 'renders probable' explicitly brings an element of probability into determinations of relevance, as for one fact to be relevant to another, it does not need to prove it with 100% certainty, it merely needs to make it more or less probable. Even if fact x increases the probability of the existence of fact y by only 0.001%, this satisfies Stephen's test for relevance. This emphasises the binary nature of relevance: x either *is* or *is not* relevant to y.[21] This must be true if relevance is to have any tangible meaning and use as a discrete concept, otherwise it would collapse into 'probative value'.

Bayes' theorem has been influential in jurisprudential debates.[22] In the context of the criminal trial, the probability of a defendant being guilty given a particular item of evidence can be expressed as:[23]

$$\frac{P(E|G)}{P(E|G')} \times O(G)$$

An item of evidence is relevant to the outcome of a criminal trial if the likelihood ratio (the fraction in the equation above) does *not* equal 1. The likelihood ratio estimates the relative probabilities of finding an item of evidence given the defendant's guilt, against the probability of finding the same item of evidence given the defendant's innocence. If the probabilities of the numerator and denominator of that fraction are the same, then the likelihood ratio will equal 1, leaving the prior odds of the defendant's guilt (or innocence) unaffected. However, if there is the slightest difference between the numerator and denominator, then the likelihood ratio will not equal 1, changing the probability of the defendant's guilt. Although use of Bayes' theorem in juridical contexts can be problematic,[24] the above formula allows us to think about relevance in a more systematic way.[25]

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[20] Stephen (n7), 4.
[21] See Roberts and Zuckerman (n2), 100-101; Tapper (n6), 65.
[22] See RO Lempert, 'Modelling Relevance' (1976-1977) 75 *Michigan Law Review* 1021; P Roberts and C Aitken, *The Logic of Forensic Proof: Inferential Reasoning in Criminal Evidence and Forensic Science: Practitioner Guide No.3* (Royal Statistical Society, 2014); Anderson *et al* (n8), Ch9.
[23] Where:
E = The item of evidence in question
G = Guilty
G' = Not guilty
O = Odds that the defendant is guilty.
[24] Roberts and Zuckerman (n2), 148-155; R Friedman, 'A Presumption of Innocence, Not of Even Odds (2000) 52 *Stanford Law Review* 873.
[25] Lempert (n22), 1056. See also recent drives to increase lawyers' fluency in probability and statistics: Roberts and Aitken (n22).

3.1.C. Legal Relevance

Reflecting the well-known adage that the common law furnishes no test of relevancy,[26] there have been relatively few cases which have directly addressed the question of relevancy in the judicial context. In these cases, reference is often made to the supposedly distinct concept of 'legal relevance'. Legal relevance was first proposed by Wigmore, who considered that for a piece of evidence to be considered relevant in law, it must be both relevant in logic *and* must be of sufficient probative value (i.e. the *extent* to which the likelihood ratio in fact alters the odds of guilt) to be worthy of admission.[27]

Some judges appear to either explicitly, or implicitly, endorse Wigmore's conception of 'legal relevance'. The most overt example of the judiciary endorsing a variable standard of relevance is in *Blastland*,[28] where Lord Bridge introduced a concept of 'direct and immediate relevance'.[29] This concept aligns with Wigmore's 'legal relevance' in that it suggests that the evidence must not merely be logically relevant, but must also have a sufficient level of probative value in order to be considered 'relevant' in law.[30]

However, an alternative line of case law can be identified. In *Kilbourne*,[31] for example, Lord Simon considered evidence to be relevant if:

> 'it is logically probative or disprobative of some matter which requires proof… It is sufficient to say, even at the risk of etymological tautology, that relevant (i.e., logically probative or disprobative) evidence is evidence which makes the matter which requires proof more or less probable'.[32]

This echoes Stephen's definition of relevance, and returns us to a binary conception of relevance. Similarly, in the more recent case of *A (No 2)*,[33] Lord Steyn posited that: 'Relevance and sufficiency of proof are different things… After all, to be relevant the evidence need merely have some tendency in logic and common sense to advance the proposition in issue'.[34]

If relevance is to have any clear, useful, and independent meaning, it must surely be kept separate to considerations of probative value. When judges justify the exclusion of evidence using a variable standard of relevance (e.g. evidence being excluded because it is not relevant *enough*), what they are

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[26] Thayer (n5), 265.
[27] JH Wigmore, *Evidence in Trials at Common Law: Volume IA* (Tillers P (ed), Boston: Little, Brown, 1983), 969.
[28] *Blastland* [1986] 1 AC 41 (HL), [1985] 3 WLR 345, [1985] 2 All ER 1095.
[29] Ibid, 54 (Lord Bridge) (emphasis added).
[30] For criticism see: Roberts and Zuckerman (n2), 106.
[31] *DPP v Kilbourne* [1973] AC 729 (HL), [1973] 2 WLR 254, [1973] 1 All ER 440.
[32] Ibid, 756 (Lord Simon).
[33] *A (No 2)* [2001] UKHL 25, [2002] 1 AC 45 (HL), [2001] 2 WLR 1546.
[34] Ibid, 1546 [31] (Lord Steyn).

actually doing is excluding evidence which is in fact logically relevant, but is excluded on different grounds.[35] In conflating relevance and probative value, the true reasons for exclusion are obscured. Perhaps the evidence was not sufficiently probative, or might have had a prejudicial effect, or the time and expense which it would have consumed belie its slender probative value

3.2. The Relevance of Character Evidence to Issues at Trial[36]

The most common way in which character evidence may go to a material issue is via the propensity inference. However, character evidence may also be relevant to a plurality of material issues (such as a party's *modus operandi* or motive). Concerning collateral issues, character evidence is most often related to the issue of credibility (and its impeachment). These uses will be considered in turn.

3.2.A. Relevance and Propensity

At its most basic, the propensity inference has the following form: A has done x in the past, therefore she is more likely to do x in the present or future. As such, A has a propensity for x. In the criminal trial context, the propensity inference is most often employed regarding an individual's previous convictions: if A (whether the defendant or another individual) has committed an offence before, she is more likely to have committed the currently charged offence. The propensity inference can be employed for any type of character evidence (for example, a propensity to take illegal drugs), not merely convictions.[37]

To unpack the relevance of propensity, it is necessary to analyse the underlying assumptions and generalisations inherent in the propensity inference; chief of which is the generalisation that people act in similar ways throughout their lives. The psychological literature relating to the potential for past conduct to reliably predict future conduct has an uneven history. 'Trait theory', or 'personism', was initially advanced in the 1950s and attempted to explain individuals' behaviour as a result of their specific character traits.[38] Critiques of empirical research conducted by trait theorists

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[35] See ALT Choo, 'The Notion of Relevance and Defence Evidence' [1993] *Criminal Law Review* 114, 116; Roberts and Zuckerman (n2), 104-106.

[36] This analysis is strictly limited to relevance only. Consideration of normative or empirical arguments against the admissibility of *prima facie* relevant character evidence are beyond the scope of this thesis. For a detailed analysis of some of these issues, see M Redmayne, *Character in the Criminal Trial* (Oxford: OUP, 2015), Chs3-4.

[37] *Donnelly* [2006] EWCA Crim 545.

[38] SM Davies, 'Evidence of Character to Prove Conduct: A Reassessment of Relevancy' (1991) 27 *Criminal Law Bulletin* 504, 513-514; Redmayne, *Character in the Criminal Trial* (n36), 11-

led to 'situationism' being advanced as an alternative theory. This posited that an individual's behaviour is almost exclusively determined by environmental factors.[39] The dichotomised positions of trait theorists and situationists have now softened so that most contemporary psychologists agree that both stable character traits and environmental factors influence behaviour (a position termed 'interactionism').[40] In accepting that character and environment both influence behaviour, psychologists have been able to focus instead on specific types of behaviour in order to determine the relative influences of character and environment.[41]

If we focus on prior convictions: to what extent can a prior conviction reliably inform us of the likelihood that that same individual committed the currently charged offence? Both Spencer[42] and Redmayne[43] argue that due to high rates of recidivism across offences, and the fact that offenders tend to be generalists rather than specialists in the crimes they commit, evidence of an individual's prior conviction for *any* offence is not only relevant, but often highly probative of the question of whether they committed the offence in question. It is difficult to come to any alternative conclusion using the relevant data. Statistics published in 2016 regarding recidivism rates throughout 2014 show that 25.6% of all convicted offenders were convicted of at least one further offence within one year, and that this rate of recidivism has remained almost unchanged since 2004.[44] One must be careful not to overgeneralise, as rates of recidivism vary by offence-type, as well as in respect of the relevant individual's number of prior convictions.[45] What we are interested in here, though, is *comparative propensity*. Using these statistics, there is on average only a 25% probability that an offender will re-offend, which on first inspection may seem relatively low. However, when Redmayne compares this with the likelihood that a non-offender will commit an offence, he argues that offenders have a significantly higher comparative propensity for offending.[46] As considerations of relevance do not require that one fact prove another conclusively, they merely need to make it more (or less) *probable*, one must conclude that the relevance of a previous conviction

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39 Davies (ibid), 514-518; Redmayne, *Character in the Criminal Trial* (ibid), 11-13.

40 Davies (ibid), 518-519; Redmayne, *Character in the Criminal Trial* (ibid), 12.

41 For example, 'honesty' is thought to be highly situational; Davies (ibid), 521.

42 JR Spencer, *Evidence of Bad Character* (3rd edn, Oxford: Hart, 2016), 9-11.

43 Redmayne, *Character in the Criminal Trial* (n36), Ch2.

44 *Proven Reoffending Statistics Quarterly Bulletin January to December 2014, England and Wales* (London: Ministry of Justice, 2016), 4 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/563185/proven-reoffending-2014.pdf> Accessed 25/03/20.

45 Ibid, 11-12.

46 Redmayne, *Character in the Criminal Trial* (n36), Ch2.

to a future charge is indisputable[47] as the existence of a prior conviction will increase the odds of guilt (even if only slightly).[48]

The relevance of character evidence other than previous convictions is much more difficult to analyse in the abstract, due to the countless types of activity or traits which might be considered 'character evidence'. In broad terms, we are concerned with the potential for non-criminal prior conduct to be relevant to a criminal charge through propensity reasoning.

Dolan[49] illustrates the problem. Dolan was charged with murdering his three-month old son. At trial, the prosecution wished to submit evidence concerning Dolan's short temper at malfunctioning inanimate objects as relevant to his propensity for violence. For example, Dolan created a crack in a bathtub after a showerhead would not work, and on several occasions threw a remote control at his malfunctioning television.[50] Although the trial judge admitted the evidence (and Dolan was subsequently convicted), the Court of Appeal reasoned that 'The fact that a man who is not shown to have any tendency to lose his temper and react violently towards human beings becomes frustrated with and violent towards inanimate object is, we think, irrelevant'.[51] In explaining his reasoning, Tuckey LJ made reference to how common it is for people to get frustrated at inanimate objects, such as when undertaking DIY projects, and break them in bursts of anger.[52]

The reasoning seems to echo McEwan's contention that non-criminal propensity reasoning depends largely on what average people regard as 'usual' and 'unusual',[53] as well as the application of scripts concerning the 'correct' reaction to a malfunctioning object. Applying one's common sense, the mere fact that Dolan sometimes broke malfunctioning inanimate objects would not appear to make it any more or less likely that he would commit violence against another human, as frustration with technology is a hallmark of modern living. However, it is submitted that Tuckey LJ unnecessarily limited himself by only discussing the targets of Dolan's violence, rather he should have also considered the contexts and causes of those outbursts. Looking at these particulars, the use of force required to break a bathtub in relation to the inconvenience of a malfunctioning showerhead is surely

[47] Cf. McEwan, *The Verdict of the Court* (n15), Ch6.
[48] The weight of the particular previous conviction would depend on the specific facts.
[49] *Dolan* [2003] EWCA Crim 1859, [2003] Crim LR 41, [2003] 1 CrAppR 18.
[50] Ibid, [10] (Tuckey LJ).
[51] One must assume Tuckey LJ was referring to logical irrelevance, not 'legal irrelevance'; ibid, [23] (Tuckey LJ).
[52] Ibid, [23] (Tuckey LJ).
[53] J McEwan, 'Reasoning, Relevance and Law Reform: the Influence of Empirical Research on Criminal Adjudication' in P Roberts and M Redmayne (eds), *Innovations in Evidence and Proof* (Oxford: Hart, 2007), 191-192.

disproportionate.[54] Moreover, one can easily imagine situations where a three-month old baby would be just as uncooperative as a broken TV remote control. The fact that there are many further instances of *prima facie* disproportionate violence to minor inconveniences alluded to in the case[55] emphasises that it is perhaps the disproportionality, quickness of response, and causes of the violence which should have been considered by Tuckey LJ, rather than concentrating solely on the (inanimate) targets of the outbursts.

On this analysis, Dolan's behaviour may well indicate a general propensity to react disproportionately violently to what most of us would consider inconveniences, which would certainly be relevant to the likelihood that he killed his infant son in the circumstances of the case. This highlights the difficulties of analysing non-criminal character evidence. Relevance turns on:

1) The specificity of the prior conduct in question.
2) The frequency of the occurrence of the prior conduct.
3) The type of propensity the prior conduct is meant to suggest.
4) The type of crime that is currently being alleged.

As a result, the most that can be said at an abstract level concerning the relevance of non-criminal character is: it is certainly capable of being relevant, but it depends on all the facts.

3.2.B. Other Material Inferences

Besides the propensity inference, character can also be relevant to a particular party's *modus operandi* (MO). Literally translated as 'manner of working', an MO is a 'particular way or method of doing something; the characteristic way in which a person sets about a task'.[56] One can see the relationship between propensity and MO: propensity relates to one's engaging in certain behaviour (and the likelihood of engaging in it again), while MO relates to the specific way in which one engages in certain behaviour (and the likelihood of repeating it *in that way*).

Straffen[57] is a classic example. Straffen was charged with the murder of two young girls by strangulation but was found not fit to plead by reason of insanity and was detained at Broadmoor. Straffen later escaped and was caught after only a few hours. The day after his escape, a young girl was found strangled in the nearby town of Little Farley in Berkshire (her time of

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[54] This is admittedly speculative, as the facts of the case do not go into such details, but a broken showerhead would not have precluded Dolan from taking a bath (until he broke the tub, that is).

[55] *Dolan* (n49), [9]-[11] (Tuckey LJ).

[56] "modus operandi, n." *OED Online*. Oxford University Press, March 2020 <http://www.oed.com/view/Entry/238360?redirectedFrom=modus+operandi#eid> Accessed 25/03/2020.

[57] *Straffen* [1952] 2 QB 911 (CCA), [1952] 36 CrAppR 132.

death corresponding to Straffen being at large) and Straffen was charged with her murder. The question which concerned the Court was whether the MO of Straffen's previous two murders were relevant to the question of whether he murdered the third young girl?

As with propensity, the underlying assumption is that individuals have stable character traits, and behave similarly, over time. In *Straffen*, specific characteristics of the two prior murders can be picked out as constituting Straffen's MO: the means by which the victims were murdered, the peculiarities of the victims themselves, the lack of any sexual element, the lack of evidence of a struggle, and the lack of attempt to conceal the body.[58]

Intuitively, one grasps the relevance of the MO of Straffen's previous murders to the current murder. It is the peculiarity of the way in which the prior murders were carried out, and the surrounding circumstances, which makes it more probable that Straffen committed the third murder. Problems might be thought to arise when the MO is not so peculiar, as the more general and unspecific the MO the more tenuous the relevancy link appears. But even a tenuous link may be enough to render the MO relevant, though probatively weak.

A non-exhaustive list of relevant factors concerning the probative value of specific MO evidence would include:

1) The similarity between the MO and the facts of the current charge.
2) The peculiarity of the MO.
3) The frequency and recency of the events which constitute the MO.

Even authors such as McEwan, who is critical of the alleged relevance and probative value of propensity evidence, admit that evidence of a specific MO can be highly probative, especially if that MO is unusual in some way.[59] This reference to unusualness reveals one of the underlying justifications of admitting MO evidence, namely the relative (un)likelihood that someone other than the person with the peculiar MO would act in the same way.

Much like propensity, the relevancy of MO in the context of a criminal trial most often arises in relation to defendants. Usually, one would want to raise the MO of a defendant in order to suggest that they have also committed the current offence. However, both propensity and MO may be relevant regarding non-defendant witnesses if a 'him, not me' defence is being run.[60] Here,

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[58] Ibid.
[59] McEwan, *The Verdict of the Court* (n15), 153. Although generally critical of the proposition that a single prior act may support propensity reasoning, Munday also admits that a particularly peculiar single prior act may support MO reasoning; R Munday, 'Single-Act Propensity' (2010) 74 *Journal of Criminal Law* 127.
[60] I.e. the defendant argues that another individual committed the crime rather than themselves.

evidence that another individual has a particular MO which is similar to the facts of the current charge would be relevant – as by increasing the likelihood that the other person committed the crime, the probability that the defendant committed the crime would decrease (assuming they are not accomplices).

Apart from propensity and MO, character evidence may also be relevant to an individual's motive.[61] Motive evidence is relevant to material issues (primarily *mens rea*) as we expect those with reasons for acting in a particular way are more likely to have in fact acted than those without reasons.[62] In *Miller*,[63] for example, the defendant was on trial for drug offences and his friend, Clarke, was trying to take the blame for those offences. The prosecution wished to adduce evidence of other crimes for which Clarke was currently awaiting trial in order to suggest that Clarke was taking the blame for his friend as he already expected to go to jail for a long time. The criminal character evidence is relevant here as it sheds light on *why* Clarke is taking the blame. A parallel in relation to non-criminal character evidence, would be the potential relevance of evidence of an individual's drug habit to their motive in assaulting a drug dealer.

Likewise, character evidence may be relevant to a party's (prior) knowledge, constituting *mens rea*. In *Francis*[64] the defendant claimed that he did not know that the jewellery which he was attempting to pawn was fake. Previous occasions where the defendant had attempted to pawn fake jewellery were admitted in order to contradict the defendant's claimed ignorance. The reasoning is simple: evidence suggesting that the defendant was in the habit of fraudulently pawning fake jewellery suggests that he would not be ignorant as to the true nature of stolen jewellery on the current charge. Character evidence could similarly be used to suggest that a non-defendant witness had particular knowledge relevant to a material issue.

3.2.C. Relevance and Credibility

Evidence may be relevant in a criminal trial not only if it relates to a material issue (direct relevance), but also if it relates to a collateral issue which itself bears on a material issue (indirect relevance). Such character evidence often

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[61] D Hamer, 'The Legal Structure of Propensity Evidence' (2016) 20(2) *International Journal of Evidence and Proof* 136, 141-142.

[62] For further discussion of the inferences involved with motive evidence, see: JH Wigmore, *The Principles of Judicial Proof as Given by Logic, Psychology, and General Experience, and Illustrated by Judicial Trials* (Boston: Little, Brown, 1913), 94-95; Roberts and Zuckerman (n2), 163-164.

[63] *Miller* [2010] EWCA Crim 1153, [2010] 2 CrAppR 19.

[64] *Francis* (1874) LR 2 CCR 128.

concerns credibility.[65] Just because someone says that something is true, does not make it so. Intuitively, an investigation into the truth of what a witness says has some relevance to the outcome of a criminal trial.[66] If, for example, a key witness for the prosecution is shown to be lying, the case might collapse.

Conceptually, 'credibility'[67] can take two forms. 'Specific'[68] or 'probative'[69] credibility refers to the veracity of a witness based on the content of their testimony. Impeaching specific credibility would require the presentation of evidence which contradicts the content of a witness's testimony to show that their testimony is false. 'Moral' credibility, on the other hand, refers to the general tendency of a witness to tell the truth. Impeaching moral credibility employs evidence suggesting that the witness's testimony is not to be believed regardless of its content.

The only situation in which character evidence could be conceived as relevant to specific credibility is where it is the character itself which is the subject of the impeached testimony. If a witness claimed to have no criminal record, but in fact has convictions, character evidence concerning those previous convictions would clearly be relevant to the veracity of the witness's claim as it would make it less likely that they are telling truth.[70] If two propositions contradict each other so that both cannot be true at the same time, then evidence which alters the likelihood ratio concerning the veracity of one of the propositions will logically be relevant to it. This reasoning process is not in any way unique to character evidence.[71]

The relevance of character to moral credibility has a long and confusing past in England and Wales, rooted in religious prejudice, sexism, and racism.[72] For now, this history does not concern us;[73] our question is whether character evidence can be logically relevant to one's moral credibility. When one considers the purpose of impeachment (to suggest to the fact-finder that the witness should not be believed regardless of what they have actually said), then it appears that moral credibility is effectively one's propensity to

[65] Another common use is to suggest bias. This is discussed further below at §3.3.A.i.
[66] Anderson *et al* (n8), 60.
[67] Also known as 'veracity' or, regarding untruthfulness, 'mendacity'.
[68] Law Commission, *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant* (Law Com CP No 141, 1996), para 6.42-6.47.
[69] Roberts and Zuckerman (n2), 347.
[70] This is also one of the exceptions to collateral finality; see s.6 of the Criminal Procedure Act 1865.
[71] For example, a witness who claimed to not be in a particular place could be contradicted by the existence of video evidence which showed them to in fact be in that place.
[72] See for example Wigmore's lengthy discussions of the supposed natural capacities for (not) telling the truth of non-white people and women; Wigmore, *The Principles of Judicial Proof* (n62), 314-329, 340-351.
[73] See Ch2.

be dis/honest.

Psychological literature indicates that individuals do not have consistent and stable *moral* characteristics across situations.[74] Indeed, honesty is considered by most psychologists to be highly situational, in that one's environment and situation are the most influential factors when considering the likelihood of telling lies.[75] In particular, the purpose of the lie, and the perceived likelihood of getting away with it, are all highly influential variables.[76] However, there are some individual characteristics which have been found to increase the frequency and likelihood of lie-telling, including: psychopathy, extroversion, and social anxiety.[77] If it is plausible that certain individuals have greater comparative propensities to lie, what character evidence might be relevant?

Clearly, evidence of individual personality traits such as psychopathy and extroversion are pertinent as empirical psychological research suggests these indicate a greater propensity to lie relative to the general population.[78] For other non-criminal prior conduct, the circumstances surrounding the prior instances of dishonesty would have to be sufficiently similar to the context of giving testimony under oath in a criminal trial to be considered relevant. Acknowledging the importance of fact-specific variables, one might consider evidence that a defendant had demonstrably lied in the past in order to avoid some severe punishment or negative consequence (such as losing a job) to be sufficiently analogous for *prima facie* relevance. Similar lines of reasoning may be employed in considering the potential relevance of character evidence to non-defendants' moral credibility, for example: evidence which shows that an individual has lied in order to protect a friend from punishment (in a case where the witness and defendant know each other), or evidence suggesting that a complainant has made allegations of crimes which are verifiably false.[79]

The relevance of previous criminal convictions is debatable. Most commentators consider the fact that someone has a previous conviction for a criminal offence to be of no relevance whatsoever to general veracity.[80]

[74] McEwan, *The Verdict of the Court* (n15), 102-103.
[75] Davies (n38), 519-521; R Friedman, 'Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and Proposed Overhaul' (1990-1991) 38 *UCLA Law Review* 637; A Memon, A Vrij and R Bull, *Psychology and Law* (2nd edn, Chichester: Wiley, 2003), Ch2.
[76] A Vrij, *Detecting Lies and Deceit: Pitfalls and Opportunities* (2nd edn, Chichester: Wiley, 2008), Ch2.
[77] Ibid, 30-34.
[78] Although it is unlikely that these would qualify as evidence of BC; see Ch4.
[79] See for similar analysis; R Pattenden, 'The Character of Victims and Third Parties in Criminal Proceedings Other Than Rape Trials' [1986] *Criminal Law Review* 367, 374-375.
[80] Davies (n38), 520, 533-534; P Murphy, 'Character Evidence: The Search for Logic and Policy Continues' (1998) 2(2) *International Journal of Evidence and Proof* 71, 96-99; J Jackson and M

However, some of those same commentators concede that a criminal offence which involves some form of dishonesty may potentially affect testimonial credibility if it indicates deceptive behaviour.[81] Given the highly situational nature of honesty, this concession seems extravagant. A defendant's previous conviction for the theft of fruit from a market stall surely has no general bearing on testimonial credibility in relation to completely different proceedings. Crimes of dishonesty do not seem to be relevant to a propensity to lie in a broad sense, though it is not impossible that a particular previous conviction could be relevant if the situational factors of the crime were similar enough to the new testimonial context.

Perjury presents the strongest case for being considered *prima facie* relevant to testimonial veracity.[82] In addition to being a crime which necessarily involves untruthfulness, perjury can only be committed when giving testimony in judicial proceedings. The inference that is involved here combines both individual and situational factors in determining that because a person has lied during testimony before, they are comparatively more likely to be willing to lie again.

Redmayne goes much further, considering it plausible (though admittedly not conclusive) for a previous conviction for *any* offence to be relevant to one's propensity for dishonesty.[83] To support this, Redmayne cites psychological and criminological studies proposing a link between dishonesty and deviant behaviour more generally.[84] However, in each of the studies the test subjects were either secondary school or university students, and the only form of dishonesty they measured was 'academic dishonesty' (the likelihood of a student cheating in an exam or engaging in plagiarism).[85] It is rather a leap to go from a suggested link between academic dishonesty and deviant behaviour[86] to considering a previous conviction for a criminal offence to be relevant to a general propensity to be dishonest. We should

Wasik, 'Character Evidence and Criminal Procedure' in D Hayton (ed), *Law's Future(s)* (Oxford: Hart, 2000), 364-5; Friedman, 'Character Impeachment Evidence' (n75); Lempert (n22), 1040.

[81] Murphy (ibid).

[82] Perjury Act 1911, s.1. Similar reasoning could apply to other offences against the administration of justice.

[83] Redmayne, *Character in the Criminal Trial* (n36), 197-198. Some commentators, such as Birch, seem willing to accept Redmayne's tentative conclusions here; D Birch, 'A Credible Solution? Non-Defendant's Bad Character and Section 100 of the Criminal Justice Act 2003' [2019] *Criminal Law Review* 841, 852.

[84] Redmayne, *Character in the Criminal Trial* (ibid), 198 fn16.

[85] See: JK Cochran, WB Wood, CS Sellers, W Wilkerson and MB Chamlin, 'Academic Dishonesty and Low Self-Control: An Empirical Test of a General Theory of Crime' (1998) 19(3) *Deviant Behaviour* 227; KL Blankenship and BE Whitley, 'Relation of General Deviance to Academic Dishonesty' (2000) 10(1) *Ethics and Behaviour* 1; AU Bolin, 'Self-Control, Perceived Opportunity, and Attitudes as Predictors of Academic Dishonesty' (2004) 138(2) *Journal of Psychology* 101.

[86] Which included, in one study, the use of alcohol and driving violations: Blankenship and Whitley (ibid), 4.

continue to examine the exact nature of the prior conviction in order to determine whether it could be relevant to an individual's testimonial credibility.

3.2.D. Character Evidence as 'Background Evidence'

The common law concept of 'background' or 'explanatory' evidence poses difficulties for this analysis. In *Pettman*, Purchas LJ stated:

> '… where it is necessary to place before the jury evidence of part of a continual background or history relevant to the offence charged in the indictment, and without the totality of which the account placed before the jury would be incomplete or incomprehensible, then the fact that the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence.'[87]

The importance of background evidence is highlighted by several commentators,[88] including the Law Commission which proposed specific admissibility gateways for BC evidence going to background, acknowledging the importance of narratives and scripts in common sense reasoning.[89]

Background evidence was sometimes considered outside of the general framework of relevance,[90] and was admissible despite its irrelevance in order to provide the 'context against which the dispute must be resolved'.[91] This reasoning, it is submitted, takes an overly strict view of relevance as only encompassing evidence which *directly* influences the odds of the defendant's guilt. The conceptualisation of relevance advanced here allows for the consideration of evidence which may *indirectly* alter the odds of guilt. Background evidence is better conceptualised as indirectly relevant evidence.

One illustration would be any character evidence which sheds light on the relationship between a defendant and a complainant. For example, evidence that the defendant and complainant had been accomplices in a prior crime (which has no similarities at all to the current charged crime) may assist in 'setting the scene' against which other relevant evidence may be evaluated. Alternatively, in sexual offence cases, evidence that the defendant and complainant had been in a prior sexual relationship would assist greatly in

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[87] *Pettman,* Unreported, May 2, 1985, CA, No 5048/C/82 (Purchas LJ) quoted in *Fulcher* [1995] 2 CrAppR 251; [1995] CrimLR 883 [258] (Kennedy LJ).
[88] D Birch, 'Rethinking Sexual History Evidence: Proposals for Fairer Trials' [2002] *Criminal Law Review* 531; N Kibble, 'The Relevance and Admissibility of Prior Sexual History with the Defendant in Sexual Offence Cases' (2001) 32 *Cambrian Law Review* 27; G Young, 'The Sexual History Provisions in the Youth Justice and Criminal Evidence Act 1999 - A Violation of the Right to a Fair Trial?' (2001) 41(3) *Medicine, Science and the Law* 217.
[89] Law Commission, *Evidence of Bad Character in Criminal Proceedings* (Law Com No 273, 2001), Part X. See also §3.1.A.
[90] Ibid, Part X.
[91] Birch, 'Rethinking Sexual History Evidence' (n88), 540.

setting the context for the current charged crime.[92] Without evidence such as this, a fact-finder may assume that the defendant and complainant were total strangers prior to the facts of the alleged offence, which may lead to faulty conclusions about the probative value of other evidence and unfairly prejudice the defendant.[93]

3.3. The Relevance of Sexual History Evidence to Issues at Trial[94]

Sexual history (SH) evidence is a subset of character evidence which specifically concerns prior *sexual* conduct, or particular *sexual* character traits. Sexual history evidence warrants special consideration owing to the legal distinction drawn between BC and SH evidence,[95] but also due to extensive policy debate and critical commentary.

Durston observes:

> 'the issue [of SH] has sometimes been drawn into wider questions of "gender politics", as a result of which some academic critics have tended to ignore general principles of relevance and have overlooked the inherently irreconcilable conflict between the two competing aims of finding the truth… and protecting the sensitivities of a complainant giving evidence for the Crown'.[96]

The relevance of SH will be approached using the general principles and framework of relevance described above, to determine the potential relevance of SH to both material and collateral issues. The potential relevance of SH evidence as 'background' is encompassed by the previous general discussion.[97]

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[92] Birch notes the difference in how a jury would view a defendant on trial for raping his best friend's girlfriend on a towpath if they knew that the defendant and the complainant were engaged in an affair, from if they were not told this background information; ibid, 541-542.

[93] Ibid, 540-542; Kibble, 'The Relevance and Admissibility of Prior Sexual History' (n88), 51-52; Young (n88), 224.

[94] As with BC, this analysis of SH is strictly limited to relevance only. Though many argue that SH evidence, if relevant, should nonetheless be excluded because of juror prejudice arising out of 'rape myths' or to protect the complainant's privacy, these questions are beyond the scope of the thesis. For treatment of some of these issues see: Z Adler, *Rape on Trial* (London: Routledge & Keegan Paul, 1987); G Durston, 'Cross-Examination of Rape Complainants: Ongoing Tensions Between Conflicting Priorities in the Criminal Justice System' (1998) 62 *Journal of Criminal Law* 91; J Temkin, *Rape and the Legal Process* (2nd edn, Oxford: OUP, 2002); S Lees, *Carnal Knowledge: Rape on Trial* (London: Women's Press, 2002); M Redmayne, 'Myths, Relationships and Coincidences: The New Problems of Sexual History' (2003) 7(2) *International Journal of Evidence and Proof* 75; J Temkin, 'Sexual History Evidence – Beware the Backlash' [2003] *Criminal Law Review* 217; JR Spencer, 'Criminal Procedure: The Rights of the Victim Versus the Rights of the Defendant' in E Cape (ed), *Reconcilable Rights? Analysing The Tension between Victims and Defendants* (London: Legal Action Group, 2004); L Ellison and VE Munro, 'Better the Devil You Know? 'Real Rape' Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberation' (2013) 17 *Evidence and Proof* 299, 308-314, 322; C McGlynn, 'Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence' (2017) 81(5) *Journal of Criminal Law* 367.

[95] See Ch4.

[96] Durston (n94), 95.

[97] §3.2.D.

3.3.A. Relevance and Material Issues

The logic underlying the relevance of criminal SH (a previous conviction for a sexual offence) to material issues would replicate the analysis for any other type of criminal prior conduct.[98] We are here primarily concerned with non-criminal SH evidence and its relevance to sexual crimes.[99] The relevance of SH is contingent on the defence's case.

3.3.A.i. Denial

Where the defendant denies all sexual contact with the complainant, evidence of a complainant's SH may be relevant for four primary purposes: motive, bias, prior knowledge, and providing an alternative explanation. The first may be illustrated by the case of *Martin*.[100] The defendant was charged with indecently assaulting the complainant. In support of his defence that the allegations were completely fabricated, Martin adduced evidence of a prior occasion where he and the complainant were at a party and he had fallen asleep. On awaking, Martin found the complainant performing oral sex on him which he forced her to stop. The Court of Appeal considered this evidence to be substantially probative of the complainant's potential motive to fabricate the allegations as such a rejection might cause feelings of resentment (worse than words).[101] Common sense suggests that revenge is a very strong motivator for action, to which the rejection of sexual advances can greatly contribute.

The second inference that may support the relevance of a complainant's SH to a defence of denial is through 'bias'.[102] One of the common law exceptions to collateral finality,[103] SH evidence may be used to support an argument that a complainant is biased in some way against the defendant. In *Thomas v David*,[104] evidence of a prior sexual relationship between the complainant and another witness was admitted to support the inference that they had conspired against the defendant. In the context of a sexual offence case, the situation may arise where a married woman and her secret lover conspire together to allege an offence by the husband. Here, evidence of the

[98] For example: where a sexual assault defendant claims it was in fact the complainant who sexually assaulted them, a complainant's prior convictions for sexual assault may be relevant in determining who sexually assaulted who.
[99] For non-sexual crimes Redmayne gives an example of a defendant whose wife is having an affair, who finds himself having a motive to kill his wife's lover through no choice of his own. Evidence of the wife's affair would be evidence of her SH, and would be relevant in order to suggest the defendant's motive. See Redmayne, *Character in the Criminal Trial* (n36), 85.
[100] *Martin* [2004] EWCA Crim 916, [2004] 2 CrAppR 22.
[101] Ibid, [34]-[35] (Crane J).
[102] Though often considered a collateral issue, bias is more conveniently dealt with here.
[103] *Thomas v David* (1836) 7 C&P 350.
[104] Ibid.

wife and her lover's sexual relationship would certainly be relevant to show potential bias or collusion against the husband.

The third potential inference arising in this context is 'prior knowledge'. This situation arises when the sexual offence complainant is relatively young. On hearing the complainant's account, the jury may reasonably infer that the only way the complainant could have come by their sexual knowledge is through being the victim of the current offence. Evidence of that complainant's SH may be relevant in rebutting this assumption by indicating other possible ways in which the complainant could have gained experience.[105] Rebutting jury assumptions is significant in the context of SH,[106] as relevance often turns on assumptions about common sense generalisations.[107]

Fourthly, SH may be relevant in providing an alternative (innocent) explanation for a particular state of affairs. For example, a rape complainant may have injuries to her vagina which she alleges were inflicted by the defendant. Absent other evidence, this appears to be compelling evidence of assault. However, evidence that the complainant had, hours before the alleged rape, had violent sexual intercourse with a third party may be relevant in providing an alternative explanation for those injuries, exonerating the defendant.

3.3.A.ii. Consent

Where the defence is consent, the use of SH evidence often involves an appeal to the propensity inference: as an individual has engaged in consensual sex in the past, they are comparatively more likely to have engaged consensually in the sexual conduct which is the subject of the current criminal charge. Interestingly, arguments against the use of the propensity inference to support the *relevance*[108] (as opposed to admissibility)[109] of SH either predate or appear to be unaware of the BC reforms contained in the Criminal Justice Act 2003 which reversed the old

[105] For a case in which this argument was advanced, though failed on the facts, see: *MF* [2005] EWCA Crim 3376.

[106] Kibble and Boyle note that dispelling jury assumptions is one of the key uses of SH (and especially relationship) evidence; N Kibble, 'Judicial Perspectives on the Operation of s.41 and the Relevance and Admissibility of Prior Sexual History Evidence: Four Scenarios: Part 1' [2005] *Criminal Law Review* 190, 197-198; C Boyle, 'Sexual Assault in Abusive Relationships: Common Sense about Sexual History' (1996) 19 *Dalhousie Law Journal* 223.

[107] See L Ellison and VE Munro, 'Of 'Normal Sex' and 'Real Rape': Exploring The Use of Socio-Sexual Scripts in (Mock) Jury Deliberation' (2009) 18 *Social and Legal Studies* 291.

[108] S Easton, 'The Use of Sexual History Evidence in Rape Trials' in M Childs and L Ellison (eds), *Feminist Perspectives on Evidence* (London: Cavendish, 2000), 174-180; A McColgan, 'Common Law and the Relevance of Previous Sexual History Evidence' (1996) 16 *Oxford Journal of Legal Studies* 275.

[109] Evidence can be relevant, but particular normative or empirical factors may nonetheless justify its exclusion.

common law suspicion against propensity inferences.[110]

McColgan contests the relevance of non-virginity.[111] She argues that the fact that an individual is not a virgin has no relevance to the likelihood that they consented to sex on any later specific occasion. McColgan does this by comparing the likelihoods that a virgin and non-virgin would consent to sex on any specific occasion, and concludes that as the difference is not substantial, and as female non-virginity is the social norm, there is nothing to warrant the conclusion that evidence of non-virginity is relevant to the issue of consent.[112] One clear flaw in the first limb of McColgan's argument is that she explicitly endorses a variable standard of relevance;[113] by admitting that as there *is* a difference in the likelihood of virgins and non-virgins consenting to sexual activity, then the likelihood ratio concerning the odds of consent would be altered and so the evidence must be considered logically relevant.[114]

The second limb of McColgan's argument is more plausible. Given that the majority of adults in today's society are sexually active,[115] and fact-finders must be taken to know this, evidence which confirms this assumption would not alter their pre-conceived beliefs. Therefore, evidence of the bare fact of having had at least one prior sexual experience would logically not influence the odds that the complainant had consented.[116] This conclusion is not unique to the use of SH evidence, but applies to reasoning by propensity more generally: doing x once does not mean that one has a propensity for x, unless x is *highly* unusual.

Durston suggests a candidate for this 'highly unusual' scenario: what is the relevance of a 16-year old female rape complainant's prior consensual sexual relationship with a different 70 year-old male to the question of whether she consented to sex with the current 70 year-old male defendant?[117] The jury's starting point in this case (informed by their common sense) would likely be that consensual sex between adolescents and the elderly is rare, and so they would justifiably think it highly

[110] For an overview of the old common law position, see §2.2.
[111] McColgan (n108).
[112] Ibid, 285-286.
[113] See similarly McGlynn (n94), 368-369.
[114] Redmayne, 'Myths, Relationships and Coincidences' (n94), 78.
[115] CH Mercer, C Tanton, P Prah, B Erens, P Sonnenberg, S Clifton, W Macdowall, R Lewis, N Field, J Datta, AJ Copas, A Phelps, K Wellings and AM Johnson, 'Changes in Sexual Attitudes and Lifestyles in Britain Through the Life Course and Over Time: Findings from the National Surveys of Sexual Attitudes and Lifestyles (Natsal)' (2013) 382 *The Lancet* 1781.
[116] On the other hand, as the number of adults who have had no sexual experiences is relatively small, evidence of virginity may be relevant to rebut the fact-finders' assumption that the complainant is sexually active.
[117] Durston (n94), 99.

improbable that the complainant in this case consented. The relevance of this particular complainant's SH, then, is in rebutting this common sense assumption. The complainant is placed in the relatively small class of adolescent women who are *comparatively more likely* to consent to sex with much older men such as the defendant.[118]

Moving beyond single instances, the question of whether evidence of multiple sexual partners could indicate a propensity to consent requires us to examine where decisions to consent lie on the trait/situation spectrum. Redmayne notes, citing the second National Survey of Sexual Attitudes and Lifestyles,[119] that the amount of sexual partners people have is neither normally nor randomly distributed.[120] Of particular interest is that the number of individuals who had a large number sexual partners was extremely small,[121] and so identifying an individual as a member of that group is not merely relevant, claims Redmayne, it would be highly probative.[122] In attempting to explain why certain individuals have many more sexual partners than others, Redmayne offers two hypotheses which reflect alternate psychological theories of behaviour prediction. Either: (i) certain individuals have a propensity to consent to sex; or (ii) certain individuals have a propensity to get themselves into consent-conducive situations.[123] As previously noted,[124] both individual traits and situations seemingly influence behaviour. The bare fact of an individual having a large number of sexual partners may consequently indicate a propensity to consent, though situational factors should also be considered in determining whether the particular complainant in a particular case in fact has a propensity to consent (or get themselves into consent-conducive situations).

Special consideration must be given to the relevance of a prior sexual relationship between the defendant and complainant in a sexual offence case.[125] Unlike 'third party SH', Redmayne argues that the case for the

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[118] For greater elucidation of the reasoning involved here, see; M Bagaric and K Amarasekara, 'The Prejudice Against Similar Fact Evidence' (2001) 5(2) *International Journal of Evidence and Proof* 71.

[119] B Erens, S McManus, A Prescott, J Field, AM Johnson, K Wellings, KA Fenton, C Mercer, W Macdowall, AJ Copas, K Nanchahal, 'National Survey of Sexual Attitudes and Lifestyles II: Reference Tables and Summary Report' (2012). <http://www.natsal.ac.uk/media/2083/reference_tables_and_summary_report.pdf> Accessed 25/03/2020.

[120] Redmayne, 'Myths, Relationships and Coincidences' (n94), 79.

[121] 1/100 men reported over one hundred sexual partners, while 1/100 women reported forty partners or more: Erens *et al* (n119).

[122] Redmayne, 'Myths, Relationships and Coincidences' (n94), 79.

[123] Ibid, 81.

[124] See above at §3.2.A; Davies (n38).

[125] This focus on 'third party SH' at the expense of 'relationship evidence' has been extensively criticised in the literature; Kibble, 'The Relevance and Admissibility of Prior Sexual History' (n88); Redmayne, 'Myths, Relationships and Coincidences' (n94); Birch, 'Rethinking Sexual History Evidence' (n88).

relevance of 'relationship evidence' is much weaker due to the evidence being equally probative of non-consent.[126] However to state at an abstract level that relationship evidence is equally probative of consent and non-consent is uninformative. Much depends on the particular context and facts. Furthermore, just because SH evidence may pull in two directions does not mean that it is not relevant.[127]

The relevance of relationship evidence to consent does not rest solely on the propensity inference. Galvin proposes an alternative basis: relationship evidence may be relevant to consent through revealing the state of mind of the complainant towards the defendant.[128] If the defendant and complainant have had a prior sexual relationship, this would inform the complainant's attitude and feelings towards the defendant at the time of the alleged rape or sexual assault. Our feelings towards individuals are plausibly influenced by our prior experiences with them, possibly overlapping with 'background evidence'.[129] Also worth noting is the potential relevance of evidence that the complainant and defendant had consensual sex *after* the alleged sexual assault.[130] Galvin's argument applies equally here, in that evidence of post-SH may be relevant in revealing the complainant's state of mind towards the defendant; the most obvious inference being that the complainant is less likely to have not consented on the earlier occasion if she is willing to continue having consensual sex with the defendant.[131]

The earlier conclusion regarding the relevance of non-criminal propensity evidence in general is equally applicable both to third party SH and relationship evidence. SH may be relevant to consent, but the less numerous, recent, or unusual the SH evidence, the less likely that that evidence will in fact be relevant.

In addition to propensity and states of mind, SH evidence regarding a complainant's sexual MO may be relevant to the issue of consent. The

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[126] Although we may be more likely to have sex with people we have previously had sex with than strangers, statistics show that the majority of rapes are committed by people known to the complainant rather than strangers; Redmayne, 'Myths, Relationships and Coincidences' (ibid), 86-87. See also for arguments about relationship evidence being probative of non-consent in an Australian context; TH Smith and OP Holdenson, 'Comparative Evidence: Admission of Evidence of Relationship in Sexual Offence Prosecutions' (1999) 73 *Australian Law Journal* 432.

[127] Kibble, 'Judicial Perspectives' (n106), 197-198.

[128] HR Galvin, 'Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade' (1986) 70 *Minnesota Law Review* 763, 807.

[129] See §3.2.D.

[130] It is precisely because SH evidence includes both prior and post sexual behaviour that the neutral term 'sexual history' is used in this thesis rather than the more common 'previous sexual history'.

[131] This, of course, does not deny the importance of context in specific cases. This evidence is less likely to be relevant where, for example, there was a history of domestic abuse where the complainant frequently submitted to the defendant's threats.

reasoning runs as follows: as an individual has engaged in consensual sexual behaviour in a particular way in the past, if they behaved in that particular way during the sexual behaviour in question then they are more likely to have consented. MO seems intuitively relevant, as it is more directly concerned with how individuals act in similar situations. By definition, it addresses situational factors. If evidence of a rape complainant's SH showed that whenever they had consensual sex in the past they wore a pirate hat and shouted 'Yo-ho-ho', it is more likely that future pirate-style sex would be consensual, than if they had not worn the hat and shouted the phrase.[132] However, as with MO evidence generally, the relevance (and probative value) of such evidence would greatly depend on the similarity between the MO and the facts of the current charge, the peculiarity of the MO, and the frequency and recency of the events which constitute the MO.

3.3.A.iii. Reasonable Belief

The defendant's belief in consent must have been *reasonable* to constitute a defence,[133] as determined by the jury having regard to all relevant circumstances.[134] For a complainant's SH to have any relevance to the defendant's belief in consent, the defendant must have had knowledge of that history. Without such knowledge, there is no logical nexus between the defendant's state of mind and the complainant's previous conduct.[135]

Starting with propensity inferences, if a defendant knew that the complainant had consented to sexual activity in the past, would this knowledge be relevant to the defendant's belief in consent? An initial difficulty here is distinguishing between evidence which may have in fact influenced a particular defendant's belief in consent, and evidence which may bear on the reasonableness of a particular defendant's belief in consent.[136] If a defendant truly believed that a complainant consented to sex primarily because they had previously had sex with many of the defendant's friends, then evidence of that complainant's sexual promiscuity would be technically relevant to that defendant's belief, no matter how unreasonable it may be.[137]

[132] A similar argument was advanced by Baroness Mallalieu in the House of Lords, though in her example the participants were re-enacting *Romeo & Juliet* rather than *Pirates of the Caribbean*; HL Deb 8 Feb 1999, vol 579, col 45.

[133] Note, the current tests in Part 1 of the Sexual Offences Act 2003 are *not* a pure objective assessment of what the 'reasonable man' would have done, but combines both objective and subjective elements in determining whether the defendant's belief was reasonable having regard to all of the circumstances. See P Rook and R Ward, *Rook and Ward on Sexual Offences Law and Practice* (5th edn, London: Sweet & Maxwell, 2016), paras 1.374-1.384.

[134] See Sexual Offences Act 2003, s.1(1)(c), s.1(2), s.2(1)(d), s.2(2).

[135] Cf. the remarkable decision in *Evans* [2016] EWCA Crim 452, [2016] 4 WLR 169, [2017] 1 CrAppR 13, [2017] Crim LR 406.

[136] The separate nature of these issues is often neglected in the literature. See for example: McGlynn (n94), 384-385.

[137] For a case with similar facts where the third party SH evidence was ruled as irrelevant see

Similar reasoning would apply to MO reasoning.

Commentators such as McColgan consistently argue along the following lines:

> '[The defendant's] knowledge of the woman's sexual history cannot be relevant to the defence of mistaken belief unless we accept that this knowledge was sufficient to cause him to dismiss completely the possibility—indicated by the complainant's words or physical resistance or by something else which would alert a reasonable person to the possibility of non-consent—that she was not consenting'.[138]

This argument makes several mistakes. Firstly, McColgan conflates the relevance of SH evidence to a defendant's belief in consent with the jury's assessment of the mistakenness (now reasonableness) of that belief. Secondly, she appears to consider relevance to require the evidence in question to 'dismiss completely the possibility' of the alternative hypothesis, when in fact a logical assessment of relevance merely needs to increase or decrease the likelihood of any relevant hypothesis. Thirdly, by including other situational factors which may impact on a defendant's belief in a complainant's consent, McColgan slips from an assessment of relevance to an assessment of probative value.

Whether one considers relevance through the lens of propensity or MO, evidence of a complainant's SH can be relevant to the defendant's belief in consent, so long as it can be argued that the defendant actually had knowledge of that SH prior to the sexual activity in question and that it actually influenced their belief.

3.3.B. Relevance and Collateral Issues

Since many sexual offence cases rely on the testimony of a single witness, the complainant, the veracity of that witness is highly influential.[139] Cross-examination of sexual offence complainants often predictably impeaches their credibility.[140]

As previously mentioned, one may differentiate specific credibility from moral credibility (or a propensity to lie). Regarding the former, the general analysis applies here. If a complainant or defendant makes a specific statement regarding their SH, evidence which directly contradicts that statement would be relevant to the veracity of their claim. In addition, SH may be used to suggest bias, thereby undermining the complainant's

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Miah and Uddin [2006] EWCA Crim 1168, (2006) 150 SJLB 702.

[138] McColgan (n108), 293.

[139] McEwan, *The Verdict of the Court* (n15), 103.

[140] J Boakes, 'Complainants of Sexual Misconduct' in A Heaton-Armstrong, E Shepherd and D Wolchover (eds), Analysing Witness Testimony: A Guide For Legal Practitioners & Other Legal Professionals (London: Blackstone, 1999).

credibility.[141]

As with BC evidence, moral credibility is especially problematic. Wigmore considered dishonesty to be a peculiarly feminine attribute, equating honesty with 'real manliness'.[142] Furthermore, Wigmore considered unchaste women and prostitutes to be *incapable* of testimonial reliability.[143] The 'reasoning' here appealed to the 'Madonna-Whore complex', whereby virginity is considered virtuous, whilst unchastity is considered immoral. By equating immorality with untrustworthiness, women of ill-repute are therefore not to be trusted in their testimony.[144]

Again, there is no evidential basis for linking moral character (if such a thing even exists) to a general propensity for truth-telling. The suggestion that being unchaste is 'immoral' in twenty-first century Britain is 'crude'[145] to the point of absurdity. The only way in which SH evidence could potentially be relevant to a propensity to lie, is if that prior sexual conduct involved dishonesty in a situation analogous to testifying in a criminal trial.

3.4. Relevant Concluding Remarks

This chapter emphasis the pivotal status of *relevance*. It has been argued that both BC and SH can be relevant to a variety of material issues through several inferential routes, including: propensity, MO, and motive. The relevance of character evidence via propensity or MO inferences depends on the specificity and similarity of the prior conduct, the type of propensity or MO suggested, and the frequency and recency of the prior conduct being relied upon. In addition, character evidence may be relevant to an individual's specific credibility if capable of rebutting a particular claim. However, due to the highly situational nature of honesty, character evidence is very rarely relevant to an individual's general credibility unless the previous instances of dishonesty occurred in sufficiently similar situations as giving evidence under oath (such as a conviction for perjury). Apart from being considered directly relevant to a material or collateral issue, character evidence may also be indirectly relevant as 'background' if it assists in determining the probative value of other evidence.

[141] See above at §3.3.A.i.
[142] Wigmore, *The Principles of Judicial Proof* (n62), 343.
[143] Ibid, 367-368.
[144] See Adler (n94), 94-101.
[145] McColgan (n108), 288.

4. DEFINITIONAL SCOPE OF THE EXCLUSIONARY RULES

This chapter combines doctrine and my original empirical data to examine the scope of the exclusionary rules in s.100 of the Criminal Justice Act (CJA) 2003 and s.41 of the Youth Justice and Criminal Evidence Act (YJCEA) 1999, and overlaps between them. Through the analysis of each rule's operational concepts of 'bad character' (BC) and 'sexual history' (SH), and how they are interpreted and applied in practice, we will see that both rules of exclusion have a much wider scope than is currently acknowledged. Three potential points of overlap between the two rules are identified as causing particular doctrinal and practical difficulties.

4.1. 'Bad Character' in Law and Practice

How 'bad character' is defined for the purpose of s.100 is pivotal as any evidence which falls outside of the definition will usually be admissible 'without more ado',[1] subject to relevancy and any other applicable exclusionary rules.[2] Section 100 applies not only to evidence-in-chief, but in cross-examination.[3] Questions must have some basis in fact, and advocates cannot simply speculate, as this is exactly the sort of behaviour which s.100 was intended to prevent.[4]

Section 98 CJA 2003 indicates how 'bad character' is to be interpreted:

> evidence of a person's "bad character"… [is] evidence of, or of a disposition towards, misconduct on his part, other than evidence which —
>
> (a) has to do with the alleged facts of the offence with which the defendant is charged, or
>
> (b) is evidence of misconduct in connection with the investigation or prosecution of that offence.

[1] *Edwards* [2005] EWCA Crim 3244, [2006] 1 WLR 1524 [1] (Scott Baker LJ). See also *Weir (Manister)* [2005] EWCA Crim 2866, [2006] 1 WLR 1885, [2006] 2 All ER 570 [95] (Kennedy LJ). This point is not uncontentious, as Tapper and Huxley have argued that s.99 CJA technically leaves intact that part of the old common law which relates to misconduct evidence which is not caught by the definition of BC in the CJA, although Goudkamp counters that this runs contrary to the intention behind the CJA 2003: C Tapper, *Cross and Tapper on Evidence* (12th edn, Oxford: OUP, 2010), 383-384; P Huxley, 'Mental Gymnastics and Intellectual Acrobatics: The Meanings of Statutory and Common Law "Bad Character"' (2011) 75(2) *Journal of Criminal Law* 132, 135; J Goudkamp, 'Bad Character Evidence and Reprehensible Behaviour' (2008) 12(2) *International Journal of Evidence and Proof* 116, 119; Law Commission, *Evidence of Bad Character in Criminal Proceedings* (Law Com No 273, 2001), para 4.84.

[2] Such as if the evidence was hearsay (ss.114-136 CJA 2003) or, if prosecution evidence, would deny the accused a fair trial (s.78 of the Police and Criminal Evidence Act (PACE) 1984).

[3] *V* [2006] EWCA Crim 1901.

[4] See *Miller* [2010] EWCA Crim 1153, [2010] 2 CrAppR 19; *Mount* [2010] EWCA Crim 2974. Cf. the discussion concerning s.109 below at §4.1.B.iii.

'Misconduct' is further defined under s.112(1) CJA 2003 as 'the commission of an offence or other reprehensible behaviour'. There are therefore 6 criteria:

A. BC evidence must concern a 'person';
B. Relate to a person's misconduct, including the 'commission of an offence';
C. Or 'reprehensible behaviour'.
D. Alternatively, BC may be a 'disposition towards' misconduct.
E. Evidence of a person's misconduct is *not* BC if it 'has to do' with the alleged facts of the current offence;
F. Or if it is 'in connection with' the investigation or prosecution of the current offence.

Each of these six legal limits on what evidence qualifies as BC will be examined with reference to both the case law and my empirical data in order to clarify the operation of s.100 CJA. As these limits apply to defendants and non-defendants alike, cases and empirical examples concerning both with be referred to.[5]

4.1.A. Bad Character of Whom?

The first conceptual limitation contained within s.98 is that it applies only to a 'person'. Clearly, 'person' includes the defendant(s) because they are singled out for protection in s.101. It also seems uncontroversial that 'person' covers non-defendant witnesses for both the prosecution and defence.[6] However, as s.100 refers to 'a person other than the defendant', rather than to a 'witness', 'person' may also encompass non-witnesses.

4.1.A.i. Non-Witnesses

Though Munday is critical,[7] the Court of Appeal has assumed that 'person' can refer to an individual who is deceased, such as a homicide victim.[8] In interviews, barristers seemed to agree that s.100 would apply in this situation:

> **Barrister 8**
> Section 100 on a victim of a murder. It would crop up then wouldn't it?

The Court of Appeal in *Harvey*[9] held that BC evidence would in principle be admissible to hearsay declarants by virtue of s.124 CJA 2003 in conjunction

[5] As such, other than parts of §4.1.A, much of this analysis applies equally to the scope of s.101.
[6] Law Com No 273 (n1), Ch9.
[7] R Munday, 'The Quick and the Dead: Who Counts as A "Person" Under s.100 of the Criminal Justice Act 2003?' (2007) 71(3) *Journal of Criminal Law* 238.
[8] *AB* [2016] EWCA Crim 1849.
[9] *Harvey* [2014] EWCA Crim 54.

with s.100. The Court of Appeal has also held that co-defendants who plead guilty are subsequently no longer co-defendants for the purposes of s.101(1)(e), but s.100 still applies.[10]

Slightly less straightforward are individuals who feature in the case in some regard, but do not give evidence (either live or through a hearsay statement).[11] The issue arose recently in *RA*[12] where it was held that the defendant was allowed to adduce the BC of his ex-wife (a non-witness) whom he alleged had persuaded her sister, the complainant, to make the current allegation of sexual assault against him.

The situation appears to arise most commonly when the defence claim a different individual, who is not a witness, committed the currently charged crime (a 'him, not me' defence), and they want to adduce the BC of that individual to suggest a propensity:[13]

> **Barrister 6**
> This case that I've got coming up next week, where I will be making a s.100 application. I mean, he's not even a prosecution witness, but he features in the evidence. […] He's the person we're potentially pointing the finger at for the previous assault, and therefore has a motive for the murder as well, whereas we [the defendant] don't have a motive for the murder. But as I say, he's not even a prosecution witness. So whether the judge will let me put his 'form' in, we'll have to wait and see.

A particular difficulty arises when the defendant is trying to 'point the finger' at an individual whose very existence is contested. In **Case 13**, D was charged with three counts of possession of drugs with intent to supply, found in his bedroom. The defence case was that D had been renting his bedroom out to his friend (F) while D stayed with his girlfriend, and that it was F who owned the found drugs and paraphernalia. D refused to identify F to the police, his lawyers, or the court, but maintained F was a known and persistent drug dealer (clearly BC evidence). The judge ruled that the prosecution could either argue that the friend was an 'absurd' fantasy, or that he *did* exist and his character was being attacked (therefore requiring a s.100 application), but they could not consistently make both claims. As the prosecution preferred the former, the defence had free rein to attack the character of this shady individual.

It is surely logical that the word 'person' does not cover fictional persons, otherwise one would have to make a s.100 application in order to claim in

[10] *Jewkes* [2018] EWCA Crim 176 [31]-[32] (Flaux LJ).
[11] For a theoretical analysis of the character of non-witnesses in the context of pre-CJA law, see; R Pattenden, 'The Character of Victims and Third Parties in Criminal Proceedings Other Than Rape Trials' [1986] *Criminal Law Review* 367.
[12] *RA* [2017] EWCA Crim 1515.
[13] **Barrister 8** gave a similar example.

court that Lord Voldemort murdered Lily and James Potter. Although it is only one example, it seems likely that the sort of defence advanced in **Case 13** might not be uncommon,[14] and the failure of the legislature to account for this situation will push trial judges to come up with inventive solutions. Moreover, if the logical approach taken in **Case 13** is the correct one,[15] then the applicability of the BC provisions will rely on the trial tactics of prosecution counsel.

4.1.A.ii. Victims and Perpetrators

A common difficulty which arose in the observed trials was how to deal with an individual (witness or defendant) who had been the victim (alleged or proven) of a prior criminal offence. Clearly, being a victim of crime is not BC. However, that crime is evidence of the BC of the perpetrator who, despite usually having nothing to do with the case in hand, is a 'person' and so qualifies for the protections under s.100.

In most observed cases where this issue arose,[16] the evidence was agreed between the prosecution and defence.[17] In two cases, the issue was contested.[18] **Case 2** concerned an allegation of rape against a child by a *de facto* stepfather. C had two sisters, each of whom had previously been raped or sexually assaulted by one of their mother's previous partners. One of these men had been convicted following a trial, and the other had committed suicide before any investigation. The defence applied under s.100 to admit these prior instances of abuse in the family to argue, in effect, that D would not have been 'stupid enough' to be the third man to sexually assault a daughter in this family, especially given the near-constant presence of social services. Neither the prior victims nor the alleged perpetrators were witnesses in **Case 2**, but s.100 still applied. Moreover, **Barrister 4** mentioned a case she had defended where she applied under s.100 to adduce the defendant's ex-partner's (not a witness) prior assault conviction:

> **Barrister 4**
> I needed it in to show that my client was a victim of domestic violence. The Crown would not accept that she was.

The Court of Appeal has yet to resolve this issue,[19] but my empirical data suggest that trial courts are having to deal with it regularly. It is difficult to

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[14] See for a case law example; *H* [2009] EWCA Crim 2899, (2010) 174 JP 203.
[15] As is also claimed by Spencer; JR Spencer *Evidence of Bad Character* (3rd edn, Oxford: Hart, 2016), paras 3.47-3.49.
[16] **Case 5**, **Case 7**, **Case 8** and **Case 17**.
[17] Either under s.100(1)(c) or s.101(1)(a).
[18] **Case 2** and **Case 21**.
[19] In cases where it has arisen, the Court has not had to get involved as counsel have agreed to admit the evidence between themselves; *H* [2019] EWCA Crim 1855.

square this literal application of the legislation with its initial intention of protecting *witnesses*[20] from unnecessary, irrelevant, and humiliating cross-examination.[21] Functionally, while some witnesses may be protected from unnecessary cross-examination concerning their prior victimisation, the legislation does not discriminate between these witnesses and: a) defendants who may want to use their prior victimisation in their own defence; b) witnesses for either the prosecution or defence whose prior victimisation is relevant to the case of the party who called them; and c) non-witnesses whose victimisation may be circumstantially relevant to the issues (as in **Case 2**).

4.1.B. 'The Commission of an Offence'

The first of the two forms of 'misconduct' which qualify as evidence of BC is the 'commission of an offence'.

4.1.B.i. Convictions

It seems obvious that evidence of a previous conviction for *any* criminal offence qualifies as the 'commission of an offence', whether it be in documentary form[22] or otherwise, or whether the offence was committed in this jurisdiction or another.[23] Indeed, respondents claimed applications were 'straightforward'[24] where they concerned a previous conviction.

4.1.B.ii. Out-Of-Court Disposals

Critical attention has been directed towards whether cautions and other out-of-court disposals qualify as evidence of 'the commission of an offence'. The issue was considered in several cases,[25] where it has been reasoned that only those out-of-court disposals which involve an admission of guilt (such as cautions) should qualify for BC-related constraints.

In comparison to the detailed academic[26] and appellate attention, out-of-court disposals did not feature prominently in either my interview data or trial observations. Cautions were mentioned twice: in interview by **Barrister 4**; and by both counsel during a break in **Case 7**. Both mentions suggest

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[20] And perhaps deceased victims; see s.1(3) of the Criminal Evidence Act 1898.
[21] Law Com No 273 (n1), Ch9.
[22] Section 74 PACE creates a hearsay exception whereby documentary evidence of a previous conviction is admissible as proof that the relevant person in fact committed the previous offence.
[23] Section 7 of the Evidence Act 1851; *Kordasinski* [2006] EWCA Crim 2984, [2007] 1 CrAppR 238; *Agrela* [2016] EWCA Crim 693.
[24] **Barrister 5**.
[25] *Olu* [2010] EWCA Crim 2975, [2011] 1 CrAppR 33; *Braithwaite* [2010] EWCA Crim 1082, [2010] 2 CrAppR 24; *Hamer* [2010] EWCA Crim 2053, [2011] 1 CrAppR 3.
[26] See G Branston, 'A Reprehensible Use of Cautions as Bad Character Evidence?' [2015] *Criminal Law Review* 594; JR Spencer, 'Cautions as Character Evidence – A Reply to Judge Branston' [2015] *Criminal Law Review* 611.; G Branston, 'Letter To The Editor' [2015] *Criminal Law Review* 616.

that out-of-court disposals are often thought to be of insufficient probative value (as compared to a conviction) to be worth pursuing.

4.1.B.iii. Probable Offending

The phrase 'the commission of an offence' includes not only criminal activities which have attracted a formal sanction, but also situations where an individual has been prosecuted but not yet tried,[27] or where they have been tried and acquitted of an offence and either the prosecution or defence wishes to adduce evidence contradicting the acquittal.[28] It is also not limited to activity which has attracted state attention, as evidence which suggests an individual has committed a previously undetected criminal offence[29] is within its scope. Inextricably linked to this type of evidence is s.109 CJA 2003:

> (1) Subject to subsection (2), a reference in this Chapter to the relevance or probative value of evidence is a reference to its relevance or probative value on the assumption that it is true.
>
> (2) In assessing the relevance or probative value of an item of evidence for any purpose of this Chapter, a court need not assume that the evidence is true if it appears, on the basis of any material before the court (including any evidence it decides to hear on the matter), that *no court or jury could reasonably find it to be true.*[30]

This section means that, for the purposes of determining admissibility, there is a presumption of the truth of BC evidence, rebuttable only if a judge considers that 'no court or jury could reasonably find… [the BC allegation] to be true'. The Explanatory Notes claim that this provision covers 'very much… exceptional cases'.[31] Therefore most allegations of prior offending must be considered true for the purposes of admissibility.

Section 109 risks admission of highly speculative BC evidence.[32] Moreover, two leading cases on s.109 directly contradict each other. In the reported case of *Dizaei*[33] the Court of Appeal held that s.109 should not be interpreted so that any and all allegations are assumed to be true, and that questions of truthfulness could also be taken into account when determining admissibility under a particular gateway. Conversely, in the unreported case of *Luckett*[34]

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[27] Explanatory Notes to the Criminal Justice Act 2003, para 354; Spencer, *Evidence of Bad Character* (3rd edn) (n15), para 2.8.
[28] See *Terry and Colman* [2004] EWCA Crim 3252, [2005] QB 966, [2005] 3 WLR 379; Explanatory Notes to the Criminal Justice Act 2003, para 354.
[29] Or one which, although investigated by the police, never led to formal criminal charges.
[30] Emphasis added.
[31] Explanatory Notes to the Criminal Justice Act 2003, para 389.
[32] Birch also argues that another effect of s.109 is to bypass the collateral finality rule; see D Birch, 'A Credible Solution? Non-Defendant's Bad Character and Section 100 of the Criminal Justice Act 2003' [2019] *Criminal Law Review* 841, 842, 856-857.
[33] *Dizaei* [2013] EWCA Crim 88, [2013] 1 WLR 2257, [2013] 1 CrAppR 31.
[34] *Luckett* [2015] EWCA Crim 1050.

it was held that questions of probative value could not take the truthfulness of an allegation into consideration, and the test for disregarding the assumption in s.109(2) is 'a high test and it would be met only in a clear case'.[35] Though the analysis in *Luckett* is the logical conclusion of applying s.109 according to its wording, more recent cases have tended to follow the reasoning in *Dizaei*.[36]

Interviews with counsel reveal that behaviour which, although not formally sanctioned, *would be* criminal is a common subject of BC applications:

> **Barrister 10**
> In domestic violence cases you will often find [] complainants will say "he's done this to me before, this isn't the first time", that sort of thing. And you can have it where the court will allow you, when you're prosecuting, to introduce that evidence. But you *have* to make a bad character application first. So it comes up quite a lot in fact, […] "criminal acts that haven't been prosecuted" or where the police haven't been involved.

This situation was common in the trial data. In **Case 2**, discussed above, a s.100 application was made to adduce the prior sexual abuse of one of C's sisters, where the alleged perpetrator had committed suicide before any investigation could be conducted. This behaviour was assumed to be true for the purposes of admissibility and was duly admitted. Similarly, in **Case 8**, a s.100 application was made by the defence to adduce C's mother's alleged violence against a prior partner. This alleged violence had never attracted the attention of the police, but was supported by accounts from that partner (a witness for the prosecution) and D. Although refused for other reasons, the judge commented in his ruling that he was assuming that the allegations were true for the purposes of admissibility.

Contra the case law, these findings suggest that *Luckett* may have had a greater influence on everyday trial practice than *Dizaei* (or that counsel are simply following the wording of the statute) so that unproven allegations of criminal behaviour are routinely being admitted at trial. However, such evidence does not go before the jury without challenge. Returning to **Case 8**, allegations that D had previously been raped by her brother were admitted by agreement. Although these were assumed to be true for the purposes of admissibility, the prosecutor used her cross examination of D and her closing speech to suggest to the jury that these allegations were unsubstantiated and obviously false. The role of counsel in framing allegations in their

[35] Ibid, [26] (Lloyd Jones LJ); this supports the interpretation given in the Explanatory Notes.
[36] *Paine* [2019] EWCA Crim 341; *Lee* [2019] EWCA Crim 2052; *Umo* [2020] EWCA Crim 284.

examination of witnesses and closing speeches is vital to their being given proper weight in the deliberation room.[37]

4.1.B.iv. Potential Criminal Behaviour, Children, and *Doli Incapax*

A discrete issue which arose in the trial observations is the extraneous, potentially criminal, behaviour of children. The current age of criminal responsibility in England and Wales is ten,[38] but up until 1998 if a child was aged 10-14 and charged with a criminal offence the prosecution had to rebut the presumption of *doli incapax*, by proving beyond a reasonable doubt that the child knew what they were doing was seriously wrong.[39] As the abolition of *doli incapax* was not retrospective,[40] the presumption still holds, and causes problems, for cases involving historic allegations.[41]

The case law on childhood BC of defendants was recently addressed in *DM*[42] where the defendant was charged with historic sex offences (1997-1999) against his sister. The indictment was deliberately drafted so that only alleged incidents which occurred *after* the defendant turned 14 were charged, to avoid *doli incapax* objections. Alleged incidents which occurred *before* the defendant turned 14 were instead used as BC evidence to show a propensity for the defendant to sexually assault his sister. In the judgement of the Court of Appeal, it appears that in holding that the un-charged incidents were properly admissible, it was assumed that this behaviour qualified as evidence of BC.[43]

Logically, if 'the commission of an offence' is intended to encompass actions done by individuals which, were they proceeded against, could lead to a criminal conviction, then the behaviour of children between the ages of 10-14 before 1998 could be caught by this only if *doli incapax* was rebutted. However, s.109 calls this into question. If it must be assumed to be true that an individual in question did an alleged criminal act (*actus reus*) for the purposes of admissibility, then it must surely also be assumed that they acted with the requisite capacity and *mens rea*. Though it gives rise to many

[37] See further §7.3.
[38] Children and Young Persons Act 1933, s.50.
[39] *C v DPP* [1996] AC 1, [1995] 2 All ER 43 (HL).
[40] Crime and Disorder Act 1998, s.34.
[41] DC Ormerod and K Laird, *Smith, Hogan and, Ormerod's Criminal Law* (15th edn, Oxford: OUP, 2018), 344.
[42] *DM* [2016] EWCA Crim 674, [2016] 4 WLR 146.
[43] Ibid, [20] (Simon LJ). This case has been heavily criticised, though the assumption that this was evidence of BC is carried over; E Engleby and R Arthur, 'Evidence of Bad Character in Cases of Historic Youth Sexual Offending - Demonstrating a Defunct Moral Compass or Distracting the Jury and Evading the Retrospective Effect of the Presumption of *doli incapax*?' [2018] *Child and Family Law Quarterly* 351.

theoretical concerns (particularly regarding the presumption of innocence), they are concerns 'which English law is committed to tolerating in the name of pragmatism'.[44] My empirical data bears this out. In **Case 5**, where D was charged with sexually abusing two young Cs between 1988-1995, and while he was aged 11-19, instances of alleged abuse when D was under 14 were admitted as BC evidence in support of the allegations when D was over 14.

From my observations, potentially criminal behaviour committed by children *under* the age of criminal responsibility (ten) is not always considered by counsel or trial judges to be evidence of BC. In **Case 17**[45] D was charged with sexual assault on a child (nine) by penetration. Legal argument centred on two prior incidents: C had searched for child pornography on her mother's phone, and had also taken pictures of her naked 13 year-old brother in the bath. As explained to me by the prosecutor in the case, this argument concerned only the *relevance* of these incidents – as C was under the criminal age of responsibility, BC-related constraints did not arise.

4.1.C. 'Other Reprehensible Behaviour'

Perhaps the most nebulous concept employed in the CJA 2003's BC provisions is 'reprehensible behaviour'. Commentators have been highly critical of this term,[46] claiming it is 'more evocative of Victorian social moralising than representative of the more neutral traits of a statute'.[47] The Explanatory Notes to the CJA 2003 give only two examples of reprehensible behaviour: an individual having a 'sexual interest in children or… [being] racist'.[48]

4.1.C.i. Case Law

It is difficult to identify any principled consistency in the case law addressing 'reprehensible behaviour'. The only explicit elucidation of the concept came from Sir Igor Judge P in *Renda*,[49] where it was stated that the word reprehensible 'carries with it some element of culpability or blameworthiness'.[50] Minor clarification was offered in the later case of *Fox*[51] where Scott Baker LJ cited with approval Spencer's suggestion that

[44] P Roberts and A Zuckerman, *Criminal Evidence* (2nd edn, Oxford: OUP, 2010), 615.
[45] Alternative examples occurred in **Case 8** and **Case 9**.
[46] R Munday, 'What Constitutes "Other Reprehensible Behaviour" Under the Bad Character Provisions of the Criminal Justice Act 2003' [2005] *Criminal Law Review* 24; Goudkamp (n1).
[47] Munday, 'What Constitutes "Other Reprehensible Behaviour"' (ibid), 25.
[48] Explanatory Notes to the Criminal Justice Act 2003, para 355. Racist language was held to constitute reprehensible behaviour in *Moody* [2019] EWCA Crim 1222.
[49] *Renda* [2005] EWCA Crim 2826, [2006] 1 WLR 2948.
[50] Ibid, [24] (Sir Igor Judge P).
[51] *Fox* [2009] EWCA Crim 653, [2009] Crim LR 881.

'reprehensible behaviour' is more than 'dubious behaviour',[52] though no definition of 'dubious' was advanced by either. It appears from these cases that instances of behaviour which might otherwise be categorised as reprehensible but were caused by accident or mistake would not trigger BC-related admissibility constraints.

In its zeal to analyse admissibility gateways, the Court of Appeal often overlooks the initial question of whether the activity is 'reprehensible'.[53] Particular examples of disparate behaviour which the Court has been willing to censure include: being addicted to drugs,[54] fabricating documents,[55] being a prostitute,[56] continuously loitering outside a men's lavatory,[57] writing violent rap lyrics,[58] and having an interest in images of violent attacks.[59] Although there may be an arguable case for the moral blameworthiness of some of these activities, the standard is obscure.

Conversely, behaviour which the Court of Appeal has refused to label reprehensible includes: a 34 year-old man's relationship with a 16 year-old girl,[60] failing to provide a witness statement to the police,[61] a student telling lies about a teacher hitting them,[62] overdosing on drugs,[63] and sending embarrassing flirtatious texts to unreceptive women.[64] Though Goudkamp considered this inconsistency problematic and issued a plea for clarity,[65] these examples evince a distinct lack of willingness by the Court of Appeal to scrutinise trial judges' categorisation of evidence.

4.1.C.ii. Reprehensible Behaviour in Practice

Several forms of potentially reprehensible behaviour featured in my practitioner interviews and trial observations. Following the Court of Appeal's lead in its overcautious, and controversial,[66] inclusion of violent rap lyrics,[67] it appears that barristers consider any evidence which suggests (violent)

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[52] Spencer, *Evidence of Bad Character* (1st edn, Oxford: Hart, 2006), para 2.20 cited in *Fox* (ibid), [27] (Scott Baker LJ).
[53] For example in *Ball* where the Court of Appeal implicitly confirmed that being a 'slag' counted as reprehensible behaviour, though they did not appear to be aware that this was the logical result of their decision regarding the evidence's admissibility. *Renda (Ball)* (n49), [31], [33], [37] (Sir Igor Judge P); Goudkamp (n1), 130.
[54] *Donnelly* [2006] EWCA Crim 545.
[55] *Malone* [2006] EWCA Crim 1860.
[56] *Alyson* [2016] EWCA Crim 2253.
[57] *Rossi* [2009] EWCA Crim 2406.
[58] *Saleem* [2007] EWCA Crim 1923; *Martin* [2017] EWCA Crim 488.
[59] *Saleem* (ibid).
[60] *Weir (Manister)* (n1).
[61] *Weir (He)* (ibid).
[62] *V* (n3).
[63] *Hall-Chung* [2007] EWCA Crim 3429, (2007) 151 SJLB 1020.
[64] *Ahmed* [2012] EWCA Crim 288.
[65] Goudkamp (n1), 139-140.
[66] N Stoia, K Adams and K Drakulich, 'Rap Lyrics as Evidence: What Can Music Theory Tell Us?' (2017) 8(4) *Race and Justice* 330.
[67] *Saleem* (n58); *Martin* (n58).

gang affiliation to require a BC application:[68]

(*In response to a question concerning gang-related BC*)

> **Barrister 10**
> Also you can have bad character by association as well. So in gang-related cases, if you want to prove that this person is affiliated with a certain violent gang, and therefore are more likely to have been involved in this particular offence […] the prosecution might make an application to be able to adduce evidence of who they associate with and the fact that the police have stopped and searched them in the presence of this known gang member. Those types of applications can be made. And yeah, rap lyrics for gang-land murders.

One barrister dissented:

> **Barrister 3**
> [BC related to gangs is] a whole messy area. I don't agree with that, people say all sorts of things in violent gangster lyrics, and it really isn't [true].

Gangs did not feature in the trial observations other than in **Case 5**, where it was agreed between parties that the complainant's previous membership of a known violent gang could be mentioned.

Two other forms of reprehensible behaviour feature in my data: professional reprimands, which were thought to be straightforward;[69] and substance abuse, which caused some confusion. **Barrister 7** stated that substance abuse is not often treated as a BC issue, and besides is usually admitted by agreement. Other respondents were equally suspicious of treating substance abuse as BC:

> **Barrister 1**
> If you say they've downloaded pornography, but it's not child pornography, well would you say that's reprehensible? Being a drunk, being an alcoholic, is that reprehensible? […] I've never had a case where there's been a ruling, where [the judge has] said "yes you can ask whether he's an alcoholic". Like in this case [**Case 2**], she [the complainant's mother] said she was an alcoholic and didn't look after her children. Nobody ever thought we had to make any sort of bad character application.
>
> **Barrister 10**
> If you've got a drugs case, and your client is saying simple possession, "I don't deal drugs, I use drugs". The fact that they've tested positive for a particular drug when they've been arrested – that could technically be reprehensible behaviour because clearly they've been using drugs.[70] […] Or if someone drinks and gets drunk regularly, that sort of thing. That might be relevant. But I don't know whether you would *necessarily* have to make a bad character application there…

[68] A similar statement was given by **Barrister 5**.

[69] **Barrister 8** referred to disciplinary findings against medical doctors, while **Case 10** involved the admission of Council letters, warning individuals to desist in anti-social behaviour (though it was unclear whether this evidence was treated as BC).

[70] Although this evidence would also likely be covered by the exception in s.98(a), see §4.1.E.

Case 5, **Case 9** and **Case 12** involved witnesses being cross-examined about their alcohol abuse, with few judicial restrictions. By contrast, cocaine use in **Case 14** was treated as BC evidence admissible under gateway (c) of s.100. One explanation for this divergence would be that the use of controlled substances is considered more reprehensible than alcohol. But in **Case 4** (heroin and crack cocaine) and **Case 13** (cannabis) addictions were referred to with no reference to their potential BC status. Whether this was because the lawyers in those cases genuinely did not think the evidence qualified as BC, or the evidence was agreed to be admitted beforehand, was unclear. If the former, it appears that the inconsistency in the case law on this issue is being reflected in practice.[71]

Potential contradictions were also observed concerning self-harm. In **Case 14** the alleged self-harm by C was treated explicitly as evidence of BC.[72] **Barrister 10** felt that suicide was particularly difficult:

> **Barrister 10**
> I have recently introduced evidence of a complainant having tried to commit suicide. […] It was agreed that it wasn't a bad character application. I know that views can differ, because […] there's an old-fashioned view of suicide that's quite negative. But in that case it wasn't […] to lower the opinion of her in the minds of the jury. […] But we didn't have to use the bad character legislation. I flagged it up with the judge, because I knew there was the possibility that we might have to go down that route, because some people have a certain attitude towards suicide.

The apparent inconsistency between self-harm and suicide could be explained by the different purposes for which the evidence was adduced, but also salient is the vagueness and inherent moral character[73] of the phrase 'reprehensible behaviour'. Ultimately, if the applicability of the BC provisions depends, in part, on the moral leanings of counsel and the trial judge, then consistency is improbable.

An important point, which my empirical evidence firmly supports, is the irony of a (doctrinally) narrow definition of 'reprehensible behaviour'.[74] Due to the perhaps understandable hesitation of the courts and counsel to label behaviour as 'reprehensible', a great deal of relevant, but potentially highly prejudicial, evidence is admitted without having to satisfy either s.100 or s.101. 'Poor mothering', for example, was referred to in **Case 2**, **Case 5**, **Case 8** and **Case 9**.[75] Other cases included relevant, though potentially

[71] Contrast *Hall-Chung* (n63), *Donnelly* (n54), and *Stabler* [2019] EWCA Crim 1886.
[72] Defence counsel stated to the judge 'I will be cross-examining the complainant on two matters of bad character' – the self-harm and cocaine abuse.
[73] *Renda* (n49), [24] (Sir Igor Judge P).
[74] See Goudkamp (n1), 123.
[75] Including allegations of: turning a blind-eye to sexual abuse they knew was happening, giving

prejudicial, references to sexual relationships between individuals where there was a large age gap,[76] serial infidelity, underage drinking, and working as a prostitute. Whether or not these could, or should, qualify as BC evidence, they produced cross-examinations on issues of marginal probative value which were highly distressing for the witnesses, and which may well have affected the jury's perceptions. Spencer's suggestion that courts will make use of Art 8 ECHR (via the Human Rights Act 1998) to exclude dubious behaviour short of reprehensibility appears to not have had much influence in practice, according to my data.[77]

4.1.C.iii. Does the Lack of Clarity Matter?

Notwithstanding the tangible practical concerns about a seemingly narrow conception of 'reprehensible behaviour', Roberts and Zuckerman,[78] and Spencer[79] claim the lack of doctrinal clarity is unproblematic. They argue that the labelling of behaviour as 'reprehensible', and therefore BC, is a matter for the trial judge who will make such a determination in the context of the case at hand, and appellate judges are rightly hesitant to interfere with these fact-based, contextual decisions. To a certain extent, this must be correct, and may even be necessary, as any guiding principles laid down by the Court of Appeal would lead to further difficulties as trial judges attempt to apply them in a variety of disparate and unforeseen contexts. Spencer further argues that the definition of 'reprehensible behaviour' matters less than whether the trial judge considers the evidence relevant, as judges will generally admit relevant 'dubious behaviour' evidence whether it is considered BC or not.[80] My trial observations support this.

A theme which arose from the interviews was that questions of 'reprehensible behaviour' rarely arise because: a) when it is considered highly probative, the BC is usually agreed between parties anyway;[81] and b) when it is considered marginally probative, it is either not labelled BC evidence, or is thought to not be worth the effort of making the application:[82]

> **Barrister 3**
> A lot of the things that would come under reprehensible behaviour like, for example, a suspension or exclusion at school, not having a ticket on a train, is valueless. So I personally wouldn't make such an application if the behaviour was low crap. It's not particularly

children as young as 3 cigarettes, and failures to feed and clothe their children.

[76] See *Weir (Manister)* (n1).

[77] Spencer, *Evidence of Bad Character* (3rd edn) (n15), para 2.18.

[78] Roberts and Zuckerman (n44), 604-605.

[79] Spencer, *Evidence of Bad Character* (3rd edn) (n15), para 2.16.

[80] JR Spencer, 'Evidence of Bad Character – Where We Are Today' (2014) 5 *Archbold Review* 5, 5.

[81] §4.1.E.i. and §5.3.

[82] **Barrister 1** agreed that behaviour short of criminal rarely features.

> relevant. […] You could do away with that term […] The fact that someone might not have paid a bus fare is not probative or relevant. So I think people are sensible enough to make the difference.

This seems reasonable from a pragmatic perspective. The two primary purposes of adducing BC evidence are to suggest a propensity or to undermine credibility.[83] The probative value of non-criminal acts to show a propensity to act in a criminal way is likely to be low. Similarly, prior instances of acting dishonestly outside of a court setting are of marginal probative value to one's credibility under oath. However, the empirical evidence presented in the previous section suggests that evidence which may potentially amount to 'reprehensible behaviour', but is not considered as such, *is* being used as evidence of 'background', and may indirectly influence the jury's assessment of particular witnesses or issues in the case.

4.1.D. 'A Disposition Towards Misconduct'

Under s.98 CJA 2003, BC evidence may alternatively show a 'disposition towards' misconduct. Most often in the case law this concerns evidence suggesting an individual has an inclination to being sexually attracted to children.[84] The inclusion of the words 'disposition towards' enables the courts to avoid labelling psychiatric illnesses as reprehensible behaviour in themselves, while still giving those with psychiatric illnesses the admissibility protections granted by ss.100-101 CJA 2003 – e.g. psychosis is not itself 'reprehensible', but it may indicate a 'disposition towards' violence.[85] This aspect of BC was noticeably absent from my empirical data, at least explicitly.[86]

4.1.E. Misconduct Which 'Has to do with the Alleged Facts of the Offence'

Evidence of a person's misconduct may still not be considered BC evidence if either s.98(a) or s.98(b) CJA 2003 apply.

4.1.E.i. Agreed Evidence and s.98(a)

It is difficult to analyse the scope of s.98(a) without first acknowledging a primary finding from my interviews: s.98(a) is usually either utilised or avoided in the process of the prosecution and defence agreeing evidence

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[83] Although BC evidence may also be used for other purposes, such as to suggest a particular motive or prior knowledge; see §3.2.
[84] See *S* [2007] EWCA Crim 1387; *D, P and U* [2011] EWCA Crim 1474, [2013] 1 WLR 676, [2011] 4 All ER 568.
[85] *Tine* [2006] EWCA Crim 1788 [13] (Crane J).
[86] See §4.3.C for discussion concerning the potential for this criterion to apply to 'fantastic allegations'.

pre-trial:[87]

> **Barrister 1**
> Often as part of the narrative, people don't actually address any sort of bad character considerations. […] You have cases involving people who are alleged to have gone round to houses armed to the teeth, and they're charged with aggravated burglary, and it turns out that in fact they've gone round because of a drug debt. And so by implication, you're saying that the person you've gone round to see has sold you drugs. […] But in fact you 99 times out of 100 will have agreed with the prosecution that that's something you'd legitimately explore because it's part of the history of the case. It would be completely artificial to try and avoid that.
>
> **Barrister 7**
> Non-defendant reprehensible behaviour [is] usually part and parcel of the case, it's relevant to the facts, it's just clearly part of the background or the context. So it normally just goes in on that basis. […] I suppose the other obvious time where it most often arises is when you have allegations of affray and things like that, arising out of ongoing disputes. And the defence team will suggest that the complainant's basically the instigator, and it's happened before; all of that sort of thing. But really that's facts to do with the offence, so it's not going to fall under the umbrella of bad character as such, it'll just go in as part and parcel of the case as a whole.

In the process of agreeing the factual and contextual boundaries of the case, counsel will agree between themselves what misconduct 'has to do' with the facts of the offence. In light of this pre-trial negotiation, there is no need for counsel to refer to s.98(a) in court, so long the agreed limits are respected. That s.98(a) need not be invoked in order to apply might explain why there was not one single mention of s.98(a) in my trial observations, despite there being situations where it seemed plausible that s.98(a) should arise.

Counsel and judges are theoretically limited by case law which circumscribes when s.98(a) applies, and it is open to judges to interrupt the case if BC evidence which is *obviously* outside the scope of s.98(a) is adduced without an application. But ultimately, in practical terms, even if judges are proactive in the way described, it is open for barristers to agree (under s.100(1)(c) or s.101(1)(a)) to present BC evidence which does *not* come within s.98(a). If the evidence is agreed, then it is admissible whether or not it would be covered by s.98(a).

4.1.E.ii. 'Part and Parcel' of the Narrative

Having acknowledged this practical caveat, it remains to be analysed what types of misconduct are considered, both in law and practice, to come within s.98(a). Some *ex post facto* inferences can be drawn from my trial

[87] Bad character evidence can be admitted by agreement under either s.100(1)(c) (non-defendants) or s.101(1)(a) (defendants), see §5.3.

observations.

Firstly, s.98(a) excludes from the definition of BC any evidence of misconduct related to the currently charged crime. This is obvious and uncontroversial. The key point of contention regarding s.98(a) concerns interpretations of the phrase 'to do with'.[88] In *Tirnaveanu*[89] it was held that there needed to be some '*nexus in time*'[90] between the charged offence and the relevant misconduct. For example: assaults against children committed during the same time period for which a defendant was alleged to have been cruel to children, [91] driving recklessly immediately before hitting bystanders,[92] and hitting bystanders with a car whilst speeding away from a theft[93] have each been considered close enough in time to be within s.98(a). On the other hand, accessing violent rap lyrics 10 days prior to an assault was held to have been too far removed in time to qualify.[94]

There appear to be three significant exceptions to the 'nexus in time' requirement. Firstly, prior misconduct which forms a legal ingredient of the offence charged is within s.98(a) regardless of when that prior misconduct occurred.[95] This exception could have been utilised in **Case 6** where D's previous conviction for harassment was admitted, as this resulted in a restraining order, the breach of which was the subject of the current proceedings. The second exception to the 'nexus in time' requirement is that evidence of prior misconduct which is relevant to an individual's motive for the current charge is within the s.98(a) exception. This is justified on the common-sense generalisation that a motive for a crime can be formed at any point in time, even months or years before it is acted upon.[96] Thirdly, the guilty plea of a defendant's accomplice is covered by s.98(a) regardless of when that guilty plea was entered.[97]

The only decision on s.98(a) which concerns non-defendants is *Machado*,[98] where it was held that the drug taking of the complainant prior to a robbery could be admitted through s.98(a), on the basis that these events happened very close together in time and that being under the

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[88] See for general criticism; C Tapper, 'The Law of Evidence and the Rule of Law' (2009) 68 *Cambridge Law Journal* 67, 77-81.
[89] *Tirnaveanu* [2007] EWCA Crim 1239, [2007] 1 WLR 3049.
[90] Ibid, [23] (Thomas LJ) (emphasis added).
[91] *R* [2006] EWCA Crim 3196.
[92] *Bishop* [2013] EWCA Crim 2413.
[93] *Brummitt* [2006] EWCA Crim 1629.
[94] *Saleem* (n58).
[95] *DPP v Agyemang* [2009] EWHC 1542 (Admin), (2009) 173 JP 487; *Morris* [2019] EWCA Crim 147.
[96] See *Sule* [2012] EWCA Crim 1130, [2013] 1 CrAppR 3 [11]-[12] (Stanley Burnton LJ); confirmed in *Lunkulu* [2015] EWCA Crim 1350.
[97] *Smith* [2007] EWCA Crim 2105.
[98] *Machado* [2006] EWCA Crim 837, (2006) 170 JP 400.

influence would have influenced his recollection of events (undermining his credibility).[99] In my trial observations, the substance use and the mental state of individuals at the time of alleged offences was a common issue. Complainants and witnesses[100] were alleged to have been drunk or high at the time of the charged offence in **Case 9**, **Case 12**, and **Case 14**. Though s.98(a) was not mentioned in these cases, in each the evidence was admitted for the purpose of challenging witness reliability, as in *Machado*.

The Explanatory Notes mention an assault committed in the course of a burglary as the kind of situation which was intended to be covered by s.98(a).[101] One may infer that any offence committed in the course of another offence will be caught. For example, in **Case 1**, a defendant's use of an illegal mobile phone from prison to control his alleged drug operation was admitted, and would likely have been within s.98(a).

Similar reasoning can be applied where a defendant is running a 'him, not me' defence.[102] In **Case 7** D was charged with stealing from her father (C) over the course of several years through access to his bank account. D's case was that her sister and brother-in-law (prosecution witnesses) were the true perpetrators and had put C up to making the allegations against her, and that they had threatened D that they would tell the police that she was the thief unless she paid them £35,000. This allegation of blackmail was not subject to any BC restrictions. Even in situations like this, it is likely that the evidence was agreed between the parties. In response to my asking if the prosecution ever agreed to admitting the complainant's BC, **Barrister 4** replied:

> **Barrister 4**
> In November I had a s.18 [Offences Against the Person Act 1861] and basically the complainant had come to my chap's accommodation and abused him etcetera. Then my chap struck him with a broken bottle. […] The complainant had then pursued him through the barracks, and shouting and screaming at [the defendant] and trying to hit him, and did actually hit him in the courtyard.

Although C assaulting D before and after the alleged bottling would surely have been within s.98(a), **Barrister 4** considered this an example of 'agreed' evidence.

It has been suggested that cases like *Machado* and *Malone*[103] indicate

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[99] Cf. Tapper argues that this evidence should have been inadmissible on the grounds of irrelevance; Tapper, 'The Law of Evidence' (n88), 78.
[100] Similar admissions against a defendant occurred in **Case 4**.
[101] Explanatory Notes to the Criminal Justice Act 2003, para 357.
[102] R Munday, 'Misconduct That "Has to Do with the Alleged Facts of the Offence with Which the Defendant Is Charged"...More of Less' (2008) 72(3) *Journal of Criminal Law* 214, 218-219.
[103] *Malone* (n55).

potential overlaps between s.98(a) and the admissibility gateways contained in ss.100-101. Spencer refers to these as 'belt and braces' decisions, where the Court of Appeal has treated admissibility as more important than the route the evidence takes to get there.[104] In more recent cases, the Court of Appeal has called on judges (trial and appellate) to be more explicit and clear about the statutory basis for admissibility.[105] However, my data suggest that barristers are not concerning themselves with these technical doctrinal distinctions as, in practice, they are largely beside the point.

4.1.E.iii. The Scope of the Indictment and s.98(a)

My trial observations also highlight that s.98(a)'s applicability relies on the charging decisions of the Crown Prosecution Service (CPS), and how specific counts in the indictment are drafted. Guidance on drafting indictments is found in Rules 3 and 10 of the Criminal Procedure Rules (CrimPR) and part 10 of the Criminal Practice Directions. Under Rule 3.21, indictments can be joined if they are either founded on the same facts or form a series of offences of a similar character, and if doing so would not prejudice or embarrass the defendant. This gives the CPS an immense power in controlling the admissibility of BC evidence.

One issue that arises is potential 'cross-admissibility' of counts. **Case 10**, involving two defendants (a father, DF, and son, DS) and two incidents, provides an illustration. In the first incident, DF was alleged to have assaulted a father and son (CF and CS) at a cattle market. The second incident was alleged to have occurred a few months later, where both defendants were alleged to have attacked CF with a rounders bat at a different cattle auction. These two incidents were charged on the same indictment.

Under s.112(2) of the CJA, each charge is to be treated as separate for the purposes of the BC provisions, and so in **Case 10** the first incident qualified as BC evidence and would have been *prima facie* inadmissible regarding the second incident, and vice versa. To establish cross-admissibility, the prosecution is required to apply under s.101.[106] Though there is much to critique about cross-admissibility of counts,[107] it is sufficient for our purposes to note that joining counts on the same indictment in this way establishes 'nexus*es* of time' through which misconduct evidence can *de*

[104] Spencer, *Evidence of Bad Character* (3rd edn) (n15), paras 2.30-2.31.
[105] *Fox* (n51), [27] (Scott Baker LJ); *RJ* [2017] EWCA Crim 1943 [41] (Simon LJ); *King* [2019] EWCA Crim 2434 [40]-[41] (Flaux LJ).
[106] *R v Wallace* [2007] EWCA Crim 1760, [2007] 2 CrAppR 30 (397), [2008] 1 WLR 572; *R v Adams* [2019] EWCA Crim 1363.
[107] M Redmayne, *Character in the Criminal Trial* (Oxford: OUP, 2015), Ch8.

facto avoid the exclusionary rules in ss.100-101.

A second issue concerns specimen counts. A specimen count is a charge on the indictment which is intended to represent multiple instances of a single offence, especially when specific dates for the commission of the offences are impossible to ascertain. For example, a specimen count in **Case 9** read that D intentionally penetrated his sister anally on 'at least five occasions' between two specific dates which covered almost the entirety of 2013-2016. The use of specimen counts is regulated by Rule 10.2(2) of the CrimPR which allows them to be used only where the 'incidents taken together amount to a course of conduct'. This rule is likely satisfied in **Case 9** as the count is meant to represent regular and repeated abuse over four years. However, the long period of time covered in the indictment potentially transforms the limitation in s.98(a) into a gaping chasm, especially as the primary constraint on the applicability of s.98(a) is a temporal one ('nexus in *time*'). Due to the four-year period of the count in **Case 9**, any evidence, including evidence which may potentially have amounted to reprehensible behaviour, of D being nasty to his sister was admitted to show a general propensity to hurt her (and her mother) and disregard her feelings. It is possible that the defence agreed admissibility, but it is doubtful whether admission of this evidence could realistically, or successfully, have been resisted.

A similar problem arises with certain offence definitions. In **Case 11** D was charged with rape and putting a person in fear of violence under s.4 of the Protection from Harassment Act 1997. The offence under s.4 requires the prosecution to prove that D pursued a course of conduct which, on at least two occasions, led C to fear violence. The prosecution case was that D and C had been in a relationship for three years, throughout which the defendant had been both physically and verbally abusive to the complainant. In order to prove a course of conduct, the prosecution relied on nine alleged incidents which encompassed a variety of behaviour including: violence, threats of violence, forced oral sex, and stalking. Notably, the charge of rape did *not* refer to the incident of forced oral sex, but to a separate occasion when D allegedly vaginally penetrated C after her repeated pleas for him to desist. By charging D with s.4 harassment, rather than nine separate offences, the prosecution was effectively able to refer to any act of misconduct on the part of D towards the complainant over a three-year period. The operation of this offence may therefore expose some defendants

to prejudice.[108]

4.1.F. Misconduct 'In Connection with the Investigation or Prosecution'

The second route through which evidence of misconduct may avoid the statutory exclusionary rules in ss.100-101 is found in s.98(b) CJA 2003 which renders admissible 'evidence of misconduct in connection with the investigation or prosecution' of an offence.

The following general test was formulated in *S*:[109] '[t]he misconduct has to have some close[] link with the actual investigation of the offences, or with their actual prosecution'.[110] The courts have adopted both wide and narrow interpretations of this test in different contexts. Pressure exerted by one defendant on a co-defendant to take the full blame for the offence charged is evidently within s.98(b), thereby confirming that its scope is not restricted to official police investigations or prosecutions.[111] In *S* itself, it was held that a defendant putting improper pressure on a witness did not have a 'close link' and so therefore could not be brought within s.98(b). This appears odd, as this situation was highlighted in the Explanatory Notes as one where s.98(b) should apply.[112] But *S* has nonetheless been affirmed.[113]

Though s.98(b) was never explicitly invoked during my trial observations, its implicit influence might be glimpsed. **Case 7**, **Case 10** and **Case 13** each involved allegations of police incompetence which, though probably below the 'reprehensibility' threshold, indicate that criticisms of the investigation were referred to in trials with reasonable ease. Beyond official criminal justice agencies, **Case 16** involved an allegation from C1 and C2 that a friend of D had moved or tried to hide the axe used to threaten them. This is arguably an allegation of an offence against the administration of justice, which would technically be caught by s.98(b) due to it involving an act which may have hindered the investigation of the charged offence. Although only one example, when combined with my prior finding that ss.98(a)-(b) are generally pre-empted by agreement, it is likely that the Court of Appeal's reluctance to admit evidence of private interference through s.98(b) has not affected practice on the ground to a great extent. Misconduct evidence

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[108] Though s.78 PACE still applies.
[109] *S* [2009] EWCA Crim 2457.
[110] Ibid, [38] (Aikens LJ).
[111] *Apabhai* [2011] EWCA Crim 917 [33] (Elias LJ); *Haxihaj* [2016] EWCA Crim 83, [2016] 1 CrAppR (S) 72 [28] (Lloyd Jones LJ).
[112] Explanatory Notes to the Criminal Justice Act 2003, para 357. Spencer considers the decision in *S* to simply be 'wrong'; Spencer, *Evidence of Bad Character* (3rd edn) (n15), para 2.35 fn63.
[113] *Mahil* [2013] EWCA Crim 673.

related to the investigation is probably routinely admitted by agreement.

4.2. 'Sexual History' in Law and Practice

Evidence is subject to the exclusionary rule in s.41 if four criteria are fulfilled.

4.2.A. Sexual Offences Only

Section 41 applies only where the defendant is charged with a sexual offence; listed in s.62 YJCEA 1999.[114] It therefore follows that s.41 does not apply when the defendant is *not* charged with a sexual offence. For example, in **Case 20** D was charged with burglary, and C's prior sexual relationship with D, where he had paid her for sex, was referred to without reference to s.41.

4.2.B. The Complainant

It is only the complainant's SH which is subject to the exclusionary rule in s.41, and only when the *defence* seeks to adduce it. Therefore, s.41 does not preclude the prosecution from adducing evidence of a complainant's SH.[115] This *prima facie* inequality was upheld in *Soroya*,[116] where the Court of Appeal stated that s.41 (with the addition of the 'ECHR gloss' from *A (No 2))*[117] was finely balanced, and that s.78 PACE would prevent any unfairness in practice.[118] Trial judges should be aware of the one-sided nature of s.41 and how it may impact on the defence.[119]

Section 41 refers to 'the' complainant, which on a plain reading refers to the alleged victim of the crime *currently* being tried.[120] Therefore, if a defendant with prior sexual convictions is on trial for an offence and the prosecution calls a complainant from one of those prior convictions to give evidence of that prior offence[121] then they do not qualify as a 'complainant' for the purposes of s.41 as they are not the complainant for the current charge.[122] Other than one query in **Case 12**,[123] it seems that the identification of the 'complainant', framing the scope of s.41, is relatively

[114] An initial oversight where s.62 did not include pre-SOA 2003 offences was resolved in *C* [2007] EWCA Crim 2581, [2008] 1 WLR 966, [2008] 1 CrAppR 22, and later by Schedule 26, para 37 of the Criminal Justice and Immigration Act 2008.
[115] *IWAT (No 2)* [2001] EWCA Crim 1898.
[116] *Soroya* [2006] EWCA Crim 1884, (2006) 150 SJLB 1054, [2007] Crim LR 181.
[117] *A (No 2)* [2001] UKHL 25, [2002] 1 AC 45 (HL), [2001] 2 WLR 1546. See further at §6.6.B.
[118] *Soroya* (n116), [28] (Crane J).
[119] *F* [2005] EWCA Crim 493, [2005] 1 WLR 2848, [2005] 2 CrAppR 13.
[120] References to a non-complainant's sexual history were made with no objections in the following other sex trials: **Case 2**, **Case 3**, **Case 5**, **Case 8**, **Case 9**, **Case 11** and **Case 12** and **Case 17**. Reference was also made to a non-complainant's sexual history in **Case 20** which was a burglary trial.
[121] This would most likely require a s.101 application as this would be BC evidence of the defendant.
[122] *Maynard* [2006] EWCA Crim 1509 [23] (Hooper). Cf *Halliday* where Holroyde LJ erroneously assumed that s.41 extended to complainants in extraneous allegations; *Halliday* [2019] EWCA Crim 1457 [16] and [26] (Holroyde LJ).
[123] See §4.2.E.

unproblematic in practice.

4.2.C. 'Sexual Behaviour' and 'Sexual Experience'

The two primary conceptual limitations on what evidence is caught by s.41, 'sexual behaviour' and 'sexual experience', overlap considerably and can conveniently be dealt with together.

4.2.C.i. What Behaviour and Experiences are 'Sexual'?

Vaginal,[124] anal,[125] and oral[126] sexual intercourse are each uncontentiously considered 'sexual behaviour', regardless of the motives or intentions of either party. They are 'inherently sexual' acts.[127] In interviews, barristers suggested that these were also the most common behaviours covered by s.41 (especially relationship evidence). Though there were only two s.41 applications in my trial observations, one of these (**Case 11**) concerned alleged sexual intercourse before and after the alleged rape.

At the opposite end of the sexual spectrum is evidence of virginity. As this evidence is most often adduced by the prosecution (usually in order to suggest the complainant would not have consented),[128] and as prosecution evidence is not prohibited by s.41, the issue has only recently come to the attention of the Court of Appeal. In *Steltner*[129] the Court seemed willing to entertain the question of whether evidence of virginity would be covered by s.41, although they ultimately ruled that they did not need to decide.[130] Logically, evidence of a lack of sexual contact is not evidence of sexual behaviour, and so is not covered by s.41. The only time evidence of the complainant's virginity arose in the trial observations was when it was adduced by the prosecution (**Case 2**, **Case 12**, and **Case 17**), and so no s.41 application was made or required.

Sexual behaviour or experience(s) can involve anyone (the defendant or third parties) or, significantly, no one else at all. Evidence of masturbation, for example, would require a s.41 application (as in **Case 12**). Appellate rulings have confirmed that other sexual behaviour involving only the complainant include viewing pornography[131] or taking sexually explicit photos or videos of oneself.[132] **Case 17** concerned a sexual assault on a 9-

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[124] *Mokrecovas* [2001] EWCA Crim 1644, [2002] 1 CrAppR 20.
[125] *MM* [2011] EWCA Crim 1291.
[126] *Rooney* [2001] EWCA Crim 2844.
[127] This term is not used in the case law, but it is an appropriate label to give to behaviour which has been held in cases to count as 'sexual behaviour' due to the nature of the behaviour alone.
[128] See for example *GS* [2001] EWCA Crim 144.
[129] *Steltner* [2018] EWCA Crim 1479.
[130] Ibid, [21] (Hallett LJ).
[131] *F* (n119); *Ben-Rejab and Baccar* [2011] EWCA Crim 1136, [2012] 1 WLR 2364, [2012] 1 CrAppR 1256.
[132] *T* [2012] EWCA Crim 2358, [2013] Crim LR 596.

year old child, and evidence was adduced that C had searched for child pornography on her mother's phone. As previously noted,[133] this was not considered 'reprehensible behaviour' for the purposes of the CJA, but neither was it considered sexual behaviour. During a break, prosecution counsel told me that it did not occur to either party, or the judge, that s.41 applied, given the lack of sexual intent and youth of C. She conceded the issue might have been given more thought, but said it was already too late to reconsider. It seems that when young complainants engage in 'inherently sexual' behaviour, their intent could be relevant in ways not applicable to adult complainants.

This does not bring us much closer to understanding what characteristics behaviour (or experience) needs to display in order to become 'sexual' for the purpose of s.41. Judicial comments merely rehearse the wording of the statute:

> It is… to be noticed that the phrases "sexual behaviour" and "other sexual experience" seem to be referring to matters of conduct or activity, to acts or events, of a sexual character and not to general considerations of the existence of a relationship or to the objective facts of acquaintanceship or familiarity or the lack of such factor.[134]

Appellate judges seem unwilling to elaborate further:

> In many cases it will be very easy to say what is or is not sexual behaviour, but there are obviously borderline cases in which the sexuality of what happens may be not so apparent as to lead on to the conclusion that the behaviour under examination is sexual. It would not be possible to try to define sexual behaviour further. Indeed, it probably would be foolish to do so. *It is really a matter of impression and common sense*.[135]

The case from which this comment is taken might be thought to be a peculiar application of one's 'impression and common sense'. In *Mukadi*, the defendant met the complainant whilst working as a supermarket security guard. On finishing his shift, the defendant met with the complainant and they went to the defendant's flat for a drink, following which the complainant alleged the defendant raped her. At trial, the defendant sought to question the complainant regarding her behaviour before meeting him that night, where she was alleged to have got into a stranger's car and was driven around by him, though no sexual activity occurred. The trial judge held that the complainant getting into the stranger's car qualified as 'sexual behaviour' as there was further testimony from the complainant regarding her

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[133] §4.1.B.iv.
[134] *A (No 2)* (n117), [128] (Lord Clyde).
[135] *Mukadi* [2003] EWCA Crim 3765, [2004] Crim LR 373 [14] (Sir Edwin Jowitt) (emphasis added).

(potentially sexual) intentions when getting into the stranger's car.[136] Therefore in determining the 'sexual character' of behaviour, it does not appear necessary that any sexual touching needs to have taken place: innocuous behaviour may be considered sexual depending on the individual's state of mind or intent.

On first inspection, this appears sensible given the almost infinite galaxy of sexual preferences and fetishes:

> **Barrister 6**
> Obviously, there's a fairly blurred line as to whether something is sexual conduct or not. If someone's got a toe sucking fetish is that sexual conduct? I don't know. I did once see quite an interesting argument [that if] it's gratifying for the perpetrator, that can make it sexual, even if to an ordinary person it wouldn't be. And toe sucking is perhaps an example.

There is consequently a danger that virtually any behaviour might be caught by s.41 YJCEA 1999. For otherwise innocuous behaviour to qualify as 'sexual', it is submitted that there must also be an evidential basis to establish a sexual motive.

The Court of Appeal has sometimes considered certain acts to be 'sexual behaviour' regardless of the intent or motive of either, or any, of the participants. In *Bahador*[137] it was held that exposing one's breasts and simulating sex acts in a nightclub should be considered 'sexual behaviour', while in *Pemberton*[138] it was stated that a prostitute soliciting for clients counts as sexual behaviour even if no clients are engaged. It was also suggested in an *obiter* comment in *Pemberton* that questions concerning any medical examinations of one's genitals may have to go through s.41, presumably on the (dubious) reasoning that any activity involving genitals is inherently sexual.[139] These cases evidence a willingness on the part of the Court of Appeal to categorise behaviour as sexual if there is *any* sexual aspect to the behaviour.

Although it makes little practical difference (because the definition is broad) it has been suggested that 'sexual behaviour' refers only to behaviour done *by* the complainant, while 'sexual experience' includes things done *to* the complainant that they themselves either did not realise or intend to be sexual.[140] This aspect of the definition is necessary so that s.41 covers

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[136] Ibid, [16] (Sir Edwin Jowitt). The Court of Appeal at [17] did not feel it was required to decide whether the activity was properly considered 'sexual behaviour', though they clearly thought it was possible.
[137] *Bahador* [2005] EWCA Crim 396.
[138] *Pemberton* [2007] EWCA Crim 3201.
[139] Ibid, [14] (Moses LJ).
[140] *E* [2004] EWCA Crim 1313, [2005] Crim LR 227 [4] (Buxton LJ).

evidence and questions relating to sexual acts experienced by children who would not have realised their sexual nature. This situation arose in **Case 5** where the defence was told by the judge that if they wanted to cross examine C concerning their sexual abuse by care home workers, which allegedly took place years after the events of the current charges, they would need to apply under s.41.[141] However, caution is required. If the complainant's intent may be irrelevant, and the behaviour is not 'inherently sexual', then the state of mind of the other participant (not necessarily the defendant) in the behaviour will need to be explored carefully. Probing the state of mind of a third party regarding their potential sexual intent in participating in certain (possibly otherwise innocuous) behaviour with the complainant would be a significant detour from the main issues in a trial. Counsel and judges might err on the side of caution and assume the behaviour is sexual in order to protect complainants from intrusive cross-examination.[142]

4.2.C.ii. Evidence 'About' Sexual Behaviour and Sexual Writing

Section 41(1) states that SH evidence must be 'about' sexual behaviour, so the purpose of adducing the evidence is also significant. For example, in *Lloyd*[143] a question arose in the case concerning the true author of an entry in the complainant's diary which read: 'I had [a] 10-inch cock in my mouth today mmm'. It was held that questions could be asked without a s.41 application as they concerned the diary's authorship rather than its content. This was confirmed in the later case of *P*,[144] where it was noted that although questions concerning a complainant's lawful abortion would logically indicate that the complainant had engaged in prior sexual behaviour, the questions were not 'about' that sexual behaviour and so were not restricted by s.41.[145]

The question of whether written descriptions of sexual acts are 'about' sexual behaviour is more complex in the area of 'sexting'[146] and social media posts. In *Ben-Rejab*,[147] the complainant had answered questions to several

[141] This seemed to be a pre-emptory caution, as the defence counsel responded that they had no intention of doing so. Ultimately, the prosecution agreed to lead the evidence as part of the background context; see §6.8.
[142] See below at §4.2.E.
[143] *Lloyd* [2005] EWCA Crim 1111.
[144] *P* [2013] EWCA Crim 2331, [2014] 1 WLR 3058, [2014] 1 CrAppR 28.
[145] Although it was indicated that any questions concerning the source of the complainant's aborted pregnancy would likely have to pass s.41 as then they would be 'about' sexual behaviour; *P* (ibid), [33] (McCombe LJ); see also *Moody* (n48) and the Explanatory Notes to the Youth Justice and Criminal Evidence Act 1999, para 145.
[146] 'The action or practice of sending or exchanging sexually explicit or suggestive messages or images electronically, esp. using a mobile phone', "sexting, n." *OED Online*. Oxford University Press, May 2017 http://www.oed.com/view/Entry/407923?redirectedFrom=sexting#eid.
[147] *Ben-Rejab and Baccar* (n131).

quizzes on Facebook with titles such as: 'Best places to have sex around the house', 'How good are you in bed?' and 'What's your sexual style?'. In holding that answering questions to these quizzes qualifies as sexual behaviour, Pitchford LJ reasoned thus: 'What motive can there have been when engaging in the activity of answering sexually explicit questions unless it was to obtain sexual pleasure from it?'.[148] In the context of how social media are used and consumed this is naïve.[149] Motives for answering sexual questions depend on the social context in which they are asked (and perhaps the truthfulness of the answers), but may conceivably range from flirting, to humour, to boasting. Given the fickle nature of social media use, two barristers were particularly critical of this kind of evidence being subject to s.41:

> **Barrister 3**
> [It's] just an ignorance of what young people do these days, without thought that it's wrong or bizarre or peculiar. It's very worrying.

(*I ask what non-sexual reasons there might be for 'sexting' or posting sexual things on social media)*

> Well for a laugh! To embarrass someone. A lot of people do things without thinking about the consequences.

> **Barrister 9**

(*I ask whether sexual text messaging or social media posts require a s.41 application*)

> Is that sexual behaviour though? That's what I would be arguing. What I would be doing in those circumstances is that I would put in a s.41 application to cover myself, but I would be arguing that that is not sexual behaviour. That would be my primary stance. The question of whether something is 'sexual behaviour' is very often a live issue.

A promising example of good practice in this area was suggested by another interviewee:

> **Barrister 4**
> There were text messages between the teenagers. She and another little chap, who she didn't have sex with. The text messages were pretty lewd. Things like "I love it when you put your finger on my clit" etc. […] I made the [s.41] application. […] And the judge said "before we ask the complainant about it, let's ask the young man". […] And I said to him "did you have an intimate relationship with this woman?". Which the judge bridled at a little bit, but he said "no, no that's just the way we talk to each other".

In this case, **Barrister 4** explained enquiries were made in order to determine whether the sexting referred to actual sexual behaviour or not. As the defendant denied that the sexting was based on real sexual activities,

[148] Ibid, [35] (Pitchford LJ).

[149] For general criticism of this case and the use of social media posts as evidence more generally, see: M O'Floinn and D Ormerod, 'Social Networking Material as Criminal Evidence' [2012] *Criminal Law Review* 486.

it was determined that s.41 was not necessary to authorise questioning the complainant about the messages.[150] In the absence of probative evidence concerning the purpose of sexual messaging or posts,[151] enquiries should be made to ascertain whether a s.41 application is necessary.

One of the interviewed barristers took a narrower view of the law, and seemed willing to follow *Ben-Rejab* more closely:

> **Barrister 7**
> I've found that s.41s are coming up a little bit more in relation to social media things. […] So I did have a case where I was prosecuting a 15 year old for having sex with a 12 year old. […] But the defence discovered a lot of things on her Facebook page. […] And I've had other cases like that where it's been stuff that's been posted on social media.

(*I ask whether all sexual posts on social media count as sexual behaviour*)

> I think there's been some authority […] that says that it is. So I think most people know the law.

It may be relevant here to note that **Barrister 3**, **Barrister 4**, and **Barrister 9** all primarily defend, while **Barrister 7** primarily prosecutes. If evidence of this sort is caught by s.41, it will make life harder for defence barristers as they will have to make applications in order to adduce it. Prosecuting barristers are not similarly constrained. As **Barrister 1** astutely observed:

> **Barrister 1**
> If you defend [sexual history and sexual behaviour] are sufficiently defined, but they are very restrictive. […] No doubt if you're prosecuting you think they're far too liberal. So it depends on your perspective

4.2.D. Sexual Behaviour which is Not 'Part of' the Charged Event

As with BC evidence, the exclusionary rule under s.41 applies only to sexual behaviour which is separate to (either before or after) the sexual incident which is the subject of the currently charged offence. In contrast to s.98(a)'s conceptual restriction, any sexual behaviour which took place 'at or about the same time' (s.41(3)(b)) as the charged conduct *is* subject to the exclusionary scope of s.41. As with BC, the applicability of the exclusionary rules relies heavily on the drafting of the indictment and the specific offences charged.

4.2.E. Caution in Context

Like the protean nature of 'reprehensible behaviour', determinations of the scope of 'sexual behaviour' are highly contextual and fact-based. One is unlikely to find complete consistency in application.[152] However, as the case

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[150] See for further discussion of 'fantasy' sexual writing at §4.3.C.
[151] See for example: *D* [2015] EWCA Crim 1092.
[152] See for similar arguments; P Green, 'Dispelling the Rape Myths: An Evaluation of s.41 of the

law stands, principled guidance is scant. There can be little objection to considering penetrative intercourse as inherently sexual. For most other types of behaviour the state of mind of the complainant (and, if relevant, the other participant(s)) should be the primary point of reference in determining whether behaviour is 'sexual' in order to prevent s.41 from applying to behaviour which is not obviously sexual.

In addition to the case-sensitive factual context, my data suggest that wider social and political factors influence the making of s.41 applications. Many of my interviewees expressed marked caution when considering SH evidence. Defence counsel said that they would usually make a s.41 application, even if they thought that legally they did not need to, just to make sure that they were covered:

> **Barrister 2**
> I think in practice we all err on the side of caution. And if there's anything that could be controversial you would make the application so that it's all out in the open.
>
> **Barrister 9**
> [If SH is a possible issue] I would put in a s.41 application to cover myself.

Defence counsel may be making s.41 applications where they are strictly unnecessary, just to make sure they are not rebuked by the judge when they later cross-examine the complainant. In **Case 12**, defence counsel (**Barrister 1**) was initially confused as to whether she required a s.41 application to ask a non-complainant witness questions about alleged sexual behaviour with D the same night as the alleged sexual assault on C. On first asking the prosecution barrister, defence counsel appeared genuinely fearful that: she had failed D in not making the proper application on time, and that if she made it now and it was denied the trial would be unfair. Moreover, the judge might take a dim view of the omission, possibly affecting future applications. Once the prosecution reassured defence counsel that she had not made a mistake, she let out a heavy sigh of relief and loudly proclaimed 'Thank god for that! I was genuinely worried'.

Although one explanation for this cautious approach is that barristers have a professional obligation, when unsure, to seek judicial guidance,[153] this was not the reason given by my interviewees:[154]

> **Barrister 9**
> People are more sensitive about the recent press coverage. […] One

Youth Justice and Criminal Evidence Act 1999 in Light of Recent Reform Proposals' (2018) 6(2) *Legal Issues Journal* 1, 6-8.

[153] *T and H* [2001] EWCA Crim 1877, [2002] 1 WLR, 632, [2002] 1 All ER 683 [41] (Keene LJ).

[154] Similar responses were given by: **Barrister 1**, **Barrister 4**, **Barrister 5**, and **Barrister 7**.

> of my main grievances is how people like [Harriet] Harman and [Vera] Baird, and indeed elements of the popular media, misrepresent the position. That is a huge bugbear, not just of me but ugh, probably most barristers who deal in particular with sex cases.
>
> **Barrister 2**
> But I think if there is a common anecdotal viewpoint which, for example people like Harriet Harman and Vera Baird are putting across, that s.41 is being routinely used to discredit female complainants in rape cases – that is not my experience.
>
> **Barrister 6**
> I think there's a misconception in the general public that defence barristers have a complete free rein to cross-examine at will a complainant in a sex case about their entire previous sexual history.

The similarity in responses is even more striking when one considers that these interviews occurred over a nine-month period, and that these barristers were based in different parts of the country. The case of Ched Evans[155] caused great controversy amongst the media, politicians and academics concerning the use of SH evidence. The clear perception amongst barristers was that following the backlash to the *Evans* case, they are still heavily monitored regarding their use of s.41 years later. Defence barristers fear association with misusing or avoiding s.41. By being overcautious in making s.41 applications, barristers are trying to shield themselves from later public or professional criticism. It is also particularly revealing that in a recent training session for barristers on how to use s.41, they were told 'If in doubt, make an application!'.[156]

The rules of evidence are applied by real people who are not shielded from wider societal and professional mores and pressures (such as internal policies of the CPS). Criminal trials, and their participants, do not operate in an insulated bubble. However, it might not have been anticipated that the public pressure concerning the use of SH evidence would feature so heavily in barristers' minds when making applications. It would clearly be problematic if this perception were to override counsel's obligations to advance for the best interests of their client. The extent to which this finding is worrying depends on how difficult it is to *argue successfully* that the s.41 application satisfies that statutory tests for admissibility.[157]

4.3. Overlaps and Grey Areas

Though the statutory regimes which regulate the admissibility of BC and SH

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[155] *Evans* [2016] EWCA Crim 452, [2016] 4 WLR 169, [2017] 1 CrAppR 13, [2017] Crim LR 406. See further at §6.6.C.
[156] Attended in person 20th March 2019.
[157] See Ch6.

operate separately, it is theoretically possible for evidence to concern behaviour which is both 'misconduct' for the purposes of s.112(3)(b) CJA 2003, and 'sexual' for the purposes of s.42(1)(c) YJCEA 1999. Another significant type of evidence which may fall under either the BC or SH regimes is evidence of prior false (sexual) allegations. Finally, my empirical data reveal a further potential grey area concerning 'fantastic' (sexual) allegations.

4.3.A. Extraneous Sexual Misconduct

While the potential for overlap is implicitly recognised in s.112(3)(b) CJA 2003, no reported case has addressed the interaction between the two admissibility regimes. For both s.100 and s.41 to apply, the evidence must concern a complainant in a case of sexual assault, and the relevant behaviour must qualify as both misconduct and sexual behaviour. The simplest example of such behaviour would be a prior conviction for a sexual offence such as rape. In *Hodkinson*[158] the defendant was convicted of sexually assaulting two male complainants. Both complainants and the defendant were prisoners in a specialist sex-offenders prison, and the defendant wanted to adduce the complainants' prior convictions for sexual offences in order to show they had a propensity for violence and to undermine their testimonial credibility. No overlap between the BC and SH admissibility regimes was acknowledged in the Court of Appeal's judgment, and only s.100 CJA 2003 was examined.[159] Even in 'simple' cases such as this, it is evidently not automatic that both sections will be utilised. One type of behaviour which has been labelled reprehensible is prostitution,[160] which has also been held under s.41 YJCEA 1999 jurisprudence to be evidence of 'sexual behaviour' even where no clients have been serviced,[161] albeit that the conceptual overlap was not acknowledged in either case.

Only one potential example of a complainant's sexual misconduct arose in my trial observations. In **Case 17**, the young C had apparently searched for child pornography on her mother's phone and taken pictures of her naked 13-year old brother in the bath. It was agreed that this was neither BC (due to C's age), nor SH (due to her lack of sexual intent) for the purposes of admissibility. However, prosecution counsel explained to me that had C been an adult, the evidence may have required both s.100 and s.41 applications.

When sexual misconduct evidence was raised with interviewees,

[158] *Hodkinson* [2015] EWCA Crim 1509.
[159] See also *McChleery* where only s.100 was referred to in considering the admissibility of prior alleged sexual assaults by the complainant in a sexual offence case: *McChleery* [2019] EWCA Crim 2100.
[160] *Alyson* (n56).
[161] *Pemberton* (n138).

barristers seemed aware that there was theoretical overlap with s.100, though none had personally encountered it:

(*Would you need to apply under both s.41 and s.100 to adduce a complainant's prior conviction for a sex offence?*)

> **Barrister 9**
> Technically yes. But no I've not come across that, where a complainant in a sex case who's had previous for a sexual offence. That's probably quite unusual. […] But it might need both [s.41 and s.100], depending on the circumstances.

In response to direct prompting, **Barrister 1** mooted another situation:

> **Barrister 1**
> You may say the reason [the complainant has] got injuries is because [they have] been subject to a sexual assault by somebody else, but then of course you've got s.41 feeding in. Then you have to have made an application to explore previous sexual history.

On a strict application of the definitions of BC and SH, this must be correct. As we have seen, one cannot refer to an individual being a victim without implicitly referring to the BC of their attacker. **Barrister 1**'s speculation highlights another unexplored area of overlap between the two admissibility regimes.

4.3.B. Extraneous False Allegations

In sexual offence prosecutions, a common defence is a complete denial of the alleged sexual assault by the defendant.[162] The defendant may seek to adduce supporting evidence of prior sexual assault allegations by the complainant, with the intention of asserting the falsity to attack the complainant's general credibility. This poses the question: is evidence concerning prior false allegations made by a complainant 'sexual behaviour', 'reprehensible behaviour', or perhaps both? The answer can be significant as under s.41(4), no SH evidence can be adduced if its main purpose is to undermine the complainant's credibility, whereas s.100 has no such comprehensive credibility bar for BC evidence.

4.3.B.i. Types of False Allegations

Conceptually, there is a simple answer.[163] If a complainant has (on purpose) made prior false allegations of sexual assault where there was no sexual activity (a 'pure' false allegation), then these are damaging lies and surely

[162] See for examples: *Lloyd* (n143); *W* [2005] EWCA Crim 2134; *V* (n3); *AM* [2009] EWCA Crim 618, [2010] Crim LR 79; *Crossland* [2013] EWCA Crim 2313; *Dent* [2014] EWCA Crim 457. This was also the defence in most of the observed sex trials: **Case 3**, **Case 4**, **Case 5**, **Case 8**, **Case 9** (for the second complainant), **Case 11**, **Case 17**, and **Case 21**.

[163] Though there is some confusion in the literature. McGlynn appears to be unaware that 'pure' false allegations are dealt with under s.100 CJA 2003 rather than s.41 YJCEA 1999; C McGlynn, 'Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence' (2017) 81(5) *Journal of Criminal Law* 367, 375, 385.

qualify as 'reprehensible behaviour', triggering s.100. As no sexual activity took place in this situation there will have been no 'sexual behaviour' and s.41 would *not* apply.[164] Though initially uncertain,[165] this analysis is now orthodox.

A second type of false allegation concerns the situation where there was sexual activity (such as intercourse), but the complainant lied about there being a lack of consent.[166] In this situation, there has been both 'reprehensible behaviour' (in the lying about consent) and a 'sexual experience', and so s.100 CJA 2003 *and* s.41 YJCEA 1999 would apply.[167] No cases have explicitly engaged with 'lack of consent' false allegations, and it has been suggested sensibly that clearly formulated guidelines would assist trial judges in distinguishing between these scenarios.[168]

In interviews, barristers seemed most comfortable with 'pure' false allegations and knew that these qualified as evidence of BC, but not SH:

> **Barrister 6**
> Obviously making a false allegation against somebody is reprehensible conduct.
>
> **Barrister 7**
> I wouldn't class previous false allegations as s.41 at all. I'd say that they're squarely credibility and lies, aren't they?
>
> **Barrister 8**
> So the most interesting thing about [potential overlaps between s.41 and s.100] is false allegations, that's what's most interesting to me. Because a false allegation is not to do with someone's previous sexual history. If it's false, it didn't happen.

There was only passing familiarity with 'lack of consent' false allegations:

> **Barrister 10**
> [If] someone's made up a false rape allegation in the past […] Because that clearly relates to previous sexual conduct if they previously had consensual sex with somebody and then alleged rape.

4.3.B.ii. Proof of Falsity

Accepting that there are different forms of false allegation, the question then

[164] Explanatory Notes to the Youth Justice and Criminal Evidence Act 1999, para 150. It was also suggested in *Moody* (n48) that threats to make a false allegation which are not followed through would also qualify as reprehensible behaviour.
[165] *Archer* [2003] EWCA Crim 2072; *C and B* [2003] EWCA Crim 29; *V* (n3).
[166] See for discussion of the different ways in which an allegation may be 'false' see: C Saunders, 'The Truth, The Half-Truth, and Nothing Like the Truth: Reconceptualizing False Allegations of Rape' (2012) 52(6) *The British Journal of Criminology* 1152; F Goodyear-Smith, 'Why and How False Allegations of Abuse Occur: An Overview' in R Burnett (ed), *Wrongful Allegations of Sexual and Child Abuse* (Oxford: OUP, 2016).
[167] N McEnvoy-Cooke, D Wolchover and A Heaton-Armstrong, 'Two Aspects of the Statutory Restriction on Introducing a Complainant's Sexual History' in P Radcliffe, GH Gudjonsson, A Heaton-Armstrong and D Wolchover (eds), *Witness Testimony in Sexual Cases: Evidential, Investigative and Scientific Perspectives* (Oxford: OUP, 2016), paras 5.21-5.22.
[168] Ibid, para 5.52.

becomes: what qualifies as a 'false' allegation, and how does one prove it? It might be thought that s.109 CJA 2003 solves this conundrum, by mandating that all allegations of BC must be presumed to be true for the purposes of ss.100-101. However, s.109 does *not* apply to s.41 YJCEA, and practitioners must grapple with the question of how to determine whether a prior allegation is false in order to determine s.41's application.

Barrister 2 described this issue as a 'minefield', and analysis of the case law reveals why. The first major decision was *T and H*,[169] where it was stated that in order for an allegation to be considered false, 'the defence must have a *proper evidential basis* for asserting that any such previous statement was (a) made and (b) untrue'.[170] These preconditions are aimed at preventing 'fishing expeditions'. In *AM*[171] the Court of Appeal elaborated that a proper evidential basis is 'less than a *strong factual foundation*',[172] and that the relevant test for the trial judge (whose assessment the Court of Appeal will be slow to contradict)[173] to apply is 'whether that material is capable of leading to a conclusion that the previous complaint was false'.[174] Although there has been some confusion regarding which test is correct,[175] and indeed both have been criticised for failing to take into account the complex reasons why individuals retract allegations of sexual offences,[176] subsequent Court of Appeal decisions have confirmed these tests and suggested that there is no material difference between them.[177]

Voluminous case law has considered what evidence satisfies the 'proper evidential basis' test. Evidence (including hearsay statements)[178] that the complainant has admitted that their prior allegation was false constitutes a proper evidential basis.[179] One example was offered in interview:

> **Barrister 6**
> One of my complainants made a false allegation of rape against a previous boyfriend. […] She'd admitted it was a false allegation. […] [I]t went in not because of the sexual context of the allegation; it went in because it was a false complaint and an admitted lie that she'd told on a previous occasion in circumstances of a sexual complaint.

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[169] *T and H* (n153).
[170] *T and H* (n153), [33] (Keene LJ) (emphasis added).
[171] *AM* (n162).
[172] Ibid, [22] (Dyson LJ) (emphasis added).
[173] *Conn* [2018] EWCA Crim 1752 [36] (Simon LJ).
[174] *AM* (n162), [23] (Dyson LJ).
[175] P Rook and R Ward, *Rook and Ward on Sexual Offences Law and Practice* (5th edn, London: Sweet & Maxwell, 2016), paras 26.156-26.164.
[176] B Brewis and M Stockdale, 'False Allegations: The Limitations of the "Evidential Basis Test"' (2014) 78(6) *Journal of Criminal Law* 453; McEnvoy-Cooke *et al* (n167), paras 5.33-5.34.
[177] *E* [2009] EWCA Crim 2668; *All-Hilly* [2014] EWCA Crim 1614, [2014] 2 CrAppR 33.
[178] *AM* (n162); *Davarifar* [2009] EWCA Crim 2294, [2011] Crim LR 818.
[179] *Clarke* [2016] EWCA Crim 2030.

Of course, the easiest way to prove that a prior allegation was false would be if the complainant had a related prior conviction for either perjury or perverting the course of justice:

> **Barrister 8**
> I have had false allegations come up, but they've not required s.41 being considered. There was a rape case I did where someone had a previous conviction for perverting the course of justice, which was an admitted false allegation, and that was admitted through s.100 as a previous conviction.

However, short of the complainant either admitting falsity or having it proved at trial, the test is seemingly difficult to satisfy as mere 'question mark[s]'[180] over the truth of the allegations are insufficient. For example, in *E*[181] a father was convicted of sexually assaulting two of his children. Whilst awaiting appeal, the two children made various other (sexual and violent) allegations towards almost every adult they had been in contact with since the trial. The defendant wanted to suggest that from the number and similarity of the later allegations one could infer that all were false. The Court of Appeal disagreed, holding that the improbability of so many allegations being true does not constitute a proper evidential basis for falsity, one requires evidence independent of the allegations themselves.[182] A slightly less stringent approach was taken in *C and B*,[183] a case with similar facts to *E*. Here, the Court of Appeal ruled several similar and inconsistent allegations admissible, but held that the sexual aspects should be deleted owing to the lack of independent evidence of falsity. **Barrister 5** briefly mentioned a case where she tried, and failed, to run the argument for falsity from multiple prior allegations:

> **Barrister 5**
> It was an allegation of assault by penetration by a guy against his partner's daughter. And she had made previous allegations against two of her mother's previous boyfriends. So I applied to adduce that, and unsurprisingly that didn't go anywhere. […] But it wasn't so lacking in merit that I felt I couldn't legally make it, but I also knew it was an uphill battle and it didn't go in.

The use of the word 'unsurprisingly' suggests that **Barrister 5** knew that this sort of argument rarely works, but may sometimes succeed – though it may equally have been posturing for a forceful client. Assuming the former, the success of the argument may depend on the facts, and in particular whether the prior allegations are still probative if the sexual aspects are

[180] *Kamara* [2019] EWCA Crim 1918 [11] (Lambert J).
[181] *E* (n140).
[182] *E* (n140), [9]-[15] (Buxton LJ). See also *Kamara* (n180).
[183] *C and B* (n165).

removed. An additional difficulty was raised by another interviewee:

> **Barrister 7**
> Obviously when you're defending, whether or not you're dealing with a complainant who's got a history of making these complaints. And often it's very difficult for a defendant to understand. "She said so and so did this to her", it's very difficult for them to appreciate that that's not going to be admissible, and you're not going to be able to go there. […] I think for a lay person that does seem relevant, they don't work it through to see that actually that some people perhaps are just very unfortunate, and they have been in that position more than once.

Defence counsel must seemingly be careful to manage the expectations of their clients, and explain to them why exactly prior allegations may be inadmissible.[184]

The mere fact that a prior allegation was investigated by the police but then later dropped by either the police[185] or CPS[186] is clearly not a proper evidential basis for alleging that the prior allegation is false. For example, **Case 3** involved an allegation of rape. A few weeks prior to C making the current allegation, she had made another allegation of sexual assault against a third party which, after some investigation by the police, was marked No Further Action (NFA). Despite the prosecution, defence, and judge all suspecting that this prior allegation was false,[187] it was also agreed that the NFA decision was insufficient by itself to satisfy the evidential basis test, and so the prior allegation was not admitted. Another mention of a false allegation occurred during a break in proceedings in **Case 12**. Here, the defence had found that C had made an allegation of sexual assault against her own father but, absent contextual information, decided not even to make the argument.

It is somewhat surprising that this clarity in the case law and my trial observations did not seem to carry over to my interviews, in which a range of opinions emerged:

> **Barrister 8**
> Sometimes it's a bit tricky when you've got […] an allegation that just sort of fizzles out, and that doesn't take anyone anywhere.
>
> **Barrister 7**
> Well you have to prove they are false don't you? […] You know, we do get quite a few cases where there have been previous allegations which have not been prosecuted, or have not been pursued. And it does raise question marks […] [but] you just can't prove it one way or another.

[184] See further §6.2.B.
[185] *D* [2009] EWCA Crim 2137; *All-Hilly* (n177).
[186] *Davarifar* (n178).
[187] See §4.3.C.

> **Barrister 4**
> If you've got one or two previous allegations that have been made where there hasn't either been a prosecution or conviction, then you're more likely to be successful because [the judge] will bend over to try and help you have a fair trial. If you've got one where [the complaint has] been made and withdrawn you may be in a different scenario.

Barrister 8 and **Barrister 7** concurred that where a prior allegation has been investigated by the police but dropped for some reason, something more is needed in order to establish an evidential basis for falsity. Yet **Barrister 4** says that so long as the reason for the investigation being dropped is *not* the complainant withdrawing their allegation, then such prior complaints may be admitted as false allegations. Given the unmistakable message from the Court of Appeal on this issue, it might be inferred that there was a known explanation for the police stopping the investigation which suggested the allegation was false in the situations **Barrister 4** had in mind. Taking **Barrister 4** at face value, though, it may be that the standard is being relaxed in some cases due to a 'fair trial' argument.[188]

An allegation resulting in an acquittal after a contested trial has also been held to not constitute a proper evidential basis, as all that can be inferred from an acquittal is that the jury (or magistrate) was not *sure* of the defendant's guilt.[189] In interview, two barristers nonetheless suggested that an acquittal may be useful to support falsity in conjunction with other evidence:

> **Barrister 7**
> Well an acquittal of a defendant doesn't necessarily mean it's a false allegation but you might be able to establish a factual foundation in that way.

> **Barrister 4**
> The judge only allowed it in because she had accused somebody else […], and in [that] trial he was acquitted. So I was allowed to bring it in because the judge felt it had to be fair.

The case law suggests that a primary reason for trial judges not accepting, in isolation, police or CPS discontinuances or acquittals as satisfying the evidential basis test is that it is inappropriate for a court to substitute its judgment for that of those other courts and agencies.[190] However, this scruple does not preclude consideration of the reasoning of prior decision-makers. In *Davarifar*,[191] for example, part of the reason why the CPS decided

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[188] It is possible that the ECHR gloss from *A (No 2)* (n117) is being utilised. See §6.6.B.
[189] *BD* [2007] EWCA Crim 4; *Citak* [2017] EWCA Crim 1738.
[190] *Davarifar* (n178), [10] (Stanley Burnton LJ).
[191] Ibid.

not to charge an individual was that the complainant's social worker disclosed that the complainant had admitted making a prior false allegation. Being careful not to substitute the CPS's decision for its own, the Court of Appeal held that the social worker's hearsay statements could constitute a proper evidential basis for falsity. By contrast, in *D*[192] the police decision not to proceed because of insufficient evidence was felt by the Court of Appeal not to constitute a proper evidential basis.

Barristers indicated that satisfying the evidential basis test was much easier if the police or CPS disclosed specific information which disproved the complainant's prior allegation:

> **Barrister 9**
> I had a case where a woman had previously alleged to the police that she had been abducted off the street into a van and raped. […] We got the log of the police investigation of that time, and it became clear, or seemed clear from that, that it was a complete lie. Because the police had been to check the CCTV in the location in the town centre where she said she'd been bundled into the van. There was no such incident shown on the CCTV, […] so it was a lie.

In situations where there is independent evidence of the falsity of the prior allegation, the evidential basis test is easily met.[193] However, **Barrister 7** warned that even if one does have this information, there can be additional evidentiary obstacles to admission:

> **Barrister 7**
> Obviously, if there's anything in the police files, any unused material, then you would have to disclose that. […] I mean often that would just be hearsay evidence, so you still might find yourself in a bit of a pickle unless you're in a position to call evidence. So it's not easy, it's really not easy at all. I think a judge would give you some leeway in those circumstances, if there was stuff in the unused that suggests, oh she said "so and so raped her", and there's a comment from the police officer saying he's got a cast iron alibi, for example. I'm sure that you'd find ways around that.

Much information in police investigation files, which might suggest that a specific prior allegation was false, would be hearsay in the current trial, and *prima facie* excluded. However, **Barrister 7** suggested that in situations such as these, both counsel and the judge often come to an agreement as to how this evidence might be admitted.[194]

4.3.C. Extraneous Fantastic Allegations

A tactic that was mentioned frequently by defence barristers in interview, and was used in many of the observed sex trials, was to paint the

[192] *D* (n185).
[193] A text message was thought sufficient independent evidence in *Umo* [2020] EWCA Crim 284.
[194] Hearsay evidence is admissible via agreement between counsel: s.114(1)(c) CJA 2003.

complainant as a 'fantasist'. Rather than suggest that the complainant had made the current allegation out of malice, it would be argued that she had either concocted the entire allegation as an elaborate fantasy from her imagination, or that she had forgotten the details of the allegation and was using her imagination to fill in the blanks. In support of this argument, defence counsel would seek to adduce evidence of a prior false allegation of rape (or other sexual offence); however, unlike with a 'malicious' false allegation, the argument would be that the complainant has a propensity to 'fantasise', rather than purposefully make false allegations.[195] **Barrister 1** gave the following example:

> **Barrister 1**
> There is the grey area where you aren't seeking to say the complainant has actually engaged in previous sexual activity, but they have *complained* they have.

(*I ask for an example*)

> The complainant had alleged something like eight different allegations of sexual misconduct including rape. And my defence was that she was a complete fantasist, so clearly in that case the judge agreed it wasn't strictly a s.41 case because I wasn't saying she'd engaged in previous sexual conduct, I was saying she was a fantasist, and these were the stories she was making up in support of that. So in fact the judge ruled that I could ask those questions.

Doctrinally, fantastic allegations create similar issues to false allegations. A 'pure' fantastic allegation would be a completely fictional scenario concocted by the complainant, and so would have involved no prior sexual behaviour at all. Alternatively, there may have been a sexual encounter, but the fictional element may be that the complainant misremembers or fantasises that the encounter was non-consensual. In the former situation, s.41 would not apply as there has been no sexual behaviour, whereas in the latter s.41 *would* apply as there has been some sexual encounter. Although few reported cases on this narrow issue exist, it can be read across from decisions on false allegations that defence counsel would need to provide some 'evidential basis' in order to suggest that the prior allegation was a fantasy rather than reality, and so avoid s.41. As with false allegations, the (non-)applicability of s.41 is significant owing to the credibility bar under s.41(4). The main purpose of alleging that the complainant has made a prior fantastic allegation is to undermine her credibility concerning the current allegation, which is impermissible if s.41 applies.

So far, so similar. However, as **Barrister 1** noted, a significant grey area remains concerning the applicability of s.100. In the absence of judicial

[195] Effectively arguing the complainant is 'mad, not bad': PM Prior, 'Mad, Not Bad: Crime, Mental Disorder and Gender in Nineteenth-Century Ireland' (1997) 8(32) *History of Psychiatry* 501.

interpretation, the statutory wording is the only guide. Whereas making a false allegation of rape with malicious intent is quite obviously 'reprehensible behaviour', potentially even the 'commission of an offence', a fantastic allegation is more debated. Consider the following scenarios:

1. Complainant intentionally concocts a fantasy rape and reports to the police, knowing it to be untrue, but for non-malicious reason (e.g. attention-seeking);
2. Complainant intentionally concocts a fantasy rape and, knowing it to be untrue, publishes it in some way (e.g. in a book or online post);
3. Complainant intentionally concocts a fantasy rape and never publishes it or tells anyone;
4. Complainant unintentionally concocts a fantasy rape and reports to police in belief that it is true (due to e.g. false memories, mental illness, substance abuse);
5. Complainant unintentionally concocts a fantasy rape and publishes it;
6. Complainant unintentionally concocts a fantasy rape and never publishes it or tells anyone.

These examples highlight several important features which should be considered when determining whether the making of a fantastic allegation is considered reprehensible behaviour. A complainant who intentionally concocts a fictional rape and, knowing it to be untrue, reports it or otherwise publishes it in a way that suggests that it *is* true is surely acting more reprehensibly than the complainant who publishes the fictional situation and represents it *as fiction*.[196] Moreover, concocting a rape fantasy that is never shared or told to anyone other than the fantasiser is also not 'reprehensible'. **Barrister 4** described a case[197] where she had wanted to adduce sexual text messages between the complainant and defendant. Having determined that these messages were pure fantasy, **Barrister 4** was able to cross-examine the complainant about them without either a s.41 or s.100 application. This approach must be correct: s.41 did not apply as there was no real sexual behaviour, and s.100 did not apply as, although the fantasies were concocted intentionally, they were created for the purposes of flirting and were not shared beyond the complainant and defendant.

The confusion that fantastic allegations can create in practice is attested by a lengthy legal argument in **Case 12**. Here, the defence to an allegation of sexual assault by penetration painted C as a fantasist. Developing this strategy, defence counsel (**Barrister 1**) applied to adduce the following: earlier the same night C had had a sexual encounter with a third party, and

[196] We surely cannot claim that authors of crime-fiction are behaving reprehensibly when describing sexual offences in their stories.
[197] At §4.2.C.ii.

had written a description of this incident in the 'Notes' on her phone which suggested that the encounter was non-consensual. When being interviewed by the police, C said that this note was an 'exaggeration'. This admission was seemingly sufficient to satisfy an 'evidential basis'.

In seeking the note's admission, **Barrister 1** initially claimed that the evidence evaded both s.41 and s.100, but was making the application to be safe. She argued that s.41 did not apply as she wished to adduce the evidence of the exaggerations (not the admitted sexual behaviour), and s.100 did not apply as the note was private and so C's behaviour could not properly be labelled 'reprehensible'. Prosecution counsel (**Barrister 7**) initially claimed that this was a s.100 matter, but swivelled focus to s.41 following the trial judge's expressed scepticism. **Barrister 7** cited authorities[198] to support her argument that writing about sexual behaviour (which C had admitted occurred) is covered by s.41, and argued that as the primary purpose of making the application was to undermine C's credibility, the questioning must be excluded pursuant to s.41(4). The judge ruled on s.41,[199] having agreed that s.100 did not apply. When the fantasy allegation was initially raised, neither counsel nor the judge were certain as to whether s.41 or s.100 applied. With no authority to guide them, they fell back on logic and statutory interpretation. Given that the exaggerated written account was based on a real sexual encounter s.41 inevitably applied, despite defence counsel's first impression.[200] The judge accepted the defence's argument that fantasising to oneself, even if in that fantasy one is falsely alleging a sexual assault, cannot be considered reprehensible behaviour within s.100. Although C intentionally exaggerated the sexual incident with the third party as non-consensual, the account was a personal note to herself which she did not intend to share with anyone else.

Further conceptual variations concern complainants who concoct fantasy rapes *unintentionally*, perhaps due to poor memory or mental disability. It seems to stretch the meaning of 'reprehensible' to cover these allegations, regardless of whether the complainant believes their fantasy to be true or whether it is communicated. Does this therefore mean that s.100 will never apply to unintentional fantastic allegations? If so, it would mean that complainants could be cross-examined about any fantasy meeting the threshold standard of common law relevance. An argument can be made,

[198] A follow-up conversation revealed that she was referring to *Lloyd* (n143), which actually did not support her argument; see §4.2.C.ii.
[199] See §6.10.C.
[200] Though note that a s.41 application was made even though defence counsel did not think one was required – further evidencing the caution identified in §4.2.E.

though, that the 'disposition towards' aspect of the definition of BC might be invoked.[201] That is, a complainant's condition may not be reprehensible in itself, but the condition may create a disposition in the complainant to act reprehensibly in the making of false allegations. In practice, however, it seems that this argument is not being utilised. Several cases suggest that s.100 may be inapplicable to false allegations attributable to personality problems, substance abuse, or mental disorder.[202]

Case 3 was previously discussed in terms of false allegations, but might alternatively be analysed through the lens of fantastic allegations. The defence case was that C's two sisters had taken advantage of C's learning disability and suggestibility in convincing her that she had been sexually assaulted by D. The defence attempted to adduce evidence of prior allegations made by C which, it was asserted, were also concocted by the sisters. Although both counsel and the judge suspected that there was some foundation to this submission, in the absence of evidential support the judge ruled that s.41 blocked these questions. Section 100 analysis was thereby pre-empted. Had the defence been able to satisfy the evidential basis test, it is submitted that s.41 would not have applied. Regarding s.100, assuming the 'disposition towards' argument would fail, it seems equally inapplicable to C.[203]

4.4. Concluding Remarks on Uncertain Scopes

This chapter, through a combined analysis of doctrine and my empirical data, has addressed my first and second research questions: what evidence is subject to s.100 and s.41; and how do the two sections interact? Several key findings can be identified.

The general lack of conceptual clarity in the case law concerning what evidence qualifies as BC appears to carry over into practice. Ultimately, the expansive definition of 'person' means that the BC exclusionary rules apply to any and all human beings (live or dead) in the world, which leads to some questionable applications in practice concerning potentially fictional individuals and certain non-witnesses. However, limiting their scope to testimonial 'witnesses' would be unsatisfactory, as certain non-witnesses, such as deceased victims of homicide and hearsay declarants merit s.100's protection. Ideally the scope of 'person' should align with the original

[201] See §4.1.D.
[202] *Davarifar* (n178); *Clarke* (n179); *Kamara* [2019] EWCA Crim 1918.
[203] A determined prosecutor may nonetheless have been able to argue that s.100 applied due to the necessary implication against the two sisters who, in putting the complainant up to the allegations, had acted reprehensibly.

intended purpose of s.100.

Concerning evidence of the 'commission of an offence', real-world, practical, illustrations of how the BC of children, in particular, is dealt with reveal much about the conceptual limitations of the CJA 2003's BC provisions. For a prior incident to qualify as 'the commission of an offence', it must have been possible for the individual concerned to have been convicted of the criminal offence they are alleged to have committed at the time of that behaviour. Consequently, the potentially criminal acts of children under 10 evade the protections granted by ss.100 and 101, and are therefore admissible subject only to common law relevance. In addition, s.109 does a tremendous amount of heavy-lifting in resolving these complex and contentious practical uncertainties – whether or not those resolutions are desirable or were intended by the legislature.

Though criminal behaviour is evidently within the scope of ss.98 and 112 CJA 2003, my data suggests that evidence of 'reprehensible behaviour' is generally avoided by counsel due to uncertainty of its scope. Combining the analysis of 'reprehensible behaviour' with that of ss.98(a) and (b), my data reveal that if both counsel want BC evidence in, the statute ultimately cannot prevent this. Though there is some evidence which suggests that the scope of s.98(a) is being utilised in admissibility negotiations between adversarial parties, the methodology of this study provides limited illumination. Further research investigating pre-trial meetings between counsel would be desirable.

Concerning s.98(a) specifically, it seems obvious that whether evidence 'has to do' with the facts alleged depends very much on what facts (and offences) the prosecution is alleging, and how the indictment is formulated. However, my trial observations indicate that joining counts, and using specimen counts, can lead to problematic admissions of (what would otherwise be) BC evidence via s.98(a). Moreover, the wide scope of some offences, such as s.4 harassment, allow for the admission of vast quantities of misconduct evidence through s.98(a) to establish a 'course of conduct'. Admission of some forms of BC evidence is consequently heavily dependent on charging decision of CPS reviewing lawyers. Further research into those charging decisions might explore whether the CPS is aware of these evidentiary consequences of their decisions.

As with BC, doctrinal uncertainties identifying 'sexual' behaviour are carried over into practice,[204] but unlike BC it appears that these uncertainties

[204] Difficulties with the scope of s.41 were found by Kelly at al, but have not since been remedied; L Kelly, J Temkin and S Griffiths, 'Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials' (Home Office Online Report 20/06, 2006), 76. See also for

lead to an over-inclusion of any behaviour which may tangentially relate to sex, reflecting deeply felt concerns about potential public and political backlash. Whilst the admissibility status of false allegations is reasonably settled, satisfying the 'evidential basis' test is a particular problem for counsel. Of concern are unresolved grey areas between s.41 and s.100 concerning false allegations which are not made maliciously. In the absence of case law, counsel make applications according to their own lights. It seems likely that divergent approaches are taken by different counsel and trial judges, potentially leading to inconsistencies. Evidently, this previously unacknowledged 'fantasy' form of false allegations requires further doctrinal clarification. Further research might determine whether this issue is common and how barristers deal with it without appellate guidance.

criticism of the definition: McGlynn (n163), 389.

5. THE ADMISSIBILITY OF NON-DEFENDANT BAD CHARACTER EVIDENCE UNDER S.100

This chapter examines the doctrinal framework and practical operation of the admissibility gateways for evidence of a non-defendant's bad character (BC) under s.100 of the Criminal Justice Act (CJA) 2003.[1] Through an analysis of my empirical data, we will see that non-defendant BC is a common issue which counsel have to consider. Though the law is relevant, decisions to make an application under s.100 are heavily influenced by tactical considerations. When the evidence *is* admitted, my data suggest that this is overwhelmingly done by agreement between counsel, under gateway (c). This chapter also explores how the two contested gateways in s.100 ((a) and (b)) are interpreted and applied, and sometimes conflated, in practice.

5.1. PREVALENCE

Westlaw lists over 160 appellate judgments which interpret and apply s.100.[2] Of the 22 trials observed in this study, non-defendant bad character evidence was admitted in nine – not a trivial number. Moreover, my interviewees suggested that non-defendant BC is an issue that must always *at least be considered* in every case:

> **Barrister 10**
> I think [non-defendant bad character] is an *issue* quite a lot, but whether it actually gets taken any further is a different matter. Because one of the things that is always asked for in a defence case statement is going to be any previous convictions, cautions, or reprimands against any of the prosecution witnesses. Because that is capable of undermining the credibility of their witness. But it's once you've got the record and you can see if the complainants have got anything, you can then decide whether or not there's anything that assists you.

Barrister 7, **Barrister 8**, and **Barrister 10** said that non-defendant BC issues most commonly arose in violent offences where the complainant has previous convictions for violence and the defence are claiming self-defence.[3]

There were competing views as to the frequency of complainant BC in sex cases:

> **Barrister 8**
> It's one of those things that crops up more often in sex cases than in other cases. The reason being: so many of these sex cases tend to be familial or tend to be defendants who *don't* have previous

[1] Thereby answering the research questions posed in §1.2.
[2] As of April 2020.
[3] This argument was also utilised (unsuccessfully) for a s.100 application in **Case 10**.

> convictions. And in those circumstances, because the defendant has nothing to lose by attacking other people's character because there's no danger of their own going in, you see a lot more s.100 applications in those cases than you do anywhere else.
>
> **Barrister 9**
> It's not particularly common in sex cases, it has to be said, that non-defendant bad character is an issue. […] When you raise issues about whether an application should be made about certain things, quite often they don't amount to bad character.

Both respondents' claims seem plausible, and may be compatible. In sex offence cases, it may often be the case that the defendant has no prior convictions, and therefore the potential for 'tit-for-tat' applications under s101(1)(g) is limited.[4] Equally, complainants in sex offence cases (especially those involving children) may be unlikely to have previous convictions, and so there may be no BC to attack them with. Whether complainant BC is in issue in sex offence cases is seemingly fact specific. Note, though, that non-defendant BC in sex cases does not necessarily have to relate to the complainant.[5]

Accepting that non-defendant BC is a relatively common issue, it does not necessarily follow that s.100 is commonly litigated. Indeed, counsel were keen to stress the rarity of contested applications:

> **Barrister 2**
> Non-defendant bad character applications actually are not probably as common as people might think they are. Or at least [not] that common in my practice. […] I'm struggling to remember the last time I made a s.100 application.
>
> **Barrister 3**
> In general crime, not very often. In sex work, again not very often. It's probably one in ten cases you get the opportunity to put in a non-defendant's bad character.

With one exception, all barristers I talked to during my trial observations told me that they had either never made a s.100 application, or that it was very rare to have them contested. When pressed on this, **Barrister 8** claimed that where a BC application *is* contested, objections are often 'half-hearted' as 'People have a pretty good idea about what is going in and what isn't going in'. This 'half-hearted' contesting might be seen in **Case 18** where a defence barrister was opposing the admission of defendant BC under s.101. In response to the judge inviting defence submissions, counsel responded (with his client in the dock behind him) 'Well, I may raise a *token* objection'. Surprising no-one, except perhaps the defendant, the prosecution

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[4] See further at §5.2.A. Cf. the defendant may alienate the jury. See §5.2.B.
[5] As was the case in **Case 2**, **Case 8** and **Case 21**.

application succeeded.

When interviewees were pushed to expand, the most common response was that the thresholds for admissibility in gateways (a) and (b) are too high,[6] so that it is usually not worth the time making an application which is expected to fail:

> **Barrister 4**
> [The tests in s.100 are] very very difficult tests to get over. In fact, I would say 99 times out of 100 you could make the application and you just wouldn't get there. I don't know whether anyone else is finding that or whether it's just my ineptitude!

> **Barrister 6**
> Because, obviously, the threshold for admissibility for s.100 is much higher [than for s.101] because it's got to have *substantial* probative value, it's quite rare that it comes up.

Demanding admissibility tests are evidently acting, at least for some barristers, as a deterrent to making applications. When considering the purpose of the legislation,[7] this could be seen as a positive development, as it may be leading to fewer witnesses having their character attacked when it is of low probative value. On the other hand, if these barristers see s.100 as almost impossible to overcome, then relevant evidence which theoretically satisfies either test may not have a chance of being heard by the jury.

This perception that s.100 is difficult to satisfy may also explain the fact that much BC is instead admitted by agreement:[8]

> **Barrister 2**
> I think people who are on the academic side of the legal system probably don't appreciate, and there's no particular reason why they should appreciate, the extent to which the majority of these applications are agreed between counsel. It's the exception rather than the rule for the judge to rule upon them.

> **Barrister 3**
> I always try and get it [s.100 and s.101 applications] agreed, I can't remember the last time that the prosecution have properly objected.

Barrister 7 concurred, suggesting that legal arguments on s.100 are very rare. Interviewees' claims regarding the rarity of contested s.100 applications were not wholly supported by my trial observation data. Applications were made under s.100 in **Case 2**, **Case 5**, **Case 8**, **Case 9**, **Case 10**, **Case 12** and **Case 21**, albeit that in **Case 5**, **Case 9**, and **Case 10**, the applications were ultimately withdrawn after counsel came to agreements,[9] and in **Case 21** the application was withdrawn after D changed

[6] See more on these below at §5.4.
[7] See §2.2.B.
[8] See further §5.3.
[9] In **Case 10** the agreement was to exclude, rather than admit, the evidence.

his plea. Therefore, rulings were given in only three of these seven applications. Bad character evidence relating to a non-defendant was admitted by agreement without a prior s.100 application in:[10] **Case 1**, **Case 2**, **Case 5**, **Case 7**, **Case 8**, and **Case 14**.[11] It is possible that this potential discrepancy between what respondents reported and what I observed could be explained by the relatively small number of trials I observed, and that I simply struck lucky in terms of stumbling on interesting cases. Alternatively, as **Barrister 2** suggests, it may be that my interviewees were describing the rarity not of s.100 applications alone, but those applications requiring a judicial ruling. If read this way, my trial data are more supportive. Whether or not this interpretation is correct, my trial data *do* support the claim that a very significant amount of non-defendant BC evidence is admitted via agreement, rather than a contested gateway.

5.2. Bad Character and Trial Tactics

The decision to make a s.100 application is not one that is taken lightly. Indeed, it is not axiomatic that the existence of BC evidence against a witness will necessarily lead to an attempt to adduce it. The following risks are examined in detail below: the threat of retaliation by the operation of s.101(1)(g) (the 'tit-for-tat' gateway); and the concern that attacks on witnesses may backfire. Bad character can also play a major role in decisions to call witnesses.

5.2.A. Tit-For-Tat

Under ss.101(1)(g) and 101(3), defendant BC is admissible if 'the defendant has made an attack on another person's character', and if it would not have 'such an adverse effect on the fairness of the proceedings that the court ought not to admit it'. Broadly speaking, a successful s.100 application from the defence qualifies as an 'attack' triggering potential retaliation. This holds whether the application concerns a witness or non-witness, though in *Nelson*[12] the Court of Appeal suggested that if the defence was attacking a non-witness the 'fairness' threshold in s.101(3) would rarely be met.

This situation arose in **Case 2**. The defence successfully applied under s.100 to ask questions concerning two of C's sisters (non-witnesses), who had allegedly been abused by their mother's prior partners. Already in evidence were two of D's prior convictions for assaulting a child and criminal

[10] This list includes evidence which may have also been admissible under ss.98(a)-(b); see §§4.1.E-F.
[11] Cases may appear in both lists as some BC in those cases were subject to applications, whilst other BC evidence had been agreed beforehand.
[12] *Nelson* [2006] EWCA Crim 3412.

damage. In the middle of D's evidence, the prosecution applied under s.101(1)(g)[13] to admit two further prior convictions of domestic assault. In submissions, **Barrister 1** argued for the defence that the overriding fairness caveat in s.101(3) applied, and that there was already sufficient BC of D before the jury. The judge agreed with **Barrister 1** and denied the prosecution's application.

A related, but somewhat novel, issue arose in **Case 13**. D was charged with several drug offences, and claimed that the real owner of the drugs, whom he alleged was a serial drug user and dealer, was his friend (F) whom he was unwilling to identify. The prosecution alleged F was fictional. **Barrister 8** nonetheless applied under gateway (g)[14] to admit D's previous drug offences. In ruling on this gateway, the judge stated that the prosecution could not both claim that F was fictional *and* that he is a person whose character has been attacked. The application consequently failed under that gateway. For gateway (g) to be activated, the person whose character is being attacked must be real (and, ideally, identifiable).[15] **Barrister 8** later confided that this aspect of her application may have been a stretch:

> **Barrister 8**
> I had one bit in it that shouldn't have been in it – you know, the attack on someone's character was a bit dodgy.

Vital to this discussion is the level of the risk for the defendant. Significantly, the Court of Appeal has been willing to allow dishonesty BC to be admitted via gateway (g) for credibility purposes,[16] departing from the reasoning in *Hanson*.[17] The tit-for-tat deterrent is therefore very real.

Almost all of the barristers I talked to, both in interview and during observations, referred to gateway (g):

> **Barrister 6**
> One of the realities of life is that, generally speaking, a defendant is likely to have previous convictions. And the minute you engage s.100, you're then opening the door for your client's 'form' to go in! So, unless the difference between the prosecution witness's character is markedly worse than the defendant's, tactically you tend not to deploy s.100 anyway.
>
> **Barrister 10**
> It's very rare to have a client that's got a good character [laughs]. It's very rare. So […] to make an application against a prosecution witness, to put their bad character in, you have to realise that by so

[13] The application also concerned s.101(1)(f), which also failed.
[14] And ss.101(1)(d) and (f) – the application succeeded under these two gateways.
[15] With a name and/or address, so that further enquiries could be made.
[16] *Singh* [2007] EWCA Crim 2140.
[17] *Hanson* [2005] EWCA Crim 824, [2005] 1 WLR 3169, [2005] 2 CrAppR 21. See further at §5.4.C.

> doing, your client's character is fair game. So that, I think, is a big restriction on the defence of making use of s.100.

Indeed, gateway (g) was often seen as the most significant hurdle – over the admissibility tests within s.100 itself – in attacking a non-defendant's character, due to most defendants being repeat offenders. The bare fact of one's client having prior convictions, though, was not seen as a complete bar to making a s.100 application, as much would depend on the specific offences, and the importance of attacking that other person's character:[18]

> **Barrister 1**
> You have to make a judgement call, because the cost to you of the jury learning about your character could completely outweigh the attack on a non-defendant's character. You've got to judge each case on its merits.

This cost/benefit analysis must be undertaken for every BC application, where counsel's judgement will depend largely on their experience in previous cases, the nature of the current case, and the types and seriousness of the BC in question.

Conversely, it was clear from my interviews that s.100 applications were more likely in cases where tit-for-tat was not an option – because the defendant had no previous convictions:

> **Barrister 1**
> It's usually the case in historic [sexual] cases that the defendant's of good character. So by attacking a non-defendant's character, you aren't risking putting your own character in because you haven't got a character to put in.

Both **Barrister 1** and **Barrister 8**[19] highlight (historic) sex cases as ones in which gateway (g) is less likely to be a factor. With no prior record to reveal, the defence has 'nothing to lose' by attacking the character of a prosecution witness (or non-witness). The same tactic was deployed in **Case 14** where D was charged with assaulting his ex-partner with a knife. D was of good character, and so faced no consequences in attacking C throughout the trial as a habitual drug user.

Another situation where there is 'nothing to lose' in making a s.100 application is where the defence believe they have already lost the character battle. Where there is no hope of opposing a s.101 application, there is no forensic penalty for attacking the character of the main complainant:[20]

> **Barrister 10**
> If your client has got previous convictions that are relevant, and the prosecution are going to probably make an application against you

[18] Echoed by **Barrister 9**.
[19] See quote above at §5.1.
[20] See also discussion of **Case 5** at §5.3.D.

> that is likely to succeed, then you don't want to miss the opportunity. So, if your character is going to go in anyway, you may as well make an application against the [prosecution] witnesses because you know your character is going in.

5.2.B. Bad Character Backfiring

A cold reading of the statute and case law might imply that if there is evidence of BC relating to an individual, it is likely that one of the parties will seek to admit that evidence if they think it will help their case. However, even if a witness has a string of prior convictions, it may not be in that party's best tactical interests to seek their admission. This is the worry that attacking a witness's[21] character in cross-examination will not discredit the witness in the eyes of the jury, but rather will discredit the party doing the attacking.

Barrister 10 described to me a case in which she was defending a man who was alleged to have digitally penetrated a woman in the shop where they both worked. She called a witness to describe the layout of the shop in order to suggest that there was no location in the shop where the defendant could have done this without other people seeing. The prosecution successfully applied under s.100 to adduce this witness's lengthy history of committing dishonesty offences. **Barrister 10** considered this overkill, and was able to flip the narrative in her closing speech:

> **Barrister 10**
> In my closing I said to the jury: "Well why do you even need to know that? All you know is that this man has come to court and been humiliated in the witness box by the prosecution because they're clutching at straws. Does it *really matter* that he's got previous convictions for theft? What are the prosecution actually saying? They don't *seem* to be saying that these witnesses have come to court to lie, to cover up a sexual assault that they witnessed. Because the prosecution have never suggested that they did witness it. It's always been the prosecution case that this managed to happen without them seeing it. So why does it matter that he's previously been a thief and a burglar? He's just here to assist you with what happened on that day." And the jury were… well it's always impossible to know, but the jury *were* very much nodding their heads in agreement when I was making those points. *And* at the time that the witness was being cross-examined about his previous convictions, there were audible frustrated sighs from the jury. So, I think it backfired – I would never have made the application personally.

Evidently, some barristers are alive to the prospect of appearing callous, or even desperate, in the eyes of the jury, especially if the witness in question is young, or otherwise vulnerable.

[21] Other than deceased victims, who are likely to draw sympathy from the jury, it is unlikely that this reasoning would apply to non-witnesses as the jury will not see those individuals react to their BC being admitted.

Worries about BC evidence backfiring are perhaps more salient when there is already other material undermining that individual. In **Case 12**, an issue arose concerning C being bullied at school, including threatening letters being left in her locker. The school had investigated, concluding that C had likely authored the letters herself in order to seek attention. **Barrister 1**, for the defence, sought to adduce the letters and the school's report under s.100 in order to undermine C's credibility. However, this application was made in tandem with two s.41 applications which were successful.[22] In the course of a dialogue with the judge, **Barrister 1** admitted that she was not sure whether cross-examining C on this relatively marginal issue, as well as on two matters of sexual history (SH), would make D appear desperate. The judge concurred, and denied the application at the invitation of the defence. A witness's BC will evidently not always be brought out.

5.2.C. Calling Witnesses of Bad Character

Another aspect of trial strategy implicating BC evidence is the decision to call witnesses. From my data, the salience of BC seemingly varies depending on whether one is defending or prosecuting. Concerning the defence; many of my respondents claimed that on receiving the antecedents of any potential witnesses, the defence often gets cold feet about calling them:

> **Barrister 6**
> The case I'm [prosecuting] at the moment is a paedophile sex case, and the defence were planning on calling a witness who himself had got a previous conviction for indecent assault on a girl under 14. And the defence were proposing to call him to say: "The defendant's a nice guy, and I wouldn't expect this sort of thing of him". So, once we'd disclosed that previous conviction, he very quickly disappeared off the defence list of witnesses!
>
> **Barrister 10**
> Prosecutors don't tend to make [s.100] applications because defence witnesses are very few and far between. And often, even when there is a defence witness, once the prosecution then disclose […] to the defence "Oh you've told us that you're going to call this witness, here's a copy of their record so you know" [laughs]. And once you know, you might think "Oh God now I can't call them", if there's a problem. So tactically the defence will just not call that witness if they don't have to.

Such reactions seem tactically sound. If a witness is likely to have their credibility undermined by reference to BC, calling them may end up doing more harm than good. Indeed, for many defence barristers calling witnesses other than the defendant is ill-advised in general, and any potential BC related to a witness would take them out of consideration completely, unless

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[22] See §§6.2.A and 6.7.B.

that witness was *vital*:[23]

> **Barrister 3**
> You only call a defence witness if they're perfect without any previous convictions, and if they're very, very good. You lose so many cases by calling "a friend" who is shit, or a mother who is not relevant. Have I ever had a s.100 against me? No, because I don't think I would call someone unless […] I have to or they are bloody good.

(*I ask whether she would* ever *call a witness with previous convictions*)

> Depending on the circumstances. If they knew the defendant, then no. If they were completely independent and just happened to be there, then fine. But those scenarios are not common.

These tactical assessments do not appear to depend on whether counsel think the BC is likely to be admissible (having satisfied either gateway (a) or (b) in s.100). The mere *possibility* of the BC being brought up seems to be enough for counsel to discount calling most witnesses. It is possible, therefore, that defence witnesses who could give exculpatory evidence are not being adduced for this reason, which is problematic where prior convictions are irrelevant or would be inadmissible on judicial application of s.100.

The salience of BC for prosecution counsel appears to be much less, since witness selections are generally made by CPS reviewing lawyers:

> **Barrister 8**
> Prosecuting, I don't think it would make any difference. The reason being that because by the time as counsel you come to the case, the decision has already been made to charge, and you already have the witnesses lined up that you're going to rely upon. And you then just have to deal with the fact that they might be undermined by whatever information you have, or convictions they have.

When prosecuting, then, barristers must make do with the witnesses they are given and 'deal with' any s.100 applications against them by mitigation. This is especially true when the witness in question is the complainant – one cannot drop a case merely because the alleged victim has previous convictions. This reality is evidenced by **Case 19**, where D was alleged to have been the head of a drug-dealing operation, who had knifed three of his dealers. All three complainants, as well as a witness to one of the stabbings, had lengthy criminal histories.[24]

An alternate view was proposed by **Barrister 7**, who suggested that, as trial counsel, the ultimate decision to call a witness rests with her, and that she might decide not to call a witness if she thought their BC outweighed their usefulness. There are two potential explanations for **Barrister 7**'s view.

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[23] Similar opinions were expressed by **Barrister 4** and **Barrister 9**.

[24] The case was ultimately dropped; not for reasons relating to BC, but because all complainants and witnesses refused to attend court.

The first is that **Barrister 7** was a relatively senior prosecutor, and regularly took on major sex cases. She may therefore have a greater influence on pre-trial decisions than more junior barristers. Secondly, if a barrister is selected as trial counsel for a case early on (as is more likely in major cases), then they are also more likely to be involved in pre-trial decisions than a barrister who picks up the case as a late return. Unfortunately, the lack of CPS involvement in this study means that the effect of BC on CPS reviewing lawyers' decisions to select witnesses for trial remains unexamined, but would be worth pursuing in future research if access could be secured.

5.3. AGREED BAD CHARACTER

This gateway is doctrinally self-explanatory, given adversarial assumptions. Under gateway (c) of s.100 evidence of a non-defendant's BC is admissible if all parties agree to its admission.[25] CPS guidance suggests that prosecutors should only agree to admit the BC of a prosecution witness if the evidence satisfies a gateway, or if admission would be 'in the interests of justice'.[26]

If the parties agree, the judge has little power, under s.100(4), to prevent the evidence being admitted.[27] However, in the interests of good trial management, and so that an appropriate direction is given, the judge should be informed of any agreements.[28]

5.3.A. Barrister Communities

In their study of the social world of barristers in England and Wales, Morison and Leith employed the concept of a 'community of professional interest' to describe local collections of barristers outside London who work mostly in particular regions of the country ('circuits').[29] The barristers in these communities work and socialise together; everyone knows everyone, and so barristers are able to tailor their approach to cases based on who their opponent is going to be. Counsel have shared ideas of the 'proper' way to do things, and due to the close-knit community they are also more likely to have opportunities to contact each other outside of court appearances to discuss their upcoming cases, which may involve negotiating pleas or evidence informally.

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[25] Including: the defence, the prosecution, and any co-defendants.
[26] CPS, *Bad Character Evidence* (London: Crown Prosecution Service, 2019). <https://www.cps.gov.uk/legal-guidance/bad-character-evidence> Accessed 25/03/2020.
[27] *Tennant* [2012] EWCA Crim 1173. However, if that witness is for the defence, the BC evidence adduced by the prosecution will still be subject to s.78 PACE.
[28] *J (DC)* [2010] EWCA Crim 385, [2010] 2 CrAppR 2, [2010] Crim LR 769.
[29] J Morison and P Leith, *The Barrister's World* (Buckingham: Open University Press, 1992), 127-136.

There were some intimations of a 'community of professional interest' amongst the barristers at the Crown Court centre selected for my trial observations. Barristers in the trials I observed often knew each other by first name and would, in the breaks between trials, gossip about the last trial they did together. One interviewee, who was an occasional visitor to this Crown Court, thought that the existence of this community might explain the high levels of agreed evidence, and thought this was a good thing:

> **Barrister 8**
> I tend to find that, certainly practicing […] where most of the barristers know each other, mostly people have a pretty good idea agreed between themselves, because it's a very co-operative process actually, despite what you see in court. […] The standard of advocacy in this court is actually quite high.

This was expressed to me in favourable contrast to other regions of the country (usually London) where the Bar is much larger. Indeed, one judge mentioned to me that there seemed to be much greater levels of agreement in the sample area than in an area like London where one is highly unlikely to encounter the same barrister twice. It seems plausible that familiarity between barristers partly explains the high levels of agreement found, albeit that my data do not support a pronounced level of familiarity between counsel. In the break-time conversations, there was no sense that any of them were 'regular' adversaries.[30]

The Crown Court I studied attracted barristers from a large 'pool' across several counties, and many of the barristers observed and interviewed had travelled from much further afield (again, usually London) to conduct cases. In my nine months at Court, I never saw the same barristers appearing as opponents. Most barristers were observed in action only once or twice. More fundamentally, this community analysis does not account for situations where otherwise friendly counsel strongly contested the admission of BC evidence.

<u>5.3.B. Personalities and Experience</u>

My interviews suggest that the characteristics and values of individual barristers may be influential in understanding why counsel agree evidence or not. Indeed, many barristers interviewed were resistant to the validity of the above 'community' analysis. It was said that some barristers are simply more stubborn, and others more friendly and agreeable:

> **Barrister 9**
> I think it depends who's prosecuting […] I think you can't really say

[30] Informal conversations with barristers suggested that counsel may have the same opponent, at trial, only two or three times, maximum, in a year.

in general**.**

> **Barrister 7**
> I think it just comes down to personality actually. […] [It's] the gamekeeper/poacher type scenario, where you kind of swap roles. [People] can be really, really difficult defenders, and then they're a bloody pain in the neck when they prosecute.

This banal rationalisation rings true. Though it would be too simplistic to state that because of their idiosyncrasies some barristers *always* agree evidence and other *always* contest, human nature doubtless comes into the equation. Trial counsel's role is uniquely characterised by professional autonomy and discretion. When interviewees were pushed on the point of 'personality', it seems that what they meant boiled down to alternative conceptions of 'fairness':[31]

> **Barrister 10**
> A lot of it depends on the individual barristers. When I prosecute, I take the view that it's my job to be fair. And if I can see that something will assist – will *actually* assist – the defence that is relevant, and passes the test [in s.100], I'm not going to kick up a fuss. I'm going to say, "Well that's clearly relevant". The end. Other prosecutors wouldn't take that view, and they take the view that everything should be a battle. And people have different styles.

All interviewees, including those who prosecute, expressed a strong commitment to their duty to ensure that every defendant is afforded a fair trial. 'Fairness' here is not an abstract concept, but a value which is intrinsically linked to the specific case and evidence in hand. Professional self-conceptions of 'fair trial' therefore *matter*; they influence case conduct and outcomes.

In the current context, a commitment to fairness seems to mean that if there is relevant and probative BC evidence of a non-defendant which the defence could use to support their case, the prosecution feels an ethical obligation to agree its production. This obligation seems to hold regardless of the supposedly strict admissibility tests under gateways (a) and (b) in s.100. In fact, only **Barrister 10** made any reference to the statutory tests when discussing how they would conclude that fairness required evidence to be agreed. In practice, this may constitute a significant lowering of the bars to admissibility for non-defendant character evidence based on what individual counsel assess is 'relevant' or 'fair'. Significantly, this approach has been endorsed by the Court of Appeal in *Tennant*,[32] where it was held that if

[31] **Barrister 6** and **Barrister 7** stated that they would also be helpful as prosecuting counsel if they thought it 'fair' to admit the BC evidence.
[32] *Tennant* (n27).

counsel agree the evidence using gateway (c), then the judge is unable to interfere with the admission of the evidence, even if the judge thinks that the evidence does not meet either of the tests in gateways (a) or (b).

This finding coheres with barristers' perceptions reported below that the gateways to admissibility in s.100 are too restrictive.[33] The ability to agree evidence under gateway (c) allows this perceived over-restrictiveness to be circumvented. It is not difficult to understand that if barristers find it easier to convince opposing counsel, rather than the judge, that fairness requires specific non-defendant BC to be adduced, then they will walk the path of least resistance.

My data also suggest that barristers who *only* prosecute are much less likely to agree to admit evidence than counsel with mixed practices. Many of my interviewees felt full-time prosecutors – in particular, CPS in-house counsel – are much less willing to cooperate than any other:

> **Barrister 10**
> In-house [CPS prosecutors] are far more difficult to speak to […] I think part of that is a lack of ability. […] And of course there are CPS in-house counsel who have been doing the job since before I was born. And who am I to say they're not that great? […] Maybe because they don't defend as well, but they do have a tendency to lose sight of what's reasonable and what's fair. And you can often find yourself responding to ridiculous applications by the prosecution. […] When you're against someone who's in-house, you have to be on your toes a bit more. And it *is* more difficult to negotiate things. Because they don't see what the end result is going to be. And sometimes things that are obvious, are not obvious to them. And I don't know why that is. It could be a lack of experience, it could be just a belligerence that comes with only ever prosecuting. […] [Whereas independent] prosecutors know that what's more important is that the defendant has a fair trial, than that they secure a conviction.

Barrister 10 argues that CPS counsel are less willing to cooperate for three reasons: lack of 'ability';[34] lack of perspective; and a lack of interest in the ultimate outcome of the case. It seems that contesting BC applications is seen by some barristers as evidence of a lack of skill, a view shared by **Barrister 8** who opined that cooperation between parties evidences a 'high level of advocacy'.[35] The second and third reasons suggest that a lack of defence experience is significant in reducing co-operation. In this sense, CPS prosecutors may be more disconnected from the cases they prosecute than independent barristers who, assuming they do at least occasional defence work, meet and talk to defendants. If, as my interviewees suggest, the

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[33] See §§5.4.
[34] A similar sentiment was expressed by **Barrister 5**.
[35] See quote above at §5.3.A.

performance of CPS barristers is internally assessed according to case outcomes, it is certainly not in their interest to agree to admit their complainant's (or another witness's) BC as this can only, generally speaking, lower the possibility of a conviction. My trial observation data has little to contribute here. I met and observed a handful of CPS barristers during my time at court, only two of whom are represented in the case sample. In **Case 1**, the CPS prosecutor opposed a s.100 application, but in **Case 19** a different CPS prosecutor was apparently willing to agree to the admission of three complainants' BC.[36] These observations do not refute **Barrister 10**'s claims; and, if she is correct, this may evidence a worrying trend that in-house counsel are prioritising conviction statistics over their ethical and constitutional role to ensure a fair trial.[37]

Barrister 10's musings are not the only possible explanations for CPS counsel being less cooperative. **Barrister 1** suggested that CPS counsel are more single-minded and prosecution focussed.[38] She also believed that CPS counsel are less time-pressured, claiming that they usually only handle one case at a time, unlike independent barristers who have to juggle several cases simultaneously in order to earn a living. As CPS barristers are less time pressured, there is less incentive to limit the length of trials through agreeing evidence. This portrait of the CPS leisure is not entirely fair. In-house CPS counsel have their own pressures, operating within a vast bureaucracy with an ever-increasing case load.[39] Time pressures constrain both independent *and* CPS counsel, though perhaps in different ways.[40]

Whatever the underlying reasons, my interview data support the argument that decisions to agree or contest evidence can be influenced by the personal characteristics and values of the individuals involved. In **Barrister 10**'s encapsulation:

> You might have two perfectly reasonable barristers, but for whatever reason they are not getting on. And if they're not getting on, they're not going to do anything to help each other.

5.3.C. Reputation and Professional Prospects

Agreeing BC evidence is routinely equated with 'good' advocacy, being 'sensible' and 'reasonable'. Being able and willing to agree the admission of certain types of evidence, such as BC, rather than contesting appears to be

[36] Though the case was ultimately discontinued due to the complainants refusing to attend.
[37] See Core Duty 1 of the Barrister's Code of Conduct: The Code of Conduct (4th edn, Bar Standards Board, 2019).
[38] These points were made to me in the minutes prior to the starting of the interview, though **Barrister 1** gave me permission to note down what was said.
[39] A Boon, *The Ethics and Conduct of Lawyers in England and Wales* (Oxford: Hart, 2014), 638.
[40] Time and resource pressures on counsel are further explored at §§5.3.D., 7.2., and 8.1.

expected, at least to a degree. Those who depart from this norm, such as CPS barristers, are considered *un*reasonable, and may develop a negative reputation as a result:

> **Barrister 10**
> In crime, no one wants to get a reputation of being unnecessarily, unreasonably difficult. Far more than in other areas of law. Because we're all just having to get along with each other on a day-to-day basis. […] Nobody wants to be described as 'sharp' at the criminal Bar.

The desire to avoid a bad reputation may link to the fact that barristers who work trials back-to-back will deal with anywhere from 50 to 150 different opposing counsel in a year. Barristers who make life more difficult for other barristers may in turn have life made more difficult for them.[41] It is consequently not in a barrister's interest to depart from the norm of trying, where possible, to agree BC evidence. If one is agreeable in this manner, an opponent is more likely to be agreeable in other parts of the trial.[42]

It is not merely one's reputation amongst other barristers that is at stake, but one's reputation with trial judges:

> **Barrister 10**
> If you look at the law, and you can see that it's borderline […] you might feel that you're going to lose [the judge] by making the application. And if I've got other applications that I'm going to be making further down the line that are more important, tactically I might decide "Well, I don't want to push that one" because it's not so important, but it's really important that [the judge] allows me to mention [the complainant's] mental health, or it's really important that he doesn't exclude X or does exclude Y. You see what I mean? And if the judge has already got it into his head that I'm one of those barristers that makes crappy applications just for the hell of it, he's not going to give it the same respect as if he's […] not already been arguing the toss with me about applications that are doomed to fail.

> **Barrister 8**
> If you've been up against the same judges again and again and again, it doesn't do your credibility with the judge any good to be taking crap points all the time. […] I think it focuses minds if you're in front of judges whose opinion you'll care about in the future, or whose opinion will be useful to you in the future.

These sentiments signal two different reasons why one would not want to annoy trial judges. The first is that if a barrister gets a reputation for making unnecessary or hopeless applications (such as those under s.100 or s.101), they may face an uphill struggle in other areas of judicial discretion, such as in requesting some leeway during cross-examination, or for any additional

[41] Boon (n39), 656-657.
[42] For example, they may request fewer edits in the police interviews or in any video-recorded evidence, or not oppose requests for breaks to consult with their client (or, if prosecuting, the CPS).

breaks during the trial. These little things are unlikely to overly prejudice that party, but they would make counsel's job slightly more difficult or onerous than it could have otherwise been. Notably, this factor not only applies to the current trial, but also relates to future trials in front of the same judge, suggesting that there may be an element of counsel playing current defendants' interests off against future clients' welfare.

The second reason concerns career aspirations. Applications to be appointed Queen's Counsel or a member of the judiciary require judicial references,[43] which may be difficult to acquire if one is not popular amongst the local judiciary. Several interactions between counsel and trial judges in my trial observations suggested a judicial preference for counsel to work issues out between themselves rather than require rulings, the most overt example of which occurred in **Case 21**. Here, the judge specifically requested that the prosecution and defence meet privately to discuss whether an agreement could be made concerning a defence s.100 application, and that he would only give a ruling if those negotiations were unsuccessful. Though initially hesitant, prosecution counsel acquiesced to this request. This interaction revealed a preference on the part of the trial judge for counsel to agree BC evidence, and showed that there may be significant proactive judicial influence over decisions of counsel in a given case. Though this study affords insufficient basis to claim that counsel who have a judicial career in mind are more deferential and accommodating to judges than those content with life at the Bar, it would be an interesting avenue for further research.

5.3.D. Agreement in Case 5 – Slinging Mud

Whilst all of the preceding factors are supported in my interviews and trial observations, they skirt around the most significant variables which influence these decisions: the facts and evidence of particular cases. Most of my interviewees were willing to offer more generalisable speculation why BC evidence is commonly agreed, but **Barrister 9** balked at the suggestion that any factors other than the case in hand were relevant. While not quite as dismissive, **Barrister 2** likewise considered the high frequency of agreement a difficult subject to discuss in the abstract, instead emphasising the importance of pre-trial negotiations where parties can speak frankly so that

[43] *Queen's Counsel Competition for England and Wales 2019 Guidance for Applicants*, 18. <http://www.qcappointments.org/wp-content/uploads/2019/03/Final-Guidance-to-Applicants-2019.pdf>. See the guidance for applicants to the judiciary. <https://www.judicialappointments.gov.uk/references-guidance-candidates> Accessed 25/03/2020.

fair compromises and deals can be struck. One cannot predict the results of such negotiations without knowing more information:

- What offence/s is/are currently being charged?
- What behaviour constitutes the alleged BC evidence?
- To whom does the BC relate?
- For what purpose is the BC being adduced?
- Does the defendant himself have BC evidence which could be admitted in retaliation?[44]

Case 5 exemplifies the many case-specific variables that can influence decisions to either admit or contest non-defendant BC evidence. An additional reason for selecting **Case 5** as emblematic is that both defence counsel (**Barrister 3**) and prosecuting counsel (**Barrister 7**) were interviewed.

Case 5 concerned historic sexual abuse allegations. The trial started with two defendants, Kevin and David,[45] but David's erratic behaviour led to him being sectioned prior to jury selection. The trial went ahead with the remaining defendant, Kevin, who was charged on indictment with eight counts of indecent assault, three counts of indecent assault on a child, two counts of buggery, and two counts of attempted buggery. Most of these were specimen counts, referring to continued offending over a period of seven years (1988-1995). Kevin's mother was friends with the mother of the first complainant, Mark. When Mark was between the ages of 6-13, and Kevin was aged 11-18 (a five-year age gap), Mark would stay at Kevin's house after school. Over the seven years, Kevin allegedly groomed Mark to masturbate and perform oral sex on him, which eventually led to attempts at anal penetration. After a period of grooming, Kevin involved his friend, David. Additionally, Kevin and David persuaded Mark to involve one of his school friends, Harry, who was the second complainant. Though Mark was alleged to have been abused over the entire seven years, Harry alleged only one single instance of abuse as he refused to 'play' with them again.

The complaint arose out of unconnected proceedings relating to Mark's allegation that he had been sexually abused when he was in care between the ages of 15-18. It was while detailing these allegations to the police that Mark described separate abuse when he was much younger, at the hands of Kevin and David. The two different allegations made by Mark were investigated separately, and the allegations against Kevin and David reached

[44] See §5.2.A.

[45] Pseudonyms have been used to protect anonymity, and to assist tracking the multiple individuals involved in the case.

trial first. The other allegations against care home staff were, at the time of **Case 5**, scheduled for trial several months later.

There was extensive evidence potentially qualifying as BC on both sides. Regarding 'background' BC, there was the alleged sexual abuse of the care home workers which, under ss.100 and 109, was technically BC evidence of non-witnesses (as well as SH of Mark).[46] Additionally, though much of David's alleged involvement in the abuse would have been admissible by virtue of s.98(a), some incidents which occurred without Kevin's presence were extraneous.

The first complainant, Mark, had extensive BC. Mark was regularly excluded from school for violence and other disruptive behaviour. During his time in care as a teenager, Mark was allegedly a member of 'The Invincibles', a gang in which he was said to have committed multiple violent, dishonesty, and drugs offences. In addition to these unproven crimes, Mark had been convicted of 14 offences – mostly theft and drugs – and was currently serving a lengthy prison sentence for burglary. The second complainant, Harry, had no previous convictions, though he was a recovering alcoholic.[47] It also came to light that Harry's mother alleged that she had been sexually abused by her step-father when she was a child, which is BC of that man as a non-witness.

Finally, the defendant had been convicted several years previously for possession of over 800 images of child and extreme pornography, for which he served a short prison sentence and following release on license had restricted access to the internet. After Kevin's arrest for the current offence, the police found a smartphone hidden in a wall cavity at his house, which had on its memory card several hundred images and videos of child pornography. Two months prior to the current trial, Kevin had pleaded guilty to breaching his license conditions, as well as to additional possession charges, and was currently serving the corresponding prison sentence.

Strictly, all of this BC required s.100 and s.101 applications, however *almost every single piece of BC evidence was admitted by agreement*. The only BC evidence not to be admitted were a handful of Mark's lower-level drug offences. This outcome was not a foregone conclusion. On the first morning of the trial, prior to the jury being empanelled, **Barrister 3** gave notice that she intended to submit a s.100 application to adduce Mark's previous convictions for offences of dishonesty, for the purposes of

[46] See §6.10.A.
[47] Though it did not in this case, substance abuse sometimes qualifies as 'reprehensible behaviour' depending on the context. See §4.1.C.

challenging his credibility. The judge requested an application made in writing by the end of the day. Defence counsel managed to achieve this,[48] and the eventual s.100 application (under gateways (a) and (b)) concerned *all* of Mark's prior convictions. In the course of oral submissions, **Barrister 3** also made a point of explaining that, unlike defendant BC, prior convictions need not necessarily involve dishonesty or untruthfulness in order to be relevant and admissible to a non-defendant's credibility.[49] Rather than ruling immediately, the judge deferred the matter to the following morning to allow **Barrister 7** to consider her position.

The next morning, both counsel informed the court that they had come to an agreement, and that most of Mark's previous convictions, as well as some other matters of character, could be admitted uncontested. The judge praised counsel for being able to resolve the matter between themselves, and noted that it would have been difficult for the jury not to suspect any criminal behaviour on the part of the Mark given that, as a currently serving prisoner, a guard would be accompanying him in the witness box. So, why did **Barrister 3** and **Barrister 7** eventually agree to proceed consensually?

Barrister 3 and **Barrister 7** first met on the morning of the trial.[50] Neither had dealt with any of the pre-trial hearings, and both had come to the case late. Therefore, the first day of the trial was also the first opportunity for any negotiation or agreement concerning admissibility. After **Barrister 3**'s s.100 application, counsel met to discuss the matter further.

Beginning with Mark's BC, **Barrister 3** was determined to get some of his prior convictions and gang membership adduced as this was effectively the only eligible line of defence:

> **Barrister 3**
> Fortunately, the issue in this case is whether [Mark] is telling the truth, therefore it's all about credibility. It's an issue in the case. It's an *important* issue in the case. And the jury couldn't understand it without it.

Identifying the primary complainant's credibility as the crux of the prosecution case, **Barrister 3** then mixed the language of gateways (a) and (b) in s.100 to argue that without Mark's prior convictions being admitted, the jury would be prevented from hearing vital defence evidence. This was her assessment of its probative value:

> **Barrister 3**
> We were trying to explain why [Mark] would lie. […] He's saying: "The

[48] By working over the lunch break.
[49] See further below at §5.4.C.
[50] Though they knew each other from previous cases, neither knew the other would be on this case until that morning.

> defendant ruined my life from an early age". The convictions demonstrate that he didn't start offending until he was 14. […] But they went on for such a substantial period of time that a jury may accept a teenager being in trouble because of something recent, but when it continues into adulthood I think his initial complaint loses force. That's why we did it on those grounds. And that nature of the offending, although it's not directly dishonesty, the possession and supply of drugs is ugly. […] It's clearly relevant, and I don't think the judge would have had any issue if we hadn't agreed.

Echoing **Barrister 3**'s expectation that this evidence would have been admitted by the judge had it been contested, **Barrister 7** seemed both resigned and relatively untroubled by this outcome:

> **Barrister 7**
> That guy from prison, [Mark], he was a fantastic witness. One of the best witnesses I've ever had. Because he was just "This is what I am, take it or leave it, I don't care" sort of thing.

Mark's prior convictions were perceived as being helpful to the defence case without harming the prosecution's central narrative. **Barrister 7** had met Mark the morning of the trial, and had decided that her best tactic was to present him warts and all. Once Mark's convictions were agreed she was able to spin them to fit her case. In evidence-in-chief, **Barrister 7** invited Mark to assert that he only ever committed crimes triggered by abuse. The prosecution thus advanced a plausible explanation for the BC which may have supported, rather than undermined, their case.

Barrister 3 took a different view: the later offending, whether dishonest or not, showed a *positive choice* to engage in gang-related criminal activity, and so could undermine Mark's credibility in the eyes of the jury. That this was the defence's only tactic became plain during cross-examination, over half of which was taken up with questions about Mark's criminal activity. **Barrister 3** invoked the phrase 'offences of *dishonesty*' at every possible opportunity, implying that Mark's criminality was a career choice. On top of this, **Barrister 3** cross-examined Harry and an additional witness (a mutual school friend) about their knowledge of Mark's criminal lifestyle, and spent a large portion of her closing embroidering this theme.

One cannot, however, uncouple these trial tactics from the agreement concerning the *defendant's* BC. In a frank admission, **Barrister 3** confessed the futility of opposing the admission of Kevin's prior convictions:

> **Barrister 3**
> All the time, you say [in court] "it's not relevant blah blah blah".[51] But as we saw in this case, of course it's relevant. Superficially the fact [Kevin] looks at kiddie porn 20 years after is not relevant. But the

[51] **Barrister 3** is paraphrasing here part of her closing speech where she stated 'There's a difference between watching child abuse and doing it'.

> fact he's looking at young boys fisting, sucking and everything else he's accused of doing with a young boy, you can't really… let's be grown up about this, of course it's relevant.

Seeking the admission of Kevin's previous convictions for propensity purposes was always part of **Barrister 7**'s plan, but when the opportunity for agreement arose, she changed tactics. This might surprise Munday, who supposed that it would be 'rare'[52] for evidence of a defendant's BC to be admitted by agreement. Despite both counsel being resigned to the BC of the complainant and the defendant satisfying the statutory admissibility tests, there was still negotiation concerning admissibility, with both using 'not contesting' as leverage for achieving strategic goals. In fact, **Barrister 3** thought that by negotiating her lack of opposition to the defendant's BC, she ended up getting in some of the complainant's previous convictions that would not have passed the judge:

> **Barrister 3**
> Robbery is an offence of dishonesty with violence – it's more sexy. [But] I was lucky to get that one in, it's got nothing to do with this case!

Though this tactic cannot be commended, it demonstrates that BC evidence which may not satisfy an admissibility gateway can be admitted as a result of negotiations in circumstances where factors unrelated to the relevance and probative value of that evidence (such as saving time or effort) may have a bearing on decisions to agree.[53]

Also of relevance is the 'tit-for-tat' gateway under s.101(1)(g).[54] By attacking the complainant, **Barrister 3** knew that the defendant's own BC would be exposed to retaliatory effect. But since Kevin's prior convictions were going to be admitted in any event, there was nothing to lose:

> **Barrister 3**
> If you know you're going to get your shit thrown at you, you've got to try and throw as much shit back!

When Kevin's previous convictions were read out as part of the agreed facts, it was striking to see jurors' faces drop. There was a visible impact on the jury, which **Barrister 3** anticipated given previous experience defending in sex trials. This defence strategy, though ethically problematic, is understandable.

Other admitted BC evidence in this case included: Mark's prior care home

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[52] R Munday, *Cross and Tapper on Evidence* (13th edn, Oxford: OUP, 2019), 410.
[53] Cf. Birch argues that the prosecution should not agree to admit evidence which goes against the policy of s.100; D Birch, 'A Credible Solution? Non-Defendant's Bad Character and Section 100 of the Criminal Justice Act 2003' [2019] *Criminal Law Review* 841, 844.
[54] §5.2.A.

allegations,[55] drug and alcohol abuse of Mark and Harry, and Harry's mother's alleged abuse by her stepfather. The last, adduced as agreed facts, is perhaps the most confusing, and was otherwise referred to only in **Barrister 3**'s closing speech. Counsel argued that because Harry's mother had been sexually abused, she had taught her children to complain if anything similar happened to them, which Harry did not do at the time. In a break, **Barrister 7** told me that she thought it was 'fair' to admit this, perhaps evidencing her commitment to agreeing relevant evidence which does not directly contradict her own case theory.

Case 5 demonstrates that agreements to admit BC evidence on the part of both adversarial sides are complex and inextricably linked to the specifics of the case in question. One conclusion, supported by other examples from my trial observations, is that counsel may be more likely to agree BC evidence if opposing it seems like wasted time and effort. Alternatively, counsel may agree BC evidence (defendant or non-defendant) if can be spun in ways that either support their case, or at least do not directly undermine it. For example, in **Case 8** it was agreed that BC evidence relating to D allegedly being a victim of repeated rape by her brother could be admitted. The defence wanted this evidence to suggest that, as a victim, D would be less likely to commit the charged sexual assaults, while the prosecution wanted to use D's allegations in a way that suggested that they were implausibly 'wild' so as to undermine her credibility. It is not clear whether this reasoning could be justified in terms of CPS guidance directing prosecutors to only agree BC evidence only when in the 'interests of justice'.[56]

5.4. CONTESTED BAD CHARACTER

Though most BC evidence is ultimately admitted by party agreement, contested applications relating to non-defendant or defendant BC were observed in 12 of the 22 sample cases. Focussing on non-defendants, the wordings of the admissibility gateways contained in s.100(1)(a) and s.100(1)(b), and their juridical interpretations, are pivotal in resolving these applications. This section considers gateways (a) and (b), as they relate both to material and collateral trial issues, from both doctrinal and practical perspectives.

If the BC evidence (or question) has satisfied one of the s.100 gateways,

[55] These were only referred to as contextualisation in the prosecution's opening speech. Had the defence wished to refer to them, a s.41 application would have been required, see §6.8.
[56] CPS (n26).

Braithwaite[57] established that there is 'no residual discretion in the judge to refuse to admit the evidence'.[58] Although apparently sweeping, it can be assumed that BC evidence adduced *by the prosecution* which satisfies one of the gateways in s.100 CJA 2003 would theoretically still be subject to exclusion if it would have such an 'adverse effect on the fairness of proceedings' under s.78 PACE. Spencer argues that this is unlikely to occur in practice,[59] and in my trial observations there was not a single mention of s.78 in this context. One of my interviewees offered the following explanation:

> **Barrister 10**
> Obviously we always have s.78 of PACE to exclude something, but once a judge has decided that the legislation for s.100 is satisfied, it's very difficult to then stand up and say "well in which case, your honour, I'm making an application under s.78 on the grounds of fairness". Because if they felt it was unfair they wouldn't have allowed it in in the first place. That's going to be their mind-set.

It seems that s.78 may have limited practical use in excluding non-defendant BC which has satisfied a gateway within s.100.

5.4.A. Gateway (a) – Important Explanatory Evidence

The first admissibility gateway is contained in s.100(1)(a) CJA 2003, whereby non-defendant BC may be admissible if 'it is important explanatory evidence.' As elucidated by s.100(2), evidence is 'important explanatory evidence' if:

> (a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and
>
> (b) its value for understanding the case as a whole is substantial.

Further assistance can be gleaned from the Explanatory Notes, which describe the purpose of gateway (a) in terms of securing admission of 'evidence which, whilst not going to the question of whether the defendant is guilty, is necessary for the jury to have a proper understanding of other evidence being given in the case by putting it in its proper context'.[60] This suggests that the gateway was primarily intended to admit BC going to background or collateral issues.

The use of the words 'important', 'impossible', 'difficult' and 'substantial' in the relevant provisions give the distinct impression of a high bar to admissibility. One might infer that the gateway would be little used. Although there are no reliable recent statistics[61] regarding usage, there are relatively

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[57] *Braithwaite* [2010] EWCA Crim 1082, [2010] 2 CrAppR 24.
[58] Ibid, [12] (Hughes LJ).
[59] JR Spencer, *Evidence of Bad Character* (3rd edn, Oxford: Hart, 2016), para 3.53.
[60] Explanatory Notes to the Criminal Justice Act 2003, para 360.
[61] The 2009 Ministry of Justice study on BC evidence focused on s.101. Only 36 s.100

few appellate decisions addressing gateway (a) compared to gateway (b). Whenever I attempted to open discussions around uses of gateway (a) in interviews most barristers stopped me, claiming that they either never, or rarely, used the gateway and so had nothing to say. This supports the impression of low usage. Two respondents were willing to expound a little, though only to complain about gateway (a)'s strictness:

> **Barrister 6**
> The one problem I have with s.100, is when it comes to important explanatory evidence. The definition that it would have to be "impossible for the jury to understand the case without it". And I think "impossible" is far too high a threshold. Because it's very difficult to imagine anything which would render it *impossible* for the jury to understand the case without it. And I think that should be a much lower threshold. […] So I do find that bit of s.100 troubling. And I know that a lot of my colleagues do as well, and so do a lot of judges to be honest.

> **Barrister 8**
> I think "important explanatory evidence" either in s.100 or s.101 is almost always a red herring. Because if you look at the definitions of that, it basically needs to be *impossible* to understand the case without it.

Both barristers stated that gateway (a) is rarely used because the bar to admissibility is impossibly high. Does the case law support this interpretation? The first significant case was *Buaduwah-Esandol*,[62] where Waller LJ restated the s.100(2) criteria in defining what evidence should be considered 'important explanatory evidence', before concluding that BC evidence going to an individual's prior knowledge would not be admissible through gateway (a), though it might pass gateway (b) depending on the circumstances.[63] *Buaduwah-Esandol* supports the suggestion in the Explanatory Notes that BC evidence going to material issues would not be admissible via gateway (a). Subsequent cases align: the Court of Appeal has stated that BC evidence relating to an individual's motive to lie might be admissible via (a),[64] whereas BC suggesting a manslaughter victim's propensity for violence could not.[65]

Barrister 8 offered the following example of a case where she had successfully argued the admission of BC evidence under gateway (a):

> **Barrister 8**
> [T]he defendant assert[ed] that he had never met the complainant.

applications were identified in the study, of which 14 used gateway (a): Morgan Harris Burrows LLP, *Research into the Impact of Bad Character Provisions on the Courts* (Ministry of Justice Research Series 5/09, 2009), 15-16.

[62] *Buaduwah-Esandol* [2005] EWCA Crim 3580.

[63] Ibid, [25], [29]-[30] (Waller LJ).

[64] *Miller* [2010] EWCA Crim 1153, [2010] 2 CrAppR 19. Cf. *R v Murphy* [2020] EWCA Crim 137, where the Court of Appeal endorsed the trial judge's decision to admit a defence witness's BC to suggest a motive to lie via gateway (b).

[65] *Edwards* [2018] EWCA Crim 424

> And the complainant changed his account from "we went to school together", to "actually, we used to deal drugs together, that's how I knew him". And then produced a photograph of the two of them holding out a fan of money with a pile of drugs. It was quite compelling, as you can imagine! But the issue there was, it wasn't actually *probative* because it was a robbery – [the defendant had] robbed him. So the drug dealing wasn't probative to whether he had a propensity, but it was important explanatory evidence because it was the only way that he could explain that he knew him.

This case appears to be a reasonably straightforward application of gateway (a), as the BC had no direct relevance to the current charge of robbery, but was indirectly relevant in explaining the background relationship between the complainant and defendant.

Applications of s.100 are not always so clear-cut. In *Luckett*,[66] the defendant had been convicted of putting a person in fear of violence by harassment. On appeal, the defendant argued that the trial judge erred in refusing to admit evidence of the complainant's association with drug dealers[67] which was relevant to his defence that it was these drug dealers, rather the defendant, who had intimidated and attacked the complainant. Allowing the appeal, the Court of Appeal considered that 'without this evidence the jury would find it difficult properly to understand other evidence in the case, and its value for understanding the case as a whole was substantial',[68] therefore satisfying s.100(2). However, the Court also thought that the BC evidence could have been admitted under gateway (b),[69] suggesting that the two gateways are not mutually exclusive. Given the statutory wordings this is not surprising as evidence which has 'substantial probative value' in relation to a matter in issue may also be 'important explanatory evidence'. As in this case, evidence of the complainant's association with drug dealers went indirectly to a material issue, namely whether it was the defendant who had done the intimidating and assault, but could also be considered to be contextual information which 'set the scene' for the litigated facts.

Luckett might therefore indicate that gateway (a) is not solely for BC evidence going to background or collateral issues. However, the multiple purposes of the evidence, and the Court of Appeal's ruling, warrant caution. More recently, in *Edwards*,[70] the Court clearly demarcated gateways (a) and (b), suggesting that the admissibility requirements are distinct and must not

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[66] *Luckett* [2015] EWCA Crim 1050.
[67] This was explicitly assumed to be 'reprehensible behaviour'; ibid, [21] (Lloyd Jones LJ).
[68] Ibid, [22] (Lloyd Jones LJ).
[69] Ibid, [21] (Lloyd Jones LJ).
[70] *Edwards* (n65).

be conflated. Despite this, the only s.100 applications made under gateway (a) during my trial observations were argued in combination with gateway (b), as we will see.[71]

5.4.B. Gateway (b) – Substantially Probative to a Material Issue

The second admissibility gateway is contained in s.100(1)(b) CJA 2003, whereby the evidence will be admissible if:

> (b) it has substantial probative value in relation to a matter which—
>
> > (i) is a matter in issue in the proceedings, and
> > (ii) is of substantial importance in the context of the case as a whole.

Section 100(3) then sets out this list of factors which must be considered when assessing the probative value of the evidence:

> (a) the nature and number of the events, or other things, to which the evidence relates;
>
> (b) when those events or things are alleged to have happened or existed;
>
> (c) where—
>
> > (i) the evidence is evidence of a person's misconduct, and
> > (ii) it is suggested that the evidence has probative value by reason of similarity between that misconduct and other alleged misconduct,
>
> the nature and extent of the similarities and the dissimilarities between each of the alleged instances of misconduct;
>
> (d) where—
>
> > (i) the evidence is evidence of a person's misconduct,
> > (ii) it is suggested that that person is also responsible for the misconduct charged, and
> > (iii) the identity of the person responsible for the misconduct charged is disputed,
>
> the extent to which the evidence shows or tends to show that the same person was responsible each time.

For gateway (b), then, the evidence must not only be probative, but 'substantial[ly]' probative.[72] Though the BC evidence itself does not have to be important in the context of the case, the issue in the case that the BC evidence is 'substantial[ly] probative' *of* must be of 'substantial importance'.[73]

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[71] At §5.5.
[72] *Braithwaite* (n57), [16] (Hughes LJ).
[73] *Masimba* [2007] EWCA Crim 939 [34] (Rix LJ).

The Explanatory Notes offer two examples of issues which may be of substantial importance depending on context. The first is the credibility of a witness. The second is where a defendant claims that a witness was the individual who committed the crime charged ('him, not me' defences). Both are issues which commonly arise in trials, but the Notes are silent on how judges are to determine whether these issues are of 'substantial importance' in a given case.

Regarding non-defendants, it was held in *H*[74] that a witness's propensity to do something can count as a 'matter in issue',[75] which may be of 'substantial importance' in the context of a case (especially in a 'him, not me' situation), and that previous convictions (or other BC) may be of 'substantial probative value' in supporting the alleged propensity. However, the alleged propensity must itself relate to a material issue which is of 'substantial importance'. In *Muhedeen,*[76] although a complainant's four prior convictions (each involving the use of knives) were thought to be of 'substantial probative value' regarding his propensity to carry and use knives, that propensity was held not to relate to an issue of 'substantial importance' as it had no bearing on the primary issues in the case (the aggressor's identity and intention).[77]

Although most reported cases deal with BC evidence going to propensity, evidence can be admissible under gateway (b) for a plurality of material issues. **Barrister 4** gave the following example:

> **Barrister 4**
> I made [a s.100 application] in an allegation of GBH/attempted murder. [The complainant] was said to have assaulted her husband in response to him abusing her in the kitchen. I had to make an application [for her first husband's] previous conviction in Scotland for breach of the peace where he had abused, shouted and hit her in a car when she was 7 or 8 months pregnant. […] I needed it in to show that my client was a victim of domestic violence.

In this case, the defendant's previous husband's conviction was adduced in order to portray her as a victim of domestic violence, which would shed light on her state of mind and assist in explaining her reactions to her current husband's abuse (thereby supporting a self-defence argument).

Non-defendant BC went to a different issue in **Case 2**. D was charged

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[74] *H* [2009] EWCA Crim 2899, (2010) 174 JP 203.
[75] For the purposes of s.100, 'propensity' and *modus operandi* inferences are treated the same; JR Spencer, 'Evidence of Bad Character – Where We Are Today' (2014) 5 *Archbold Review* 5, 8-9.
[76] *Muhedeen* [2016] EWCA Crim 1.
[77] See also *Edwards* where a propensity for violence could have been established, though it was held to not be substantially probative of the main issue in the case; *Edwards* (n65), [37]-[38] (Holroyde LJ).

with raping and sexually assaulting his partner's young daughter. The mother had two other daughters, both of whom had been sexually abused by two previous partners of hers. One of these men had been convicted following trial, whilst the other had committed suicide following an allegation. Defence counsel applied under s.100(1)(b) to adduce these two prior instances of sexual abuse in the family, primarily in order to: deny D had the opportunity to commit the abuse (due to the heavy presence of Social Services); and suggest that D was not 'so stupid' to be the third man in this family to sexually abuse one of the daughters. The judge ruled that the BC evidence was admissible under gateway (b) as the defence could not run their case properly without it. Plainly, whether an issue is of 'substantial importance' can depend on the particular defence advanced.

The factors listed under s.100(3) CJA 2003 are imperative factors which a judge must take into account when considering gateway (b), but the list is non-exhaustive. In *Dizaei*[78] the Court of Appeal suggested that trial judges could, and should, also have regard to the factors in s.100(2), which formally only relate to gateway (a), when using gateway (b). It was also mentioned in *Hodkinson*[79] that when determining admissibility under gateway (b), it might be legitimate for a trial judge to take into account the potential prejudicial effect (to the defendant) which may occur in the opening of the tit-for-tat gateway in s.101(1)(g) CJA 2003.[80] Though this suggestion has potentially sweeping ramifications, the ruling was case-specific: the defendant was convicted of sexually assaulting two male complainants, both of whom, like the defendant, were inmates in a specialist sex-offenders prison. Here, one can plainly see the dangers of prejudicial reasoning and being distracted from the main issues of the case if the jury were told of each person's prior convictions. The decision in *Hodkinson* might consequently be limited to situations where all parties involved have significant offending histories.

The potential for juries to get distracted from the main issues of a case is an additional consideration which may influence trial judges' practical decisions. Several cases[81] have expressly stated judges are entitled to exclude evidence using gateway (b) in order to avoid satellite issues from assuming much prominence and distracting the jury from the primary issues

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[78] *Dizaei* [2013] EWCA Crim 88, [2013] 1 WLR 2257, [2013] 1 CrAppR 31.
[79] *Hodkinson* [2015] EWCA Crim 1509.
[80] See §5.2.A.
[81] *Bovell* [2005] EWCA Crim 1091, [2005] 2 CrAppR 27; *Dizaei* (n78); *King* [2015] EWCA Crim 1631; *Rehman* [2017] EWCA Crim 106.

in the trial.[82] Yet whilst this is a legitimate consideration, justice and rigorous fact-finding should not be sacrificed for the sake of expediency.

One must also scrutinise what propensity prior conduct *actually* suggests. The Court of Appeal has refused to accept that misconduct which does not include any element of violence, such as drug taking or non-violent sexual abuse,[83] establishes a propensity to act violently. When it comes to differing 'levels' of misconduct, so long as the misconduct is sufficiently similar in nature the Court of Appeal has sometimes been willing to infer that less extreme misconduct may establish a propensity to act in more extreme ways, though decisions are not fully consistent.[84]

Under s.100(3)(a), courts are directed to consider the number of prior instances of misconduct when assessing their probative value. If multiple prior instances of misconduct are being adduced to suggest a propensity, each does not have to be proved to the criminal standard. Rather, the prior instances should be considered together by the jury in order to determine whether they are sure that a propensity has been established.[85]

In relation to propensity, the Court of Appeal stated in *Hanson*:[86]

> There is no minimum number of events necessary to demonstrate such a propensity. The fewer the number of convictions the weaker is likely to be the evidence of propensity. A single previous conviction for an offence of the same description or category will often not show propensity. But it may do so where, for example, it shows a tendency to unusual behaviour or where its circumstances demonstrate probative force in relation to the offence charged. [87]

Therefore, it appears that a single conviction for a common offence, such as assault or theft, may not be considered sufficient to demonstrate a propensity, but a single conviction for an 'unusual' offence (or a common offence with an 'unusual' *modus operandi*) may be considered sufficient. Whilst *Hanson* proposed two examples of committing child sexual abuse and arson as 'clear' instances of 'unusual behaviour',[88] the Court did not further define the concept of 'unusual'. As such, it remains unclear whether 'unusual' should be taken to mean behaviour which is statistically rare, or whether there is a class of behaviour which is inherently 'unusual'.

The recency (s.100(3)(b)) and similarity (ss.100(3)(a), (c)) of the prior conduct are articulated factors in considering the probative value of BC

[82] Birch considers this development a result of the failure to include a residual discretion to exclude evidence which satisfies one of the two gateways; Birch (n53), 858-859.
[83] *AB* [2016] EWCA Crim 1849.
[84] Contrast *Dizaei* (n78) and *Berry* [2009] EWCA Crim 39.
[85] *Mitchell* [2016] UKSC 55, [2016] 3 WLR 1405, [2017] 1 CrAppR 9 [24] (Lord Kerr).
[86] *Hanson* (n17).
[87] Ibid, [9] (Rose LJ).
[88] Ibid.

evidence to establish a propensity. For example, in *Berry*[89] a defendant charged with assault wished to adduce the complainant's prior convictions for assault, in order to suggest a propensity for violence. In rejecting the defendant's appeal, the Court of Appeal considered it significant that the complainant's prior convictions were over 10 years old and were of a relatively minor nature.[90] Similarly, the previous violent convictions of the father-complainant in **Case 10** were excluded by the judge largely on the grounds that they were 25 years old, and so were not of 'remote arguable relevance' to his current alleged propensity for violence. If prior behaviour is particularly uncommon or unusual it is possible that this may outweigh the passage of time,[91] but one cannot generalise too far.

Regarding similarity, my interviews indicate that details matter:

> **Barrister 9**
> I always want the details. Not just of the convictions, but the details of what happened, the details of the offence itself, whether they pleaded guilty or not etcetera.
>
> **Barrister 8**
> Generally, I think people don't go too much into the detail either, even though I think the authorities say you should, to point out similarities. But the difficulty is that often, particularly convictions more than a few years old, the reason we don't go into the details is because we haven't got any.[92]

These quotations highlight the concern that relevant and probative BC may not be admitted owing to lack of information.

Section 100(3)(d) applies in 'him, not me' situations. Though it does not specifically direct that the 'nature' or 'similarity' of the prior conduct should be considered in determining admissibility, the Court of Appeal in *H*[93] stated that such factors might still be taken into account in establishing 'the extent to which the evidence shows or tends to show that the same person was responsible each time'. This seems eminently sensible. Moreover, in interview, barristers felt that gateway (b) was easiest to satisfy in 'him, not me' situations:

> **Barrister 2**
> I think in practice it's probably more difficult to establish that bad character evidence against a *witness* is going to have substantial probative value to an issue in proceedings […] unless for example you're saying "well it wasn't me that knifed the bloke, it was him".

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[89] *Berry* (n84).
[90] Ibid, [17] (Pill LJ).
[91] It has been suggested that a witness's ten year old conviction for robbery involving the use of a knife could be considered substantially probative of that witness's propensity to carry and use knives. Minor similarities between prior conduct and the current alleged conduct may therefore be enough to outweigh its age. See *Bovell* (n81), [21] (Rose LJ).
[92] The adequacy of prosecution disclosure is taken up in §7.1.
[93] *H* (n74), [13], [16] (Moses LJ).

> **Barrister 6**
> I'm going to have to deploy [s.100] in a case I've got starting next week. Because my client's charged with murder. He is saying it wasn't him, and the deceased was attacked two weeks previously. We don't know who by, but we're saying there's a potential candidate who's got previous [convictions] for robbery and possession of a bladed article. And the deceased was stabbed to death.

An additional factor to be borne in mind when assessing probative value for the purposes of gateway (b) is whether the evidence of misconduct is hearsay. In *M*,[94] it was held that if BC evidence qualifies as hearsay, this may erode its probative value (even if admissible via a hearsay exception in ss.114-136 CJA 2003).

We have seen that the Court of Appeal in *Luckett*[95] thought that a complainant's prior association with drug dealers could be admissible under gateway (b), as well as (a), as being substantially probative regarding the defendant's case that it was those same drug dealers who intimidated and assaulted the complainant rather than the defendant. However, a clutch of similar cases has been decided the other way. In both *Lewis*[96] and *Alyson*,[97] vague suggestions that the complainants' lifestyle made them vulnerable to violence were held to not reach 'substantial' probative value. Therefore, though it is possible to have a propensity to be vulnerable, for BC evidence of that propensity to be considered substantially probative a specific and identifiable threat may need to be shown.

A particular point of contention in the s.100 case law is how to deal with allegations and out-of-court disposals which qualify as BC evidence. As previously discussed,[98] charges are a form of allegation which are considered to be misconduct, and therefore BC, by virtue of their being assumed true under s.109. This assumption of truth holds, not just for the categorisation of the evidence as BC, but also for the purposes of assessing its probative value.[99] However, under s.109(2) this presumption can be rebutted if the judge rules that 'no… jury could reasonably find it to be true'. This limitation was utilised in *Bahaji*,[100] where the Court of Appeal agreed with the trial judge's assessment that for a charge to have *any* probative value a jury would have to conclude that the individual was guilty of that charge, which

[94] *M* [2013] EWCA Crim 2238.
[95] *Luckett* (n66).
[96] *Lewis* [2012] EWCA Crim 3233.
[97] *Alyson* [2016] EWCA Crim 2253.
[98] See §§4.1.B.ii-iii.
[99] *Luckett* (n66); see also §4.1.B.iii.
[100] *Bahaji* [2009] EWCA Crim 2863.

would be too much of a departure from the main issues in the current case.[101] It was also acknowledged in *Bahaji* that although the position may differ regarding the admissibility of charges as evidence of BC against defendants under s.101, the difference is statutorily justified as s.100's gateways are 'much narrower'.[102]

Unproven allegations of BC may pass the admissibility threshold in (b) if evidence can be adduced to substantiate them.[103] **Barrister 10** described a case, not in my trial sample, where she was able to support allegations concerning the complainant's violence (which had not attracted any prior police attention) by calling his alleged victims to give evidence of that violence. In determining the admissibility of BC evidence under s.100, trial judges are also to consider all other available evidence in the trial. Specifically, if there is already character evidence admitted in relation to an individual, further character evidence may be inadmissible if it would not substantially add to the existing evidence.[104]

5.4.C. Gateway (b) – Substantially Probative to Credibility

Adducing BC evidence going to specific credibility seems relatively uncontentious, since this merely involves rebutting a factual statement made by a witness.[105] The focus here will be general, or 'moral', credibility.[106]

Although the wording of gateway (b) created some initial doubt as to whether credibility could be considered a 'matter in issue in the proceedings', it did not take long for the Court of Appeal to confirm this possibility in *Yaxley-Lennon*.[107] This logic was reflected in interviews:

> **Barrister 9**
> The creditworthiness of a witness is *always* a matter in issue.

Whether it is also an issue which is of 'substantial importance in the context of the case as a whole' will largely depend on the case facts. In addition, it was suggested in *Clarke*[108] that misconduct which occurs post-conviction may theoretically be relevant and admissible for a witness's credibility for the purposes of an appeal. It seems that, unlike BC going to material

[101] Ibid, [17], [41] (Aikens LJ). See also *Lee* [2019] EWCA Crim 2052. Cf. *S v DPP* where the High Court thought that it was at least arguable that a charge could pass through one of the s.100 gateways: *S v DPP* [2006] EWHC 1207 (Admin) [16] (Openshaw J).
[102] *Bahaji* (n100), [41] (Aikens LJ).
[103] *Umo* [2020] EWCA Crim 284 [38] (Fulford LJ).
[104] *Shaid* [2019] EWCA Crim 412 [44]-[45] (Gross LJ).
[105] But see A Keane, 'The Collateral Evidence Rule: A Sad Forensic Fable Involving a Circus, its Sideshow, Confusion, Vanishing Tricks and Alchemy' (2015) 19(2) *International Journal of Evidence and Proof* 100.
[106] See §3.2.C.
[107] *Weir (Yaxley-Lennon)* [2005] EWCA Crim 2866, [2006] 1 WLR 1885, [2006] 2 All ER 570 [73] (Kennedy LJ). See also Explanatory Notes to the Criminal Justice Act 2003, para 362; Birch (n53), 848-849.
[108] *Clarke* [2016] EWCA Crim 2030.

issues,[109] the individual in question needs to be both *alive* and a *witness* (live or hearsay) in order to for their credibility to be an issue in the case.[110]

The evidence which is most likely to meet the test of 'substantial probative value', though probably rare, is a previous conviction for perjury or any offence against the administration of justice:

> **Barrister 10**
> Obviously, if someone's got a conviction for perverting the course of justice, you're going to be thinking: jackpot!

Another form of BC evidence easily adduced, which featured in both my interview data and trial observations but is neglected in the case law, is a previous conviction for any offence where that individual gave sworn testimony in their defence. Depending on the details of the testimony, the logic here is that being found guilty is evidence of lying under oath:[111]

> **Barrister 8**
> One thing that's dramatically underused […] is when defendants have previous convictions and they're found guilty after trial. Just adduce them for the fact that the defendant lied. I always try and use them, but lots of people don't. I think that they can be quite helpful […] One of the difficulties is […] that often the data as to whether or not the defendant gave evidence in their own trial is missing. So you can't actually be sure that they gave evidence on oath that was disbelieved.

Again, the difficulties in sourcing the details of prior convictions were highlighted. If the relevant facts can be ascertained, it seems relatively straightforward to satisfy the test in gateway (b). In **Case 9**, one of the complainants had a previous conviction for criminal damage where she had given evidence in her defence, but was found guilty. This evidence was initially subject to a s.100 application, but was ultimately admitted by agreement after both the prosecution and judge concurred that this 'obviously' met the test.

Other than these relatively straightforward examples, the case law in this area is messy and contradictory. A primary sticking point appears to be whether there is a difference between 'untruthfulness' and 'dishonesty'. Addressing the credibility of defendants under s.101, *Hanson*[112] drew a firm distinction between untruthfulness and dishonesty, holding that the former is relevant to credibility while the latter is only relevant to certain material issues (for example, the question of the identity of a thief). This is the logical conclusion endorsed in §3.2.C.

Although logical assessments of relevance apply equally to defendants

[109] See *AB* (n83); *Edwards* (n65).
[110] *Jukes* [2018] EWCA Crim 176. Cf. deceased victims.
[111] **Barrister 9** also highlighted this as an underused form of BC evidence.
[112] *Hanson* (n17).

and non-defendants, the Court of Appeal has equivocated on whether *Hanson* should be applied in s.100 cases. *S*[113] and *Garnham*[114] appear to follow *Hanson*; both held that prior convictions for offences of dishonesty could not be used to undermine a witness's credibility unless those offences also involved untruthfulness.[115] Conversely, in *Stephenson*[116] it was held that *Hanson* was limited to s.101 cases and, unlike with defendants, there is less need for caution when considering the credibility of a non-defendant witness as they do not bear the risk of conviction. *Stephenson* can be criticised for failing to engage seriously with the *Hanson* rationale for distinguishing between dishonesty and untruthfulness, falling back instead on the old common law assumption that any recent or grave previous conviction may be relevant to a witness's credibility.[117]

The Court of Appeal ostensibly 'resolved'[118] this conflicting authority in *Brewster*,[119] where the Court stated:

> 'It seems to us that the judge's task will be to evaluate the evidence of bad character which it is proposed to admit for the purpose of deciding whether it *is reasonably capable of assisting a fair minded jury to reach a view whether the witness's evidence is, or is not, worthy of belief.* Only then can it properly be said that the evidence is of substantial probative value on the issue of creditworthiness… Whether convictions have persuasive value on the issue of creditworthiness will, it seems to us, depend principally on the nature, number and age of the convictions. However, *we do not consider that the conviction must, in order to qualify for admission in evidence, demonstrate any tendency towards dishonesty or untruthfulness*.'[120]

The clear message was that a fair-minded jury, in assessing the credibility of a non-defendant witness, may justifiably take into account previous convictions for offences which involved no dishonesty or untruthfulness.

Although some early post-*Brewster* cases on s.100 continued to utilise the *Hanson* distinction,[121] more recent decisions suggest that courts are willing to admit previous convictions which involved no dishonesty or untruthfulness at all for the purposes of impeaching credibility. In *Docherty*[122] a complainant's prior convictions for rape and assault were thought to be 'of

[113] *S* [2006] EWCA Crim 1303, [2007] 1 WLR 63, [2006] 2 CrAppR 31.
[114] *Garnham* [2008] EWCA Crim 266.
[115] In *S* itself, the BC evidence was ultimately held admissible as going to a material issue: the witness's dishonesty. *S* (n113), [13]-[15] (Laws J).
[116] *Stephenson* [2006] EWCA Crim 2325, (2006) 103(36) LSG 34, (2006) 150 SJLB 1151.
[117] *Sweet-Escott* (1971) 55 CrAppR 316.
[118] Spencer, *Evidence of Bad Character* (3rd edn) (n59), para 3.23.
[119] *Brewster* [2010] EWCA Crim 1194, [2011] 1 WLR 601, [2010] 2 CrAppR 20.
[120] Ibid, [22]-[23] (Pitchford LJ) (emphasis added).
[121] *Ul-Haq* [2010] EWCA Crim 1683; *South* [2011] EWCA Crim 754; *Dizaei* (n78). See also Birch (n53), 852.
[122] *Docherty* [2012] EWCA Crim 2948.

great significance'[123] to his credibility regarding his allegation that the defendant threatened to '[d]o in [the complainant's] car proper'.[124] Similarly, in *Hussain*[125] a witness's laundry list of previous convictions (including robbery, assault, shoplifting and dangerous driving) was held to be of substantial probative value, though unlike in *Docherty* admissibility here seemed to be a function of the number, rather than nature, of the previous convictions.[126] For previous offences involving no dishonesty or untruthfulness, the Court of Appeal has stressed that they need to be relatively recent if they are to have substantial probative value.[127]

The *Brewster* doctrine appears to have had some impact on the ground. Interviewees were flush with examples of adducing offences of dishonesty for credibility purposes:[128]

> **Barrister 7**
> I defended someone accused of buggering his nephew – under the old [pre-SOA 2003] law – and the complainant had 26 previous convictions for fraud. We wanted, in essence, to show that they were a thoroughly dishonest person who would lie to get whatever they wanted. Ultimately that was successful, and I think it made a big difference in the context of the case.

Case 5 was discussed above regarding gateway (c). In that case, **Barrister 3** was particularly keen to admit C's prior *dishonesty* offences to attack his credibility. But in addition, **Case 5** involved the admission (by agreement) of C's convictions for drug offences which were also used to attack his credibility. During the initial s.100 argument, **Barrister 3** submitted that, unlike for defendants, previous convictions need not have involved dishonesty or untruthfulness in order to be relevant to a non-defendant's credibility in law. This was an explicit invocation of *Brewster* reasoning. Other barristers admitted using this tactic, though in tones suggesting shame in appealing to moral prejudice over logical relevance:

> **Barrister 1**
> Most members of the jury will have no experience being the victims of crime *save for burglary*. So, if they realise [you have] burgled other people's houses, you may not attract a very sympathetic hearing from a jury.

(*I ask if* all *forms of BC, including those not involving dishonesty, are used to attack witness credibility*)

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[123] Ibid, [14] (Treacy LJ).
[124] Ibid, [3] (Treacy LJ).
[125] *Hussain* [2015] EWCA Crim 383.
[126] Ibid, [24] (Pitchford LJ).
[127] *Muhedeen* (n76). Interestingly the position under s.101 CJA 2003 regarding defendants appears to be the opposite, whereby the recency of the misconduct related to credibility has little bearing on admissibility; M Redmayne, *Character in the Criminal Trial* (Oxford: OUP, 2015), 207.
[128] Examples were also offered by **Barrister 1**, **Barrister 6**, **Barrister 8** and **Barrister 10**.

> **Barrister 9**
> [I]f a witness's bad character has gone in, that's all about their credibility.

Barrister 8 agreed that juries tend to accept the discredited link between criminality and dishonesty,[129] but refused to utilise this to her advantage. She expressed commitments to the *Hanson* distinction:

> **Barrister 8**
> I think jurors tend to come to the conclusion that if you've got previous convictions it's likely that you did the same thing. And I think they also come to the conclusion that if you've got previous convictions, whatever type they are, you're more likely to tell fibs. I suspect that's what juries think. […] [But] it seems to me you can be a thug, and it wouldn't necessarily make you dishonest. […] You can drink drive a car full of cocaine, punch someone in the face. But as long as you're *honest* about those things […] it doesn't necessarily affect your truthfulness.

Barrister 10 also endorsed the *Hanson* distinction. She described a case to me where her client was charged with assault by (digital) penetration of an employee in a shop. **Barrister 10** called another employee of the shop to give evidence about the general layout of the store, to suggest that there was nowhere that the defendant could have committed the assault without anyone else seeing. This witness had a very lengthy criminal record:

> **Barrister 10**
> Anything that's contrary to the Theft Act was there! *But*, as far as I was concerned it didn't really matter. Because *stealing something is not the same as coming to court to lie*. […] But the prosecutor made an application that the judge granted. […] But he was acquitted anyway, so it didn't matter in the end! But it *could* have mattered […] because if my client had been convicted it would have been a ground of appeal, I think.[130]

Despite **Barrister 10**'s protestations that committing offences of dishonesty is not relevant to one's testimonial credibility, the judge in this case admitted the evidence which, following *Brewster*, is a correct application of the law. Even on this limited sampling, it is striking that counsel are taking such different approaches to the uses of previous convictions to undermine witness credibility. If nothing else, Spencer's claim that *Brewster* 'resolved'[131] the dishonest/untruthful distinction for non-defendants is surely questionable.

Regarding non-conviction BC going to credibility, the Court of Appeal has not been so relaxed. For example: exaggerating events to friends,[132] making

[129] See §3.2.C.
[130] Emphasis added.
[131] Spencer, *Evidence of Bad Character* (3rd edn) (n59), para 3.23.
[132] *T* [2014] EWCA Crim 618.

complaints to the police which were not believed,[133] allegedly committing fraud and theft,[134] and allegedly lying about sexually abusing a third party[135] have all been held not to meet the threshold of substantial probative value in relation to a witness's credibility. Two generic rationalisations have been advanced: lack of similarity between the prior instance of untruthfulness and testifying under oath; and concerns over engendering satellite litigation. The former reason indicates more intense judicial scrutiny towards non-conviction BC as opposed to conviction BC. More recently, the Court of Appeal suggested in *Moody*[136] that non-conviction BC (such as evidence of racism) could be admissible for credibility purposes if it is thought that the evidence would likely impact the jury's assessment of the witness.[137] Though there is no obvious inferential link between being racist and being dishonest, *Moody* may evidence the first ripple effect of *Brewster* impacting on the use of reprehensible behaviour under s.100(1)(b) for credibility purposes.[138]

The admissibility of prior false allegations has received inconsistent judicial treatment. Though most cases concern false *sexual* allegations, and will be addressed later,[139] there is some case law on false allegations of violence. In *Walsh*[140] and *Hawkins*,[141] evidence of the complainants making prior false allegations of violence against third parties was excluded due to dissimilarities in the types of violence in the prior and current allegations, and concerns over satellite litigation. In *V*,[142] by contrast, the complainant's prior false allegation of being mugged was held to bear substantial probative value for her credibility on the current allegation of rape. It is not clear how these cases can be satisfactorily reconciled. An example suggested by **Barrister 3** may imply that *Walsh* and *Hawkins* would have greater resonance with practitioners:

> **Barrister 3**
> I did a kidnap/false imprisonment trial and the victim had made two false allegations when she was 14, She was kidnapped at 16. The one was to the school about her mum holding a knife to her throat, and one was to the police saying that her house had been robbed and she had been robbed, when in fact she had had a party without her parents knowing and stuff had been nicked by her friends. We managed to get both of those false allegations in because the crux of the case was the credibility of the complainant, and here she was

[133] *W* [2014] EWCA Crim 545.
[134] *Kelly* [2015] EWCA Crim 817.
[135] *AB* (n83).
[136] *Moody* [2019] EWCA Crim 1222.
[137] Ibid, [26]-[27] (Rafferty LJ).
[138] For this author's criticism of the decision in *Moody*, see [2019] CrimLR 975.
[139] See §6.10.
[140] *Walsh* [2012] EWCA Crim 2728.
[141] *Hawkins* [2018] EWCA Crim 406.
[142] Though it is somewhat unclear whether the evidence was also being adduced for a material purpose: *V* [2006] EWCA Crim 1901.

> lying to authorities and the police at the age of 14. […] And, the crux of that case, in each of the false complaints she was saying someone had a knife and was holding a knife to her, or she was threatened by a knife. And in the current case, the clinching feature, my client had apparently held a knife to her and had struck her with a knife. So there was the link of knife-knife-knife.

For non-sexual prior false allegations, it may be that there needs to be some specific similarity, such as the knives in the case described by **Barrister 3**, in order to satisfy the substantial probative value test.

5.5. Dual Applications Under Both Gateways

When considering which gateway to apply under, it appears that counsel often hedge their bets and try both. New empirical data are not needed to make this argument, as many appeals on s.100 concern evidence which is being argued under both gateways.[143] Though **Barrister 8** strongly disapproved of this practice, believing gateway (a) virtually impossible to satisfy,[144] the rest of my interview and trial observation data support the impression that both gateways are often utilised in tandem:[145]

> **Barrister 9**
> (a) and (b) I quite often do [together]. I had a case where my client was charged with arranging to have her ex-boyfriend beaten up and robbed. He was a serving prisoner, a drug dealer, by the time of the trial. And we made an application to put in his previous convictions which included, obviously, drug dealing and violence to show why she would have been afraid of him, therefore not likely to be party to what he was suggesting in the way he was suggesting it had been carried out […] So we successfully applied to put all of that in against him [using gateways] (a) *and* (b).

A s.100 application made in **Case 8** reflects an indiscriminate approach. The trial concerned historic sexual abuse, allegedly committed by a female baby-sitter on two young brothers. The defence was a complete denial of any sexual contact, and counsel made an application to adduce C's mother's alleged violence against her then partner, in order to suggest the current allegations were fabricated as misplaced revenge on their violent and absent mother. The application was made under both gateways (a) and (b), with defence counsel admitting in oral submissions that she had somewhat conflated the gateways but that 'your honour gets the point'. Though the application failed in the teeth of robust prosecution opposition, there was no negative consequence to applying under both gateways; the judge made no

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[143] See: *Buaduwah-Esandol* (n62); *Masimba* (n73); *Bahaji* (n100); *Berry* (n84); *Miller* (n64); *Ul-Haq* (n121); *Walsh* (n140); *King* (n81); *Luckett* (n66); *AB* (n83); *Alyson* (n97); *Khan* [2017] EWCA Crim 767; *Edwards* (n65).

[144] See quote at §5.4.A.

[145] **Barrister 5** concurred.

criticism of the defence and dealt with both limbs in ruling the evidence inadmissible.

This was a desperate and confused application that had little chance of success – indeed, it took prosecution counsel and the judge several further minutes to grasp the alleged relevance of the evidence. But this case is worth mentioning precisely *because* of the lack of rigour of the defence's application. It appears that confusion resulted in the defence being forced to make a hastily written application in writing during a short break, with possibly less thought and reflection than it ideally merited.[146]

The reference to the judge 'getting the point' seems to be an allusion to the fact that many barristers consider the statutory wordings of the gateways mostly inconsequential. These decisions are made more on lawyers' instinct and experience:

> **Barrister 1**
> You see these phrases are used. You know what I think? I think – it doesn't sound very legal – but it's often gut instinct. With trying to rationalise it you just have a feel for the case. You see the whole case and the whole dynamic of the case, and you have a feel for what's right and what isn't.
>
> **Barrister 7**
> I think in practice, […] we have these gateways and this statutory tick box, but we tend to take quite a practical approach to a lot of this. […] You tend to have a feel for what's going to go in and what isn't.

If, like these barristers, one has practiced for several decades and made many BC applications, then it seems reasonable to draw on that wealth of experience in assessing whether particular BC evidence is likely to be admitted or excluded. If doctrinalists might be disappointed that my empirical data reveal that few counsel differentiate between the two gateways, it is not surprising. As previously discussed, Court of Appeal judgments have been inconsistent in boundary-drawing and tolerating overlaps.

The realities of the working lives of barristers are also pertinent. Given the high level of rotation of barristers on cases,[147] it seems reasonable to suppose that if counsel has the time to make a s.100 application, but does not expect to actually conduct the trial, applying under both gateways will preserve the greatest flexibility for trial counsel. More generally, given the preparation required to run a case, it is no wonder that the technical niceties which distinguish gateways (a) and (b) are overlooked in favour of 'gut

[146] See further at §7.2.C.
[147] Discussed further at §§7.2.D.ii. and 8.1.C.ii.

instinct', especially if there is no downside to hedging one's bets.

5.6. Concluding Remarks on Neglected Issues

Lack of scholarly interest in s.100 CJA 2003 could perhaps be justified if the section was an obscure, rarely used or litigated rule of admissibility. This is plainly not the case. Whether considering the case law, or my empirical data, non-defendant BC is an issue with which counsel commonly grapple.

The practical operation of s.100 is both a great deal simpler and more complex than a cold reading of the case law would suggest. It is simpler because contested applications under the gateways are relatively rare. Admissibility is most commonly worked out between the two parties through negotiations and bargaining concerning what is 'sensible' and 'fair' to admit in the context of the particular case. Specifically, my data indicate that counsel are likely to agree the admission of BC evidence if it can be 'spun' in some way to fit both parties' cases. Other factors such as saving time, career progression, and professional collegiality are also potentially influential.

Where BC is contested, however, the situation is more complicated due to a raft of tactical decisions which affect counsels' decisions to make BC applications. Principally, it appears that the most significant barrier to adducing the BC of a prosecution witness is not the strictness of the gateways in s.100, but the threat of the defendant's BC being admitted in retaliation. In addition, counsel must make a judgement as to whether attacking the character of a witness will, on balance, be more beneficial or harmful to the jury's assessment of their case.

Concerning the gateways themselves, the Court of Appeal's unprincipled attempts to differentiate non-defendants from defendants, as regards the relevance of BC to credibility, clash with lawyers' natural instincts and, it is submitted, flout logical analysis. Yet, some barristers are taking advantage of the current legal position. The Court of Appeal should revisit this issue and reassert the *Hanson* test for all BC evidence being adduced for general (moral) credibility purposes,[148] whether s.100 or s.101 is utilised.[149]

Aside from this issue of credibility under s.100, my data suggest that the technical doctrinal distinctions between gateways (a) and (b) are often lost in practice where counsel commonly apply under both. Barristers' attitudes are unlikely to change unless they can spend more time on case preparation, which cannot occur unless there are significant reforms to case listings and

[148] *Hanson* would, and should, not apply where BC is being adduced to undermine an individual's *specific* credibility (see the discussion at §3.2.C.).
[149] See further on this *Moody* (n138).

a reversal to recent funding cuts to both legal aid and Her Majesty's Courts and Tribunals' Service.[150]

[150] Discussed further at §8.1.

6. SEXUAL HISTORY EVIDENCE AND ADMISSIBILITY OVERLAPS

This chapter is structured like the previous one, but now focussing on sexual history (SH) evidence and the operation of s.41 of the Youth Justice and Criminal Evidence Act (YJCEA) 1999. Along similar lines, my empirical data reveal that SH is an issue which counsel must consider in most sex offence trials. There are parallel concerns regarding the potential for SH evidence to backfire on the party adducing. An additional consideration arises where clients pressure their advocates to adduce SH evidence. Through an analysis combining new empirical data and doctrine, we will see that s.41's four admissibility gateways are each very strict, yet there appear to be some arguments which are regularly successful. Though there is no 'agreement' gateway in s.41, we will also discover that the prosecution is sometimes willing to assist the defence in getting SH admitted. Finally, this chapter continues the analysis of overlaps between the admissibility regimes, focussing specifically on how the admissibility gateways in both s.100 and s.41 are navigated when there are uncertainties about which provision applies.

6.1. PREVALENCE

It was previously argued that defence barristers approach s.41 cautiously.[1] They avoid SH-related topics if possible, but are also over-inclusive in determining what evidence requires a s.41 application. Conscious of being exposed to criticism if they get it wrong, SH *as an issue* is something which counsel must consider in almost every sexual offence case:

> **Barrister 2**
> [Sexual history] does crop up. It's an issue you have to consider in virtually every case. In most cases you would consider and say it's not appropriate to make a s.41 application. But there always will be the odd case where it is important to make the application.

This is uncontroversial. Defence barristers must consider all potential avenues in compiling their defence strategy; not to consider the possible relevance of any SH evidence, and whether it warrants a s.41 application, would be a failure of counsel's duty to their client. Moreover, the decision on whether to make an application is not a one-time event:

> **Barrister 10**
> If it is borderline I may park it. […] If something changes during the

[1] §4.2.E.

> course of the trial. If she [the complainant] says something that means that it's now relevant whereas it wasn't before, then I'll reconsider. I don't say [to my client] "This is it, hard and fast we're not going there" unless 100% we're not going there.

The fluid nature of trials mean that these decisions are continuous, and the issue of SH must be borne in mind throughout the course of proceedings. In terms of actually making s.41 applications, though, most barristers interviewed stressed their rarity (even accounting for their over-inclusive approach to the definition of 'sexual behaviour'):[2]

> **Barrister 1**
> They're rarely made actually, there has to be something specific these days. [..] [The] public might think that defence barristers are constantly trying to get in previous sexual history when that isn't the case. […] Because the law is so restrictive, even then you don't make a lot of them unless you've got a really important point. It's actually been quite a while since I last made one.

> **Barrister 6**
> I can't remember the last time I did a case that involved s.41 to be honest [laughing]. I mean, as you'll know, the passage of that particular legislation through Parliament was a pretty tortuous one. And the form in which it finally evolved is such that it makes it *almost* impossible to cross-examine a complainant on her previous sexual experience. […] So it's a very little used piece of legislation, because it effectively largely shut the door on a line of cross-examination that used to be a free for all.

So eager were some barristers to convey this scarcity, that they would show me their laptops (unprompted) as they searched their document folders in vain for any mention of s.41. Combined with other conversations I had with barristers and judges, the message is clear: s.41 applications are not routinely made. Moreover, the overwhelming impression to be drawn is that the legal profession feels embattled by the ever-mounting public and political discourse, supported by studies[3] of dubious methodological validity,[4] which claim that s.41 applications are common, usually successful, and therefore must be stopped. Due to their openness in showing me their case files, I have little reason to doubt the veracity of the claims made by my interviewees (especially those who prosecute more than defend) and my

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[2] This point was corroborated by **Barrister 7**, **Barrister 8**, **Barrister 9**, and **Barrister 10**, as well as all counsel I raised the topic with in casual conversation during my observations.

[3] R Durham, R Lawson, A Lord and V Baird DBE QC, *Seeing is Believing: the Northumbria Court Observers Panel Report on 30 Rape Trials 2015-16* (Vera Baird Police & Crime Commissioner, 2017); LimeCulture Community Interest Company, *Application of Section 41 Youth Justice and Criminal Evidence Act 1999: a Survey of Independent Sexual Violence Advisors (ISVAs)* (September 2017); O Smith, *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths* (Basingstoke: Palgrave MacMillan, 2018), Chapter 4; J Temkin, JM Gray and J Barrett, 'Different Functions of Rape Myth Use in Court: Findings From a Trial Observation Study' (2016) 13(2) *Feminist Criminology* 205.

[4] See L Hoyano, *The Operation of YJCEA 1999 Section 41 in the Courts of England and Wales: Views from Barristers' Row* (Criminal Bar Association, 2018), paras 9-42.

findings are supported by the recent wide-ranging report on s.41 conducted by Hoyano.[5]

The number of applications made is, however, largely beside the point. What matters is the number of *successful* applications, and whether judges are correctly applying the law in granting them. Given the seemingly low frequency of applications made, when barristers *do* make an application they must be reasonably confident in its success:

> **Barrister 1**
> I think you don't make them unless you think you've got a really good argument these days. Because there's lots of case law, which you should know, so you should know whether you've got a sound argument.

In my 22 trial observations (ten of which involved sexual offence allegations), only **Case 11** and **Case 12** (where **Barrister 1** was defence counsel) involved s.41 applications; the former was partially granted, while the latter was granted in full. My interviewees suggested I was fortunate to see these successful applications, though, as such success was rare:[6]

> **Barrister 4**
> They never work when you make [s.41] applications, you know. I think judges are very nervous to allow you to go beyond the scope. They really think very, very carefully, and you've really got to work hard to get permission to cross examine on previous sexual history. […] Or perhaps […] I'm just ineffectual [in getting s.41 applications in]. But I don't think I am ineffectual. I think judges are really loathe to say this is relevant. […] In the last 10 years, I've only been successful on, really, one occasion.

Two primary reasons are offered for this apparent low success rate. The first is, again, public and political (as well as legal) pressure on counsel and judges to better protect complainants and witnesses. The second is the restrictiveness of the law, which will be analysed in this chapter.

6.2. Sexual History and Trial Tactics

As with BC, just because SH evidence relating to the complainant is available does not necessarily mean that an application will be made. The decision to make a s.41 application is highly context-sensitive, and the risk of a successful application backfiring is even greater. Though the SH of the complainant may conceivably have an effect on decisions to prosecute,[7] once the decision to proceed has been made SH is unlikely to have an effect on the prosecuting advocate's decision to call the complainant. In addition,

[5] Ibid.
[6] Corroborating statements were given by **Barrister 2**, **Barrister 3**, **Barrister 5** and **Barrister 7**.
[7] This issue would have been explored had CPS access been obtained.

unlike general BC, there appear to be greater pressures on barristers from their clients to cross-examine complainants on matters of SH.

One aspect of trial strategy which was not mentioned in my data was the possibility of the tit-for-tat gateway for defendant BC (s.101(1)(g) CJA 2003) being opened by a successful s.41 application. The theoretical possibility remains open,[8] if the cross-examination concerns SH which involves 'reprehensible behaviour' (s.106(2)).[9]

6.2.A. Sexual History Backfiring

If cross-examining a witness on their BC can lead to the jury taking an unfavourable view of counsel, the danger may be even more pronounced when cross examining a sexual assault complainant about their sexual past:

> **Barrister 10**
> [Y]ou have to be very wary as to whether you need it or not, I think. And the majority of cases don't call for it – that's my view. But even the cases where it might be borderline, you have to consider how the jury might react to it. And losing [the judge] as well. […] You have to question: is it worth arguing it?

It is taken as read that complainants in sexual offence cases are vulnerable,[10] and barristers are well aware of the media and academic scrutiny attracted by complainants' treatment in the witness box.

That cross-examining the complainant on matters of SH, following a successful s.41 application, can seriously backfire may be illustrated by **Case 12**. Defence counsel (**Barrister 1**) successfully applied to ask C questions about her allegedly masturbating with three fingers during the week preceding the alleged sexual assault, in order to suggest an innocent explanation for tears to her hymen. C withstood this questioning, and was robust in stating that the messages where she had claimed to have done this were fiction – she was just flirting with a boy. The prosecution (**Barrister 7**), in her closing speech, described the questioning as a 'particularly unpleasant part' of the defence case, questioning 'to what depths won't [D] go?'. She also asked the jury to consider how embarrassing it would have been for C to answer questions about masturbation in public court.

In response, **Barrister 1** felt this was an outrageous attack on herself, and in between the closing speeches she told me that it was 'not on' that D was being attacked by the prosecution for the decisions of his counsel. After getting wind of **Barrister 1**'s discontent, **Barrister 7** admitted to me that

[8] See *Renda (Ball)* [2005] EWCA Crim 2826, [2006] 1 WLR 2948.
[9] See §4.3. for a discussion of what behaviour qualifies as both reprehensible and sexual.
[10] YJCEA 1999, s.17(4).

perhaps she went a bit too far,[11] but that the case had made her particularly angry. Defence counsel attempted to rebuff **Barrister 7**'s attack in her own closing speech by stating that the judge had signed-off on this line of questioning, and that asking these questions was a matter of her own (not D's) judgement. Moreover, **Barrister 1** reiterated the potential relevance of the masturbation as providing an innocent explanation for the tears to C's hymen. Prosecution counsel later apologised in front of the jury during the sentencing hearing for her criticism of **Barrister 1**, but by that point any damage had already been done – D had been found guilty. The points that **Barrister 7** made in her closing speech, though, are surely ones which might have occurred to jurors themselves at the time of the actual cross-examination.

The choice to make a s.41 application, then, is a delicate one. In **Case 12**, it is difficult to disagree with the decision to cross-examine C on the possible alternative explanation for relevant injuries – especially as penetration was denied. Without this evidence, D was sure to be found guilty. The risk that the jury would find the cross-examination distasteful was one which had to be taken. As with BC, counsel must make cost/benefit analyses as to whether adducing SH evidence is worth the possibility of alienating jurors.

6.2.B. Client Pressure

It is not only the jury's expectations which must be considered, but the defendant's. This factor was mentioned primarily by **Barrister 10**, however there is support from some other interviewees and my trial observations, as well as in the wider literature on lawyer negotiations.[12] Pressure from one's client is commonplace:

> **Barrister 10**
> Particularly defendants that are charged with offences of a sexual nature, they feel like their lives are ending.

This is understandable, and would have been plain to any observer of the trials I watched. This heavy emotional toll led to several defendants pushing back on counsel's advice. In **Case 8**, which concerned a female babysitter charged with sexually assaulting two young brothers, defence counsel told the court that she was advising against the calling of several witnesses following disclosure of evidence which would severely undermine the claim

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[11] Indeed, it may have come close to breaching the rule in *Ekaireb* against commenting on the personal conduct of opposing counsel in speeches; *Ekaireb* [2015] EWCA Crim 1936, [2016] CrimLR 291.

[12] A Boon, *The Ethics and Conduct of Lawyers in England and Wales* (Oxford: Hart, 2014), 657.

they would make. Prosecuting counsel (**Barrister 7**) later explained to me that D wished to call her sister and mother in support of her claim that she had been repeatedly raped by her brother. However, the sister and mother gave statements to the police describing D as delusional. D was told about this conflicting evidence but pressured her barrister to call her relatives anyway. It was only after several hours of persuasion that defence counsel convinced her that calling the witnesses would be detrimental to her case.

Pressure was also evident in **Case 12**. Here, D was charged with sexually assaulting a teenager in the back of his car. D had some familiarity with trial process, and so took it upon himself to trawl through the disclosed material for any evidence which could be used against C. This personal investigation led to a s.100 application concerning C allegedly fabricating claims of being bullied, though following further investigation defence counsel dropped the application.[13] D's investigation also led to pressure on his barrister to apply to adduce the fact that C had made a prior allegation of rape against her father, though this never materialised.

The salience of the defendant's wishes to make s.41 applications is underlined by an example offered by **Barrister 10**. She had defended a sexual offence case where the issue was consent. In text messages between the complainant and defendant, the complainant had claimed that she did not like anal sex. The defendant wanted **Barrister 10** to investigate whether this claim was a lie:

> **Barrister 10**
> [I]t wouldn't matter whether or not she was telling the truth in those messages, that she doesn't like anal sex. Why would we, as the defence, go off on a exploration of whether she's had anal sex before? The fact that she said [in the messages] that she doesn't like it suggests that she has had anal sex before, because she *knows* she doesn't like it. […] As his barrister, *I know* that the judge is not going to allow it because the test is so restrictive – deliberately so. But tactically what is to be gained from humiliating her, and degrading her, in front of a jury? How is that going to help my client? The jury are just going to dislike me, and therefore him, if I put her through something like that. Whereas a much softer approach with her would be far more effective. […] I'll say to [the defendant] "that's what *they want us to do*! Because then she'll get the opportunity to get all embarrassed and cry in court, and *I don't want that*, I want the focus to be on *you [the client] as the victim* having had a false allegation been made against you. *Not* to give the impression of this *poor woman* that's come into court, and now she's being examined about previous sexual history just to make everything even worse!"

[13] See §5.2.B.

From the accused's perspective, given the possibility of their life falling apart and collateral sanctions associated with the label of 'sex offender', their desire to attack the complainant is understandable. This can generate pressure on barristers to make s.41 applications which they may think would serve to undermine the defence case, and potentially lose the jury. **Barrister 10**'s solution is to explain the potential risks of cross-examining on SH backfiring. Reflecting more generally, **Barrister 8** commented:

> **Barrister 8**
> Ultimately, you're constrained as the defence was in the case you've just seen [**Case 13**][14] by the fact that your client might have ideas that are different to yours. And some people are more robust with their clients than others. […] Sometimes, a client loses a case all on their own.

Barrister 8 explained that 'robustness' with clients involves being confident in one's approach, and persuading clients against giving instructions which would be contrary to their interests. However, if a client remains unpersuadable, counsel must follow their instructions even if they judge it ill-advised.[15]

6.3. SECTION 41 – PRELIMINARY ISSUES

Evidence of, or questions relating to, extraneous sexual behaviour of the complainant are subject to a *prima facie* rule of exclusion under s.41 YJCEA 1999, within which are four limited gateways to admissibility. If evidence is admitted through one of the four s.41 gateways, there is no residual discretion to exclude it or limit its impact.[16] Before analysing those gateways, three prior considerations arise.

6.3.A. The Credibility Bar

Section 41(4) places a significant restriction on three of the four gateways within s.41 (all but gateway (d)). Sexual history evidence is not admissible if its 'purpose (or main purpose)… [is] for impugning the credibility of the complainant'. As §3.3.B. concluded that SH is not relevant to (general) credibility at all, this might seem a welcome reminder for trial and appellate judges. However, s.41(4) does not distinguish between specific and general credibility, and so there is a danger that SH evidence that is relevant and

[14] **Barrister 8**'s reference here to **Case 13** (in which she prosecuted) concerned a prior conversation where she thought that defence counsel's best efforts were undermined by the defendant pushing an 'absurd' defence and being overly hostile and dismissive when giving evidence.

[15] Barrister's Code of Conduct: The Code of Conduct (4th edn, Bar Standards Board, 2019), section C3.

[16] *F* [2005] EWCA Crim 493, [2005] 1 WLR 2848, [2005] 2 CrAppR 13 [29] (Judge LJ). Although s.78 PACE would not apply, presumably hearsay SH evidence would need to satisfy ss.114-136 CJA 2003.

probative of a complainant's specific credibility may be excluded as well.[17]

It was noted in *F*[18] and *Evans*[19] that, ultimately, any evidence which challenges the evidence given by the complainant challenges their credibility. Therefore, the words 'purpose' and 'main purpose' in s.41(4) are extremely important.[20] The Court of Appeal has indicated that trial judges should not take the defence's stated purpose(s) for adducing the evidence at face value. A court may substitute its own analysis if it appears that the 'true' motive for adducing SH is to impeach the complainant's credibility.[21]

6.3.B. Specific Behaviour

A further restriction contained in s.41(6) is that the SH must relate to *specific* sexual behaviour of the complainant. This prevents defence counsel going on SH 'fishing expeditions' in cross-examination. In the case law, s.41(6) has received a strict interpretation. In *Darnell*,[22] semen not belonging to the defendant was found on the complainant's underwear and the defendant sought leave to cross-examine the complainant regarding its source. However, as the defence could not specify the sexual behaviour which led to the semen being deposited, leave was refused.[23] This restrictive interpretation was confirmed in *White*,[24] where it was held that providing a date and a place for the prior sexual behaviour is not specific enough to satisfy s.41(6).[25] Interviewees considered this to be a considerable initial hurdle in making s.41 applications:

> **Barrister 3**
> It has to be really specific. And in the majority of cases there isn't that specificity available.

The restrictiveness of s.41(6) prompted Rook and Ward to consider the provision a 'rock[] lurking under the surface… [which has] the capability to threaten the fairness of trials',[26] which certainly appears plausible (at least on this point) following *Darnell*.[27] Another implication of s.41(6) is that it bars evidence of general sexuality,[28] and so in same-sex sexual assault cases

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[17] See discussion of *Singh* [2003] EWCA Crim 485 at §6.7.A.
[18] *F* [2005] (n16).
[19] *Evans* [2016] EWCA Crim 452, [2016] 4 WLR 169, [2017] 1 CrAppR 13, [2017] Crim LR 406.
[20] Ibid, [49] (Hallett LJ).
[21] *Darnell* [2003] EWCA Crim 176, [2003] All ER (D) 24 (Feb).
[22] Ibid.
[23] Ibid, [44] (Potter LJ). However, my empirical data suggest that this evidence would nowadays be reasonably easy to admit via gateway (d) – see §6.7.B.
[24] *White* [2004] EWCA Crim 946, (2004) 148 SJLB 300.
[25] Ibid, [16] (Pill LJ).
[26] P Rook and R Ward, *Rook and Ward on Sexual Offences Law and Practice* (5th edn, London: Sweet & Maxwell, 2016), para 26.178.
[27] Although the Court of Appeal also considered that had the questioning passed s.41(6) it would still have been denied by s.41(4); *Darnell* (n21), [39]-[40] (Potter LJ).
[28] Strictly speaking, evidence of sexuality is not evidence of 'sexual behaviour' or 'sexual experience' in the first place, and so logically should avoid s.41 altogether. However, the courts

the defendant cannot adduce general evidence of the complainant's homosexuality in order to suggest that they are more likely to consent to homosexual sex than a heterosexual person would be.[29]

6.3.C. Relevant Issue in the Case

For the purposes of gateways (a), (b) and (c), SH evidence is admissible only if it relates to a 'relevant issue in the case' under s.41(3). Additionally s.41(2), which applies to all four gateways, states that even if SH evidence passes through one of the gateways, it is only admissible if 'a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any *relevant issue in the case*'.[30] The term is defined in s.42(1)(a) as 'any issue falling to be proved by the prosecution or defence in the trial of the accused'. On a strict reading, this appears to confine admissible SH to material issues, primarily the elements of the specific offence to be proved and any defences raised. For example, in **Case 12** the s.41 application concerned SH which was said to provide an alternative explanation for the hymen injuries of C allegedly caused by the defendant's fingers: the relevant issue was penetration.

On this interpretation, issues which are not technically elements of an offence, such as motive or prior knowledge, or any collateral issues, may be outside this definition. In the first few years of s.41's operation, there was some controversy regarding this,[31] but the matter was settled in *A (No 2)* where Lord Hope considered, in the context of gateway (a), that bias, motive and prior knowledge could, and should, all be considered 'relevant issues' depending on the facts of the particular case.[32] Though this approach was doubted in *Darnell*,[33] subsequent appellate decisions have unanimously followed Lord Hope's approach in focussing on the facts of the case.[34] For example, in both *Martin*[35] and *F*[36] it was held that SH evidence going to the complainant's motive to fabricate the current allegation against the defendant could qualify as 'relevant issues'. However in *W*,[37] SH evidence suggesting that the complainant knew the defendant before the incident

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have assumed that s.41 applies here: *Beedall* [2007] EWCA Crim 23, [2007] Crim LR 910.

[29] Ibid.

[30] Emphasis added.

[31] D Birch, 'Rethinking Sexual History Evidence: Proposals for Fairer Trials' [2002] *Criminal Law Review* 531, 536; D Birch, 'Untangling Sexual History Evidence: A Rejoinder to Professor Temkin' [2003] *Criminal Law Review* 370, 380-381.

[32] *A (No 2)* [2001] UKHL 25, [2002] 1 AC 45 (HL), [2001] 2 WLR 1546 [79] (Lord Hope).

[33] *Darnell* (n21), [42]-[43] (Potter LJ).

[34] Cf. Judicial training which advised that 'motive' could not be a 'relevant issue' for the purposes of s.41: P Mott, Section 41 Youth Justice and Criminal Evidence Act 1999 Handout, Western Circuit RASSO Course (28 February 2015), para 31 (on file with author).

[35] *Martin* [2004] EWCA Crim 916, [2004] 2 CrAppR 22.

[36] *F* [2005] (n16).

[37] *W* [2005] EWCA Crim 2134.

which formed the facts of the current charge was held not to be a 'relevant issue in the case' as it had no bearing on the question of whether the defendant sexually assaulted her and kept her prisoner. Whether a motive or prior knowledge is considered a 'relevant issue in the case' can also depend on the defence argument. In *T*,[38] the complainant's alleged motive for bringing the current allegation against the defendant was held to be a 'relevant issue in the case' as the defence was a complete denial of the facts. The Court of Appeal suggested that the test would not have been satisfied had the defence been one of consent.[39]

Since the credibility bar under s.41(4) does not apply to gateway (d), the complainant's veracity can be a 'relevant issue in the case' for the purposes of that gateway. Although sensible from a practical point of view, it appears to do violence to the language of the definition in s.42(1)(a) to consider credibility an 'issue falling to be proved by the prosecution or defence'. In light of these interpretive complexities, some have proposed that the YJCEA 1999 be amended to give a clearer definition of 'relevant issue in the case'.[40]

My empirical data add little to this discussion. Interviewees did not consider this to be a prominent issue in practice. There may be a working assumption that s.41 applies to any contested issue in a given case.

6.4. GATEWAY (A)

The first gateway to admissibility is found in s.41(3)(a) YJCEA 1999, which states that SH evidence is admissible if:

> the evidence or question relates to a relevant issue in the case and…
>
> (a) that issue is not an issue of consent

In addition, the SH evidence or question is admissible only if 'a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case' as set out in s.41(2)(b) (the 'unsafe conclusion' test). Gateway (a) was not mentioned by any barristers in interview, though there is voluminous case law on the provision, and one of the two observed s.41 applications was made under it.

Though credibility is not an issue of consent, the Court of Appeal has maintained that s.41(4) prevents gateway (a) being used for this purpose.[41]

[38] *T* [2012] EWCA Crim 2358, [2013] Crim LR 596.
[39] Ibid, [16] (Moses LJ).
[40] N McEnvoy-Cooke, D Wolchover and A Heaton-Armstrong, 'Two Aspects of the Statutory Restriction on Introducing a Complainant's Sexual History' in P Radcliffe, GH Gudjonsson, A Heaton-Armstrong and D Wolchover (eds), *Witness Testimony in Sexual Cases: Evidential, Investigative and Scientific Perspectives* (Oxford: OUP, 2016), paras 5.10-5.18.
[41] *C and B* [2003] EWCA Crim 29; *Darnell* (n21).

A complainant's 'state of mind' is an issue for which relevant SH evidence may be admitted through gateway (a). For example, in *T*[42] evidence that a complainant had sent sexually suggestive photographs of herself to the defendant was held to be admissible via gateway (a) as they were relevant and probative of the complainant's state of mind towards the defendant.

As a complainant's motive to make an allegation against the defendant can be a 'relevant issue in the case', SH evidence related to that motive may theoretically pass through gateway (a). However, the courts have generally been wary of admitting motive evidence in this way unless SH is strongly probative of motive.[43] For example, in *Martin*[44] the defendant wanted to give evidence that the complainant was pestering him to have sex with her, and that on one occasion he awoke to find the complainant performing oral sex on him which he forced her to stop. It was held that the sexual element added greatly to the complainant's potential motive to fabricate her allegation of indecent assault against the defendant, as being rejected mid-sex act would likely cause greater resentment than merely verbal rejections.[45] Similar reasoning has been applied to proving a young complainant's prior knowledge of sexual matters, where the Court of Appeal has held that SH should only be admissible if the argument cannot be adequately advanced using other evidence.[46]

A novel argument is suggested by *Conn*.[47] Part of the prosecution case involved referring to the complainant's drastic changes in mood and behaviour contemporaneous with the defendant's alleged offences in 1976. The defence wished to point to other sexual allegations the complainant had made around the same time as an alternative explanation for behavioural changes.[48] Though the evidence was ultimately held inadmissible for other reasons,[49] the Court did not deny the applicability of gateway (a) in principle. 'Explanations for the complainant's behaviour' is therefore another issue to which SH evidence may be adduced via (a).[50]

Gateway (a) was employed in the s.41 application in **Case 11**, where D

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[42] *T* [2012] (n38).
[43] *Mokrecovas* [2001] EWCA Crim 1644, [2002] 1 CrAppR 2; *Moody* [2019] EWCA Crim 1222, [2019] CrimLR 975 [15] (Rafferty LJ).
[44] *Martin* (n35).
[45] Ibid, [33]-[36] (Crane J).
[46] *MF* [2005] EWCA Crim 3376 [18]-[20] (Dyson LJ).
[47] *Conn* [2018] EWCA Crim 1752.
[48] It is unclear why there was no s.100 application, as the prior allegations qualify as BC of those alleged perpetrators; see §4.1.A.
[49] Essentially, the Court took a dim view of the defendant arguing that these prior allegations were untrue for some grounds of appeal, but true for others; *Conn* (n47), [31]-[45] (Simon LJ). See also for the admissibility of false allegations in general §§4.3. and 6.10.
[50] It seems peculiar that gateway (a) was utilised at all in this case. As the defence were responding to prosecution evidence, the more suitable gateway may have been (d); see §6.7.

was charged with rape and putting a person in fear of violence under s.4 of the Protection from Harassment Act 1997. On the rape charge, the defence case was outright denial. In support, the defence made a s.41 application to ask two questions of C:

1. Have there been other occasions where C initially refused sex, but later consented?
2. Did C have consensual sex with D after the alleged rape?

Though the prosecution did not oppose the application,[51] the judge noted that s.41 sets a very high standard and, as the defence were not arguing consent, he did not see the relevance of the first question. However, the judge considered that the second question may bear on the issue of whether the rape occurred.[52] Considering that the purpose of the evidence was not to impugn C's credibility, specific incidents were referred to, and the jury's conclusion might be unsafe were they not to hear the evidence, the judge granted leave. Clearly, the first question could only have had relevance if the defence was consent, and was rightly rebuffed by the judge. The second question came within the remit of gateway (a), and it is reassuring that the judge worked systematically through the statutory tests (s.41(4), s.41(6), and s.41(2)(b)) in coming to the conclusion that the evidence was admissible.

The issue which has generated most doctrinal controversy regarding gateway (a) is the defendant's belief in consent.[53] McEwan even claimed that s.41 is 'powerless'[54] to prevent a complainant being subjected to humiliating cross-examination concerning belief in consent. As was discussed in §3.3.A.iii., for evidence to be relevant to a defendant's honest or reasonable belief it needs to have genuinely had some impact on the defendant's belief regarding the complainant's consent. As with SH going to motive or prior knowledge, the Court of Appeal, applying the 'unsafe conclusion' test in s.41(2)(b), has refused to admit evidence where the defendant is able to advance his argument without referencing SH evidence.[55] Therefore the 'unsafe conclusion' test appears to be a significant 'power' here.[56]

Cases decided since the 'honest belief' test[57] was replaced by a

[51] See §6.8.
[52] The reasoning concerning the relevance of post-incident consensual sex is considered further at §6.6.B.
[53] Cases under the pre-2004 law concern a defendant's 'honest belief' under s.1(1)(b) of the Sexual Offences (Amendment Act) 1976, cases under the post-2004 law concern a defendant's 'reasonable belief' under s.1(1)(c) SOA 2003.
[54] J McEwan, '"I Thought She Consented": Defeat of the Rape Shield or the Defence That Shall Not Run?' [2006] *Criminal Law Review* 969, 969.
[55] *Bahador* [2005] EWCA Crim 396 [12], [14] (Lord Wolf CJ).
[56] See also: *Smith* [2017] EWCA Crim 941.
[57] *DPP v Morgan* [1976] AC 182 (HL), [1975] 61 CrAppR 150.

'reasonable belief' standard in the SOA 2003 have focused mostly on whether a complainant's prior sexual behaviour with third parties is admissible for this purpose via gateway (a). The case law is not entirely consistent. *Winter*[58] held that the defendant's knowledge of the complainant's affair was not only inadmissible, but irrelevant to his reasonable belief in her consent. Whereas in *Gjoni*,[59] the defendant's knowledge that one of his friends had had sex with the complainant was considered arguably relevant to the defendant's reasonable belief[60] – though the Court still held the evidence inadmissible under the 'unsafe conclusion' test. Even for relevant evidence the test in s.42(2)(b) requires high probative value for admissibility. An example is *H*,[61] where evidence of the complainant's prior sexual victimisation was held to be admissible to support the defendant's argument that his knowledge of her history made him check 'assiduously' for consent whenever they had sexual contact throughout their relationship. He would never persist (he said) in the absence of consent.

One final decision worth mentioning here is *Evans*.[62] During the alleged rape, Evans claimed that the complainant used the phrases 'fuck me harder' and 'go harder', and that the complainant was on all fours. The appeal concerned fresh evidence from two witnesses who claimed that they had both had sex with the complainant (before and after the alleged rape) during which she had used the same phrases and been in the same position. Although the case primarily concerned consent and gateway (c),[63] the Court of Appeal thought that the evidence could be considered relevant and admissible regarding the defendant's belief in consent via gateway (a).[64] This reasoning can be criticised as faulty on two grounds. First, evidence cannot be relevant to the defendant's reasonable belief in consent if the defendant did not know about the evidence at the time he formed his belief. Secondly, post-charge sexual behaviour cannot possibly be relevant to *the defendant's* reasonable belief in consent: one's belief in the past cannot be informed by knowledge gained in the future. As the remark was *obiter*, the suggestion made in *Evans* will hopefully be ignored.

6.5. Gateway (b)

Under s.41(3), SH evidence is admissible if:

[58] *Winter* [2008] EWCA Crim 3, [2008] Crim LR 971.
[59] *Gjoni* [2014] EWCA Crim 691, [2014] Crim LR 765.
[60] For criticism of this, see *Gjoni* [2014] Crim LR 765.
[61] *H* [2019] EWCA Crim 1855.
[62] *Evans* (n19).
[63] See §6.6.C.
[64] *Evans* (n19), [72] (Hallett LJ).

the evidence or question relates to a relevant issue in the case and…

(b) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the accused.

Like gateway (a), this inclusionary exception is also subject to the 'unsafe conclusion' test in s.41(2)(b). Gateway (b) applies where the sexual behaviour of the complainant is sufficiently contemporaneous with the sexual behaviour which is the subject of the current charge. There is very little case law concerning gateway (b), suggesting either that it is rarely used, or unproblematic in practice, and so has not required clarification by appellate courts.

The main point of contention has been the scope of the contemporaneity requirement. This was discussed at length in *A (No2)*, with little agreement between the Lords.[65] Taking the speeches together, one may conclude that sexual behaviour which occurred within 24 hours of the alleged crime might in principle be admissible through gateway (b),[66] and that sexual behaviour which is only narrowly outside of this window may be admissible depending on the circumstances of the particular case. However, any sexual behaviour which is further beyond the (approximate) 24-hour window will not be admissible. One application may be found in *Pemberton*,[67] where a prostitute soliciting for clients approximately 24 hours prior to the alleged rape was held to be too remote for gateway (b) to apply.

The only other reported case on gateway (b) is the contentious case of *Mukadi*.[68] Hours prior to the alleged rape, the complainant got into a third party's car and was taken for a drive. Although no sexual contact occurred between them, the Court of Appeal held that s.41 applied and that the evidence was admissible through gateway (b) due to the contemporaneity of the prior behaviour. This decision has been criticised by many commentators[69] as the Court of Appeal seemed to reason backwards that the prior sexual behaviour was relevant to consent *because* it was close in time to the alleged crime. Given the lack of any further case law or empirical

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[65] *A (No 2)* (n32), [9]-[10], [12] (Lord Slynn), [40] (Lord Steyn), [82] (Lord Hope), [132] (Lord Clyde).
[66] See Explanatory Notes to the Youth Justice and Criminal Evidence Act 1999, para 148.
[67] *Pemberton* [2007] EWCA Crim 3201.
[68] *Mukadi* [2003] EWCA Crim 3765, [2004] Crim LR 373. See further criticism at §4.2.C.i.
[69] See *Mukadi* [2004] Crim LR 373; Rook and Ward (5th edn) (n26), para 26.80; C McGlynn, 'Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence' (2017) 81(5) *Journal of Criminal Law* 367, 386.

work on gateway (b)[70] one cannot determine whether pleas for the case to be ignored have been heeded.

My empirical data, unfortunately, shed no further light. Neither of the observed s.41 applications referred to gateway (b), nor was it mentioned by barristers in interview. Hoyano's survey of Criminal Bar Association members found that gateway (b) was the second most popular gateway in her application sample.[71] Its absence from my interview data may suggest that barristers find using this gateway routine and unproblematic.

6.6. Gateway (c)

The third gateway subject to the 'unsafe conclusion' test in s.41(2)(b) is set out in s.41(3)(c). Sexual history evidence is admissible pursuant to this gateway if:

> the evidence or question relates to a relevant issue in the case and…
>
> (c) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar—
>
> i) to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused, or
> ii) to any other sexual behaviour of the complainant which (according to such evidence) took place at or about the same time as that event,
>
> that the similarity cannot reasonably be explained as a coincidence.

Gateway (c) may be utilised if the SH of the complainant is 'so similar' to their behaviour during, or 'about the same time' as, the alleged crime that it 'cannot reasonably be explained as a coincidence'. This provision enables the admission of SH evidence which is relevant for primarily sexual *modus operandi* (MO) purposes, though it could also theoretically admit propensity evidence.[72]

Two strands of case law on gateway (c) merit examination: the first involves ordinary canons of statutory interpretation, the second invokes the 'ECHR gloss' derived from *A (No 2)*.[73]

[70] The empirical part of Kelly et al's study does not distinguish between the four gateways; L Kelly, J Temkin and S Griffiths, 'Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials' (Home Office Online Report 20/06, 2006).
[71] Hoyano (n4), para 88.
[72] See §3.3.A.
[73] *A (No 2)* (n32).

6.6.A. Similarity

The House of Lords in *A (No2)* labelled gateway (c) 'very restrictive',[74] and subsequent Court of Appeal decisions have confirmed a high admissibility threshold.[75] A good illustration of this strand of case law is *T*.[76] The defendant was alleged to have raped (vaginally and orally) the complainant in particular positions inside a climbing frame in a public children's park. The defendant wanted to adduce evidence that he and the complainant had had consensual oral and vaginal sex in the very same climbing frame (and other outdoor venues) and in the same position on several prior occasions. This was presumably to rebut the jurors' common sense generalisation that individuals do not usually consent to sex in children's climbing frames. The Court of Appeal held that the SH evidence was admissible via gateway (c) as the similarities between the prior and current conduct could not be explained as a coincidence.[77]

T is one of the only reported cases where SH evidence was admitted through gateway (c) using ordinary methods of statutory interpretation. Two of my interviewees were able to contribute further examples from their own practice:

> **Barrister 6**
> There was a very particular and very unusual sexual practice that this girl liked to get involved in, and it featured in the allegations. So we used s.41 for that purpose, because the defendant was running consent. I can't remember what [the peculiar act] was, but it *was* very unusual. And he said he'd had consensual sex with this girl, and this [peculiar act] had happened. She said it was a straightforward rape, and the fact that she had a predilection for this, which we were able to establish through other evidence, the judge said "yes that can go in", because that's what his account is. So I used it then. […] I've been racking my brain trying to think what that peculiar act was, but it was during intercourse. But I do remember thinking "Gosh that's a bit unusual!".
>
> **Barrister 9**
> [I had] a case where my client was said to have multiply raped a woman who he'd been having a relationship with who he'd met online. Their relationship, he was saying, was based around their mutual enjoyment of BDSM. And, some of the things that she was alleging, that he had done to her, were BDSM-related. And she was saying that she didn't consent to those because she wasn't into that sort of thing. And we were saying that she actively consented because she very

[74] Ibid, [9] (Lord Slynn). Cf. Lord Hutton at [159] and M Redmayne, 'Myths, Relationships and Coincidences: The New Problems of Sexual History' (2003) 7(2) *International Journal of Evidence and Proof* 75, 96-99.
[75] *Guthrie* [2016] EWCA Crim 1633, [2016] 4 WLR 185, [2017] 1 CrAppR 27 [11] (Sir Brian Leveson P). Cf. McGlynn (n69), 377-384.
[76] *T* [2004] EWCA Crim 1220, [2004] 2 CrAppR 32.
[77] Ibid, [14]-[15] (Waller LJ). Prior instances of oral sex were also admitted using the 'ECHR gloss'.

> much *was* into that sort of thing and that they'd done it before. And they'd been to clubs and done it before *in front of people* as well [laughs]. And so that was successful. I think that was [gateway] (c).

Though **Barrister 6** could not remember the nature of the peculiar act, it is clear she considers gateway (c) as covering only particularly unusual sexual practices. **Barrister 9**'s example concerns the complainant's prior consensual engagement in BDSM, which was admitted in order to rebut what might have been the jury's assumption that this particular complainant would not normally consent to BDSM-style sex.[78]

Aside from *T*, the Court of Appeal has been hesitant to admit evidence via gateway (c). In *Hamadi*,[79] the alleged similarities between prior sexual behaviour and the facts of the current charge were: the complainant instigated sexual contact, the sex was in a public place in winter, and the complainant had a boyfriend at the time. Although somewhat similar, these facts were held not to be *sufficiently* similar to be admitted through gateway (c).[80] In considering similarity, the Court of Appeal has highlighted the importance of identifying relevant *dis*similarities as well, as these will count against admissibility.[81]

6.6.B. The 'ECHR Gloss'

The restrictiveness of the similarity test in gateway (c) led the House of Lords in *A (No 2)* to conclude that it could exclude evidence in breach of a defendant's right to a fair trial under Art 6 of the European Convention on Human Rights (ECHR).[82] Using the interpretative obligation under s.3 of the Human Rights Act (HRA) 1998, Lord Steyn formulated the following test (the 'ECHR gloss') to which all of the Law Lords assented:

> [T]he test of admissibility is whether the evidence (and questioning in relation to it) is… so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under article 6 of the Convention. If this test is satisfied the evidence should not be excluded.[83]

As *A (No2)* concerned prior sexual behaviour with the defendant, some have argued that the ECHR gloss could and should not be used to admit evidence of prior sexual behaviour with a third party.[84] Although one early decision

[78] The evidence might have had an easier ride through gateway (d), as it would have rebutted prosecution evidence that the complainant did not like BDSM.
[79] *Hamadi* [2007] EWCA Crim 3048.
[80] Ibid, [23] (Moore-Bick LJ).
[81] *Harris* [2009] EWCA Crim 434, [2010] Crim LR 54.
[82] *A (No 2)* (n32), [45] (Lord Steyn). Although there was some disagreement as to whether gateway (c) breached Art 6 ECHR in general, or whether breaches would be fact specific, see Lord Hope's speech at [102]-[106].
[83] Ibid, [45] (Lord Steyn); for agreements see [15] (Lord Slynn), [111] (Lord Hope), [140] (Lord Clyde), [163] (Lord Hutton).
[84] J Temkin, 'Sexual History Evidence – Beware the Backlash' [2003] *Criminal Law Review* 217,

supports this view,[85] more recent cases have reasoned that as Lord Steyn's test does not distinguish defendant from third party SH evidence, the gloss is of 'general application'.[86]

The fairness test applies to the fact-specific context of individual cases, and so it is perilous to draw general conclusions from particular applications.[87] What is tolerably clear is that the ECHR gloss has led to SH evidence being admitted where it would have been excluded using ordinary canons of statutory construction. In *R*,[88] for example, there was evidence that the complainant and defendant had been in a sexual relationship before *and after* the alleged rape. Though there were no specific similarities between the complainant's sexual behaviour before, during, and after the alleged rape, the evidence was held to be 'so relevant' to the issue of consent that exclusion would deprive the defendant of a fair trial.[89] The ECHR gloss has also led to evidence of a prior sexual relationship between the complainant and defendant being admitted where it was both vital background information and necessary for the defendant to argue a 'cornerstone'[90] of his defence of denial. However, the ECHR gloss argument is not always successful. There are cases where the SH evidence has not been sufficiently probative to secure its admission.[91]

In my interviews, evidence of consensual sex between the complainant and defendant *after* (or before *and* after) the alleged sexual offence, as in *R*, was considered to be one of the primary uses of the ECHR gloss:[92]

> **Barrister 1**
> I've been involved in cases where there has been a significant sexual relationship *after*. Which is probably far more important in terms of the jury's consideration of the case and anything that's happened before. Because, the $64 question is: "why would they continue in a sexual relationship if they then say they've been raped?".

If the defence is running consent, post-allegation consensual sex will be inadmissible without the ECHR gloss unless it was within 24 hours (gateway (b)) or was particularly unusual (gateway (c)). These two scenarios are exceptional. Consequently, **Barrister 1**'s $64 question would be inadmissible in the absence of greater flexibility in the application of s.41. There may, of

240; Kelly *et al* (n70), 19.

[85] *White* (n24).

[86] *Hamadi* (n79), [18] (Moore-Bick LJ); *Evans* (n19); HM Malek (ed), *Phipson on Evidence* (19th edn, London: Sweet & Maxwell, 2018), para 22.45.

[87] P Green, 'Dispelling the Rape Myths: An Evaluation of s.41 of the Youth Justice and Criminal Evidence Act 1999 in Light of Recent Reform Proposals' (2018) 6(2) *Legal Issues Journal* 1.

[88] *R* [2003] EWCA Crim 2754.

[89] Ibid, [20], [34] (Mantell LJ).

[90] *F* [2005] (n16), [15] (Judge LJ).

[91] *Beedall* (n28); *MM* [2011] EWCA Crim 129.

[92] Examples were also given by **Barrister 7** and **Barrister 10.**

course, be alternative explanations, such as the complainant consenting due to fear of future violence. But the fact that, applying s.41 to its letter, the question could not even be put to the complainant would surely deny the defendant a legitimate line of inquiry, and potentially render the trial unfair. The ECHR gloss is a vital safety valve here.

Regarding pre-allegation consensual sex, barristers argued that the ECHR gloss was a necessary remedy to the inflexibility of s.41 which, if strictly applied, would prevent the jury from knowing that the complainant and defendant had been in a long-standing relationship. This could be necessary background evidence to contextualise disputed events.

> **Barrister 2**
> I think it could be argued that maybe whoever framed s.41 didn't completely think it through as to just how strict it was going to be. As of course you'll be aware of the House of Lords decision [in *A (No 2)*]. And I've certainly had cases where we've had to have recourse to that. So I can see a sense in which [relationship evidence] is a loophole which could do with tightening up. In practice, I don't think it does cause many problems, as normally these things are solvable by common sense on all sides. But it is certainly arguable that that is a failing within s.41.
>
> **Barrister 9**
> In terms of s.41, I think it is too restrictive. Because I think it is obviously relevant if the allegation arises in the course of an ongoing relationship but the jury can't hear about how many other previous times they've done X and it's been apparently consensual. Because I think that just gives the jury a false impression, if they don't hear about that. Or it's potentially misleading.

In practice, then, it appears that the ECHR gloss is being employed with reasonable frequency in order to admit relationship evidence as background. Without it, the trial may be unfair because the evidence would be incomplete, and the jury would possibly be misled as to the nature of the relationship between the parties.

6.6.C. The Evans Case

The most significant decision since *A (No 2)* concerning gateway (c) is the contentious case of *Evans*.[93] The case concerned the complainant's use of the phrases 'fuck me harder' and 'go harder', and the sexual position involving the complainant being on all fours. These facts were said to be present during the alleged rape, and during the complainant's prior and post sexual experiences with two other men. One of the many remarkable things about the Court of Appeal's decision in *Evans* is its failure to clarify whether it was applying gateway (c) according to its ordinary wording or whether it

[93] *Evans* (n19).

was utilising the ECHR gloss. The Court first elaborated on the ordinary wording of gateway (c) in stating that the prior sexual behaviour 'does not have to be unusual or bizarre; it has to be sufficiently similar that it cannot be explained reasonably as a coincidence',[94] implying that the evidence might have been admissible on similarity grounds. However, the court then went on to state that the case was one in which it was appropriate to use the ECHR gloss from *A (No 2)*.[95] One criticism made of *Evans* is that it blurs the distinction between the two different uses of gateway (c) which had, until this ruling, been considered separate.[96]

We have seen that the bar set by the ordinary interpretation of gateway (c) is exacting; appellate courts rarely consider it satisfied. If the relatively common phrases and positions used by the complainant in *Evans* are considered 'so similar… that they cannot be explained as a coincidence', then the bar has now been significantly lowered.[97] It might be thought preferable that *Evans* be interpreted as a decision using the ECHR gloss, yet even by this relaxed standard the decision seems generous to the defendant. Subsequent cases concerning gateway (c) have not mentioned *Evans*,[98] possibly implying that it will be treated as a fact-specific decision. Moreover, in one recent case concerning similarity,[99] the Court of Appeal seems to have returned to its prior methodology of weighing up similarities *and dissimilarities* when determining admissibility.

Reflecting media furore surrounding *Evans*, and the defendant's subsequent acquittal on being retried, the case was a hot topic amongst barristers. The majority felt that the evidence was properly admitted using the ECHR gloss. Two respondents, though, thought that the case was decided on similarity grounds, and they expressed polar assessments:

> **Barrister 3**
> [The evidence was] only admitted because the woman had a specific thing that she did.

(*I challenge that it was not* that *specific*)

> Being fucked from behind and shouting "fuck me harder"?

(*I say that that is not a particularly unusual situation*)

> No, but he says this happened. […] He said from the outset that "this is what happened, this is what she did". They're able to prove that is how she likes to have intercourse. She says, "no it didn't, I didn't want it". How was he to know, when he answers questions in interview, that that's normally how she likes to have sexual intercourse. It's

[94] Ibid, [73] (Hallett LJ).
[95] Ibid, [74] (Hallett LJ).
[96] *Evans* [2017] Crim LR 406, 410; MJ Thomason, 'Previous Sexual History Evidence: A Gloss on Relevance and Relationship Evidence' (2018) 22 *International Journal of Evidence and Proof* 342.
[97] See further: McGlynn (n69), 382-387.
[98] See *Guthrie* (n75); *Smith* (n56); *Aidarus* [2018] EWCA Crim 2073.
[99] *Aidarus* (ibid).

> pretty specific isn't it? […] I felt in that case [admitting the SH] was the right thing.
>
> **Barrister 5**
> The Ched Evans decision caused me some slight discomfort, because I felt that greying men in their 60s and 70s, however old they are, to be making a decision on what they felt was an unusual sexual practice. I think a panel of people my age would come to a very different conclusion, about the way the complainant behaved and whether that was particularly unusual. I don't think it is. But they obviously thought that it was, that it was unusual and similar, and for that reason let it in. But I guess that's more the application than the standard.

The key message to draw is that *Evans* has instilled great confusion. Barristers did not agree on what basis the Court of Appeal made its decision, and neither do leading practitioner works.[100] Far from opening the floodgates to more SH evidence in trials, as feared by some commentators,[101] *Evans* is being confined to its facts by most practitioners. Indeed, anecdotally one trial judge disclosed to me that most of their judicial colleagues considered the *Evans* decision to be 'unreasoned and ridiculous', and so it is largely being ignored in practice. It would appear that normal service has since resumed.

6.7. Gateway (d)

The fourth and final gateway to admissibility for SH evidence can be found in s.41(5) which applies if:

> the evidence or question—
>
> (a) relates to any evidence adduced by the prosecution about any sexual behaviour of the complainant; and
>
> (b) in the opinion of the court, would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the accused.

Like gateways (a)-(c), gateway (d) is subject to the 'unsafe conclusion' caveat in s.41(2)(b).[102] Significantly, the credibility bar in s.41(4) does not apply to gateway (d), and so evidence which has as its primary or main purpose the undermining of the complainant's credibility may be admitted through the gateway. This is just as well, as rebutting the complainant's evidence will often be aimed at undermining their specific credibility.

A complainant's evidence-in-chief is considered 'evidence adduced by the

[100] *Blackstone's* treats *Evans* as an 'ECHR gloss' case, while *Rook & Ward* treats it primarily as a similarity case: D Ormerod D and P Perry (eds), *Blackstone's Criminal Practice 2020* (Oxford: OUP, 2019), F7.45; P Rook and R Ward, *Rook and Ward on Sexual Offences Law and Practice: First Supplement* (5th edn, London: Sweet & Maxwell, 2019), paras 26.96A-26.96J.

[101] McGlynn (n69).

[102] Though Birch argues it is unnecessary for this gateway: Birch, 'Rethinking Sexual History Evidence' (n31), 536.

prosecution' for the purposes of the gateway.[103] Moreover, it has been suggested that s.41(5) must be read in light of the principles underlying the decision in *A (No 2)* which may, if the fairness of the trial is at risk, allow the defendant to rebut something said voluntarily by the complainant during cross-examination.[104]

The theoretical breadth of gateway (d) led to one interviewee claiming that (d) is the primary route to admissibility:

> **Barrister 2**
> The basic distinction hinges on whether the issue is consent or not. If the issue is consent, it's much more difficult to get the s.41 evidence in. Because on the face of it, it looks as if it's a way of saying 'well she consented then, therefore she's consenting now'. And that clearly is not an acceptable line of reasoning. But in the cases where the issue is consent, the most common way of getting it in […] is to deal with the prosecution's case. And unless you can present the full extent of the relationship, then you can't answer the prosecution's case. So that's probably, in practice, the most common gateway within which the issue of consent is admitted.

In addition to the ECHR gloss, **Barrister 2** stated that another way to adduce relationship evidence in is via gateway (d). In practice, this would require a co-operative prosecution barrister[105] to lead evidence that there was no such prior sexual relationship, so that it could be rebutted by the defence following a s.41 application.

6.7.A. Rebutting Complainant Evidence

Rook and Ward argue that s.41(5) was intended to apply mainly in cases where the prosecution advance evidence of the complainant's virginity or lack of sexual experience, which the defence could then rebut.[106] Indeed, most appellate decisions regarding gateway (d) concern exactly this situation,[107] though the Court of Appeal has been careful to emphasise that the evidence adduced in rebuttal must go 'no further than is necessary', as required by s.41(5).[108]

Barrister 7, who primarily prosecutes sex offences, said that rebutting sexual inexperience is a common use of s.41, and gave two examples:

> **Barrister 7**
> There's quite a lot of authorities, I think. Where somebody says they're a virgin, or it's their first time, and it turns out there's been

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[103] *Hamadi* (n79), [20] (Moore-Bick LJ).
[104] Ibid, [21] (Moore-Bick LJ).
[105] See §6.8.
[106] Usually to suggest that the complainant would not choose their first sexual experience to be with the defendant; Rook and Ward (5th edn) (n26), para 26.125.
[107] *GS* [2001] EWCA Crim 144; *IWAT (No 2)* [2001] EWCA Crim 1898; *Rooney* [2001] EWCA Crim 2844.
[108] For an example where the rebuttal would have gone too far see *Steltner* [2018] EWCA Crim 1479.

> previous sexual relationships. […] One of the complainants in [a recent historic sex] case, she was in and out of care from when she was about 3: really, really horrific background. But there was quite a lot of evidence in the unused material, social services records and things like that, to suggest that she had been suspected of being engaged in prostitution from a very early age. So she was soliciting from when she was about 11 or something like that. And the reason it may have become relevant was because at one point in her DVD she alleged that she had been a virgin at the time she was abused by the defendant. […] Next week I'm prosecuting another woman, and there's a potential there for some [SH evidence] to go in because of that point. Because actually, again, that's a case where [in] the ABE, the complainant says it was his first sexual experience, but there's stuff in the unused to suggest that actually it wouldn't have been. […] I'm just wondering if that rears its head at the start of the trial. It may well do.

Barrister 9, by contrast, found this argument generally unhelpful in historic cases:

> **Barrister 9**
> I don't think [rebutting virginity] has ever been an issue in one of my cases. Because obviously, a lot of the cases that I deal with, particularly historic ones, you are saying that no activity took place at all.

Recently, the Court of Appeal has stressed the importance of identifying exactly what the defence is intending to rebut. In *Aidarus*,[109] the complainant gave evidence that she had told the defendant that she had never performed oral sex before, however there was other evidence which suggested this was a lie. The defence case was that the complainant had never told the defendant this at all, and so it was held that the defendant was disqualified from rebutting the truth of a statement which he denies was ever made.

Virginity is not the only prosecution evidence which may open gateway (d). For example, the Court of Appeal has held that evidence of pornographic videos and pictures showing the complainant happy and smiling with the defendant were admissible to rebut her claims that their relationship was abusive and unhappy.[110] The defence in *F* were also allowed to cross-examine the complainant regarding a 'pregnancy scare' where she had named different potential fathers for the baby at different times, including during examination-in-chief.[111]

Gateway (d) is entirely dependent on how the prosecution runs its case. Potential problems are highlighted in *Singh,*[112] where the complainant claimed during her evidence-in-chief that she was a virgin. Following the

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109 *Aidarus* (n98).
110 *F* [2005] (n16), [31]-[33] (Judge LJ). In order to mitigate the distress for the complainant, these photos and videos were shown to the jury without the complainant's presence.
111 *F* [2008] EWCA Crim 2859 [23] (Lord Judge).
112 *Singh* (n17).

defendant's subsequent conviction, fresh evidence emerged contradicting the complainant's claim, prompting a retrial. This time, the prosecution chose not to elicit from the complainant her claim of virginity. On appeal, the Court of Appeal held that as the prosecution chose not to adduce the evidence of virginity, there was nothing for the defendant to rebut and so the fresh evidence which suggested that the complainant had lied under oath in the first trial was ruled inadmissible.[113] Therefore 'evidence adduced by the prosecution' refers only to evidence adduced in the current trial. It does not matter how many untruthful claims a complainant may or may not have made about their prior sexual behaviour (including those made during police interviews), if the prosecution chooses not to adduce that evidence[114] then the defendant will be denied the opportunity to undermine the complainant's (specific) credibility by rebutting those claims.

Singh gives further cause for alarm as it is not clear that s.41 was the correct provision to consider. Although the complainant's lying in the first trial concerned sexual intercourse, lying itself is not 'sexual behaviour'. On the other hand, lying amounting to perjury certainly qualifies as evidence of BC. Therefore, admissibility should have been considered under s.100 CJA 2003, rather than s.41. *Singh* suggests a lack of awareness of the differences and overlaps between the BC and SH admissibility regimes (further discussed below), and raises the prospect of probative evidence mistakenly being excluded by applying the wrong exclusionary rule.

6.7.B. Providing an Alternative Explanation

A common argument utilising gateway (d) in my data is the use of SH evidence to supply an alternative ('innocent') explanation for other evidence *prima facie* incriminating the defendant. For example, SH evidence may be relevant in providing an alternative explanation for the presence of semen or other DNA evidence on the complainant:[115]

> **Barrister 5**
> It was about the complainant, who had semen of three other men on her knickers, and I think she said "I would never cheat on my boy-friend, there's no way I would have sex with the defendant because I'm in a committed relationship". I'm not sure I can tell you very reliably what happened, it was a long time ago. But I think some of that went in, I applied for several elements for some other stuff as well. And I think that did go in.

The relevance of the SH in these situations is plain. The prior sex provides

[113] Ibid, [26] (McCombe LJ).
[114] Which may be tactically sensible.
[115] **Barrister 4** gave a similar example.

an alternative explanation for the semen found in the complainant's vagina or underwear – the probative link being particularly strong if DNA tests match with individuals other than the defendant. Without this evidence being admitted, the jury would hear about only one possible source of the semen: the defendant. The defendant would be deprived of a legitimate line of defence, and would undoubtedly be denied a fair trial.

As well as providing an alternative explanation for the presence of DNA, the s.41 application in **Case 12** concerned the use of SH to provide an alternative explanation for physical injuries. D was alleged to have penetrated C's vagina digitally and with his tongue. It was elicited through the evidence of C and an expert medical examiner that C was a virgin, but her hymen was torn. The medical examiner was able to say that the tear was consistent with forced digital penetration, but could not say with certainty that this was the source of the tear. It transpired that a week prior to the alleged assault, C had texted a male friend about her masturbating with three fingers. The defence applied to admit this text using gateway (d) in order to suggest an alternative (innocent) explanation for the hymen tears. Though the prosecution attempted to oppose this application,[116] primarily based on anticipated embarrassment for C, the judge pointed out that it was the prosecution who were raising the damaged hymen as an issue, and that fairness required the defence be able to respond. Having checked with the medical examiner that the tears could have been self-inflicted ('unlikely but not impossible'), the judge granted leave, holding that it was possible the jury would reach an unsafe conclusion on the issue of the hymen tears if the evidence was not admitted. The only other eligible explanation was that D had caused the injury.

From further informal discussions with counsel, I gained the impression that it is relatively easy to successfully argue the admissibility of SH evidence under gateway (d) in order to provide an alternative explanation for *prima facie* incriminating prosecution evidence. The issue has arisen before the Court of Appeal only once. In *L*[117] the Court agreed with the trial judge that evidence that the complainant had been raped once before was admissible in order to provide an alternative explanation for the complainant's current hymen injuries, which were relied upon by the prosecution. However, the evidence was dealt with under gateway (a),[118] as concerning the probative

[116] During a break, the prosecution (**Barrister 7**) admitted to me that she thought the judge was correct to allow this evidence in; though she did not think it so vital that she should not have opposed the application.
[117] *L* [2015] EWCA Crim 741.
[118] Perhaps due to Lord Hope's suggestion that (a) would apply here: *A (No 2)* (n32), [79] (Lord

value of medical evidence.[119] It appears, therefore, that this kind of evidence has two potential gateways through which it may pass with relative ease.

It is understandable why 'alternative explanation' evidence causes few issues. Much of the controversy surrounding SH evidence concerns propensity inferences or states of mind. Here, by contrast, we are concerned with physical evidence (such as semen or genital injuries) which calls for an explanation. Any evidence (whether SH or not) which may assist in providing an explanation for this physical evidence is relevant. After the prosecution leads evidence which supports an inculpatory interpretation, it would be impossible for jurors to make a safe conclusion on that issue if completely shielded from evidence supporting an exculpatory explanation.

6.8. Prosecution Opposition and Agreement

The prosecution is unhindered in admitting evidence of the complainant's SH. The s.41(1) exclusionary rule applies only to the defence. Concerning defence applications under s.41, the role of the prosecution is unclear. Decisions to admit SH evidence are for the court, and nothing in ss.41-43 explicitly refers to prosecution responses to applications. Under the Criminal Procedure Rules (CrimPR), the prosecution is invited to make representations concerning a s.41 application if it 'wants';[120] there is no positive requirement. This is supported by CPS guidance on s.41, which states that prosecutors are not required to oppose applications if they think the admission of the evidence is necessary for a fair trial.[121]

In contrast to other rules of evidence for defendant or non-defendant BC (s.101(1)(a) and s.100(1)(c) CJA 2003), or even for hearsay (s.114(1)(c) CJA 2003), there is no explicit option for SH evidence to be admitted by agreement within s.41:

> **Barrister 1**
> The thing is the prosecution and the defence can't agree. With [bad] character there can be an agreement; s.41 you've got to make an application which has to be in writing.

The Court of Appeal provided some guidance in *Steltner*[122] and *H*,[123] endorsing agreement so long as both counsel, and the judge, agree that the evidence passes the requirements of s.41. This is just as well, as prosecution cooperation in s.41 applications has been noted in several empirical

Hope).

[119] *L* (n117), [43]-[56] (Macur DBE LJ). Gateway (d) was also argued by counsel, but the Court did not engage with this argument in detail.

[120] CrimPR, Rule 22.6.

[121] CPS, *Rape and Sexual Offences* (London: Crown Prosecution Service, 2018), Ch4.

[122] *Steltner* (n108), [21] (Hallett LJ).

[123] *H* (n61).

studies,[124] as well as in my own data:

> **Barrister 2**
> [I]f a man is accused of rape by a woman that he's had a long-standing sexual relationship with […] it would be fairly obvious that there will have been sexual intercourse between them. […] Now, in practice the prosecution and defence will almost certainly come to an agreement about the fact that it would be daft for the jury not to know what would be obvious to them in any event. And the thing would be put in a form that both parties agreed, which doesn't disadvantage either side.

(*I ask approximately how many s.41 applications they make a year*)

> **Barrister 7**
> I've only, in the last 5 years I think I've had maybe 2 or 3. Maybe as low as that. And again, frequently […] counsel just get together and work out what's fair. And certainly, I mean I prosecute and I defend, but as a prosecutor I would always want to be fair. I would never try and keep something out that truly I thought was required for the defendant to have a fair trial.

Much like with agreed BC under s.100(1)(c),[125] adversarial parties are willing to cooperate when they think the admission of the SH evidence would be 'fair'. Unlike for BC, though, an agreement is not sufficient in itself for the evidence to be admitted; it must still somehow navigate s.41. Several strategies can be utilised: the prosecution could adduce evidence itself; the prosecution might lead other evidence which would render the SH evidence admissible by way of rebuttal under gateway (d); or the prosecution might simply 'not oppose' the application.

Regarding the first strategy: in **Case 5**, defence counsel (**Barrister 3**) indicated that she was considering making a s.41 application in order to cross-examine C about his allegedly being a victim of sexual abuse at a care home (which post-dated the events subject to the current trial). Following discussion between counsel, the prosecution (**Barrister 7**) agreed that the later sexual abuse was relevant in setting the context for the current dispute (as C only made the allegations against the present defendants following investigation into the care-home abuse), and consequently referred to this in her opening speech, as well as briefly in re-examination of the complainant. An alternative example is offered by **Case 11**, which involved a s.41 application under gateway (a). In addition, the prosecution led evidence in the form of the C's ABE interview concerning the way in which C and D usually had sex.[126] Here, the defence wanted the evidence in order to provide necessary background to the relationship between the parties, whilst the

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[124] Kelly *et al* (n70), 54-55; LimeCulture (n3), para 27; Hoyano (n4), paras 103-105.
[125] At §5.3.
[126] As argued by Hoyano, this method has the benefit of the complainant not having to give evidence on SH in open court; Hoyano (n4), paras 105.

prosecution wanted it in order to argue that the alleged rape was not 'usual' sex. The reasons for agreement in these cases (to provide necessary background; mutual strategic advantage) mirror those identified regarding BC.[127] Importantly, where SH evidence is adduced by the prosecution, the defence is allowed to comment on the evidence in its closing speech, so long as counsel do not stray into propounding the 'twin myths' which s.41 was intended to prevent.[128]

The second strategy arises in situations where it may not be appropriate for the prosecution to lead the evidence because it directly contradicts their case, but prosecution counsel nonetheless concede that the evidence is necessary for a fair trial. **Barrister 7** gave an example of a *Newton* hearing for a rape case where she was the prosecutor.[129] The complainant claimed that the rape was her first sexual experience, but there was social media and text-message evidence which contradicted these claims. As **Barrister 7** considered this evidence 'clearly was relevant', she agreed to lead evidence that the alleged rape was the complainant's first sexual experience so that the defence would be able to apply under gateway (d) to adduce evidence in rebuttal. Here, **Barrister 7** thought that the evidence was so important for the fairness of the hearing that she did not want to risk the possibility that the evidence be excluded and potentially lead to an appeal.

The third strategy requires the least effort: the prosecution can simply do nothing. This is the tactic recommended in CPS guidance.[130] Though not strictly a form of 'agreement', a lack of opposition to an application can be influential in the trial judge determining admissibility under s.41.[131] This situation occurred in **Case 11**. Defence counsel applied to ask C about consensual sex between her and D *after* the alleged rape. When the judge invited submissions from the prosecution, she declined to advance any.

Though none of these three strategies are 'breaches' of s.41 in a strict sense, they do appear to be circumventions of it (or, less pejoratively, 'workarounds'). As previously mentioned, this is not the first study to reveal prosecution cooperation in s.41 applications, and conclusions are polarised. The Baird Report regarded prosecution cooperation as outrageous, recommending that prosecutors should vigorously oppose any and all s.41

[127] §5.3.
[128] *Le Brocq v Liverpool Crown Court* [2019] EWCA Crim 1398 [47]-[60] (Lord Burnett).
[129] Normal rules of evidence and procedure apply: *Gandy* [1989] 12 WLUK 123, (1989) 11 CrAppR(S) 564.
[130] CPS, *Rape and Sexual Offences* (n121), Ch4.
[131] Especially if it is an application where the ECHR gloss may be applied, and when considering the 'unsafe conclusion' test in s.41(2)(b).

applications.[132] Conversely, Hoyano strongly defends this practice, citing statutes[133] and parts of the CrimPR[134] which lay down obligations for parties to cooperate and encourage the most efficient use of court time. Moreover, prosecutors are not advocates for the complainant, but ministers of justice bound by Art 6 ECHR.[135]

Both views can be criticised for their failure to acknowledge the legitimate points made by the other. Hoyano is correct that the Baird Report mischaracterises the constitutional role of the prosecutor, who is there to promote the administration of justice, not to pursue a prosecution at all costs. However, Hoyano's attempt to avoid characterising the practices identified as 'circumventions' of s.41, and to justify them on the back of general duties of cooperation, are a protest too far. These creative workarounds *do* allow SH evidence to be admitted which would otherwise be excluded. Whether this is a cause for concern is another matter. There is certainly a *danger* that complainants may be subject to cross-examination on matters of SH which, had the prosecution opposed, may not have been admitted. But the examples in my data, as well as those in Hoyano's study,[136] do not substantiate this fear. By raising SH in the prosecution's opening speech, or through the ABE, the complainant is spared questioning on the details. In situations where the prosecution led evidence to be rebutted, it seems likely (admittedly, not certain) that the evidence could have been admitted through other gateways. And where the prosecution does not oppose the evidence, defence counsel still must convince the judge that the statutory tests are satisfied.

6.9. The Complexity of Section 41

As should be clear from the preceding analysis, applying the relevant criteria in s.41 is not a straightforward process. Once one has determined that the evidence does indeed require a s.41 application,[137] the following questions must be considered:

- Does the evidence relate to specific behaviour of the complainant? (s.41(7))
- Is the SH evidence relevant to consent?

[132] See Durham *et al* (n3), 9, 11.
[133] Sections 31(6), (7), (9) of the Criminal Procedure Investigation Act 1996 and s.9(4) of the Criminal Justice Act 1987.
[134] CrimPR, Rules 3.3(2)(a), 3.3(2)(c)(ii), 3.3(2)(e), 3.14(1).
[135] Hoyano (n4), paras 21, 23, 103-105; CPS, *Code For Crown Prosecutors* (London: Crown Prosecution Service, 2018), paras 2.7, 2.10; Boon, *The Ethics and Conduct of Lawyers* (n12), 640-641; A Boon, *Lawyers' Ethics and Professional Responsibility* (Oxford: Hart, 2015), 310-311.
[136] Hoyano (n4), paras 103-105.
[137] A not insignificant task; see §4.2.

  - If yes, do gateways (b), (c), or (d) apply?
  - If no, do gateways (a) or (d) apply?
  - If no gateways ostensibly apply, is the ECHR gloss salient?
- If using gateways (a), (b), or (c): does the evidence have as its main purpose the undermining of the complainant's credibility? (s.41(4))
- Without the evidence, would the jury reach an unsafe conclusion on a relevant issue? (s.41(2)(b))

In interviews, barristers felt comfortable admitting their own frustrations with s.41:

> **Barrister 3**
> [Section 41 is] overtly complicated! There's no need for it, I don't think; and I'm sure the majority of practising lawyers think that. And this is the problem, the statutes aren't being made by practising lawyers.

> **Barrister 7**
> I wouldn't change [s.41]. Well, I would only change it to the extent that I would redraft it so that a normal person could understand it! […] I do think somebody should grasp the nettle with it and just redraft the bloody section. But I hope that they let lawyers do it – *practising* lawyers – rather than, you know, parliamentarians or whoever normally does these things. Because they're the ones who screw it up, and we have to put up with the fallout.

In addition, on learning I was researching s.41, one trial judge stated that their only opinion for me was that the section is 'unwieldy and terribly written'. These findings align with those in Hoyano's study.[138] Such complaints were somewhat supported by the fact that, although many interviewees were happy to discuss s.100 unaided, once the topic turned to s.41 I would be stopped so that they could have a copy of the statute in front of them.[139] Though there was no obvious scrambling for the statute during the s.41 application in **Case 11**, in **Case 12** a heavily worn copy of **Barrister 7**'s *Rook & Ward*[140] was given great attention by both counsel, both before and during the s.41 legal argument.

There is a serious point to be made. That sexual offence specialist barristers, who are more familiar with s.41 than most, as well as trial judges, still re-read the section every time they make an application surely speaks to a drafting failure. Legislative complexity is exacerbated by external pressure from the media and politicians.[141] In this politically charged context,

[138] Hoyano (n4), paras 62, 120-122.
[139] In anticipation of this, I carried paper copies of both statutes for use in interviews.
[140] Rook and Ward (5th edn) (n26).
[141] See §4.2.E.

it is unsurprising that barristers are unwilling to discuss or use s.41 without having the text to hand.

6.10. OVERLAPS AND GREY AREAS

Section 4.3 identified two primary points of conceptual overlap between BC and SH evidence: sexual misconduct evidence and evidence of false allegations. In addition, my data suggested a third grey area of 'fantastic allegations' which may, depending on the circumstances, be subject to s.100, s.41, both, or neither. This section examines the relevant tests for admissibility regarding these areas of overlap, integrating doctrinal analysis with data from my trial observations and interviews.

6.10.A. Extraneous Sexual Misconduct

In the rare instances of overlaps between the BC and SH regimes, both sets of tests must be satisfied for the evidence to be admissible.[142] Though potentially onerous, the Law Commission argued that evidence which passes the 'unsafe conclusion' test in s.41(2)(b) YJCEA 1999 would 'almost certain[ly]'[143] have 'substantial probative value' for the purposes of s.100(1)(b). However, there is one potential discrepancy: s.41(2) refers only to a 'relevant issue' in the case, whereas for s.100(1)(b) CJA 2003 the issue to which the evidence is 'substantially probative' must itself be 'of substantial importance in the context of the case as a whole'. The test under s.100(1)(b) is therefore more stringent. As such, if the *Hodkinson*[144] scenario arises again (evidence of a complainant's previous conviction of a sexual offence adduced in sexual assault proceedings), trial judges should be aware that the sexual misconduct evidence must navigate both s.100 CJA 2003 and s.41 YJCEA 1999, and it should not be taken for granted that evidence which satisfies one admissibility regime will necessarily satisfy the other.

My trial observations and interviews add little here as barristers claimed not to have dealt with sexual misconduct evidence. **Case 5** is possibly salient. Here, the judge asked the defence if they were intending on cross-examining C concerning their allegedly being a victim of sexual abuse in a care home, which occurred years after the events of the current allegations. Technically, this is both SH (of C) and BC (of the perpetrators), but the judge stated that only a s.41 application was required. Two possible inferences might be drawn. The first is that **Case 5** indicates that, in practice, courts sometimes accept

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[142] JR Spencer, *Evidence of Bad Character* (3rd edn, Oxford: Hart, 2016), paras 3.35.
[143] Law Commission, *Evidence of Bad Character in Criminal Proceedings* (Law Com No 273, 2001), para 9.45.
[144] *Hodkinson* [2015] EWCA Crim 1509.

the argument that evidence which passes s.41 will also pass s.100, and so only the former is required. The second, perhaps more plausible inference, is that the evidence was (wrongly)[145] not considered to require s.100 analysis as the alleged perpetrators of the sexual abuse were not parties to the case. More research may be needed on this issue.

6.10.B. Extraneous False Allegations

Short of the complainant admitting that their prior sexual allegation was untrue, or perhaps a conviction for perjury or perverting the course of justice,[146] evidence or questions concerning false allegations will not be supported by a proper evidential basis. This line of argument would have to go through s.41, where such evidence is doomed to be ruled inadmissible due to the credibility bar in s.41(4). Also likely doomed are false allegations where the complainant has lied about not consenting (rather than lying that sexual contact occurred), as this will trigger both s.41 and s.100 where, unless gateway (d) of s.41 is utilised, s.41(4) will again bite.

'Pure' false allegations, supported with a proper evidential basis, will face only gateway (b) of s.100. In addition to having a proper evidential basis, the false allegation will need 'substantial probative value' in relation to a matter in issue which is of 'substantial importance' in the case. As the complainant's credibility is almost always an issue of 'substantial importance' in the case,[147] the chief hurdle will be whether the false allegation has 'substantial probative value' in relation to that issue. This will depend on case- and fact-specific variables such as the age of the prior allegation and whether there is a compelling explanation for why the complainant made a false allegation.[148] The analysis is illustrated by the case of *W*.[149] The complainant had previously made a complaint against two police officers regarding sexually inappropriate comments that they had allegedly made towards her. Following a disciplinary tribunal, the police officers were acquitted partly due to the tribunal's opinion that the complainant was 'not a credible witness'.[150] Although this was enough to constitute a proper evidential basis that the complaint was false, it was not considered to be substantially probative to the complainant's credibility for the current

[145] See §4.1.A.
[146] Of which there are relatively few, although this may be due to the high evidential threshold; A Levitt and CPS, *Charging Perverting the Course of Justice and Wasting Police Time in Cases Involving Allegedly False Rape and Domestic Violence Allegations* (London: Crown Prosecution Service, 2013).
[147] *Weir (Yaxley-Lennon)* [2005] EWCA Crim 2866, [2006] 1 WLR 1885, [2006] 2 All ER 570.
[148] See *Smith* (n56).
[149] *W* [2014] EWCA Crim 545.
[150] Ibid, [22] (Davis LJ).

allegations (that she was indecently assaulted and raped as a child by her half-uncle) due to the lack of similarity and judicial concerns regarding satellite issues. The Court of Appeal emphasised the distinction between not being believed and deliberately lying; only evidence of the latter could, and should,[151] be admissible through gateway (b).[152] In addition, the Court of Appeal has imposed a sense of proportionality in cases where a complainant has made lots of false allegations, holding that the jury should be given only enough evidence to be able to assess the credibility of the complainant.[153] Mere threats to make false allegations would rarely be sufficient to pass the tests in gateway (b).[154]

In interviews, barristers argued that the difficult part of admitting false allegations was satisfying the 'evidential basis' test. Once this initial hurdle has been jumped, it seems that gateway (b) in s.100 is relatively easy to satisfy:[155]

> **Barrister 8**
> The test for s.100 is much easier than the test under s.41 […] There was a rape case I did where someone had a previous conviction for perverting the course of justice, which was an admitted false allegation, and that was admitted through s.100 as a previous conviction.

In fact, once the evidential basis test is satisfied, false allegations are often seen as so obviously admissible that the evidence is commonly admitted by agreement under s.100(1)(c):

> **Barrister 6**
> One of my complainants made a false allegation of rape against a previous boyfriend; that did actually go in by agreement. […] And you *tend* to find that that sort of material does go in, more than previous convictions, and more often than not by agreement too.

> **Barrister 7**
> [With false allegations] the prosecution would probably make the admission for you, because they'd sort of have to. But a lot of these things come down to common sense of counsel, you know. It's a feel for the case, feel for the judge, feel for what's fair really.

Both of these statements link back to the general analysis of agreement under s.100(1)(c): barristers will often agree evidence if they feel there is no point in opposing, or if they consider it to be in the interest of fairness

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[151] See the arguments relating to general credibility in §3.2.C.
[152] *W* [2014] (n149), [21]-[22] (Davis LJ). Cf. See at §5.4.C how the Court of Appeal has been much more generous in allowing other BC evidence to be admitted under gateway (b) for credibility purposes.
[153] *Dinc* [2017] EWCA Crim 1206.
[154] *Moody* (n43).
[155] Corroborating statements and examples were given by **Barrister 4** and **Barrister 9**.

that the evidence be admitted.[156] However, as with BC and SH more generally, the decision to apply for leave to adduce evidence of false allegations is a delicate one, and sometimes counsel may make a tactical decision against it:

> **Barrister 2**
> If you're in [false allegations] territory, you really have to think through very carefully what it is exactly you're saying. If I'm presented with a case where I know that a woman alleging rape against my client now, made an allegation 10 years ago that didn't go to court. I'm not just going to blunder into it, and assume that it was a false allegation. Not only would that be unfair to the witness, but it would be extremely poor tactics from a defendant's point of view. Because if it turned out that it was a truthful allegation which was dropped for reasons beyond the complainant's control then I could end up provoking a situation where the jury feel immensely sympathetic to a complainant and do my own case immense harm. So that is an area that you need to address very carefully.

Cross-examining the complainant on their prior allegations, then, can be risky; especially if the complainant maintains that the prior allegations were in fact true, and any evidence indicating falsity might be explained away. Barristers must make a factual judgement here, based on the available evidence and their experience.

6.10.C. Extraneous Fantastic Allegations

Section 4.3.C. argued that prior 'fantastic allegations' are a form of evidence which have not attracted much doctrinal attention, but which are not uncommon in practice. In the absence of appellate guidance, we must fall back on relevant legislation and a logical application of doctrinal principles to guide the analysis of applicable gateways.

As with false allegations, if any fantastic allegation concerns actual sexual behaviour (fantasy element is a claim of non-consent) then s.41 will apply. The purpose of adducing prior fantastic allegations will usually be to suggest that the current allegations are also a fantasy constructed by the complainant, and so s.41(4) will bite. This was the reason for excluding evidence of a prior fantastic allegation in **Case 3**: as defence counsel was unable to verify the falsity of prior allegations, the judge ruled that s.41 had to apply. The questioning then became impermissible due to s.41(4).

However, **Case 12** produced a different result. D was charged with sexual assault. The defence applied to cross-examine C concerning a personal note she had written to herself on her phone earlier the same night, where she detailed a non-consensual sexual encounter with a male friend which she

[156] See §5.3.

later claimed to the police was an 'exaggeration'. Following lengthy legal arguments as to whether s.41 or s.100 (or both, or neither) applied, the judge ruled that s.41 was the applicable section. In holding the evidence as admissible, the judge stated that the issue was not consent, and that he was satisfied that the issue was not 'mainly or wholly' about C's credibility – it was about her ability to fantasise.

This reasoning is difficult to rationalise, and becomes even more so once the opinions of the prosecution (**Barrister 7**) and defence (**Barrister 1**) are taken into account. In informal conversations with both counsel, **Barrister 7** described this decision as 'simply wrong' and exclaimed that she did not 'know what [the judge] was thinking!'. The evidence should surely have been caught by the credibility bar. In agreement, **Barrister 1** told me separately that one of the reasons why she argued in submissions that s.41 did not apply is because otherwise the credibility bar would have stymied her.

It is difficult to disagree with counsel's assessment that this ruling was incorrect. Notably, the judge did not invite submissions concerning the tests for admissibility within the specific gateways. The entire legal argument was devoted to the question of whether s.41 or s.100 applied. Once it was decided to prefer s.41, there was no real argument over whether the evidence in fact satisfied the detailed statutory requirements. Lack of judicial guidance as to the operation of the gateways in this grey area of fantastic allegations seems to be causing confusion and error. It is hoped that, should there be further doctrinal clarification as to which sections apply in which situations, then counsel will instead be able to focus their arguments on the specific requirements of the applicable provision.

If the prior fantastic allegation does not concern a real sexual encounter, but details an entirely fictitious scenario, then s.41 has no role to play. The applicability of s.100, on the other hand, will depend largely on the intent of the individual when concocting the fantasy. Assuming sufficient malice on the part of the fantasiser, and that the fantasy is published or shared in some way, then s.100 may apply. As with false allegations, it is likely that gateway (b) would be invoked, and that evidence of this sort would readily satisfy the statutory tests, as the complainant's credibility will be in issue and evidence of the complainant having created and shared fantasy accounts of being the victim of sexual offences would almost certainly be substantially probative of that issue. Alternatively, this seems like the sort of evidence which may be routinely agreed between parties and admitted by virtue of s.100(1)(c).

Where this is no malice in concocting the fantasy (e.g. mental illness),

s.100 is not obviously salient.[157] This issue has been mentioned briefly in several cases,[158] where it has been suggested that evidence of prior allegations may be admissible without reference to s.100 if they were the result of mental disorders or substance abuse. If the suggestion in §4.3.C is accepted, that the 'disposition towards' misconduct aspect of the definition of BC may be utilised so that s.100 applies, then the argument would be the same as for malicious fantasies (gateway (b)). However, if this suggestion is not accepted, then unintentional fantasies will be admissible so long as they meet the threshold standard of common law relevance which, in this context, is likely.

Concerning unpublished and unshared fantasies, these should not activate s.100; a point accepted by the trial judge in **Case 12**. Moreover, one might think that it would be rare for unpublished fantasies even to be considered relevant. After all, an individual exaggerating or fantasising (for any reason) about sexual assault in, for example, their personal diary does not necessarily support the inference that they would equally be willing to report those fantasies to others or the police. The argument accepted by the judge in **Case 12** was that the fantasy note showed that C was 'capable' of exaggerating a sexual encounter; but surely everyone is *capable* of doing this.[159] Unless the fantasy account is strikingly unusual or specific, and replicates the account the complainant is giving of the current allegation, it is not at all clear that personal fantasies would meet common law relevance in this context.

One final point concerns tactics. Again, there is a very real risk of counterproductive cross-examination. Cross-examining C in **Case 12** about her exaggerated private note seemed to backfire dramatically for the defence. Not only did the jury, from their expressions, appear to be sceptical of this line of questioning, but C explained in response to defence counsel's questions that the entire (rather lengthy) note was accurate; the only untruth being the last sentence which read '[Name] sexually assaulted me'. Prosecution counsel was then able to capitalise on this revelation in re-examination, where she invited C to explain the difference between the prior incident and the events subject to the charge: the first in which she

[157] This very much depends on the context. A crime-author who publishes a story with a fictitious rape account would surely not be acting reprehensibly – though this evidence may still be relevant and admissible if their current allegation of rape was similar to their fictitious authored account.
[158] *Davarifar* [2009] EWCA Crim 2294, [2011] Crim LR 818; *Clarke* [2016] EWCA Crim 2030; *Kamara* [2019] EWCA Crim 1918.
[159] The ability to concoct a false allegation was considered in *Moody*, where it was held not to satisfy the substantial probative value test in s.100(1)(b); *Moody* (n43).

consented, and the second to which no consent was given.

Two tactical issues lessons arise from this example. The first is that the jury may take a dim view of cross-examining on prior fantastic allegations, which may ultimately harm the defence case. The second is that cross-examining on a topic for which there is insufficient prior information can be a huge gamble.

6.11. Concluding Remarks on Litigation Culture

More so than with s.100, s.41 applications are not made lightly. Barristers feel under intense media and political scrutiny regarding SH evidence. They know that making a mistake might harm both current and future cases. Whether the evidence concerns SH, false allegations, or fantastic allegations, advocates may decide against applying to adduce probative exculpatory evidence for fear of losing the jury or garnering sympathy for the complainant. On the other hand, there is enough evidence in my data of 'difficult clients' to infer that, *at least sometimes*, s.41 applications result from unwavering pressure from defendants themselves.[160]

Keeping abreast of the latest case law and procedural changes related to s.41 appeared to be more important for counsel here, whereas barristers felt reasonably safe relying on broad principles informing s.100 applications. In general, my data suggest that although the four gateways in s.41 are very strict, there are two arguments which have reasonable success rates: evidence of consensual sexual behaviour with the defendant *after* the alleged assault (under either gateway (a) or by virtue of the ECHR gloss); and evidence which provides an alternative explanation for something alleged by the prosecution (under gateways (a) or (d)).

In addition to being admitted via the gateways in s.41, SH evidence is sometimes adduced with the assistance of the prosecution in circumvention of the statute. These creative 'workarounds' are not necessarily objectionable. Much will depend on the particular factual circumstances, as well as the professional standards and experience of the prosecutor in question. Moreover, there are ever increasing time and resource pressures on barristers to cooperate and agree at every stage of the trial process. It was almost inevitable that there would be shortcuts adopted in the application of s.41. In this climate, it does not seem practically feasible to close these loopholes without causing further problems.

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[160] Cf. Newman who argues that solicitors are often able to coerce clients to their will concerning guilty pleas; D Newman, *Legal Aid Lawyers and the Quest for Justice* (Oxford: Hart, 2013), Ch5.

What may be feasible, political will notwithstanding, is to redraft s.41 to make it easier to understand and use. Complexity leads to misunderstandings and mistakes, not to mention the lost time that is spent on reappraising oneself with the relevant tests each time the issue arises. An additional consequence is suggested by Hoyano: complexity leads to misunderstandings of s.41 not only by lawyers, but also by the media and politicians.[161] My data support previous arguments[162] that s.41 needs significant redrafting in order to make it more comprehensible and user-friendly. In addition, conceptual overlaps with BC which are causing difficulties in practice could be clarified by setting out exactly when and in what situations evidence of false or fantastic allegations should be admissible.

[161] Hoyano (n4), para 140.
[162] Thomason (n96); F Stark, 'Bringing the Background to the Fore in Sexual History Evidence' (2017) 8 *Archbold Review* 4; Hoyano (n4).

7. CHARACTER EVIDENCE IN PROCEDURAL CONTEXT

The regulation of bad character (BC) and sexual history (SH) goes beyond the statutory gateways and questions of admissibility. The procedural context within which these applications are made must also be addressed. Three procedural aspects will be examined. In order to make an application under either s.100 of the Criminal Justice Act (CJA) 2003 or s.41 of the Youth Justice and Criminal Evidence Act (YJCEA) 1999, counsel must first have BC or SH evidence in their possession, which in many cases turns on prosecution compliance with disclosure obligations. Following a decision to make an application, the Criminal Procedure Rules (CrimPR) set strict procedures by which these applications must be made (which appear to be unattainable in practice, as we will see). Even if an application has been made and is successful, judicial directions must still be given to instruct jurors how they are to use the character evidence. Both counsel also give speeches inviting the jury to use evidence in particular ways.

7.1. CHARACTER EVIDENCE AND DISCLOSURE

Applications made under s.100 and s.41 commonly rely on information that is gathered by the police.[1] Following an overview of the relevant law, my barrister interviews and trial observations will be utilised to analyse the defence's reliance on disclosure for s.100 and s.41 applications.

7.1.A. Disclosure Law

When lawyers and commentators talk of 'disclosure', it is rarely used to describe the primary obligation on the prosecution to hand over to the defence evidence which the prosecution intends to rely on at trial. This obligation is generally uncontroversial.[2] Instead, 'disclosure' is more commonly used to describe the obligation on the prosecution to provide the defence with any *other* evidence or information they hold (the 'unused material') which undermines their own case, or supports the defence case. This obligation is set out in s.3(1)(a) of the Criminal Procedure and Investigations Act (CPIA) 1996 (as amended by Part V of the Criminal Justice Act 2003), which states that the defence must be given:

> any prosecution material which has not previously been disclosed to

[1] DJ McBarnet, *Conviction* (London: Macmillan, 1981), 111.
[2] D Ormerod and D Perry (eds), *Blackstone's Criminal Practice 2020* (Oxford: OUP, 2019), D9.1, D15.70. Cf. I Dennis, 'Prosecution Disclosure: Are The Problems Insoluble? [2018] *Criminal Law Review* 829, 830.

> the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused.

It was described by Lord Bingham in *H* as a 'golden rule'[3] that the defence be given any and all material which weakens the prosecution case or strengthens the defence case. However, it was also said that there is no obligation for the prosecution to disclose 'neutral' material which does not satisfy the test in s.3(1)(a).[4] In order to make a disclosure decision, the prosecution must take into account the use(s) to which evidence may be put in the cross-examination of prosecution witnesses, the capacity of the evidence to provide an alternative explanation for the defendant's actions, and the defendant's rights to a fair trial.[5] In addition, the evidence must be analysed in combination with other potentially disclosable unused material.[6] Under s.7A(2) CPIA 1996, the duty to disclose is an ongoing one, and must be reviewed continually throughout the pre-trial and trial process.[7]

Concerning the time at which the prosecution is meant to perform disclosure, as the Secretary of State has never issued relevant regulations under s.12 CPIA 1996 the transitional provision under s.13 applies. This states that disclosure must occur 'as soon as is reasonably practicable' once the case is committed to trial. Judicial guidance on disclosure requires judges to be proactive in fixing timetables for disclosure during pre-trial hearings, and that these timetables should be reviewed at every subsequent hearing.[8]

To trigger disclosure, s.3(2) states that the material must be in the possession of the prosecution. Material in the hands of the police but not communicated to the prosecutor is therefore not disclosable.[9] As a result, disclosure is heavily dependent on police cooperation.[10] The CPIA 1996 (Code of Practice) Order 2015 sets out the correct procedure. Following a fair investigation which, under s.23(1)(a) CPIA 1996, pursues 'all reasonable lines of enquiry' (including those which are exculpatory for the suspect),[11] the disclosure officer (DO) is required to assign all relevant evidence in the

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[3] *H* [2004] UKHL 3, [2004], 2 AC 134 [14] (Lord Bingham).
[4] Ibid, 134 [17], [35] (Lord Bingham).
[5] *Attorney General's Guidelines on Disclosure: For Investigators, Prosecutors and Defence Practitioners* (Attorney General's Office, 2013), para 6.
[6] Ibid, para 7.
[7] *Blackstone's Criminal Practice 2020* (n2), para D9.24.
[8] *Judicial Protocol on the Disclosure of Unused Material in Criminal Cases* (Judiciary of England and Wales, 2013), paras 7, 9.
[9] *Attorney General's Guidelines on Disclosure* (n5), paras 22, 35.
[10] Provoking criticism of disclosure officers, and disagreements between the police and prosecutors; CW Taylor, *Criminal Investigation and Pre-Trial Disclosure in the United Kingdom: How Detectives Put Together a Case* (Lampeter: Edwin Mellen, 2006); J Sprack, *A Practical Approach to Criminal Procedure* (15th edn, Oxford: OUP, 2015), para 9.12.
[11] *Joof* [2012] EWCA Crim 1475.

case into two schedules for 'sensitive' and 'non-sensitive' material – only the latter of which may be disclosable if it satisfies the s.3(1)(a) test.[12] The DO is required to highlight to the prosecution material which they think satisfies the s.3(1)(a) test, and they are under an ongoing obligation to disclose material to the prosecution which may become relevant on learning the defence case.[13] In order to streamline this process, the prosecution (usually the CPS reviewing lawyer)[14] is under a duty to identify the key issues in the case to guide the decisions of the DO.[15]

7.1.B. Disclosure of Character Evidence

From both sources of my empirical data, it was clear that the defence is reliant on timely disclosure for the purposes of making s.100 applications:

> **Barrister 8**
> You get a lot of stuff from defendants. Like, "my aunt Doreen says that this and that". You get an awful load of crap like that. Most of which usually amounts to nothing. […] So generally you're very reliant on the prosecution providing you with whatever they think undermines.

Concerning previous convictions of prosecution witnesses, it was held in *Vasiliou* that these should be disclosed if the evidence to be given by that witness directly conflicts with the defence case.[16] In the CPIA Code of Practice[17] and CPS Disclosure Manual,[18] this test has been interpreted to mean that only the antecedent history of complainants and 'key witnesses' need be disclosed. Also of relevance here is Privy Council guidance that Art 6 ECHR does not require the disclosure of any and all prior convictions; only those which actually satisfy the test in s.3(1)(a) CPIA 1996 (in that they undermine the prosecution case or strengthen the defence case) are disclosable.[19] Dennis argues that, in practice, previous convictions of prosecution witnesses cause the least disclosure problems, and are likely disclosed as a matter of course.[20] Indeed, just because a prior conviction is disclosable does not mean it would be admissible, as it must still surmount s.100 CJA 2003.

The restrictive approach set out in practitioner guidance is somewhat at

[12] CPIA Code of Practice, paras 6.8-6.17.
[13] CPIA Code of Practice, paras 8.1-8.3.
[14] Though the entire prosecution team is jointly responsible: *Attorney General's Guidelines on Disclosure* (n5), paras 11-14.
[15] *Olu* [2010] EWCA Crim 2975, [2011] 1 CrAppR 33.
[16] As was noted in the commentary on the case, this test would almost always be satisfied: *Vasiliou* [2000] 2 WLUK 169, [2000] CrimLR 845.
[17] Para 6.6.
[18] Page 10.
[19] *HM Advocate v Murtagh* [2009] UKPC 36, [2011] 1 AC 731.
[20] Dennis (n2), 838.

odds with recent case law. In *RA*,[21] the Court of Appeal suggested that the complainant's sister's previous conviction for benefit fraud, as well as a caution for harassment, should have been disclosed. This issue was also given lengthy consideration in *Simmons*,[22] where it was held that 20 items of BC evidence (including: potential false allegations, alleged drug use, and allegations of violence) should have been disclosed *notwithstanding the fact* that most of these would not have been admissible under s.100. This case highlights that the test for disclosure is much lower than that for admissibility, and that non-conviction BC which may undermine a witness's credibility should be disclosed.[23]

As the test in s.3(1)(a) CPIA 1996 refers only to evidence which would help the defence, there is no general obligation on the prosecution to disclose the previous convictions (or other evidence which might undermine credibility) of any defence witnesses.[24] However, Corker and Parkinson argue that in practice the defence will usually be notified of this regardless of any duty.[25] This is because the defence would, justifiably, request an adjournment once the prosecution attempts to deploy such evidence, leading to delays and disruption. In the interest of smooth trial management, defence counsel will likely be informed of the prior convictions of their potential witnesses so that they can make informed decisions in advance of trial as to whether they should be called. The empirical findings discussed at §5.2.C, where decisions to call witnesses can depend greatly on whether they have previous convictions, support this argument.

Turning to SH evidence, where the evidence in question concerns prior sex between the defendant and complainant, there will likely be fewer disclosure issues as the defendant will be able to give evidence on this himself, or will at least be able to assist in guiding disclosure:

> **Barrister 1**
> Defendants can give you some information obviously, about the relationship between the two of them. But the prosecution, and it's very pertinent at the moment, they have to disclose anything that undermines their case or assists you with yours. But you've generally got a lead from the defendant. So it's a voyage of discovery.

However, there is still a heavy reliance on disclosure for evidence concerning the complainant which is obtained in the course of the police investigation:

> **Barrister 4**
> About 2 months before the trial, the prosecutor – who is a very fair

[21] *RA* [2017] EWCA Crim 1515.
[22] *Simmons* [2018] EWCA Crim 2534.
[23] Ibid, [42]-[53] (Hallett LJ).
[24] *Khan* [2007] EWCA Crim 2911.
[25] D Corker and S Parkinson, *Disclosure in Criminal Proceedings* (Oxford: OUP, 2009), para 12.36.

> prosecutor – served another ABE with the police. [The complainant] admitted that she had had sex that afternoon, before my chap's alleged to have raped her, with a 26 year old. And when they did the DNA, there was more of a match to him than there was to my client. […] My chap was acquitted of all 3 charges. […] But if you imagine, if that had not been served, I would have never known about it, and therefore I wouldn't have been able to make the s.41 application. So that's quite frightening.

A related issue is third party disclosure. Any evidence compiled by the police from third parties is disclosable if it meets the statutory test. However, it is often the case that potentially exculpatory evidence lies with third parties:[26]

> **Barrister 5**
> Particularly on s.41 applications, you are dependent on obtaining material, obviously if you're the defence. The prosecution might obtain it from social services records, whatever.

In some situations, as **Barrister 5** describes, the police will obtain this evidence during the investigation, and so this will be in their possession and potentially disclosable. This is not always the case; there may be evidence in the hands of third parties whom the police have not contacted. In order to obtain this material, the defence must apply to the court under s.2(1) of the Criminal Procedure (Attendance of Witnesses) Act 1965, and argue that the evidence would be 'material' to the case. In *Brushett*,[27] it was held that in these applications judges have to balance the public interest of protecting the privacy of third party records against the defendant's right to a fair trial. Types of evidence suggested by Otton LJ which would normally satisfy this test included evidence of the complainant making false allegations, or of making similar allegations against third parties.[28]

A s.2(1) application was made in **Case 12**. The unused material indicated that C had been bullied at school, but the school suspected that the bullying was a fabrication invented for the purposes of seeking attention. The defence applied for full disclosure of the school records, in the hope of further credibility-damaging details, and the judge granted approval. Once the evidence was brought to court, the judge reviewed the material himself before ruling that they were indeed disclosable. The material was ultimately subject to a s.100 application which failed – further evidencing the differing standards for disclosure and admissibility.

Third party disclosure applications require there to be some information from which it can be inferred that the third party has this 'material' evidence.

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[26] Especially in sex offence trials: P Rook and R Ward, *Rook and Ward on Sexual Offences Law and Practice* (5th edn, London: Sweet & Maxwell, 2016), para 18.02.
[27] *Brushett* [2000] 12 WLUK 651, [2001] CrimLR 471.
[28] Ibid, [15]-[16] (Otton LJ).

In other words, one needs to know the evidence exists in order to request access to it. The role of serendipity is evidenced in a case described by **Barrister 3**:

> **Barrister 3**
> I did a trial last year – kidnap/false imprisonment trial – and the victim had made two false allegations when she was 14, she was kidnapped at 16. […] We managed to get both of those false allegations in because the crux of the case was the credibility of the complainant, and here she was lying to authorities and the police at the age of 14. […] We only got the information about the false allegation because my client's younger sister was at school with her and she knew about it. It was complete fortune. It wouldn't have been on any police thing, it wasn't the case we were asking for social services records or anything else like that. It would have gone completely unknown. Which is a worry.

The defence is not only reliant on the police and the prosecution for disclosure, but must also make the best use of the resources and contacts of the defendant himself. Even then, there will be cases where the existence of potentially exculpatory evidence will be unknown to all parties.

7.1.C. Disclosure Failings

A complete analysis of the issue of disclosure failings is obviously beyond the scope of this thesis. Focussing specifically on the disclosure of character evidence, two issues were prominent in my trial observations and interviews: late disclosure and incomplete disclosure.

7.1.C.i. Late Disclosure

Late disclosure of evidence was an issue in most of the cases observed. The main implications for character-related material were that there was little time to consider whether an application needed to be made, and that any applications which *were* made were hastily put together.

These consequences were realised in **Case 10**, which concerned father and son defendants (DF and DS) who were accused of assaulting father and son complainants (CF and CS). The defence were given the antecedent history of CF only *after* he had completed evidence-in-chief. As a result, both defence counsel only had one hour over lunch to analyse the evidence, take instructions, and draft any relevant applications. Defence counsel for DF did make a s.100 application, but due to the limited time to consider it, the application was ill thought out and DS's counsel was unaware the application would be made. Had disclosure of these convictions occurred earlier, there would have been time for both defence advocates to discuss their approaches, and the application could have been better argued.

The most egregious example of late disclosure occurred in **Case 11**. In

this case, D was charged with rape and s.4 harassment. Prosecuting counsel came to the case late, having been instructed over the weekend before the Monday. During pre-trial discussions, the prosecutor informed the judge and the defence that the unused material had yet to be disclosed to her, and that she was in the process of obtaining this, after which she would attempt to read through it and disclose any relevant material. On the second day of trial, the prosecutor explained that the CPS had refused to give her access to C's unused text messages, and that the CPS were blaming the DO's lack of cooperation. It had also come to her attention that there was a second ABE interview with C of which she was previously unaware. In addition, the CPS had provided social service records concerning C, which prosecuting counsel had disclosed to the defence that morning. Following defence counsel's cross-examination of C, the prosecutor told the court that the evidence given by C had raised several unexpected issues, and that there may now be more disclosable material. On the third day of trial, the prosecutor informed the court that, having received and analysed the text messages and second ABE, the prosecution was obliged to offer no further evidence. The defendant was duly acquitted.

Prosecuting counsel must be commended for her determination to comply with her disclosure obligations. Nevertheless, major criticism can be made of the fact that, according to the prosecutor, both the police and the CPS obstructed her access to the unused material. A similar situation occurred in **Case 20**, where prosecuting counsel was unaware of D's previous convictions until the CPS notified her of them on the second day of the trial. These examples make it difficult to conceptualise the police, CPS and court advocate as 'jointly' responsible for disclosure.[29] During wider discussions on disclosure failings, interviewees felt that placing the initial disclosure obligation on the police, combined with under-resourcing and a lack of proper training, were the main causes:[30]

> **Barrister 2**
> [Disclosure failings are] massive, massive. It's a really difficult issue. It's very easy for me as a defence practitioner just to have a go at the prosecution. But the problems are endless. Sometimes the problem is lack of resources, sometimes the problem is inability or unwillingness to focus on what's important in a case. But often – and this is a criticism of the system – I don't think the police are always in a position to actually appreciate why something might be important. And I think a system that places that duty on them is one which is asking for trouble. Where the police have been dishonest, it's usually fairly obvious. What's much more difficult is where they're doing their

[29] *Attorney General's Guidelines on Disclosure* (n5), paras 11-14.
[30] Similar sentiments were expressed by **Barrister 1** and **Barrister 3**.

job honestly and conscientiously, but, for whatever reason, *badly*.

7.1.C.ii. Incomplete Disclosure

When making applications under s.100 and s.41, the details matter. For the former, the specific facts which underpin the previous conviction may be vital in making an argument under gateway (b). For s.41, the specificity of the sexual conduct is salient to s.41(6). It is particularly worrying, then, that this detail is often lacking in disclosed material:

> **Barrister 8**
> If you ask the CPS for something they won't find [it]. Records being destroyed or whatever, so you end up with "Robbery – 2004", and that's as much as you get. Sometimes you see people speculatively asking the defendant "So, your robbery conviction in 2004… what was that about?". [laughs] In the hope that it's going to be really horrible!

Though it concerned a s.101 application, this issue arose in **Case 10**. Here, the prosecution applied to introduce DF's 35 year-old convictions for actual bodily harm and grievous bodily harm. Despite attempts by the police to track down the details, the relevant documents no longer existed. This was considered a relevant factor by the judge in denying the application.[31]

Rival interpretations of the test set out in s.3(1)(a), and the particular individuals who make the decisions, are further areas of difficulty:

> **Barrister 10**
> You will always get defence asking if the prosecution witnesses have any previous convictions. If you're against an in-house CPS barrister, you're going to have to check with them several times. "They don't have any previous convictions *do they*?". And you don't necessarily trust that you're being given the right answer. […] They might look at it and go "well it's a few thefts, they don't need to know about that". But anyone else would say "well that's a dishonesty offence, so the defence are entitled to know about it". They might not *use it*, but they're entitled to know about it.

As with decisions to agree or contest BC evidence, **Barrister 10** argued that CPS in-house advocates are less willing to cooperate than independent prosecution barristers.[32] The explanation may be a conviction-led culture, or a failure to see things from the defence point of view. Institutional culture, and how this can negatively influence disclosure decisions, has been frequently cited as a primary reason for disclosure failings.[33]

Whatever the cause, my empirical data suggest that incomplete information regarding previous convictions creates two problems. First, it

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[31] It was also denied due to satellite litigation concerns.
[32] §5.3.B.
[33] Taylor (n10); H Quirk, 'The Significance of Culture in Criminal Procedure Reform: Why The Revised Disclosure Scheme Cannot Work' (2006) 10 *International Journal of Evidence and Proof* 42; Dennis (n2).

may lead to instances of prior criminal behaviour being excluded which might have been admissible had the information been available. Secondly, the defence may be left in the dark for prosecution applications, which may then be unfairly exploited.

7.2. CHARACTER EVIDENCE AND THE CRIMINAL PROCEDURE RULES

The procedural framework of criminal trials, within which the rules of evidence operate, is governed by the ever expanding CrimPR.[34] The CrimPR, first published in 2005, have been regularly revised and expanded over the years, with a focus on encouraging judges to engage in active case management in order to speed up and streamline the trial process.[35]

7.2.A. The Rules

7.2.A.i. Bad Character

Under s.100(4) CJA 2003 evidence of the BC of a non-defendant[36] may not be adduced without leave being granted by the court.[37] Rule 21 CrimPR sets out the applicable procedure. Any application[38] to adduce evidence of BC must be served to both the court and the opposing party[39] (or parties) as soon as is 'reasonably practicable'[40] so that they can be ruled on in a Pre-Trial Preparation Hearing (PTPH).[41] Any defence applications which rely on material disclosed by the prosecution must be served within 14 days of that disclosure.[42] The application must clearly state: the facts of the alleged misconduct relied on, how the facts will be proven, and why the evidence should be admissible.[43] Within 14 days of receipt of an application, the opposing party may file an objection to the application.[44] It is open to the trial judge to determine BC applications in a public or private hearing, or

[34] For more on their origin, see §8.1.B.ii.
[35] Sprack (n10), paras 2.14-2.17.
[36] This includes questions to be asked in cross-examination. See *Braithwaite* [2010] EWCA Crim 1082, [2010] 2 CrAppR 24 [12] (Hughes LJ).
[37] The leave requirement does not apply to BC being admitted via gateway (c), though parties should still inform the trial judge as soon as possible in the interests of good case management. See *J (DC)* [2010] EWCA Crim 385, [2010] 2 CrAppR 2, [2010] Crim LR 769.
[38] Template application forms are available: <https://www.justice.gov.uk/courts/procedure-rules/criminal/docs/october-2015/ebc001-eng.pdf>.
[39] CrimPR, Rule 21.3(2).
[40] CrimPR, Rule 21.3(3)(a).
[41] *Practice Direction ((CA Crim Div): Criminal Practice Directions 2015: Amendment No.5)* [2017] EWCA Crim 1076, 18E.28.
[42] CrimPR, Rule 21.3(3)(b).
[43] CrimPR, Rule 21.2(2).
[44] CrimPR, Rule 21.3(4)(b). Template objection forms are available: <https://www.justice.gov.uk/courts/procedure-rules/criminal/docs/october-2015/ebc002-eng.pdf>.

without a hearing at all.[45] However, trial judges must give reasons in open court (without the jury) for their decision to either admit or refuse applications under s.110 CJA 2003 and Rule 21.5 CrimPR.

Birch highlights several benefits to this structured procedure.[46] Notice requirements enable opposing parties to scrutinise BC applications rigorously and effectively, which in turn facilitates negotiations to agree the admission of the evidence or, if the application is contested, making sure that only BC evidence which legitimately passes through one of the admissibility gateways is admitted. Nevertheless, under Rule 21.6 the court may: shorten or extend the time limits; allow applications and objections to be given in different forms (including orally); or dispense with the notice requirement completely. This flexibility may be necessary in the interests of justice, as a strict adherence to the notice requirements would deny advocates any opportunity for exploring new (BC-related) lines of enquiry which may arise following late disclosure or during cross-examination.[47] However, no further guidance is given as to when and in what situations judges may exercise these flexibility powers.

In general, the Court of Appeal has refused to interfere with trial judges' decisions to waive the notice requirements, though it has been indicated that judges should not waive the requirements if doing so would unfairly prejudice the opposing side.[48] Due to the Court's light-touch approach there is no real incentive for the prosecution and defence to comply with the notice requirements (other than perhaps the threat of a stern rebuke by a trial judge). Research conducted in 2006 for the Ministry of Justice found that approximately half of the 36 s.100 applications reviewed were made orally.[49] Furthermore, it reported that the 14 day time limit for applications and responses was commonly exceeded, and that judicial discretion to allow flexibility in the time limits was exercised unevenly.[50] Although this was a very small sample of applications,[51] if these results are taken together with empirical evaluations of the operation of s.41 YJCEA 1999,[52] then it may

[45] CrimPR, Rule 21.3(5)(a).
[46] D Birch, 'A Credible Solution? Non-Defendant's Bad Character and Section 100 of the Criminal Justice Act 2003' [2019] *Criminal Law Review* 841, 855.
[47] See JR Spencer, *Evidence of Bad Character* (3rd edn, Oxford: Hart, 2016), para 5.44.
[48] See *Culhane* [2006] EWCA Crim 1053; *R (on the application of Robinson) v Sutton Coldfield Magistrates Court* [2006] EWHC 307 (Admin), [2006] 4 All ER 1029; *Moran* [2007] EWCA Crim 2974; *Hassan* [2007] EWCA Crim 1287.
[49] Morgan Harris Burrows LLP, *Research into the Impact of Bad Character Provisions on the Courts* (Ministry of Justice Research Series 5/09, 2009), 12.
[50] Ibid, 8.
[51] Spencer warns of drawing firm conclusions from the study: Spencer, *Evidence of Bad Character* (3rd edn) (n47), paras 1.86-1.88.
[52] L Kelly, J Temkin and S Griffiths, 'Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials' (Home Office Online Report 20/06, 2006), 70-75; L Hoyano,

indicate widespread lack of compliance with notice requirements under the CrimPRs.

7.2.A.ii. Sexual History

Evidence of the SH of complainants may be adduced only with the leave of the court under s.43 YJCEA 1999. Unlike the notice requirements for BC, s.43(1) states that applications for leave *must* be heard in private in the absence of the complainant, although the reasons for allowing or denying those applications must still be given in public under s.43(2). The giving of reasons in public is important partly because the defendant is entitled to know them, but also so that appellate courts will be able to scrutinise evidentiary rulings.[53]

The detailed procedure for applying for leave is set out in Rule 22 CrimPR. The defendant must apply to the court and all other parties[54] for permission to adduce evidence of, or cross-examine regarding, the complainant's SH. If the application[55] relies on evidence disclosed by the prosecution, then it must be served within 14 days[56] of the prosecution complying with its disclosure obligations under the CPIA 1996,[57] and in sufficient time before any Ground Rules Hearings.[58] If the application relies on other information (e.g. from the defendant) then it must be served 'as soon as reasonably practicable'.[59] Applications must state: the issue(s) which the SH is allegedly relevant to, the particulars of the evidence or question, which gateway in s.41 YJCEA 1999 is being utilised, and the name and date of birth of any witnesses giving evidence about the SH of the complainant.[60] If the prosecution (or any other party) want to contest the application, they must submit a response within 14 days of receipt of the defence's application.[61] If the defence application is successful, the prosecution must also be given 'sufficient time' to inform the complainant that they will be asked questions about their SH.[62]

Like the notice requirements for BC, there is flexibility. Under Rule 22.8 the court may extend or shorten the time limits (though, as with BC, no guidance is given). Prior to the Criminal Procedure (Amendment) Rules

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The Operation of YJCEA 1999 Section 41 in the Courts of England and Wales: Views from Barristers' Row (Criminal Bar Association, 2018).

[53] *Gjoni* [2014] EWCA Crim 691, [2014] Crim LR 765 [23] (Pitchford LJ).
[54] CrimPR, Rule 22.4.
[55] Unlike for BC, there are no template application forms available.
[56] This time limit was 28 days prior to the 2018 amendments; CrimPR (2015) Rule 22.2(b).
[57] See §7.1.; CrimPR, Rule 22.4(1)(b).
[58] *Criminal Practice Directions 2015: Amendment No.5* (n41), 18E.28.
[59] CrimPR, Rule 22.4(1)(b)(ii).
[60] CrimPR, Rule 22.4(2).
[61] CrimPR, Rule 22.6. No guidance is given in the CrimPR as to what this response must contain.
[62] CrimPR, Rule 22.3.

2018[63] applications needed to be in writing.[64] Though there is now no requirement in the Rules themselves, the Criminal Practice Directions V Part 22A.1 remain unchanged in stating that applications must be in writing and, as there is no power in Rule 22.8 to allow oral applications, it must be assumed that applications must still be written. Unlike the Rules relating to BC evidence the court must also 'take adequate account of the complainant's rights'[65] when considering applications, which may require representations from prosecuting counsel.[66]

Court of Appeal decisions regarding compliance with the SH notice requirements are consistent with BC decisions. Appellate judgments have repeatedly called for the notice requirements to be complied with, while simultaneously refusing to enforce any sort of penalty other than a stern verbal warning.[67] Furthermore, even though the Practice Direction does not allow it, the Court of Appeal has implicitly confirmed that verbal applications are permissible.[68] However, in the case of on-the-day applications, there should be an adjournment to allow the prosecution to formulate any response or objection they wish to make[69] — a procedure which, it is submitted, should also be utilised for on-the-day BC applications.

Kelly et al's study from 2006 found that, in practice, the majority of applications to adduce SH were made verbally at trial, and that in some cases no application was made at all.[70] Although more recent empirical research on s.41 reports that oral applications are rarer (though still sometimes made), studies are unanimous in finding that applications are routinely made out of time.[71] Though perhaps inevitable given practical realities,[72] the worry remains that failure to comply with the CrimPR,

> 'makes it more likely that things will go wrong at the trial, either

[63] The update was recommended following a report by the Ministry of Justice evaluating the frequency and success rate for s.41 applications; *Limiting the Use of Complainant's Sexual History: Section 41 of the Youth Justice and Criminal Evidence Act 1999: The Law on the Admissibility of Sexual History Evidence in Practice* (Cm. 9547, London: Ministry of Justice, 2017), 12.
[64] CrimPR (2015), Rule 22.2(a).
[65] Crim PR, 22.2(b)(ii).
[66] N Dent, 'Section 41: Same Law, New Rules' (2018) 182 *Criminal Law & Justice Weekly* 247, 248.
[67] See *T and H* [2001] EWCA Crim 1877, [2002] 1 WLR, 632, [2002] 1 All ER 683 [41] (Keene LJ); *Crossland* [2013] EWCA Crim 2313 [28] (Sharp LJ); *Andrede* [2015] EWCA Crim 1722, [2016] Crim LR 424 [18] (McCombe LJ).
[68] *Ogbodo* [2011] EWCA Crim 564; *Andrede* (ibid).
[69] *T* [2012] EWCA Crim 2358, [2013] Crim LR 596.
[70] Kelly *et al* (n52), 70-75.
[71] R Durham, R Lawson, A Lord and V Baird, *Seeing is Believing: the Northumbria Court Observers Panel Report on 30 Rape Trials 2015-16* (Vera Baird Police & Crime Commissioner, 2017); LimeCulture Community Interest Company, *Application of Section 41 Youth Justice and Criminal Evidence Act 1999: a Survey of Independent Sexual Violence Advisors* (September 2017); O Smith, *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths* (Basingstoke: Palgrave MacMillan, 2018); Hoyano (n52).
[72] Dent (n72), 249.

> because the statutory protection given to the complainants in sexual offence proceedings will be undermined or because the defence will be prohibited from pursuing a legitimate line of questioning.'[73]

7.2.B. Hearings in Private

The power enabling judges to rule that s.100 applications can be heard in private was not activated during my trial observations. Observing s.43(1) to the letter, I arguably should not have been able to observe legal arguments concerning s.41 as these hearings are meant to be conducted in the absence of the jury and the public gallery. This is so that, if the evidence is ruled inadmissible, it will not have been aired to the public in the course of the arguments, safeguarding the complainant's privacy rights under Article 8 ECHR. In her trial observation study of rape trials, Smith was requested to leave for 6/9 of the s.41 applications which arose,[74] but could remain in three. In other trial observation research there seem to have been few issues with members of the public observing s.41 applications.[75]

Case 11 and **Case 12** involved s.41 applications. The trials were in different courtrooms and presided over by different judges, and I was not asked to leave the public gallery in either. In **Case 11**, members of family supporting D were also present during legal argument. In **Case 12**, only myself and the Officer in the Case were present in the public gallery. In both, the judge was aware of my status as a researcher. It is difficult to infer much from these two situations. My researcher status did not seem to make any difference, nor did the presence of other members of the public. Combining my experience with prior research, the least that can be said is that s.43(1) is inconsistently applied. Though beneficial for research into the operation of s.41, this may be viewed as detrimental for complainants who are having their SH openly discussed in courts in the presence of members of the public, which may include the defendant's family.

7.2.C. Oral or Written Applications

As discussed above, BC applications can be written or oral. Though the relevant Practice Direction states that s.41 applications must be made in writing, the Court of Appeal has declined to criticise counsel for making oral applications.[76] Nonetheless, in interviews barristers argued that there has been increasing pressure through the CrimPR for all evidentiary applications

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[73] *Crossland* (n67), [28] (Sharp LJ).
[74] Smith mistakenly attributes this to judicial concerns about her status as a feminist researcher, seemingly unaware that it is a legal requirement: Smith (n71), 106-107.
[75] Durham *et al* (n71); J Temkin, JM Gray and J Barrett, 'Different Functions of Rape Myth Use in Court: Findings From a Trial Observation Study' (2016) 13(2) *Feminist Criminology* 205.
[76] *Ogbodo* (n68); *Andrede* (n67).

to be made in writing:[77]

> **Barrister 2**
> Most judges will insist on a written application, if only to protect themselves. Because if the case went to appeal, a judge would certainly be criticised if he'd allowed an application to be made orally.
>
> **Barrister 1**
> If it was a simple point then [the judge] would be prepared to hear it argued orally. But because judges are obviously conscious of the fact that you may appeal their decision, quite rightly they want everything done properly, so they've got time to think about it and it's not just sprung on them.

Judicial self-protection was not the only consideration. By requiring applications to be made in writing, arguments from counsel may be better articulated, and may lead to better decision-making. Indeed, many counsel were broadly in favour of written applications:[78]

> **Barrister 2**
> In general, as long as they're seen as something to concentrate the mind, then there's nothing wrong with them as a matter of principle, I think.
>
> **Barrister 5**
> But non-defendant bad character applications don't come up very often at all, and s.41 is notoriously difficult, and notoriously open to appeal if the judge gets it wrong. I wouldn't dream of trying either without a proper [written] argument.

In some of the observed cases, counsel attempted to make oral applications, only to be rebuffed by the judge. For example, in **Case 5** defence counsel suggested at the beginning of the case that she was intending to make a s.100 application, after which the judge requested it be made in writing.[79] This strict requirement caused some difficulty in **Case 8**, where defence counsel attempted to make a s.100 application orally between the relevant witness's evidence-in-chief and cross-examination, but the judge demanded it be made in writing. This meant counsel had to hastily write, by hand, an application during a break. The resulting application was muddled. Prosecution counsel and the judge found it difficult to understand the purpose of the application,[80] leading to defence counsel having to articulate the application orally anyway. In this case, mandating that the application be made in writing appears to have wasted more time than it was intending to save.

Both s.41 applications observed were also made in writing. There was a

[77] **Barrister 8** also made a similar point.
[78] Support was also given by **Barrister 6** and **Barrister 8**.
[79] The application was ultimately unnecessary as the evidence was agreed.
[80] See §5.5.

weak attempt in **Case 12** from the defence barrister to argue that she should be permitted to apply orally to avoid having to spend her lunch hour wading through recently disclosed material. The judge was unmoved by this, and the application was ultimately made in writing.

Though most applications observed were made in writing, responses were usually oral. This appeared to be routine:

> **Barrister 8**
> You'll have written applications almost always. Rarely, in fact, do you get written responses. Now – there should be written responses as per the CrimPR, but often that doesn't happen.

As almost all character applications observed were made on the day of the trial, the opposing party had no time to draft a written response. Though unproblematic in most observed cases, this caused difficulties in **Case 8** (see above) and **Case 10**. In the latter case, the defence made a s.100 application to admit the BC of one of the complainants. The prosecution had sight of the application only minutes before the oral argument and so had little time to consider it.[81] As a result, she initially agreed to admit the evidence, until the judge suggested to her that the evidence was too old to be of any relevance, at which point she changed her mind. The combination of not allowing sufficient time to assess the application, and so denying the opportunity to draft a written response, led to a confused and ill-considered reply.

Oral applications appeared to be the preferred option by all parties in one situation: where an issue of character has arisen because of what a witness has said, and the issue needs to be dealt with quickly:

> **Barrister 10**
> [Some applications] are always going to be ad hoc. Because the witness has said something and, "A matter of law has arisen your Honour!", and we just have to deal with it verbally.

This situation arose in **Case 10** concerning defendant BC. Whilst being cross examined, DF claimed that he had 'never been in a fight in my life', following which prosecution counsel requested that the jury be removed for legal argument. DF in fact had two convictions for violence which the prosecution wished to adduce under s.101(1)(f) (to correct a false impression). This application, and the response, were made orally with no adverse comment from the judge. In these situations, oral applications appear to be sensible as the issues are relatively simple, and there is the concern that the witness is in the middle of their evidence and any delays will have consequences for

[81] It is worth noting that the lateness of the s.100 application was itself caused by the lateness of the disclosure of C's previous convictions. See §7.1.C.

them.

7.2.D. Time Limits

When discussing the CrimPR with barristers in interview, their opinions of the 'in writing' requirements were mostly positive. Their major grievances were instead directed at tight time limits. Following the 2018 amendment, both s.100 and s.41 applications must be made within 14 days of disclosure of the triggering material, albeit Rules 21.6 and 22.7 allow these time limits to be extended indefinitely at the discretion of the judge.

7.2.D.i. Late Applications are the Norm

That s.100 and s.41 applications are frequently made late is not a new discovery.[82] In fact, interviewees regarded late applications as the norm:[83]

> **Barrister 2**
> They're very rarely on time. But it never causes a problem. There are almost always good reasons why you can't. The CrimPR are almost a counsel of perfection. In reality, it's almost impossible to do things, when you're dealing with real people.
>
> **Barrister 6**
> Although we're being told we must obey the CrimPR at all times, the reality of practice, and life in practice, is you get around to making the application when you've got a free couple of hours to draft it. And I've yet to come across a case where a judge says, "I'm not prepared to entertain this application because it's out of time". As long as there's no prejudice caused to the other side, I think any judge would hear an application even if it fell afoul of the CrimPR.

Non-compliance with the time limits does not appear to prevent applications being heard. Interviewees suggested that judges are quite willing to use their powers to vary the time limits. This is overwhelmingly supported by my trial observations. Of all the BC and SH applications made on the first day of trial or later (which was most of them), in only one did lateness attract judicial criticism. In **Case 6** prosecution counsel applied under s.101 to adduce D's previous convictions for harassment. These prior convictions had led to a restraining order, the breach of which was the subject of the current proceedings. Though the judge and defence counsel agreed that the single conviction which resulted in the restraining order should be admitted, the lateness of the application generated some controversy regarding the other convictions. **Case 6** had been listed for trial eight months prior, but was abandoned due to D not attending. In addition, there had been eight PTPHs between then and now, and other PTPHs which occurred prior to the first

[82] Morgan Harris Burrows (n49), 8; Durham *et al* (n71); LimeCulture (n71); Smith (n71); Hoyano (n52).
[83] **Barrister 7**, **Barrister 8**, and **Barrister 9** were in agreement.

trial date. In none of these had there been any notification that a s.101 application would be made. Prosecution counsel was unable to explain why there had been no prior indications: she was the fifth barrister on the case and had been briefed only two days previously. In ruling that he would not consider the merits of the application, the judge commented that the prosecution had had more than ten opportunities to make an application before today, and that the CrimPR 'have to count for *something*'. It seems, then, that the time limits may occasionally be invoked if there are particularly egregious breaches. This was echoed by **Barrister 7**:

> **Barrister 7**
> *Ninety-nine* times out of 100, [lateness] doesn't matter. The one time it will matter is when you get a particularly difficult judge, you take the piss and you're not ready on the day. Because if you're not ready when you should be, then fair enough you'll be hauled – "Well, this should have been eight months ago" – and that's fair enough.

7.2.D.ii. Reasons for Late Applications

Few previous studies have investigated *the reasons* for the late applications they report.[84] During my interviews, a multitude of reasons were canvassed – most of which stack, compounding the issue.

The first identified reason is that, ultimately, criminal proceedings are subject to Article 6 of the ECHR, as well as broader common law notions of fairness. No matter how late an application might be, if denying a party the opportunity to argue the application would endanger the fairness of the trial then the application must be heard.[85] For example, this overriding fairness obligation was invoked concerning a late witness summons application (not relating to BC), at the close of the defence case, in **Case 13**:

> **Barrister 8** (Prosecuting Counsel)
> I think this judge did a great example of it. He just said "Well, you wanted to call this witness, you've had bloody ages to do it, it should have been done earlier, but ultimately *fairness* is what I'm aiming for" and he said "you can have your time". That's a classic example where all the CrimPR would be on his side if he'd said, "Let's not adjourn, let's not give you the opportunity for a witness summons" and so forth. But he just went, "No, bollocks to the CrimPR".

The second reason is the lack of monitoring of compliance with time limits. Simply put, no one checks whether these applications have been made on time, outside of PTPHs:

> **Barrister 7**
> [The applications are] sent off to some ether somewhere, you know. Your opponent won't look at them, the judge isn't looking at them, the court's not looking at them. Nobody cares! […] There's nobody

[84] Cf. Hoyano (n52), paras 94-99.
[85] This appears to chime with the case law discussed at §7.2.A.

> monitoring those directions from the court saying "Oh they haven't done their bad character app, what about the ABE edits?". […] As long as you come to court ready, then I don't think it's usually going to be a problem. [Theatrical whisper] Most judges aren't looking at these cases until the night before trial, and as long as it's all there when *they* look at it…

Barrister 7 sat as a part-time Recorder, and so her suggestion that judges do not check the trial documents until soon before the trial date carries the weight of personal experience, and the experience of her colleagues. Given acute time pressures, and the amount of material to read for every case, this is not surprising. So long as everything is ready on the day of the trial, no issue will arise and no one will notice.

A third reason concerns listings and 'rotating barristers' (or 'discontinuous representation').[86] Crown Courts in England and Wales operate a 'warned list' system, whereby a case will be listed for trial within a period of weeks. Should a Court become free in that period, the case will then be given a 'fixture' (fixed trial date).[87] The problem with this is that it requires counsel to be highly flexible in their availability, whilst most are juggling a high turnover of cases in order to remain profitable. This is not invariably the case. Certain cases (primarily sex offences) are given fixtures early on which allows for counsel to plan, though even in these cases the time limits are not strictly adhered to:

> **Barrister 10**
> The cases I deal with, because the defence cases I've been doing recently have been sex cases that tend to have fixtures because they have vulnerable witnesses. So you tend to find with those kinds of cases, defence counsel who is instructed at the beginning is the person that comes for the trial. […] Because of that, I'm already aware from the beginning what the time limits are, and what I should be looking into. Even then, there's always some slippage! [laughs]

In the location for my trial observations, an extremely high 'return' rate was observed: most counsel (especially defence) appearing at trial had been instructed days, or even hours, prior to the trial date due to the original counsel being busy elsewhere. This causes two main difficulties. First, different barristers may have different opinions on how to run the case:

> **Barrister 1**
> It may be the case that a new barrister takes over the case, and a different barrister takes a different view of the case and says, "Oh yes we better make a s.41 application," and then in that case the judge will be sympathetic to that.

[86] A Boon, *The Ethics and Conduct of Lawyers in England and Wales* (Oxford: Hart, 2014), 646.
[87] Alternatively, it may be listed as a 'floating trial'. Whether a floating trial is heard relies on another trial cracking or otherwise collapsing, which then frees up the courtroom for the 'floater'. This requires even greater flexibility of counsel.

The s.100 application which was required to be in writing in **Case 8** has already been mentioned. Defence counsel had received the brief the Friday before the Monday, and this was her earliest opportunity to make the application. The judge did not criticise counsel for the late application, noting that different advocates make personal factual choices. Similarly, in **Case 9** the judge was understanding when the defence made a s.100 application, once counsel explained that she had received the brief that very morning!

The second issue caused by 'rotating barristers' is that as the practice becomes culturally normalised, there is a disincentive to make applications pre-trial as counsel know they will not be participating in the trial anyway:

> **Barrister 3**
> You can't do all the work you're supposed to do on every case, because 9 times out of 10, you're not going to do that case. So I'm not going to waste my time, and I'm not going to get paid, to prepare a case to the nth degree, only to find I'm not doing it. Now, that means you can get into trouble. And you say to the judge, "Sorry, I picked this up at the last minute; sorry I have a difference of opinion from the prior barrister". And, it doesn't really matter. Because the judges only make decisions on those sorts of applications when it's the trial. So yes, you're told when the things have to be done, if it's a big trial and there's no issue about it being kept – if the fixture's not going to be broken – then fine you can do it. Otherwise, no. […] 90% of Crown Court work is a lot of people covering other people's work, and everyone's just doing their best.

Aside from this issue of late applications, if most counsel are preparing for cases hours before they are running them, there are serious concerns about their ability to represent clients effectively, especially if opposing counsel has not had to return the case and so is better prepared.

Already alluded to by **Barrister 3**, the fourth reason for late applications is the lack of financial incentive, and constrained resources.

> **Barrister 4**
> We're not paid to make all these bloody applications now anyway.

> **Barrister 7**
> They're *never in* when the CrimPRs say they should be in, because there aren't the resources in this system for us to work to those time limits.

Although some might treat this reason as self-serving, one must appreciate that in the context of severe cuts to legal aid, and changes to the types of work for which barristers can claim remuneration, much of the junior criminal Bar is struggling even to make ends meet.[88] Given the choice between spending time on work that one is likely to get paid for, and other unremunerated work, the incentive structure points only one way.

[88] See further at §8.1.C.

The fifth identified reason for late applications is particularly significant: late disclosure. This topic has already been addressed,[89] and was also highlighted in Hoyano's Study as the primary reason for late applications.[90] In interview, barristers were keen to stress the adverse impact of late disclosure:[91]

> **Barrister 5**
> I think that in most courts there is some flexibility, because, particularly on s.41 applications, you are dependent on obtaining material, obviously if you're the defence. The prosecution might obtain it from social services records, whatever. So the few that I've done, 9 times out of 10 we couldn't fit it in the timetable. And it's one of those things that counsel kind of don't kick up a fuss about, because we all know how it works. So if my opponent is late with a timetable, I don't make a fuss unless they're deliberately trying to ambush me on the day of trial. But that doesn't really happen very often.

Late disclosure puts the defence in a particularly difficult position, and not only with potential character applications.

In consequence of the strict time limits imposed by the CrimPR, a practice has arisen where blank or incomplete character applications are submitted in order to comply formally with time limits. It is then intended that these blank applications are either filled in at a later date (e.g. following disclosure) or abandoned completely. The increasing prevalence of this practice was also identified by Hoyano.[92] In interviews, a range of opinions were expressed:

> **Barrister 2**
> I think sometimes the CPS think, "Well, let's make the bad character application, it's then on the table, we can always abandon or amend it later on". And that is something I find pretty annoying, because sometimes I have to respond to what are obviously ridiculous bad character applications that no judge is ever going to allow. It's just a waste of my time.

> **Barrister 10**
> One of the things that does irritate me: […] you do sometimes feel that because there's a time limit in place, that you need to put the [s.41] application in writing, and then abandon it later. Which is frustrating, because it's work that you're doing even though you haven't yet decided whether you're going to go there or not. And that's a bit frustrating I think. But your client will have already flagged that up to you, so you can't say, "Oh well, I haven't decided yet, judge. So I didn't want to make the application too soon, because I had to make a final decision about whether to make the application or not". From the moment you are aware that it's an issue, you really need to put it in writing so that you can abandon it later.

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[89] At §7.1.C.i.
[90] Hoyano (n52), paras 94-99.
[91] Similar complaints were made by **Barrister 6** and **Barrister 9**.
[92] Hoyano (n52), para 100.

Neither **Barrister 2** nor **Barrister 10** was particularly happy about this practice, though **Barrister 10** acknowledged its necessity owing to the strictness of the time limits. This feeds into the argument made by **Barrister 7**, that so long as the application is filled in before the judge reads it, no one will notice. Another aspect of submitting empty applications relates to the 'rotating barristers' problem, as it was suggested to me by one barrister during my trial observations that often barristers will submit empty or incomplete s.100 or s.41 applications so that they don't 'tie the hands' of the counsel who eventually conducts the trial. The upshot is a kind of 'prisoner's dilemma' whereby, ultimately, barristers are wasting their own time in making speculative empty applications, as well as the time of any opponents required to respond to them.

7.3. Character Evidence Framing

Admissible BC or SH evidence will be put to the jury in some way. It could be adduced as an agreed fact, in documentary form, or questions could be asked of a witness in order to elicit the evidence. But this is not the end of the story. The judge must direct the jury on matters of law (including character), and sum up the evidence in an impartial manner. Additionally, both counsel have the opportunity to give closing speeches to the jury which frame the evidence in a way which supports their respective cases.[93]

7.3.A. Judicial Directions

7.3.A.i. Bad Character

When evidence of the BC of a non-defendant is admitted through one of the statutory gateways,[94] trial judges are required to direct the jury as to how they may use it. Guidance on the formulation of directions is contained in the Crown Court Compendium.[95] A BC direction must identify the evidence of BC and explain how, and with regards to what, the evidence may be relevant.[96] The jury should also be told that the use of the BC evidence in resolving any issues in the case is up to them, and that (depending on the nature of the BC evidence) the BC may be relevant to the individual's credibility as a witness.[97] It was added in *Kelly*[98] that if the use of BC

[93] Recent guidance suggests that speeches should come between judicial directions and evidence summing-up: Criminal Practice Direction VI (2018), 26K.16.
[94] Including gateway (c): *J* [2010] EWCA Crim 385.
[95] Available at <https://www.judiciary.uk/wp-content/uploads/2016/06/Crown-Court-Compendium-Part-I-December-2019-amended-19.02.20.pdf>.
[96] *Crown Court Compendium*, 12-10(7)-(8).
[97] *Crown Court Compendium*, 12-10(9)-(10).
[98] *Kelly* [2008] EWCA Crim 1456, applying the principles set out for directions for defendant BC in *Campbell* [2007] EWCA Crim 1472; [2007] 2 CrAppR 28.

evidence is 'obvious', a direction may not necessarily be required.

Argument was joined in **Case 9** on exactly this point. Evidence had been admitted that one of the complainants (the mother, CM) had been convicted of criminal damage, where she had given evidence in her own defence; the implication being that CM had previously lied under oath. Defence counsel requested a BC direction concerning CM. The judge was resistant, claiming that BC directions are more appropriate for defendants than non-defendants, and that telling the jury that an individual lying under oath damages their credibility is so obvious as to be unnecessary. However, following oral quotations from the Compendium[99] the judge relented and gave a short direction that the jury could take this BC into account when assessing CM's credibility. Perhaps *Kelly* has influenced the giving of non-defendant BC directions in practice. A second reason for judicial reluctance in this case was the overly comprehensive and proscriptive nature of the Compendium, which the judge felt led to directions becoming overly formulaic.

Trial judges must direct juries as to *all* of the issues to which BC evidence is 'potentially relevant'.[100] Therefore, the judge may have to mention to the jury matters of theoretical relevance which did not figure in the parties' articulated rationales for adducing BC evidence. This reflects a general principle, characterised by Spencer as 'when it's in, it's in'.[101] However, given that almost any prior conviction could be admissible for credibility purposes,[102] trial judges may feel compelled to direct juries that they are entitled to use prior convictions that were admitted for other purposes (such as propensity) for assessing credibility. Indeed, in *Ivers*,[103] the Court of Appeal endorsed the proposition that directions should clearly state that it is up to the jury to decide as to whether, and how, BC evidence may influence their determinations regarding a witness's credibility. This creates a risk that jurors who, quite sensibly, assume that there is no logical connection between prior convictions and credibility may reassess their assumption in light of the judicial direction.

In the non-defendant BC judicial directions observed, judges did not stray from counsel's arguments explaining how the BC evidence could be relevant to the issues. In **Case 2**, prior abuse of C's two sisters was admitted through s.100. In his directions, the judge stated that the primary reasons for referring to these extraneous matters was to explain the frequent presence

[99] *Crown Court Compendium*, 12-10(10).
[100] *Crown Court Compendium*, 12-10(8).
[101] Spencer, *Evidence of Bad Character* (3rd edn) (n47), para 5.62.
[102] *Brewster* [2010] EWCA Crim 1194, [2011] 1 WLR 601, [2010] 2 CrAppR 20.
[103] *Ivers* [2007] EWCA Crim 1773.

of social services in the family, and to support D's defence that he would be less likely to do the things alleged given this history of abuse. The direction given in **Case 14** included competing arguments from the prosecution and defence. Here, BC was admitted concerning an alleged prior fight between ex-partners C and D. The judge directed that this incident could suggest that C had a history of making false allegations, or it could suggest D's propensity to be violent towards C, or it could merely be a history of how they acted towards each other. It was explicitly left to the jury to assess these three possibilities.

There is little support from my observations that judges are giving directions on character which cover any and all potential uses of the admitted evidence. But by constraining their directions (in all observed cases) to rehearsing the arguments which counsel had either already made or were about to make, the added value of the directions was possibly limited to their being in writing, which the jury could consult during their deliberations.[104] It is also possible that these arguments would carry greater authenticity coming from the judge, rather than the adversarial parties.

7.3.A.ii. Sexual History

In contrast to BC, there are no specific directions for SH evidence in the Crown Court Compendium. Instead there are general guidelines for giving directions in certain recurrent scenarios in sexual offence cases. For example, where there is evidence of a prior sexual relationship between the complainant and defendant, the trial judge must alert the jury that 'the mere fact that… [the complainant] has had consensual sexual intercourse with… [the defendant] on other occasions does not mean that she must have consented to have sexual intercourse with him on this occasion'.[105] It was also suggested by Lord Clyde in *A (No 2)* that where SH evidence has been admitted through gateway (a) as going to belief in consent, the jury may need to be directed that they should not use it to infer consent in fact.[106] Other than these two examples, directions are ultimately within the discretion of the trial judge who may tailor a SH direction if 'necessary'.[107]

One such direction was given in **Case 11**, where evidence was admitted that C and D had consensual sex both before and after the alleged rape. The

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[104] CrimPR, Rules 25.14(3)(b) and (4).
[105] *Crown Court Compendium*, 20-1 Example 9. Judges appear to be proactive in making these sorts of directions; N Kibble, 'Judicial perspectives on the operation of s.41 and the relevance and admissibility of prior sexual history evidence: four scenarios: Part 1' [2005] *Criminal Law Review* 190, 201-202.
[106] *A (No 2)* [2001] UKHL 25, [2002] 1 AC 45 (HL), [2001] 2 WLR 1546 [130] (Lord Clyde).
[107] *Crown Court Compendium*, 20-1(8)

direction, given between C's evidence-in-chief and cross-examination, stated that the parties had been in a relationship and had previously had consensual sex, but that this did not mean that C consented on the occasion in question; adding that D could not use this prior consensual sex in support of a reasonable belief. This direction was effectively taken straight from the Compendium.

Though only one other s.41 application was observed, it supports the impression that directions are more likely if the SH evidence concerns a prior relationship. In **Case 12**, evidence that C may have masturbated close in time to the alleged assault was admitted in order to suggest an alternative explanation for her hymen injuries. This was not mentioned at all during the judge's legal directions.

7.3.A.iii. Barrister Opinions of Judicial Directions

Though my research methodology could not directly examine the effect of legal directions on juries, my interviews with barristers allowed for the exploration of *their* opinions of directions. As suggested in the previous sections, directions concerning non-defendant character appear to be rare. As a result, barristers had little to say specifically about character directions, other than some complaints about the use of the word 'propensity' (common also in defendant BC directions):[108]

> **Barrister 6**
> The use of the word "propensity" has always troubled me. Because I'm not sure how many people fully understand what propensity means. But what I've found is that the better judges tend to say propensity, but then go on to say "that simply means a tendency to behave in a certain way", or "a tendency to do something". And juries understand "tendency" far better than "propensity" I think. And I do think the better judges that I've seen simplify the language even further, and that's a good thing too, I think.

A more pervasive worry was that technical language in directions – even if written down – is causing vital directions to be misunderstood, or not understood at all, by juries. This links to widespread concerns amongst interviewed counsel about the length and quality of directions, and the ability of lay people to understand them. The following is representative of numerous comments:[109]

> **Barrister 1**
> If you want my honest opinion, it's far too complicated. They give all these directions about giving different evidence from what they've said in their interview if you went no comment, or an attack on character. We've just seen an example [in **Case 1**], in that summing

[108] Concurring statements were given by **Barrister 4** and **Barrister 7**.
[109] In agreement were **Barrister 2**, **Barrister 3**, **Barrister 4**, and **Barrister 5**.

> up the legal directions ran to 8 pages of closely typed text. And to imagine a jury can sit and comprehend all that, and absorb it and appreciate it, I mean it's stuff you do at degree level. If you want my honest answer, I think it's a ritual, and I think we kid ourselves that juries are taking this all on board and can apply it and balance it. They're given so many legal directions I think we've almost become a system where the procedure is more important than the substance. So, my honest frank answer – I think my perception is that a lot of it just goes over the jury's heads.

7.3.B. Counsel's Closing Speeches

Prosecution and defence counsel's closing speeches are their opportunity to convince the jury that the evidence best supports their own case (or does *not* support the opposition case). Speeches are loosely regulated by the CPS Code and case law.[110] The prosecution is to go first,[111] and must be conscious of their role as ministers of justice in not pursuing convictions at all costs.[112] Defence counsel have slightly more latitude, and are able to advance any exculpatory hypothesis which is supported by the evidence.[113] Where SH evidence has been admitted by the prosecution and there has been no s.41 application, the defence must be careful in referring to that evidence in their speech as they must not go against the 'spirit' of s.41 by alluding to the 'twin myths'.[114]

Where prosecution witness BC was admitted in the observed trials, defence counsel's closing speeches often used that evidence in framing the issues.[115] In **Case 9**, as well as a judicial direction concerning CM's prior lying under oath,[116] both counsel addressed the issue in their speeches. Prosecution counsel could not avoid the damage to CM's credibility, but instead focussed on the credibility of the daughter-complainant (CD) who was not similarly undermined. Unsurprisingly, defence counsel focussed on CM, painting her as controlling and manipulative with a proven 'flippant approach to court proceedings', potentially to the extent that she could have convinced CD to invent the current allegations.

Clearly, evidence of CM having lied under oath was inconvenient for the prosecution's case. Counsel's tactics were to acknowledge the existence of the evidence, but to immediately shift the focus to CD, who had *not* been exposed as a perjurer. For defence counsel, attacking the credibility of both

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[110] See generally *Blackstone's Criminal Practice 2020* (n2), D18.15-20.
[111] CrimPR, Rules 25.9(j)-(k).
[112] CPS, *Code For Crown Prosecutors* (London: Crown Prosecution Service, 2018), paras 2.7; *Gonez* [1999] AllER(D) 674.
[113] *Bateson* [1991] 3 WLUK 118.
[114] *Le Brocq v Liverpool Crown Court* [2019] EWCA Crim 1398 [47]-[60] (Lord Burnett).
[115] See also the discussion of the effect of closing speeches concerning BC in **Case 5** at §5.3.D.
[116] See §7.3.A.i.

complainants was the main line of defence. This BC evidence was therefore a linchpin of the speech. It was afforded significant time and emphasis, as well stylistic flourishes ('hoodwink the magistrates').

The charge in **Case 14** was actual bodily harm. The current allegation concerned an evening where C was at a restaurant with her new boyfriend, when she heard that D (her ex-boyfriend) was also on the premises, fixing an oven in the kitchen. C went to confront D, during which he allegedly swung a kitchen knife at her, cutting her arm. It was agreed between counsel that evidence of C's cocaine and cannabis use could be admitted; it was the main argument of the defence that C was hysterical, and prone to exaggerations which were exacerbated by drug use. D gave evidence of the drug use himself (he 'knew what she was like' when high), and there was also evidence in the form of audio from C's 999 call, where she talked too quickly for the operator to understand and slurred her words.

Prosecuting counsel began her speech by questioning the likelihood that a cocaine user would indulge on a Thursday night, before arguing that there was no independent evidence in support of this drug allegation. To neutralise the 999 call, she stated that C spoke fast naturally, which would have been exacerbated by her justifiable feelings of distress at the time. Concluding that the cocaine use was a smokescreen to distract the jury, the prosecution also suggested that if D was lying about this it undermined *his* credibility. In response, defence counsel noted that addicts do not confine drug-taking to weekends, and so it was 'perfectly plausible' that C was using on a Thursday evening. Defence counsel argued that D's claims were based on his long history with C, combined with how he saw her act that evening. Preferring not to editorialise about the 999 call, the barrister merely stated, with a wink and nudge, that the jury could 'infer what they will' from the call. Unlike prosecuting counsel in **Case 9**, who had two complainants to rely on, the prosecuting barrister in **Case 14** had to confront the BC of her only complainant head-on. Her tactics were to rely on the absence of supporting evidence of drug use that evening, and to paint C as a woman who was in severe distress, rather than high on cocaine. The entire defence case relied on portraying C as a fantasist who was obsessed with D and unwilling to let him go. Either side of this part of the defence speech were references to the complainant being a 'rebuffed' ex-lover, and a known 'trouble-maker' for seeking attention. It was plausible that C was under the influence, and the 999 call was allowed to speak for itself.

The point to be drawn from these examples, and others discussed

elsewhere, is that admitted BC and SH evidence is not only mentioned in evidence. Because the evidence is usually desired to be admitted by at least one of the parties, they have an interest in framing it for particular use by the jury. In doing so, counsel can place the character evidence in the wider context of the case as a whole. Moreover, opposing counsel can contend to the jury that they should *not* take the character evidence into account in their deliberations. With the additional benefits of written judicial directions, the jury are expected to be able to understand the character evidence, and appreciate its legitimate uses in the trial.

7.4. Concluding Remarks on Procedural Failings

Given widespread disclosure failures in the criminal justice system, it is not very surprising to discover that disclosure of character evidence is frequently late or incomplete. The knock-on effect is that full compliance with the relevant procedural requirements in the CrimPR becomes difficult, if not impossible. None of the five reasons for late character applications identified in my empirical data could be solved through greater enforcement of the CrimPR, or severe consequences for breaches (such as strict obligations for judges to reject late applications).[117] These failings instead point to much wider concerns about the cuts to funding and resources throughout the criminal justice system, including problems with trial listings and 'rotating barristers', which are responsible for delays and other non-compliance. Moreover, the CrimPR must not impede the proper administration of justice, as ultimately the success of s.100 and s.41 applications must be determined on their merits, and not by formal compliance with procedural requirements (so long as the opposing side is not disadvantaged).

When BC or SH evidence is admitted, the jury are not simply left to come to their own conclusions. They are guided by the judge as to legally permissible uses of the evidence, whilst counsel will invite the jury to use the evidence in a way which fits the narrative of their own case. Though not the focus of the present study, the expressed lack of confidence in the efficacy of judicial directions should prompt further research, not only into character directions, but judicial directions in general.[118] Furthermore, there is a distinct lack of research on the form and impact of counsel's speeches. This may be an avenue which is ripe for further research.

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[117] As suggested in Durham *et al* (n71).

[118] Psychologists are ahead of legal researchers in this regard: MJ Saks and BA Spellman, *The Psychological Foundations of Evidence Law* (New York: NYU Press, 2016), Ch3.

8. CONCLUSIONS: BEYOND CHARACTER EVIDENCE

This thesis has addressed four central research questions concerning the use of non-defendant bad character (BC) under s.100 of the Criminal Justice Act (CJA) 2003, and sexual history (SH) evidence under s.41 of the Youth Justice and Criminal Evidence Act (YJCEA) 1999.[1] Having elaborated the thesis questions and methodology in Chapters 1-3, Chapter 4 examined the scope of the admissibility rules and their overlaps. Chapters 5 and 6 scrutinised the rules themselves along with their role in counsels' trial tactics. Chapter 7 explored three procedural aspects of character evidence (disclosure, notice under the Criminal Procedure Rules (CrimPR), and judicial directions and closing speeches). Each of these chapters presents discrete findings related to the research questions, informed by combining doctrinal analysis with my empirical data. By way of conclusion, some of the common findings across chapters will be extracted and linked to broader themes which concern the changing character of criminal trials in England and Wales, as well as the changing character of evidence scholarship.

8.1. CHARACTERISING CRIMINAL TRIALS: MANAGERIALISM ON THE CHEAP

Drawing out overarching themes from the data presented in the thesis is difficult. Not because there are none to draw – far from it – but because almost all substantive meta-themes lead to the same two structuring thematics: a) the increasing managerial ethos of the criminal justice system; and b) (a lack of) time and money. Ideally, these could be separated and discussed as independent themes, but to do so would require much artificial line-drawing. Each bears on the other, and they are often in direct conflict. After summarising key findings from my data which link to these two ultimate themes, my research findings will be situated in wider debates concerning the changing nature of criminal trials and criminal process.

8.1.A. My Findings: Increasing Cooperation and Doing More with Less

One of the key findings in my analysis of both s.100 and s.41 (and s.101) is that most applications are uncontested, and so evidence of BC and SH is

[1] See §1.2.

commonly admitted following an agreement between the parties. This seems to be the case even though s.41 does not technically allow SH evidence to be admitted by agreement. It was found in §6.8 that counsel utilise three creative 'workarounds' for this doctrinal inflexibility: the prosecution can admit the evidence itself, the prosecution can adduce contrasting evidence in order to open the rebuttal gateway (s.41(5)) for the defence, or the prosecution can 'not oppose' the defence's s.41 application.

Chapters 5 and 6 developed the argument that, although there are some general factors which influence decisions to agree (such as individual personalities, familiarity between counsel etc.) consensus is ultimately based on case and fact-specific variables such as the relevant advocate's theory of the case and their trial tactics. However, saving time and reducing workloads were also factors which some barristers seemed to consider when agreeing evidence.

Agreements to admit character evidence must be contextualised with agreements to admit other kinds of evidence. In general, agreed evidence (or 'formal admissions'/'agreed facts') is admissible by virtue of ss.9-10 of the Criminal Justice Act 1967, and often gets short shrift in evidence textbooks due to the lack of doctrinal interest in uncontested evidence.[2] Roberts and Zuckerman give the topic slightly more consideration, arguing that agreed evidence 'reflects the pragmatic imperatives of expediting trial proceedings and minimizing avoidable costs',[3] while also assisting the jury to concentrate on facts which are actually in dispute. Adversarialism provides the structure for this practice; parties have the freedom to 'define the parameters of the litigation contest'.[4] It follows that the parties can also agree what evidence is disputed and what is not.[5]

There are no recent empirical studies which specifically examine the frequency of evidence being admitted by agreement. Zander and Henderson's *Crown Court Study* from 1993 found that 27% of trial counsel surveyed sought pre-trial agreements to admit certain evidence; of which approximately 80% were successful.[6] The Ministry of Justice report on BC evidence found in their sample that only 2/361 defendant BC applications

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[2] See for example the single paragraph in R Munday, *Evidence* (10th edn, Oxford: OUP, 2019), para 9.99.
[3] P Roberts and A Zuckerman, *Criminal Evidence* (2nd edn, Oxford: OUP, 2010), 120.
[4] Ibid, 121.
[5] In Scotland there is a legal duty on counsel to agree 'uncontroversial' evidence under s.257 of the Criminal procedure (Scotland) Act 1995. See further; P Duff, 'Intermediate diets and the agreement of evidence: a move towards inquisitorial culture?' (1998) *Juridical Review* 349; P Duff, 'The Agreement of Uncontroversial Evidence and the Presumption of Innocence: An Insoluble Dilemma?' (2002) 6(1) *Edinburgh Law Review* 25.
[6] M Zander and P Henderson, *The Royal Commission on Criminal Justice: Crown Court Study* (London: HMSO, 1993), 73.

and 3/32 non-defendant BC applications were admitted by agreement.[7] Given that every single case observed in this study involved lengthy admissions of agreed evidence (not just character evidence), it is probably safe to say that these studies are not representative of current practice, and that admitting evidence by agreement is 'probably endemic'.[8] Whether or not these studies were representative of practice at the time, it is argued here that there has been a cultural shift, in a relatively short duration, from agreements occurring 'sometimes', to agreements occurring in almost all cases. It is submitted here that this cultural shift has been precipitated by increasing case management obligations and drives for efficiency throughout the criminal process.

Another major finding in this study concerns procedural failures. Under Rules 21 and 22 of the CrimPR, counsel must serve applications to adduce evidence of BC or SH as soon as is practical so that the application can be resolved at a pre-trial hearing. If the application concerns SH, it should also be in writing. My empirical data align with findings elsewhere that non-compliance with these procedural requirements is the norm.[9] Three main reasons for these breaches were identified, all relating to time and money. Firstly, counsel do not have the time to make these applications and are not paid enough to make them worth doing. Secondly, cuts to legal aid and funding for the courts are causing barristers to take on more and more cases to stay profitable, but long delays to cases combined with unpredictable listings are leading to a very high returned brief rate. Finally, counsel cannot make these applications in good time because the prosecution has not complied with its disclosure obligations.

Regarding disclosure failings, my data reveal that the prosecution frequently discharges its disclosure obligations very late – sometimes on the morning of, or even during, the trial. When disclosure occurs, it was found that there is often a severe lack of detail in the material given. The main explanation is insufficient funding for the police and CPS to conduct adequate disclosure assessments.

Links between managerialism and underfunding are plain to see. The CrimPR obligations to give prior notice for character applications are meant to assist in streamlining the process so that less time and money is wasted on legal issues at trial. However, compliance with these measures is stymied

[7] Morgan Harris Burrows LLP, *Research into the Impact of Bad Character Provisions on the Courts* (Ministry of Justice Research Series 5/09, 2009), 15-16.
[8] Roberts and Zuckerman (n3), 120.
[9] See studies cited in §7.2.D.i. fn82.

by funding cuts to legal aid, the judiciary, the CPS, and the police. Those involved in the criminal justice process are being asked to do much more, but on a much tighter budget.

8.1.B. Managerialism and Case Management

These study findings have implications beyond character evidence. My empirical data support the contention that evidence admitted by agreement is rife. Breaches of the CrimPR were endemic, not just regarding character evidence. And disclosure issues plagued most observed trials, not just regarding character evidence. These findings need to be placed in wider contexts of increasing managerialism and budget cuts.

8.1.B.i. Managerialism as a Theoretical Model

Models of criminal justice are not intended to portray the empirical reality of criminal trial procedure, but are normative frameworks which we can use to interpret the underlying values of particular aspects of real trial procedure. Though Herbert Packer's 'crime control' and 'due process' models of criminal justice are widely discussed and influential,[10] King's 'bureaucratic' model is more salient here.[11] This model reflects a criminal justice process which is independent from political considerations; where speed, efficiency, and cost-saving are the core values; and where conflict between parties is minimised. A criminal process which aligns with the bureaucratic model contains encouragement and rewards for efficiency, and punishments for time or cost-wasting.[12] One would also expect to find good relationships between courtroom regulars, which reduces tension between parties and fosters cooperation. King suggested that a 'pure' bureaucratic criminal process is unlikely in any system where the defendant has influence over the way their case is run (as they generally push for more conflict), and where broad notions of justice are accepted as overriding any efficiency or cost-saving agendas in individual cases.[13] The bureaucratic model nonetheless resonates with recent trends in criminal process in England and Wales.

Raine and Willson build on these bureaucratic values under the concept of 'managerialism'.[14] They argue that managerialism is typified by an emphasis on productivity (case management), cost efficiency (cuts to legal aid and the courts budget) and consumerism (focussing on complainants/victims and

[10] H Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968).
[11] One of six models proposed by King: M King, *The Framework of Criminal Justice* (London: Croom Helm, 1981), 13.
[12] Ibid, 21-24.
[13] Ibid, 106-108.
[14] JW Raine and MJ Willson, 'Beyond Managerialism in Criminal Justice' (1997) 36(1) *The Howard Journal* 80.

witnesses as 'consumers' of criminal justice) at the expense of human rights and due process. Importantly, they situate increasing managerialism in the criminal justice process in the wider context of 'New Public Management' where private sector principles were imported into traditionally public sector services.[15]

8.1.B.ii. Managerialism in Action

Though it is clear that case management was becoming an increasing concern well before the introduction of the CrimPR in 2005,[16] the CrimPR can be seen as a watershed moment in the managerialisation of the trial process.[17] Initially proposed in The Auld Report,[18] the CrimPR were an attempt to consolidate and combine as many of the disparate rules and regulations relating to criminal trials as possible into one document. At the time, this goal was warmly welcomed by commentators,[19] though some were hesitant at the introduction of an 'overriding objective' in Rule 1.1 which required both the prosecution and defence to assist in the prosecution of the guilty and the acquittal of the innocent,[20] and also placed the obligation on all parties to deal with cases 'efficiently and expeditiously' (Rule 1.1(2)(e)). Taking the CrimPR as a whole, Dennis argues that they were not the mere codification promised, but created a new emphasis on a 'spirit of co-operation by participants'[21] which would require both a culture change at the Bar and an increase in remuneration for counsel for all of the additional pre-trial work this would generate.

Intensifying case management through the CrimPR has been promoted by the senior judiciary:

> '[T]he case management process, especially following the introduction of the Criminal Procedure Rules, *requires a greater level of cooperation between the parties than was once the case*. The real issues are required to be identified at an early stage... That is all the more obvious in the environment in which the parties now operate by reference to the Criminal Procedure Rules and the overriding objective.'[22]

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[15] Ibid, 80-82.

[16] Ibid; J McEwan, 'From Adversarialism to Managerialism: Criminal Justice in Transition' (2011) 31(4) *Legal Studies* 519; P Darbyshire, 'Judicial Case Management in Ten Crown Courts' [2014] *Criminal Law Review* 30; M McConville and L Marsh, 'Adversarialism Goes West: Case Management in Criminal Courts' (2015) 19(3) *International Journal of Evidence and Proof* 172.

[17] McEwan, 'From Adversarialism to Managerialism' (ibid).

[18] R Auld (LJ), *Review of the Criminal Courts of England and Wales,* (The Stationery Office: London, 2001), paras 10.271-10.280.

[19] 'The Criminal Procedure Rules' (Editorial) [2004] *Criminal Law Review* 397.

[20] I Dennis, 'Criminal Procedure Rules – An Update' [2005] *Criminal Law Review* 335.

[21] Ibid, 336.

[22] *R (CPS) v Norwich Magistrates' Court* [2011] EWHC 82 (Admin), [11] (Richards LJ) (emphasis added). See also Lord Thomas of Cwmgeidd, 'The Criminal Procedure Rules: 10 Years On' [2015] *Criminal Law Review* 395, 397-398.

However, the findings from Darbyshire's empirical study of case management in 10 crown courts suggest that many trial judges are less enthusiastic.[23] In general, she found that courts in the North and Midlands of England were reluctant to adhere to the strict requirements of the CrimPR – but *not* because of a resistance to efficiency and case management. Rather, these areas felt that they were operating at a higher efficiency than would be possible if they followed the CrimPR![24]

That the CrimPR and case management powers of trial judges are aimed at increasing court efficiency and lower costs is emphasised in Leveson LJ's more recent Review, which even has the key word 'Efficiency' in its title.[25] In the explicit context of exploring further opportunities for cost savings in the criminal courts, Leveson LJ states as his fourth principle that there must be 'effective and consistent case management',[26] which includes the goal that all parties must comply with the CrimPR and work together. Though some are supportive of this principle,[27] Marsh is highly critical, describing the Leveson Review as a 'key plank'[28] of the recent drives for cost-efficiency and austerity in the criminal justice process. Marsh also notes that the Review sets aside disclosure issues in its analysis – which is absurd since disclosure issues are *the* primary cause of inefficiencies at trial.[29]

Whatever the merits of the Leveson Review, and even though the CrimPR appear to be rarely followed to the letter, it is plain that case management, cooperation, and efficiency ('managerialism') are now core values of the criminal justice system, and that in a relatively short space of time this managerial ethos has been internalised and adopted by practitioners. McConville and Marsh agree that despite widespread non-compliance, the CrimPR have ushered in a new culture of cooperation and subservience to the judiciary.[30] Johnston similarly argues that the CrimPR have fundamentally altered the role of defence counsel.[31] McEwan goes further, describing the CrimPR's focus on defence cooperation and efficiency as a

[23] Darbyshire (n16).
[24] Ibid, 35-39.
[25] B Leveson, *Review of Efficiency in Criminal Proceedings* (Judiciary of England and Wales, 2015).
[26] Ibid, para 38.
[27] A Edwards, 'The Other Leveson Report – The Review of Efficiency in Criminal Proceedings' [2015] *Criminal Law Review* 399.
[28] L Marsh, 'Leveson's Narrow Pursuit of Justice: Efficiency and Outcomes in the Criminal Process' (2016) 45(1) *Common Law World Review* 51, 51-52.
[29] Ibid, 58-59; see also §7.1.
[30] McConville and Marsh (n16).
[31] Especially regarding defence disclosure; E Johnston, 'The Adversarial Defence Lawyer: Myths, Disclosure and Efficiency – A Contemporary Analysis of the Role in the Era of the Criminal Procedure Rules' (2019) 24(1) *International Journal of Evidence and Proof* 35.

'quiet revolution'.[32] All concur that criminal trials are becoming less adversarial, which in turn leads to less vigorous enforcement of defence rights by defence counsel.

In the context of this study on character evidence, it is not obvious that increasing pressure for cooperation is leading to reduced opportunities for the defence to attack the character of prosecution witnesses. On the contrary, my findings reveal that the prosecution is often more than happy to assist the defence in adducing BC or SH evidence against their own witnesses if they believe it would be fair to do so, or if other tactical advantages are perceived. This is all the more striking in the context of SH where, strictly, s.41 prevents SH evidence from being admitted by agreement, and yet my findings show that counsel are employing workarounds. At least with regards to character evidence, then, an increasing culture of cooperation has not necessarily worsened the defence position.

8.1.C. Doing More with Less[33]

Concluding her analysis of the impact of the CrimPR, Darbyshire argues that the Rules are a 'wish-list, unenforceable in the cut and thrust of daily courtroom practice (on a reducing budget).'[34] At one end, trial process is being increasingly dominated by the CrimPR's efficiency and case management concerns in an attempt to drive down costs and reduce wasted time, whilst increasing workloads for all involved. At the other end, the budgets for legal aid (on which most defence counsel rely), the courts, the CPS, and the police are all being heavily squeezed. Budget reductions have two related effects on compliance with case management obligations. Counsel and criminal justice agencies are unable (and sometimes unwilling) to do more work without increased resources and remuneration. As a result of being paid less, counsel take on multiple cases which means that they cannot devote as much time to each individual case. The CPS and police are also spending less time on individual cases due to heavily increased workloads with no equivalent increase in staffing. Compounding these issues are two further problems identified in this thesis:[35] 'rotating barristers', and unfixed case listings.

[32] McEwan, 'From Adversarialism to Managerialism' (n16), 528.
[33] See references to the justice system having to become more effective or 'better' with less resources in: *Ministry of Justice 2012 Capability Action Plan* (Civil Service, 2012), 6; *Ministry of Justice Improvement Plan* (Ministry of Justice, 2014), 3-4; *The Lord Chief Justice's Report 2019* (Judicial Office, 2019), 4. For an Australian perspective on the same mantra see N Cowdery, 'Negotiating Justice with Integrity in New South Wales' in J Hunter, P Roberts, SNM Young and D Dixon (eds), *The Integrity of Criminal Process* (Oxford: Hart, 2016), 121-122.
[34] Darbyshire (n16), 49.
[35] See §7.2.D.ii.

8.1.C.i. Legal Aid

Legal aid has been described as the 'fourth pillar of the welfare state'.[36] The modern legal aid regime can be sourced to the Legal Aid and Assistance Act 1949, which provided funds for access to legal services to the poor and those of 'moderate means',[37] though the relevant parts for criminal defence were not implemented until the 1960s.[38] Smith and Cape argue that the 1990s to the early 2000s are a critical period in the history of legal aid.[39] In this period, the narrative arose that England and Wales had the most expensive legal aid system in the world, and that costs had spiralled out of control to feed 'fat cat lawyers'. Smith and Cape, echoed by 'The Secret Barrister', argue that this narrative was a fiction and that per-case spending remained relatively stable. Increasing costs were primarily driven by increasing caseloads (exacerbated by New Labour introducing over 3000 new criminal offences) and the increasing complexity of criminal proceedings (amplified by the introduction and constant updating of the CrimPR).[40] Cuts to the expanding legal aid budget were first planned by New Labour in 2006-7. 'Fixed fees' for certain types of work and stricter means testing were introduced, then went into overdrive following the financial crash and the austerity-driven policies of the Coalition Government.[41]

Recent changes to the legal aid budget hitting Crown Court advocates are the most salient for this study. In 2010, the criminal Bar took a 37% real-term cut in Crown Court fees, followed by a further 8.75% cut in 2014.[42] These reforms also introduced a complicated fixed fee system, whereby counsel are to be paid according to a formula which takes into account such things as the number of pages of evidence, the types and number of pre-trial hearings, and the length of the actual trial.[43] Under this, it is 'immaterial how much work [advocates] *actually* do',[44] the fee is the same.

The current regime, along with recent proposals to alter it again, were recently analysed by the Criminal Bar Association.[45] The CBA cite a rape trial

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[36] J Robins (ed), *Unequal Before The Law? The Future of Legal Aid* (London: Wilmington, 2011), 9.
[37] Ibid.
[38] T Smith and E Cape, 'The Rise and Decline of Criminal Legal Aid in England and Wales' in A Flynn and J Hodgson (eds), *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Oxford: Hart, 2017), 64.
[39] Ibid, 68-69.
[40] Ibid, 70; Secret Barrister, *The Secret Barrister: Stories of the Law and How It's Broken* (London: MacMillan, 2018), 203-207.
[41] Smith and Cape (n38), 70-71.
[42] Secret Barrister (n40), 182-183.
[43] Ibid, 209.
[44] Ibid, 209 (emphasis in original).
[45] *Response of the Criminal Bar Association of England & Wales Consultation on Amending the Advocates' Graduated Fee Scheme* (Criminal Bar Association, 2018).
<https://www.criminalbar.com/wp-content/uploads/2018/10/Response-of-the-Criminal-Bar-

with multiple defendants with 15,000 pages of evidence which needs to be closely analysed, where counsel advises a guilty plea – for which defence counsel will be paid in total only £900.[46] Similarly, the point is made that counsel can only be paid for 'wasted preparation' (where counsel conducts pre-trial preparation but for some reason the case does not go ahead) if the trial was intended to last for more than five days *and* preparation took more than eight hours.[47]

It was predicted by Smith and Cape that these cuts and changes to advocate fees would lead to decreases in court efficiency, longer trials, and advocates taking on higher caseloads in an attempt to mitigate their loss of earnings. Moreover, they warned that these factors would eventually lead to problems with retention rates of junior barristers – many of whom have to work at an effective rate below minimum wage for their first few years in practice.[48] This brief overview is enough to see the contradiction at the heart of the current drive for efficiency. At the same time as counsel are being asked to conduct more pre-trial preparation and have as much evidence agreed prior to trial as possible, the pay for such activities is being cut and, in some cases, entirely removed. Given this, it is wholly unsurprising that the CrimPR seem to be considered, overall, an unenforceable 'wish-list'.[49]

As yet, there has been little academic analysis of the impact of cuts to the funding of the criminal Bar; a recent edited collection dedicated to critiquing cuts to legal aid barely mentions barristers at all.[50] Whether it be consequences for the efficiency of court proceedings, impacts on defendants, or implications for the quality of service provided by advocates; my study suggests at the very least that these issues require urgent policy reconsideration and further empirical research.

8.1.C.ii. (Dis)Continuity of Counsel and Listings

Reviewing the state of the criminal Bar, Jeffrey identifies four factors responsible for advocates' underpreparation:[51]

1. Solicitor firms do not instruct advocates until they know what the defendant's plea will be – which is often rather late.

Association-of-England-Wales-Consultation-on-Amending-the-Advocates'-Graduated-Fee-Scheme.12.10.18-.pdf> Accessed 25/03/2020.

[46] Ibid, para 88.

[47] Ibid, para 112-113.

[48] Smith and Cape (n38), 77; Secret Barrister (n40), 210.

[49] Darbyshire (n16), 49.

[50] A Flynn and J Hodgson (eds), *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Oxford: Hart, 2017).

[51] B Jeffrey, *Independent Criminal Advocacy in England and Wales* (May 2014), paras 7.6-7.7. <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/310712/jeffrey-review-criminal-advocacy.pdf> Accessed 25/03/20.

2. The CPS similarly do not instruct advocates until late on in the process.
3. Counsel have to return cases late due to clashes in their diaries.
4. The method of listing trials entails that advocates are not able to plan their diaries.

Though all four are relevant, Jeffrey identifies the fourth (and, by implication as they are linked, also the third) as the main reason for lack of preparation and poor compliance with the CrimPR. Crown Courts in England and Wales operate a 'warned listings' system, whereby cases are 'warned' to appear in a particular period, and will be given a secure fixture once a courtroom is available.[52] As a significant number of cases which get to trial crack (the defendant pleads guilty or the prosecution is dropped), listings officers utilise this flexibility to move cases around to fill empty courts. The downside to this system is that there is a great deal of uncertainty for all participants (including witnesses).

Uncertainty for counsel means that their diaries contain educated guesses for trial dates. When these estimations are incorrect, counsel have to 'return' the case and another advocate has to take it on. My empirical data contained no examples of counsel at trial being the same advocate throughout the lifespan of the case - in fact most barristers received the case only days or hours before the hearing. Over the last ten years, it has become increasingly apparent that few cases have continuity of counsel. Auld LJ was 'over-optimistic' in this regard.[53]

Despite identifying listings and high rates of return as key issues stymying the efficiency of criminal proceedings, Jeffrey stops short of prescribing any remedies. Instead, he passed the buck to Leveson LJ's Review. Leveson LJ appears to address the listings issue discreetly, with no regard for high return rates or discontinuity of counsel. As a result, Leveson LJ's recommendations all concern greater pre-trial preparation and inducement of guilty pleas.[54] Though agreeing that more 'fixed listings' (where a firm trial date is set well in advance) would be desirable, the only potential solution offered is for courts to sit longer hours (early mornings and evenings). This suggestion is mainly aimed at facilitating the participation of witnesses and complainants who work during the week.[55] It is unclear how asking members of the Bar to work 'alternative hours' would solve the problems identified here.

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[52] Criminal Practice Direction XIII; M Fenhalls, 'Focus on the Future' (2015) 4 *Criminal Bar Quarterly* 4.
[53] Darbyshire (n16), fn32 citing Auld (n18), para 10.226.
[54] Leveson (n25), paras 138-142.
[55] Ibid, paras 130-144, 214-222.

Though 'rotating barristers' has always been problematic, Boon argues that discontinuity has increased significantly in recent years, and has been driven primarily by cuts to legal aid.[56] Counsel are not being paid for pre-trial work mandated by the CrimPR, meaning that they are taking on more cases to remain profitable. Taking on too many cases leads to a higher rate of returns, which is linked to the warned listings system. As this practice becomes ingrained pre-trial work becomes highly unattractive, both because it is (mostly) unpaid, and unlikely that the advocate doing the pre-trial work will conduct the eventual trial. Much like legal aid more generally, then, my data indicate that (dis)continuity of counsel and related problems with listings are topics which demand further empirical investigation.

8.1.C.iii. Disclosure: The CPS and the Police

My empirical data highlighted late and/or incomplete disclosure as another main cause for lack of compliance with the CrimPR. As discussed in §7.1.C.i, my interviewees ascribed these failures to under resourcing rather than incompetence or malice. In a nutshell, the police and CPS do not have the time or resources to comply with their disclosure obligations under the Criminal Procedure and Investigations Act (CPIA) 1996.

Disclosure failings clearly do not relate only to character evidence. Findings from my interviews and trial observations are corroborated by other studies on disclosure which have found that both the police and CPS are severely overworked and understaffed, meaning that even individuals with the best intentions are unable to do the job properly or on time.[57] This is fast becoming one of the most pressing concerns in the entire criminal justice process, and is being made worse by exponentially increasing quantities of digital evidence requiring careful analysis, while funding is either dropping or stagnating.[58] This thesis contributes to the choir of voices suggesting that in order for disclosure to work as it should, the individuals and agencies involved need to be adequately resourced.

8.2. CHARACTERISING CRIMINAL EVIDENCE METHODOLOGY

Moving away from the substantive findings, the second major theme, apparent from reading across the analytical chapters, is the importance of

[56] A Boon, *The Ethics and Conduct of Lawyers in England and Wales* (Oxford: Hart, 2014), 646.
[57] CW Taylor, *Criminal Investigation and Pre-Trial Disclosure in the United Kingdom: How Detectives Put Together a Case* (Lampeter: Edwin Mellen, 2006); T Smith, 'The "Near Miss" of Liam Allen: Critical Problems in Police Disclosure, Investigation Culture and the Resourcing of Criminal Justice [2018] *Criminal Law Review* 711; I Dennis, 'Prosecution Disclosure: Are The Problems Insoluble? [2018] *Criminal Law Review* 829.
[58] S Leahy, 'Too Much Information? Regulating Disclosure of Complainants' Personal Records in Sexual Offence Trials' [2016] *Criminal Law Review* 229; Smith (ibid).

studying and situating the rules of evidence in socio-legal context. This thesis can therefore also be seen as contributing to methodological developments in the study of the law of evidence, and of criminal trials, more generally.

8.2.A. Criminal Evidence at the Intersection of Law, Facts, and Practice

The law of evidence is an ideal topic for socio-legal investigation. Points of evidence law are argued over between opposing counsel in courts across the country on a daily basis. Statutes and case law are cited in support of these arguments, and counsel (and judges) are expected to keep up with the latest developments in order to minimise appeals. The law of evidence is therefore in high usage and is frequently disputed.

The formal doctrine is not the be-all and end-all, however. The applicability of different exclusionary rules and admissibility gateways (and procedural requirements) depends largely on the specific facts and evidence in each individual case. It will be recalled from Chapters 5 and 6 that a key finding was that decisions to agree or contest the admission of BC or SH are highly fact-sensitive, and most interviewees were unwilling to generalise in recognition of this truism. But though s.100 and s.41 applications are driven primarily by case-specific variables, my empirical data reveal that the 'social world of counsel' is also significant. Several external variables influencing these decisions were discussed in §§5.3.A-C, including: familiarity between counsel (and the judge), individual personalities, and counsel's professional reputation and career goals. In addition, we must not lose sight of the influence which defendants themselves can have here – as advocates are ultimately duty-bound to follow instructions.[59]

The procedure and findings of this thesis should encourage evidence scholars to study the operation of evidence law in its social context, as proposed by Twining over 20 years ago.[60] Not all available BC or SH evidence is sought for admission in criminal trials, and it seems plausible that the same can be said of hearsay and other types of evidence.[61] What is needed in particular is more research into how counsel decide to seek the admission (or not) of evidence in particular cases. This would require not only further trial observations and interviews with observed counsel, but researchers

[59] See for discussion §6.2.B.

[60] See W Twining, *Law in Context: Enlarging a Discipline* (Oxford: OUP, 1997); W Twining, *Rethinking Evidence* (2nd edn, Cambridge: CUP, 2006). See also J Jackson and P Roberts, 'Beyond Common Law Evidence: Reimagining, and Reinvigorating Evidence Law as Forensic Science' in Brown DK, Turner JI and Weisser B (eds), *The Oxford Handbook of Criminal Process* (Oxford: OUP, 2019).

[61] The trial observation data are replete with examples of hearsay admitted by agreement.

must ideally gain access to pre-trial and intra-trial private negotiations between opposing counsel concerning the admission of evidence. As agreed evidence is becoming more prevalent through the increasing managerialisation of the criminal trial process, research on these negotiations is vital for better understanding and rational policy making.

8.2.B. Seeing the Invisible Operation of the Law

Trial observations are a relatively underused methodology in the discipline of Law. Though in vogue in the 1970s and 1980s,[62] in recent years the method has primarily been utilised by criminologists and sociologists.[63] Many (though not all) of these studies neglect or underplay both the legal framework within which trials operate, and legal explanations for observed phenomena. For example, there is an entire literature concerned with the study of 'courtroom workgroups'. First proposed by US researchers Eisenstein and Jacob, the courtroom workgroup requires the study of court practice as a group activity.[64] However, courtroom workgroup analyses rarely engage seriously with the relevant legal frameworks or consider case-specific variables.[65]

My experience of trial observations was rife with nods and winks to, and unstated understandings of, the rules of evidence and procedure. In §4.1.E we saw that s.98(a) CJA 2003, which excludes from the scope of BC evidence of misconduct which 'has to do with' the current offence charged, was never once mentioned explicitly. However, this does not mean that the section was not *used*. I noted several situations where it seemed plausible that s98(a) was operating.

More common were situations where witnesses were prevented from giving evidence on particular topics because the evidence was BC, hearsay, or simply irrelevant. For example, in **Case 17** C's mother was prevented

[62] P Carlen, *Magistrates' Justice* (London: Robertson, 1976); AE Bottoms and JD McClean, *Defendants in the Criminal Process* (London: Routledge, 1976); E Burney, *Magistrate Court, and Community* (London: Hutchinson, 1979); DJ McBarnet, *Conviction* (London: Macmillan, 1981).
[63] P Rock, *The Social World of an English Crown Court* (Oxford: Clarendon Press, 1993); NG Fielding, *Courting Violence: Offences Against the Person Cases in Court* (Oxford: OUP, 2006); T Scheffer, *Adversarial Case-Making: An Ethnography of English Crown Court Procedure* (Leiden: Brill, 2010); J Jacobson, G Hunter and A Kirby, *Inside Crown Court* (Bristol: Policy Press, 2015); R Durham, R Lawson, A Lord and V Baird, *Seeing Is Believing: The Northumbria Court Observers Panel. Report on 30 rape trials 2015-16* (Northumbria Police and Crime Commissioner, 2017); LimeCulture Community Interest Company, *Application of Section 41 Youth Justice and Criminal Evidence Act 1999: a Survey of Independent Sexual Violence Advisors (ISVAs)* (September 2017); O Smith, *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths* (Basingstoke: Palgrave MacMillan, 2018).
[64] J Eisenstein and H Jacob, *Felony Justice: An Organizational Analysis of Criminal Courts* (Boston: Little, Brown, 1977), 10.
[65] Ibid, 63, 182-183, 234-234; R Young, 'Exploring the Boundaries of the Criminal Courtroom Workgroup' (2013) 42 *Common Law World Review* 203. For criticism of the use of courtroom workgroups in the England and Wales context see M McConville, J Hodgson, L Bridges and A Pavlovic, *Standing Accused* (Oxford: Clarendon, 1994), 185-188.

from giving evidence of her friend's response when she told them about D (her partner) getting into bed with her young daughter. No explanation was given to the witness as to why she was cut off, nor was the matter discussed by the judge or counsel afterwards. An appreciation of the legal context allows us to understand this as an instance of the judge preventing the witness giving evidence which is inadmissible hearsay under s.114 CJA 2003. However, someone without legal knowledge might plausibly interpret this as an arbitrary exercise of judicial power liable to unsettle an emotional witness.

A second issue with much recent trial observation research is the failure to triangulate observations with conversations or interviews with trial counsel. Without such triangulation, observational research is open to the accusation that observers are imposing their own assumptions and theoretical frames on social phenomena. Triangulation demonstrated its worth in the current study. For example, my assumption in **Case 17** that admitted evidence of the young C having searched for and viewed child pornography must have been subject to prior s.41 and s.100 applications was dispelled by talking to the prosecutor during a break. She informed me that the evidence was admitted under common law relevance as neither party (nor the judge) considered it to qualify as BC or SH due to C's youth.

As judges and counsel deal with these legal issues every day, it is unsurprising that they do not feel the need to signpost and explain which rules of evidence and procedure are being employed at any given time for the benefit of passing ethnographers. To borrow an analogy used by Geertz, observers must be able to distinguish between a judicial wink and a twitch.[66] It is not unlike trying to make sense of a cricket umpire's signals without a prior understanding of the rules of the game. Criminological or 'courtroom workgroup' analyses of trials are therefore both missing something vital. As a result, it is argued here that where the objectives of trial observation research are to understand aspects of evidence or procedure (or even substantive criminal law), the researchers themselves must have a sound grasp of the law prior to entering any courts. As such, it is hoped that this thesis can contribute to the reinvigoration of this empirical method as a serious option included within the legal scholar's methodological toolkit.

8.2.C. Beyond Exclusionary Rules and Gateways

A final methodological insight this thesis provides is that the study of evidence and procedure must look beyond rules of exclusion and admissibility. The increasing importance of procedural requirements under

[66] C Geertz, *The Interpretation of Cultures* (London: Fontana Press, 1993), 6-7.

the CrimPR have already been discussed,[67] but it is worth underlining the effect these requirements have on the application of rules of evidence. More importantly, evidence scholars must not start their analysis at the application stage and stop their analysis at the resolution of the legal issue. We must also pay attention to: how parties source and obtain evidence; why parties seek the admission of evidence; the exact form the evidence takes once it is ruled admissible; and how the jury is invited to interpret particular evidence through counsel speeches and judicial directions.

8.2.C.i. How Parties Source Evidence

Parties cannot adduce evidence or apply under a particular rule for its admission if they are not aware of its existence or have no way of sourcing it. Empirical data presented in §7.1.B. reveal that problems of sourcing evidence plague both sides, but disproportionately affect the defence.

The prosecution advocate is wholly reliant on state investigating bodies and the CPS for most evidence. The problems this can cause were highlighted in **Case 11** and **Case 20**,[68] where the police and CPS allegedly withheld both supporting and undermining evidence from prosecuting counsel. Similarly, the defence is reliant on the prosecution to disclose evidence which satisfies the s.3(1)(a) CPIA 1996 test. My empirical data, discussed in §7.1.C., revealed that disclosure is frequently late and/or incomplete, leading to situations where it is impossible for the defence to comply with notice requirements under the CrimPR.

Disclosure failings on both sides severely impact the quantity and quality of evidence which parties can adduce at trial. As such, disclosure problems permeate throughout the trial process, and can severely undermine the fairness of trials. More specifically, late disclosure means that applications to adduce certain types of evidence, such as BC or SH, can be hurried and ill-thought through which may lead to the exclusion of evidence which might have been properly admissible.

8.2.C.ii. Why Evidence is or is Not Used

The use and application of the rules of evidence cannot be separated from trial tactics. Textbooks and practitioner works expound the technical niceties of specific statutes and precedents, and such doctrinal exposition is important. However, little legal commentary conveys the reality that the rules matter much less than what the parties agree between themselves. More specifically, treatises do not inform the reader that, though there can

[67] See §§7 and 8.1.
[68] See §7.1.C.i.

be situations where it is useful, much of the time attacking the character of a complainant or other witness *is just not a good idea* from a tactical standpoint. This is because attacking a prosecution witness opens up the defendant to attacks on his own character via s.101(1)(g) CJA 2003, which is often not a price worth paying.[69] Similarly, defence counsel may feel that attacking the character of a prosecution witness may backfire and alienate the jury – which is thought a particular concern when deploying SH evidence.[70] Alternatively, there can be situations where the defendant has 'nothing to lose' in attacking the character of prosecution witnesses. [71]

These tactical factors are vital for understanding why counsel seek the admission (or not) of different types of evidence. Though some of these findings could have been predicted, doctrinal research and supposition alone are no replacement for methodologically rigorous empirical socio-legal research.

8.2.C.iii. How Evidence is Presented and Used

This thesis also highlights the importance of evidence presentation and evidence framing. Regarding the former, in **Case 5** (discussed in detail at §5.3.D.) it was agreed between the parties that Mark's (the first complainant) previous convictions for dishonesty and drug-related offences (including burglary) would be admitted. This information was provided to the jury in different ways. Mark was currently serving a prison sentence for burglary, and so there was an immediate visual aspect to his offending in his clothing and accompaniment by a guard in the witness box. During Mark's ABE interview,[72] he referred to having spent most of his life in prison, and that his life was 'wasted'. Mark's cross-examination was mostly spent on his offending history, with defence counsel repeatedly highlighting the 'dishonest' nature of Mark's offending. Prosecution counsel then spent some time in re-examination inviting Mark to attribute his offending to the current charges of sexual abuse. Defence counsel also questioned the second complainant, Harry, and a further witness (a mutual school friend) on their knowledge of Mark's offending history, in order to hammer home the point on credibility. Finally, the defendant's police interviews were read out, the second of which included the allegation from the defendant that Mark was making up the allegations due to his drug use and history of dishonest behaviour.

Merely stating that Mark's prior convictions were admitted by agreement

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[69] See §5.2.A.
[70] See §§5.2.B, 6.2.A.
[71] Either because they have no BC, or are resigned to it being admitted regardless.
[72] YJCEA 1999, s.27.

in **Case 5** is clearly insufficient if one wants to understand how this evidence was deployed. The jury was presented with references to Mark's BC visually, orally through witnesses, and finally through the defendant's police interview. It is important therefore to understand that the admission of evidence, such as BC or SH, is not necessarily a one-time discrete event. Once the evidence is admissible, it can be repeatedly referred to through the trial. Again, this is not necessarily something that one can appreciate simply by reading the case law.

Adversarial evidence framing is achieved, in the first instance, by prosecution and defence counsel's speeches to the jury, arguing how evidence in the trial should be used; followed by the judge's written legal directions, which the jury are instructed to follow.[73] Sticking with **Case 5** for the purposes of illustration, in addition to Mark's previous convictions, the defendant's previous convictions for child-pornography offences were admitted. Unlike Mark's convictions, these were referred to only once in evidence: they were read out by prosecution counsel as an unvarnished agreed fact. As such, both closing speeches were important in conveying to the jury how they should, or should not, use the defendant's prior convictions in relation to the current charges of child sexual abuse.

The CJA 2003 signalled a general shift away from strict inclusionary rules and towards trusting juries with evidence they had historically been shielded from.[74] Commentators have realised the increasing importance of judicial directions or 'forensic reasoning rules',[75] and there is already a burgeoning research literature on the form and efficacy of such directions.[76] Yet, in England and Wales,[77] similar attention is not being given to the highly partisan speeches given by prosecution and defence counsel, and the effect they may or may not have in influencing the jury. This oversight should be corrected.

8.3. CHARACTERISING THIS STUDY: CONCLUDING REMARKS

Just as an individual's character is not necessarily treated as indivisible, neither should the character of this thesis be reduced to a single trait. As initially conceptualised, the study can be seen as providing much-needed

[73] See §7.3.
[74] Auld (n18), para 11.78.
[75] Roberts and Zuckerman (n3), Ch15.3.
[76] Much of which appears to be contradictory, see J McEwan, 'Reasoning, Relevance and Law Reform: The Influence of Empirical Research on Criminal Adjudication' in P Roberts and M Redmayne (eds), *Innovations in Evidence and Proof* (Oxford: Hart, 2007), 209-212.
[77] There is some American literature on this, for example: JB Mitchell, 'Why Should the Prosecutor Get the Last Word?' (2000) 27 *American Journal of Criminal Law* 139.

qualitative empirical insight into the operation of two narrow rules of evidence; one of which (s.100) has been almost totally neglected in terms of scholarly interest[78] despite its apparent prevalence in practice, and another (s.41) which has spawned a great deal of controversy and methodologically flawed research. Through this analysis, we have seen that: both provisions are wider in scope than the case law would suggest, exploiting unclear definitions and public and political pressure; in most cases, evidence of BC or SH is admitted following an agreement between the adversarial parties; and that BC and SH evidence play an important role in counsel's trial tactics.

More ambitiously, the thesis can be viewed as a study utilising character evidence as a lens through which to examine the way in which Crown Court criminal trials have adapted to increasing managerialisation and austere funding. Failures to comply with CrimPR requirements, failures to satisfy disclosure obligations, and (to some extent) decisions to agree rather than contest the admission of evidence can all be sourced to managerialism and under-resourcing.

From another angle, the thesis is a call to arms for evidence scholars to look beyond the black letter; to undertake research which places both the rules of evidence and the evidence itself in its fuller socio-legal and institutional contexts. As such, the blended methodology of doctrinal research, trial observations, and interviews with trial counsel[79] employed in this study offers a template for examining other rules of evidence or aspects of trial procedure. Only if this call is taken up will we begin to truly understand the relationships between doctrine, practice, and tactics in the production of criminal evidence.

[78] But very recently see D Birch, 'A Credible Solution? Non-Defendant's Bad Character and Section 100 of the Criminal Justice Act 2003' [2019] *Criminal Law Review* 841.
[79] Further 'ideal' methods would include observations of pre-trial hearings and private meetings between counsel, as well as interviews with trial judges.

BIBLIOGRAPHY

—— "modus operandi, n." *OED Online*. Oxford University Press, December 2019.
—— "sexting, n." *OED Online*. Oxford University Press, December 2019.

—— *Attorney General's Guidelines on Disclosure: For Investigators, Prosecutors and Defence Practitioners* (Attorney General's Office, 2013)

—— The Code of Conduct (4th edn, Bar Standards Board, 2019)

—— *Criminal Justice: The Way Ahead* (Cm. 5074, 2001)

—— 'The Criminal Procedure Rules' (Editorial) [2004] *Criminal Law Review* 397

—— *Crown Court Compendium: Part I Jury and Trial Management and Summing Up* (Judicial College, 2019)

—— *Judicial Protocol on the Disclosure of Unused Material in Criminal Cases* (Judiciary of England and Wales, 2013)

—— *Justice for All* (Cm. 5563, 2002)

—— *Limiting the Use of Complainant's Sexual History: Section 41 of the Youth Justice and Criminal Evidence Act 1999: The Law on the Admissibility of Sexual History Evidence in Practice* (Cm. 9547, London: Ministry of Justice, 2017)

—— *The Lord Chief Justice's Report 2019* (Judicial Office, 2019)

—— *Ministry of Justice 2012 Capability Action Plan* (Civil Service, 2012)

—— *Ministry of Justice Improvement Plan* (Ministry of Justice, 2014)

—— *Proven Reoffending Statistics Quarterly Bulletin January to December 2014, England and Wales* (London: Ministry of Justice, 2016)

—— *Queen's Counsel Competition for England and Wales 2019 Guidance for Applicants*

—— *Report of the Advisory Group on the Law of Rape* (Cm. 6352, 1975)

—— *Reporting Restrictions in the Criminal Courts* (Judicial College, 2016)

—— *Response of the Criminal Bar Association of England & Wales Consultation on Amending the Advocates' Graduated Fee Scheme* (Criminal Bar Association, 2018)

—— *Speaking up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable and Intimidated Witnesses in the Criminal Justice System* (London: Home Office, 1998)

Adler Z, *Rape on Trial* (London: Routledge & Keegan Paul, 1987)

Allen RJ, 'The Nature of Juridical Proof' (1991) 13 *Cardozo Law Review* 373

Anderson T, Schum D and Twining W, *Analysis of Evidence* (2nd edn, Cambridge: CUP, 2005)

Angrosino M and Rosenburg J, 'Observations on Observation: Continuities and Challenges' in Denzin NK and Lincoln YS (eds), *Collecting and Interpreting Qualitative Materials* (4th edn, London: SAGE, 2013)

Auld R (LJ), *Review of the Criminal Courts of England and Wales,* (The Stationery Office: London, 2001)

Baber M, 'The *Youth Justice and Criminal Evidence Bill*' (House of Commons: Research Paper 99/40, 1999)

Bagaric M and Amarasekara K, 'The Prejudice Against Similar Fact Evidence' (2001) 5(2) *International Journal of Evidence and Proof* 71

Bennett W and Feldman MS, *Reconstructing Reality in the Courtroom* (London: Tavistock Publications, 1981)

Blankenship KL and Whitley BE, 'Relation of General Deviance to Academic Dishonesty' (2000) 10(1) *Ethics and Behaviour* 1

Birch D, 'A Better Deal for Vulnerable Witnesses?' [2000] *Criminal Law Review* 223
—— 'Rethinking Sexual History Evidence: Proposals for Fairer Trials' [2002] *Criminal Law Review* 531
—— 'Untangling Sexual History Evidence: A Rejoinder to Professor Temkin' [2003] *Criminal Law Review* 370
—— 'A Credible Solution? Non-Defendant's Bad Character and Section 100 of the Criminal Justice Act 2003' [2019] *Criminal Law Review* 841

Boakes J, 'Complainants of Sexual Misconduct' in Heaton-Armstrong A, Shepherd E and Wolchover D (eds), *Analysing Witness Testimony: A Guide For Legal Practitioners & Other Legal Professionals* (London: Blackstone, 1999)

Bolin AU, 'Self-Control, Perceived Opportunity, and Attitudes as Predictors of Academic Dishonesty' (2004) 138(2) *Journal of Psychology* 101

Boon A, *The Ethics and Conduct of Lawyers in England and Wales* (Oxford: Hart, 2014)
—— *Lawyers' Ethics and Professional Responsibility* (Oxford: Hart, 2015)

Bottoms AE and McClean JD, *Defendants in the Criminal Process* (London: Routledge, 1976)

Bower RT and de Gasparis P, *Ethics in Social Research: Protecting the Interests of Human Subjects* (New York: Praeger, 1978)

Boyle C, 'Sexual Assault in Abusive Relationships: Common Sense about Sexual History' (1996) 19 *Dalhousie Law Journal* 223

Branston G, 'A Reprehensible Use of Cautions as Bad Character Evidence?' [2015] *Criminal Law Review* 594
—— 'Letter To The Editor' [2015] *Criminal Law Review* 616

Brewis B and Stockdale M, 'False Allegations: The Limitations of the "Evidential Basis Test"' (2014) 78(6) *Journal of Criminal Law* 453

Brown S and Steventon B, 'The Admissibility of Bad Character Evidence' (2008) 13(1) *Coventry Law Journal* 1

Burney E, *Magistrate Court, and Community* (London: Hutchinson, 1979)

Burt MR, 'Cultural Myths and Supports for Rape' (1980) 38(2) *Journal of Personality and Social Psychology* 217

Burton M, 'Doing Empirical Research: Exploring the Decision-Making of Magistrates and Juries' in Watkins D and Burton M (eds), *Research Methods in Law* (Abingdon: Routledge, 2013)

Carlen P, *Magistrates' Justice* (London: Robertson, 1976)

Choo ALT, 'The Notion of Relevance and Defence Evidence' [1993] *Criminal Law Review* 114

Clark P, 'Redressing The Balance: The Criminal Justice Bill 2002' in Cape E (ed), *Reconcilable Rights? Analysing The Tension between Victims and Defendants* (London: Legal Action Group, 2004)

Cochran JK, Wood PB, Sellers CS, Wilkerson W and Chamlin MB, 'Academic Dishonesty and Low Self-Control: An Empirical Test of a General Theory of Crime' (1998) 19(3) *Deviant Behaviour* 227

Coen M, 'Hearsay, Bad Character and Trust in the Jury: Irish and English contrasts' (2013) 17(3) *International Journal of Evidence and Proof* 250

Conaghan J and Russell Y, 'Rape Myths, Law and Feminist Research: 'Myths About Myths'?' (2014) 22 *Feminist Legal Studies* 25

Corker D and Parkinson S, *Disclosure in Criminal Proceedings* (Oxford: OUP, 2009)

Cowdery N, 'Negotiating Justice with Integrity in New South Wales' in Hunter J, Roberts P, Young SNM and Dixon D (eds), *The Integrity of Criminal Process* (Oxford: Hart, 2016)

CPS, *Code For Crown Prosecutors* (London: Crown Prosecution Service, 2018)
—— *Disclosure Manual* (London: Crown Prosecution Service, 2018)
—— *Rape and Sexual Offences* (London: Crown Prosecution Service, 2018)
—— *Bad Character Evidence* (London: Crown Prosecution Service, 2019)

Darbyshire P, 'Judicial Case Management in Ten Crown Courts' [2014] *Criminal Law Review* 30

Damaška MR, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study' (1973) 121 *University of Pennsylvania Law Review* 506

Davies CD, *Reflexive Ethnography: A Guide to Researching Selves and Others* (2nd edn, London: Routledge, 2008)

Davies SM, 'Evidence of Character to Prove Conduct: A Reassessment of Relevancy' (1991) 27 *Criminal Law Bulletin* 504

Dent N, 'Section 41: Same Law, New Rules' (2018) 182 *Criminal Law & Justice Weekly* 247
—— and Paul S, 'In Defence of Section 41' [2017] *Criminal Law Review* 613

Dennis I, 'Criminal Procedure Rules – An Update' [2005] *Criminal Law Review* 335
—— 'Sexual History Evidence: Evaluating Section 41' [2006] *Criminal Law Review* 869
—— *The Law of Evidence* (5th edn, London: Sweet & Maxwell, 2013)
—— 'Prosecution Disclosure: Are The Problems Insoluble? [2018] *Criminal Law Review* 829

Duff P, 'Intermediate diets and the agreement of evidence: a move towards inquisitorial culture?' (1998) *Juridical Review* 349
—— 'The Agreement of Uncontroversial Evidence and the Presumption of Innocence: An Insoluble Dilemma?' (2002) 6(1) *Edinburgh Law Review* 25

Durham R, Lawson R, Lord A and Baird V, *Seeing Is Believing: The Northumbria Court Observers Panel. Report on 30 rape trials 2015-16* (Northumbria Police and Crime Commissioner, 2017)

Durston G, 'Cross-Examination of Rape Complainants: Ongoing Tensions Between Conflicting Priorities in the Criminal Justice System' (1998) 62 *Journal of Criminal Law* 91
—— 'The impact of the Criminal Justice Act 2003 on Similar Fact Evidence' (2004) 68(4) *Journal of Criminal Law* 307
—— 'Bad Character Evidence and Non-Party Witnesses Under the Criminal Justice Act 2003' (2004) 8(4) *International Journal of Evidence and Proof* 233

Easton S, 'The Use of Sexual History Evidence in Rape Trials' in Childs M and Ellison L (eds), *Feminist Perspectives on Evidence* (London: Cavendish, 2000)

Edwards A, 'The Other Leveson Report – The Review of Efficiency in Criminal Proceedings' [2015] *Criminal Law Review* 399

Eisenstein J and Jacob H, *Felony Justice: An Organizational Analysis of Criminal Courts* (Boston: Little, Brown, 1977)

Ellison L and Munro VE, 'Of 'Normal Sex' and 'Real Rape': Exploring The Use of Socio-Sexual Scripts in (Mock) Jury Deliberation' (2009) 18 *Social and Legal Studies* 291
—— 'Better the Devil You Know? 'Real Rape' Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberation' (2013) 17 *Evidence and Proof* 299

Engleby E and Arthur R, 'Evidence of Bad Character in Cases of Historic Youth Sexual Offending - Demonstrating a Defunct Moral Compass or Distracting the Jury and Evading the Retrospective Effect of the Presumption of *doli incapax*?' [2018] *Child and Family Law Quarterly* 351

Erens B, McManus S, Prescott A, Field J, Johnson AM, Wellings K, Fenton KA, Mercer C, Macdowall W, Copas AJ, Nanchahal K, 'National Survey of Sexual Attitudes and Lifestyles II: Reference Tables and Summary Report' (2012)

Fenhalls M, 'Focus on the Future' (2015) 4 *Criminal Bar Quarterly* 4

Fielding NG, *Courting Violence: Offences Against the Person Cases in Court* (Oxford: OUP, 2006)

Friedman R, 'Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and Proposed Overhaul' (1991) 38 *UCLA Law Review* 637
—— 'A Presumption of Innocence, Not of Even Odds (2000) 52 *Stanford Law Review* 873

Galvin HR, 'Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade' (1986) 70 *Minnesota Law Review* 763

Geertz C, *The Interpretation of Cultures* (London: Fontana Press, 1993)

Gobo G (A Belton (tr)), *Doing Ethnography* (London: SAGE, 2008)

Goodyear-Smith F, 'Why and How False Allegations of Abuse Occur: An Overview' in Burnett R (ed), *Wrongful Allegations of Sexual and Child Abuse* (Oxford: OUP, 2016)

Goudkamp J, 'Bad Character Evidence and Reprehensible Behaviour' (2008) 12(2) *International Journal of Evidence and Proof* 116

Green P, 'Dispelling the Rape Myths: An Evaluation of s.41 of the Youth Justice and Criminal Evidence Act 1999 in Light of Recent Reform Proposals' (2018) 6(2) *Legal Issues Journal* 1

Guest G, Bunce A and Johnson L, 'How Many Interviews are Enough? An Experiment with Data Saturation and Variability' (2006) 18 *Field Methods* 59

Hamer D, 'The Legal Structure of Propensity Evidence' (2016) 20(2) *International Journal of Evidence and Proof* 136

Hammersley M and Atkinson P, *Ethnography: Principles and Practice* (4th edn, Abingdon: Routledge, 2019)

Homan R, *The Ethics of Social Research* (London: Longman, 1991)

Hoyano L, *The Operation of YJCEA 1999 Section 41 in the Courts of England and Wales: Views from Barristers' Row* (Criminal Bar Association, 2018)

Hunter J, 'Battling a Good Story: Cross-Examining the Failure of the Law of Evidence' in Roberts P and Redmayne M (eds), *Innovations in Evidence and Proof* (Oxford: Hart, 2007)

Huxley P, 'Mental Gymnastics and Intellectual Acrobatics: The Meanings of Statutory and Common Law "Bad Character"' (2011) 75(2) *Journal of Criminal Law* 132

Jackson J, 'Putting Victims at the Heart of Criminal Justice: The Gap Between Rhetoric and Reality' in Cape E (ed), *Reconcilable Rights? Analysing The Tension between Victims and Defendants* (London: Legal Action Group, 2004)

—— 'Re-Visiting Evidentiary Barriers to Conviction and Models of Criminal Procedure' in Ackerman B, Ambos K and Sikirić H (eds), *Visions of Justice: Liber Amicorum Mirjan Damaška* (Berlin: Duncker & Humblot, 2016)
—— and Roberts P, 'Beyond Common Law Evidence: Reimagining, and Re-invigorating Evidence Law as Forensic Science' in Brown DK, Turner JI and Weisser B (eds), The Oxford Handbook of Criminal Process (Oxford: OUP, 2019)
—— and Wasik M, 'Character Evidence and Criminal Procedure' in Hayton D (ed), *Law's Future(s)* (Oxford: Hart, 2000)

Jacobson J, Hunter G and Kirby A, *Inside Crown Court* (Bristol: Policy Press, 2015)

James GF, 'Relevancy, Probability and the Law' (1941) 29 *California Law Review* 689

Jeffrey B, *Independent Criminal Advocacy in England and Wales* (May 2014)

Johnston E, 'The Adversarial Defence Lawyer: Myths, Disclosure and Efficiency – A Contemporary Analysis of the Role in the Era of the Criminal Procedure Rules' (2019) 24(1) *International Journal of Evidence and Proof* 35

Jones I, 'Problem of the Past? The Politics of 'Relevance' in Evidential Reform' (2012) 11(4) *Contemporary Issues in Law* 277

Keane A, 'The Collateral Evidence Rule: A Sad Forensic Fable Involving a Circus, its Sideshow, Confusion, Vanishing Tricks and Alchemy' (2015) 19(2) *International Journal of Evidence and Proof* 100

Kelly L, Temkin J and Griffiths S, 'Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials' (Home Office Online Report 20/06, 2006)

Kibble N, 'The Sexual History Provisions: Charting a Course Between Inflexible Legislative Rules and Wholly Untrammelled Judicial Discretion?' [2000] *Criminal Law Review* 274
—— 'The Relevance and Admissibility of Prior Sexual History with the Defendant in Sexual Offence Cases' (2001) 32 *Cambrian Law Review* 27
—— 'Section 41 Youth Justice and Criminal Evidence Act 1999: fundamentally flawed or fair and balanced?' (2004) 8 *Archbold News* 6
—— 'Judicial Perspectives on the Operation of s.41 and the Relevance and Admissibility of Prior Sexual History Evidence: Four Scenarios: Part 1' [2005] *Criminal Law Review* 190
—— 'Judicial Discretion and the Admissibility of Prior Sexual History Evidence Under Section 41 of the Youth Justice and Criminal Evidence Act 1999: Sometimes Sticking to Your Guns Means Shooting Yourself in the Foot: Part 2' [2005] *Criminal Law Review* 263

King M, *The Framework of Criminal Justice* (London: Croom Helm, 1981)

King N, Horrocks C and Brooks J, *Interviews in Qualitative Research* (2nd edn, London: SAGE, 2019)

Law Commission, *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant* (Law Com CP No 141, 1996)
—— *Evidence of Bad Character in Criminal Proceedings* (Law Com No 273, 2001)

Lees S, *Carnal Knowledge: Rape on Trial* (London: Women's Press, 2002)

Lempert RO, 'Modelling Relevance' (1976-1977) 75 *Michigan Law Review* 1021

Leahy S, 'Too Much Information? Regulating Disclosure of Complainants' Personal Records in Sexual Offence Trials' [2016] *Criminal Law Review* 229

Leveson B, *Review of Efficiency in Criminal Proceedings* (Judiciary of England and Wales, 2015)

Levi M, *The Phantom Capitalists* (Revised edn, Aldershot: Ashgate, 2008)

Levitt A and CPS, *Charging Perverting the Course of Justice and Wasting Police Time in Cases Involving Allegedly False Rape and Domestic Violence Allegations* (London: Crown Prosecution Service, 2013)

LimeCulture Community Interest Company, *Application of Section 41 Youth Justice and Criminal Evidence Act 1999: a Survey of Independent Sexual Violence Advisors (ISVAs)* (September 2017)

Marsh L, 'Leveson's Narrow Pursuit of Justice: Efficiency and Outcomes in the Criminal Process' (2016) 45(1) *Common Law World Review* 51

McBarnet DJ, *Conviction* (London: Macmillan, 1981)

McEvoy-Cooke N, Wolchover D and Heaton-Armstrong A, 'Two Aspects of the Statutory Restriction on Introducing a Complainant's Sexual History' in Radcliffe P, Gudjonsson GH, Heaton-Armstrong A and Wolchover D (eds), *Witness Testimony in Sexual Cases: Evidential, Investigative and Scientific Perspectives* (Oxford: OUP, 2016)

McColgan A, 'Common Law and the Relevance of Previous Sexual History Evidence' (1996) 16 *Oxford Journal of Legal Studies* 275

McConville M
—— and Hodgson J, Bridges L and Pavlovic A, *Standing Accused* (Oxford: Clarendon, 1994)
—— and Marsh L, 'Adversarialism Goes West: Case Management in Criminal Courts' (2015) 19(3) *International Journal of Evidence and Proof* 172

McCrudden C, 'Legal Research and the Social Sciences' (2006) 122 *Law Quarterly Review* 632

McEwan J, 'In Defence of Vulnerable Witnesses: the Youth Justice and Criminal Evidence Act 1999' (2000) 4(1) *International Journal of Evidence and Proof* 1
—— *The Verdict of the Court: Passing Judgment in Law and Psychology* (Oxford: Hart, 2003)
—— '"I Thought She Consented": Defeat of the Rape Shield or the Defence That Shall Not Run?' [2006] *Criminal Law Review* 969
—— 'Reasoning, Relevance and Law Reform: the Influence of Empirical Research on Criminal Adjudication' in Roberts P and Redmayne M (eds), *Innovations in Evidence and Proof* (Oxford: Hart, 2007)
—— 'From Adversarialism to Managerialism: Criminal Justice in Transition' (2011) 31(4) *Legal Studies* 519

McGlynn C, 'Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence' (2017) 81(5) *Journal of Criminal Law* 367
—— 'Challenging the Law on Sexual History Evidence: A Response to Dent and Paul' [2018] *Criminal Law Review* 216

Memon A, Vrij A and Bull R, *Psychology and Law* (2nd edn, Chichester: Wiley, 2003)

Menashe D and Shamesh ME, 'The Narrative Fallacy' (2005) 3(1) *International Commentary on Evidence* Article 3

Mercer CH, Tanton C, Prah P, Erens B, Sonnenberg P, Clifton S, Macdowall W, Lewis R, Field N, Datta J, Copas AJ, Phelps A, Wellings K and Johnson AM, 'Changes in Sexual Attitudes and Lifestyles in Britain Through the Life Course and Over Time: Findings from the National Surveys of Sexual Attitudes and Lifestyles (Natsal)' (2013) 382 *The Lancet* 1781

Mitchell JB, 'Why Should the Prosecutor Get the Last Word?' (2000) 27 *American Journal of Criminal Law* 139

Mirfield P, 'Character and credibility' [2009] *Criminal Law Review* 135

Morgan Harris Burrows LLP, *Research into the Impact of Bad Character Provisions on the Courts* (Ministry of Justice Research Series 5/09, 2009)

Morison J and Leith P, *The Barrister's World* (Buckingham: Open University Press, 1992)

Mott P, Section 41 Youth Justice and Criminal Evidence Act 1999 Handout, Western Circuit RASSO Course (28 February 2015).

Munday R, 'What Constitutes "Other Reprehensible Behaviour" Under the Bad Character Provisions of the Criminal Justice Act 2003' [2005] *Criminal Law Review* 24
—— 'The Quick and the Dead: Who Counts as A "Person" Under S.100 of the Criminal Justice Act 2003?' (2007) 71(3) *Journal of Criminal Law* 238
—— 'Misconduct That "Has to Do with the Alleged Facts of the Offence with Which the Defendant Is Charged"...More of Less' (2008) 72(3) *Journal of Criminal Law* 214
—— 'Single-Act Propensity' (2010) 74 *Journal of Criminal Law* 127
—— *Evidence* (10th edn, Oxford: OUP, 2019)
—— *Cross and Tapper on Evidence* (13th edn, Oxford: OUP, 2019)

Murphy E and Dingwall R, 'Informed Consent, Anticipatory Regulation and Ethnographic Practice' (2007) 65 *Social Science & Medicine* 2223

Murphy P, 'Character Evidence: the Search for Logic and Policy Continues' (1998) 2(2) *International Journal of Evidence and Proof* 71

Newman D, *Legal Aid Lawyers and the Quest for Justice* (Oxford: Hart, 2013)

O'Floinn M and Ormerod D, 'Social Networking Material as Criminal Evidence' [2012] *Criminal Law Review* 486

O'Reilly K (2012), *Ethnographic Methods* (2nd edn), London: Routledge.

Ormerod D
—— and Laird K, *Smith, Hogan, and Ormerod's Criminal Law* (15th edn, Oxford: OUP, 2018)
—— and Perry D (eds), *Blackstone's Criminal Practice 2020* (Oxford: OUP, 2019)

Pattenden R, 'The Character of Victims and Third Parties in Criminal Proceedings Other Than Rape Trials' [1986] *Criminal Law Review* 367

Pennington N and Hastie R, 'A Cognitive Theory of Juror Decision Making: The Story Model' (1991) 13 *Cardozo Law Review* 519
—— 'The Story Model for Juror Decision Making' in Hastie R (ed), *Inside the Juror* (Cambridge: CUP, 1993)

Prior PM, 'Mad, Not Bad: Crime, Mental Disorder and Gender in Nineteenth-Century Ireland' (1997) 8(32) *History of Psychiatry* 501

Quirk H, 'The Significance of Culture in Criminal Procedure Reform: Why The Revised Disclosure Scheme Cannot Work' (2006) 10 *International Journal of Evidence and Proof* 42

Raine JW and Willson MJ, 'Beyond Managerialism in Criminal Justice' (1997) 36(1) *The Howard Journal* 80

Redmayne M, 'Myths, Relationships and Coincidences: The New Problems of Sexual History' (2003) 7(2) *International Journal of Evidence and Proof* 75
—— *Character in the Criminal Trial* (Oxford: OUP, 2015)

Reece H, 'Rape Myths: Is Elite Opinion Right and Popular Opinion Wrong?' (2013) 33(3) *Oxford Journal of Legal Studies* 445
—— 'Debating Rape Myths' (LSE Law, Society and Economy Working Papers 21-2014)

Roberts GB, 'Methodology in Evidence — Facts in Issue, Relevance and Purpose' (1993) 19 *Monash University Law Review* 68

Roberts P, 'The Law Commission Consultation Paper on Previous Misconduct: Part 1: All the Usual Suspects: A Critical Appraisal of Law Commission Consultation Paper No.141' [1997] *Criminal Law Review* 75
—— and Zuckerman A, *Criminal Evidence* (2nd edn, Oxford: OUP, 2010)
—— and Aitken C, *The Logic of Forensic Proof: Inferential Reasoning in Criminal Evidence and Forensic Science: Practitioner Guide No.3* (Royal Statistical Society, 2014)

Robins J (ed), *Unequal Before The Law? The Future of Legal Aid* (London: Wilmington, 2011)

Rock P, *The Social World of an English Crown Court* (Oxford: Clarendon Press, 1993)

Rook P and Ward R, *Rook and Ward on Sexual Offences Law and Practice* (5th edn, London: Sweet & Maxwell, 2016)
—— *Rook and Ward on Sexual Offences Law and Practice: First Supplement* (5th edn, London: Sweet & Maxwell, 2019)

Royal Commission on Criminal Justice, *Report* (Cm. 2263, London: Home Office, 1996)

Saunders C, 'The Truth, The Half-Truth, and Nothing Like the Truth: Reconceptualizing False Allegations of Rape' (2012) 52(6) *The British Journal of Criminology* 1152

Seabrooke S, 'The Vanishing Trick – Blurring The Line Between Credit and Issue' [1999] *Criminal Law Review* 387

Secret Barrister, *The Secret Barrister: Stories of the Law and How It's Broken* (London: MacMillan, 2018)

Scheffer T, *Adversarial Case-Making: An Ethnography of English Crown Court Procedure* (Leiden: Brill, 2010)

Schum D, *The Evidential Foundations of Probabilistic Reasoning* (New York: Wiley, 1994)

Seidman I, *Interviewing as Qualitative Research* (4th edn, New York: Teachers College Press, 2013)

Silverman D, *Interpreting Qualitative Data* (5th edn, London: SAGE, 2014)
—— *Doing Qualitative Research* (5th edn, London: SAGE, 2017)

Smith O, 'How Rape Myths Are Used and Challenged in Rape and Sexual Assault Trials' (2017) 26(4) *Social & Legal Studies* 441
—— *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths* (Basingstoke: Palgrave MacMillan, 2018)

Smith T, 'The "Near Miss" of Liam Allen: Critical Problems in Police Disclosure, Investigation Culture and the Resourcing of Criminal Justice [2018] *Criminal Law Review* 711
—— and Cape E, 'The Rise and Decline of Criminal Legal Aid in England and Wales' in Flynn A and Hodgson J (eds), *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Oxford: Hart, 2017)

Smith TH and Holdenson OP, 'Comparative Evidence: Admission of Evidence of Relationship in Sexual Offence Prosecutions' (1999) 73 *Australian Law Journal* 432

Spencer JR, '"Rape Shields" and the Right to a Fair Trial' (2001) 60(3) *Cambridge Law Journal* 452
—— 'Criminal Procedure: The Rights of the Victim Versus the Rights of the Defendant' in Cape E (ed), *Reconcilable Rights? Analysing The Tension between Victims and Defendants* (London: Legal Action Group, 2004)
—— *Evidence of Bad Character* (1st edn, Oxford: Hart, 2006)
—— 'Evidence of Bad Character – Where We Are Today' (2014) 5 *Archbold Review* 5
—— 'Cautions as Character Evidence – A Reply to Judge Branston' [2015] *Criminal Law Review* 611
—— *Evidence of Bad Character* (3rd edn, Oxford: Hart, 2016)

Stephen JF, *Digest of the Law of Evidence* (1st edn, London: Macmillan, 1876)
—— *Digest of the Law of Evidence* (12th edn, London: Macmillan, 1948)

Sprack J, *A Practical Approach to Criminal Procedure* (15th edn, Oxford: OUP, 2015)

Stoia N, Adams K and Drakulich K, 'Rap Lyrics as Evidence: What Can Music Theory Tell Us?' (2017) 8(4) *Race and Justice* 330

Tapper C, 'Criminal Justice Act 2003: Part 3: Evidence of Bad Character' [2004] *Criminal Law Review* 533
—— 'The Law of Evidence and the Rule of Law' (2009) 68 *Cambridge Law Journal* 67
—— *Cross and Tapper on Evidence* (12th edn, Oxford: OUP, 2010)

Taylor CW, *Criminal Investigation and Pre-Trial Disclosure in the United Kingdom: How Detectives Put Together a Case* (Lampeter: Edwin Mellen, 2006)

Taylor SJ, Bogdan R and DeVault ML, *Introduction to Qualitative Research Methods: A Guidebook and Resource* (4th edn, Hoboken: Wiley, 2016)

Temkin J, 'Sexual History Evidence – The Ravishment of Section 2' [1993] *Criminal Law Review* 3
—— 'Prosecuting and Defending Rape: Perspectives from the Bar' (2000) *Journal of Law and Society* 219
—— *Rape and the Legal Process* (2nd edn, Oxford: OUP, 2002)
—— 'Sexual History Evidence – Beware The Backlash' [2003] *Criminal Law Review* 217
—— and Gray JM and Barrett J, 'Different Functions of Rape Myth Use in Court: Findings From a Trial Observation Study' (2016) 13(2) *Feminist Criminology* 205
—— and Krahé B, *Sexual Assault and the Justice Gap: A Question of Attitude* (Oxford: Hart, 2008)

Thayer JB, *A Preliminary Treatise on Evidence at the Common Law* (Boston: Little, Brown, 1898)

Lord Thomas of Cwmgeidd, 'The Criminal Procedure Rules: 10 Years On' [2015] *Criminal Law Review* 395

Thomason MJ, 'Previous Sexual History Evidence: A Gloss on Relevance and Relationship Evidence' (2018) 22 *International Journal of Evidence and Proof* 342

Tillers P, 'What Is Wrong With Character Evidence?' (1998) 49 *Hastings Law Journal* 781

Trickett W, 'Impeachment of Witnesses' (1903-1904) 8 *The Forum* 245

Twining W, 'Anchored Narratives: A Comment' (1995) 3 *European Journal of Crime, Criminal Law and Criminal Justice* 106
—— *Law in Context: Enlarging a Discipline* (Oxford: OUP, 1997)
—— *Rethinking Evidence* (2nd edn, Cambridge: CUP, 2006)

Vrij A, *Detecting Lies and Deceit: Pitfalls and Opportunities* (2nd edn, Chichester: Wiley, 2008)

Waterman A and Dempster T, 'Bad character: Feeling Our Way One Year On' [2006] *Criminal Law Review* 614

Webley L, 'Qualitative Approaches to Empirical Legal Research' in Cane P and Kritzer HM (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford: OUP, 2010)

Wigmore JH, *The Principles of Judicial Proof as Given by Logic, Psychology, and General Experience, and Illustrated by Judicial Trials* (Boston: Little, Brown, 1913)
—— *Evidence in Trials at Common Law: Volume IA* (Tillers P (ed), Boston: Little, Brown, 1983)

Whitehead E, *Witness Satisfaction: Findings from the Witness Satisfaction Survey 2000* (Home Office: London, 2001)

Young G, 'The Sexual History Provisions in the Youth Justice and Criminal Evidence Act 1999 - A Violation of the Right to a Fair Trial?' (2001) 41(3) *Medicine, Science and the Law* 217

Young R, 'Exploring the Boundaries of the Criminal Courtroom Workgroup' (2013) 42 *Common Law World Review* 203

Zander M and Henderson P, *The Royal Commission on Criminal Justice: Crown Court Study* (London: HMSO, 1993)

TABLE OF CASES

ENGLAND AND WALES

A (No 2) [2001] UKHL 25, [2002] 1 AC 45 (HL), [2001] 2 WLR 1546

AB [2016] EWCA Crim 1849

Adams [2019] EWCA Crim 1363

Agrela [2016] EWCA Crim 693

Ahmed [2012] EWCA Crim 288

Aidarus [2018] EWCA Crim 2073

All-Hilly [2014] EWCA Crim 1614, [2014] 2 CrAppR 33

Alyson [2016] EWCA Crim 2253

AM [2009] EWCA Crim 618, [2010] Crim LR 79

Andrede [2015] EWCA Crim 1722, [2016] Crim LR 424

Apabhai [2011] EWCA Crim 917

Archer [2003] EWCA Crim 2072

Attorney-General v Hitchcock (1847) 154 ER 38, (1874) 1 Ex 91

Attorney-General v Leveller Magazine [1979] AC 440 (HL), (1979) 68 CrAppR 342

Bahador [2005] EWCA Crim 396

Bahaji [2009] EWCA Crim 2836

Barker [1829] 3 C&P 589

Bashir [1969] 3 All ER 692

Bateson [1991] 3 WLUK 118

BD [2007] EWCA Crim 4

Beedall [2007] EWCA Crim 23, [2007] Crim LR 910

Ben-Rejab and Baccar [2011] EWCA Crim 1136, [2012] 1 WLR 2364, [2012] 1 CrAppR 1256

Berry [2009] EWCA Crim 39

Bishop [2013] EWCA Crim 2413

Blastland [1986] 1 AC 41 (HL), [1985] 3 WLR 345, [1985] 2 All ER 1095

Bovell [2005] EWCA Crim 1091, [2005] 2 CrAppR 27

Braithwaite [2010] EWCA Crim 1082, [2010] 2 CrAppR 24

Brewster [2010] EWCA Crim 1194, [2011] 1 WLR 601, [2010] 2 CrAppR 20

Brown and Hedley (1867) LR 1 CCR 70

Brummitt [2006] EWCA Crim 1629

Brushett [2000] 12 WLUK 651, [2001] CrimLR 471

Buaduwah-Esandol [2005] EWCA Crim 3580

C [2007] EWCA Crim 2581, [2008] 1 WLR 966, [2008] 1 CrAppR 22

C and B [2003] EWCA Crim 29

C v DPP [1996] AC 1, [1995] 2 All ER 43 (HL)

Campbell [2007] EWCA Crim 1472; [2007] 2 CrAppR 28

Citak [2017] EWCA Crim 1738

Clarke [1817] 2 Stark 241

Clarke [2016] EWCA Crim 2030

Clay [1851] 5 Cox 146

Cockcroft (1870) 11 Cox 410

Conn [2018] EWCA Crim 1752

Crossland [2013] EWCA Crim 2313

Culhane [2006] EWCA Crim 1053

D [2009] EWCA Crim 2137

D [2015] EWCA Crim 1092

D, P and U [2011] EWCA Crim 1474, [2013] 1 WLR 676, [2011] 4 All ER 568

Darnell [2003] EWCA Crim 176, [2003] All ER (D) 24 (Feb)

Davarifar [2009] EWCA Crim 2294, [2011] Crim LR 818

Dent [2014] EWCA Crim 457

Dinc [2017] EWCA Crim 1206

Dizaei [2013] EWCA Crim 88, [2013] 1 WLR 2257, [2013] 1 CrAppR 31

DM [2016] EWCA Crim 674, [2016] 4 WLR 146

Docherty [2012] EWCA Crim 2948

Dolan [2003] EWCA Crim 1859, [2003] Crim LR 41, [2003] 1 CrAppR 18

Donnelly [2006] EWCA Crim 545

DPP v Agyemang [2009] EWHC 1542 (Admin), (2009) 173 JP 487

DPP v Boardman [1975] AC 421 (HL), [1974] 3 WLR 673, [1974] 3 All ER 887

DPP v Kilbourne [1973] AC 729 (HL), [1973] 2 WLR 254, [1973] 1 All ER 440

DPP v Morgan [1976] AC 182 (HL), [1975] 61 CrAppR 150

DPP v P [1991] 2 AC 447 (HL), [1991] 3 WLR 161, (1991) 93 CrAppR 267

E [2004] EWCA Crim 1313, [2005] Crim LR 227

E [2009] EWCA Crim 2668

Edwards [2005] EWCA Crim 3244, [2006] 1 WLR 1524

Edwards [2018] EWCA Crim 424

Ekaireb [2015] EWCA Crim 1936, [2016] CrimLR 291

Ellis (1826) 6 B&C 145, 108 ER 406

Evans [2016] EWCA Crim 452, [2016] 4 WLR 169, [2017] 1 CrAppR 13, [2017] Crim LR 406

F [2005] EWCA Crim 493, [2005] 1 WLR 2848, [2005] 2 CrAppR 13

F [2008] EWCA Crim 2859

Fox [2009] EWCA Crim 653, [2009] Crim LR 881

Francis (1874) LR 2 CCR 128

Fulcher [1995] 2 CrAppR 251

Funderburk [1990] 1 WLR 587, [1990] 2 AllER 482, (1990) 90 CrAppR 466

Gandy [1989] 12 WLUK 123, (1989) 11 CrAppR(S) 564

Garnham [2008] EWCA Crim 266

Gjoni [2014] EWCA Crim 691, [2014] Crim LR 765

Gonez [1999] AllER(D) 674

Greatbanks [1959] Crim LR 450

GS [2001] EWCA Crim 144

Guthrie [2016] EWCA Crim 1633, [2016] 4 WLR 185, [2017] 1 CrAppR 27

H [2004] UKHL 3, [2004] 2 AC 134

H [2009] EWCA Crim 2899, (2010) 174 JP 203

H [2019] EWCA Crim 1855

Hall-Chung [2007] EWCA Crim 3429, (2007) 151 SJLB 1020

Halliday [2019] EWCA Crim 1457

Hamadi [2007] EWCA Crim 3048

Hamer [2010] EWCA Crim 2053, [2011] 1 CrAppR 3

Hanson [2005] EWCA Crim 824, [2005] 1 WLR 3169, [2005] 2 CrAppR 21

Harris [2009] EWCA Crim 434, [2010] Crim LR 54

Harris v Tippit (1811) 170 ER 1277, (1811) 2 Camp 637

Harvey [2014] EWCA Crim 54

Hassan [2007] EWCA Crim 1287

Hawkins [2018] EWCA Crim 406

Haxihaj [2016] EWCA Crim 83, [2016] 1 CrAppR (S) 72

HM Advocate v Murtagh [2009] UKPC 36, [2011] 1 AC 731

Hobbs v Tinling [1929] 2 KB 1 (CA)

Hodgson [1812] R&R 211

Hodkinson [2015] EWCA Crim 1509

Hussain [2015] EWCA Crim 383

Ivers [2007] EWCA Crim 1773

IWAT (No 2) [2001] EWCA Crim 1898

J (DC) [2010] EWCA Crim 385, [2010] 2 CrAppR 2, [2010] Crim LR 769

JD [2001] EWCA Crim 1976

Joof [2012] EWCA Crim 1475

Jukes [2018] EWCA Crim 176

Kalia (1974) 60 CrAppR 200

Kamara [2019] EWCA Crim 1918

Kelly [2008] EWCA Crim 1456

Kelly [2015] EWCA Crim 817

Khan [2007] EWCA Crim 2911

Khan [2017] EWCA Crim 767

King [2015] EWCA Crim 1631

King [2019] EWCA Crim 2434

Kordasinski [2006] EWCA Crim 2984, [2007] 1 CrAppR 238

Krausz (1973) 57 CrAppR 466

L [2015] EWCA Crim 741

Lawrence [1977] Crim LR 492

Le Brocq v Liverpool Crown Court [2019] EWCA Crim 1398

Lee [2019] EWCA Crim 2052

Lewis [2012] EWCA Crim 3233

Lloyd [2005] EWCA Crim 1111

Luckett [2015] EWCA Crim 1050

Lunkulu [2015] EWCA Crim 1350

M [2013] EWCA Crim 2238

Machado [2006] EWCA Crim 837, (2006) 170 JP 400

Mahil [2013] EWCA Crim 673

Makin v Attorney General of New South Wales [1894] AC 57 (PC)

Malone [2006] EWCA Crim 1860

Martin [2004] EWCA Crim 916, [2004] 2 CrAppR 22

Martin [2017] EWCA Crim 488

Masimba [2008] EWCA Crim 939

Maynard (1979) 69 CrAppR 309

Maynard [2006] EWCA Crim 1509

McChleery [2019] EWCA Crim 2100

MF [2005] EWCA Crim 3376

Miah and Uddin [2006] EWCA Crim 1168, (2006) 150 SJLB 702

Miller [2010] EWCA Crim 1153, [2010] 2 CrAppR 19

Mills (1979) 68 CrAppR 327

Mitchell [2016] UKSC 55, [2016] 3 WLR 1405, [2017] 1 CrAppR 9

MM [2011] EWCA Crim 1291

Mokrecovas [2001] EWCA Crim 1644, [2002] 1 CrAppR 20

Moody [2019] EWCA Crim 1222, [2019] CrimLR 975

Moran [2007] EWCA Crim 2974

Morris [2019] EWCA Crim 147

Mount [2010] EWCA Crim 2974

Muhedeen [2016] EWCA Crim 1

Mukadi [2003] EWCA Crim 3765, [2004] Crim LR 373

R v Murphy [2020] EWCA Crim 137

Nelson [2006] EWCA Crim 3412

Ogbodo [2015] EWCA Crim 564

Olu [2010] EWCA Crim 2975, [2011] 1 CrAppR 33

P [2013] EWCA Crim 2331, [2014] 1 WLR 3058, [2014] 1 CrAppR 28

Paine [2019] EWCA Crim 341

Pemberton [2007] EWCA Crim 3201

Pettman, Unreported, May 2, 1985, CA, No 5048/C/82

R (CPS) v Norwich Magistrates' Court [2011] EWHC 82 (Admin)

R (on the application of Robinson) v Sutton Coldfield Magistrates Court [2006] EWHC 307 (Admin), [2006] 4 All ER 1029

R [2003] EWCA Crim 2754

R [2006] EWCA Crim 3196

RA [2017] EWCA Crim 1515

Rehman and others [2017] EWCA Crim 106

Renda [2005] EWCA Crim 2826, [2006] 1 WLR 2948

Riley [1887] 18 QBD 481

RJ [2017] EWCA Crim 1943

Rooney [2001] EWCA Crim 2844

Rossi [2009] EWCA Crim 2406

Rowton (1865) L&C 520

S [2006] EWCA Crim 1303, [2007] 1 WLR 63, [2006] 2 CrAppR 31

S [2007] EWCA Crim 1387

S [2009] EWCA Crim 2457

S v DPP [2006] EWHC 1207 (Admin)

Saleem [2007] EWCA Crim 1923

Scott v Scott [1913] AC 417 (HL)

Shaid [2019] EWCA Crim 412

Simmons [2018] EWCA Crim 2534

Singh [2003] EWCA Crim 485

Singh [2007] EWCA Crim 2140

Smith [2007] EWCA Crim 2105

Smith [2017] EWCA Crim 941

Soroya [2006] EWCA Crim 1884, (2006) 150 SJLB 1054, [2007] Crim LR 181

South [2011] EWCA Crim 754

Stabler [2019] EWCA Crim 1886

Steltner [2018] EWCA Crim 1479

Stephenson [2006] EWCA Crim 2325, (2006) 103(36) LSG 34, (2006) 150 SJLB 1151

Straffen [1952] 2 QB 911 (CCA), [1952] 36 CrAppR 132

Sule [2012] EWCA Crim 1130, [2013] 1 CrAppR 3

Sweet-Escott (1971) 55 CrAppR 316

T [2004] EWCA Crim 1220, [2004] 2 CrAppR 32

T [2012] EWCA Crim 2358, [2013] Crim LR 596

T [2014] EWCA Crim 618

T and H [2001] EWCA Crim 1877, [2002] 1 WLR 632, [2002] 1 All ER 683

Tennant [2012] EWCA Crim 1173

Terry and Colman [2004] EWCA Crim 3252, [2005] QB 966, [2005] 3 WLR 379

Thomas v David (1836) 7 C&P 350

Tine [2006] EWCA Crim 1788

Tirnaveanu [2007] EWCA Crim 1239, [2007] 1 WLR 3049

Tissington [1843] I Cox 48

Toohey v Commissioner of Police of the Metropolis [1965] AC 595, [1965] 2 WLR 439, (1965) 49 CrAppR 148

Ul-Haq [2010] EWCA Crim 1683

Umo [2020] EWCA Crim 284

V [2006] EWCA Crim 1901

Vasiliou [2000] 2 WLUK 169, [2000] CrimLR 845

Viola [1982] 1 WLR 1138, [1982] 3 All ER 73, (1982) 75 CrAppR 125

W [2005] EWCA Crim 2134

W [2014] EWCA Crim 545

Wallace [2007] EWCA Crim 1760, [2007] 2 CrAppR 30 (397), [2008] 1 WLR 572

Walsh [2012] EWCA Crim 2728

Weir [2005] EWCA Crim 2866, [2006] 1 WLR 1885, [2006] 2 All ER 570

White [2004] EWCA Crim 946, (2004) 148 SJLB 300

Williams (1986) 84 CrAppR 299

Winfield (1939) 27 CrAppR 139

Winter [2008] EWCA Crim 3, [2008] Crim LR 971

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Seaboyer (1991) 83 DLR (4th) 193, [1991] 2 SCR 577