Admitting Evidence by Agreement: Recalibrating Managerialism and Adversarialism in Crown Court Criminal Trials[1]

This paper challenges the orthodox academic view which assumes that the admissibility of evidence in Crown Court criminal trials is primarily regulated by rules of evidence. Instead, it offers an account, based on original empirical data (trial observations and interviews with trial counsel), which suggests that a significant amount of evidence is admitted after negotiation and agreement between the adversarial parties. The article uses bad character evidence as a lens through which to examine the wider phenomena of 'agreed evidence', and analyses reasons for the high level of agreement found in the study. It then sets these findings in the broader context of increasing managerialisation of criminal trials, and the 'adversarial' system of England and Wales. Some implications for rights of defendants and witnesses are also considered.

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Introduction

This article examines the use of 'agreed evidence' (or 'formal admissions', 'agreed facts') in Crown Court criminal trials in England and Wales. Generally, agreed evidence is admissible by virtue of the Criminal Justice Act 1967 ss.9-10, and gets short shrift in evidence textbooks.[2] Roberts and Zuckerman give the topic the most consideration, arguing that agreed evidence "reflect[s] the pragmatic imperatives of expediting trial proceedings and minimizing avoidable

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[2] See for example the single paragraph in R. Munday, *Evidence* (10th edn, Oxford: OUP, 2019), para. 9.99.

costs",[3] while also assisting the jury to concentrate on the 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] and so it follows that the parties can also agree what evidence is disputed and what is not.[5] However, it remains the case that there is a dearth of scholarship addressing the critical questions of when and why counsel admit evidence by agreement, rather than contesting it. The most recent research in England and Wales is Zander and Henderson's *Crown Court Study* from 1993,[6] which found that 27% of questionnaired trial counsel sought pre-trial agreements to admit certain evidence; of which approximately 80% achieved an admission.[7] Whether or not the *Crown Court Study* was representative of practice over 25 years ago, criminal trials have changed a great deal and so the *Study* is unlikely to be representative of the present state of affairs.

This article takes some tentative steps towards filling this gap in the literature by critically analysing one specific type of evidence which is admissible by agreement: evidence of bad character (BC). Like most other rules of evidence, those which regulate the admissibility of bad character (BC) evidence (Criminal Justice Act (CJA) 2003 ss.98-113) have been subject to a great deal of academic scrutiny. Commentators have queried the scope of the legal definition of 'bad character',[8] as well as the various admissibility gateways through which defendant and,

[3] P. Roberts and A. Zuckerman, *Criminal Evidence* (2nd edn, Oxford: OUP, 2010), p. 120.
[4] P. Roberts and A. Zuckerman, *Criminal Evidence*, p. 121. This characterisation of 'adversarialism' is not uncontested, see: J. Hodgson, *The Metamorphosis of Criminal Justice* (Oxford: OUP, 2020), Ch. 1; M. McConville and L. Marsh, *Criminal Judges: Legitimacy, Courts and State-Induced Guilty Pleas in Britain* (Cheltenham: Edward Elgar, 2014).
[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) Jur. Rev. 349; P. Duff, 'The Agreement of Uncontroversial Evidence and the Presumption of Innocence: An Insoluble Dilemma?' (2002) 6(1) Edin. L.R. 25; R. McPherson, 'The Rise of Agreed Narratives in Scottish Criminal Procedure' (2013) 2 Jur. Rev. 141.
[6] That we must go so far back to find research on the subject is in itself a reflection of the paucity of empirical research on criminal trials in England and Wales. In Northern Ireland, Jackson and Doran's study on Diplock trials found that counsel were more likely to agree evidence in jury-less trials: J. Jackson and D. Doran, *Judge Without Jury: Diplock Trials in the Adversary System* (Oxford: Clarendon Press, 1995), pp. 200-202.
[7] M. Zander and P. Henderson, *The Royal Commission on Criminal Justice: Crown Court Study* (London: HMSO, 1993), p. 73.
[8] R. Munday, 'What Constitutes "Other Reprehensible Behaviour" Under the Bad Character Provisions of the Criminal Justice Act 2003' [2005] Crim. L.R. 24; J. Goudkamp, 'Bad Character Evidence and Reprehensible Behaviour' (2008) 12(2) E&P 116; P. Huxley, 'Mental Gymnastics and Intellectual Acrobatics: The Meanings of Statutory and Common Law "Bad Character"' (2011) 75(2) J.C.L. 132.

more recently, non-defendant BC evidence may be admitted.[9] Also like other rules of evidence, what is missing is any critical evaluation of BC evidence which is admitted *not* by contested applications, but by express agreement between the adversarial parties.[10]

This article presents original, qualitative empirical data (interviews with barristers and Crown Court trial observations) collected in 2018 as part of a research study on the use of non-defendant character evidence (BC and sexual history) in Crown Court trials.[11] Though non-defendant character was the focus, defendant BC featured prominently in the data and so has been included for analysis here. The empirical data presented in this article challenge the hypothesis of some scholars that agreed BC is "rare",[12] instead providing support for Roberts and Zuckerman's alternative view (one likely shared by most practitioners as self-evident) that agreed evidence is "probably endemic".[13] The article then canvasses explanations which may explain agreements to admit BC evidence, before conducting an in-depth analysis of BC evidence admitted by agreement in a single trial. Finally, the article contextualises agreements to admit evidence within the following current debates in criminal justice scholarship: managerialism, adversarialism, and the rights of trial participants.

[9] G. Durston, 'Bad Character Evidence and Non-Party Witnesses Under the Criminal Justice Act 2003' (2004) 8(4) E&P 233; C. Tapper, 'Criminal Justice Act 2003: Part 3: Evidence of Bad Character' [2004] Crim. L.R. 533; G. Durston, 'The Impact of the Criminal Justice Act 2003 on Similar Fact Evidence' (2004) 68(4) J.C.L. 307; A. Waterman and T. Dempster, 'Bad Character: Feeling Our Way One Year On' [2006] Crim. L.R. 614; J. Goudkamp, 'Bad Character Evidence and Reprehensible Behaviour' (2008) 12(2) E&P 116; S. Brown and B. Steventon, 'The Admissibility of Bad Character Evidence' (2008) 13(1) Cov. L.J. 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) J.C.L. 214; P. Mirfield, 'Character and credibility' [2009] Crim. L.R. 135; M. Redmayne, *Character in the Criminal Trial* (Oxford: OUP, 2015); D. Birch, 'A Credible Solution? Non-Defendant's Bad Character and Section 100 of the Criminal Justice Act 2003' [2019] Crim. L.R. 841.

[10] The problems caused by implied agreements, or acquiescence, are beyond the scope of this article. For an illuminating discussion on this by Munday in the context of hearsay, see: *Smith (Alec) CLW*/20/37/3.

[11] Ten barristers were formally interviewed in total, and will be referred to throughout in bold type with numerical identifiers (e.g. **Barrister 1**). The barristers were all independent members of the Criminal Bar, with a range of experience (7-37 years' call) and were evenly split by gender, though female pronouns will be used here to protect anonymity. In addition to formal interviews, dozens of other barristers were talked to informally during the trial observations, and these conversations will also be referred to where relevant.

Trial observations occurred at one large Crown Court centre in England. Approximately 450 hours of full trial hearings were observed, and at least another 150 hours of pre-trial and sentencing hearings, and the beginnings of trials which cracked. This translates to 22 full trials for the case sample. As with interviews, cases will be referred to in bold type with numerical identifiers (e.g. **Case 2**), and some material facts of the cases have been altered to protect anonymity.

[12] R. Munday, *Cross and Tapper on Evidence* (13th edn, Oxford: OUP, 2019), p. 410.

[13] P. Roberts and A. Zuckerman, *Criminal Evidence*, p. 120. See also J. Hodgson, 'The Future of Adversarial Criminal Justice in 21st Century Britain (2010) 35 N.C. J. Int'l L. & Com. Reg. 319, pp. 332-333.

Legal and Professional Framework

The relevant admissibility gateways for agreed BC evidence are doctrinally self-explanatory, given adversarial assumptions. If all parties agree to its admission,[14] then non-defendant BC is admissible via s.100(1)(c) CJA 2003, and defendant BC via s.101(1)(a) CJA 2003. For non-defendant BC, s.100(4) explicitly states that leave of the court is not required for evidence admitted via gateway (c). More generally, trial judges have little power to prevent the admission of agreed BC evidence (assuming it is relevant),[15] as the evidence is admissible even if the judge considers that it would not have satisfied any other admissibility gateway.[16] Though s.78 of the Police and Criminal Evidence Act 1984 may still theoretically be deployed to exclude defendant BC,[17] the issue is unlikely to arise in practice where that defendant has already agreed to the evidence's admission.[18] However, in the interests of good trial management, and so that an appropriate direction is given, counsel are advised to inform the trial judge of any BC evidence which will be admitted by agreement.[19]

There is little professional guidance for counsel to assist them in making decisions to agree or contest BC evidence. CPS guidance suggests that prosecutors should only agree to admit the BC of a prosecution witness if the evidence satisfies one of the contestable gateways (s.100(1)(a) or s.100(1)(b)), or if its admission would be "in the interests of justice".[20] Birch argues that this guidance should be interpreted so that evidence should only be admitted by agreement if to do so would not contradict the overall policy of s.100 to protect witnesses from character attacks of low probative value.[21] No such specific guidance is available for defence counsel, and so

[14] Including: the defence, the prosecution, and any co-defendants.
[15] For the legal definition of relevance see *A (No 2)* [2001] UKHL 25, [2002] 1 A.C. 45 (HL), [2001] 2 W.L.R. 1546, at [31] (Lord Steyn).
[16] *Tennant* [2012] EWCA Crim 1173. Though *Tennant* concerned s.100(1)(c), the reasoning of the Court surely applies equally to s.101(1)(a).
[17] *Boxall* [2020] EWCA Crim 688, [2020] Crim. L.R. 939; J.R. Spencer, *Evidence of Bad Character* (3rd edn, Oxford: Hart, 2016), para. 1.62.
[18] Cf. Where the agreement is made pre-trial with different counsel, but trial counsel takes a different view of the evidence (see below concerning 'rotating barristers'). Or where counsel decides to change tactics mid-trial.
[19] *J (DC)* [2010] EWCA Crim 385, [2010] 2 Cr. App. R. 2, [2010] Crim. L.R. 769.
[20] CPS, *Bad Character Evidence* (London: Crown Prosecution Service, 2019). <https://www.cps.gov.uk/legal-guidance/bad-character-evidence> Accessed 16/04/2020.
[21] D. Birch, 'A Credible Solution? Non-Defendant's Bad Character and Section 100 of the Criminal Justice Act 2003' [2019]

they must fall back on general principles of professional ethics. For example, they must act in accordance with the Bar Standards Board's 'Core Duties'.[22] Salient here are the duties to "observe your duty to the court in the administration of justice" (Core Duty 1), to "act in the best interests of each client" (Core Duty 2), and to "act with honesty, and with integrity" (Core Duty 3). Significantly, Core Duty 2 is subordinate to Core Duty 1 which includes the obligation on counsel to "take reasonable steps to avoid wasting the court's time".[23]

Agreement is Not Uncommon

Though small studies employing qualitative methods are not ideal for determining the frequency of an observed phenomenon, they are sufficient to give a general impression of the frequency in the sample area. However, this limitation should not be overstated as most counsel interviewed and observed practiced all over England, and there are few reasons to suspect that the sample area is an outlier.

In interviews, and in casual conversations, counsel were keen to stress the rarity of contested s.100 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 1**
> "[Contested s.100 applications occur] very rarely. I would be surprised if it occurs more than a few times in a year. […] In fact I don't think I've ever made one."

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. Though initially claiming that contesting was common, when pressed **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

Crim. L.R. 841, p. 844.
[22] The Code of Conduct (edn 4.6, Bar Standards Board, 2021).
[23] The Code of Conduct, rC3, rC3.3.

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 application succeeded.

However, counsel were equally eager to emphasise that much BC, both defendant and non-defendant, is admitted by agreement:

> **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 and s.101 are very rare. Interviewees' claims regarding the rarity of contested BC applications were not wholly supported by my trial observation data. Applications were made under either s.100 or s.101 in twelve out of twenty-two observed trials. Though in six of these twelve cases the applications were ultimately withdrawn after counsel came to agreements, and in **Case 21** the application was withdrawn after D changed his plea. Bad character evidence was admitted by agreement without a prior application in nine cases.[24] 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 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

[24] Due to overlaps between agreements that particular evidence is *not* BC evidence as defined by s.98 CJA 2003 (and so not requiring an application), and agreements to admit evidence which both counsel consider BC, this list includes evidence which may have also been admissible by virtue of ss.98(a)-(b).

data *do* support the claim that a very significant amount of BC evidence is admitted via agreement, rather than a contested gateway.

Reasons for Agreeing Character Evidence

Across the interviews and trial observations, several broad factors were identified as influencing decisions to agree BC evidence: the restrictiveness of the statutory framework; communities of cooperation; individual personality and experience; and individual reputation and career plans. Though these four factors are relevant to decisions to agree, it will then be argued through an in-depth analysis of **Case 5** that, ultimately, case-specific variables are most important.

Restrictiveness of the Gateways

When interviewees were pushed on reasons for agreeing, rather than contesting, non-defendant BC evidence the most common response was that the thresholds for admissibility in the two other s.100 gateways are too high, 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!"

The first of the two gateways for non-defendant BC, s.100(1)(a), allows evidence to be admitted if without it the jury would find it "impossible or difficult properly to understand other evidence in the case". Respondents considered this gateway, and its defendant BC counterpart in s.101(1)(c), to be especially difficult to satisfy[25]:

> **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."

[25] These practitioner opinions on infrequent use are supported by the lack of case law on these gateways, in contrast to the abundance of case law on s.100(1)(b) and s.101(1)(d).

> **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."

Similar opinions were offered concerning the "substantial probative value" gateway for non-defendant BC in s.100(1)(b), and were contrasted with the equivalent gateway for defendant BC in s.101(1)(d) which requires only that the evidence be "relevant" rather than substantially probative:

> **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."

> **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'."

Demanding admissibility tests are evidently acting, at least for some barristers, as a deterrent to making applications.[26] When considering the purpose of the legislation,[27] this could be 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 (potentially 'substantially probative') evidence which theoretically satisfies either test may be withheld from the jury.

Barrister Communities

In their study of the social world of barristers in England and Wales, Morison and Leith employ

[26] For gateways s.101(d) and s.100(1)(b), the Court of Appeal has repeatedly stressed the importance of establishing a strong similarity between BC evidence and any alleged propensity: *Hanson* [2005] EWCA Crim 824, [2005] 1 W.L.R. 3169, [2005] 2 Cr. App. R. 21; *Berry* [2009] EWCA Crim 39. Though similarity is not necessary, a strong probative link is required for BC going to defendant credibility via s.101(d) (e.g. a prior conviction for perjury where the present offence is assault): *Hanson* [2005] EWCA Crim 824. Significantly, there is a lower standard of admissibility for BC going to defendant credibility under ss.101(1)(e) and (g), and for non-defendant BC going to credibility under s.100(1)(b): *Brewster* [2010] EWCA Crim 1194, [2011] 1 W.L.R. 601, [2010] 2 Cr. App. R. 20; *Hussain* [2015] EWCA Crim 383; *Moody* [2019] EWCA Crim 1222, [2019] Crim. L.R. 975.

[27] D. Birch, 'A Credible Solution? Non-Defendant's Bad Character and Section 100 of the Criminal Justice Act 2003' [2019] Crim. L.R. 841, pp. 842-844. See also: Law Commission, *Evidence of Bad Character in Criminal Proceedings* (Law Com No 273, 2001), Part V; R Auld (LJ), *Review of the Criminal Courts of England and Wales,* (The Stationery Office: London, 2001), paras. 11.112-11.120.

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').[28] 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.

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 considered this a good thing:

> **Barrister 8**
> "I tend to find that, certainly practicing up here where most of the barristers know each other, mostly people have a pretty good idea agreed between themselves, because it's a very cooperative 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 cities (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 'counties' than in London where one is much less likely 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. When observed barristers conversed during breaks between proceedings there was no sense that any of them were regular adversaries.[29]

[28] J. Morison and P. Leith, *The Barrister's World* (Buckingham: Open University Press, 1992), pp. 127-136.
[29] Informal conversations with barristers suggested that counsel may have the same opponent, at trial, only two or three times,

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.

Personalities, Experience, and Values

Interviewees suggested 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 alternative 'community' hypothesis. 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 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, and was found to be equally significant by McPherson in her study on agreed narratives for the purposes of sentencing in Scots trials.[30] Though it would be too simplistic to state that because of their idiosyncrasies some barristers *always* agree evidence and others *always* contest, human nature doubtless comes into the equation. Trial counsel's role is 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

maximum, in a year.
[30] R. McPherson, 'The Rise of Agreed Narratives in Scottish Criminal Procedure' (2013) 2 Jur. Rev. 141, p. 146.
[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.

> 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 practical 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.

Concerning non-defendant BC, a commitment to fairness seems to mean that if there is relevant and probative evidence 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, the Court of Appeal has criticised trial judges who have attempted to interfere with agreements to admit BC evidence, even where the judge is of the opinion that the evidence does not meet either of the tests in gateways (a) or (b).[32]

This finding coheres with barristers' perceptions reported above that the gateways to admissibility in s.100 and, to a lesser extent, s.101 are too restrictive. The opportunity to agree evidence 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 BC to be adduced, then they will walk the path of least resistance.

[32] *Tennant* [2012] EWCA Crim 1173.

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 others:

> **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"[33]; lack of perspective; and a lack of interest in defendants (or perhaps defence rights). 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 evinces a "high standard" of advocacy. The second and third reasons suggest that a lack of defence experience is significant in reducing cooperation. 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.[34] My trial observation data have 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.[35] 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

[33] A similar sentiment was expressed by **Barrister 5**.
[34] Barristers taking both prosecution work and defence work is generally considered a strength of the English and Welsh Bar: J.C. Smith, 'The Personnel of the Criminal Law in England and the United States' (1955) C.L.J. 80, p. 94.
[35] Though the case was ultimately discontinued due to the complainants refusing to attend.

conviction statistics over their ethical and constitutional role to ensure a fair trial.[36]

Linked to **Barrister 10**'s suggestion of CPS belligerence, **Barrister 1** argued that CPS counsel are more single-minded and prosecution focussed.[37] If, as my interviewees suggest, the 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. **Barrister 1** also believed that CPS counsel are less time-pressured, claiming that they usually only handle one case at a time, unlike independent barristers who must juggle several cases simultaneously in order to earn a living. As such, so **Barrister 1** argued, there is less incentive for CPS barristers to limit the length of trials through agreeing evidence. This portrait of 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.[38] Time pressures constrain both independent *and* CPS counsel, though perhaps in different ways.[39]

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."

Reputation and Professional Prospects

Agreeing BC evidence is routinely equated with "good" advocacy, being "sensible" and

[36] See Core Duty 1 of the Barrister's Code of Conduct. CPS in-house advocates remain subject to the Code: *Advocacy: National Standards* (London: Crown Prosecution Service, 2008) <Advocacy: National Standards of | The Crown Prosecution Service (cps.gov.uk)> Accessed 16/04/2021.

[37] 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.

[38] See in relation to time and resource pressures affecting disclosure: C.W. 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] Crim. L.R. 711; I. Dennis, 'Prosecution Disclosure: Are The Problems Insoluble? [2018] Crim. L.R. 829.

[39] These points concerning the CPS would have been explored with CPS in-house counsel interviews had my attempts to get access been successful.

"reasonable".[40] Being able and willing to agree the admission of certain types of evidence, such as BC, rather than contesting it appears to be expected, at least to a degree. Those who depart from this norm, such as CPS barristers, are considered *un*reasonable, and may acquire 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] Ultimately, all advocates are just trying to 'get on with the job',[42] and so 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.[43]

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

> **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."

> **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

[40] 'Reasonableness' is also considered an important characteristic for plea bargaining: A.S. Blumberg, 'The Practice of Law as Confidence Game: Organizational Cooptation of a Profession (1967) 1 L. & Soc'y Rev. 15, p. 24.
[41] A. Boon, *The Ethics and Conduct of Lawyers in England and Wales* (3rd edn, Oxford: Hart, 2014), pp. 656-657.
[42] A similar point is made by McPherson in the Scots context: R. McPherson, 'The Rise of Agreed Narratives in Scottish Criminal Procedure' (2013) 2 Jur. Rev. 141, p. 148.
[43] 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).

> 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."

These sentiments signal two different reasons why one would not want to annoy trial judges. The first concerns career aspirations. Applications to be appointed Queen's Counsel or a member of the judiciary require judicial references,[44] 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.

The second reason 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 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

[44] *Queen's Counsel Competition for England and Wales 2021 Guidance for Applicants*, para. 34. < https://qcappointments.org/wp-content/uploads/2021/02/FINAL-Guidance-for-Applicants-2021.pdf>. For guidance for applicants to the judiciary, see: < https://judicialappointments.gov.uk/guidance-on-the-application-process-2/>.

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' prospects.[45]

An Emblematic Case Study of Bad Character Agreements

Though each of the above factors are relevant to decisions to agree or contest BC evidence, they skirt around the most significant variables: the facts and evidence of individual cases. Most of my interviewees were willing to offer more generalisable speculation as to 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 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?[46]

To explore these case-specific variables, **Case 5** has been selected for in-depth analysis. The reason for selecting **Case 5** is not because it is typical, but rather because it brings together many factors and facets which *are* typical into a single trial. It may therefore be considered an outlier in some respects, though it is worth emphasising that cases such as this *do happen*. An additional reason for presenting **Case 5** as emblematic is that both defence counsel (**Barrister**

[45] This point has been made previously in the American literature: D. Sudnow, 'Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office' (1965) 12 Social Problems 255; A.S. Blumberg, 'The Practice of Law as Confidence Game: Organizational Cooptation of a Profession (1967) 1 L. & Soc'y Rev. 15.
[46] Section 101(1)(g) CJA 2003.

3) and prosecuting counsel (**Barrister 7**) were interviewed.

Case 5 concerned historic sexual abuse allegations. The trial started with two defendants, Kevin and David,[47] but David's erratic behaviour led to him being detained under the Mental Health Act 1983 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 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.[48] Additionally, though much of

[47] Pseudonyms have been used to protect anonymity, and to assist tracking the multiple individuals involved in the case.
[48] Non-witnesses are "persons" for the purposes of s.100, see *RA* [2017] EWCA Crim 1515. This evidence may also have

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 offences of violence, dishonesty, and drug dealing. 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.[49] 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, Kevin, 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

constituted "sexual behaviour" of the complainant (things done "to" an individual may constitute 'sexual behaviour': *E* [2004] EWCA Crim 1313, [2005] Crim. L.R. 227), and so would have required an application under s.41 of the Youth Justice and Criminal Evidence Act (YJCEA) 1999.

[49] Though it did not in this case, substance abuse sometimes qualifies as reprehensible behaviour depending on the context. See for comparison: *Hall-Chung* [2007] EWCA Crim 3429, (2007) 151 S.J.L.B. 1020; *Donnelly* [2006] EWCA Crim 545; and *Stabler* [2019] EWCA Crim 1886.

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 complainant Mark's previous convictions for offences of dishonesty, for the purposes of challenging his credibility. The judge requested an application made in writing by the end of the day. Defence counsel managed to achieve this,[50] 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.[51] Rather than ruling immediately, the judge deferred the matter to the following morning to allow **Barrister 7** to consider how best to proceed.

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 complainant 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? Counsel first met on the morning of the trial.[52] 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 this complainant's prior convictions and gang membership adduced as this was effectively the only eligible line of

[50] By working over the lunch break.
[51] This was held in *Brewster* [2010] EWCA Crim 1194 at [22]-[23] (Pitchford LJ). For criticism see: Thomason [2019] Crim. L.R. 975.
[52] Though they knew each other from previous cases, neither knew the other would be on this case until that morning.

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 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] 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 the history of offending 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 speech 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'.[53] 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 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. 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 sides 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!"

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

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.

Also of relevance is the 'tit-for-tat' gateway under s.101(1)(g). 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 in light of her previous experience defending in sex trials. This defence strategy, though ethically problematic, is strategically astute.

Other admitted BC evidence in this case included: Mark's prior care home allegations,[54] drug and alcohol abuse of Mark and Harry, and Harry's mother's alleged abuse by her stepfather. The last, adduced as an agreed fact, 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.[55]

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

[54] These were only referred to as contextualisation in the prosecution's opening speech. The judge indicated that if the defence wanted to refer to them, an application under s.41 YJCEA 1999 would be required.
[55] See fn 31.

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 that evidence can be spun in ways that either support their own 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 doubtful whether this reasoning could be justified in terms of CPS guidance directing prosecutors to agree BC evidence only when in the "interests of justice".[56]

Implications for Criminal Justice Scholarship

The increasing frequency and willingness of the adversarial parties to work together in order to streamline trials can be linked to three current issues in criminal justice scholarship: the increasing managerialisation of the criminal process, reduced adversarialism, and concerns over the rights of defendants and non-defendants.

Internalising the Managerial Ethos

Though not explicitly mentioned in the data, reading between the lines an additional factor reveals itself as highly influential in encouraging agreements: managerialism. Boiled down to its essentials, managerialism is an ideology which is typified by an emphasis on productivity (case management),[57] cost efficiency (cuts to legal aid and the courts budget)[58] and consumerism (focussing on complainants/victims and witnesses as 'consumers' of criminal

[56] CPS, *Bad Character Evidence* (London: Crown Prosecution Service, 2019). <https://www.cps.gov.uk/legal-guidance/bad-character-evidence> Accessed 16/04/2021.
[57] Primarily through the Criminal Procedure Rules. For academic commentary see: J. McEwan, 'From Adversarialism to Managerialism: Criminal Justice in Transition' (2011) 31(4) L.S. 519; P. Darbyshire, 'Judicial Case Management in Ten Crown Courts' [2014] Crim. L.R. 30; M. McConville and L. Marsh, 'Adversarialism Goes West: Case Management in Criminal Courts' (2015) 19(3) E&P 172.
[58] See J. Robins (ed), *Unequal Before The Law? The Future of Legal Aid* (London: Wilmington, 2011); 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; Secret Barrister, *The Secret Barrister: Stories of the Law and How It's Broken* (London: MacMillan, 2018).

justice)[59] at the expense of human rights and due process.[60] The rise of managerialism in the criminal process has been explored at length by many scholars and, though many have researched its effect on the working practices of criminal solicitors,[61] few have examined its effect on barristers and their actions in effective criminal trials.[62]

It is now generally accepted that the Criminal Procedure Rules (CrimPR) have ushered in a new "spirit of co-operation"[63] between the adversarial parties, which Dennis argued would require both a culture change at the Bar, as well as an increase in remuneration for pre-trial preparation. Though the latter has emphatically not occurred (quite the opposite), 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 they appear to have been internalised and adopted by practitioners. Darbyshire's empirical study of case management in the criminal courts found that the managerial ethic has been enthusiastically embraced by the judiciary.[64] McConville and Marsh agree that even though the CrimPR may not be followed to the letter, they have ushered in a new culture of cooperation and deference to the judiciary.[65] Johnston similarly argues that the CrimPR have fundamentally altered the role of defence counsel.[66] McEwan goes further, describing the CrimPR's focus on defence cooperation and

[59] *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); *Justice for All* (Cm. 5563, 2002); 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).

[60] J.W. Raine and M.J. Willson, 'Beyond Managerialism in Criminal Justice' (1997) 36(1) The Howard Journal of Crime and Criminal Justice 80.

[61] See recently: D. Newman, *Legal Aid Lawyers and the Quest for Justice* (Oxford: Hart, 2013); 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) E&P 35; J. Thornton, 'The Way in Which Fee Reductions Influence Legal Aid Criminal Defence Lawyer Work: Insights from a Qualitative Study' (2019) 46(4) Journal of Law and Society 559.

[62] A notable exception is: J. Thornton, 'The Way in Which Fee Reductions Influence Legal Aid Criminal Defence Lawyer Work: Insights from a Qualitative Study' (2019) 46(4) Journal of Law and Society 559; J. Thornton, 'Is Publicly Funded Criminal Defence Sustainable? Legal Aid Cuts, Morale, Retention and Recruitment in the English Criminal Law Professions' (2020) 40 L.S. 230.

[63] I. Dennis, 'Criminal Procedure Rules – An Update' [2005] Crim. L.R. 335, p. 336.

[64] P. Darbyshire, 'Judicial Case Management in Ten Crown Courts' [2014] Crim. L.R. 30. See also the empirical data referred to above suggesting judicial preferences for agreed evidence.

[65] M. McConville and L. Marsh, 'Adversarialism Goes West: Case Management in Criminal Courts' (2015) 19(3) E&P 172. Cf. Hall who suggests the CrimPR merely concretised an already existing informal duty to cooperate: A. Hall, 'Where Do the Advocates Stand When the Goal Posts Are Moved' (2010) 14 E&P 107, p. 114.

[66] 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) E&P 35.

efficiency drives as a "quiet revolution".[67]

The findings in this study support the impression that barristers have, at least to some extent, adopted the managerial ethos, in apparent contradiction to the English and Welsh system's adversarial tradition.[68] This is plain from the frequency with which BC is admitted by agreement, and the fact that agreeing as much evidence as possible is now perceived by both barristers and judges as a "high level of advocacy". However, managerialism does not operate only on the level of individual decision-making, but also provides structural incentives to agree evidence, and disincentives to contest.

At one end, the trial process is being increasingly driven by the CrimPR's efficiency and case management concerns in an attempt to drive down costs and reduce wasted time, though increasing workloads for all involved.[69] 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. It is tolerably clear that counsel and criminal justice agencies are unable (and sometimes unwilling) to do more work without increased resources and remuneration[70]:

> **Barrister 4**
> "We're not paid to make all these bloody [BC] applications now anyway."
>
> **Barrister 7**
> "[BC applications] are *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."

As a result of being paid less, counsel are taking on multiple cases which means that they cannot spend as much time on each individual case, while the CPS and Police are also spending less time on individual cases due to heavily increased workloads with no equivalent increase in staffing. The data here therefore support Thornton's assertion that legal aid "rewards those who

[67] J. McEwan, 'From Adversarialism to Managerialism: Criminal Justice in Transition' (2011) 31(4) L.S. 519, p. 528.
[68] R. McPherson, 'The Rise of Agreed Narratives in Scottish Criminal Procedure' (2013) 2 Jur. Rev. 141, pp. 149-150.
[69] J. Hodgson, 'The Future of Adversarial Criminal Justice in 21st Century Britain (2010) 35 N.C. J. Int'l L. & Com. Reg. 319, pp. 332-333.
[70] This is corroborated by Thornton's study of the impact of legal aid cuts to barristers (and solicitors): J. Thornton, 'The Way in Which Fee Reductions Influence Legal Aid Criminal Defence Lawyer Work: Insights from a Qualitative Study' (2019) 46(4) Journal of Law and Society 559, pp. 580-582.

cut corners and punishes those who do not".[71]

Compounding these issues are two further problems: case listings and 'rotating barristers' (or 'discontinuous representation').[72] 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).[73] This 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 promptly 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 significant 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."

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

[71] J. Thornton, 'The Way in Which Fee Reductions Influence Legal Aid Criminal Defence Lawyer Work: Insights from a Qualitative Study' (2019) 46(4) Journal of Law and Society 559, p. 582. See also A.S. Blumberg, 'The Practice of Law as Confidence Game: Organizational Cooptation of a Profession (1967) 1 L. & Soc'y Rev. 15, p. 22.
[72] A. Boon, *The Ethics and Conduct of Lawyers in England and Wales*, 646. A similar problem was identified in the US over 50 years ago: D. Sudnow, 'Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office' (1965) 12 Social Problems 255, pp. 265-266.
[73] 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.

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 n^{th} 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."

We saw this occur in **Case 5**, where both counsel received their briefs late, and met for the first time on the morning of the trial. No BC applications had been made prior to the trial by the barristers who had previously had responsibility for the case. Clearly, case-specific variables and trial tactics were at the forefront of each barrister's mind when negotiating over the admissibility of the mountain of BC evidence in that case. However, it seems unlikely that the severe time pressure to 'sort out' the BC issues in this case between the first and second day of the trial had *no* influence on the advocates' decision to agree the admissibility of almost all of the BC evidence.[74] On the contrary, with each barrister having only a dozen (or so) hours to get to grips with this new information, this mutual constraint fostered a 'spirit of cooperation' in which agreements were more likely to occur so as to reduce the stress and (mostly unpaid) workload.[75] This is not to say that these time and resource pressures always lead to agreements, as there were plenty of examples in the study where contested applications were made (often hastily written either over lunch or overnight), but they create conditions under which counsel may be more likely to work together. As **Barrister 3** put it:

> "Ninety percent of Crown Court work is a lot of people covering other people's work, and everyone's just doing their best."

[74] McPherson argues that the Scots' obligation to agree uncontroversial evidence is rooted in a drive for efficient and streamlined criminal trials: R. McPherson, 'The Rise of Agreed Narratives in Scottish Criminal Procedure' (2013) 2 Jur. Rev. 141, p. 142.

[75] For more on the effect of work-related stress on the activities of counsel see: J. Thornton, 'The Way in Which Fee Reductions Influence Legal Aid Criminal Defence Lawyer Work: Insights from a Qualitative Study' (2019) 46(4) Journal of Law and Society 559; J. Thornton, 'Is Publicly Funded Criminal Defence Sustainable? Legal Aid Cuts, Morale, Retention and Recruitment in the English Criminal Law Professions' (2020) 40 L.S. 230.

With pressures to cooperate increasing further, it is unlikely that this problem is an exceptional artefact of a single study.

Recalibrating English Adversarialism as 'Party Control'

The changing face of adversarialism in England and Wales in the last few decades has been well documented, with many arguing that we are moving away from adversarialism as traditionally understood.[76] The increasing frequency and intensity of cooperation between prosecution and defence counsel documented here stands in marked contrast to descriptions of attorneys in the United States, who conform more to an ideal type of adversarialism.[77] For example, Van Kessel and Pizzi both argue that American lawyers are much more willing, than their English counterparts,[78] to object to any and all opposing evidence or motions in an attempt to frustrate their opposite number's chances of victory at trial.[79] However, this study highlights clearly one aspect of adversarialism that is still as strong here as it is in the US: party control over evidence.[80]

In theory, party control means that both prosecution and defence counsel have the final say over which witnesses to call and what physical evidence (etc.) to adduce, so long as the evidence is relevant and there are no applicable exclusionary rules.[81] In practice, this seems to be largely true, although there may be additional constraints on prosecutors:

> **Barrister 8**
> [B]y the time as counsel you come to the case, the decision has already been made [by

[76] J. Hodgson, 'The Future of Adversarial Criminal Justice in 21st Century Britain (2010) 35 N.C. J. Int'l L. & Com. Reg. 31; J. McEwan, 'From Adversarialism to Managerialism: Criminal Justice in Transition' (2011) 31(4) L.S. 519; M. McConville and L. Marsh, 'Adversarialism Goes West: Case Management in Criminal Courts' (2015) 19(3) E&P 172; 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) E&P 35.

[77] See: D. Sudnow, 'Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office' (1965) 12 Social Problems 255; G. Van Kessel, 'Adversary Excesses in the American Criminal Trial' (1992) 67 Notre Dame L. Rev. 403; W. Pizzi, *Trials Without Truth: Why Our System of Criminal Trials Has Become an Expensive Failure and What We Need to Do to Rebuild It* (New York: NYU Press, 1998).

[78] And it usually is *English*. Welsh lawyers are rarely acknowledged in the American literature.

[79] Moreover, they argue that this is a *bad* thing: G. Van Kessel, 'Adversary Excesses in the American Criminal Trial' (1992) 67 Notre Dame L. Rev. 403, pp. 435-446, 463-465; W. Pizzi, *Trials Without Truth: Why Our System of Criminal Trials Has Become an Expensive Failure and What We Need to Do to Rebuild It*, pp. 110, 131-136.

[80] P. Roberts and A. Zuckerman, *Criminal Evidence,* pp. 120- 121; G. Van Kessel, 'Adversary Excesses in the American Criminal Trial' (1992) 67 Notre Dame L. Rev. 403, pp. 485-487; W. Pizzi, *Trials Without Truth: Why Our System of Criminal Trials Has Become an Expensive Failure and What We Need to Do to Rebuild It*, pp. 121-126.

[81] Though the trial judge retains powers to call witnesses, this is to be used sparingly (*Roberts* (1984) 80 Cr. App. R. 89). A significant hurdle to the exercise of this power is that the judge first needs to know a relevant witness exists.

> the CPS] 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 [them].

This view was challenged by **Barrister 7**, an experienced prosecutor, who argued 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, for example, she thought their BC outweighed their usefulness. For prosecutors, then, control may depend on experience.

Though it might seem counterintuitive, increasing cooperation between parties can lead to an even greater control over the evidence to be presented at trial. By sacrificing some individual control, counsel gain a collective level of control over the evidence above what they could achieve alone. Significantly, as argued above, counsel are able to bypass the most restrictive exclusionary rules (BC, hearsay, and sexual history)[82] through their cooperation. And where both parties want to admit a particular item of evidence, there is little the judge can do to stop them.

In practice, these 'losses' in individual control (e.g. allowing the defendant's BC to be admitted in order to get the complainant's BC in) are not losses at all. This is partly because each barrister will usually only agree evidence where there is a tactical advantage, but more significantly individual advocates retain control over *how evidence is presented*. With witnesses, both parties have the opportunity to elicit favourable answers to their questions.[83] Furthermore, counsel will comment on all admitted evidence in their closing speeches, which they will use to convince the jury that the evidence best supports their own case (or does *not* support the opposition case).[84]

[82] For a discussion of how counsel negotiate the admissibility of sexual history evidence despite the lack of an explicit 'agreement' gateway in s.41 YJCEA 1999, 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. 81, 103-105.
[83] See above concerning the different ways in which the prosecution and defence questioned complainant Mark in **Case 5**.
[84] See generally: D. Ormerod and D. Perry (eds), *Blackstone's Criminal Practice 2020* (Oxford: OUP, 2019), D18.15-20. Speeches are loosely regulated by case law: *Gonez* [1999] All. E.R. (D) 674; *Bateson* [1991] 3 W.L.U.K. 118. Though prosecutors are subject to some additional constraints: CPS, *Code For Crown Prosecutors* (London: Crown Prosecution Service, 2018), para 2.7.

Speeches are vital where evidence plausibly fits both the prosecution and defence explanations. **Case 8** was referred to above, where the defendant's prior allegations of abuse were argued in closing speeches to be true by the defence (in order to support D's claim that she would never abuse anyone herself), and false by the prosecution (in order to undermine D's credibility). Another example is in **Case 14**, where the charge was actual bodily harm. The current allegation concerned an evening where C was at a pub with her new boyfriend, when she heard that D (her ex-boyfriend) was also on the premises, fixing the sink 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 somewhat 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 (as she did in evidence), which would obviously 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. The point to be drawn from these examples is that counsel retain individual control, whether in

questioning or speeches, on how evidence is 'spun' to fit their overriding case narrative.

Though managerialism has reduced the power of barristers (and increased the power of judges) in many ways,[85] it seems clear from my data that counsel retain significant control over the evidence presented at trial. Moreover, increased cooperation driven by managerialism has had the unexpected consequence of giving counsel *more* control over the evidence. At the trial stage of the criminal process, then, some aspects of adversarialism are being minimised whilst others are being amplified.[86] It may therefore be time to recalibrate our understanding of adversarialism as it relates to trials in England and Wales, and recognise that 'party control' is its new core identifier.

Unclear Implications for Defence and Witness Rights

Accepting that managerialism puts pressure on the protection of defence rights,[87] in the context of this study on character evidence it is not obvious that increasing pushes for cooperation are leading to reduced opportunities for the defence to attack the character of prosecution witnesses. Rather, my findings reveal that the prosecution (or at least *independent* prosecutors) are often more than happy to assist the defence in admitting BC evidence against their own witnesses if they believe it would be fair or "just"[88] to do so, or that they could gain collateral tactical advantages. Fairness to the accused is explicitly being considered in these negotiations over evidence. Though there are clearly concerns in other aspects of the criminal process (such as pressure on defendants to plead guilty), at least with regards to BC evidence an increasing culture of cooperation has not necessarily led to a worsened position for the defence.

[85] M. McConville and L. Marsh, *Criminal Judges: Legitimacy, Courts and State-Induced Guilty Pleas in Britain*; M. McConville and L. Marsh, 'Adversarialism Goes West: Case Management in Criminal Courts' (2015) 19(3) E&P 172.
[86] Cf. Some might dispute this characterisation, arguing that that *any* cooperation or negotiation denies the 'adversarial' label: J Hodgson, *The Metamorphosis of Criminal Justice*; M. McConville and L. Marsh, *Criminal Judges: Legitimacy, Courts and State-Induced Guilty Pleas in Britain*.
[87] J. McEwan, 'From Adversarialism to Managerialism: Criminal Justice in Transition' (2011) 31(4) L.S. 519; M. McConville and L. Marsh, 'Adversarialism Goes West: Case Management in Criminal Courts' (2015) 19(3) E&P 172; 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) E&P 35. The US literature foresaw this decades ago: D. Sudnow, 'Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office' (1965) 12 Social Problems 255; A.S. Blumberg, 'The Practice of Law as Confidence Game: Organizational Cooptation of a Profession (1967) 1 L. & Soc'y Rev. 15.
[88] See CrimPR, Rule 1.1.

On the other hand, counsel also have a responsibility under CrimPR Rule 1.1(2)(d) to respect the interests of witnesses and complainants. When considering that the purpose of s.100 was to prevent character attacks on witnesses where BC is unnecessary or of low probative value,[89] the evidence presented here shows this purpose is being circumvented in at least some cases. As the practice of agreeing non-defendant BC becomes more ingrained (if it is not already) then the standard of admissibility may continue to be distorted,[90] raising concerns for the treatment of witnesses when being cross-examined. However, as Hoyano found with regard to sexual history evidence,[91] agreements may bypass the need to raise the issue with the relevant witness altogether: if non-defendant BC is admitted in the 'agreed facts', then the relevant witness may not be subject to the distress which often comes with responding to such questioning. Whether agreements negatively impact on the rights of non-defendants is therefore less clear, and would benefit from further empirical research.

Conclusions

Taking BC evidence as its focal point, this article takes the first steps towards (re)opening agreed evidence as a legitimate subject of enquiry for evidence and criminal justice scholars. The qualitative data presented here indicate that evidence admitted by agreement is a relatively common phenomenon (quantitative research would assist in determining its frequency with greater precision), and as such demands further research.[92] Indeed, anecdotal evidence[93] suggests that pressures to agree evidence and truncate the length of trials have intensified since the pandemic hit, due to concerns about making the most efficient use of the smaller number of

[89] D. Birch, 'A Credible Solution? Non-Defendant's Bad Character and Section 100 of the Criminal Justice Act 2003' [2019] Crim. L.R. 841, pp. 842-844; Law Commission, *Evidence of Bad Character in Criminal Proceedings*, Part V; R Auld (LJ), *Review of the Criminal Courts of England and Wales*, paras. 11.112-11.120.

[90] Similar arguments have been made with regard to plea bargains, in that definitions of 'crimes' become distorted from their technical legal meaning over time. See: D. Sudnow, 'Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office' (1965) 12 Social Problems 255; W. Pizzi, *Trials Without Truth: Why Our System of Criminal Trials Has Become an Expensive Failure and What We Need to Do to Rebuild It*, pp. 72-73.

[91] L. Hoyano, *The Operation of YJCEA 1999 Section 41 in the Courts of England and Wales: Views from Barristers' Row*, para. 105.

[92] Though not the focus of the present article, my empirical data was replete with other types of evidence (such as hearsay and sexual history) also being admitted by virtue of agreement.

[93] Informal conversations with some barristers.

operating courts. The impact of this finding should not be understated, obvious thought it may be for practitioners who are increasingly getting used to late-night emailing sessions to reduce the number of contested issues and evidence.[94] For a significant amount of evidence, it is not judges and the rules of exclusion which determine admissibility, but barristers and their powers of negotiation. The consequences of this for jury verdicts, defence rights to challenge evidence, and the treatment of witnesses and complainants are unclear. One result may be additional pressure on trial judges to give appropriate directions to the jury on how they may use the agreed evidence. Furthermore, given the strength of the managerial current, it seems likely that proposals for evidence reform which do not permit party agreement for admissibility are unlikely to have their intended effect.[95]

Agreements seem to centre on what counsel believe is "sensible" and "fair" to admit in the context of the particular case. Counsel are likely to agree the admission of BC evidence if it can be 'spun' in some way to fit both parties' cases, either in witness questioning or closing speeches. Other factors such as saving time, career progression, and professional collegiality were also identified as potentially influential. Taking a step back, the argument was then developed that intensifying managerialism throughout the criminal process has created and exacerbated various pressures (ideological and practical) which have contributed to a working environment within which cooperation between the adversarial parties is more likely. Standard accounts of trial management paint judges as having a highly influential role in pushing the managerial agenda,[96] however the corrective offered here argues that, although the influence of judges operates as a shadow to negotiations, counsel themselves remain in primary control of the evidence.

[94] As occurred recently in *Gabbai* [2019] EWCA Crim 2287, [2020] Crim. L.R. 750.
[95] See recent proposals to reform s.41 YJCEA 1999: B. Brewis and A. Jackson, 'Sexual Behaviour Evidence and Evidence of Bad Character in Sexual Offence Proceedings: Proposing a Combined Admissibility Framework' (2020) 84(1) The Journal of Criminal Law 49.
[96] M. McConville and L. Marsh, *Criminal Judges: Legitimacy, Courts and State-Induced Guilty Pleas in Britain;* M. McConville and L. Marsh, 'Adversarialism Goes West: Case Management in Criminal Courts' (2015) 19(3) E&P 172.

All of this points to the need to know more about how trials and trial management are evolving. The argument developed here is that adversarialism is not necessarily diminishing, rather the focus of adversarialism in England and Wales has shifted from aggressive trial combat to more party control over the evidence and proceedings. What is therefore needed is further empirical research into the working practices of barristers, and how opposing counsel negotiate over not only the admissibility of evidence, but also other aspects of effective trials amenable to negotiation such as: which issues are contested, edits to police interviews, and which witnesses are to be called. Such research would be able to cast further light on the extent to which the rules of admissibility (and other rules of evidence and procedure) are giving way to managerial pressures. If this is the case, further normative questions arise concerning the purpose of those rules. Put simply, if rules of admissibility are avoidable, and often are avoided, what exactly is their function? At the very least, they will surely continue to operate as a 'back up' to when negotiations fail. But assuming managerial pressures continue to get worse as we come out of the pandemic,[97] it may be that classic common law rules of admissibility (such as those related to BC and hearsay) will play an increasingly symbolic role.

[97] See for discussion of the current Crown Court backlog: H. Riddle, A. Edwards and M. Hardcastle, 'COVID-19 and the Criminal Courts' [2021] Criminal Law Review 159.