THE RELEVANCE OF RELEVANCE: A THEORETICAL, DOCTRINAL, AND EMPIRICAL REVIEW OF EVIDENTIAL RELEVANCE IN THE CRIMINAL COURTS

by

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ABSTRACT

This thesis examines the requirement that all pieces of criminal evidence must be regarded as 'relevant' before being admitted in criminal trials. This research is a wide-ranging review of evidential relevance and an important foundation towards a normative debate on what relevance is and how it is applied in the criminal courts. To do this, this thesis analyses relevance on three distinct levels: theoretical, doctrinal, and empirical. The theoretical investigation of relevance explores academic framings of relevance and the different representations of relevance in decision-making processes. An analysis of appellate case law then informs an investigation of relevance on a doctrinal level, to consider the ways in which relevance has been conceptualised and operationalised in the appellate courts. An empirical insight into relevance is then drawn from primary data gathered as part of this project, from interviews conducted with 20 criminal barristers on their views and approaches to decision-making on evidential relevance in criminal trials, and their understanding of relevance in practice. This wide-ranging review of evidential relevance is the first research endeavour of its kind, and the first to engage directly with barristers on their decision-making on this fundamental and consequential evidential device. Keith Hawkins' theoretical framework of 'Surround, Field and Frame' is adopted as an analytical tool throughout this thesis, permitting the analysis of multi-layered approaches to decision-making, and the examination of the multitude of factors that impact interpretations of relevance. The thesis demonstrates how relevance is a highly dynamic and innately relational concept that is far more complex and nuanced than is typically appreciated by academics and practitioners alike. The review of relevance

undertaken here shows that the ways relevance is understood and used can be highly internalised, rather than deliberative, making the decision-making processes susceptible to a range of legal and non-legal influences. Relevance as an evidential concept is highly impactful in the trial process and it is imperative that we have as comprehensive an account of relevance as is possible. This thesis provides context, substance, and detail to that important end.

DEDICATION

The brightest ray of sunshine and quite simply the best child I could have ever wished for, Charlie.

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LIST OF ABBREVIATIONS

CP – Consultation Paper

CPS – Crown Prosecution Service

ECHR – European Convention on Human Rights

PACE – Police and Criminal Evidence Act 1984

YJCEA – Youth Justice and Criminal Evidence Act 1999

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R v Reynolds (Nicholas) [2019] EWCA Crim 2145

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Children and Young Person Act 1933 s 1

Criminal Justice Act 1967 s 10

Criminal Justice Act 1967 s 9

Criminal Justice Act 2003 s 100 (1)(a)

Criminal Justice Act 2003 s 100 (1)(b)

Criminal Procedure (Scotland) Act 1995 s 257

Criminal Procedure and Investigations Act 1996

Criminal Procedure Rules 2005 pt 1.1

Criminal Procedure Rules 2005 pt 1.1 s 2(a)

Criminal Procedure Rules 2005 pt 1.1 s 2(b)

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Criminal Procedure Rules 2005 pt 1.1 s 2(g)

Criminal Procedure Rules 2005 pt 1.2 s 1(a)

Criminal Procedure Rules 2020 pt 1(1)

Police and Criminal Evidence Act 1984 s 78

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INTRODUCTION

The criminal justice process comprises a number of key institutions, one of the most symbolic and public of which is the Crown Court. It is here that the state considers the most serious criminal offences and engages in adjudication that is regulated by a myriad of rules pertaining to criminal procedure, substantive offences, and criminal evidence. Of the latter, the law of evidence plays a consequential role and 'regulates what evidence may be admitted at trial and under what conditions'.[1] As such, the implications of evidential rules and standards are of the upmost importance and have a profound impact on how trials will proceed, the legal arguments that can be advanced, and what evidence may or may not be admitted and put before a jury. On this point, Munday puts it aptly:

> '[I]t determines the critical issue of which items of proof parties are actually permitted to produce before a court in support of their contentions, it would be difficult to exaggerate the importance of the subject'.[2]

Within the significant body of evidential rules and standards in England and Wales, there is one fundamental evidential requirement that applies universally to all pieces of evidence: the requirement that all pieces of evidence must be regarded as *relevant* before being admitted in a criminal trial. This thesis argues that investigating 'what relevance is' in an evidential context is an essential endeavour, and explores and

[1] Roderick Munday, *Evidence* (9th edn, OUP 2017) 15.
[2] ibid 1.

interrogates the concept of relevance from an academic, appellate, and empirical perspective.

Evidence is typically understood to be relevant if it 'makes the matter which requires proof more or less probable'.[3] Relevance is concerned with the relationship between facts in a criminal case[4] and cannot be established in the abstract, evidence 'must be relevant to something – the something being a proper object of proof in the case'.[5] In sum, relevance plays a central role in criminal proceeding and is 'a function of what you want to know and why you want to know it'.[6] In this way, relevance is a 'fundamental condition of admissibility',[7] and works as an initial filter for all evidential questions: if evidential relevance is established, the evidence will be prima facie admissible. However, relevant evidence may be subsequently rendered inadmissible through the exercise of an exclusionary rule of evidence. This evidential process, and the steps within it, are usefully expressed in Roberts and Zuckerman's tripartite structure, which sets out that trial judges must consider whether the evidence is:

1) Relevant;
2) Subject to an exclusionary rule; and
3) Subject to an inclusionary exception to any applicable exclusionary rule.[8]

This structure was devised for academic, rather than practical, purposes and is one way of expressing the placement of relevance in the evidential process. Other

[3] R v Kilbourne [1973] AC 729, 756 per Lord Simon.
[4] Paul Roberts, *Roberts and Zuckerman's Criminal Evidence* (3rd edn OUP 2022) 185.
[5] Ian Dennis, *The Law of Evidence* (Sweet & Maxwell 2017) 67.
[6] Paul Roberts, *Roberts and Zuckerman's Criminal Evidence* (3rd edn OUP 2022)185.
[7] Ian Dennis, *The Law of Evidence* (6th edn, Sweet & Maxwell 2017) 65.
[8] Paul Roberts, *Roberts and Zuckerman's Criminal Evidence* (3rd edn, OUP 2022) 181.

representations of the evidential process also exist,[9] including the following four-step process:

1) Is the evidence relevant?
2) Is the evidence subject to a special admissibility regime?
3) Does the evidence pass the relevant tests within that special admissibility regime?
4) Should the evidence nevertheless be excluded?[10]

These formulations are useful academic representations and simplifications of the evidential process, that aid the analysis of relevance as an evidential requirement. They are not designed, nor do they claim, to capture the nuance of decision-making on complex evidential matters in a practical courtroom setting. Roberts and Zuckerman explicitly acknowledged the limitations of their formulation:

> …[T]he structure itself should not be reified or fetishized. It is not intended to be a sociologically realistic description of how questions of admissibility are routinely decided in practice. Experienced lawyers and judges have internalised admissibility doctrines and often apply them 'without thinking'.[11]

Notwithstanding this caveat, simplified representations of the evidential process are valuable as an analytical tool for two reasons. First, representations of the evidential process, such as those included above, highlight the fundamental distinction between

[9] For example Munday says 'before it can be admitted, evidence has to clear two hurdles' relevance and consideration of exclusionary rules; in Roderick Munday, *Evidence* (9th edn, OUP 2017) 25.
[10] This approach was shared with me by Findlay Stark (University of Cambridge) in comments on a draft of an article now published: Polly Hernandez, 'The Revival of Evidential Relevance: Overcoming Myths and Misconceptions' [2024] 7 CLR 458.
[11] Paul Roberts, *Roberts and Zuckerman's Criminal Evidence* (3rd edn, OUP 2022) 182.

relevance and admissibility. Relevance and admissibility are separate evidential matters and if a piece of evidence is relevant it is not necessarily admissible. Secondly, academic representations of the evidential process are helpful in highlighting the fundamental role performed by relevance, and its universal application. On its universal application it is worth setting out precisely what is meant by this, and the different ways in which relevance can operate. First, relevance applies as a standalone evidential requirement, as the first hurdle to be surpassed in the evidential process outlined above. Where it applies in this way, it is required in relation to all pieces of evidence. Alternatively, relevance can operate in conjunction with, and in relation to, exclusionary rules of evidence. Where it relates to exclusionary rules of evidence, it does so in relation to particular categories or types of evidence, such as hearsay evidence[12] or bad character evidence.[13] This distinction – in terms of applicability – is important when reading this thesis. Most of the work therein is concerned with relevance in its general universal application. A discussion of relevance and its relationship to and with exclusionary rules of evidence is conducted exclusively in Chapter 8.

I. The function of relevance

Relevance aims to serve both practical and principled functions within the trial process. On a practical level, it acts as an evidential filter and regulates what evidence will go before the jury. Filtering evidence has the practical advantage (at least in theory) of promoting efficiency in the trial process, as it ensures that juries are only presented with information that is salient to their deliberations. The filtering function of relevance

[12] Criminal Justice Act 2003 section 98, 101.
[13] ibid section 114-120.

assists the court more broadly by ensuring that the court is not overloaded with an excessive volume of evidence. Were evidence not filtered in some way prior to being admitted at trial, the efficiency of court proceedings would be hindered significantly and temporal burdens on the court may render the trial process unworkable. This is an important consideration given that in October 2023 there were 65,004 outstanding cases in the Crown Court[14] and in the same period there were 353,700 outstanding cases in the magistrates' court.[15] Delays are undesirable for courts given the considerable expense involved, but they can also have a significant impact on those involved in criminal proceedings, including victims,[16] witnesses, and defendants. Lord Justice Judge expresses this sentiment in *Jisl:*

> Resources are limited. The funding for courts and judges, for prosecuting and the vast majority of defence lawyers is dependent on public money, for which there are many competing demands. Time itself is a resource. Every day unnecessarily used, while the trial meanders sluggishly to its eventual conclusion, represents another day's stressful waiting for the remaining witnesses and the jurors in that particular trial; and, no less important, continuing and increasing tension and worry for another defendant or defendants, some of whom are remanded in custody.[17]

Over two decades later, this sentiment remains and the position arguably exacerbated by the imposition of subsequent austerity measures. Relevance has an innately

[14] HM Courts and Tribunals Service, 'HMCTS Management Information – August 2023' (HM Courts and Tribunals Service 12 October 2023) <www.gov.uk/government/statistical-data-sets/hmcts-management-information-august-2023> accessed 23 November 2023.
[15] ibid.
[16] Dame Vera Baird, 'Annual Report 2020/2021' (CP463,2021) <www.victimscommissioner.org.uk/document/annual-report-of-the-victims-commissioner-2020-to-2021/> accessed 16 September 2023.
[17] *Jisl* [2004] EWCA Crim 696 [114].

practical role, then, in ensuring that evidence is filtered appropriately. Relevance also serves a principled function in seeking to uphold the principle of accurate fact-finding in criminal proceedings. The principle of accurate fact-finding posits that criminal adjudication must concern itself with 'ascertaining the truth of disputed allegations'.[18] The principle of accurate fact-finding is a foundational principle of criminal evidence and '[i]n global terms, factual accuracy in adjudication is the cornerstone of the rule of law'.[19] Using evidential rules to filter evidence presented to juries is an important means of seeking to reach factually accurate outcomes; as a mechanism for reducing the volume of evidence presented to juries. This point has been expressed by Mr. Justice Byrne: 'the fewer and simpler the issues left to the jury, the less chance there is of a miscarriage of justice'.[20] Relevance is not merely concerned with reducing or simplifying the evidence presented to juries, it is also a mechanism for ensuring the jury are given evidence salient and evidentially useful to the facts in issue and to the questions that they must consider in their pursuit of accurate fact-finding. What *is* salient and evidentially useful to juries – and put more simply, 'what is relevant' – is a complex matter and one which is considered throughout this thesis.

The requirement of evidential relevance is intertwined with accurate fact-finding principles, and reflects the broader rationale for wide-ranging evidential rules. Rules of evidence have been described as a 'practical, living, body of rules and doctrines, part designed and part evolved, to facilitate forensic fact-finding and serve the ends of criminal justice'.[21] Though this is perhaps a simplistic representation of the aims of criminal evidence – indeed some evidential rules and practices may in fact obfuscate

[18] Paul Roberts, *Roberts and Zuckerman's Criminal Evidence* (3rd edn OUP 2022) 80.
[19] ibid.
[20] *R v Patel (Framrose)* (1951) 35 Cr App R (CA) 62, 66.
[21] Paul Roberts, *Roberts and Zuckerman's Criminal Evidence* (3rd edn, OUP 2022) 42.

forensic fact-finding[22] – it affirms the underlying prominence of accurate fact-finding in evidential matters. Given its central role in the criminal courtroom, this thesis provides an in-depth exploration of relevance on three distinct levels: theoretical, doctrinal, and empirical. The remainder of this introductory chapter sets out the prevailing definitions of relevance;[23] the justification for conducting research on relevance;[24] an overview of the research methods and objectives; [25] an outline of the thesis;[26] and an overview of the significance and originality of the research.[27]

II. Defining relevance

Though relevance is a central concept in the law of evidence, definitionally it is 'by no means an exact science'.[28] This is, perhaps, to understate the definitional breadth of relevance, and this thesis shows the different ways in which relevance can be defined, framed, and conceptualised in a legal setting. This thesis considers academic conceptualisations of relevance,[29] appellate framings of relevance,[30] and how practitioners frame relevance.[31] It is important too that legal conceptions of relevance are understood and situated alongside *lay* conceptions of relevance. This is because 'relevance' is not an exclusively legal term that only has a legal definition. Instead, lay conceptions of relevance exist that relate to relevance as a non-legal concept, and its inclusion in everyday, non-legal discourse. Throughout this thesis, legal constructions

[22] For example, the admission of defendant or non-defendant bad character evidence may make fact-finding more difficult for the jury.
[23] Section II.
[24] Section III.
[25] Section IV.
[26] Section V.
[27] Section VI.
[28] Roderick Munday, *Evidence* (9th edn, OUP 2017) 19.
[29] Chapter 3.
[30] Chapter 4.
[31] Chapter 5; Chapter 6; Chapter 7; Chapter 8.

of relevance are shown to be intrinsically interwoven with lay constructions of relevance and lay understandings of how relevance is established. In the upcoming discussions on academic, appellate, and practitioner framings of relevance each show, to varying extents, a reliance upon lay constructions of relevance. Before exploring the interrelationship between legal and lay constructions of relevance, it is necessary to first set out, in basic terms, how relevance is understood in the criminal evidence context. Generally, evidence is understood to be relevant if it 'makes the matter which requires proof more or less probable'.[32] Choo elaborates and links relevance to matters of probative value, rather than probability, stating 'an item of evidence is relevant so long as it has probative value or probative force'.[33] Whether couched in the language of probity or probability, the essence of relevance relates to its ability to prove or disprove a fact in issue.

Relevance can further be characterised by two defining features. First, it requires a connection between a piece of evidence and a fact in issue, or a contested fact. In this sense, it is *relational* and relevance must always be established in relation to a particular issue. For example, evidence of the accused's height would not be relevant to the issue of whether the accused intended to harm another, but evidence of their height may be relevant to a different issue in the case such as whether the accused could reach a particular weapon. The second feature of relevance, then, is linked to this relational question, and requires that a threshold is met in terms of whether a piece of evidence makes a fact in issue more or less probable. Fitzjames Stephens' definition of relevance emphasises both of these elements of relevance, and describes relevance in the following terms:

[32] *R v Kilbourne* [1973] AC 729, 756 (Simon LJ).
[33] Andrew Choo, *Evidence* (6th edn, OUP 2021) 2.

> '[A]ny 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 or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other'.[34]

The relational nature of relevance is evident in Fitzjames Stephen's emphasis on the relationship between two facts. The threshold element is addressed in the second limb of the quote, focusing on whether the existence of one fact 'renders probable' the existence of another fact. Absent from this definition is detail on the precise test to be applied when deciding whether a fact (or piece of evidence) is relevant. The question of what threshold applies to evidential relevance is of fundamental importance. Academic discourse has at times sought to identify and extrapolate, from legal practice, distinct tests or approaches to relevance. The two oft-cited approaches to relevance are known as logical relevance and legal relevance.[35] Before explaining what those tests are, it is important to note that these are academic labels for what academic writers, notably Choo, have previously regarded as the courts' broad approaches to relevance.[36]

A deeper discussion of the origins and application of these approaches to relevance takes place in Chapter 3.3., but it is nevertheless helpful to introduce and summarise the two predominant approaches presented in academic literature at this stage. Logical relevance requires the lower threshold of the two approaches, and is

[34] James Fitzjames Stephen, *Digest of the Law of Evidence (*12th ed, Macmillan 1948) 4.
[35] Paul Roberts, *Roberts and Zuckerman's Criminal Evidence* (3rd edn, OUP 2022) 188-192; Andrew Choo *Evidence* (6th edn, OUP 2021) 2-4. It is important to note, however, that not all evidence literature refers to or endorses these two tests for relevance: Jonathan Doak, Claire McGourlay and Mark Thomas, *Evidence: Law and Context* (5th edn, Routledge 2018); Nicola Monaghan, *Law of Evidence* (Cambridge University Press 2015); Ian Dennis, *The Law of Evidence* (5th edn, Sweet & Maxwell 2013).
[36] Andrew Choo, *Evidence* (6th edn, OUP 2021).

regarded as 'an affair of logic and not of law'.[37] It posits that 'to be relevant the evidence need merely have some tendency in logic and common sense to advance the proposition in issue';[38] no additional threshold need be met beyond the metrics of common sense and logic. In conceptualising relevance this way, logical relevance presents an empirical question, asking only whether the evidence makes a particular fact more or less likely. Crucially, however, the mechanism by which it does this is not scientific, it is based on lay perceptions of what it means for a fact to be relevant, which are embedded in notions of 'common sense' and 'logic'.

Legal relevance, by contrast, requires a higher threshold be met before evidence is regarded as relevant. Choo usefully expresses legal relevance in the form of an equation: logical relevance + plus value = legal relevance.[39] After a logical connection between evidence and a contested fact is established, an additional 'plus value' is required, that is, the evidence must have some 'additional probative value'.[40] It is not enough for legal relevance that a piece of evidence simply makes a fact more or less probable, instead it appears to delve into *degrees* of probative value. It insists upon there being a degree of additional probative value (on top of its logical value) attached to the evidence. The (im)precise nature of this degree of additional probative value is discussed in detail in Chapter 3.3.2. but suffice to say here that legal relevance provides a mechanism by which evidence can be 'vetted', and evidence that is logically relevant but bears little probative value can be excluded.

It is somewhat surprising that a fundamental rule of evidence should appear to have multiple *potential* approaches, with no clarity or consistency as to which is the

[37] James Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Little Brown 1898) 269.
[38] *R v A (no 2*) [2001] UKHL 25 [31].
[39] Andrew Choo, *Evidence* (6th edn, OUP 2021) 3.
[40] ibid.

'correct' approach. Academic literature generally presents these two approaches to relevance in a fairly cursory way, with little to no enquiry into their practical operation and with little or no analysis given to which is or should be preferred. Of significance here is Thomason's recent suggestion that 'it is now relatively settled that "relevance" means the same in law as it does in logic and reason'.[41] This point is asserted rather than demonstrated and the discussion in this thesis (including the empirical data) does not necessarily support that conclusion. Instead, it shows relevance to be far more complex a matter than this assertion would suggest.

Within this thesis, scrutiny of the two approaches shows that neither approach to relevance is without fault, and barristers' critiques of these approaches are shared and discussed in Chapter 5.[42] In brief, logical relevance presents practical difficulties in that its relatively low threshold runs a real risk of permitting the admission of a significant volume of evidence that - without any further filtering device or additional requirements - may unduly burden the already burdened court system. It presents further difficulty in its predication on *logic* and *common sense* which bear inherent subjectivity and invite individualistic assessments and ascription of meaning.

Conversely, legal relevance has an implicit paradox in that evidence which is logically relevant may nevertheless be regarded 'irrelevant' and subsequently inadmissible should it not pass the additional threshold test. Equally, although legal relevance applies a threshold to decision-making, it is not clear whether one must enter into assessing *degrees* of probative value, or simply engage in a probative value vs. prejudicial effect test.[43] While this distinction may seem small, it may have

[41] Matt Thomason, 'Previous Sexual History Evidence: A Gloss on Relevance and Relationship Evidence' (2018) 22(4) IJEP 343, 344.
[42] Section 5.3.
[43] A discussion of this issue is in Chapter 3.

significant consequences and may explain some of the differing interpretations and understandings of relevance that have been seen in the appellate courts and are shared and discussed in Chapter 4.

Irrespective of their faults and intricacies, logical relevance and legal relevance are two broad conceptions of relevance which have featured in academic discourse on relevance. This thesis argues that this binary understanding of relevance approaches is too narrow, and emphasises that relevance is capable of being understood in several different ways. For example, an additional approach to relevance has been included in previous[44] and recent[45] Law Commission reports. This alternative approach to relevance is labelled by the Law Commission as 'enhanced relevance'.[46] Enhanced relevance differs from logical and legal relevance in that it seeks to define in more specific terms the threshold to be attached to relevance; it requires that evidence must have 'substantial probative value'.[47] Stipulating the threshold in these terms - 'substantial probative value' – goes further than logical and legal relevance in that it provides a criteria and seeks to define, in more precise terms, the threshold that should be attached to relevance. Invariably, discretion remains in how one determines what constitutes 'substantial probative value', but the scope in overall discretion when assessing whether something is 'relevant' is reduced.

It is worth noting at this stage that each of the approaches to relevance are united in their rejection of the 'free-proof idea'.[48] The free-proof idea is an approach to

[44] Law Commission, *Evidence of Bad Character in Criminal Proceedings* (Law Com No 273, 2001) 129 – 130, 142-145.
[45] Law Commission, *Evidence in Sexual Offences Prosecutions*: *A Consultation Paper* (Law Com CP No 259, 2023).
[46] ibid.
[47] ibid xvii.
[48] Frederick Schauer 'The Role of Rules in the Law of Evidence' in Christian Dahlman, Alex Stein, Giovanni Tuzet (eds) *Philosophical Foundations of Evidence Law* (OUP 2021) 69.

fact-finding that opposes restrictions on evidence, and instead favours a system under which 'juries would hear all evidence and weight it accordingly'.[49] Rather, the approaches to relevance identified here are predicated on an acceptance that relevance requires *some* mechanism to regulate the evidence that goes before a jury. The key point of distinction between the three approaches discussed here is that they differ on the nature and specifics of said mechanism. While stated approaches to relevance may differ in technical substance, they have in common their academic origins. Each of the three approaches to relevance are academic conceptions or academic *framings* of relevance and must be viewed in this context. Rather like the academic representations of the evidential process introduced above, academic framings of relevance are an attempt to condense and communicate complex decision-making processes that are not necessarily easily expressed in the form of a simple 'test'. Chapter 3 explores these academic framings of relevance in much more depth and highlights their potential impact/s and limitations in the practical legal setting.

III. Research on relevance

Relevance performs an important function in the criminal process, and has been characterised as 'possibly the most basic concept in the law of evidence'.[50] Unusually for such a basic or foundational concept, relevance has been the subject of relatively little rigorous empirical or doctrinal investigation. Discussion of evidential relevance is often confined to a few pages within introductory chapters of evidence textbooks,[51]

[49] ibid.
[50] Andrew Choo *Evidence* (5th edn, OUP 2018) 2.
[51] In Nicola Monoghan, *The Law of Evidence* (CUP 2015) relevance is covered in the 'Preliminary Issues' chapter and in Andrew Choo, *Evidence* (6th edn, OUP 2021) it is covered in the 'Introduction' chapter.

and it rarely features as an isolated issue in case law. Some academics have, at times, denied the existence of debate in this area, with Thomason stating that 'it might be thought that … there would be a lively debate amongst academics and the judiciary concerning what "relevance" is. However, this is not so'.[52] It is certainly the case that there has been no lively – or indeed any – debate amongst academics and the judiciary about what relevance is. Yet, it is argued that debate on the substance of relevance is not only important but necessary, and it is the substance of relevance that is probed throughout this thesis.

This interrogation of relevance is particularly timely as evidential relevance has recently come to the fore in some innately complex and difficult legal debates. In a recent Law Commission consultation paper,[53] the Law Commission include a specific relevance test as an integral element of their law reform proposals relating to both sexual history evidence[54] and disclosure requirements.[55] Not only has relevance featured in recent law reform proposals but it has, for the first time, been subject to academic critique that highlights, in stark terms, 'the failure of evidential relevance'.[56] The so-called failures of evidential relevance are raised in relation to the complex matter of the admissibility of sexual behaviour evidence in rape and sexual offence trials.[57] Conaghan and Russell highlight – in a piece illustratively titled 'It's 'Common Sense': Sexual History and the Failure of Evidential Relevance' - what they regard as

[52] Matt Thomason, 'Previous Sexual History Evidence: A Gloss on Relevance and Relationship Evidence' (2018) 22(4) IJEP 343, 344.
[53] Law Commission, *Evidence in Sexual Offences Prosecutions*: *A Consultation Paper* (Law Com CP No 259, 2023)
[54] ibid 137-205.
[55] ibid 61-136.
[56] Joanne Conaghan and Yvette Russell, 'It's just common sense: sexual history and the failure of evidential relevance' (*London School of Economics* 23 November 2023) <https://legalresearch.blogs.bris.ac.uk/2023/11/its-just-common-sense-sexual-history-and-the-failure-of-evidential-relevance/> accessed 5 May 2023.
[57] Charlotte Herriott, *Sexual History Evidence in Rape Trials: Is the Jury Out?* (Routledge 2023);

the failures of evidential relevance and its contribution to difficulties with the management of sexual behaviour evidence.[58] Herriott also considers the impact of relevance on other areas of evidence, suggesting 'at the heart of debates about the inclusion of sexual history evidence at trial lay pivotal questions around relevance and admissibility'.[59] These critiques are discussed in more depth in Chapter 5, but at this stage it is sufficient to summarise that some academic critique has been raised, recently, against relevance which suggest that complex evidential categories (such as sexual behaviour evidence) expose flaws in the foundations of relevance.

Together, the Law Commission's use of relevance at the centre of reform proposals and academic critique of relevance tells an important story about relevance. The Law Commission is seemingly advocating for the increased use of relevance in evidential matters, while other academic work is pointing to the flaws and inadequacies of relevance. At first glance, it may seem hard to reconcile these two propositions. At the very least, it suggests that relevance is capable of being conceptualised and understood in different ways, and may not be as well understood or 'basic' as it first appears. Chapter 3 will explore these academic framings of relevance in more depth, and suggest that two positions – the Law Commission proposals and academic critique of relevance - are perhaps not so far from one another and may in fact go hand-in-hand in identifying the same challenges associated with relevance.[60]

In contrast to the practical justifications for researching relevance, there are important principled reasons for conducting an in-depth examination of a key evidential

[58] Joanne Conaghan and Yvette Russell, 'It's just common sense: sexual history and the failure of evidential relevance' (*London School of Economics* 23 November 2023) <https://legalresearch.blogs.bris.ac.uk/2023/11/its-just-common-sense-sexual-history-and-the-failure-of-evidential-relevance/> accessed 5 May 2023.
[59] Charlotte Herriott, *Sexual History Evidence in Rape Trials: Is the Jury Out?* (Routledge 2023) 39.
[60] For more commentary on relevance in the context of the Law Commission proposal please see: Polly Hernandez, 'The Relevance of Relevance: Overcoming Myths and Misconceptions' (2024) 7(7) CLR 458.

concept. As a matter of principle, it is important that all evidential rules and practices are understood and can be applied consistently, and in accordance with the rule of law's commitment to legal certainty. This objective becomes more acute where *discretionary* decision-making is concerned. Decisions on evidential relevance are inherently discretionary, and there is no statutory or common law 'criteria' for relevance. Instead, relevance is open-textured and at the behest of legal professionals where 'the question of relevance often boils down to subjective interpretation'.[61] The relational element of relevance makes determinations of relevance contingent upon a fact/s in issue in a particular case. This means that what will be a relevant piece of evidence in one case will not necessarily be relevant in another case. Requiring relevance to be established in relation *to* something means relevance must, inevitably, have a degree of flexibility within it. On this, Dennis suggests that 'flexibility is purchased at the cost of some obscurity and inconsistency'.[62] Obscurity and inconsistency are not necessarily the ideal hallmarks of an evidential concept, nor do those characteristics sit neatly alongside the requirement that 'the law must be … so far as possible intelligible, clear and predictable'.[63] There are inevitable tensions between these ideals and how the law and legal decision-makers must navigate them, as flexibility, clarity, consistency and predictability are each valuable commodities in the legal arena.

The law seeks to navigate these tensions by allowing legal professionals to exercise discretion in relation to their decision-making on relevance. This way, legal

[61] Jonathan Doak, Claire McGourlay and Mark Thomas, *Evidence: Law and Context* (5th edn, Routledge 2018) 6.
[62] Ian Dennis, *The Law of Evidence* (6th edn, Sweet & Maxwell 2017) 66.
[63] Tom Bingham, 'The Rule of Law' (Speech at the Sixth Sir David Williams Lecture, Cambridge, 16 November 2006) 6 <www.cpl.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.cpl.law.cam.ac.uk/legacy/Media/THE%20RULE%20OF%20LAW%202006.pdf> accessed 22 December 2023.

professionals are afforded flexibility to account for case context, within the parameters of evidential norms and practices. Given the myriad of competing ideals and aims that feature in discretionary decision-making it is perhaps inevitable that there is scope for relevance to be understood and applied differently by different decision-makers.

If we envisage the rigid application of evidential rules at one end of a spectrum, and unfettered discretionary decision-making at the other, both have significant limitations. Rigid evidential rules may undermine the justice system's overarching pursuit for justice and fairness, by limiting the law's ability to engage with case-contextual factors. Unfettered discretion and allowance for flexibility, on the other hand, may undermine consistency in the law and obfuscate the basis upon which decisions are made. As such, unfettered discretionary decision-making leaves the door open for decisions to be informed by prejudice or other nefarious grounds that cannot necessarily be accounted for. This potential is highlighted by Conaghan and Russell who contend that: 'the 'factual' bases of claims of evidentiary relevance continue to be grounded in historically entrenched, gender-inflected perceptions of how men and women behave in sexual encounters'.[64]

Aside from this possibility, there are at least two further risks that may arise from the ambiguity around relevance. First there is a danger that instead of addressing relevance as a specific evidential requirement, the courts may simply assume all evidence put before them is relevant. The test for relevance may thereby become redundant and evidence proffered by barristers routinely admitted with little or no scrutiny. Secondly, there is a risk that if relevance is a redundant requirement, it will

[64] Joanne Conaghan and Yvette Russell, 'It's just common sense: sexual history and the failure of evidential relevance' (*London School of Economics* 23 November 2023) <https://legalresearch.blogs.bris.ac.uk/2023/11/its-just-common-sense-sexual-history-and-the-failure-of-evidential-relevance/> accessed 5 May 2023.

be replaced or subsumed by specific tests for relevance pertaining to the specific type or category of evidence. The risk here is that such a change may happen without considered thought and the 'test' for relevance remains, essentially, unknown. Whilst unknown, and presumably with less focus upon it, it will not be clear whether relevance as a standalone issue or concept is worth retaining and refining.

An example of relevance, arguably, being subsumed by a specific legislative regime is seen where the defence seeks to admit evidence of a complainant's sexual behaviour. In this instance, several specific legislative hurdles must first be surpassed.[65] Section 41 Youth Justice and Criminal Evidence Act (YJCEA) details the specific instances in which sexual behaviour evidence will be relevant. It is pertinent that this is the same category of evidence that Conaghan and Russell discuss above, where they suggest relevance in the context of sexual offences may be informed by 'historically entrenched' and 'gender-inflected' perceptions of behaviours. That a specific legislative regime was introduced to regulate this category of evidence is an example of the standard of admissibility being intentionally raised as a matter of policy. The restrictions on sexual history evidence seek to determine what should or should not be considered relevant in sexual offence trials, seemingly on the basis that a relevance filter alone is not sufficient for this purpose. The sexual offence trial context is also useful in illustrating the potential for relevance to *change* in particular contexts. The evidential restrictions on sexual history evidence were enacted in response to social change and in an effort to address gendered inequalities and stereotypes, as well as 'rape myths'.[66] In other words, what was once deemed relevant to a complainant's credibility in sexual offence trials – for instance, evidence of

[65] Youth Justice and Criminal Evidence Act 1999 Section 41.
[66] R v Seaboyer [1991] 2 SCR 577, 634.

prostitution[67] - is no longer accepted as relevant to the complainant's credibility. As such, it is important to investigate whether relevance has been replaced by specific tests of relevance related to the type of evidence in question. If this is the case, it is essential that we understand the consequences of this change, and whether the apparent subsumption of one of the only universal rules of evidence is in the interests of justice.

This thesis explores whether general evidential relevance has become a redundant requirement, in the sense that it has been subsumed by specific tests for relevance related to certain types of evidence, or indeed if it has been reconceived. These possibilities will be unpacked and explored throughout the thesis. Concern over the foundations of relevance is not only borne out of limited research on the topic, but from a small pilot study conducted prior to this research.[68] As part of a masters dissertation, I gained an insight into how legal professionals understood evidential relevance in practice. Three criminal barristers and one judge filled in an online questionnaire answering open-ended questions about evidential relevance. Responses from the four participants showed that each had a somewhat different understanding of evidential relevance, notwithstanding all participants suggesting that relevance was a clear and settled concept. There was no consensus as to the appropriate test for relevance in England and Wales, indeed two of the participants suggested the test for relevance was predicated on logic, while the other two participants highlighted the existence of a legal test that required the evidence had additional probative value. In this small study, participants did not necessarily understand that test consistently with one another. For instance, one barrister

[67] R v Holmes and Furness (1871) 12 Cox CC 137, CCR; cf. R v Cargill (1913) 8 Cr App R 224.
[68] Polly Green, 'The Relevance of Relevance' (MA Social Research Dissertation, University of Birmingham 2020).

suggested that legal relevance was the predominant approach to relevance in England and Wales, whereas another barrister took the view that 'no legal test could cover the range of situations that may arise in a case'. Though this study was very small, and the results are clearly not generalisable beyond the four participants involved, they do provide a glimpse into the potential confusion or contradiction that may arise in discourse on relevance. It, therefore, hints at the *need* for this debate that is currently absent from the literature.

While relevance as a general evidential requirement has not formed the basis of research endeavours, relevance has been used and included in distinct legal research. The Law Commission have, on a number of occasions, engaged with relevance within a research context, but only where it relates to a wider evidential issue.[69] Most recently, in May 2023 the Law Commission use relevance as a key component in their proposal pertaining to sexual behaviour evidence.[70] This is an important use of relevance and is discussed in more depth in Chapter 3.3.3. It is of note, at this stage, that relevance has been used *within* proposed legal tests or rules with an assumed certainty, and without acknowledgement of any difficulties that may be associated with relevance. This, again, begs the question of what relevance means in a legal setting.

[69] Law Commission, *Evidence of Bad Character in Criminal Proceedings* (Law Com No 273, 2001) 129 – 130, 142-145.
[70] Law Commission, *Evidence in Sexual Offences Prosecutions*: *A Consultation Paper* (Law Com CP No 259, 2023).

IV. Research methods and methodology

Chapter 2 is dedicated to explaining the methodological choices in this research, but the details are set out in headline terms here, along with the justifications for those methodological choices. The overarching research question is as follows:

- How is evidential relevance understood and applied in the criminal courts?

This primary research question can be understood as comprising 5 key research secondary questions, each of which contribute answer and address the overarching research question. The secondary research questions are:

RQ1. What are the possible 'tests' for evidential relevance already in existence?

RQ2. How are relevance 'tests' applied in appellate courts?

RQ3. To what extent are relevance 'tests' applied consistently in the criminal courts as per my respondents' experiences?

RQ4. According to my respondents, what factors influence criminal barristers' decision-making on evidential relevance?

RQ5. How does evidential relevance appear to interact with other rules of evidence in practice?

To address and answer these research questions, theoretical, doctrinal, and empirical methods were used to investigate relevance. It is necessary to investigate relevance on these three distinct levels to provide as comprehensive an insight as is possible.

This is particularly important given that relevance has not previously been researched in such depth and, equally, due to the innate discretion attached to decision-making on relevance. This innate discretion within relevance decision-making means it is important that we understand relevance, to mitigate against any potential inconsistencies and uncertainties that may arise when that discretion is exercised.

No meaningful investigation of relevance in doctrine or in practice can take place without first understanding the underpinnings of relevance in terms of its theoretical construction. This research begins by exploring the key question of 'what is relevance?' through a theoretical and, in places, philosophical lens. Engaging with relevance on a theoretical level is not merely a prerequisite to effective analysis of relevance in doctrine and practice, it is valuable in and of itself. A comprehensive theoretical analysis of evidential relevance is an original and novel offering, and one that is presently and notably absent from existing evidential scholarship.[71]

A comprehensive review of appellate case law then supplements and builds upon the theoretical findings and forms the doctrinal analysis of relevance. This is with a view to exploring how judges understand, use, and engage with relevance in specific cases. While judges are ultimately responsible for making decisions on evidential relevance, barristers too have a significant role in deciding whether a piece of evidence is relevant, as well as – in some instances –making the case for relevance before a judge. It is insights from criminal barristers that forms and *in*forms the empirical discussion in this thesis. Criminal barristers' insights are shared and explored in a bid to understand how relevance is used 'on the ground' in the everyday Crown Court setting.

[71] For a notable exception, see Andrew Choo 'The Notion of Relevance and Defence Evidence' [1993] CLR 114.

To examine evidential relevance on a theoretical, doctrinal, and empirical level this thesis uses mixed methods. Desk-based research forms the basis of the theoretical and doctrinal examination of relevance. The theoretical examination of relevance entails analysis of academic and practitioner literature on relevance, where the doctrinal analysis involves an extensive review of appellate case law. To build upon and make sense of the theoretical and doctrinal investigations, it is important to explore how relevance operates in practice. To see how relevance is understood and used by legal professionals in practice, qualitative data is collected and examined. In-depth semi-structured interviews were conducted with 20 criminal barristers, each of whom had between 6-46 years' post-qualifying experience. The decision to interview barristers was based on their position as gatekeepers of relevance; barristers are responsible for deciding what evidence is relevant to their case at an early stage in proceedings and throughout the trial process. In relation to the latter, it is barristers who make the case for relevance *in relation to* a particular fact or issue in the case. Following this, judges may resolve any disputes relating to the relevance of a piece of evidence. Interviews were conducted with a view to gaining insight into how a sample of legal professionals understand relevance, the factors that influence their decisions on relevance, and how relevance works when it is considered alongside specific exclusionary rules of evidence.

V. **A theoretical framework for legal decision-making**

The research adopts Keith Hawkins' 'Surround, Field, and Frame' theoretical framework throughout the thesis. The framework provides a tool for organising and analysing complex and, at times, multi-layered analysis involving the decision-making of legal professionals. In essence, the framework acts as an organisational device

which organises, links and, at times, separates 'the macro-, micro-, and meso-level factors at play in decision making'.[72] It acknowledges the reality that 'legal decision-making has … to be seen in a holistic or systemic perspective so that decisions are not treated as the work of individual legal actors behaving autonomously and independently of others'.[73] This is particularly efficacious here due to the highly contextual nature of relevance, and the tension between having universal legal rules and 'doing justice'. It is this ongoing tension that may render relevance particularly susceptible to the influence of both legal, quasi-legal and non-legal influences upon decision-making.

Hawkins identifies three 'levels' or metrics by which we can analyse and explore influences upon legal decision-making.[74] Each of the three layers are discussed in-depth in both Chapter 1, but it is worth setting out the basics of them in brief first. The surround represents the 'the broad social, political, and economic context in which decision making takes place'[75] and engages the broader climate in which evidential rules were created and exist. The surround is fluid at the behest of socio-political fiat, decisions and instruction. The field, in contrast, captures the defined setting in which decisions are made, that is, the 'organisationally defined setting',[76] it relates to the organisational processes and mandates[77] that apply to decision-makers and set the confines in which their decisions are made. These two elements of Hawkins framework

[72] Samantha Fairclough, 'Using Hawkins's Surround, Field, and Frames Concepts to Understand the Complexities of Special Measures Decision Making in Crown Court Trials' (2018) 45 IJEP 457, 463.
[73] Keith Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (OUP 2002) 32.
[74] ibid 47.
[75] Samantha Fairclough, 'Using Hawkins's Surround, Field, and Frames Concepts to Understand the Complexities of Special Measures Decision Making in Crown Court Trials' (2018) 45 IJEP 457, 463.
[76] Keith Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (OUP 2002) 52.
[77] ibid 50.

are explored in more depth in Chapter 1 where the context in which evidential relevance operates is set out with reference to both the surround and the legal field.

Where the surround and field represent the macro and meso level influences upon decision-making,[78] the third limb of Hawkins framework relates to the individual decision-making processes that operate on the micro, person-specific level. The third element of Hawkins framework is decision frames, which are 'interpretive and classificatory devices'[79] that are concerned with the interpretive behaviour involved in the decision-making on a specific matter,[80] as influenced by 'individual biographies'.[81] In the context of evidential decision-making, framing is a prerequisite to a barrister deciding whether a piece of evidence is relevant, and informs the basis upon which they deem it so. Frames draw upon and are influenced by elements, movements, and shifts in the field and surround, and although the three levels of Hawkins framework are presented as distinct from one another, this is not the case. Each of the surround, field, and frame are in continuous 'mutual interaction'[82] with one another and inform one another. For instance, when making the decisions 'the surround and field influence which frames move from background to foreground and vice versa'.[83]

Hawkins identified four dominant frames, each of which are drawn upon to varying extents throughout this research. Before explaining what those four frames are, it is helpful to explain why Hawkins devised them. In the regulatory health and safety context in which Hawkins devised this theoretical framework, he held that it was

[78] Samantha Fairclough, 'Using Hawkins's Surround, Field, and Frames Concepts to Understand the Complexities of Special Measures Decision Making in Crown Court Trials' (2018) 45 IJEP 457, 463.
[79] Keith Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (OUP 2002) 48.
[80] ibid 52.
[81] Carolyn Hoyle, *Forensic Science and Expert Testimony in Wrongful Convictions: A Study of Decision-Making at the Criminal Cases Review Commission* (2019) 59 British Journal of Criminology 919, 930.
[82] Keith Hawkins, *Law as Last Resort: Prosecution Decision Making in a Regulatory Agency* (OUP 2002) 52.
[83] ibid.

not only 'the law' that was used to guide decision-making. He found that a number of non-legal or quasi-legal influences impact decision-making, and devised the four frames as analytical devices to account for those influences. The non-legal influences identified in Hawkins' research involved decisions based on matters such as whether a prosecution would make a practical difference to the situation, and whether it would have a deterrent effect on the occurrence of potential future health and safety breaches. A decision being made based on its potential impact is captured by Hawkins *instrumental frame*. [84] Hawkins found instrumental frames to be present where 'prosecution is employed instrumentally to achieve a reduction in certain untoward events, undesired activities, or state of affairs.'[85] Interview data shows that instrumental frames were prevalent in the context of relevance and barristers decision-making, the detail of this is discussed in Chapter 7.

Hawkins also found that, when making decisions on whether to prosecute, decision-makers would consider whether the ascription of blame was appropriate in the given circumstances. He found that decision-makers would consider whether the harm caused by the health and safety breach and the associated blame was such that prosecution was deserved or warranted.[86] For decision-making of this kind, Hawkins devised the *symbolic frame*, which is predicated on the notion that 'legal processes bear the imprint of moral values'.[87] Symbolic frames account for moralistic assessments within decision-making, and are a 'mixture of calculation (…) and personal feeling … the personal feeling which is most prominent and pervasive in legal

[84] ibid 282.
[85] ibid.
[86] Keith Hawkins, *Law as Last Resort: Prosecution Decision Making in a Regulatory Agency* (OUP 2002) Chapter 11.
[87] ibid 334.

decision-making is a desire to blame'.[88] Though one may not expect symbolic framing to feature in decision-making on relevance, it did in some circumstances and in conjunction with other frames. The prevalence of symbolic framing in barristers' decision-making on relevance is discussed in Chapter 6.

Hawkins then identified a third non-legal influence on decision-making relating to how and whether a prosecution would further professional and organisational aims and objectives. For this, he created the *organisational frame*, to refer to the organisational 'mandates, objectives, and interests particular to them which serve to create a conception of the organisational interest'.[89] Organisational framing therefore denotes the way/s in which organisational – and institutional – values influence individuals' decision-making within that organisation. Interview data showed barristers routinely employed organisational frames in their decision-making on relevance, and Chapter 7 explores at length how organisational practices featured in barristers' interpretive processes on relevance.

Hawkins suggested that, generally, decision-makers would employ symbolic, instrumental and/or organisational frames in the first instance. Once the decision to prosecute is made, then decision-makers would consider the legal case for the prosecution and how the case 'can be made' so to speak. It is at that stage that, generally, decision-makers would go on to employ Hawkins' fourth dominant frame, the legal frame. Hawkins used legal frames to explore the decision-making of health and safety inspectors, specifically around whether health and safety breaches meet the legal requirements for a prosecution.[90] Hawkins tells us that 'the character of legal

[88] ibid 333.
[89] ibid 305.
[90] Keith Hawkins, *Law as Last Resort: Prosecution Decision Making in a Regulatory Agency* (OUP 2002) 380.

framing … is a discourse organised around legal categories, conceptions, rules, and preoccupations'.[91] Hawkins then specifies that 'before any decision to prosecute can finally be confirmed … officials must apply the legal frame to the case before them'.[92] In Hawkins' work, the legal frame saw prosecutorial decision-making explored against the backdrop of legislative provisions such as the Health and Safety at Work Act 1974.

In the context of relevance, the legal frame relates to legal materials and principles, including any relevant legislation and case law guidance,[93] that assists decision-makers in producing a legally viable decision on relevance. Legal frames are discussed in two areas of this thesis, first in Chapter 3's coverage of academic framings of relevance, as related to the distinct tests for relevance identified in academic commentaries. Legal frames are then used to explore and unpack interview data in Chapter 6, to examine the legalistic approaches taken by barristers towards evidential relevance. We will return to each of these dominant frames in the review of empirical data gathered in this research, and they are used to extrapolate meaning and to make sense of barristers' insights on relevance.

Hawkins' concept of frames refers the 'structure of knowledge, experience, values, and meanings that decision-makers employ in deciding. It addresses the fundamental question 'What is going on here?'.[94] Hawkins' framework was originally used in a regulatory law context, but is sufficiently adaptable and accessible to be applied in the criminal/evidential context. Indeed, other researchers have successfully transposed Hawkins' framework into different areas of law, and to great effect.[95] The

[91] ibid 412.
[92] ibid 380.
[93] ibid 394.
[94] Erving Goffman, *Frame Analysis: An Essay on the Organisation of Experience* (Penguin 1975).
[95] For instance, the framework has been used in: Carolyn Hoyle and Mai Santo, *Reasons to Doubt: Wrongful Convictions and the Criminal Cases Review Commission* (OUP 2019); Samantha Fairclough, 'Using Hawkins's

framework provides an effective means by which influences over decision-making can be understood, contextualised, and the relationship between those influences explored, as Hawkins highlights:

> Some connection needs to be forged between these forces in the decision-making environment, and the processes that individuals engage in when deciding about a particular matter. The concepts of surround, field, and frame enable this connection to be made.[96]

There are several advantages to using a theoretical framework to aid analysis of evidential decision-making. First, it recognises and can account for the complexity of decision-making processes in complex environments. Hawkins' framework is predicated on the assumption that legal decision-making does not occur in a vacuum:

> To see legal decisions as guided and constrained solely by existing legal rules, whether they exist in the form of statutes, case law, or other influences discernible in the policy statements of legal bureaucracies, is to ignore the social, political, and economic contexts in which those decisions are made and the richness, subtlety, and complexity of all the processes involved.[97]

Use of a theoretical framework to investigate empirical data on relevance facilitates a consideration of legal rules within the context they are created, interpreted, and acted upon. Importantly, the framework allows for investigation of the interaction between

Surround, Field, and Frames Concepts to Understand the Complexities of Special Measures Decision Making in Crown Court Trials' (2018) 45 IJEP 457; Emma Oakley 'Policing the Missing: Negotiating Absence' (PhD thesis, University of Bristol 2014).

[96] Keith Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (OUP 2002) 52.

[97] ibid 29-30.

legal rules and non-legal influences. To revert to Roberts' comments in the introduction when discussing the tripartite structure of admissibility, academic representation of the evidential process are 'not intended to be a sociologically realistic description of how questions of admissibility are routinely decided in practice'.[98] The use of a theoretical framework helps develop this sociological explanation of decision-making in the evidential context. Relevance is a relatively under researched concept, therefore a framework predicated upon investigating 'What is going on here?'[99] is beneficial.

An organisational device is useful in and of itself, but is also an important prerequisite to understanding precisely how multiple influences over decision-making *interact* with one another. This is another important benefit of using the framework, and Hawkins acknowledges the role of the interrelation of various factors and influences in legal decision-making: he finds 'a very great deal of legal decision-making is a collective enterprise in which several people, either formally or informally, take part'.[100] The characterisation of decision-making as a 'collective enterprise' can be seen in relevance decision-making, where barristers and judges both have a role to play in making decisions on relevance. Where those decisions are likely 'being decided in the context of other decisions'[101] and in response to procedural and structural stimuli. In an environment as rich and dynamic as this, it is important that influences on decision-making can be identified and analysed in as comprehensive and comprehensible a manner as possible. The use of Hawkins' framework facilitates this holistic examination of decision-making on relevance, and underpins this research.

[98] Paul Roberts, *Roberts and Zuckerman's Criminal Evidence* (3rd edn, OUP 2022) 182.
[99] Erving Goffman, *Frame Analysis: An Essay on the Organisation of Experience* (Penguin 1975).
[100] Keith Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (OUP 2002) 32.
[101] Keith Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (OUP 2002) 32.

VI. Thesis outline

Chapter 1 'Relevance in Context' uses Keith Hawkins' theoretical framework of surround, field and frame to situate relevance within the adversarial criminal justice environment. This chapter provides an in-depth explanation of the role of relevance within the law of evidence, as well as its relationship with other evidential rules. Following this, it considers the broader procedural and practical environment in which relevance operates. This includes a comprehensive discussion of the adversarial tradition in England and Wales, and how this adversarial landscape may impact decision-making on relevance. Changes to the adversarial tradition are also documented, including a discussion of the managerialist creep within the justice process that may impact the way in which relevance is understood and used in the criminal courtroom. Very much related to this, this first chapter considers the socio-political context that may impact the operation of evidential rules, and explores how changes to this wider socio-political environment may affect how legal professionals engage with relevance 'on the ground'.

Chapter 2 considers the research methods and methodology adopted in the research. Section 2.1. details the research objectives and questions which guided the research process throughout. Section 2.2. and 2.3. together consider how the theoretical, doctrinal, and empirical research was conducted, before section 2.4. considers the ethical issues that arose in the research process, and the mitigations that I put in place in response to ethical challenges.

Chapter 3 'Academic Framing of Relevance' probes RQ1: 'what are the possible 'tests' for evidential relevance?'.[102] It introduces relevance as a theoretical

[102] Set out in Introduction Section IV, and considered in more depth in Chapter 1.1.

construct and explores academic framings of relevance, that is how legal academics appear to understand and conceptualise relevance. This discussion is situated within the context of Hawkins' decision field, as academic framings of relevance feed into informal field-level influences upon decision-making in the criminal courts. This chapter explores the two dominant framings of relevance that are often identified in academic literature - logical relevance and legal relevance - and their theoretical foundations and challenges. The chapter goes on to discuss a potential third framing of relevance identified and used by the Law Commission, known as *enhanced relevance*. This chapter provides comment and critique of those conceptions and highlights some of the problems posed by academic framings of relevance and their potential import into practical legal decision-making.

Chapter 4 continues the examination of field-level influences upon decision-making, and focuses on formal field-level influences in the form of appellate framings of relevance. As such, this chapter engages with RQ2: 'How are relevance 'tests' applied in appellate courts?'. Chapter 4 reflects upon an extensive review of appellate case law to see how arguments around relevance have been constructed, and how judges have responded to and treated relevance in the appeal courts. This chapter reflects upon how, and the extent to which, the different academic framings of relevance identified in Chapter 3 inform legal decision-making in practice, and how tensions between those theories of relevance manifest themselves in case law. It concludes by highlighting that the appellate courts, on the whole, favour a logical test of relevance and have, with some notable exceptions, endorsed logical relevance.

Chapter 5 introduces the empirical element of the research, and is the first of four substantive chapters that engage with the interview data gathered for this research. It engages with RQ3 to consider the extent to which relevance 'tests' are

applied consistently in the criminal courts.[103] This chapter shares barristers' perspectives on relevance, its treatment in the courts, and their views on some of the academic framings and summations of relevance. It shows that barristers generally perceive relevance as a straightforward concept, and one that is applied and used consistently in the criminal courts. Analysis of the interview data shows, however, that barristers can understand and conceptualise relevance in several different and dynamic ways that can lead to divergent practical understandings of relevance in practice.

Chapter 6 and Chapter 7 both draw upon Hawkins' framework to engage with RQ4: 'According to my respondents, what factors influence criminal barristers' decision-making on evidential relevance?'.[104] The titles of these two chapters refer to four of Hawkins' dominant frames that are used to analyse the interview data, and the ways in which barristers can engage in decision-making on relevance. Together, these chapters highlight the complexity of decision-making on relevance and show that, aside from adherence to legal principles and rules, a myriad of different factors and influences can impact how barristers make decisions on evidential relevance.

Chapter 8 'Relevance and Exclusionary Rules' considers how barristers make decisions on relevance where evidence is also, potentially, subject to exclusionary rules of evidence. This chapter emerged from a recurring theme in interview data, where barristers reflected on the close relationship between relevance and other specific exclusionary rules of evidence. This chapter explores the ways in which exclusionary rules of evidence can interact and inform barristers decision-making processes around relevance.

[103] Introduction Section IV, and considered further in Chapter 1.1.
[104] Introduction Section IV, RQ4.

Chapter 9 concludes the thesis by engaging with the overarching research aim and revisiting each of the five research questions. This thesis highlights how far from a settled, straight-forward concept, relevance is a highly dynamic and innately relational concept that is far more complex and nuanced than seems typically appreciated by academics and practitioners alike. The review of relevance undertaken here shows that the ways relevance is understood and used can be highly internalised, rather than deliberative, making the processes susceptible to a range of legal and non-legal influences and with significant implications. The thesis concludes with some immediate suggestions as to the future of relevance, including potential avenues for future research on relevance.

VII. Significance and Originality

This thesis is the first of its kind to conduct an in-depth examination on what it means for evidence to be relevant in the criminal courtroom. It argues that relevance is far more complex and nuanced than is typically appreciated or documented. The theoretical analysis of relevance shows academic engagement with relevance to be limited, and the (often) binary presentation of relevance framings insufficient. The doctrinal review of relevance shows a lack of clarity in the appeal court, as to what relevance means and how decisions on relevance are made by judges. As will be explored, some of these ambiguities were reflected in the interviews with barristers. Despite a collective consensus among barristers that relevance was a straightforward evidential matter that posed them few practical difficulties, there were significant inconsistencies across the interview data. Such inconsistencies were particularly prominent in relation to barristers' approaches to, and understandings of, relevance.

Taken together, this extensive review of relevance highlights the importance of relevance in its own right, but also as the basis for additional evidential rules and tests. The thesis shows how open-textured a concept relevance is, and the significant scope for relevance to be understood and used in a myriad of ways, both in principle and in practice. To return to the words of Lord Bingham, in so far as is possible the law is to be ‘‘intelligible, clear and predictable’.[105] It remains to be seen whether evidential relevance does, and is indeed capable of, fulfilling these requirements. Whichever lens one uses to look at evidential relevance, it has one of the most important and impactful roles in criminal evidence. By its very nature it can dictate the course of a trial, shape the trial narratives, and may influence trial outcomes. It is, therefore, of the upmost importance that we understand the use and development of evidential relevance across the criminal law. This research is the first to contribute to that important end.

[105] Tom Bingham, ‘The Rule of Law’ (Speech at the Sixth Sir David Williams Lecture, Cambridge, 16 November 2006) 6 <www.cpl.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.cpl.law.cam.ac.uk/legacy/Media/THE%20RULE%20OF%20LAW%202006.pdf> accessed 22 December 2023.

CHAPTER 1: RELEVANCE IN CONTEXT

The evidential rules and principles that regulate criminal trials are extensive and can be highly complex in both their substance and operation. Such rules do not operate in the abstract, they must be situated within the broader multi-layered context of procedural, institutional, and socio-political influences upon them. Any analysis of evidential rules must, therefore, take a holistic view of this wider context. The need for a holistic examination of evidential matters is aptly summarised by Roberts in the following terms:

> Criminal adjudication takes place in particular procedural environments comprised of rules, institutions, processes, routine working practices, and professional cultures, all of which…mould the nature and significance of the evidentiary rules and doctrines applied in court.[106]

This chapter sets out the institutional and procedural environment in which relevance exists, and considers the broader influences upon evidential rules and practices in the

[106] Paul Roberts, *Roberts and Zuckerman's Criminal Evidence* (3rd edn, OUP 2022) 117.

criminal courtroom. It then sets out the ways in which relevance may be 'moulded' and its operation shaped by elements of that wider institutional and social environment. This chapter argues that the open-textured nature of relevance renders it particularly susceptible to environmental influences and it is, therefore, important we have a full understanding of the broad environment in which relevance exists. It also provides additional impetus to explore what is happening in trial courts in practice, which is the focus of the data chapters later in the thesis. To do justice to the complexity of the institutional and social environment of relevance, a theoretical framework is adopted to aid analysis. Hawkins' framework of 'surround, field and frame' provides a mechanism for disentangling complex and multi-layered environmental influences.

Section 1.1. provides a summary of the role and function of relevance within the Crown Court environment. Section 1.2. then engages with Hawkins' theoretical framework and uses it to set out the different influences upon evidential decision-making in the Crown Court. It does so by engaging with the first limb of Hawkins' framework, 'the surround', to underpin a discussion of 'the broad economic, political and social settings within which organisations … do their work'.[107] This includes coverage of the socio-political, ideological and economic context in which evidential decisions are made. Section 1.3. considers the next element of Hawkins' framework - 'the field' – to examine structural confines within which legal decision-makers operate, as well as the mandates under which they work. This section engages with the adversarial model of criminal adjudication used in England and Wales, with a specific focus on the adversarial principle of party control. The adversarial principle of party control is highlighted as a particularly pertinent principle in relation to relevance and

[107] Steve Tombs, 'Review: Law as Last Resort: Prosecutorial Decision-Making in a Regulatory Agency' (2004) 67 (4) Modern Law Review 704.

discretionary decision-making, and coverage of this principle serves to explain which parties are involved with decision-making on evidential relevance in practice, and in what way or which ways. Section 1.4. tracks changes in the legal field, and highlights the dilution of traditional notions of adversarialism in England and Wales. This section considers the ways adversarialism has been, arguably, diminished over recent decades. Some of the key catalysts for such changes are considered, and the ideology of managerialism is considered, along with its impact on the evidential environment and evidential rules – including relevance - operating within in.

Evidential rules are complex, and their application nuanced. This is particularly true of evidential relevance, where decision-making is grounded in case-context, probabilities, and the relational links between evidence and case facts. No complete review of relevance can take place without accounting for and exploring the institutional and social environment in which relevance sits. This chapter provides this essential context, and the themes identified and collated here inform much of the analysis in each of the upcoming chapters.

1.1. Relevance in the Crown Court

The requirement that all evidence in criminal trials must be relevant prior to its admission at trial is both fundamental and universal. Relevance is generally understood as a test for the admission of evidence that questions whether a piece of evidence makes a fact in issue more or less likely. This is a question of law for judges to decide. In Crown Court trials – the focus of this thesis – it is then for the jury to decide, in their capacity as triers of fact, how much *weight* to subsequently afford the

evidence.[108] Though judges are responsible for deciding questions of evidential admissibility, they do so in the absence of a statutory definition of relevance, or rigid guidance or criteria relating to relevance. Some common law guidance has been provided in case law which provides some indications of how questions of evidential relevance should be approached, but this guidance often highlights the contextual nature of relevance, and the need for discretion in decision-making on the part of legal professionals.

Lord Steyn in *R v A*, for example, set out that 'to be relevant the evidence need merely have some tendency in logic and common sense to advance the proposition in issue'.[109] Logic and common sense are not qualities that necessarily provide precision and consistency, as both invite, and indeed require, subjective assessments to be made in the decision-making process. As such, it has been said that 'the question of relevance often boils down to subjective interpretation'.[110] This is undoubtedly the case, and significant latitude and discretion is afforded to legal professionals when making decisions on relevance. This is why it is of the upmost importance to understand the range of factors that may inform and subsequently influence the exercise of that discretion.

There is a role for both barristers and judges when engaging in 'subjective interpretation' on matters of relevance. Barristers have a significant role to play in deciding whether a piece of evidence may be relevant and appropriate to include in their case, as well as how they might 'make the case' for relevance before a judge. Under the Bar Standards Board Code of Conduct, ten core duties of a barrister are

[108] Discussed at length in Chapter 3.
[109] *R v A (no 2)* [2001] UKHL 25, 31.
[110] Jonathan Doak, Claire Mcgourlay and Mark Thomas *Evidence: Law and Context* (5th edn, Routledge 2018) 6.

identified.[111] The first of these core duties is that all barristers must observe their duty to the court in the administration of justice, which includes the requirement that barristers 'must make sure the court has all the *relevant* information it needs'.[112] The Bar Standards Board regards this a fundamental responsibility that should take precedence over all other core objectives.[113] As such, barristers have a specific obligation to introduce all relevant information to the court, which one can reasonably assume to mean all *relevant* evidence.

It is against this backdrop of subjective and discretionary decision-making on relevance that an exploration of the wider evidential environment is essential. This is in recognition of the reality that 'studying the rules in isolation would produce, at best, only a skewed and superficial understanding of the law of criminal evidence'.[114] That is true of any legal rule/s, but is particularly pertinent where those rules are contingent upon qualities such as 'common sense' and 'logic'. The role of subjective and discretionary decision-making around relevance may render it particularly susceptible to the influence of environmental factors and stimuli. The legal environment is complex, where an array of institutional, social, and political influences are interwoven with one another. It is owed to this complexity that a theoretical framework is used to help navigate this dense environment. The nature and application of the chosen framework is explained and set out in the next section.

[111] Bar Standards Board, *BSB Handbook* (BSB 2023) part 2-B. <www.barstandardsboard.org.uk/for-barristers/bsb-handbook-and-code-guidance.html> accessed 12 November 2023.
[112] ibid.
[113] ibid.
[114] Paul Roberts, *Roberts and Zuckerman's Criminal Evidence* (3rd edn OUP 2022) 48.

1.2. ‘The Surround’: The socio-political, ideological, and economic context of decision-making

Any exploration of features of the criminal process must consider the broader *macro* influences over the criminal justice process. The law of evidence is no exception, and any exploration of how evidential rules work in practice must be underpinned by a discussion of the broader climate in which those rules were created and exist. The ‘surround’ captures this detail and refers to ‘the broad social, political, and economic context in which decision making takes place’.[115] Its fluidity is an important characteristic of the surround and Hawkins affirms that the surround is not static, but ‘susceptible to change (…) which may create expectations and impose demands on organisations and their staff’.[116] This section considers the different ways in which the surround can impact evidential matters in the criminal courts. In this research context, the surround is understood as comprising three elements: the socio-political, the ideological and the economic contexts in which legal decision-making occurs. These components are not distinct from one another, indeed they are interwoven and often inform and influence one another. It is useful to separate them for present analytical purposes, however, to provide a comprehensive picture of the broad context where relevance operates.

The socio-political environment has a profound impact on the criminal justice process, as at the most basic level it is the political agenda that determines the very substance of the criminal law. It is the political agenda that informs the work of Parliament, as the legislative body in the UK, which chooses what behaviours to

[115] Samantha Fairclough, 'Using Hawkins's Surround, Field, and Frames Concepts to Understand the Complexities of Special Measures Decision Making in Crown Court Trials' (2018) 45 (3) Journal of Law and Society 457, 463.
[116] Andrew Britton, ‘Pressed for Sentence? An Examination of the New Zealand Crown Prosecutor’s Role in Sentencing’ (2018) 29(3) 377, 405.

criminalise or decriminalise, and the relevant sentences that attach to most criminal offences. The politically informed act of criminalisation is a direct way in which socio-political elements of the surround can influence legal reality and the evidential landscape in the criminal courts. This is not only through the decision about which behaviours to criminalise, but the *way* in which crimes (and defences) are constructed. For instance, the constituent parts of a crime, and how those parts of the crime are formed and expressed, all feed into matters of proof and will shape what evidence must be produced at trial. Equally, the creation or amendment of legislation can dramatically shape evidential matters, quite simply by placing evidential requirements (or restrictions) on a legislative footing.

This is seen clearly in relation to exclusionary rules of evidence which are set out in legislation, for example the admission of a complainant's sexual history evidence at trial is restricted by Section 41 of the Youth Justice and Criminal Evidence Act 1999.[117] Section 41 identifies instances in which it may be appropriate to admit evidence of a complainant's sexual behaviour which, therefore, provides the parameters for evidential decision-making in the criminal courts. Importantly, this example highlights the close relationship between the political and the social, where it is social feeling and, at times, changes in societal attitudes that inform political decisions. It is, therefore, certainly true to say that 'criminal law engages with political and societal pressures which find expression in the form and content of the law'.[118] Illustratively, the legislative framework surrounding sexual history evidence was introduced in response to growing critique of the treatment of rape complainants in the

[117] Youth Justice and Criminal Evidence Act 1999 Section 41.
[118] John Child and others, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (8th edn, Hart 2022) 3.

criminal courts.[119] Such critique often centered around the shifts in societal attitudes towards women and the need for the law to reflect contemporary societal values.[120]

Aside from political choices relating to criminalisation and evidential regulation, political choices regulate nearly all aspects of the criminal justice system, and even where relevance is not the object of such interventions or regulations, it is affected by them. This is because political interventions, wherever directed, have real scope to introduce, instill, and embed wider values within the justice system, values that give cause to change how relevance operates in the criminal arena. The values that can be introduced or sustained through socio-political activity are captured by the next component of the surround and the ideological context in which decisions are to be taken. Ideological, in the context of the surround, bears the same meaning as its everyday dictionary meaning. It relates to: 'a systematic scheme of ideas, usually relating to politics, economics, or society and forming the basis of action or policy; a set of beliefs governing conduct'.[121] The ideological component of the surround is to be understood as akin to value systems that are instilled and catalysed by socio-political activity. Stramignon highlights that where this occurs 'the accent is laid not so much on legal institutions as such - rather, on the struggles for power lurking behind the workings of this or that particular legal institution'.[122]

[119] Jennifer Temkin, 'Regulating Sexual History Evidence – The Limits of Discretionary Legislation' (1984) 33(4) International and Comparative Law Quarterly 942; Zsuzsanna Adler, 'Rape: The Intention of Parliament and the Practice of the Courts' (1982) 45 MLR 664; Report of the Advisory Group of the Law of Rape (the Heilbron Committee) (1975) 15-19.

[120] For a comprehensive summary of the Women's Liberation Movement between the 1970's and 1980's in the United Kingdom, see: <www.lse.ac.uk/library/collection-highlights/womens-liberation-movement> accessed 16 December 2023.

[121] Oxford English Dictionary, 'Ideological' <www.oed.com/dictionary/ideology_n?tab=meaning_and_use#907352> accessed 2 January 2022.

[122] Igor Stramignon, 'At the margins of the history of English law: the institutional, the socio-political and the 'blotted-out'' 2009 Legal Studies 22(3) 420, 430.

There are two dominant ideological approaches to the criminal process, introduced and labelled by Packer as the crime control model and the due process model.[123] Before explaining the substance of the models, it is necessary to set out the purpose of these 'models' and why they were created. 'Crime control' and 'due process' are theoretical models of criminal justice, used by Packer as a tool to help explain and map trends in the justice process. They are analytical devices, which represent two extremes of a broad spectrum.[124] Crime control represents a system under which 'primary attention (is) paid to the efficiency with which the criminal process operates'[125] where there is 'a premium on speed and finality'.[126] The crime control model refers to a 'conveyor belt'[127] approach to justice where the aim is to conclude cases as quickly as possible. This is in contrast to the due process model, which sits at the opposite end of the spectrum and favours an approach to justice that resembles more of an 'obstacle course'.[128] The obstacle course approach is predicated on the presumption of a defendant's innocence and is designed to prevent the accused from progressing through the various stages of the justice process.[129] The fundamental concern of the due process model is 'to guard against the possibility of defendants being convicted of a crime that they did not commit'.[130]

Though theoretical devices representing two ends of an ideological spectrum, these models provide a practical means of contextualising and understanding the ideological forces that interact with and, arguably, underpin the justice system.

[123] Herbert Packer, 'Two Models of the Criminal Process' (1964) 113(1) University of Pennsylvania Law Review 1, 1.
[124] ibid 6.
[125] ibid 10.
[126] ibid.
[127] ibid 11.
[128] ibid 13.
[129] ibid.
[130] Peter Joyce, *Criminal Justice* (3rd edn, Taylor and Francis 2017) 507.

Ideological values such as these form part of the surround and have scope to 'filter down' and impact practices and decision-making in criminal courts. They do this by setting the ethos of the justice environment as well as the overarching goals and aims of the justice process, toward which legal professionals must work. The ideological is closely related to the socio-political, in that political agendas often celebrate and advance particular ideological foci,[131] and put ideology into practice through various policy initiatives. Recent years have seen crime control values become increasingly prevalent in the justice system and prominent in criminal justice policies. This is seen in the ethos of managerialism which appears increasingly prominent in the contemporary justice environment. Managerialism is an approach to justice that favours efficiency and streamlined justice, by 'governing public institutions similarly to the private sector, with emphasis on cost-cutting, (individual) accountability and quantitative performance indicators'.[132] Thomason provides detail on some of the key values that underpin managerialism:

> Boiled down to its essentials, managerialism is an ideology which is typified by an emphasis on productivity (case management), cost efficiency (cuts to legal aid and the courts budget) and consumerism … at the expensive of human rights and due process.[133]

Managerialism is a product of a crime control ideology and has, it is suggested, been embedded in the justice process through a cumulation of policy initiatives, reviews, and commissions. As a broad ideological value-system, managerialism is part of the

[131] Recall the Labour Party 'tough on crime' mantra in the 1997 Labour Party manifesto.
[132] Anna Pivaty and Ed Johnston, 'The Move Towards Efficiency and Managerialism in Criminal Justice' in Ed Johnston and Anna Pivaty (eds), *Efficiency and Bureaucratisation of Criminal Justice: Global Trends* (Routledge 2023) 1.
[133] Matt Thomason, 'Admitting Evidence by Agreement: Recalibrating Managerialism and Adversarialism in Crown Court Criminal Trials' [2021] CLR 9, 727, 744.

surround, but it is not exclusively a component of the surround. Managerialism also forms part of the organisational structure/s of criminal justice and is often projected as the opposite of adversarialism. As such, managerialism is also captured by Hawkins' second theoretical layer that denotes the organisational setting of decisions: 'the field'. This shows the interwoven nature of the surround and field, and their ability to inform and influence one another. As such, managerialism and its influence upon the court setting is returned to in the next section.[134] For now, it suffices to say that broad ideological shifts, closely related to the socio-political environment, have significant scope to direct and influence the criminal justice context and its overarching aims and objectives.

Closely related to the ideological, and socio-political is the economic context in which legal decision-making occurs. The allocation of resources to and within the justice system can have a profound impact on how evidential matters are engaged with in court. Justice is an expensive end, with the average Crown Court trial costing approximately £20,000.[135] The longer and more complex the trial, the more expensive it will be. Where courts consider and apply relevance tests, it will be remembered, they are assessing the volume of material to be admitted into the court; where more material will typically result in more time spent on the case.

Political decisions have prompted and exacerbated financial pressures on the criminal court system. In 2010, the coalition government began a programme of fiscal austerity, this being 'a form of voluntary deflation in which the economy adjusts through the reduction of wages, prices, and public spending to restore competitiveness'.[136]

[134] Section 1.4.
[135] Hallett LJ, 'Trial by Jury – Past and Present' 35th (Blackstone Lecture 2017, Oxford, 20th May 2017) <www.judiciary.uk/announcements/35th-blackstone-lecture-by-lady-justice-hallett-trial-by-jury-past-and-present/> accessed 31 July 2023.
[136] Mark Blyth, *Austerity: The History of a Dangerous Idea* (OUP 2015) 2.

Criminal justice was a casualty of the reduction of public spending and the Institute of Fiscal Studies reported that Ministry of Justice budgets fell by 29% between 2010 and 2015. Spending on the Courts and Tribunal Service, specifically, fell by 24% between 2010 and 2019.[137] The Bar Council note that as of 2022 there had been 239 court closures in England and Wales over the previous 12 years,[138] and 65% of Parliamentary constituencies were left without an active local court.[139] Spending cuts of this magnitude have a significant impact on the ways in which the criminal justice system operates, the capacity it has to attend to evidential matters, and the values it advertently or inadvertently instils.

On values, where resources are taken out of the justice system a premium on efficiency emerges, one aligned with aspects of the crime control 'conveyor belt' model of adjudication discussed previously. The focus on efficiency is not necessarily ideologically driven, but one of practicality and of legal professionals responding to the time-pressured and resource limited environment they are in. The Law Society have previously highlighted some of the dangers of streamlined justice, they warn: 'concentrating on processing cases speedily is likely to reduce the safeguards that exist to protect the innocent, and the risk of miscarriages of justice will be increased significantly'.[140] The Law Society here reflect on the damage that can be caused to due process protections, should streamlined justice be prioritised. The move towards efficient justice is not necessarily ideologically-driven (though it can be) it can be a result of economic pressures on the justice system.

[137] Bar Council, 'Access Denied: The state of the justice system in England and Wales in 2022' (Bar Council, November 2022) 7 <www.barcouncil.org.uk/resource/access-denied-november-2022.html> accessed 6 January 2023.
[138] ibid.
[139] ibid.
[140] Catherine Baksi, 'Speeding up Cases Risks Miscarriages of Justice' <www.lawgazette.co.uk/news/speeding-up-cases-risks-miscarriages-of-justice/68517.article> accessed 10 December 2023.

While the components of the surround have been artificially separated here, in practice they are interrelated and cannot necessarily be separated from one another. The economic is inseparable from socio-political, which cannot be divorced from the ideological. It is the interaction between each these elements that together form the surround that overarches and bears influence upon legal decision-making on the ground in criminal proceedings. The surround exerts a considerable influence over the decision-making environment, before the *implications* of its influence on relevance are considered, it is first necessary to set out the decision 'field' as the organisational setting in which evidential decisions are made.

1.3. 'The field': Relevance and adversarialism

Nestled within the surround is the legal field, which Hawkins regards as the 'legally and organisationally defined setting'[141] of decision-making. At its core, the field is 'the immediate setting of a decision',[142] which involves organisational processes and mandates[143] that apply to decision-makers. The field is in constant interaction with the surround and can respond to the surround 'through gradual shifts in policy or immediate changes in practice'.[144] In broad terms, the field in this context is the criminal justice system itself. As this research is concerned with evidential decision-making in the Crown Court, the field relates, specifically, to the elements of the criminal justice system that 'relate to the preparation for and realities of Crown Court trials'.[145]

a[141] Keith Hawkins, *Law as Last Resort: Prosecution Decision Making in a Regulatory Agency* (OUP 2002) 27.
[142] Andrew Britton, 'Pressed for Sentence? An Examination of the New Zealand Crown Prosecutor's Role in Sentencing' (2018) 29(3) 377, 406.
[143] Keith Hawkins, *Law as Last Resort: Prosecution Decision Making in a Regulatory Agency* (OUP 2002) 50.
[144] Andrew Britton, 'Pressed for Sentence? An Examination of the New Zealand Crown Prosecutor's Role in Sentencing' (2018) 29(3) 377, 405.
[145] Samantha Fairclough, 'Using Hawkins's Surround, Field, and Frames Concepts to Understand the Complexities of Special Measures Decision Making in Crown Court Trials' (2018) 45 (3) Journal of Law and Society 457, 463.

This includes formal organisational practices, guidance and processes as well as informal customs and expectations on decision-makers,[146] and informal influence such as academic understanding and framing of relevance. It is the distinction between formal and informal influences within the decision field that forms the basis of Chapter 3 and Chapter 4. The former explores informal field-level influences in the form of academic framings of relevance, and the latter engages with formal field-level influences upon by examining appellate framings of relevance; considering judicial engagement with relevance in the appeal courts. This section considers how aspects of the field can impact the operation of relevance in the criminal courts. To do so it reflects primarily on the adversarial model of justice within which evidential decisions are made.

The model of criminal adjudication is an important element of the legal field, and it provides the formal structural confines in which decision-making takes place. It is generally understood that there are two broad models or systems of criminal adjudication: adversarialism and inquisitorialism. They are regarded as 'broad approaches to fact-finding',[147] rather than definitive or proscriptive in what they entail. The two approaches to fact-finding are best understood as 'ideal-typical models'[148] which 'are valuable tools because they simplify complex processes and emphasize their characteristic features'.[149] As such, one adversarial system may look very different to another adversarial system, equally so with inquisitorial systems. It must also be noted that the criminal justice process invariably entails a number of different

[146] Andrew Britton, 'Pressed for Sentence? An Examination of the New Zealand Crown Prosecutor's Role in Sentencing' (2018) 29(3) 377, 406.
[147] Lucy Welsh, Layla Skinns and Andrew Sanders, *Sanders and Young's Criminal Justice* (5th edn, OUP 2021) 12.
[148] Paul Roberts, *Roberts and Zuckerman's Criminal Evidence* (3rd edn, OUP 2022) 121.
[149] ibid.

stages, and commitment to adversarial or inquisitorial principles may vary at different stages in the criminal process.

The legal system in England and Wales is typically characterised as adversarial, as is centred around a confrontational battle-type contest between two parties. It is predicated upon the belief that 'truth is best discovered by powerful statements on both sides of the question'.[150] The parties on each side of the argument are the prosecution (who acts on behalf of the state) and the defence (who acts on behalf of the accused). The two parties then face one another before an impartial 'umpire-like'[151] judge. While this confrontation plays out before a jury in the English and Welsh context, adversarialism does not demand it do so; the presence of a jury in the criminal courtroom is not necessarily a feature of adversarialism. Rather than defining the English and Welsh mode of adversarialism by what it is not, it is preferable to define it by reference to its key characteristics. Roberts identifies these key characteristics as follows:

1. The parties dominate the conduct of proceedings, with the judge playing a relatively passive role;
2. Trials are continuous, oral, and public events;
3. The imbalance of power between the state and the accused is ameliorated by rules and principles reducing 'inequality of arms';
4. The overriding objective of criminal trials is to achieve a legitimate verdict resolving the disputed issues in the case - in other words, to dispense justice.[152]

[150] *Ex p Lloyd* (1822) Mont 70, 72.
[151] Nicola Monoghan, *The Law of Evidence* (CUP 2015) 14.
[152] Paul Roberts, *Roberts and Zuckerman's Criminal Evidence* (3rd edn, OUP 2022) 125.

This provides a broad structure of the approach to criminal adjudication and provides some context to the legal field and the structures within which decisions are made. The adversarial tradition shapes, to a significant extent, how criminal cases and the evidence associated with those cases, are presented and organised. Invariably, these adversarial principles then have an impact on the evidential rules that operate within these structures; they set parameters within which legal professionals can construct their cases. In the case of relevance, certain characteristics of adversarialism are of particular importance. This next section considers the adversarial principle that parties control proceedings (referred to for shorthand as the principle of party control) within criminal proceedings, and explores how this relates to decision-making on relevance.

1.3.1. The principle of party control

As shown in the summary of adversarial characteristics, party control over proceedings is a key characteristic of adversarialism in England and Wales. Party control, therefore, is also an integral element of the legal field and shapes the ways in which legal professionals act and make decisions. In practice, the principle of party control means that representatives of the Crown (the prosecution) and the defence are responsible for organising and directing proceedings. Sanders and Young understand party control to mean that 'the burden of preparing the case for the court falls on the parties themselves'.[153] Yet the principle of party control is broader than this, as the responsibility befalls parties *throughout* different stages of proceedings. Pre-trial, it is prosecutors and police who decide the terms of the indictment and are able to alter these without judicial supervision.[154] In the immediate run up to the trial, and

[153] Lucy Welsh, Layla Skinns and Andrew Sanders, *Sanders and Young's Criminal Justice* (5th edn, OUP 2021) 12.
[154] Paul Roberts, *Roberts and Zuckerman's Criminal Evidence* (3rd ed, OUP 2022) 125.

indeed during the trial, criminal barristers then have significant scope to shape proceedings; they construct the narrative of their case, decide which evidence to present, and make important decisions as to which witnesses will be called and the questions to be asked of them. As such, adversarialism 'is structurally geared to maximise the power of the parties'[155] at every stage of criminal proceedings. This discussion is, however, confined primarily to party control during the trial process, as this is where consideration of evidential rules and relevance typically occur.

In contrast to the confrontational imagery of barristers, adversarialism dictates that judges act as an impartial third party who are 'relatively passive'[156] in their role. Where it comes to decision-making on relevance, we have seen that this is ultimately a matter of law for judges to decide. Yet the principle of party control means barristers also have a significant role in matters of evidential relevance. When judges consider the relevance of a piece of evidence, they do so in response to narratives and arguments presented to them by barristers. On one view, the principle of party control facilitates and encourages an active role for barristers in deciding questions of relevance. Barristers make the initial determination of evidential relevance, decide which evidence to present before a judge, and construct the case narrative to 'make the case' for relevance to the judge. In practical terms, if a barrister decides a piece of evidence is irrelevant, that decision is final. A judge will not be given the opportunity to make a decision as to the relevance of that piece of evidence.

There are compelling reasons why barristers have a prominent role in determining whether evidence is relevant. They will likely be intimately familiar with

[155] Jonathan Doak, Claire Mcgourlay and Mark Thomas *Evidence: Law and Context* (5th edn, Routledge 2018) 21.
[156] Jacqueline Hodgson 'The Future of Adversarial Criminal Justice in 21st Century Britain' (2010) 35(2) North Carolina Journal of International Law and Commercial Regulation 319, 320.

the details of a case – certainly more so than judges - and are therefore best placed to identify the relevance of the evidence in relation to the case facts and issues. It is the role of barristers to frame their case narrative and situate evidential relevance within that narrative. So much so that even 'evidence rejected on one 'theory of relevance' (or 'story' about the disputed facts), may yet be admissible when re-presented as part of an alternative theory or story that the judge finds more persuasive'.[157] Not only does this speak to the active role of barristers in identifying and presenting the relevance of evidence, but it speaks to the relational and dynamic nature of relevance that barristers are likely best placed to evaluate. It is the principle of party control that facilitates this central role for barristers in evidential decision-making.

Given that adversarial principles – such as that of party control - underpin much of the English and Welsh adversarial experience, it is important to note that adversarialism as it has traditionally existed in England and Wales has changed significantly over recent decades. The following section identifies and tracks changes to the legal field that have seen shifts in the adversarial landscape. Section 1.4. considers the ways in which core adversarial principles have changed, and how such changes may impact relevance and other matters that operate within the legal field. The next section shows how changes to the legal field have scope to filter down to impact individuals' decision-making in the criminal courts.

[157] Paul Roberts, *Roberts and Zuckerman's Criminal Evidence* (3rd ed, OUP 2022) 185.

1.4. The evolution of adversarialism

Over recent decades there have been extensive changes to and within the legal field, which have impacted adversarialism in England and Wales. McConville and Marsh suggest that the justice system has seen an 'erosion of the adversary ideal',[158] while Johnston regards 'piecemeal changes to the criminal justice process' as tantamount to the abandonment of adversarialism.[159] It is suggested here that adversarialism has not necessarily been abandoned, but significantly *diluted* by a managerial ideology that favours speed, efficiency, and expediency within the justice system.

Section 1.3. reflected on managerialism as an ideological force that forms part of the surround. Managerial ideologies in the justice process are not unique to the English and Welsh experience. Managerialism is a global phenomenon[160] with scope to alter the mechanics of the courtroom and impact evidential matters in a multiplicity of ways that are discussed in this section. Managerialism is not in the exclusive domain of the surround, managerialism transcends the surround and, it is argued, also forms part of the field. This is because managerialism can have different manifestations; it can act as a broad ideology but also as akin to a *model* of criminal adjudication; and has at times been referred to as the opposite number of adversarialism.[161] In both iterations, managerialism exemplifies the scope for influences of the surround upon the organisational field. The ideological in this case informs the practical, and the introduction of an increasingly managerial model of justice cannot be traced to a single

[158] Mike McConville and Luke Marsh, 'Adversarialism goes West: Case Management in Criminal Courts' (2015) 19(3) IJEP 172, 172.
[159] Ed Johnston, 'The adversarial defence lawyer: myths, disclosure and efficiency - a contemporary analysis of the role in the era of the Criminal Procedure Rules' (2020) 24(1) IJEP 35, 54.
[160] Anna Pivaty and Ed Johnston, 'The Move Towards Efficiency and Managerialism in Criminal Justice' in ED Johnston and Anna Pivaty (eds), *Efficiency and Bureaucratisation of Criminal Justice: Global Trends* (Routledge 2023) 2.
[161] Jenny McEwan, 'From Adversarialism to Managerialism: Criminal Justice in Transition' (2011) 31(4) Legal Studies 519; Matt Thomason, 'Admitting Evidence by Agreement: recalibrating managerialism and adversarialism in Crown Court Criminal Trials' [2021] CLR 9, 727.

substantive change or initiative but, as Johnston says, is a result of 'piecemeal' changes and trends.[162] These piecemeal changes are tracked here, before considering the ways in which these field-level changes have scope to influence and impact on decisions on relevance.

Over recent years there have been a number of initiatives that have encouraged a more managerial ethos in the criminal justice system. In 1991, the Royal Commission on Criminal Justice (often referred to as the 'Runciman Commission') was tasked with examining 'the effectiveness of the criminal justice system in England and Wales in securing the conviction of those guilty of criminal offences and the acquittal of those who are innocent, having regard to the efficient uses of resources'.[163] In 1993, the Commission produced a wide-ranging report and made a number of recommendations, many of which were subsequently adopted and had a significant impact on the justice system and the nature of adversarialism. Specifically, Lord Runciman regarded the Commission as an opportunity to correct 'the excesses of the adversarial system'[164], and recommended several measures to increase the efficiency of the justice system such as incentivising guilty pleas, the erosion of the right to silence, and changing pre-trial procedures to encourage summary justice.[165] While the adopted recommendations were somewhat modest, they did signal in a shift in wider discourse – introducing a premium on efficiency within the justice process – and

[162] Ed Johnston, 'The adversarial defence lawyer: myths, disclosure and efficiency - a contemporary analysis of the role in the era of the Criminal Procedure Rules' (2020) 24(1) IJEP 35, 54.

[163] Viscount Runciman, *Royal Commission on Criminal Justice* (Runciman Report) (Cm 2263, 1993) i. < https://www.gov.uk/government/publications/report-of-the-royal-commission-on-criminal-justice> accessed 18 August 2021.

[164] Stewart Field and Philip Thomas, 'Introduction: Justice and Efficiency? The Royal Commission on Criminal Justice' (1994) 21(1) 1,14.

[165] Viscount Runciman, *Royal Commission on Criminal Justice* (Runciman Report) (Cm 2263, 1993) i. < https://www.gov.uk/government/publications/report-of-the-royal-commission-on-criminal-justice> accessed 18 August 2021.

arguably proved a catalyst for a number of subsequent changes that built upon these themes.

Since the Runciman Commission, several other initiatives have considered similar issues and shifted the focus from adversarial ideals to increasing efficiency within the justice system. In 2001, Auld LJ's *Review of the Criminal Courts in England and Wales*[166] (hereafter the Auld Review) acknowledged 'the boundaries between the adversarial and inquisitorial systems of trial are blurring',[167] and suggested a numbers of means by which uniform case management could be introduced.[168] The following year a whitepaper was produced - *Justice for All*[169] – that took forward some of Auld's suggestions in the Criminal Justice Act 2003.[170] A similar approach to promoting efficiency in the justice process was seen in the early 2010's when the then coalition government made extensive cuts across the justice system during a programme of austerity.[171] In 2015, a Review of Efficiency in Criminal Proceedings,[172] led by Sir Brian Leverson, considered ways in which 'it might be possible to streamline the disposal of criminal cases thereby reducing the cost of criminal proceedings for all public bodies'.[173] The Review recommended several means of achieving this aim, including increasing the role of judicial case management,[174] the incentivisation of guilty pleas,[175]

[166] Robin Auld, *Review of the Criminal Courts of England and Wales* (2001) <www.criminal-courts-review.org.uk/auldconts.htm> accessed 12 August 2021.
[167] ibid 104.
[168]Robin Auld, *Review of the Criminal Courts of England and Wales* (2001) <www.criminal-courts-review.org.uk/auldconts.htm> accessed 12 August 2021, chapter 10, para 271.
[169] Home Office, Justice for All (Cmnd 5563, Home Office 2002).
[170] These were subsequently implemented in the Criminal Justice Act 2003.
[171] For example, CPS budgets were reduced by 23% between 2010 and 2015; see: Bowcott O, 'Crown Prosecution Service chief inspector signals concern over funding' The Guardian, 23 September 2015 available at <https://www.theguardian.com/law/2015/sep/23/cps-chief-inspector-kevin-mcginty-cuts-can-leave-agencies-unable-to-function> (accessed 28.09.23).
[172] Brian Leveson, *Review of Efficiency in Criminal Proceedings* (Judiciary of England and Wales January 2015).
[173] ibid 1.
[174] ibid 12.
[175] ibid 25-28.

and extended opening hours of magistrates' courts;[176] and all much to the concern of commentators at the time.[177]

In the same era, one of the most influential shifts in the criminal justice landscape came about as a result of the introduction of the Criminal Procedure Rules in 2005.[178] The introduction of this delegated legislation was described as having 'effected a sea change to the way cases are to be conducted'.[179] When enacted in 2005, the Rules were introduced with the aim of 'making trials timely, streamlined and disciplined'.[180] Almost two decades later the Criminal Procedure Rules Committee affirmed their priorities as 'to make the criminal justice system as accessible, fair and efficient as possible'.[181] One might legitimately conclude that 'streamlined' justice and 'efficient' justice are synonymous with one another, but it is of note that that commitment to efficiency is explicitly presented as a priority of the Committee, and on an equal footing with accessibility and fairness. Whether efficient or streamlined, the procedure rules are underpinned and informed by an element of managerialism. That is, the desire for justice to be dispensed expeditiously. While there is much to be said on the Criminal Procedure Rules, it is a specific element of those Rules that is important to this discussion, and that reflects a managerial model of adjudication.

Part 1.1 of the Criminal Procedure Rules[182] contains the 'overriding objective' of criminal adjudication. It specifies: 'the overriding objective of this procedural code is

[176] ibid 42.
[177] Luke Marsh, 'Leveson's Narrow Pursuit of Justice: Efficiency and Outcomes in the Criminal Process' (2016) 45(1) Common Law World Review 51.
[178] Criminal Procedure Rules 2005.
[179] Andrew Ashworth, Mike Redmayne and Liz Campbell, *The Criminal Process* (5th edn, OUP 2019) 38.
[180] Jenny McEwan and Fae Garland, 'Embracing the Overriding Objective: Difficulties and Dilemmas in the New Criminal Climate' (2012) 16(3) IJEP 233, 235.
[181] Criminal Procedure Rule Committee <www.gov.uk/government/organisations/criminal-procedure-rule-committee/about> accessed 21 November 2023.
[182] Criminal Procedure Rules 2020 1.1.

that criminal cases be dealt with justly'.[183] It goes on to provide seven examples of what dealing with criminal cases justly means.[184] One of the seven addendums states that dealing with cases justly means 'dealing with cases efficiently and expeditiously'.[185] This appears an explicit affirmation that managerial commitment to efficient dispensation of justice has a place within the justice process, alongside more familiar principled statements such as 'acquitting the innocent and convicting the guilty'[186] or 'recognising the rights of a defendant'.[187] The Overriding Objective places a heavy and explicit premium on efficiency within the justice process. Barristers and judges have been identified as the parties responsible for making decisions on relevance, and as courtroom participants they both labour under this overriding objective.[188]

It is necessary to consider how the focus on efficiency within the justice system, and the increasingly managerial model of adjudication, impacts decision-making on relevance. It is important to investigate this, not least as we do not have empirical data to shed light on what is happening in terms of decisions on relevance. The rise in managerial objectives within the justice system, may have several possible consequences on relevance, and specifically how professional actors frame (interpret and respond to) questions of relevance in situ.

First, a justice system that places such a premium on efficiency may result in relevance being assumed by legal practitioners. By this it is meant that the relevance of a piece of evidence is less likely to be challenged - by either party - for the simple reason that to do so would add time and delay to a temporally pressured system. If

[183] ibid.
[184] ibid part 1.1 Section 2(a)-(g).
[185] ibid 1.1 (2)(e).
[186] Criminal Procedure Rules 2005 part 1.1 (a).
[187] ibid part 1.1 (c).
[188] ibid 1.2 (1)(a).

this were the case, interests of efficiency may subsume those of substantive justice, and even where a barrister has cause to question the relevance of a particular piece of evidence, they may refrain from doing so in a bid to streamline proceedings and avoid delays. Here the subjective and contextual nature of relevance would be diminished, instead of being nuanced, questions of relevance may become far more standardised. Were this the case, barristers would have the primary responsibility for making decisions on relevance, with few challenges. This would give barristers largely unfettered scope to determine the parameters of relevance, in the knowledge that there with likely be little challenge from barristers and judges operating under the same temporal pressures.

The second potential consequence of managerialism on evidential decision-making is that a high threshold is applied to relevance. Time pressures may encourage barristers to 'leave out' pieces of evidence which may give opposing counsel cause to challenge its relevance. This hypothetical is based on the premise that any challenge to the relevance of a piece of evidence would inevitably take up valuable time and thereby delay proceedings. The pressure to avoid any delays to proceedings might, therefore, have the effect of narrowing the scope of relevance to evidence that has a sufficient degree of probative value and is less likely to be challenged by the opposing counsel. In this way, relevance might start to resemble something akin to the theoretical conception of 'legal relevance' whereby in addition to being logically relevant, evidence must have a so called 'plus value'.[189] This approach from barristers may attract increased scrutiny from judges on their evidential decisions, in a bid to avoid material that is not highly probative and/or salient to the case facts.

[189] Andrew Choo, *Evidence* (6th edn, OUP 2021) 3.

Thirdly, a focus on streamlining criminal proceedings could give rise to increased cooperation between parties at trial. In practice, this could look like barristers agreeing particular facts or evidence with one another informally, and outside of the courtroom. Thomason discusses this phenomena and draws on his research to explain how changes in the adversarial landscape affect the ways in which evidence is admitted at trial, and specifically the impact those changes have on the principle of party control.[190] A key finding from Thomason's interviews with criminal barristers was that 'a significant amount of evidence is admitted after negotiation and agreement between the adversarial parties'.[191] He concludes that changes in adversarialism over recent years have resulted in a situation whereby this practice has resulted in a shift from 'aggressive trial combat …to more party control over the evidence and proceedings'.[192] The potential for 'agreed facts' to be used in relation to relevance was also prevalent in the findings of this research.[193]

In terms of relevance, it may well be that the ongoing efficiency drive encourages cooperation between barristers, and pressure to agree which evidence will be relevant to the case and subsequently admissible at trial. This process would avoid delays caused by challenging the relevance of a piece of evidence, or in voir dire hearings, whilst facilitating pre-trial discussions that effectively diminishes the role of the judge in deciding questions of relevance. In this way, it would arguably strengthen the principle of party control over proceedings by giving barristers full autonomy in deciding questions of relevance in (one would hope) a spirit of compromise, fairness, and cooperation. Managerialist values encouraging informal

[190] Matt Thomason, Admitting Evidence by Agreement: Recalibrating Managerialism and Adversarialism in Crown Court Criminal Trials' [2021] CLR 9, 727.
[191] ibid 727.
[192] Ibid 752.
[193] Chapter 7.

party control, paradoxically, bears some resonance with the principle of party control; a core feature of adversarialism.

The benefit of party cooperation is that cases are streamlined, less challenges will arise in open court, and delays will thereby be avoided. Streamlining proceedings is not only about processing cases as fast as is possible, but there is also an inherent benefit to parties to whom delays are plainly detrimental. Indeed, the well-known legal maxim 'justice delayed is justice denied'[194] is extremely fitting in this context. Nevertheless, where matters of relevance are dealt with in pre-trial proceedings and in agreement between barristers, there invariably arises a lack of transparency around decision-making. Where transparency is lacking, there is then potential for decisions to be made based on nefarious or prejudicial grounds which simply cannot be accounted for. Equally, where decision-making occurs between parties pre-trial, there is scope for decision-making to lack consistency as decisions may differ based on the geographical norms and practices, professional experience of counsel, and potentially individual biases and prejudices of those engaged in decision-making. That agreement between parties looks set to become increasingly prevalent is an inevitable result of the ongoing managerialist 'creep' within the justice system. The role of party cooperation in evidential decision-making is considered further in Chapter 7's coverage of the interview data. The potential consequences of managerialism on evidential decision-making are projections. All, some, or none of them may be true, and each invite their own difficulties, and potentially sit in contradiction with one another. The inclusion of these projections is to highlight the unknowns and reinforce the importance of a comprehensive review of relevance, and of empirical data, to examine the result of these potentially impactful forces.

[194] *Gladstone Gohman v City of St. Bernard 111 Ohio St. 726* (1924) 737.

1.5. Conclusion

This chapter has explored the environment in which relevance exists, through the lens of Hawkins theoretical framework. Relevance has been situated within its socio-political, economic, and ideological surround, as well as its organisational and procedural setting; the decision field. The discussion has emphasised the close relationship between surround and field, and their ability to mutually inform and impact upon one another. This chapter has sought to show the importance of the context in which evidential decisions are made, and to highlight how that context can shift and change in response to external stimuli.

Both the surround and field can have a profound impact on the immediate environment in which decisions on relevance are taken, and the context in which barristers make decisions. It is the nature of relevance that makes this discussion all the more important, given its innate subjectivity and its scope to encourage discretionary decision-making. Such characteristics render relevance very sensitive to environmental stimuli. A key aspect of the legal field is the model of criminal adjudication – traditionally adversarialism - yet recent changes to (and within) the legal field have seen an upheaval of adversarialism. At best, this could be regarded an *evolution* or development of adversarialism but, at worst, recent decades have seen adversarial values and principles diluted and diminished. The changing nature of adversarialism in England and Wales poses challenges for criminal proceedings, and particularly for intricate evidential matters. The impact of the introduction and endorsement of managerialist values in the justice system on discrete matters of evidence remain to be seen, but some potential consequences of managerialism – fuelled by ideological managerial values – have been mooted here.

The surround and field have been explored in this chapter to aid understanding of the context in which relevance exists. The upcoming chapters of this thesis draw upon the surround and field when considering barristers' decision-making on relevance in the criminal courts. The third element of Hawkins' theoretical framework – frames – is then used to consider the immediate 'structure[s] of knowledge, experience, values, and meaning that decision-makers employ'.[195] That is, to aid exploration of how barristers interviewed made sense of relevance, and how they approached decision-making in this regard. Ahead of this, the following chapter sets out the research methods and methodological approach taken to the research.

[195] Keith Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (OUP 2002) 52.

CHAPTER 2:

RESEARCH METHODS AND METHODOLOGY

This chapter explains how this socio-legal research was conducted, and considers the research process as a whole. It explores the research design that was adopted to facilitate an investigation of evidential relevance, and sets out the research methods and methodology adopted in this research. Section 2.1. begins by recalling the research questions posed at the outset of this research, and details the research design, including an explanation of the decision to conduct a mixed-method study, with a heavy reliance upon qualitative research to investigate evidential relevance. Section 2.2. discusses the research methods adopted in relation to the theoretical and doctrinal strands of the research.[196] Section 2.3. then considers the empirical strand of the research and details the interview process as a whole; including how interviews were arranged, conducted, transcribed, and how the data was subsequently analysed. Interviewee demographics are also set out in both written and visual form. Section 2.4. then goes on to consider the ethical issues posed by and related to the research.

[196] Section 2.2.2.

2.1. Research questions and research design

The overarching aim of this research was identified in the Introduction, and is reproduced here as it directly informs the research design. The overarching research question is:

- How is evidential relevance understood and applied in the criminal courts?

There are five distinct research questions that feed into the overarching research question. These secondary research questions are as follows:

RQ1. What are the possible 'tests' for evidential relevance?

RQ2. How are relevance 'tests' applied in appellate courts?

RQ3. To what extent are relevance 'tests' applied consistently in the criminal courts as per my respondents' experiences?

RQ4. According to my respondents, what factors influence criminal barristers' decision-making on evidential relevance?

RQ5. How does evidential relevance interact with other rules of evidence?

This research was designed using methods appropriate for answering these distinct research questions and to facilitate the extensive review of evidential relevance. Given the breadth and coverage of the research questions, and the centrality of *decision-making,* a socio-legal approach was needed to answer fully the research questions posed. Socio-legal is the 'umbrella term, unconfined to a singular method or

definition'[197] that represents a hybrid approach to legal and sociological research. In broad terms, socio-legal research is concerned with 'study of the interactions between the law and the social, historical and economic contexts within which it operates'.[198] Chapter 1 has shown how the surround and its inherent socio-political, ideological, procedural, and structural influences, all bear upon the criminal courtroom environment. A socio-legal approach to research can engage with these influences as, at its core, it facilitates the examination of the 'law in context'.[199]

This research examines relevance on three levels, it considers how relevance is framed and understood from an academic perspective, then examines how the appellate courts have used, defined and interpreted relevance, before conducting an empirical examination of relevance and gathering barristers' views on relevance as an evidential device. The research is, therefore, mixed-methods and uses a combination of desk-based research and qualitative empirical methods to create a fuller picture of how evidential relevance is understood and used in practice. In terms of the data collection, the decision to gather qualitative empirical information is owed to the ability of qualitative information 'to generate deep insights'[200] and its ability to ascribe and attach *meaning* to social phenomena.[201] The capacity for deep analysis and insight is important given that this research is the first of its kind to consider evidential relevance in such depth. Marshall and Rossman suggest qualitative research is designed to do a number of key things, including 'describe poorly understood phenomena'.[202] It is

[197] Thomas Peck, 'Interdisciplinary Methodological Approaches to Desk-Based Socio-Legal Human Rights Research' Law and Method (2023) January, 3.
[198] ibid.
[199] Fiona Cownie, *Legal Academics: Cultures and Identities* (Bloomsbury Publishing Plc 2004) 58.
[200] Tom Clark and others, *Bryman's Social Research Methods* (6th edn, OUP 2021) 351.
[201] Virginia Braun and Victoria Clarke, *Successful Qualitative Research: A Practical Guide for Beginners* (SAGE 2013) 20.
[202] Virginia Braun and Victoria Clarke, *Successful Qualitative Research: A Practical Guide for Beginners* (SAGE 2013) 20.

suggested that there is much to learn about relevance, and that practical everyday operation of relevance is at present poorly understood. This research uses qualitative methods to remedy that reality.

As explored in Chapter 1, relevance sits within a complex environment and is subject to a range of influences relating to both the surround and field. Given the intricate nature of the Crown Court environment, it is important the research design accounts for these complexities. Braun and Clarke highlight the ability of qualitative research to investigate and understand specific contexts: 'qualitative data are understood as accounts that are not produced in the ether. Instead, they are seen to be produced in particular contexts, by participants who come from, and are located within, specific contexts'.[203] This renders qualitative methods particularly well-suited to this research and its exploration of relevance within the unique and complex environment that is the Crown Court.

The decision to take a qualitative research approach reflects the interpretivist methodology that underpins this research. Before explaining what an interpretivist methodology is, it is necessary first to expand upon *methodology* itself. A research methodology is distinct from the research methods used in research. Research methods are the specific tools or techniques used to gather and analyse data,[204] and these are discussed in the next section. Research methodology is much broader concept and encompasses the wider 'discussion associated with your method'[205] and 'consists of theories and practices for how we go about conducting research'.[206] The

[203] ibid.
[204] ibid 31.
[205] Tom Clark, Liam Foster and Alan *Bryman How to do your Social Research Project or Dissertation'* (OUP 2019) 339.
[206] Virginia Braun and Victoria Clarke, *Successful Qualitative Research: A Practical Guide for Beginners* (SAGE 2013) 31.

qualitative methodology is reflective of an interpretive methodology, which is, in essence, predicated on the search for meaning of a particular phenomenon where 'meaning is mediated through the researcher as instrument, data analysis is inductive, and the outcome is descriptive'.[207] The interpretivist methodology reflects the socio-legal examination of relevance, and the social processes involved in decision-making on relevance. It is legal actors (barristers and judges) who are responsible for ascribing meaning to relevance, and they are therefore responsible for the information that is – or is not – presented to juries. Not only this but legal actors are responsible for the *way* information is presented to juries, in terms of the narratives they project and the 'stories' they tell with evidence. Relevance is, therefore, in many ways at the behest of legal professionals whose interpretation and input can shape what relevance means. For this reason, a constructivist ontological stance is adopted in this research. This is a vision of reality where 'social phenomena and their meanings are continually being accomplished by social actors'.[208] This aligns with a socio-legal exploration of relevance, as here it is a *legal* phenomenon (relevance) and its meaning is accomplished by social actors (legal professionals). That is, this research views relevance and associated decision-making as much a social process as it is a legal one. This bears resonance with the assumption that underlies qualitative research, that it 'is about capturing some aspect of the social or psychological world'.[209]

The constructivist ontology is accompanied by an interpretivist epistemology, which holds that that 'human beings are 'meaningful' actors, and scholars must aim at

[207] Sharan Merriam and Robin Grenier *Qualitative Research in Practice: Examples for Discussion and Analysis* (2nd edn, John Wiley & Sons 2019) 8.
[208] Tom Clarke, Liam Foster, Luke Sloan and Alan Bryman, *Bryman's Social Research Methods* (6th edn OUP 2021) 29.
[209] Virginia Braun and Victoria Clarke, *Successful Qualitative Research: A Practical Guide for Beginners* (SAGE 2013) 20.

discovering the meanings that motivate their actions'.[210] Acceptance of an interpretivist epistemology means we can explore the underlying motivations and thought processes that *inform* the ascription of meaning, and how legal professionals make sense of relevance in practice. Interpretivist and constructivist assumptions lend themselves well to the use of qualitative methods,[211] and in this research context it is these ontological and epistemological positions that inform the chosen research methodology. The next two sections are dedicated to a discussion of the research methods chosen in this research. Due to the nature of the research, the research methods discussion is separated into two parts: Section 2.2. considers the research methods used to examine relevance on a theoretical and doctrinal level. Section 2.3. then sets out the research methods chosen for the empirical examination of relevance.

2.2 Theoretical and doctrinal research methods

Chapter 3 and Chapter 4 of this thesis examine relevance from a theoretical/academic and doctrinal/appellate perspective respectively. Chapter 3 considers academic framings of relevance, and Chapter 4 explores appellate framing of relevance, that being the way relevance has been understood and used in the appellate courts. For both these elements of the research, desk-based research was conducted. The nature of the desk-based research differed due to the aims of each of these strands of research, for this reason the approach taken to desk-based research in each are discussed separately here. For Chapter 3's coverage of academic framing of relevance, the desk-based research involved qualitative documentary analysis, as a

[210] Donatella Della-Porter and Michael Keating (eds), *Approaches and Methodologies in the Social Sciences* (Cambridge University Press 2012) 24.
[211] Mark Risjord, *Philosophy of Social Science* (Routledge 2014) 57.

tool to analyse and review existing data on evidential relevance as a concept.[212] This involved a wide-ranging review of the existing literature, including legal and quasi-legal materials, such as case law, legislation, academic texts, policy documents, and judicial commentaries that engaged with evidential relevance as a concept. The purpose of conducting desk-based research of this nature was to explore how the concept of evidential relevance has been constructed and developed in academic commentaries, including an examination of the materials upon which academics rely when framing relevance on a conceptual level.

Chapter 4 considers appellate framings of relevance, which is an exploration of the way evidential relevance has been understood and used in the appellate criminal courts. For this element of the research, desk-based research was also used but with a specific use of doctrinal research methods. The doctrinal research method focuses 'exclusively on traditional legal materials and the techniques required to interpret them'[213] and typically 'forms the basis for most, if not all, legal research projects'.[214] The extent to which doctrinal research informs contemporary legal research varies, however, and in this research it is one limb of a three-pronged mixed-method approach to research on relevance. In broad terms, doctrinal investigation 'is the research process used to identify, analyse and synthesise the content of the law'.[215] In practice, this means identification and extensive analysis of the 'the law'. Identifying 'the law' is not always a straightforward process and requires extensive investigation and 'synthesis of rules, principles, norms, interpretive guidelines and values'.[216] In the

[212] Colin Robson and Kieran McCartan, *Real World Research* (4th edn, John Wiley & Sons Ltd 2016) 82.
[213] Fiona Cownie and Anthony Bradney 'Socio-Legal Studies: A Challenge to the Doctrinal Approach' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (2nd edn, Routledge 2017) 40.
[214] Terry Hutchinson, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (2nd edn, Routledge 2018) 10.
[215] ibid 13.
[216] Trisha Mann (ed), *Australian Law Dictionary* (OUP 2010) 197.

context of relevance, there is no statutory guidance to assist barristers and judges in their determinations of relevance; and so a synthesis of case law is necessary. In the absence of statutory guidance, then, it is the courts that embody and communicate 'the law' on matters pertaining to relevance.

Some commentators note that there has been a move away from doctrinal research methods in legal research over recent years,[217] in favour of an increase in socio-legal research that seeks to examine the 'law in context'.[218] Criticism of doctrinal research centres around its perceived inability to account for the social processes in and around law. Bradney regards the critique of doctrinal legal research as three-fold: 'it is considered too provincial from an international perspective, too narrow from an interdisciplinary perspective and not creative enough from an academic perspective'.[219] It is suggested that none of these criticisms stand up to any form of scrutiny; there is undoubtedly a case for researching law by analysing primary legal resources (cases), from a specific jurisdiction, through a specific disciplinary lens, and in a legalistic fashion.

This thesis thus emphasises the importance of doctrinal analysis as a valuable and essential means of conducting legal research, rather than subscribing to the view that the academic doctrinal project is 'entering its final death throes'.[220] It is said that desk-based studies are often 'planned as a precursor to empirical research or to complement it'.[221] This was certainly true in this research context. The doctrinal research element is integral to this project. The overarching research endeavour – to

[217] Fiona Cownie and Anthony Bradney 'Socio-Legal Studies: A Challenge to the Doctrinal Approach' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (2nd edn, Routledge 2017) 40.
[218] ibid 41.
[219] Jan Smits 'What is Legal Doctrine?' in Rob Van Gestel, Hans Micklitz and Edward Rubin (eds) *Rethinking Legal Scholarship* (Cambridge University Pres 2017) 209.
[220] Anthony Bradney, 'Law as a Parasitic Discipline' (1998) March 25(1) Journal of Law and Society 71, 71.
[221] Colin Robson and Kieran McCartan *Real World Research* (4th edn, John Wiley & Sons Ltd 2016) 83.

explore how evidential relevance is understood and applied in the criminal courts – could not have been answered without doctrinal analysis and a comprehensive examination of appellate case law. Equally, conducting doctrinal research meant that I, as the researcher, had the requisite in-depth knowledge of relevance, such that was needed to engage with barristers on the issue of relevance. Conducting doctrinal research means that the overall quality of the subsequent empirical research was improved.

It is suggested that doctrinal research is not only an important investigative device, but it *enhances* socio-legal investigation, and visa-versa. Cownie acknowledges the value of doctrinal analysis alongside theoretical and empirical work, and identifies the foundational role it can play:

> Valid research is built on sound foundations, so before embarking on any theoretical critique of the law or empirical study about the law in operation, it is incumbent on the researcher to verify the authority and status of the legal doctrine being examined.'[222]

This was the logic than informed the decision to conduct an extensive review of case law as a 'necessary prerequisite'[223] to the subsequent empirical analysis. The insights gained from the doctrinal analysis certainly increased the depth and breadth of knowledge on relevance, and provided a novel insight into the ways in which the courts approach relevance. Each of those insights were not only advantageous but essential when preparing and conducting the empirical element of the research, in terms of both

[222] Terry Hutchinson, Doctrinal Research: Researching the Jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (2nd edn, Routledge 2017) 10.
[223] Jan Smits 'What is Legal Doctrine?' in Rob Van Gestel, Hans Micklitz and Edward Rubin (eds) *Rethinking Legal Scholarship* (Cambridge University Pres 2017) 209.

the interview schedule and in terms of being able to respond to lines of discussion in interviews.

The doctrinal research started by consulting key cases on relevance, as identified in academic literature. For example, cases such as *Blastland*[224] and *R v Kilbourne*[225] are often cited in academic textbook coverage of relevance, as authorities for the different approaches to relevance. I began by researching each of these key cases, and from there broadened the case search and examined the authorities cited within those key initial cases. All notes and analysis from cases was organised using Microsoft OneNote. I then used the legal database Westlaw to identify further case considerations of relevance. Given the significant number of cases available on Westlaw, a way of filtering the case search was needed. To start with, I inputted information to filter the cases by 'Subject/Keyword'; I used the keyword 'relevance'. Once the results of this search were provided, I further filtered the cases through a 'topic' filter, where I selected an option to view criminal cases only. Chapter 4 is dedicated, specifically, to the doctrinal exploration of case law; this analysis is supplemented by the examination of other legal materials, such as practice directions,[226] the Crown Court Compendium,[227] Law Commission reports,[228] consultation papers,[229] and other such materials.

[224] *R v Blastland* [1986] AC 41.
[225] *DPP v Kilbourne* [1973] AC 729 (HL).
[226] Criminal Practice Directions (2023) <www.gov.uk/guidance/rules-and-practice-directions-2020#criminal-practice-directions-2023-contents> accessed 12 December 2023.
[227] Judicial College, 'Crown Court Compendium Part I: Jury and Trial Management and Summing Up' <www.judiciary.uk/guidance-and-resources/crown-court-compendium/> June 2023 accessed 13 October 2023.
[228] Law Commission, *Evidence of Bad Character in Criminal Proceedings* (Law Com No 273, 2001)
[229] Law Commission, *Evidence in Sexual Offences Prosecutions*: *A Consultation Paper* (Law Com CP No 259, 2023).

2.3. Empirical research methods

To investigate how relevance is understood and applied by barristers in the Crown Court this thesis uses empirical methods of data collection. In-depth semi structured interviews were conducted with 20 criminal barristers. Criminal barristers were selected as the research subject as they are one of the key cohorts who routinely deal with mattes of evidential relevance in the criminal courts. Interviews were with barristers who act, or had acted, in the Crown Court rather than the magistrates' court. The decision to focus on barristers' decision-making in the Crown Court only was made in recognition of the significant differences between the two courtroom environments. This thesis will examine relevance in 'precisely the procedural environment in which one would expect issues of evidence and procedure to receive their most sustained and careful attention'.[230] In stark contrast to the Crown Court, the magistrates' courts are characterised by 'haste and inattention to finer points of procedural detail',[231] and where summary justice places a significant premium on haste, it is inevitable that evidential matters may not receive the considered 'sustained and careful attention' that they do in the Crown Court.

This is not to underestimate the importance of researching the use of evidential rules in the magistrates' court. This is particularly so given that all criminal cases are initially heard in the magistrates' court, and that over 95% of criminal cases are concluded there.[232] While magistrates' case load is numerically significant, it is dwarfed by the principled significance of the cases heard in the crown courts. It is the most serious of crimes that are heard in the Crown Court, where guilt is contested,

[230]Paul Roberts, *Roberts and Zuckerman's Criminal Evidence* (3rd edn, OUP 2022) 118.
[231] ibid.
[232]Courts and Tribunals Judiciary 'About Magistrates' courts' <www.judiciary.uk/courts-and-tribunals/magistrates-courts/magistrates-court/> accessed 17 December 2023.

and where the fundamental right of individual liberty may be at stake. The magnitude of decisions in the Crown Court are of the upmost importance, notwithstanding their relative numerical (in)significance. This point is made succinctly (and a little crudely) by Roberts and Zuckerman:

> To infer from comparative caseload statistics that Crown Court trials … are uninteresting or unimportant would be like refusing to conduct medical research on bowel cancer or coronary disease because flu, myopia, and in-growing toenails are more commonly experienced ailments.[233]

An empirical analysis of relevance in the magistrates' courts might rightly be the focus of future separate research endeavours, as a topic in its own right, rather than attempting to analyse two quite different institutions within a single research project and risking the production of superficial and over-generalised research. It is hoped that this thesis will provide essential foundations upon which future research can develop and build in the important context that is summary justice.

The chosen research method for the empirical element of the research was interviews. Interviews were chosen in light of the searching nature of the overarching research aim to interrogate how evidential relevance is understood and applied in the criminal courts. This overarching research endeavour requires insight, detail, and an account of the social processes involved in decision-making. For this reason, the decision was made to use a semi-structured interview approach. This allowed for me to prepare several key questions and raise issues I felt pertinent, whilst giving space for a fluid conversation that allowed follow-up questions and discussions, and a means for barristers to raise any issues they felt salient. Evidential relevance has not been

[233] Paul Roberts, *Roberts and Zuckerman's Criminal Evidence* (3rd edn, OUP 2022) 120.

the subject of a sole research endeavour in England and Wales before, and this research is novel in conducting such a wide-ranging review of relevance. This research is the first occasion upon which barristers are asked about evidential relevance as an evidential concept in such depth and therefore interviews are the appropriate way of giving barristers space to share their experiences.

While court room observations would have no doubt provided important and interesting insights into relevance 'in the courtroom' so to speak, I decided against using them as an additional method of gathering empirical data. I made this decision as there is no one specific stage in the trial process where relevance is considered. Given my initial research on relevance, I was also aware that decisions on relevance are often made in the pre-trial stages, rather than during trials. For example, a barrister choosing what evidence they include in their skeleton argument is one way a barrister makes a decision on evidential relevance, that would often not be discussed in the criminal court. This reality brought into question the utility of observing the trial process as a means of gaining insight into how relevance is understood and is used. As the research is concerned with the decision-making process itself – including how barristers understand and make decisions on relevance – it was agreed between myself and my supervisory team that the research focus would be better served by interviewing barristers. This decision was particularly important given the time constraints associated with this research; trial observations are time consuming and would have detracted from the time I was able to spend interviewing barristers. Courtroom observations may, however, be a useful tool in additional future research on relevance in the criminal courtroom; which I discuss in the Concluding Remarks in Chapter 9.

2.3.1. *Sampling and access*

For this research, I interviewed 20 barristers who have current or recent experience practising, criminal law in England and Wales. I chose a sample size of 20 barristers in light of Saunders et al's suggestion that the use of semi-structured interviews calls for a sample size between 5-25 participants.[234] Given the novel nature of the research, I sought to be closer to the higher end of Saunders' suggested number of participants to gain as much insight as was possible within the time constraints of the research. Saunders et al also suggest that the sample size is 'dependent on your research question(s) and objectives',[235] which in this context focus largely on the subjective experience and ascription of meaning (to relevance) by barristers. On this, it is important to note that the findings are not, nor claim to be, generalisable to other barristers or legal professionals. It is useful, however, to gain a meaningful insight into the role and operation of relevance in criminal trials, on a topic that has not previously been the focus of interviews with legal professionals. Towards the end of the interview process I began to encounter broadly the same themes from the interview data. This indicated that I had reached theoretical data saturation, which involves 'continuing to sample until conceptual categories are fully developed'.[236] That I reached data saturation with 20 interviews indicates that the sample size was an appropriate one. In addition, across the sample of 20, barristers had a wide range of PQE and due to the nature of trial work they moved around circuits and geographical areas, whilst working with multiple opponents and judges. This meant barristers would likely have a broad sense of how relevance operates across time and space.

[234] Mark Saunders and others, *Research Methods for Business Students* (6th edn, Pearson Education 2012) 283.
[235] ibid 315.
[236] Tom Clark, Liam Foster, Luke Sloan and Alan Bryman, *Bryman's Social Research Methods* (6th edn, OUP 2021) 381.

While insights from barristers are invaluable in this context for the reasons noted, there are other decisive voices not heard in this research. Judges, too, have a significant role in decision-making on relevance. In light of this, I applied for permission from the Judicial Office to interview judges as part of this project. This application was successful, and permission was granted by the Judiciary in December 2022.[237] Unfortunately, the permission was given almost one year after the initial application was submitted, which did not give me sufficient time to arrange, conduct, transcribe, and analyse judicial interviews for this research project. The Judicial Office has agreed to extend this permission, to permit future research with judicial participants outside of this project; a matter which is revisited in Chapter 9's Concluding remarks.

Returning to the decision to interview criminal barristers, it is necessary to highlight their status as elite interviewees, given their elevated legal role and societal status.[238] Some researchers suggest that the imbalance of power that can occur in elite interviews may result in 'elites trying to control the research agenda'.[239] I did not find this to be the case; instead I found interviewees to be eager to participate in the research, helpful, and responsive to the questions asked of them. Where additional topics were introduced by interviewees this was in response to questions or issues posed by myself, and generally their additional insights were pertinent to relevant issues. In the few cases where I felt interviewees were steering the conversation more than was necessary, I was able to respond politely but decisively to steer them back to the topic/s at hand without problem. I return to the topic and implications of elite

[237] The Judicial Office is not often forthcoming in permitting judicial interviews, and on one view might perhaps be read as an endorsement of the importance of the research project.
[238] David Richards, 'Elite Interviewing: Approaches and Pitfalls' (1996) 16(3) Politics 199, 199.
[239] Léger Félix Ntienjom Mbohou and Sule Tomkinson, 'Rethinking Elite Interviews Through Moments of Discomfort: The Role of Information and Power' (2022) 21 *International Journal of Qualitative Methods* 1, 5.

interviewing in Section 2.4. in the context of ethical issues associated with interviewing elite participants.

For now, it is sufficient to note that the status of elite interviewees can make access difficult to obtain,[240] particularly in the legal arena which is often regarded a 'normatively closed system'.[241] Barristers' status as elite interviewees informed the sampling choices in this research. Purposive sampling was the overarching sampling method used to access participants for this element of the research. This is a sampling technique which 'involves selecting data cases (participants, texts) on the basis that they will be able to provide 'information-rich' … data to analyse'.[242] This technique was appropriate given that the research required the insight and experience of this specific group. In short, participants are chosen based on their experience and their ability to contribute to the aim/s of the research. Purposive sampling was accompanied by convenience sampling, a sampling method which Merriam and Tisdell regard in the following terms: 'convenience sampling is just what is implied by the term — you sample based on time, money, location, availability of sites respondents, and so on'.[243]

My approach to convenience sampling was one that leaned predominantly on my own existing networks. This allowed me to contact barristers who were personally known to me, including those whom I had previously met in a personal/professional capacity, and those who had participated in previous legal research that I had conducted. In these cases, I approached barristers directly via email, via personal

[240] David Richards, 'Elite Interviewing: Approaches and Pitfalls' (1996) 16(3) Politics 199, 200 'by definition, elites are less accessible and more conscious of their own importance; so problems of access are particularly important'.
[241] Niklas Luhmann, *A Sociological Theory of Law* (Routledge 1985).
[242] Virginia Braun and Victoria Clarke, *Successful Qualitative Research: A Practical Guide for Beginners* (SAGE 2013) 56.
[243] Sharan Merriam and Elizabth Tisdell, *Qualitive Research: A Guide to Design and Implementation* (4th edn, John Wiley and Sons 2015) 98.

message or via a social media platform (formerly Twitter, now 'X'). The direct communication was an effective tool for gaining access. Other barristers were known to my supervisors and their contact details provided to me. Again, direct communication proved an effective method, and I was able to secure further interviews in this way. All barristers were emailed details of the research, including a research overview document, a consent form, and a questionnaire. All these documents are included in the appendices.

While I had success contacting barristers directly, I had less success attempting to contact barristers indirectly, particularly where I sought access through a legal gatekeeper. A gatekeeper typically 'protects the population of potential respondents' and is often 'an individual who can affect the likelihood of a respondent's cooperating with the interviewer'.[244]

The gatekeepers I engaged with were typically Chambers' secretaries, and although I contacted a significant number of potential gatekeepers almost none returned my communications. I had only two successful communications with Chambers', and in both instances the secretary agreed to circulate information about the research around the Chambers. This resulted, in some cases, in barristers contacting me in response to the circulation, which subsequently led to successful interviews. The timing of these 'adverts' being circulated around Chambers was, I believe, particularly important. Most barristers received calls for participation in August/September 2022 when many were engaged in industrial action and on strike, meaning they were more likely to be available for interview.

[244] William Crano, Marilynn Brewer, and Andrew Lac, *Principle and Methods of Social Research* (3rd edn, Taylor & Francis Group 2014) 291.

When preparing my research, I had envisaged that snowball sampling would accompany convenience sampling to recruit interviewees. Snowball sampling occurs where 'sampled participants propose other participants who have had the experience or characteristics relevant to the research'.[245] Snowball sampling can be particularly useful as it 'plays into social dynamics of accessibility in terms of power and rights'.[246] Despite the potential efficacy of snowball sampling in this research, it was not as prevalent in the research process as I had envisaged. I asked several participants if they could recommend other potential interviewees to me, but most of these requests or contacts did not result in subsequent interviews. While it cannot be known, this could have been a reflection of the industrial action taking place, which may have meant that barristers did not feel comfortable suggesting participation in the research to their peers. Alternatively, if participants did pass my details on to others and suggest participation to their peers, those in receipt of those invitations may simply not have had the time or capacity to engage with interviews given the context of high workloads and poor renumeration. As such, I found snowball sampling to be of little effect, whereas convenience sampling among existing networks yielded results and direct communication with barristers. This was the most successful way of obtaining access to interviewees for this research where I did not need intend go beyond 20 participants.

The use of convenience sampling led to a significant number of interviewees from the Northwest of England and the Northeast of Wales. That the sample spans both England and Wales is a real strength. It is important to include voices from both England and Wales as 'Wales has been too often ignored in consideration of the

[245] Alan Bryman, *Social Research Methods* (5th edn OUP 2016) 415.
[246] Chaim Noy, 'Sampling Knowledge: The Hermeneutics of Snowball Sampling in Qualitative Research' 11(4) (2008) International Journal of Social Research Methodology 327, 338.

criminal justice system of England and Wales'.[247] Newman and Dehaghani emphasise the need for legal research to account for England and Wales:

> Research in relation to Wales is greatly needed. The attitude of the government in London over a long period of time … has meant that evidence, research and statistical information that consider the distinctive position in Wales are scant; they been submerged by the far greater volume of information about England.[248]

This research does not claim to be generalisable across the legal profession, but simply to provide a snapshot[249] of barristers' decision-making on relevance. It was not, therefore, necessary to take measures to ensure the sample was spread evenly throughout England and Wales. But it remains a strength that practitioners in Wales see inclusion in the sample and are not overlooked entirely. A table of the participant demographics is included below. This details the level of qualifying experience barristers had, their gender, and the type of work they engage/d with (i.e., prosecution or defence). The type of work in which they are typically instructed is split in terms of an approximate numerical ratio.

[247] Daniel Newman and Roxanna Dehaghani, *Experiences of Criminal Justice* (Bristol University Press 2022) 1.
[248] ibid 223.
[249] Fae Garland and Jenny McEwan, 'Embracing the Overriding Objective: Difficulties and Dilemmas in the New Criminal Climate' (2012) 16(3) International Journal of Evidence and Proof 233, 239.

2.3.2. Participant demographics

Table 1 – participant demographics

Identifier	Prosecution/defence workload split	PQE	Age	Gender
B1	50/50	19	40-50	M
B2	0/100[250]	15	40-50	M
B3	50/50	23	50-60	M
B4	50/50	12	40-50	F
B5	70/30	21	40-50	M
B6	50/50	16	40-50	F
B7	50/50	53	60+	M
B8	80/20	6	30-40	F
B9	50/50	9	40-50	M
B10	50/50	11	40-50	F
B11	0/100	30	60+	M
B12	0/100	20	50-60	M
B13	50/50[251]	39	60+	M
B14	50/50	16	50-60	F
B15	10/90	29	60+	M
B16	0/100[252]	46	60+	M
B17	50/50	11	40-50	F
B18	50/50	10	40-50	F
B19	70/30	8	40-50	M
B20	50/50	16	60+	M

[250] B3 had previously prosecuted 20/80, but now has an exclusively defence practice.
[251] B13 is now retired. B13 did exclusively prosecution work and exclusively defence work at different points in their career. The 50/50 is an overall summary of their experience.
[252] B16 has previously prosecuted, but at the time of interview had an exclusively defence practise.

2.3.3. The interview process

Interviews with barristers were semi-structured. I had prepared a list of questions and themes I wanted to ask barristers, but used this as a guide rather than a strict interview schedule. This is typical of a semi-structured interviews where 'potential topics are identified and explored in a manner that is responsive to the purpose of the interview and the needs of the interviewee'.[253] As this research was the first of its kind to interview criminal barristers about evidential relevance – and so was exploratory – it was important that interviewees could share their insights and experiences without the restriction of a rigid interview schedule. Semi-structured interviews are characterised by their ability to give participants the 'opportunity to discuss issues that are important to them and that the researcher hasn't anticipated, and aren't on the interview guide'.[254] This meant interviewees were able to raise issues I had not necessarily anticipated, and give a full account of their understanding of relevance and its use in practice.

I chose to conduct interviews both in person and online. I took this decision to ensure both geographical spread of interviewees,[255] and to ensure that I could fulfil my target of 20 interviews. A total of 12 interviews took place online and 8 in person. In-person interviews have, in the past, been regarded as the 'gold standard'[256] and virtual interviews 'often viewed as the (poor) substitute for face-to-face interviews'.[257] I did not find this to be the case. In terms of interview quality, I found no discernible

[253] Tom Clark, Liam Foster, Luke Sloan and Alan Bryman, *Bryman's Social Research Methods* (6th edn, OUP 2021) 211.
[254] Virginia Braun and Victoria Clarke, *Successful Qualitative Research: A Practical Guide for Beginners* (SAGE 2013) 78.
[255] Personal commitments meant that travelling across the country and staying away from home for periods of time were not possible.
[256] Gina Novick 'Is there a bias against telephone interviews in qualitative research?' (2008) Research in Nursing & Health 31, 391.
[257] Virginia Braun and Victoria Clarke, *Successful Qualitative Research: A Practical Guide for Beginners* (SAGE 2013) 79.

difference between the online and in-person interview and many advantages that flowed from the online interview. This accords with other researchers' (more recent) assessment of online interviews. For example, Solarinoa and Aguinis suggest:

> [R]emote interviews are effective, are far from being a second-best option to in-person interviews, and in fact can offer some advantages (…) First, because remote interviews are not limited by geography, they help increase participation.[258]

This was true of the online interviews I conducted, which allowed me to interview participants that I would otherwise not have been able to interview. It must also be noted that the interviews took place very shortly after the COVID-19 pandemic, which fast-tracked the use of virtual platforms for professional meetings. Given that the interviews were so close to the de-escalation of the pandemic response, some interviewees preferred to meet online, rather than in person, for reasons related to health and safety. Again, this meant I was able to interview participants I would otherwise not have been able to interview. An additional benefit of the online interview related to transcription, which is discussed later in this section.

Where interviews took place online, I used the video calling platform 'Zoom'. Such platforms are increasingly used for qualitative interviews[259] and all interviewees used the video facility during the meeting, which facilitated effective communication when not physically face-to-face. Where I met barristers in person, the location was flexible and I met barristers in several different locations including cafes, Crown Court buildings, and Chambers. I tried to make scheduling and attending the interviews as

[258] Angelo Solarinoa and Herman Aguinis, 'Challenges and Best-practice Recommendations for Designing and Conducting Interviews with Elite Informants' *Journal of Management Studies* (2021) 58(3) 663.
[259] Tom Clark, Liam Foster, Luke Sloan and Alan Bryman, *Bryman's Social Research Methods* (6th edn, OUP 2021) 440.

easy as possible for barristers, so I travelled to locations that were most convenient for them. This included visits to several different cities.

The interviews with barristers took place between June – October 2022 and typically lasted between 40 minutes – 1 hour. The shortest interview was 31 minutes and the longest 1 hour 8 minutes. I reviewed the interview progress on an ongoing basis and after every interview I noted down any reflections I had on the interview as a whole. The notes related to a range of things such as the interview questions themselves, the social interaction/s, the environment, and reflections on what worked well and what I could have improved upon. One such note related to some small vignette style questions I presented to some interviewees and asked for their comments on. However, after a small number of interviews, it became apparent that these vignettes were not necessarily conducive to producing important insights on relevance. Rather, they seemed to invite questions from interviewees about the particulars of the vignette, which diverted the discussion away from relevance and on to other matters. In light of this reflection, I removed these vignettes from the interview schedule.

I recorded all interviews and subsequently transcribed them. Where interviews took place in-person they were recorded on a password protected device, in line with the University of Birmingham's ethical requirements, with the permission of all interviewees. I had aimed to transcribe all interviews within two days of the interview, however, the reality was that I found the transcription to be more time consuming than anticipated and difficult to consistently attend to between other commitments. Instead, all in person interviews were transcribed within eight days of the interview taking place, which meant that the interview was still very recent. Online interviews were all recorded and transcribed using the Zoom platform's inbuild transcription service. This

streamlined the transcription process, because I was able to use the automatically generated transcript as a base from which to work. The Zoom platform transcription service picked up most words spoken during the interview (and by whom) but still required a significant amount of work to check, correct and re-format the transcription. Ultimately, I still found that this significantly streamlined the process and as such, I was able to transcribe all online interviews within three days.

When transcribing interviews, I anonymised the data by removing the barristers name and replaced with the identifier 'B' followed by a specific number (ranging from 1-20). The numbers I assigned to barristers were entirely random and do not reflect the order in which interviews took place. I transcribed all interviews in full, and made notes of key themes (using OneNote) as I did so. I subsequently went back to proofread and check the transcriptions for any errors. Although transcribing was time-consuming, it proved invaluable in acquainting me with the interview data. This is a well-documented advantage of self-transcription that it can 'help you to develop a familiarity with data'.[260] This remained true for those transcribed with the help of Zoom, since I had to check and recheck the transcript so closely and make appropriate changes.

When checking and proofreading the transcriptions, I removed any identifying features within the data, such as locations, references to specific cases/case facts, any references to other courtroom personnel that may lead to the identification of either the interviewee or another courtroom actor. All transcriptions, interview recordings, consent forms, and questionnaires were stored on a password protected

[260] Tom Clark, Liam Foster, Luke Sloan and Alan Bryman, *Bryman's Social Research Methods* (6th edn, OUP 2021) 218.

hard drive. After checking the transcriptions and using the data throughout this thesis, I then deleted all interview recordings.

2.3.4. Data analysis

After transcribing interviews, I analysed the data using thematic analysis. Thematic analysis is a 'method for developing, analysing and interpreting patterns across a qualitative dataset, which involves systematic processes of data coding to develop themes – themes are your ultimate analytic purpose'.[261] To analyse the data, I took a broadly inductive approach which 'involves discovering patterns, themes, and categories in one's data. Findings emerge out of the data, through the analyst's interactions with the data'.[262] For the most part, I followed this inductive orientation and identified themes that emerged from the data. I cannot claim that my approach to thematic analysis was solely inductive, however, and a deductive approach, in some respects, co-existed alongside the inductive orientation. Deductive analysis is an approach to analysis where 'the data are analysed according to an existing framework'.[263] The 'existing framework' in my research, was the research questions that I had devised prior to conducting data analysis which I could not realistically put out of my mind when transcribing and analysing my data. In practical terms, this meant that I took something of a hybrid approach to thematic analysis which incorporated elements of both inductive and deductive orientations. My use of Hawkins' framework of surround, field and frames also sensitised me to the multilevel issues that would be at play in decision-making.

[261] Virginia Braun and Victoria Clarke, *Thematic Analysis: A Practical Guide* (SAGE 2021) 4.
[262] Michael Quinn Patton, *Qualitative Research and Evaluation Methods* (4th edn, SAGE 2015) 9.
[263] ibid.

The thematic analysis was a lengthy and complex process that saw me identify key themes within data, and ascribe a label to those themes. This labelling of themes is a part of the coding process referred to in the Braun and Clark exert above, and 'label' and 'code' are synonyms in this context. Cross-themes were then identified, and cross-code identifiers included. To facilitate the data analysis and coding, I originally experimented with NVivo software as an organisational tool for thematic analysis, but found I was better able to organise the data and themes using Microsoft OneNote. On this platform, I was able to organise the data, prior to the data analysis. Braun and Clark recognise the need to be reflexive with thematic analysis and they regard coding 'an organic and evolving process'.[264] I embraced the organic nature of coding and reviewed data and codes on an ongoing and continuous basis during the data analysis phase of the research. This reflexiveness applied also to the *method* of coding. For particularly complex codes and cross-references I supplemented the electronic organisation of data (in OneNote) by using manual, paper-based methods. I created mind maps to summarise codes and key themes/findings within those codes. I found this helped me understand my data on a deeper level and, in some cases, allowed me to identify new codes or subheadings underneath those codes.

The Introduction and Chapter 1 of this thesis have shown both the complex nature of evidential relevance, and the intricacies of the environment in which decisions on relevance are made. To ensure those intricacies could be accounted for and explained, I employ a theoretical framework throughout the research to assist in the organisation and analysis of information, Keith Hawkins' framework of surround, field and frame.[265] The decision to use a theoretical framework relates closely to this

[264] Virginia Braun and Victoria Clarke, *Thematic Analysis: A Practical Guide* (SAGE 2021) 54.
[265] Keith Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (OUP 2002).

research's overarching aim of interrogating what relevance is and how legal professionals understand, use, and make decisions on evidential relevance. This socio-legal exploration of relevance demands close examination of the wide-ranging context of decision-making and the influences that may shape decisions. Context here is to be understood in the broadest possible terms, to denote the socio-legal, ideological, practical, organisational, cultural, structural, and social environment in which decisions are made. The range of contextual stimuli means a theoretical framework to organise and make sense of that context is beneficial and can aid communication and depth of analysis. For this reason, the theoretical framework is drawn upon throughout this thesis, in relation to both the desk-based work and empirical elements of the research. It is used to structure the data analysis in Chapters 5,6,7, and 8; as tool for analysing and exploring barristers' accounts of their decision-making on relevance.

2.4. Ethical issues

All research requires a consideration of ethical matters and potential ethical challenges that may arise. Prior to conducting the research, I obtained full ethical approval from the University of Birmingham and identified some key ethical issues posed by the conducting interviews. The majority of the ethical issues that arose related to the empirical element of the research, though there were some ethical considerations regarding the theoretical and doctrinal work that are addressed here.

The use of desk-based research does not immediately make one think of associated ethical concerns, yet a consideration of the ethical issues posed by any research method is always necessary. First, before starting the extensive documentary review of legal materials, including criminal cases, I was aware I may

read some materials (particularly cases) with difficult and potentially upsetting subject matters. Bryman reminds researchers to 'consider the possibility of physical or emotional harm to you … even if such a consideration is not included in an ethics form, it is something that you should consider very seriously'.[266] To mitigate against this possibility, I organised my research timetable to include frequent breaks in the doctrinal research phase. While the ethical challenges posed by the theoretical and doctrinal analysis of relevance were relatively minor, empirical research invited a host of ethical considerations.

Section 2.3.3. set out how participants' data was anonymised and stored, but it was important to protect participant confidentiality more broadly, during the interview process and in any research output. I ensured confidentiality of interviewees at all times, and regarded confidentiality in broad terms, understanding that 'confidentiality should extend beyond not naming participants to not revealing personal details which might give away a participant's identity'.[267] Diener and Crandall identify four key ethical questions which all researchers should consider, the first is 'whether there is harm to participants'.[268] Clarke and others engage with this question and state that 'a key component to protecting participants from harm is maintaining the confidentiality and security of records, meaning that you should keep the identities and records of individuals confidential'.[269] All participants were aware that other barristers were interviewed for the research, but I sought to prevent any of the participants becoming identifiable in any way. In the information sheet provided to barristers, I included a

[266] Tom Clark, Liam Foster, Luke Sloan and Alan Bryman, *Bryman's Social Research Methods* (6th edn, OUP 2021) 117.
[267] Colin Robson and Kieran McCartan, *Real World Research* (4th edn, John Wiley & Sons Ltd 2016) 220.
[268] Edward Diener and Rick Crandall, *Ethics in Social and Behavioral Research* (University of Chicago Press 1978).
[269] Tom Clark, Liam Foster, Luke Sloan and Alan Bryman, *Bryman's Social Research Methods* (6th edn, OUP 2021) 113.

section on this matter and clarified that 'There is a chance that you will remain identifiable to those whom you work closely with (or, for example, someone who recommended you to me as a participant), so full anonymity cannot be guaranteed, but your identity will remain confidential'.[270]

Preventing harm to participants in research is central to any research endeavour, but the prevention of harm also extends beyond participants in the research, and to the researcher themselves. Clarke and others label this principle as 'avoidance of harm to researcher'[271] and several studies have highlighted the need for researchers to protect themselves and consider their safety when conducting lone research.[272] All the interviews for this research were conducted on a one-to-one basis, and in a variety of locations. It was important, therefore, that I considered how best to keep myself safe during this process. Kenyon and Hawker suggest that 'the location and time of interviews and observations is … important when setting up safe research practices'.[273] In so far as this was possible, I tried to meet participants during working hours and, where interviews took place in person, in public spaces. Seeking to interview elites made it harder for me to exercise control over the location and timing of interviews, however, and as I was keen to secure interviews and did not always have the luxury of refusing to meet at a particular location and/or time proposed by an interviewee. In part, this is a result of the power imbalance in elite interviewing discussed earlier in this chapter and a more practical consideration that during working hours, barristers are working and often do not have time to schedule an interview.

[270] The full Information Sheet is provided in Appendix 4.
[271] Tom Clark, Liam Foster, Luke Sloan and Alan Bryman, *Bryman's Social Research Methods* (6th edn, OUP 2021) 117.
[272] Elizabeth Kenyon and Sheila Hawker, 'Once would be enough': Some reflections on the issue of safety for lone researchers' (1999) 2(4) International Journal of Social Research Methodology 313.
[273] ibid 317.

Prior to conducting the interviews, I was conscious that the imbalance of power in elite interviews may be exacerbated by my position as a young female researcher interviewing, at times, (older) male interviewees. This potential difficulty with fieldwork has been expanded upon in the latest edition of *Bryman's Social Research Methods,*[274] by a guest writer who formed part of the book's 'Social Research Methods Graduate Panel'. [275] Here, a graduate researcher, Minke, shared her experience of researching in a predominantly male environment and the difficulties this posed. Minke highlights that 'unfortunately, the qualities and characteristics that are inherent to us can sometimes increase the risk of harm, and they can strain or complicate the relationship between researchers and participants'.[276] She expands 'one issue that I encountered during fieldwork, during both my PhD and my masters, was the position of the young female researcher in a male-dominated research field'.[277] These remarks reflect a concern I had prior to conducting interviews, that the imbalance of power that is typical in elite interviews may be exacerbated by my position as a young female researcher. Being aware of this potential difficulty, I was required to consider my own safety in in-person interviews. To this end, I made sure all meetings would take place in public settings, such as cafés, coffee shops, or a semi-public space in a Crown Court setting.[278]

I must note that I found elite interviews to pose some difficulties in terms of the interview location. I can foresee situations whereby early career researchers - who are keen to recruit elite participants - may feel obliged to accept any interview location suggested by the elite participant. A researcher may feel they must accept to secure

[274] Tom Clark, Liam Foster, Luke Sloan and Alan Bryman, *Bryman's Social Research Methods* (6th edn, OUP 2021).
[275] ibid xxvi.
[276] ibid 117.
[277] ibid.
[278] Such as a café for the exclusive use of barristers and judges in certain Crown Court centres.

the interview, even where the location may be one where the researcher does not necessarily feel comfortable. Though there is useful literature that engages with researcher safety and dynamics with research participants, I found there to be a lack of specific guidance for keeping oneself safe during the interview process, and believe more attention, research, and guidance on this matter would be beneficial.

This chapter has sought to shine a light on the research process itself, and has detailed the methods adopted for the socio-legal exploration of evidential relevance. It has justified the mixed-method research approach, and the decision to interview participants, along with a theoretical exploration of relevance and a doctrinal analysis of appellate case law. The next chapter engages with the theoretical exploration of evidential relevance and considers academic framings of relevance.

CHAPTER 3: ACADEMIC FRAMING OF RELEVANCE

The preliminary chapters of this thesis have introduced relevance as a foundational evidential concept and situated it within criminal proceedings and the criminal justice process more broadly. The discussion thus far has highlighted how decisions on relevance are subject to a range of surround and field-level influences, that interact with and impact upon the frames decision-makers employ when deciding whether evidence is relevant. The salience and prominence of those influences upon decision-making is reinforced by the fact that relevance is rooted in notions of common sense and logic, that are open to influence and bear an inherent subjectivity. It is therefore important to explore what *informs* those determinations of common sense and logic, to further understanding of how relevance is understood and applied in the criminal courts.

This chapter considers how academics understand and explain relevance on a conceptual level. This discussion is situated within the context of Hawkins' decision field, and views academic framings of relevance as an informal field-level influences upon decision-making in the criminal courts.

In examining how legal academics frame and understand relevance, this chapter considers RQ1: 'What are the possible 'tests' for evidential relevance?'.[279] The introduction highlighted the academic development of two distinct academic framings of relevance known as logical relevance and legal relevance. The introduction highlighted that aside from the existence of two possible approaches to relevance, there has been little to no enquiry into the practical operation of either logical or legal relevance.[280] This thesis undertakes this task and conducts a practical enquiry into what evidential relevance means from an academic and conceptual perspective. It goes beyond those two approaches to relevance, and explores the existence of other academic framings that may be applied to relevance. This theoretical investigation of relevance enables us to identify and label different working definitions and tests of relevance, which may then inform how relevance is understood and used by legal professionals in practice.

To examine relevance on a theoretical level, section 3.1. explores lay framings of relevance and non-legal definitions of relevance that may, nevertheless, impact legal notions of relevance. Section 3.2. then considers academic framings of relevance in the evidential context, analysing the theoretical bases and origins of the two prevailing conceptions of relevance: legal relevance and logical relevance. The limitations of legal relevance and logical relevance are discussed, and a third, academic framing of relevance – termed 'enhanced relevance' – is then discussed. The overarching aim of this chapter is to explore and understand the broad conceptual approaches to relevance, as framed by legal academics. Hawkins' theoretical

[279] Chapter 1.1.
[280] See Introduction, II. 'Defining Relevance'.

framework is then used in subsequent chapters to help understand how individual actors (barristers) make sense and respond to these framings.

3.1. Lay framing of relevance

There is no definition of relevance contained in statute, nor a proscriptive statutory criterion for judges to consider when making decisions on evidential relevance. Instead, legal decision-makers draw upon common law guidance and, to some extent, lay notions of relevance. Within the broad context of admissibility, Jones suggests that judges apply a lay common-sense lens to relevance to assist their decision-making:

> In reality, judges will decide upon the admissibility of evidence by using their common sense, in combination with any guidance offered by statutory and common law. As judges are human beings, they are likely to be affected by the way in which a particular piece of evidence is presented and their individual view of the world.[281]

This excerpt shows how relevance in the legal context can be informed by common sense and, by implication, lay understandings of what it means for a piece of information to be relevant.

It is suggested that lay framings of relevance are instrumental in informing legal decision-makers' interpretations of evidential relevance. It is essential, therefore, to unpick and explore the matters of human experience and notions of 'common' sense that inform those lay framings of relevance. Given the element of subjectivity

[281] Imogen Jones, 'A Problem of the Past? The Politics of 'Relevance' in Evidential Reform (2012) 11(4) CIL 277, 280.

associated with relevance, we must first look to the ordinary construction and implications of the word and how they might inform relevance as a legal test in the criminal courts. The Oxford English Dictionary (OED) defines relevance as 'bearing on or connected with the matter in hand; closely relating *to* the subject or point at issue; pertinent to a specified thing'.[282] The OED then regards relevance as synonymous with terms such as: 'applicability, materiality, pertinence'.[283] At the forefront of this definition is the relational nature of relevance. By this it is meant that relevance can only be established in relation *to* something. Thomason offers a useful example on this point, stating that 'the proposition that evidence indicating that it is sunny outside is (or is not) relevant is nonsensical, unless there is a second statement to which that evidence relates (for example, my decision to wear sunglasses).'[284] Relevance in its ordinary usage, then, is not a one-dimensional concept and is underpinned by this broad relational characteristic. This feature of relevance generally is mirrored in relevance in the legal context. A piece of evidence in a criminal case must be 'pertinent to a specified thing'; evidence cannot be relevant in a general sense. In the criminal context evidence must be relevant *to* something, that 'something' being a fact in issue in the trial.

That relevance is always contingent upon another object, in both a legal and non-legal context, is a relatively straightforward proposition. Yet the threshold that must be met for that connection to be established is less clear cut. For example, the non-legal definition of relevance included above refers to several different thresholds, each expressed slightly differently. The phrases 'bearing on' and 'connecting with'

[282] Oxford English Dictionary, 'Relevant' (OED) <www.oed.com/Entry/161893?redirectedFrom=relevant#eid> accessed 2 January 2022.
[283] ibid.
[284] Matt Thomason, 'Previous Sexual History Evidence: A Gloss on Relevance and Relationship Evidence' (2018) 22(4) IJEP 343, 344.

imply a relatively low threshold is to be met before something will be regarded as relevant. Whereas ‘closely relating to the subject’ suggests a somewhat higher threshold to be met before something will be regarded as relevant. This is a basic but illustrative comparison to show that these assessments can pose some difficulty even in a non-legal context.

In the lay context, ambiguity around definitions of relevance may not be particularly problematic, but the same definitional ambiguity around legal relevance can have significant consequences. That is, the decisions that flow from decision-makers’ understandings of relevance can facilitate the inclusion or exclusion of evidence, which could have a material bearing on the arguments each party makes, the length of the trial, and even the outcome of the trial. Equally, the flexible nature of relevance may not be well-suited to legal arena where consistency and predictability are valuable (and arguably essential) commodities. This shows the need for a more precise definition of relevance in the legal setting that may be more conducive to ensuring consistency and predictability in legal decision-making on relevance, whilst still being workable in practice.

3.2. Relevance in an evidential context

This section considers how notions of relationality are dealt with in an evidential context, and discusses the tests and definitions of relevance that have been used by the courts to engage with these issues. Prior to this, several definitional points must be clarified. First, it is necessary to set out the precise form of relevance we are discussing in this part of the thesis. As discussed in the introduction, relevance can operate in two distinct ways: 1) as a standalone evidential concept, a requirement for

all pieces of evidence or 2) in conjunction with exclusionary rules of evidence (and in relation to inclusionary exceptions therein). This chapter is concerned with relevance as it operates in the general sense, as a normative assessment to be made in relation to all pieces of evidence, as distinct from exclusionary and inclusionary rules of evidence. This is so that we can isolate and explore the meaning of relevance in as much depth as possible, at its most basic level, before exploring how (if at all) understandings of relevance vary in other contexts. This chapter, therefore, does not consider relevance as it relates to other exclusionary and inclusionary rules of evidence.

When discussing relevance as an evidential concept, academic literature often refers to 'theories' or 'tests' of relevance, indeed the research questions posed in this thesis adopts the language of 'tests' of relevance. The term 'test' was used in the initial formulation of the research questions at the outset of the research, and is used to denote the *approaches* barristers take to relevance. Importantly, the term 'test' does not offer 'a decisive indicator as to what evidence should be excluded and what should be included'.[285] Instead, this thesis refers throughout to 'academic framings' of relevance, as they are academic summaries of the methods the court can employ to decide whether evidence is relevant/irrelevant for the purposes of evidential exclusion. Equally, it emphasises the central *interpretive* role of legal academics in explaining the different conceptual approaches to relevance.

When assessing whether a piece of evidence is relevant in a legal context, the precision by which these assessments are made is important. That cases be treated alike is a basic component of the rule of law,[286] and the English legal system prides

[285] Jonathan Doak, Claire McGourlay and Mark Thomas, *Evidence: Law and Context* (5th edn, Routledge 2018) 6.
[286] Paul Roberts, *Roberts and Zuckerman's Criminal Evidence* (3rd edn OUP 2022) 91.

itself upon its commitment to the consistency garnered by evidential rules and having 'evidentiary rules … compensate for epistemic deficiencies.'[287] Yet, there is no precise proscriptive test that legal professionals are to apply to when deciding whether evidence is relevant (or not). There seems to be some reluctance among pockets of the judiciary to theorise about relevance. This is seen in the following opinion of Judge LJ: 'the question whether evidence is relevant depends not on abstract legal theory but on the individual circumstances of each particular case'.[288] Here Judge LJ suggests that decisions about relevance must be individualised to circumstances and context, rather than being reliant upon general universal principle/s.

While context and 'individual circumstances of each case' can inevitably determine the *outcome* of a legal approach, they cannot define and *be* the approach in its totality. That is not to say this is what Judge LJ was claiming, but it raises questions as to how formal legal rules and principles interact with informal influences upon decision-making. While there is no proscriptive legislative guidance for legal professionals on relevance, common law principles and guidance have been developed in the appellate courts that provide the lower courts some assistance on approaches to decisions on relevance. Legal academics have sought to explain and label the approaches that the courts have, at times, taken to relevance. It is these academic expressions of relevance that are referred to as 'academic framings', as reflections of academic perspectives on the criminal justice field.

The two predominant framings of relevance in the (limited) academic literature on the topic are, as set out in the introduction to the thesis,[289] logical relevance and

[287] Frederick Schauer 'The Role of Rules in the Law of Evidence' in Christian Dahlman, Alex Stein, Giovanni Tuzet (eds) *Philosophical Foundations of Evidence Law* (OUP 2021) 79.
[288] *R v Guney* [1998] 2 Cr App R 242, 265.
[289] Introduction section II.

legal relevance. They are explored in more depth in this chapter, alongside a third framing of relevance that has emerged more recently, known as 'enhanced relevance'. Though this third relevance test has not received as much academic consideration as the other framings of relevance, its increased significance in the legal arena makes it an important concept that requires examination.. This is particularly so as enhanced relevance has gained traction in recent Law Reform proposals, that are discussed in section 3.3.3.

3.3. Academic framing of relevance: logical, legal and enhanced relevance

The introduction to this thesis outlined the two main academic framings of relevance that frequently appear in academic literature: logical relevance and legal relevance.[290] These framings of relevance and their theoretical bases are explored in this section, as well as a less-discussed third academic framing of relevance. Each of the academic framings of relevance engage with the two core elements of relevance that were identified in the Introduction and discussed above in a non-legal context.[291] Those two core elements are the relational nature of relevance, and its imposition of a threshold to establish that relationality. While the different conceptualisations of relevance engage with those two elements of relevance, they differ in the way in which they do so. Section 3.3.1. considers logical relevance, section 3.3.2. legal relevance and 3.3.3. enhanced relevance, before section 3.4. concludes the chapter.

[290] Introduction Section II.
[291] Introduction Section II.

3.3.1. Logical relevance

The first academic framing of relevance discussed is known as logical relevance, which essentially questions whether admitting a piece of evidence will, on the basis of common sense and logic, make a fact in issue more or less likely. If yes, the evidence will be relevant and therefore admissible; if no, then the evidence is inadmissible. In terms of the relational question, logical relevance uses a 'common sense' approach to whether the piece of evidence in question appears, logically, to be linked to the fact in issue. These characteristics of logical relevance have a long history, seen as early as the 1800's where Thayer regarded relevance as 'an affair of logic and not of law'.[292] Thayer elaborates on the nature of relevance in the legal setting:

> The law furnishes no test of relevancy. For this, it tacitly refers to logic and general experience— assuming that the principles of reasoning are known to its judges and ministers, just as a vast multitude of other things are assumed as already sufficiently known to them . … To the hungry furnace of the reasoning faculty the law of evidence is but a stoker.[293]

This explanation of relevance relies upon a (stated) assumption that principles of reasoning rest on a seemingly shared view of common-sense knowledge. Thayer makes the specific assumption that common-sense understandings about whether X makes Y more or less likely in a lay context can act as a basis for decisions about whether X makes Y more or less likely for the purposes of proof in the criminal court.

A similar assumption is reflected in more recent discourse in the House of Lords, where Lord Steyn suggested that 'to be relevant the evidence need merely have some tendency in logic and common sense to advance the proposition in

[292] James Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Little Brown 1898) 269.
[293] ibid 271.

issue'.[294] It appears accepted that logic and common-sense are uncontentious, and given their centrality to this particular academic framing of relevance, it is thereby of the upmost importance to know what information and assumptions *inform* those notions of logic and common sense. Equally, it is important to question whether, and the extent to which, it is acceptable for untrammelled 'common-sense' understandings of the world to inform legal determinations of relevance.

Some academics regard a logical relevance framing as the correct and accepted approach to decision-making around relevance, believing it 'now relatively settled that "relevance" means the same in law as it does in logic and reason'.[295] It is well-established how logical relevance engages with the relational issue, the connection is predicated upon non-legal notions of common sense and logic. Once a connection between the evidence and a fact in issue is established, logical relevance does not require an additional threshold be met before evidence will be regarded as relevant. Stephens' summary of logical relevance emphasises this point, when he defines relevance in the following terms:

> [A]ny 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 or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other[296]

On this definition of logical relevance, it is a concept that retains its ordinary (non-legal) meaning and so requires no specific additional legal test. On one view, the test for relevance need not encompass more than this. It permits a contextual assessment to

[294] *R v A (no 2)* [2001] UKHL 25, 31.
[295] Matt Thomason, 'Previous Sexual History Evidence: A Gloss on Relevance and Relationship Evidence' (2018) 22(4) IJEP 343, 344.
[296] James Fitzjames Stephen, *Digest of the Law of Evidence* (12th ed, Macmillan 1948) 4.

be made by legal professionals and, therefore, seems a tacit affirmation that legal professionals are better placed than a jury to make this initial evidential assessment. In this sense, judges are performing their function of 'filtering' the evidence that is put before a jury. Invariably, this particular framing of relevance gives significant power and discretion to legal professionals to determine questions of relevance, based upon their individual-specific notion of common-sense and/or even their grasp of others' common-sense understandings of a particular matter. This is problematic for the reasons outlined in the Introduction, as decision-making could be informed by assumptions, biases and stereotypes. It is not the case that everyone has the same 'common-sense' understanding of the world, free from negative influence, and so there is potential for unjustifiable inconsistency.

The principal benefit of a logical relevance framing of relevance is its apparent simplicity. It recognises the highly contextual, variable, and relational decisions that must be made on evidential relevance and strives to avoid the imposition of a complex legal test or criterion on these decisions. Instead, it asks what is ostensibly a straightforward question that accords with notions of logic and reason. Where its inherent simplicity may be viewed a strength, however, it is simultaneously responsible for a potential weakness associated with logical relevance. As noted above, notions of common-sense and logic are accepted without contention, and with little discussion as to their breadth. With common-sense and logic, it is inevitable that there will be a high degree of subjectivity in decision-making, and with little by way of guidance or principle to direct the subjective engagement in decision-making. By subjectivity in decision-making, it is meant that decision-makers apply their own individual-specific lens of common sense, which is not necessarily common at all.

Fundamentally, logical relevance offers a response to the relational question, but offers little certainty in terms of a specified threshold to regulate this connection. Under the guise of simplicity, logical relevance bears a significant degree of uncertainty. Decision-makers are afforded a wide discretion to apply their individual notions of logic in an arena which ordinarily strives to ensure uniformity, consistency, and certainty. Inevitably, then, logical relevance perpetuates the reality that 'judicial interpretation injects a significant element of uncertainty into the law'.[297] The difficulty extends beyond only individual-centric notions of common sense and logic, however, as there are collective and social influences that also interact to influence individual-level decision-making.

Where the open and subjective nature of logical relevance presents a principled issue, an equally important practical issue is presented. Were all evidence of any logical value to be regarded as relevant and therefore admissible in a criminal trial, the court system would become simply overloaded with evidence to such an extent that proceedings in some circumstances could become unworkable. This is because it would take a significant amount of time for prosecution and defence barristers to present and explain the relevance of evidence to the jury. It would then take an equally significant amount of time for the jury then to weigh and consider that volume of evidence, while also running the risk that they miss the most important bits because they are swamped in so much information with only marginal bearing on the facts of the case.

If taken to its natural conclusion, logical relevance could render admissible a significant volume of evidence, however marginal its probative value. This position

[297] Robert Sharpe 'How Judges Decide' in Rabeea Assy and Andrew Higgins (eds) *Principles, Procedure, and Justice: Essays in Honour of Adrian Zuckerman* (OUP 2020) 92.

does not seem workable nor desirable in a criminal justice system with a significant backlog of cases,[298] nor would it be in the best interests of defendants, complainants, or witnesses for whom the prospect of timely justice is paramount. Decisions made on this basis of logical relevance alone would likely permit a huge amount of evidence that may have little or no bearing on the advancement of justice in a case.

There is also a paradox in logical relevance, which sees judges filter the evidence presented to juries based on assessments of common sense and logic. It is widely accepted that, in a criminal courtroom, judges are to determine questions of law and while juries determine questions of fact.[299] Yet logical relevance presents a non-legal, factual assessment which, nevertheless, falls to the judge, rather than the jury. This presents a principled paradox in logical relevance, and is discussed further in section 3.3.2. where legal relevance is considered. From this discussion, it is apparent that a logical relevance academic framing aligns with lay conceptions of relevance and presents an empirical question to the judge (the question of whether a piece of evidence makes a fact in issue more or less likely). Crucially, however, the mechanism by which it does this is not scientific nor proscriptive, but relies heavily on decision-makers' common sense understandings of the relationship between one issue and another. We turn now to the second academic framing of relevance which appears to offer a more proscriptive and 'scientific' mechanism to guide decision-making on relevance but, as we shall see, not without difficulties of its own.

[298] Ministry of Justice, 'Criminal Court Statistics Quarterly, England and Wales, October to December 2020' (MOJ 2021) 7.
[299] Peter Joyce, *Criminal Justice* (3rd edn, Taylor and Francis Group 2017) 256.

3.3.2. Legal relevance

The second dominant framing of relevance identified by legal academics is known as legal relevance. It engages the same initial question as logical relevance: asking whether the evidence is logically relevant. It then asks whether there is an additional 'plus value' attached to the evidence. If both those requirements are satisfied, the evidence will be regarded as relevant and prima facie admissible; if not, the evidence will be regarded as irrelevant and therefore inadmissible. The structure of legal relevance may be usefully expressed in a mathematical equation, created by legal academic Andrew Choo:

Logical relevance + plus value = legal relevance[300]

There are several matters to address given the presentation of this particular academic framing. First, in terms of the relational question or aspect of relevance, legal relevance requires the same initial filter as logical relevance. It requires that, on the basis of common sense and logic, a piece of evidence is connected to a fact in issue. While both framings of relevance ask this same initial question, the distinction between them relates to the threshold they attach to relevance. Instead of leaving the threshold question of relevance at the behest of logic and common sense, a legal relevance framing seeks to define that threshold and elevate it over and above a threshold based on logic. The mechanism through which it does this is consideration of the evidential 'plus value'.

The term 'plus value' in legal relevance refers to the probative value of the evidence, and the plus value exists when the probative value of the evidence outweighs its potential prejudicial effects.[301] Legal relevance, therefore, provides a

[300] Andrew Choo, *Evidence* (6th edn, OUP 2021) 3.
[301] ibid.

threshold by which evidence that is logically relevant but has minimal probative value will not be admitted at trial. Legal relevance works in two ways, first where it compels the positive admission of evidence. This is where evidence that is logically relevant and has sufficient probative value is regarded as relevant and therefore is prima facie admissible. Legal relevance can also operate in a negative sense, that is, where it serves to *exclude* evidence that is logically relevant but nevertheless has insufficient plus value, or probative value. Equally, evidence could have significant probative value but simultaneously be unfairly prejudicial. It is worth highlighting at this stage that as an academic framing of relevance, legal relevance has a quantitative dimension to it, in the sense that it is insufficient to show merely that evidence has any degree of probative value, it must be shown to have a particular 'degree' of probative value. This then raises an important question of the precise way in which 'plus value' is defined and indeed demonstrated in practice. As such, legal relevance appears to provide a quantitative threshold, but the detail of that threshold is bound up in a qualitative process for making decisions about whether that threshold is in fact reached.

Legal relevance has several advantages, on a practical level it mitigates against the problem highlighted above that using logic as the sole metric by which to determine whether evidence is relevant, may permit an unworkable volume of evidence. Legal relevance and its imposition of a higher threshold, therefore, counters this practical difficulty of logical relevance. Aside from a practical benefit, legal relevance has a potential principled benefit. Legal relevance can be distinguished from logical relevance as it seeks to identify a more defined threshold or approach to relevance, and one that can be defined without sole recourse to subjective notions of common-sense and logic. The imposition of a more stringent and, arguably, tangible threshold provides a means by which evidence can be filtered before it is put before a jury and,

regardless of potential difficulties, this remains an essential challenge to be addressed by any framing of relevance. Related to this, is the need for jury deliberations to be focused, so as to maximise the jury's ability to return a factually accurate verdict. Where a significant volume of minimally probative evidence is admitted the potential for juror distraction is likely increased, which in turn may hinder their ability to return a factually accurate verdict. Plainly, 'the fewer and simpler the issues left to the jury the less chance there is of a miscarriage of justice'.[302] Legal relevance serves to filter out evidence of low probative value, and evidence where its probative value is outweighed by its potential prejudicial effects. The aim is that only evidence that is salient to jurors' consideration is admitted, and to assist jurors in reaching a factually accurate verdict.

The legal relevance framing is projected in quantitative terms, including its elevated evidential threshold, but, as previously stated, the process by which decisions on probative value are made is a highly qualitative process. It is therefore important to highlight that there remains a question as to what informs that qualitative process and the decision as to whether the probative value of a piece of evidence outweighs its potential prejudicial effects. Both aspects of this equation afford decision-makers considerable discretion in making these inherently subjective assessments. Even where decision makers adopt this particular framing of relevance, then, it is essential to interrogate what informs and influences those central assessments.

Another shortcoming of the legal relevance framing relates to the potential for legal relevance to produce, seemingly, *illogical* decisions. This thesis suggests that despite the appearance of precision legal relevance has a significant element of ambiguity, relating specifically to the plus value requirement. Choo regards 'plus value'

[302] *Patel* [1951]2 All ER. 29 [30] per Byrne J.

as the requirement for the total probative value of the evidence to outweigh any potential prejudice.[303] On his view, this is a simple assessment which hinges on one measure (probative value) *outweighing* the other (potential prejudice). Such an assessment is familiar to judges in England and Wales, as Section 78 of the Police and Criminal Evidence Act (PACE)[304] contains the same test and provides judges with a statutory means of excluding evidence where its prejudicial effects outweigh its probative value, or where to admit the evidence 'would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it'.[305] Nevertheless, the precise threshold demanded by 'plus value' is not altogether clear. Choo interprets the plus value as a PV < PE balancing equation, where one must outweigh the other;[306] yet 'plus value' is an elusive term and Choo's characterisation of it based on his own academic interpretation. It goes without saying that ambiguity around the meaning of plus value may lead to inconsistent decision-making in a practical legal setting.

To illustrate this point with a hypothetical example, attaching a hypothetical 'score'[307] to these two issues (prejudice and probity). Say a piece of piece of information has a probative value of four, it may be admitted when it is weighed against information with a prejudicial value of two. That same information of probative value four would, however, not be admitted when measured against other information with a prejudicial score of six. This may well be appropriate in an evidential context, but it inevitably requires considerable engagement with the meaning of 'prejudicial' and

[303] Andrew Choo, *Evidence* (6th edn, OUP 2021) 3.
[304] Police and Criminal Evidence Act 1984, section 78 (1).
[305] ibid.
[306] Andrew Choo, *Evidence* (6th edn, OUP 2021) 3.
[307] Attaching a score to probative value and prejudicial effects is equally hypothetical, and not reflective of legal decision-making in practice.

'probative', which involve unavoidably qualitative interpretative processes. Fundamentally, this is the calculation encompassed within assessments of evidential 'plus value' and demonstrates the inherent ambiguity with the term and the (im)precise nature of the test for legal relevance.

An additional shortcoming of a legal relevance framing relates to its potential to produce seemingly illogical decisions. Thomason has previously regarded legal relevance a 'logically bankrupt concept'[308] due to the capacity for the 'plus value' requirement to qualify matters of logic. Fundamentally, legal relevance demands that logic and law be considered alongside one another in an assessment of relevance, which creates a potentially problematic dynamic. That is, the consideration of logic and law together has the potential, paradoxically, to produce decisions that run the risk of seeming *illogical*. The case of *Blastland*[309] exemplifies these difficulties, in which the Lords unanimously held a piece of evidence to be logically relevant, but due to its low probative value, legally irrelevant and therefore inadmissible. The facts of *Blastland* are summarised here, and the case is considered further in the doctrinal analysis in Chapter 4.[310]

Blastland was convicted of the buggery and murder of a 12-year-old boy (K). He pleaded not guilty, arguing that he had paid K for consensual intercourse but had not killed him. The defence said that K had been murdered by another man, M, whom Blastland had seen nearby at the time. Blastland was able to describe (accurately) M. The defence also sought to adduce evidence that M had also told someone that a young boy had been murdered, before the body had been discovered. This evidence

[308] Matt Thomason, 'Previous Sexual History Evidence: A Gloss on Relevance and Relationship Evidence' (2018) 22(4) IJEP 343, 344.
[309] *R v Blastland* [1986] AC 41.
[310] Chapter 4.3.2.

was inadmissible at trial, and the Court of Appeal later dismissed the appeal on this matter. The case progressed to the House of Lords, where Lord Bridge[311] delivered the (unanimous) decision of the court. Dismissing the appeal, Lord Bridge said the evidence of M stating that a boy had been murdered, before the body had been discovered, had been rightly excluded at trial as it lacked 'direct and immediate relevance'[312] to the issues in the case. This case exemplifies the ability of legal relevance to act in a negative sense and exclude logically relevant evidence; a decision which appears to run counter to notions of justice and fairness. In sum, it exemplifies how legal declarations of relevance will not always chime with a lay understanding of relevance.

The existence of a discrepancy between logic and legality is not, however, novel in the law of evidence. Exclusionary rules of evidence operate routinely in the criminal courts and can at times produce similar results to legal relevance, that is, results that may seem to run counter to the (elusive) notions of common sense and logic. For instance, exclusionary rules regulating a complainant's sexual history[313] provide multiple means by which evidence of a complainant's sexual history can be excluded, despite such evidence being (potentially) logically relevant to a fact in issue. Nevertheless, that there is *potential* for legal relevance to produce illogical outcomes is important, and must be acknowledged. Not least because the legitimacy of the justice process relies, to a significant extent, on justice both being done (normative legitimacy) and being seen to be done (perceived legitimacy). Where illogical

[311] An interesting fact on Lord Bridge: he was the only Law Lord to sit in the House of Lords without a university degree.
[312] *R v Blastland (Douglas)* [1986] AC 41, 54.
[313] Youth Justice and Criminal Evidence Act 1999, section 41.

evidential decisions are taken, there is potential for legitimacy in the justice process to be diminished.

A filter, or a clearly defined threshold, seems a necessary element of any framing of relevance, to avoid the problems described above. What is less certain is quantitatively *where* this filter ought to apply, and qualitatively how the filter is constructed and operates to determine relevance. There are alternative approaches to relevance that could potentially be taken, for example if legal relevance is to be the preferred test, the requirement that probative value outweighs prejudicial effects could be substituted with a more stringent evaluation involving *degrees* of probative value. Such a distinction may seem of minimal significance, but may in fact have significant consequences for decision-making on relevance, and may explain the different interpretations and approaches to relevance that have been seen in the courts. For present purposes, legal relevance is to be understood in the terms Choo describes it; where the 'plus value' assessment is a probative value vs prejudicial effects test, requiring one to outweigh the other. The following section explores the third academic framing of relevance known as enhanced relevance.

3.3.3. Enhanced relevance

I suggest there is an equally important test for relevance beyond the oft-cited logical and legal relevance, this being 'enhanced relevance'. This label for the relevance test is not my own, it derives from the Law Commission, whose use of enhanced relevance will be discussed in this section. First, it is necessary to set out what enhanced relevance is. It differs from logical relevance in that it seeks to define, in specific terms, the threshold attached to relevance and differs from legal relevance in the detail of

those terms. As with logical and legal relevance, enhanced relevance asks the same first initial question: whether there is, on the basis of common sense and logic, a link between the evidence and a fact in issue. Similar to legal relevance, it then requires an additional threshold is met in order to establish this link. The difference, however, is that enhanced relevance requires a clearly defined threshold is met before the relational link will be established.

For enhanced relevance to be established, the evidence must be logically relevant to a fact in issue, and must then have *substantial probative value.* This is a higher threshold than legal relevance's 'plus value' requirement that evidence is more probative than prejudicial. The benefit of an enhanced relevance approach is that it counters the two principal issues that were identified with logical relevance. First, its use of a high threshold offers a tangible and practical regulation upon the volume of evidence that may be put before a jury. Second, enhanced relevance appears to present a defined threshold that may reduce the scope for decision-making based on innately subjective notions of common sense. The problem remains, however, that much rests upon how 'substantial' is interpreted and operationalised by decision-makers in practice. If common sense and logic remain at the core of those assessments then a potential for prejudice, biases and socio-contextual influences may still shape constructions of the term 'substantial'. In short, the scope for interpretive latitude remains in the application of an enhanced relevance framing.

At its core, enhanced relevance emphasises the legal aspect of decision-making on relevance, and defines the threshold in legal terms likely familiar to legal decision-makers. Asking a legal decision-maker to consider 'substantial probative value' may be a far more palatable and familiar assessment, rather than one that engages with notions of logic and common-sense alone. The converse implication of

this, however, is that the ostensible precision and legalistic nature of enhanced relevance may serve to provide a veneer of legality to decisions made on flawed reasoning.

It must be noted that enhanced relevance has not (at least explicitly) been applied as part of the general test for relevance. There are examples, however, that exist elsewhere in the law and within reform agendas, that illustrate the way in that enhanced relevance may be understood and used. Illustratively, since 2003 an enhanced relevance test has featured in the non-defendant bad character provisions.[314] Section 100(1) of the Criminal Justice Act (CJA)[315] holds that non-defendant bad character evidence is admissible if:

> (a) it is important explanatory evidence,
>
> (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

The inclusion of an enhanced relevance test in the context of non-defendant bad character has been largely uncontroversial. In the two decades since its enactment there have been no attempts to develop or clarify the 'substantial probative value' element of the legislation. That the enhanced relevance test has been largely untouched may be a testament to its apparent specificity and clarity on the threshold attached to relevance. Whether it does, in fact, provide specificity and clarity on relevance is discussed further in this section. Beyond the bad character context,

[314] Criminal Justice Act 2003 section 100.
[315] ibid.

enhanced relevance has also come to the fore in recent months in a Law Commission consultation paper concerned with *Evidence in Sexual Offences Prosecutions.*[316]

The consultation paper considers evidential matters across several areas related to sexual offence prosecutions, one such area being sexual behaviour evidence. The consultation paper considers the current legislative framework that regulates the admission of sexual behaviour evidence,[317] offers a critique of the regime and considers possible reforms.[318] The Law Commission proposes a new 'structured discretion model' to regulate the admission of sexual behaviour evidence. Important for our purposes, is that this structured discretion model encompasses an enhanced relevance test. The Law Commission suggests that the structured discretion model for sexual behaviour evidence should have two requirements, that:

> (1) the evidence has substantial probative value; and
>
> (2) its admission would not significantly prejudice the proper administration of justice[319]

It is the first limb of the model that the Law Commission regard an enhanced relevance test, where evidence must have 'substantial probative value'.[320] The Law Commission offers some elaboration on 'enhanced relevance', both in the glossary of the

[316] Law Commission, *Evidence in Sexual Offences Prosecutions*: *A Consultation Paper* (Law Com CP No 259, 2023).
[317] Youth Justice and Criminal Evidence Act 1999 section 41-42.
[318] Law Commission, *Evidence in Sexual Offences Prosecutions*: *A Consultation Paper* (Law Com CP No 259, 2023) 183-205.
[319] ibid 185.
[320] The LC could have gone further still as the wording 'substantial probative value' is also used in the non-defendant bad character provisions (Criminal Justice Act 2003 section 100(1); but 'substantial probative value' is followed by additional addendums in section 100(1)(b).

consultation paper[321] and within the main text of the paper itself.[322] In broad terms, the Law Commission defines it as follows:

> An enhanced relevance test for admissibility is one that requires that evidence is more than simply relevant. It may require, for example, that the probative value of the evidence outweighs its prejudicial effect, or that evidence has significant weight, often referred to as substantial probative value.[323]

It is notable that the Law Commission defines enhanced relevance here in very broad terms and in a way that encompasses the legal relevance framing discussed in the previous section. Subsequently in the consultation paper, however, the Law Commission refines the definition of enhanced relevance in the context of sexual behaviour evidence. It is the definition adopted in this context, in relation to sexual behaviour evidence, that this section engages with.

In the specific context of sexual behaviour evidence, the Law Commission specifies the enhanced relevance test is to be understood as a requirement for substantial probative value.[324] That the Law Commission has used and developed an enhanced relevance test in the SBE context may have important implications for relevance in its general application. It provides legal decision-makers with an alternative and 'stricter' test for relevance that may filter into their broader decision-making on relevance where engagement with a specific statutory regime is not necessary. Enhanced relevance bears some similarities to legal relevance, in that it

[321] Law Commission, *Evidence in Sexual Offences Prosecutions*: *A Consultation Paper* (Law Com CP No 259, 2023) xvii.
[322] ibid 186.
[323] ibid xvii.
[324] ibid 186.

provides a mechanism for assessing the probative value of evidence. Enhanced relevance in the sexual behaviour context differs, however, in that it provides further clarification on what the probative threshold actually is. It remains to be seen how this detail of the relevance threshold plays out in practice, and this is something considered in relation to the empirical data gathered for this research.

This chapter has shown the three dominant academic framings of relevance each take a subtly different approach towards the threshold they attach to relevance. Logical relevance deals with the threshold in its own terms, it demands the evidence is logically related to a fact in issue. Legal relevance requires evidence to meet a threshold based on probative value, where the probative value of the evidence must outweigh its prejudicial effects. Enhanced relevance also requires evidence to meet a probative threshold, but this threshold requires evidence to have a substantial degree of probative value. It is necessary to note at this stage that enhanced relevance exists within and in relation to specific rules only, and so its potential as a general rule is just that: one with potential to be expanded. The different approaches to the threshold question of relevance are surmised for the reader in the following table:

Table 2 - Summary of relevance tests

Test for relevance	**Threshold**
Logical relevance	Logical connection between evidence and fact/s in issue
Legal relevance	Probative value to outweigh potential prejudicial effects of evidence
Enhanced relevance	Substantial probative value

3.4. Conclusion

This chapter has identified three dominant academic framings of relevance, that may be used by legal professionals making decisions on evidential relevance in the criminal courts. Each of the framings differ in their approach to the threshold question of relevance; that is, the threshold they demand be met before evidence can be regarded as relevant. This chapter has explored the bases of the two framings for relevance oft-cited in academic literature; logical relevance and legal relevance. It has been argued that looking at relevance through the lens of these two framings is insufficient. To do so is to ignore a third framing of relevance that has operated in some manifestation quietly in the criminal courts for nearly two decades - with little academic or practitioner comment - but with important consequences. Enhanced relevance is identified as a third dominant academic framing of relevance, as an approach which requires the highest threshold is met – substantial probative value - before evidence may be regarded as relevant. Enhanced relevance may have an increasingly important function in the criminal courtroom, given its recent endorsement by the Law Commission in the context of sexual behaviour evidence. That the Law Commission has advocated for a central role for enhanced relevance in a notoriously difficult area of law may have implications for relevance in the general sense, and the way that legal professionals engage with decision-making on relevance in across the criminal courts.

The three academic framings of relevance are drawn upon in subsequent chapters and underpin Chapter 4's doctrinal analysis of relevance, to explore how judges approach and apply relevance tests in the appellate courts. They are then used as reference points and to aid analysis in the examination of empirical data gathered from interviews in Chapters 5, 6, 7 and 8. There, they are used to explore and extrapolate meaning from barristers' discussions of how they select and apply

relevance tests in practice. Collectively, then, the proceeding chapters unpick and extricate some of the complexities and uncertainty associated with relevance, and seek to provide clarity on how legal professionals engage with relevance both within the judiciary and at the Bar.

CHAPTER 4: APPELLATE FRAMING OF RELEVANCE

This chapter continues the exploration of field-level influences upon legal decision-making, but moves from the informal academic influences upon the legal field, to consider formal field-level influences upon decision-making. For this, this chapter conducts a doctrinal review of relevance, and examines appellate framings of relevance. That is, how relevance has been understood and applied by judges in the appellate courts. In so doing, this chapter engages with RQ2: 'How are relevance tests applied in appellate courts?'. The doctrinal analysis examines a range of cases from England and Wales, including those from the Court of Appeal, the House of Lords (as it was) and the Supreme Court. The doctrinal analysis in this chapter is organised thematically, based on the two key elements of relevance identified in Chapter 3:[325] the relational nature of relevance, and the threshold test attached to relevance.

Section 4.1. briefly sets out nature and scope of the doctrinal research, and considers how judges in the appeal courts *view* relevance in broad terms, including its

[325] Chapter 3.2.

function as an evidential device. Section 4.2. examines how courts understand and treat the relational nature of relevance, and the requirement for a relational connection between a piece of evidence and a contested fact. Section 4.3. then considers how courts approach the threshold question of relevance, or the threshold that must be met for the relational connection between evidence and a contested fact to be established. It identifies and explores different approaches to the threshold of relevance, as applied by the courts in different cases.

This chapter is organised thematically, based upon the three academic framings of relevance identified in Chapter 3. The chapter tracks where those academic framings and labels of relevance have come from, and the ways in which they have been used in appellate decisions. While the three dominant academic framing of relevance are a useful lens through which to examine judicial treatment of relevance, they only take the analysis so far and section 4.4. goes on to consider the relationship between relevance and a specific legislative provision, Section 78 of the Police and Criminal Evidence Act (hereafter PACE).[326] Section 4.5. then reflects on the findings of the doctrinal analysis, and offers some concluding remarks.

From the review of appellate decisions, this chapter identifies a clear theme: that the appellate courts appear to prefer a logical test for relevance, rather than the legal relevance or enhanced relevance tests identified in the previous chapter.[327] This is not a universal finding, and this chapter also highlights some inconsistent and distinct approaches to the threshold question of relevance. The doctrinal analysis provides a detailed insight into how relevance is treated and engaged with in the criminal courts. In broad terms, this chapter is concerned with exposing the specific

[326] Police and Criminal Evidence Act 1984 Section 78.
[327] Chapter 3.3.2. and Chapter 3.3.3.

points of inconsistency in the case considerations of relevance; it seeks to understand how relevance has been framed by judges in case law. The focus of the doctrinal analysis is to enhance understanding of *how* relevance has been defined, interpreted, and used, and the framings of relevance adopted in the courts. It is not an attempt to understand the legal and non-legal influences upon judges when they have made such assessments. The analysis and information gained from the doctrinal analysis in this chapter then informs the questions asked of barristers in interviews and is therefore present within the empirical chapters, where Hawkins' four dominant frames are used to help better understand relevance in a practical legal setting.

It is the results of this approach to doctrinal analysis that are discussed in this chapter, with a view to understanding the ways in which the courts have approached and framed relevance. Before exploring the specific approaches to relevance seen in case law, it is first worth considering how the courts view relevance in broad terms. For this, I began by searching for any discussions or insight into how judges view relevance as an evidential concept, before exploring how they apply and understand it in specific case contexts.

4.1. Perspectives from the Bench

Before exploring the ways in which the courts have approached relevance, in terms of the relational aspect and threshold question, it is important to consider how the courts view relevance in broad terms. The introduction to this thesis shared the academic suggestion that the courts' approach to relevance is 'relatively settled'.[328] This view was, to some extent, affirmed by judges in this review of case law. The doctrinal

[328] See Introduction Section II.

analysis showed little controversy or debate in discussions around relevance, and the courts generally spoke of relevance with certainty, referring to the 'well-established principles'[329] by which questions of relevance are decided.

It was striking that a significant volume of cases were analysed for this chapter and in only *one* of those cases was any conceptual difficulty with relevance acknowledged. This itself is an interesting finding, which indicates that relevance decisions may well be governed by well-established principles that lead to routinised and internalised decision-making. It is important, therefore, to explore the effect of this on judicial decision-making. In *Makin v Attorney General of New South Wales*[330] (in the Privy Council) the then Lord Chancellor acknowledged the existence of difficulty in relation to relevance as an evidential principle. When considering a complex issue of relevance and admissibility, he opined 'the statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other'.[331]

This passage indicates that the then Lord Chancellor sees relevance as conceptually settled, but the application of those principles can pose difficulty in practice. It is unfortunate, however, that the Lord Chancellor did not take the opportunity to elaborate on those 'easy to state' principles. Judicial explanation of key principles would have been particularly useful given the absence of statutory or procedural assistance as to decision-making around relevance. A similar statement was made by the judge in *Nolan Atkins,*[332] where it was held that 'whether the evidence is relevant or not must be judged on its merits applying the well-established

[329] *R v Nolan Atkins* [2005] EWCA Crim 3378 [28].
[330] Makin v Attorney General of New South Wales [1894] AC 57,
[331] ibid 65.
[332] R v Nolan Atkins [2005] EWCA Crim 3378.

principles'.[333] Again, no elaboration was provided as to the nature of those well-established principles.

The review of case law showed that broader considerations of relevance as an evidential concept were rare. The courts did not generally consider the status or operation of relevance in such general or principled terms. Rather, the review of cases showed that relevance was subject to almost no critique in the courts. Instead, the courts engaged with relevance as related to the cases and the context before them. The next section considers appellate courts' framing of relevance in terms of how the courts approach the relational aspect of relevance.

4.2. Relevance and relationality

Chapter 3 identified two central issues pertaining to academic framings relevance; the relational nature of relevance and the threshold applied to relevance. As we would expect, the doctrinal analysis showed that the courts routinely engaged with the first element of relevance when framing relevance and enforced the requirement that the evidence must relate *to* something. That is, it must be connected or be pertinent in some way to a contested fact or a fact in issue. The analysis showed this requirement could manifest itself in two ways, with the evidence relating either 1) directly to elements of the crime charged or 2) indirectly to a broader contested fact.

Multiple cases surveyed show that the relational requirement of relevance was generally associated with or connected directly to the elements of the crime charged. For example, in *S,*[334] the Court of Appeal had to decide whether a piece of evidence admitted at trial was, in fact, relevant in the context of a child neglect case. In *S* the

[333] R v Nolan Atkins [2005] EWCA Crim 3378.
[334] *R v S* [2016] EWCA Crim 33.

court had to consider whether the presence of a small quantity of amphetamine found in the appellant's kitchen was relevant to the appellant's conviction under Section 1 of the Children and Young Person Act 1933,[335] and the key question of whether the appellant had neglected her child. In considering the relevance of the evidence, the Court of Appeal held that the evidence had been rightly admitted on the basis that it related the defendant's state of mind at the time of the offence and, specifically 'whether the appellant at the time in question was reckless or indifferent to the safety of the child'.[336] This relates directly to the mental element of the crime charge and spoke to the 'wilful' or subjectively reckless[337] neglect of the child in question. The relational link between relevance and a contested fact in *S* is, therefore, related explicitly to the mens rea element/s of the crime charged.

The courts took a similar approach in *Bailey*,[338] and held that a contested piece of evidence was not relevant, as it did not relate to the elements of the specific crime. In *Bailey*, the defendant had been convicted of murder, and the court found he had strangled the deceased to death during sexual activity. The applicant appealed against his murder conviction on the basis that relevant evidence had been excluded during the trial. The evidence in question was video footage from the deceased's computer which showed her performing sex acts upon herself. At trial, the defence had argued that this footage 'was relevant to show that the deceased … had expressed an interest in rough sexual activities'.[339] The Court of Appeal dismissed this appeal on the basis that 'the material did not provide anything relevant to the jury's consideration of the

[335] Children and Young Person Act 1933 Section 1.
[336] *R v S* [2016] EWCA Crim 33 [6].
[337] In *R v S* [2016] EWCA Crim 33 [2] the court clarified that 'wilful' was interpreted correctly by the trial judge to mean 'subjectively reckless'.
[338] *R v Bailey (Richard)* [2019] EWCA Crim 2502.
[339] *R v Bailey (Richard)* [2019] EWCA Crim 2502 [11].

key issue of whether the applicant intended to cause more than trivial or transitory injury'[340] at the time of the victims' death. The issue of whether the accused intended to cause trivial or transitory injury is one pertaining to the mental element of the crime. This, again, shows the close relationship between the relevance of a piece of evidence and the elements of the crime in question.

In *Usayi*[341] the court followed this approach and introduced the notion of 'remoteness' in finding a piece of evidence to be irrelevant. In *Usayi* the appellant was convicted of two offences of sexual activity with a person with a mental disorder, contrary to Section 38(1) Sexual Offences Act 2003.[342] One element of the appeal centred around the judge's decision to exclude a hospital note containing information about the complainant appearing to lie to care workers. The Court of Appeal rejected this limb of the appeal on the basis that the evidence was not relevant to the core elements of the crime. Section 38(3)(b)[343] specifies that an offence will be committed if the touching in question involved the penetration of the complainants' mouth with the accused's penis. These were the core element of the crime. On this, the court held:

> We are unable to see that an extended debate about the construction of the hospital note would have been of the remotest relevance to the question of whether the appellant's penis was in the complainant's mouth. It is too remote – too far removed from the issue to be relevant.[344]

In one sense, it is not surprising that the relational part of relevance is contingent upon the elements of the crime charged in this direct way. It provides the court a tangible

[340] ibid [14].
[341] *R v Usayi (Farai)* [2017] EWCA Crim 1394.
[342] Sexual Offences Act 2003 Section 38(1).
[343] ibid Section 38(3)(b).
[344] *R v Usayi (Farai)* [2017] EWCA Crim 1394 [32].

and identifiable object to link relevance to, and to measure it against. In terms of criminal appeals it then aids the court in its determinations of relevance and is a relatively clear and straightforward metric that sets the parameters of the appeal. It can also be presumed that this association between relevance and elements of a crime apply equally to offences and the elements of defences. As such, the review of case law showed a consistent and clear connection between relevance and the elements of crimes was present in case law. This was to be expected and serves to reinforce the relational element of relevance that must be established, directly between the evidence and the elements of crimes.

Other cases engaged with the relational aspect of relevance but in a slightly different, and less direct way. In some cases, the courts establish the relational link between a piece of evidence and something other than the specific elements of a crime, such as a broader fact in issue. The Privy Council in *Myers*[345] explicitly acknowledged this fact and affirmed that the relational link between evidence and a fact in issue can be either direct or indirect:

> The starting point is that evidence is not admissible unless it is relevant. It is relevant if, but only if, it contributes something to the resolution of one or more of the issues in the case. It may do so either directly or indirectly.[346]

An indirect link between relevance and a contested fact, in practice, means that evidence need not relate to an element of the crime (or defence) but to another important issue in the case. This was seen in *Williams (Jordan)*[347] where the Court of Appeal affirmed that evidence of a defendant's possession of a knife a week before a

[345] *Myers v The Queen* [2015] UKPC 40.
[346] ibid [37].
[347] *R v Williams (Jordan)* EWCA Crim 2751.

knife attack was relevant to his account of his whereabouts and account of his behaviour at the time an offence was committed.[348] Equally, in *Gadsby*[349] the court was concerned with the principal issue of whether the appellant had placed a device under his wife's bed.[350] The Court took the opportunity to clarify the type of evidence that would be relevant to this issue:

> …[E]vidence would be admissible if it was capable of increasing or diminishing the probability of facts indicating some other person had done it. Thus evidence that showed that another person had both the opportunity of, or the motive for, placing the device under the bed was clearly relevant.[351]

The Court here is explicit in identifying that the relational connection between relevance and a fact in issue is not limited to the construction of the crime itself (the elements of the crime), but to other related case-specific matters too. Several other cases took a similar approach and reached a conclusion on the relevance or irrelevance of evidence following thorough consideration of the precise issue to which the evidence pertained.[352] In a Privy Council case, Lord Herschell explored the relational aspect of relevance, and commented on the direct and indirect ways in which it can be established, while also discussing the fluid nature of that connection. It is worth recounting his words in full:

> It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those

[348] ibid 2751 [24-26].
[349] *R v Gadsby* [2005] EWCA Crim 3206.
[350] ibid [25].
[351] ibid.
[352] *R v Usayi* [2017] EWCA Crim 1394; *R v PB* [2016] EWCA Crim 1462; *R v McDevitt* [2014] EWCA Crim 2309.

> covered in 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 show the commission of other crimes does not render it inadmissible if it is 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.[353]

The Lord Chancellor reinforces that the relational link between evidence and a fact in issue can be established in relation to a wide range of facts and related narratives within a case. The skill of the advocate in constructing that narrative is, then, an important aspect of relevance as it is the responsibility of the advocate to identify potential links and 'make the case' for the relevance of the evidence. In cases where a relational link was not established, the courts were forthcoming in finding the evidence to be irrelevant. Several cases reinforced the fundamental principle that irrelevant evidence is inadmissible: 'If not relevant, it was not admissible by any route. It is not a question of discretion; irrelevant evidence is inadmissible.'[354]

Whether a relational link is established directly to the elements of a crime, or indirectly to broader facts in the case, the doctrinal analysis showed the courts routinely engaged with the relational aspect of relevance. The cases examined show the courts were active in ensuring that evidence was connected *to* something in the case, and specifying precisely the issue to which it pertained. This, it appeared, was

[353] *Makin v Attorney-General for New South Wales* [1894] A.C. 57, 65: 756-757.
[354] *R v Usayi* [2017] EWCA Crim 1394.

of assistance to the appeal courts in giving them a tangible metric that sets parameters of the appeal. To approach the relational question in this way appears appropriate, and, tellingly, it prompted no obvious contradictions nor inconsistencies in the courts approaches to that question. This contrasted with the threshold question of relevance that is considered at length in the next section.

4.3. Relevance thresholds

The 'threshold question' of relevance denotes the evidential threshold to be met before the connection between evidence and a fact in issue will be established. Essentially, it is the level at which, or the extent to which, a piece of evidence renders a fact in issue more or less probable. The doctrinal analysis shows the appellate courts took a range of approaches to this question and, at times, applied different relevance framings. Nevertheless, the analysis shows logical relevance was the dominant appellate framing for relevance seen in the case law. This section uses the conceptions of relevance discussed in Chapter 3 to organise the different approaches to the threshold question seen in case law. Accordingly, this section separates the analysis in three parts based on the courts' different approaches to relevance. Section 4.4. then goes on to consider an additional approach to relevance the courts have seemingly adopted, one that relates to Section 78 of the Police and Criminal Evidence Act (PACE).[355]

[355] Police and Criminal Evidence Act 1984 Section 78.

4.3.1. Logical relevance

This section considers if and how a logical test for relevance is used in case law. As discussed in Chapter 3, logical relevance holds that evidence must have some tendency in logic and common sense to advance a proposition.[356] The threshold it applies, then, is one of logic; it requires no additional evidential threshold be met before evidence will be regarded as relevant. The use of a logical test for relevance was seen in a number of cases reviewed for the doctrinal analysis, but two different *approaches* to a logical relevance test emerged.

The first approach arose where the courts identify a logical relevance framing of relevance and appear to regard it as a sufficient approach to relevance questions. This approach is labelled in this thesis as 'simple logical relevance'. The second approach arose where the courts acknowledge that a logical test for relevance is the correct approach to relevance, but seem to regard it as insufficient on its own. What happens in this latter instance is that the courts accept a logical relevance test but also require a de minimus style threshold test to apply alongside logical relevance. This approach is labelled here as 'De minimus logical relevance'. For the purposes of this section, then, the analysis is separated in two parts based on these two distinct positions. Where the second approach to logical relevance is concerned, that which encompasses a de minimus style threshold test, the distinction between this form of logical relevance and legal relevance is explained.

[356] *R v A (no 2)* [2001] UKHL 25, 31.

i) Simple Logical Relevance

The first category of cases to be considered here are those in which the courts use a logical framing of relevance and regard it a sufficient mechanism for filtering evidence. The case often cited as authority for the judicial support of logical relevance is *Kilborne;*[357] regarded by Roberts as 'the modern locus classicus'[358] of logical relevance. In *Kilborne*, Lord Simon endorses a logical relevance framing, and offers some thoughts on relevance more broadly:

> Evidence is relevant if it is logically probative or disprobative of some matter which requires proof. I do not pause to analyse what is involved in "logical probativeness", except to note that the term does not of itself express the element of experience which is so significant of its operation in law, and possibly elsewhere. 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. [359]

This excerpt shows Lord Simons' commitment to a logical test of relevance, which requires evidence to have a connection with a fact in issue, or a 'matter which requires proof'.[360] The threshold for deciding whether the evidence does this is one of logic; on his understanding of relevance the court must establish that the evidence is 'logically probative or disprobative'.[361] The brief elaboration on 'logical probativeness'[362] is indicative of the simplicity that often surrounds assessments of logic in a legal setting, and provides little by way of guidance to lower courts when engaging with matters of

[357] *DPP v Kilbourne* [1973] AC 729 (HL).
[358] Paul Roberts, *Roberts and Zuckerman's Criminal Evidence* (3rd edn, OUP 2022) 208.
[359] *DPP v Kilbourne* [1973] AC 729 (HL) 756.
[360] Ibid.
[361] Ibid.
[362] Ibid.

logical probativeness. The excerpt from Lord Simon above is often cited as a key authority on relevance, but the discussion that precedes and follows it is also of importance to the discussion on relevance. Lord Simon begins by distinguishing between 'four concepts in the law of evidence: (i) relevance; (ii) admissibility; (iii) corroboration; (iv) weight'.[363] He goes on to identify the distinction between relevance and evidential weight:

> Weight of evidence is the degree of probability (both intrinsically and inferentially) which is attached to it by the tribunal of fact once it is established to be relevant and admissible in law.[364]

Lord Simon views relevance and determinations of evidential value as distinct from one another; and that once an assessment of (logical) relevance has been made, the determination of evidential value is one for the jury. His distinction between evidential relevance and evidence weight can be expressed in the following terms:

i) Relevance: considers whether a piece of evidence makes a contested fact more or less probable;
ii) Weight: considers *the extent to which* a piece of evidence makes a contested fact more or less probable.

On this view of the evidential process, the jury are responsible for assessing the evidential value of a piece of evidence, and the extent to which it makes a fact in issue more probable or less probable. This function, as distinct from assessments of relevance, is similar in some respects to that which is performed by the 'plus value' requirement of legal relevance (logical relevance + 'plus value' = relevance). They are

[363] *DPP v Kilbourne* [1973] AC 729 (HL) 756.
[364] ibid.

similar in the sense that they are both mechanisms for measuring the probative value of evidence. Indeed, the plus value requirement of legal relevance requires the decision-maker (barristers) to consider the evidential value of a piece of evidence. Lord Simon sees this not a function of relevance, but of a separate assessment to be made by the jury at a later stage in proceedings. This relates back to the discussion in the previous analysis, Chapter 3.3 identified the distinct roles of judges and juries, with the former responsible for questions of law and the latter for questions of fact. Lord Simon's interpretation is in keeping with this distinction and regards assessments of evidential value a function of the jury rather than a consideration of relevance test in law.

If relevance and weight are understood in these terms, the key differences between Lord Simons' approach and the legal relevance test are two-fold. First, the party responsible for assessing evidential value can differ. In Lord Simons' conception of logical relevance, assessments of evidential value are to be made by juries. In legal relevance, such assessments can be made by barristers when deciding what evidence is relevant to their case and are ultimately then made by the judge. Second, the placement of this assessment differs between the two approaches. For logical relevance, the assessment of evidential value is not considered within a relevance test in law but is a matter for the jury within their deliberations. In legal relevance, the evidential value (under the guise of 'plus value') is considered earlier in proceedings, at the point before the evidence is introduced in the trial. Put another way, the evidence must be demonstrated to have a particular degree of 'plus value' (probative value) before it is admissible before the jury which then makes its own determinations on evidential value in deliberations.

Almost three decades later, the House of Lords endorsed a similar approach to relevance as that of Lord Simon in *Kilborne.* In *A*[365] the court appears to affirm logical relevance as the correct test of relevance. Lord Steyn, as the most senior law Lord at this time, held that 'relevance and sufficiency of proof are different things … to be relevant the evidence need merely have some tendency in logic and common sense to advance the proposition in issue'.[366] No further detail was provided on how this assessment is to be made, or on the parameters within which those decisions should be made. In a subsequent case only two years later, Lord Steyn varied his explanation of relevance slightly:

> A judge ruling on a point of admissibility involving an issue of relevance has to decide whether the evidence is capable of increasing or diminishing the probability of the existence of a fact in issue. The question of relevance is typically a matter of degree to be determined, for the most part, by common sense and experience.[367]

This second statement on relevance offers more detail on the remit in which common-sense is to be exercised. He introduces the notion of probabilities, and includes the possibility of evidence not only advancing an issue but detracting from an issue in a negative sense. That is, for a piece of evidence to make a fact in issue either more likely or indeed *less likely.* There is not a contradiction in these two statements by Lord Steyn; rather, the second interpretation offers clarification and detail beyond the often referenced summarisation of relevance in *A.* Indeed, central to both explanations of

[365] *R v A* [2001] UKHL 25.
[366] *R v A* [2001] UKHL 25 [62].
[367] *R v Randall (Edward Peter)* [2003] UKHL 69 [20].

relevance is the non-legal notion of common sense, as the basis for decision-making around relevance, and the implicit approval of this approach to questions of relevance.

Subsequent cases have seen the court follow Lord Steyn's endorsement of logical relevance. When discussing a complex matter of relevance and admissibility, the Court of Appeal in *Mader*[368] relies on academic texts that discuss relevance[369] which regard evidence to be 'relevant as a matter of logic'.[370] This exemplifies a close relationship, in this case, between academic framings of relevance and appellate framings of relevance and the scope for each to inform the other.

The court in *Mader* state their explicit approval of the passage from Lord Steyn quoted above and concur with that framing of relevance.[371] Equally, in *Gordon*[372] the court appear to endorse a logical test for relevance, and apply a test of logic similar to that identified in *Kilborne* and applied in *A*. The test it applies rests on notions of probability and whether evidence makes a fact in issue (relating to the appellant's intention to supply drugs) more or less probable. The court held that 'to be relevant, that evidence would have to be logically probative of that intention, i.e. that the evidence made [the defendant's] intention to supply those drugs more or less probable'.[373] This also reinforces the point made in section 4.2., that courts are adept in engaging directly with the specific elements of the crime when considering relevance. In *Gordon*, this meant the courts engaging specifically with whether the appellant *intended* to supply drugs to a third party.

[368] *R v Mader* [2018] EWCA Crim 2454 [22].
[369] Michael Howard, Daniel Hochberg, Peter Mirfield (eds), *Phipson on Evidence* (15th edn, Sweet and Maxwell 1999).
[370] *R v Mader* [2018] EWCA Crim 2454 [21].
[371] ibid [22].
[372] *R v Gordon (Stafford George)* [1995] 2 Cr. App. R. 61.
[373] ibid [64].

In each of these cases, the appellate courts are engaging with and applying a logical test of relevance; deciding whether the evidence is, on the basis of common sense and logic, relevant to a fact in issue. No additional threshold is deemed necessary, the threshold is one of logic, in the ordinary sense of the word. It is notable that in the cases discussed here, the courts regard the approach to relevance grounded in logic as a sufficient test. When the judges discussed the approach to relevance, no issues were identified with the logical test, and no concerns raised about it its operation in practice. The next section considers cases where the courts appear to endorse the logical relevance test but to regard it an *in*sufficient mechanism for filtering evidence.

iii) De Minimus Logical Relevance

The doctrinal review of case law revealed that, in some instances, the courts regarded a logical relevance framing as the correct approach, but identified some shortcomings in its practical operation and apply instead a *de minimus* logical relevance test. In *Robinson (Wayne),*[374] the appellant appealed multiple convictions on the basis that voice recognition evidence should not have been admitted at the original trial. Hearing this appeal, the Court of Appeal was concerned with two questions relating to the voice recognition evidence: 'was the evidence relevant? If it was, did it pass the threshold of admissibility'.[375] The court seemed to start from a similar position to the court in *Kilborne*, in that it endorsed a logical approach to relevance, going no further than finding 'the evidence was plainly relevant'.[376] It did not elaborate further on this point, nor reference any additional legal test. In the absence of a legal test, it appears this

[374] *R v Robinson (Wayne)* [2005] EWCA Crim 1940.
[375] ibid [18].
[376] ibid [23].

initial assessment of 'plainly relevant' is one based on a logical connection between the evidence and fact/s in issue. Once the court in *Robinson* established that the evidence was relevant, it went on to consider an additional assessment to be made by the court, that relates to the evidential value of the evidence. The court opined:

> Is the evidence such that no reasonable jury, properly directed as to its defects, could place any weight upon it?" Put the other way round: if the evidence is such that a jury properly warned could place some weight on it, it should be admitted. It is our view that this basic threshold of admissibility is a low threshold.[377]

The court's assessment as to whether some weight could be placed on the evidence takes place once the evidence has been regarded as relevant. Here, the court in *Robinson* diverges from the approach taken in *Kilborne.* In Kilborne the court deems logical relevance as a sufficient test for evidential relevance, whereas in *Robinson* the court appears to use logical relevance but require an additional assessment be made as to the extent to which said evidence makes a fact in issue more or less likely. This seems to be a way in which the court can assess the value of the evidence, separate from relevance, as a discrete question pertaining to evidential admissibility. In one sense, it is a tacit indication from the court that some threshold ought to be applied to assess evidential value, once logical relevance has been established.

This is a fundamentally different approach to that taken in *Kilborne*, as this statement suggests a judge is to make a normative assessment as to the evidential value of a piece of evidence as an essential prerequisite to evidence being admitted. Though this task is couched in language that alludes to the role of the jury, similar to *Kilborne*, *Kilborne* refers to the jury as the party who weighs evidence after admission,

[377] *R v Robinson (Wayne)* [2005] EWCA Crim 1940 [19].

whereas *Robinson* refers to the jury as a justification for judges to assess the evidential weight *prior* to evidential admission. The consideration of evidential value in *Robinson* takes place after relevance is established, it is therefore not part of a relevance test itself. Yet the court suggests it is appropriate to take those two questions together, perhaps suggesting some form of threshold test is a necessary addendum to a logical relevance framing. The implication here is that logical relevance, alone, may be an insufficient mechanism for filtering evidence. The threshold applied in *Robinson* however is clarified to be 'a low threshold', perhaps something akin to a *de minimus* style threshold.

Employment of a de minimus style threshold test was seen in a number of other cases, where *minimal* probative value was used as a justification for excluding otherwise logically relevant evidence. Exclusion of marginally relevant evidence was identified in *Gordon* as a fundamental principle of relevance that 'evidence of marginal relevance may and should be excluded if it would lead to a multiplicity of subsidiary issues'.[378] This view appears in a number of previous cases,[379] and has been affirmed in subsequent cases.[380] In addition, it is clarified in the 2024 edition of Blackstone's Criminal Practice where there is a specific and instructive section titled 'Evidence of Marginal Relevance'.[381] Here it suggests 'on occasions, the effect of evidence which is technically admissible is so slight that it is wiser not to adduce it, especially if there is any danger of a contravention of the PACE [Police and Criminal Evidence Act] 1984, s. 78'.[382]

[378] *R v Gordon* [1995] 2 Cr. App. R. 61, 64.
[379] *AG v Hitchcock* 1847 1 Exch 91 105; *R v Patel* [1951] 2 All ER 29, 30.
[380] *R v Singh (Katie)* [2010] EWCA Crim 591; *R v Reynolds (Nicholas) [*2019] EWCA Crim 2145 [35]; Haddock 2011 EWCA Crim 303.
[381] *Blackstone's Criminal Practice 2024* F1.19.
[382] ibid.

As recently as 2020 the Supreme Court has lent their support to this position and state that 'the general test of whether evidence is admissible is whether it is relevant (*or of more than minimal relevance*) to the determination of any fact in issue in the proceedings'.[383] Leading practitioner guidance further lends support to this position and asserts:

> The cardinal rule of the law of evidence is that, subject to the exclusionary rules, all evidence which is sufficiently relevant to the facts in issue is admissible, and all evidence which is irrelevant or *insufficiently relevant* to the facts in issue should be excluded.[384]

It is worth briefly returning to the excerpt from *Gordon* included above, where the court suggest evidence of marginal relevance should be excluded 'if it would lead to a multiplicity of subsidiary issues'.[385] It is important at this stage to note that this statement from Henry LJ followed his expression that 'the principles to be applied seem to us to be clear'.[386] This shows the court are making a forward-looking assessment to the impact of their evidential decisions, and are mindful of the implications of their decisions on relevance and admissibility; i.e., if the admission of relevant evidence would lead to a multiplicity of subsidiary issues. This is an interesting approach to decision-making that was reflected, to a significant extent, in interview data and is discussed in Chapter 7.1. Henry LJ does not expand on the rationale for excluding evidence where it would lead to a multiplicity of subsidiary issues, but it likely has both a practical and principled justification. The principled justification for this

[383] *Shegang Shipping Company Ltd (in liquidation) (Appellant) v HNA Group Company Ltd (Respondent)* [2020] UKSC 34 [104].
[384] *Blackstone's Criminal Practice 2024* F1.11.
[385] *R v Gordon* [1995] 2 Cr. App. R. 61, 64.
[386] ibid.

position is presumably that the evidence may not be of assistance to jury, with potential to confuse rather than assist their deliberations. The intrinsically related practical justification, it seems, is that the courts have finite time in which to hear and conclude cases, and therefore would wish to avoid lengthy consideration of multiple issues that may do little to assist a jury.

Nearly 30 years after the decision in *Gordon*, time and resource pressures on the justice system, inclusive of the criminal courts, have only worsened. Chapter 1.4 highlighted shifts in the legal surround and field, that have resulted in a rise in managerial values throughout the justice process. These shifts may make Henry LJ's statement of principle more prevalent and pertinent today than it was in 1995. The courts in the current justice climate may be more willing to exclude evidence based on the subsidiary issues that may be induced by evidential decisions. This forward-looking approach to decision-making has been seen in another case, which will be discussed at length in section 4.4.2. for its consideration of legal relevance. For present purposes, it is interesting to note that the House of Lords in *Blastland*[387] rely on a decision in *Roberts (John Marcus)*[388] where the court held that to find a piece of evidence relevant 'would open a series of new issues involving the investigation of all people to whom Paul Evans [the applicant in that case] had given other statements revealing the source of his knowledge'.[389] This was used, in part, as justification for the evidence being irrelevant. The sentiment in both *Gordon* and *Roberts* are reflected in the latest practitioner guidance. Blackstone's stipulates that 'Evidence of marginal relevance may be excluded on the grounds that it would lead to a multiplicity of

[387] *R v Blastland (Douglas*) [1986] AC 41.
[388] *R v Roberts (John Marcus)* (1984) 80 Cr App R 89.
[389] ibid 94-95.

subsidiary issues, involving the court in a protracted investigation and distracting it from the main issue'.[390]

It is suggested here that, rather than referring to evidence of 'marginal relevance' it is more accurate to discuss relevant evidence with low probative value. Crucially, evidence here will not be regarded as 'irrelevant', to the contrary it will be relevant but nevertheless excluded due to its minimal probative value. In this sense, it differs from legal relevance, whereby the probative value is assessed within relevance. This means that an item of evidence that is deemed to have insufficient probative value will not be regarded as relevant at all and will be inadmissible on the basis of irrelevance. This is a subtle but important distinction that goes beyond mere semantics; it speaks to the precise basis upon which fundamental evidential decisions are made. The use of a de minimus style threshold test alongside logical relevance is an indication of the courts acknowledging a logical test for relevance but, in some circumstances, finding it an insufficient means of effectively filtering evidence, thereby requiring additional mechanisms.

This section has shown that logical relevance framings are a consistent and prominent feature in case law, with courts frequently referring to notions of common sense and logic to underpin decision-making around relevance. Importantly, logical relevance places the threshold question – the extent to which a piece of evidence makes a fact in issue more or less likely – outside of relevance. The threshold issue is considered either a question of evidential weight for the jury ('simple logical relevance'), or an initially legal one that follows relevance where the evidence is of low probative value ('de minimus logical relevance'). This section has shown that the

[390] *Blackstone's Criminal Practice* F1.19.

logical test for relevance is widely accepted in the appellate courts, and the nature of logical relevance appears relatively settled. Whether logically relevant evidence is subsequently admissible, however, is the point of divergence, and this section has shown the two approaches taken by the appellate courts in this regard. The first approach sees the court decide how much probative value the evidence has, when deciding how much weight to afford evidence. Alternatively, the courts may apply a *de minimus* style threshold test to prevent the admission of relevant evidence with low probative value. The next section moves on from logical relevance and considers how the appellate courts have engaged with a legal relevance framing.

4.3.2. Legal relevance

The previous section has explored the two approaches taken to logical relevance in the courts. The key difference in the legal relevance test is the courts' approach to the 'threshold question'. As discussed in Chapter 3.3.2, legal relevance requires two things: 1) that the evidence is logically relevant and 2) that the evidence has some form of 'plus value'.[391] It is the plus value that is the mechanism by which a threshold test operates in legal relevance, or put another way, it is *within* the relevance test that the extent to which a piece of evidence makes a contested fact more or less likely is considered. If the evidence is logically relevant but does not have sufficient 'plus value' (its probative value does not outweigh its prejudicial effect), it will not surpass the relevance threshold. This renders it legally irrelevant and therefore inadmissible.

Although the outcome of a decision on relevance must always be binary – something either is or is not relevant – legal relevance acknowledges a spectrum of

[391] Andrew Choo *Evidence* (6th edn, OUP 2021) 3.

relevance. A number of cases, including those where the court endorses logical relevance, have referred to degrees of relevance.[392] Notably Lord Steyn, who is often associated with a preference for logical relevance, believes 'the question of relevance is typically a matter of degree'.[393] Understanding relevance in this way is more akin to a legal test for relevance that engages with the probative value of evidence, and at the very least speaks to relevance as a quantifiable concept, with assessments of degrees of relevance. Once the first limb of legal relevance has been established (logical relevance), legal relevance requires a 'plus value' that relies on a familiar formulation to the law of evidence; asking whether the evidence's probative value outweighs its prejudicial effects. The case often cited as the central authority for legal relevance is *Blastland.*[394] In *Blastland,* the House of Lords held that a piece of evidence had logical relevance but was, nevertheless, legally irrelevant. The facts of *Blastland* were set out in Chapter 3[395] but are summarised again here to aid analysis.

Blastland was convicted of the buggery and murder of a 12-year-old boy (K). Blastland pleaded not guilty and argued that although he had paid K for consensual intercourse, he was not involved in K's death. Blastland's defence was that K had been murdered by another man, M, whom Blastland had seen nearby at the time he had left K. Blastland was able to accurately describe M. The defence also sought to adduce evidence that M had told a third party about the murder of a young boy prior to the body being discovered. This evidence was inadmissible at trial, and the Court of Appeal later dismissed the appeal on this matter. The case progressed to the House

[392] *R v A (no 2)* [2001] UKHL 25 [48]; *R v Blastland* [1986] AC 41 [62].
[393] *R v Randall (Edward Peter)* [2003] UKHL 69 [20].
[394] *R v Blastland (Douglas)* [1986] AC 41.
[395] Chapter 3.3.2.

of Lords, where Lord Bridge[396] delivered the decision of the court. Dismissing the appeal, Lord Bridge said the evidence had been rightly excluded as it lacked 'direct and immediate relevance'[397] to the issues in the case. Lord Bridge seemed to take a somewhat narrow view of the issues in the case:

> The issue at the trial of the appellant was whether it was proved that the appellant had buggered and murdered Karl Fletcher. Mark's knowledge that Karl had been murdered was neither itself in issue, nor was it, per se, of any relevance to the issue. What was relevant was not the fact of Mark's knowledge but how he had come by that knowledge. He might have done so in a number of ways.[398]

To avoid speculation,[399] the Lords thought it preferable to remove the issue from the jury and did so by regarding the evidence as irrelevant. This decision exemplifies a legal relevance framing in practice; with evidence viewed as logically relevant but not *sufficiently* so to be considered legally relevant, as it lacked 'direct and immediate'[400] relevance. This shows apparent degrees of relevance that can apply to notions of relevance in a legal setting. The threshold attached to relevance in *Blastland* was one that required the probative value of the evidence to outweigh its potential prejudicial effects. As Carter puts it:

> The House in *R.* v. *Blastland* seems to indicate that a degree of probative significance greater than minimal relevance is required of a person's knowledge or state of mind before evidence of that person's statements … can be received.[401]

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[396] An interesting fact on Lord Bridge: he was the only Law Lord to sit in the House of Lords without a university degree.
[397] *R v Blastland (Douglas)* [1986] AC 41, 54.
[398] ibid.
[399] ibid.
[400] ibid.
[401] Peter Carter, 'Hearsay, Relevance and Admissibility: Declarations as to State of Mind and Declarations Against Penal Interest' [1987] 103 (Jan) LQR 106, 111.

The juxtaposition between logically relevant evidence being legally irrelevant is striking and has been subject to a significant degree of criticism. Roberts highlights the obfuscation that can arise using a legal relevance framing, finding that 'it hardly makes for transparency in judicial decision-making to label the evidence 'irrelevant', since its relevance can hardly be doubted from a common sense point of view'.[402]

This response to *Blastland* highlights a central issue that can arise with legal relevance, that it can produce seemingly illogical decisions, and ones that may go against 'ordinary' notions of common sense, fairness, and justice. While the law is no stranger to ordinary conceptions being transposed into a legal concept[403] and adopting a legal meaning, this is particularly difficult where relevance – a central feature of everyday discourse - is concerned. Further, legitimacy of criminal proceedings relies on wider public *perceptions* of legitimacy; that may be undermined by decisions that seem to conflict with collective and seemingly shared notions of logic and fairness. This fact is best expressed in the key principle, encapsulated by Lord Hewart CJ, 'that justice should not only be done, but should manifestly and undoubtedly be seen to be done'.[404] The risk with legal relevance - as seen in Blastland's 'major collision between policy and logic'[405] - is its tendency to produce seemingly *un*just decisions, or at least give the perception of an unjust decision.

It is perhaps for this reason that the doctrinal analysis showed that relatively few cases adopted a *Blastland* approach to relevance. One case where a Blastland-style approach to relevance was applied, however, is *Tinsley.*[406] The facts of *Tinsley* are as

[402] Paul Roberts, *Roberts and Zuckerman's Criminal Evidence* (3rd edn, OUP 2022) 190.
[403] For example, character evidence transposes non-legal discourse into a legal setting and gives 'character' a specific legal meaning.
[404] *R v Sussex Justices Ex p. McCarthy* [1924] 1 K.B. 256, 259.
[405] Ian Dennis, *The Law of Evidence* (5th edn, Sweet & Maxwell 2013) 78.
[406] *R v Tinsley* [2007] 1 Cr App Rep 43.

follows: D was convicted of two counts of indecent assault against the complainant (V), who was his niece. V also alleged she had been separately sexually abused by her grandfather and her step-grandfather. Prior to D's conviction, the step-grandfather had pleaded guilty to the relevant charges,[407] and the grandfather 'admitted the allegations made against him by the complainant',[408] and was subsequently charged with indecent assault but died before proceedings commenced. The question on appeal was whether the evidence pertaining to those other allegations[409] was relevant and should have been admitted by the trial judge. Allowing the appeal, the Court held that neither piece of evidence was relevant to the key issue of whether D had abused V and the evidence should, therefore, not have been admitted. Though lengthy, it is useful to recount the full passage of the judgment:

> The general principle is that for evidence to be admissible as relevant, it must be logically probative (or disprobative) of a fact in issue between the parties. The question is therefore, what was it that the Crown intended to prove by putting this material before the jury? The fact that both the grandfather and the step-grandfather admitted abusing the Complainant could not possibly be relevant, in itself, to the issue of whether or not the Appellant abused the Complainant … It follows that the only purpose for which the material could have been put before the jury was to establish that because she had told the truth in relation to her grandfather and step-grandfather, the jury could be satisfied that she was telling the truth in relation to the Complainant. But the mere fact that the Complainant

[407] *R v Tinsley* [2007] 1 Cr App Rep 43 [3].
[408] ibid.
[409] The evidence in relation to the grandfather's admission of indecent assault, and evidence of the step-grandfather's conviction for indecent assault offences.

has told the truth on other occasions, even if in the same context, cannot be logically probative of the facts that she alleges in relation to the Appellant.[410]

It seems that the Court reaches its conclusion by applying a 'direct and immediate' interpretation of relevance, though omits reference to those specific terms. The substance of their decision is much the same as *Blastland,* however, as it sees evidence which might be logically relevant regarded as irrelevant due to the lack of sufficient probative value to the key issue at hand.

In some cases, there were subtle echoes of legal relevance where the courts alluded to a balancing exercise between probative value and prejudicial effect as part and parcel of relevance considerations. In *McDevitt,*[411] the court considered the sole ground of appeal that images admitted in a robbery trial 'were of marginal relevance and wholly prejudicial in their effect'.[412] In considering the appeal, the Court of Appeal accepted the applicants' submission that the evidence was prejudicial to the applicant's case, but regarded it as not *unfairly* prejudicial.[413] Assessing degrees of prejudice in this way speaks to a legal relevance framing where probative value is weighed against potential prejudicial effects of evidential admission.

In *McKay*[414] the Court of Appeal also implied that a legal relevance test is the correct test for relevance. Here, the court seemed to include an assessment of probative value within the question of relevance, whilst also considering the potential prejudicial effects of the evidence: 'we consider that that evidence was relevant and probative and, apart from being relevant and probative, in no other way prejudicial, or

[410] *R v Tinsley* [2007] 1 Cr App Rep 43 [13].
[411] *R v McDevitt* [2014] EWCA Crim 2309.
[412] ibid [10].
[413] ibid [12].
[414] *R v McKay (Patrick Arthur)* [2007] EWCA Crim 2889.

unduly prejudicial to the appellant'.[415] This excerpt shows the Court of Appeal considering the probative value of the evidence as well as the degree to which the evidence may be prejudicial. Such assessments are characteristic of legal relevance which requires those considerations as part of the relevance test itself. In both *McKa*y and *McDevitt* the Court of Appeal can be seen to align itself with a legal relevance framing, encompassing assessments of probative value and prejudicial effect within it. As stated previously, however, they do so in a less overt (or perhaps less egregious) way than in *Blastland*. Assessing the probative value of evidence is by no means a straightforward exercise, and the next section considers the final relevance test introduced in Chapter 3.3.3., enhanced relevance, which requires a 'substantial probative value' threshold is met for relevance to be established.

4.3.3. Enhanced relevance

Chapter 3 highlighted a third test for relevance, known as enhanced relevance, which requires that for evidence to be relevant in a criminal trial it has logical relevance and substantial probative value. To remind the reader, enhanced relevance derives from more specialist tests for relevance (such as the legislative non-defendant bad character provisions) and has recently featured in law reform proposals relating to sexual behaviour evidence. As such, I had not expected to see enhanced relevance in the review of cases, but was interested, nonetheless, in whether it was alluded to or hinted at in case law as a potential general rule.

The difference between legal relevance and enhanced relevance is the evidential threshold required; where legal relevance requires that the probative value of the

[415] ibid [27].

evidence outweighs its potential prejudicial effects, enhanced relevance requires more, and demands that the probative value is substantial. Enhanced relevance is, therefore, not concerned with the balancing act performed by the plus value in legal relevance, but an elevated test of probity, and the application of a consistent threshold on that axis alone. In the doctrinal review undertaken in this thesis, I found only one instance where a potential enhanced relevance test was favoured in a general evidential setting. This was Viscount Simon in *Harris,*[416] who, when reflecting on the "real question" of "what is meant by evidence being relevant", suggests that 'relevant' "does not necessarily mean 'logically probative", nor should evidence be excluded "if it is otherwise relevant… merely because it is prejudicial". Rather, he endorses the view of Lucius Stone in an article in the Harvard Law Review[417] which suggests that 'all matters having *sufficient* probative value can be given in evidence'.[418] Viscount Simon goes on to affirm the view of Lucius Stone, and supports a threshold based on 'sufficient probative value'. Sufficient probative value is, unfortunately, a somewhat opaque term but one that *could* denote substantial probative value. At the very least, it leaves open the door for an enhanced relevance test that measures the probative value of evidence. Whether Viscount Simon envisages a legal relevance (PV < PE test) sufficient for this purpose, or a requirement for substantial probative value, is not certain. One thing that is certain, however, is that Viscount Simon specifically rejects a test of logic as the sole method deciding questions of relevance. He states:

> It is the words "logically probative" which have raised doubts in some minds. Such a phrase may seem to invite philosophic discussion which would be ill-

[416] *Harris (Frank Herbert) v DPP* [1952] AC 694.
[417] Julius Stone, 'The Rule of Exclusion of Similar Fact Evidence: England' (1933) 6 Harvard Law Review 954.
[418] *Harris (Frank Herbert) v DPP* [1952] AC 694, 701. My emphasis added.

> suited to the practical business of applying the criminal law with justice to all concerned.[419]

In the same case, Lord Oaksey ostensibly concurs with this assessment and opines: 'I agree with the principle that the judge at the trial has a discretion to exclude evidence which though strictly speaking admissible is only slightly relevant'.[420] Other than the court in *Harris* adopting an approach potentially consistent with the notion of enhanced relevance, the doctrinal review found no overt engagement with an enhanced relevance framing. This is not to say enhanced relevance framings are not used in practice; where courts refer to ambiguous notions of 'logic', 'common sense', and 'sufficient probative value' the precise basis upon which decisions are made, and the thresholds applied to do so, are not necessarily transparent. Individual decision-makers may interpret and apply such broad guidance on relevance in different and, potentially, inconsistent ways that may be obfuscated by case context and vague language. As such, it is important to consider the broader decision-making process around relevance to increase understanding of the way in which decisions are made. This is the subject matter of the remaining chapters, which explore the ways in which the practitioners in this research project understood relevance. Before we get there, however, one matter that arose frequently in the literature review alongside judicial considerations of relevance was Section 78 of the Police and Criminal Evidence Act.[421] This is considered in the next and final section of this chapter.

[419] ibid.
[420] *Harris (Frank Herbert) v DPP* [1952] AC 694, 713.
[421] Police and Criminal Evidence Act 1984 Section 78.

4.4. Relevance and Section 78 PACE

The previous sections highlight different approaches that the appellate courts have taken to the interpretation of 'relevance' as an evidential concept, highlighting instances in which they apply a logical relevance test (and showing how this is not always as straight-forward as is presented in textbooks); others where a legal relevance test is used; and one example of a judicial interpretation of relevance which is potentially consistent with an 'enhanced relevance test'. This section does something slightly different and discusses a legislative provision that (unexpectedly) featured in a significant number of the cases reviewed in the doctrinal analysis, often alongside discussions on relevance.

When discussing relevance and admissibility, several cases introduced Section 78 of PACE into their considerations. Before exploring the role of Section 78 in relation to admissibility issues, it is first necessary to explain what Section 78 is and what it does. Section 78 of PACE gives judges an exclusionary discretion to exclude evidence (prosecution evidence only) where the 'admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it'.[422] It is generally accepted that this question is to be decided by assessing whether the prejudicial effects of a piece of evidence outweigh its probative value. If prosecution evidence is regarded as more prejudicial than probative, then the evidence can be excluded under Section 78. In this sense, the test is a balancing exercise seemingly identical to that contained within legal relevance and is the mechanism used to assess whether plus value exists.

[422] Police and Criminal Evidence Act 1984, Section 78 (1).

The analysis of case law showed that the courts often referred to Section 78 as a means of filtering the evidence by assessing its probative value. This is important as Section 78 can be seen as providing a means by which the evidential value can be assessed but, crucially, outside of a relevance framing. Undoubtedly, however, it asks the same question asked by legal relevance, and using the same metrics (probative value/prejudicial effects) to do so. At first glance, therefore, it may appear that it is not an important finding, since it is perhaps unsurprising that Section 78 might be essentially used as a shorthand for (and perhaps in place of) a more elusive 'relevance' test. However, there are several important issues to consider here. First, it may have implications for logical relevance in particular, which omits any such assessments of probative value/prejudicial effect as part of the relevance test. The implication of using Section 78 alongside a logical test for relevance may be that the courts are again finding it necessary to apply a mechanism to assess the evidential value of the evidence after logical relevance has been established, to effectively filter evidence.

In *Metcalfe*[423] the court considered the admissibility of a piece of expert evidence (relating to animations) and in so doing considered relevance together with Section 78. Here, the Court of Appeal endorsed the trial judge's two-stage approach to admissibility which addressed: 1) evidential relevance and 2) whether Section 78 applies. On relevance the trial judge said relatively little, other than that 'the first question for [the trial judge] is whether these animations are relevant and will assist the jury'[424] (with no further elaboration on relevance here). Absent an additional threshold test, this seems akin to a logical test for relevance, predicated upon the

[423] *R v Metcalfe (Edward)* [2016] EWCA Crim 681.
[424] ibid [9].

ability of the evidence to assist jury fact-finding. The trial judge then immediately followed the question of relevance with a consideration of Section 78: 'the next question for me is whether the production of these animations is unfair within the terms of Section 78 of the Police and Criminal Evidence Act'.[425] The Court of Appeal explicitly approved of this passage that outlines the two-stage test from the trial judge. The same approach was taken by the Court of Appeal in *S*,[426] where the court consider first whether the evidence was relevant and second whether 'it should nevertheless be excluded under Section 78 of the Police and Criminal Evidence Act as being unfairly prejudicial'.[427]

This is an interesting approach to relevance and admissibility, which seems to facilitate an evaluation of the evidential value through something akin to a threshold test, in insisting the probative value of evidence is weighed against its prejudicial effects, immediately after relevance is established. If evidence is required to surpass this threshold prior to its admission, then evidence is, again, being filtered based on its probative value versus its potential prejudicial effects. Though Section 78 and the 'plus value' in legal relevance perform the same function, there are two key conceptual distinctions between them. The first is the placement or the location of the assessment of evidential value; the stage in proceedings where the evidential value is considered. 'Plus value' is considered as a requisite part of evidential relevance (under a 'legal relevance' test), while Section 78 is a separate consideration to relevance that follows only once relevance has been established. The second difference relates to the scope of both the 'plus value' and Section 78. The requirement for evidential 'plus value' can be a universal one, as it is an essential component of the test for relevance that can

[425] ibid.
[426] R v S [2016] EWCA Crim 33.
[427] R v S [2016] EWCA Crim 33 [5].

apply to both prosecution and defence evidence. This is important as Section 78 is limited in that it operates only in relation to prosecution evidence, a reality – or limitation perhaps - acknowledged in *Robinson*.[428] Here, the Court of Appeal specifies that Section 78 'applies only where the Crown seeks to adduce evidence. If the application is made by a defendant, the evidence must be admitted if it satisfies the basic test of admissibility'.[429] While Section 78 seldom features in academic discussions around relevance, it was prevalent in cases, and was a consideration that often went hand-in-hand with relevance. The court in *Gordon*[430] usefully lists a number of principles pertaining to relevance, one of which is as follows:

> It is the duty of the judge, whether objection is taken or not, to ensure that irrelevant evidence (particularly when it is prejudicial to the defence) be not received in court. Should such evidence have been received, then the judge has the special responsibility to direct the jury either to disregard it or how to treat it, as the circumstances require.[431]

This excerpt centralises the importance of the *party* seeking to adduce the evidence, and suggests it is of particular importance to ensure irrelevant evidence is excluded when it is prejudicial towards the defence. This is an important passage which seems to suggest that the courts may apply a *highe*r relevance threshold to evidence introduced by the prosecution. This sentiment is likely a principled one, predicated upon the presumption of the accused's innocence and the desire to counter the *in*equality of arms between the prosecution and the defence. This theme was not exclusive to *Gordon,* but was visible across a number of appeal cases reviewed for

[428] *R v Robinson (Wayne)* [2005] EWCA Crim 1940.
[429] ibid [18].
[430] *R v Gordon (Stafford George)* 1995 2 Cr App R 61, 64.
[431] ibid.

this chapter. A general theme emerged whereby the courts appeared willing to engage with assessments of probative value versus prejudicial effects, as well as assessments of the overall evidential value where prosecution evidence was concerned. Indeed, this chapter has shared some of the courts' attempts to quantify the potential prejudicial effects of evidence, with reference to terms such as 'undue' or 'unfair' prejudice.

Using Section 78 to assess the evidential value has the benefit that it is a test familiar to judges and barristers alike. Indeed Chapters 6 and 7 share data from interviews with barristers and show that barristers, too, were forthcoming in introducing Section 78 into the discussion on relevance. There is a potential issue with Section 78 being used as a mechanism for assessing evidential value, however, in that is relies upon barristers raising Section 78 for a judge to consider. Indeed, of all the cases reviewed where the court considered Section 78 alongside relevance, the court did so, without fail, in response to Section 78 being raised as a potential issue by barristers. Section 78 was not introduced, without prompt, by judges in these cases. That this is the case may be unsatisfactory, as not all barristers may raise such issues, or may do so inconsistently. This may be an argument for the evidential value assessment to be part of relevance itself, as a universal means of ensuring evidential value is considered consistently and in relation to all pieces of evidence, whether introduced by the both prosecution or the defence. While a discussion of Section 78 does not relate directly to matters of relevance, Section 78 appears to have an indirect bearing on the decision-making processes around relevance and forms an important part of the broader picture of relevance and matters of admissibility.

4.5. **Conclusion**

This chapter has explored how appellate courts have engaged with questions of relevance in the case law, and the framings of relevance they have employed. The overarching thread that draws each section of this chapter together is one of complexity and nuance around decision-making on relevance. The doctrinal review showed instances where a narrative of simplicity exists around relevance; judges talk of matters being ‘plainly’ relevant, ‘a matter of common sense’ and refer to ‘well established principles’ of relevance. Yet, the doctrinal analysis shows the complex nature of relevance in practice and the difficulty that can arise when applying and communicating those principles in practice. The review of cases showed that the logical relevance framing was dominant in the appellate courts; this being important in showing how appeal courts deal with relevance on a day-to-day basis, but important too in that this approach to relevance sets the precedent which binds lower courts.

Though the doctrinal review presented a complex picture around relevance, it is important to note that the relational aspect of relevance - the requirement for a connection between the evidence and a fact in issue - did not form part of this complex picture. Rather, the relational question of relevance was approached consistently by the courts, and the courts seemed willing to engage with the relational aspect of relevance, both in conjunction with the specifics of the crime or defence in question, or indirectly to other broader issues within the case.

The appellate courts approach/es to the threshold question were less consistent and, at times, varied. Various approaches were taken to the threshold attached to relevance, and different approaches to broader structures of evidential admissibility were examined. A logical relevance framing has been used and endorsed by the senior judiciary and section 4.4.1. showed how this approach seemed to be

regarded as sufficient in a number of cases. Other cases used or endorsed a logical relevance framing but ostensibly regarded it insufficient and saw fit to introduce a *de minimus* style threshold test to remedy those perceived insufficiencies. Where a logical relevance framing was adopted, the judiciary detailed that assessments of the evidential *weight* of such evidence was a function of the jury, rather than a legal question pertaining to relevance.

Other cases brought the assessment of evidential value (the probative value) within relevance itself, and showed some sympathy with a legal relevance framing that requires evidence to have 'plus value'. These cases saw, to varying extents, the court measure and weigh the probative value of evidence against its potential prejudicial effects, and reach a conclusion as to relevance on that basis.
In other cases, the courts associate questions of relevance and admissibility with Section 78 of PACE, and used that provision as a mechanism for measuring the probative value of prosecution evidence.

These approaches show the courts' willingness to engage with assessments of probative value, and there emerged something of a trend whereby the courts adopt various different tests or methods to measure evidential value and, where necessary, exclude evidence. The doctrinal analysis saw courts use a variety of different methods to achieve this, both within relevance and outside of relevance. As part of the relevance assessment this was a threshold based on evidential 'plus value', or a logical assessment that excluded evidence of minimal probative value. Outside of relevance, the courts outsourced this as a function of jurors' assessments of evidential weight, or regarded it a function performed by Section 78.

The challenges with each of these appellate framings of relevance have been discussed throughout this chapter, but one overarching challenge is presented by the seemingly disparate approach to relevance in the courts. Although a logical relevance framing appears the preferred approach to relevance in the appellate courts, there remains some disparity in the way in which relevance is understood and used. This is of concern where it is the appellate courts that are responsible for setting the parameters and guidance around relevance that bind the lower courts. The upcoming chapters explore the ways in which appellate framings and guidance on relevance manifest themselves in barristers' decision-making 'on the ground' in the Crown courts. As set out in Chapter 2.3, I interviewed 20 criminal barristers about evidential relevance, in a bid to explore how they used and understood relevance in practice. The findings of these interviews are discussed in the next four chapters and provide an important insight into how relevance is understood and operationalised from the perspectives of these criminal barristers.

CHAPTER 5:

BARRISTERS' FRAMINGS OF RELEVANCE

This chapter is the first of four substantive chapters that analyses the data gathered from interviews with 20 barristers. The overarching endeavour of these chapters is to explore how barristers approach decision-making around relevance in practice, and to examine the consistency with which relevance is treated and applied 'on the ground'. This chapter, therefore, engages with RQ3: 'To what extent are relevance 'tests' applied consistently in the criminal courts as per my respondents' experiences?'.[432]

To answer this question, this chapter first explores barristers' views on the status and importance of relevance. It goes on to explore the specific tests and thresholds that barristers' associate with relevance in practice, and whether those tests are applied and understood consistently. The analysis in this chapter proceeds in the following way: section 5.1. considers barristers' views on the status of relevance as an evidential device, and explores their *views* on the consistency with which relevance is treated by legal professionals in the criminal courts. Section 5.2. explores

[432] Chapter 1.1.

barristers' views on the relational aspect of relevance, and section 5.3. explores the thresholds barristers apply to relevance. This section considers barristers' views on the dominant academic framings of relevance introduced in Chapter 3. I draw upon Hawkins' framework throughout each of these sections to identify where and how the surround and field appears to impact barristers' framing of relevance.

This chapter, along with Chapters 6 and 7, is concerned with relevance in its general application, as a universal evidential requirement. The analysis is not, at this stage, concerned with relevance where it informs or pertains to exclusionary rules of evidence. I made the decision to deal with relevance and exclusionary rules as a separate and distinct matter in Chapter 8. As outlined in the introduction, this decision was made in light of the distinction between relevance and exclusionary rules. Relevance is a universal evidential requirement, whereas specific exclusionary rules are not; they relate only to certain categories of evidence. It is this fundamental distinction between exclusionary rules and relevance generally that informs the decision to separate the analysis of exclusionary rules and have it form its own discrete chapter.[433]

The interview data suggests that barristers generally view relevance as a central and important evidential device that serves an important role in criminal proceedings. Barrister responses showed there to be a somewhat broad perception that relevance is understood and applied consistently by fellow practitioners in the criminal courts. Despite this general perception of consistency in approach towards relevance – and in the same vein as in the doctrinal analysis in Chapter 4 – the interview data further suggests that barristers understand and conceptualise

[433] Chapter 8 'Relevance and Exclusionary Rules of Evidence'.

relevance in several different ways, and in so doing they identify several different framings of relevance.

5.1. Views on relevance

This section considers barristers' views on the status of relevance in the law of criminal evidence, and the consistency with which it is treated by the legal profession. When asked about relevance, barristers generally highlighted and emphasised the overall importance of relevance as an evidential device. This was not surprising, as there has been no suggestion either in this research or in academic literature more broadly that evidential relevance is redundant in the law of evidence. On the contrary, relevance serves an important and central function, this was reflected by interviewees:

> B5: 'Relevance and admissibility are probably the two things that are at the forefront of my mind in every case I get, every time I start to read a case'.

> B18: 'What is relevant is the key question we must ask ourselves'.

> B7: 'As far as relevance is concerned … it was always drummed in, even as law students, and that it was the first rule of admissibility for evidence'.

As set out in Chapter 2 the sample of 20 barristers plainly does not produce findings that are generalisable beyond the sample.[434] Nevertheless, it should be noted that no interviewees questioned the relevance – for want of a better word – of relevance.[435] Instead, the interviewees emphasised its role as a key evidential tool:

> B16: 'One would always have to start with relevance, because if the evidence doesn't have any relevance at all then … why are we even thinking about adducing it?'

Suggesting that one must 'start' with relevance marries with the academic structure of the admissibility process outlined in the introductory chapter of this thesis.[436] To briefly recap, the three-part expression of the admissibility of evidence test posed by Roberts asks whether evidence is 1) relevant; 2) subject to an exclusionary rule; and 3) subject to any exception to the relevant exclusionary rule. B16's remarks appear to follow at least the first part of this structure, by 'starting' with relevance as a discrete and separate consideration. Other barristers seemed to value and emphasised the central and important position of relevance in the law of evidence. In doing so, a number of interviewees used the descriptor 'fundamental':

> B19: '[relevance is]…a fundamental consideration that is, or should be, in all our minds throughout the entirety of proceedings'.

[434] Chapter 1.3.
[435] Though the salience of relevance as an evidential issue was not questioned by any of the 20 interviewees, this is not to say others in the legal profession would share the same view.
[436] Chapter 1.1.

B1: ‘In terms of relevance of evidence … it is fundamental to the admissibility of any evidence’.

B20: ‘it is one of those fundamental questions … whether evidence is relevant’.

The Oxford English Dictionary defines fundamental as ‘serving as a basis or foundation; (hence) forming an essential or indispensable part of a system, institution’.[437] On this definition, barristers seem to affirm relevance as an integral and ‘essential’ part of the system, or institution (here the criminal justice system). An elementary and foundational role of relevance is also implied by these remarks from barristers, where relevance serves as a ‘basis or foundation’; it appears to serve as a basis or foundation*al* concept that informs decision-making in the evidential process. The question this then raises is whether, and to what extent, barristers consistently framed and approached questions of relevance and admissibility in practice. Barristers’ responses revealed a broad consensus that decision-making around relevance is consistent in the criminal courts:

B15: ‘I think, broadly speaking, we barristers approach relevance in the same way and we generally ask the same sorts of questions. By that I suppose … I

[437] Oxford English Dictionary, ‘fundamental, adj. and n.’ (OED Dec 2022) <www.oed.com/view/Entry/75497> accessed 29 January 2023.

mean we ask is something probative or could it be probative given the facts of the case'.

The sentiment expressed by B15 was similar to that of B4 who reflected on the case-specific application of relevance and brought in the conception of logic as a guiding principle in this arena:

B4: 'Relevance is obviously contextual and … of course depends on your case, the case at hand, but I think in general we [barristers] approach it in the same way and apply the same logic to these questions'.

Other barristers were more forthright in their view that relevance is generally approached consistently in the criminal courts:

B14: 'I think [barristers] are all pretty clear on what it means for evidence to be relevant. I think to put it in the most simple way for you, we need to ask 'is the evidence going to assist the jury based on the particulars of the given case?'

B17: 'I don't see much difference in how lawyers and judges deal with relevance, in all honestly we don't spend buckets of time talking about it, but even so, no, I don't see much difference in how we approach relevance and I

regularly attend different courts up and down the country so I see a lot of different people prosecuting, defending and so forth'.

A consensus emerged from interviewees that relevance was generally understood and used consistently in the criminal courts. Interviewees did, however, go on to express what relevance means differently – or at least in different ways – in the evidential context. This was a theme noted in relation to appellate framings of relevance in the previous chapter, and raises the question as to whether this is a matter only of semantics and different expressions of relevance are functional equivalents, or whether the semantic differences create scope for slightly different interpretations of relevance. This is a question probed throughout this and upcoming chapters that explore the interview data. For now, it suffices to reflect that the responses B14 and B17 above are definitive in their perspective that relevance is a clear concept that is understood and approached in a uniform way. This accords with much of the case law on relevance, where there is also a prevailing perception among the judiciary that there is little inconsistency or uncertainty about the concept. Interestingly, there was no identifiable pattern in relation to the characteristics of the barristers who expressed these views around consistency in approaches to relevance; neither in relation to their gender or their years of professional experience.

The four respondents above provide an indication as to a degree of consensus between interviewees around approaches to relevance. Other respondents appeared to agree, but presented their view in a slightly different way. Some respondents appear to concur that relevance is approached consistently, but identified the potential for the test of relevance to lead to different outcomes for different barristers. B9 was one of

two barristers who were direct in communicating their belief that barristers approach relevance in the same way but nevertheless acknowledged the scope for different decisions to be reached:

> B9: 'I have seen colleagues make decisions and regard something as relevant, where I do not agree and I think they are just plain wrong … when something, to me at least, clearly isn't relevant. But I don't think that's because they are applying a different test or understanding relevance differently or whatever … I think they have just arrived at a different conclusion to the one that I would have arrived at'.

B9's response reinforces the view that legal professionals generally approach relevance in a consistent manner. Nevertheless, this insight suggests that a distinction may usefully be drawn between barristers *approaches* to relevance and the *result or* outcome of the decision-making process itself. Going forward, this distinction will be referred to as the 'issue of approach' and the 'issue of result'. On B9's view, barristers may approach relevance in the same way, yet legitimately arrive at different conclusions as to whether evidence is relevant or not. This might suggest that though understandings of relevance may be consistent there remains significant scope for different decision outcomes in terms of evidential relevance. The interview data suggest there is some traction to this suggestion, the majority of interviewees adopted much of the same language and similar views on the nature of relevance yet when those views and interpretations of relevance were tested (as discussed in Chapters 6, 7 and 8) there appeared some divergence in their interpretation of key elements of

relevance framings. This was alluded to in Chapter 3's coverage of academic framings of relevance, where key terms such as 'probative value', 'plus value' and 'substantial' were highlighted as being open to interpretation and varying ascriptions of meaning. Another barrister shared a similar view to that of B9 above, but offered a slightly different analysis:

> B2: 'I don't think there is an inconsistency as to the law that is being applied. I do think, undoubtedly, there are inconsistencies of approach between judges and between lawyers, as to whether something genuinely is or isn't relevant. I suppose in theory, if someone gets it wrong, that's what is corrected by the Court of Appeal who can then say well actually that was relevant to this issue'.

Taking the first part of this statement, that B9 does not 'think there is an inconsistency as to the law that is being applied', it is implied that the underlying tests (or 'law' as it is referred to in the above statement of B2) of relevance are universally understood. This broadly accords with the views of the other responses highlighted here. The point of potential divergence relates to the second limb of the response, that 'there are inconsistencies of approach between judges and between lawyers'. It seems reasonable to infer here that B2 is discussing the potential for the different *results* as to decisions around what is relevant and what is not. While the language here is specific in that B2 refers specifically to the *approach* of judges and lawyers being inconsistent, the insinuation is that a broadly consistent approach to relevance (no 'inconsistency as to the law that is being applied') may still result in varying results when relevance decisions are made in practice. The difference between B2 and B9

may well rest on a linguistic difference rather than a substantive one. That a distinction may be drawn between approach and result here is not necessarily surprising. On one view, it is entirely predictable that any concept used widely in everyday language, with colloquial connotations, will prompt subjective engagement and interpretation that may lead to different results and decision outcomes. This relates to relevance being grounded in nefarious notions of 'common' sense which make it, perhaps, uniquely susceptible to the individualistic ascriptions of meaning and interpretation. This matter is returned to in more depth in the next subsection. While B2 and B9 appear to distinguish between approaches to relevance and the results of those approaches, other barristers were less explicit in their support for that position. B3 sought to highlight the differences in individual barristers' decision-making but was less specific in terms of where, if any, discrepancies lay:

> B3: 'I always try to remove anything which I think is irrelevant, you know, and it is tricky, not every barrister is the same. Other barristers might say 'oh I think that's really relevant' and you sort of think 'oh I don't know''.

B3 later went on to give an example of a situation where the opposing counsel was seeking to adduce evidence that B3 did not appear to think was relevant:

> B3: This case I'm doing now is quite interesting because my opponent is … trying to adduce all kinds of slightly strange bits of evidence about the height of floor to a fella's groin! (B3 laughs)

In common with B2 and B9, B3 seems to suggest that barristers may well arrive at different conclusions regarding the relevance of evidence. Omitted from this response, however, is the detail as to whether barristers *approach* relevance consistently but arrive at different conclusions, or whether the different decisions around relevance are because of *in*consistent approaches to and understandings of relevance. Interestingly, none of these respondents indicate the frequency with which they observe different approaches or results of decision-making around relevance. The only indication of a frequency here was provided by B12:

> B12: 'The only time that I disagree with my fellow counsel is when they try and limit it in a way that I think is irrational. My view is, as I say, could it be relevant to any issue or fact that the jury may … need to determine'.

This excerpt suggests a relatively high bar must be surpassed before B12 will 'disagree' as to evidential relevance. The bar, they suggest, rests upon B12's view as to whether evidence is being limited irrationally. This indicates that there is scope for different approaches as to whether evidence is or is not relevant, based upon decision-makers' assessments of what is irrational; a concept almost as elusive as common sense. The use of the word 'only' to preface B12's could also suggest that B12 does not generally seek to have evidence excluded, but objects where opposing counsel attempts to exclude evidence they wish to admit. Alternatively, the use of 'only' in this context may indicate that disagreement as to evidential relevance is not too frequent an occurrence in their experience. As a gauge of frequency, however, this is far from scientific and provides only an interpretive indication based on a response of one barrister.

Another barrister, B11, set out their perspective that different barristers may well disagree as to whether a piece of evidence is relevant, but again the rationale for those differences was not specified and was left open-ended. Interestingly, however, B11 brought in both the role of barrister's experience in relation to decision-making around relevance, as well as the role of judges:

> B11: 'I suppose I can only speak for what I see in the courts where I work. I think undoubtedly there may be some different views on what is relevant, and I suppose what I think is relevant and include in one of my cases, well my colleagues may well disagree with that and may well have taken a different view had they been in my position. On reflection, I do … suspect we get used to being before the same judge and knowing what will or will not be allowed in. With some judges I know they just … want to get on with the trial and don't want to spend time arguing the toss about some evidence when its relevance is bare … or marginal or something like that. Possibly that comes with experience and perhaps younger, less experienced colleagues may take a different view on what is or is not relevant'.

There is much to unpack from this response. Again, it is not entirely clear whether the different views on relevance, referred to here, are a result of a different approach being taken to relevance, or simply a result of the same approach to relevance leading to a different result. It is not specified, nor can it be inferred from the language used. The importance of this distinction is not merely semantic, as to evaluate the application and scope of any evidential rule or device, it is necessary to first understand precisely

how it is used, and where any disputes or discrepancies in its use arise. In addition to the discussion of differing decisions around relevance, B11's response also reflects on the role of barristers' professional experience and how this may impact decision-making on evidential matters. The suggestion here seems to be that barristers adapt their legal submissions, including evidential decisions, to the perceived preferences of the judge before them. In reflecting on the relationship between barrister and judge, B11 suggests relevance may be pre-judged by barristers, based on their expectations of the decision a judge may make on the matter. This is a theme that came out in a number of interviews and is discussed in more depth in Section 7.1.2.

Returning to the issue of consistency of approaches to decision-making on relevance, some barristers reflected on the relationship between a barrister's level of experience and their decision-making. When asked whether they recalled seeing different approaches to relevance B7, a retired barrister, responded:

> B7: 'I wouldn't say so … in principle. I think some people dealt with it better than others. Some people were sort of clearer thinking about what was relevant'.

Both B7 and B11 frame assessments of relevance as, in some respects, a competence issue, and B11 specifically reflects on decision-making around relevance potentially differing where barristers have varying levels of experience. The picture presented by barristers in relation to the consistency with which relevance is treated is somewhat mixed. The majority of interviewees implicitly and/or explicitly regarded relevance as something approached consistently by legal practitioners. Those who did so explicitly did so in the plainest terms, referring to the profession as 'pretty clear'

(B14) on the matter, and not seeing ‘much difference’ (B17) in approaches to relevance. Others took a more tempered view of decision-making and accepted that while similar approaches were taken by barristers, there was not always agreement on the results of those decisions. Consensus in relation to those nuances, however, could not be found. This may suggest that decisions on relevance are highly internalised and routinised in a way that is specific to the individual decision-maker.

Despite these subtle differences in perspectives from the Bar, it is inescapable that 17 out of the 20 participants believed that barristers were broadly consistent in their approaches to relevance. These 17 participants included both those who explicitly stated this to be the case and those who, by implication, accepted that the same law or approach was being applied by barristers, but leading to potentially different decisions by barristers. Of the three barristers who did not explicitly or implicitly accept this contention, none specified that they thought barristers approached relevance differently, rather their responses diverted to other issues and, in one case engaged with a personal experience of disagreement that could not necessarily be categorised either way. For example, B10 discussed their experiences of disagreeing with other members of the profession, stating simply:

> B10: ‘I’m not sure whether or not we always agree with one another, but then again that wouldn’t work very well in an adversarial system, would it?

This perception of relevance as understood consistently marries with the doctrinal analysis presented in Chapter 4, which indicated a veneer of universal understanding and consensus around relevance with little by way of controversy, challenge, or

conceptual difficulty in the courts. Consistent with the views posed by barristers here, that regard relevance a well understood matter, several barristers expressed the view that relevance was rarely an issue in the criminal courtroom:

B2: ‘It is not common in my experience, to have arguments solely centred on what relevance means, it may be that that is a fault within the system that there isn’t enough - that practitioners and judges take for granted what relevance means. It just means is something probative or not, without any deeper assessment of how you consider that’.

B3: ‘It is rare that it becomes an argument, I cannot think of many occasions when I have been making a submission to the judge trying to persuade them of the relevance of a particular piece of evidence because normally you have kind of gone through that process yourself’

B7: ‘Generally, I think no, I mean barristers would spend much more time arguing about admissibility’

B12: ‘Very rarely, most evidence that the Crown choose to put before a jury is relevant, some of it might not be admissible but that's different. This is my 21st year at the Bar, I've rarely had to argue relevance … generally speaking, if it's not relevant, that is obvious to all sides, and so one rarely needs to trouble the judge.’

B6: [On the frequency with which relevance issues arise during the course of a trial] ‘That is very, very rare in my experience’

These views lend support to the view that relevance is a straightforward matter, that does not pose barristers many practical issues in the criminal courtroom. B12 draws on their level of experience (in terms of the years they have been in practice) when suggesting relevance does not typically trouble the courts. In so doing, they draw a distinction between relevance and admissibility, as does B7. Both imply that the matter of admissibility may pose the courts more practical difficulties than relevance, and in so doing they reinforce the general perception of relevance as a fairly uncontroversial matter. The same view was taken by B7 who also sought to distinguish between relevance and admissibility, to suggest the latter attracted more dispute than the former. B2 offered an equally interesting reflection when asked about the frequency with which they encounter arguments around relevance. Their reflection that ‘it may be that that is a fault within the system that there isn’t enough - that practitioners and judges take for granted what relevance means’ is striking. This was the only instance where a barrister considered this possibility, and it is one that warrants consideration. At the very least, it is possible that a concept so often regarded a matter of logic, can be taken for granted and, in that sense, diminished. Diminished in this context means barristers may omit specific and targeted considerations of relevance, so much so that its precise meaning and application is given little thought. As such, there may be some mileage in B2’s suggestion that legal practitioners may take relevance for granted.

Not all barristers concurred with the views expressed here that suggest arguments around relevance rarely arise in the courtroom. Notably, some barristers

took the opposite view, and told me that relevance was *frequently* an issue in practice and, in many cases, a recurring issue at trial:

> B19: 'Nine times out of ten, it will come up'

> B16: 'It frequently arises because, as I say it is the first question "is it relevant?" And so judges will often say "What's the relevance of this?" Or, between counsel, for example, between advocates one will say to the other party "how is it relevant?" Of course, we may be bypassing one test of relevance, which is whether it has to do with the fabric of the case overall, we would be jumping ahead and saying "Well, is it relevant to an issue in the case yes or no, if the answer is yes, how?"'

These views contrast significantly with those proffered by fellow barristers. Instead, B16 and B19 here suggest that relevance poses an issue, in some form or another, in the majority of cases. B16 identifies both the location in which these challenges arise, as well as the party involved in that challenge. B16 also raises the possibility of relevance being questioned by other barristers. The location or the point in the process at which those challenges take place is not specified. One may assume this happens in open court and in legal argument before a judge, yet there is a significant body of literature that suggests party cooperation – cooperation between opposing barristers – is on the rise.[438] Party cooperation often involves informal discussion and negotiation between parties, and it may be that when evidential relevance is challenged by fellow barristers it is done so through those informal channels, and informal conversations

[438] Matt Thomason, 'Admitting Evidence by Agreement: Recalibrating Managerialism and Adversarialism in Crown Court Criminal Trials' (2021) CLR 727.

outside of the courtroom. Without further information, it is not possible to know whether this is what B16 meant when they discussed barristers challenging relevance. The topic of party cooperation is important and is returned to in much more depth in section 7.1.2. This section includes discussion of the reasons *why* party cooperation may be prevalent, such that relate to shifts in the legal surround and organisational field. Following their comments above, B16 went on to specify the frequency with which those challenges on relevance arose in their experience:

> B16: 'Every case, every case, every case, every case … the reason, I think, I would say with some reservation, particularly nowadays, is because so much evidence is documentary, and we are dealing with social messaging, CCTV footage. So obviously the first question is going to be, well how is it relevant?'

Contrast this statement, that states relevance to be an issue in 'every case' (B5) with other barristers' suggestions that they have 'rarely had to argue relevance' (B12). It is hard to reconcile those views. That is not a criticism, nor to say one view is right and one is wrong. Barristers are recounting their experiences and offering invaluable insights that help disentangle relevance. The source of the discrepancy here could have more to do with how precisely barristers understand relevance and its role in criminal proceedings, or the specific cases those barristers typically deal with. The barristers' accounts of relevance shared in this section indicate that this may be the case, that barristers may be ascribing different meanings to relevance and, thereby, understanding and using relevance in different and distinct ways. This would lend support to the argument that there is a lack of conceptual clarity (and therefore

consistency) around relevance. This theme is discussed further throughout the empirical analysis in the upcoming Chapters 6, 7, and 8.

5.2. Relevance and relationality

The introductory chapter to this thesis, together with Chapter 3, considered the two key aspects of relevance. First, that it is a relational concept, in that it must relate or connect to an object in the case. Second, relevance invites a threshold test to determine when evidence will be regarded as relevant. This section considers the relational aspect of relevance, as understood by interviewees. Some of the excerpts above have already alluded to the relevance requirement that evidence must relate *to* something. B12's view, included in full above, provides a useful starting point for this discussion:

> B12: 'My view is … could it be relevant to any issue or fact that the jury may … need to determine'

This view of relevance shows the barristers' belief that evidence must relate to 'any issue or fact the jury may need to determine'. This seems to include a wide remit of matters, while maintaining the view that evidence must be relevant to something. B2's response above also indicates the connection that must be established and may, in some instances, be examined by an appeal court. B2 referred to incorrect decisions on relevance being 'corrected by the Court of Appeal who can then say well actually that was relevant *to this issue'.* It was notable that the connection between evidence

and a matter or issue in the case was discussed by all participants, including B13 who reflected on the wide range of matters to which evidence can relate:

> B13: 'Evidence is relevant if it helps answer a question in the case… or if it helps the jury understand the broad issues in the case, the circumstances in which a particular text message was sent for example, it can be relevant. It is up to you … as the advocate to explain its relevance of course.'

This quote outlines the breadth the relational connection that can be established, evidence may on this view relate to 'the broad issues in the case'. This resonates with the findings in doctrinal analysis set out in Chapter 4, which discussed the ways in which a connection can be established between evidence and a broader fact in the case, beyond those related to the specific crime itself.[439] This excerpt also raises the role of the legal professional in making the case for relevance and communicating it adeptly within the confines of the adversarial system. Given the dynamism of relevance and its contextual application, it is for the barrister to make the case for relevance. This brings with it a host of further considerations, as relevance then becomes, to some extent, contingent upon the skill of the barrister tasked with making its case. It could be that the barristers who reflected on 'experience' of others may be using experience as a synonym for skills, and reflecting on the skill of barristers in making the case for evidential relevance. Interviews showed the relational element of relevance posed few problems or points of inconsistency among interviewees.

[439] This was discussed in Chapter 4.3.

Interviewees seemed to understand the relational aspect of relevance in similar ways, which mirrored the courts' approach shown in Chapter 4.

The following section picks up on another theme also identified in the doctrinal analysis in Chapter 4. The next section explores the apparent 'veneer' of simplicity that exists around relevance. While barristers, overall, tended to agree that relevance was treated and understood consistently by legal professionals, the following section explores in more depth barristers approaches to decision-making on relevance in practice. Interestingly, upon further exploration of interviewee responses, the veneer of simplicity and consistency around relevance somewhat crumbles and several complex and interrelated non-legal influences upon decision-making are identified. Those non-legal (or quasi-legal) influences are introduced and explored in this chapter, they are then explored in more depth and through the lens of Hawkins' framework in Chapter 6 and Chapter 7.

5.3. Relevance and associated framings

The analysis set out in section 5.1. shows something of a consensus among the barristers sampled, centring on the suggestion that relevance is generally understood and approached consistently by barristers in the criminal courts, though there was some discrepancy evident in relation to how frequently 'relevance' is discussed as an issue. Section 5.2. then showed how barristers were consistently mindful of and engaged with the relational aspect of relevance. This section considers how the barristers interviewed understood and approached relevance, in terms of the threshold they apply to relevance in practice. As part of this task, it is necessary to first consider barristers' views on the two academic framings of relevance that have thus far

dominated the academic literature on relevance, logical relevance and legal relevance. I asked barristers specifically about these academic framings given their prominence in academic literature which, at times, regards them as practical representations of the way legal professionals make decisions about relevance in the criminal courts. Academic commentary on evidential matters is an informal field-level influence upon legal decision-makers, and therefore can directly impact the decisions made in the criminal courts. The discussion below sets out interviewees' discussions around these framings of relevance, and concludes that there was no overall consensus amongst interviewees as to the applicability or suitability of either logical relevance or legal relevance framings in practice.

I asked interviewees for their thoughts on the theoretical academic framings of relevance, and all interviewees were given a short description of legal relevance and logical relevance. Each interviewee was asked to comment on the two academic framings of relevance, and asked whether they recognised or favoured either of the tests in practice.[440] In line with the analysis in Section 3.3.1., logical relevance was defined in terms of whether admitting a piece of evidence will make a contested fact, or a fact in issue, more likely or less likely. Its reference to 'common sense' was emphasised, as was the absence of an additional threshold relating to probative value be met before evidence will be regarded as relevant.[441] I then defined legal relevance for interviewees, as a framing of relevance that asks the same first question as logical

[440] As the interviewer I tried to provide consistent and concise descriptions of both legal and logical relevance. These definitions were drawn from Chapter 3 'Relevance in Theory'. I do, however, acknowledge that interviewees were, in most cases, reliant on the definitions I provided them and their responses are to be viewed in that context.

[441] Chapter 3 also identified two key elements relating to the tests for relevance, these were labelled the relational element and the threshold element. The relational element of relevance encapsulates the relational link between a piece of evidence and a fact in issue. Logical relevance accounts for this relational link between evidence and a fact in issue, but omits a subsequent threshold be met.

relevance: whether evidence is logically relevant, but then requires an additional assessment be made as to whether the probative value of the evidence outweighs its prejudicial effects. Chapter 3.3.2. set out the equation that neatly encapsulates this test for relevance as 'logical relevance + plus value = legal relevance'. It is necessary to note here that I did not ask barristers for their view on enhanced relevance, only on logical relevance and legal relevance. At the time the interviews were conducted, I had not examined enhanced relevance in sufficient depth for me to include it in the interview schedule. Indeed, it was only after the interviews had been completed that the Law Commission published their Consultation Paper which included specific reference to enhanced relevance, which led me to a further analysis of the concept. It was, nevertheless, of the upmost importance that I asked barristers for their views on the logical relevance and legal relevance framings. It is important given that they are dominant framings of relevance that frequently appear in academic literature, and responses to these tests may also shed light on how they might perceive an enhanced relevance test.

Despite the view posed by many interviewees and presented earlier in this chapter – that barristers generally approach relevance in a consistent manner – there was no consensus among these same barristers as to which test of relevance (logical or legal) was typically used in the courtroom. Of the 20 total interviewees, nine said logical relevance was the appropriate framing of relevance, five said legal relevance was the correct framing and the remaining six were categorised within a third category labelled 'other' (encompassing those who recognised neither logical or legal

relevance, those who stated it was a mix of both, or those who did not specify either way).[442]

When I introduced barristers to the academic conception of legal relevance they provided interesting insights into the prevalence and nature of the test. Several barristers considered it an appropriate test due to its inbuilt capacity to measure the *strength* of evidence, as seen in the responses below:

> B15: As I understand it, I would say [legal relevance] because it directs your mind to the strength of the evidence, which is necessary. You might think that some evidence is relevant to something in the case, logically speaking, but that does not necessarily mean it is *useful* to the case you are advancing. (Emphasis added)

> B3: 'I think the [legal relevance] test because you have the added-on issue of probity and I think when you are taught the law, the law of evidence, you kind of remember Section 78 [of the Police and Criminal Evidence Act 1984] … that's one of those things that stick in your mind … it is quite a nice test, it's one most people can get. So, I suppose you would look logically first of all, then you do add the second test, in some cases more than others'.

[442] Due to the way in which the two theories of relevance were presented to barristers, several interviewees responded by referring to 'the first' or 'the second' in reference to a particular theory of relevance. Bracketed information has been added to exerts of the interviews below to provide clarity for the reader.

Both these responses attach value to legal relevance' ability to measure the probative value – or strength in B15's terms - of evidence. Interestingly, B3's support for legal relevance translated to a subsequent case example they provided during their interview:

> B3: 'In cases which are sensitive, for example in a murder case, if you've got the family of the deceased there and you want to make a point about the way in which the deceased was living their life – maybe they were a drug addict – and you know you have some evidence of money they spent on drugs in the previous month, you might think logically a jury should hear about that, but then again what are you proving? Because they still died in a fight. So that would [not] go to the issue of what you are trying to prove, … that would just go to the issue of credibility of the deceased and … a judge ain't gonna have that, I would have thought'.

B3 appears to suggest that evidence of the deceased being a drug addict may logically be relevant but, nevertheless, ought not be included in the case. It is worth reflecting first on the suggestion here that a murder victim spending money on drugs may be logically relevant information that a jury should hear about. B3 does not explicitly state why this may be the case and the matter to which the logic relates, but they appear to allude to it being useful to their case, based on their subsequent reference to the evidence going to credibility of the deceased. While these are only projections based upon the B3's words, they indicate the perils of using logic as a metric by which to decide relevance. Namely, that logic can be assumed and informed by assumptions

that are not necessarily transparent, accurate, or even very useful to progressing the case.

B3's example above appears to reflect a legal relevance framing, whereby evidence is regarded as logically relevant, but an additional assessment is made as to the probative value of the evidence in light of its potential prejudicial effects (logical relevance + 'plus value' = legal relevance). Translating this equation into this practical context, B3 seems to suggest that evidence of a possible drug addiction would be marginal and, therefore, would fall foul of the second limb of the test for legal relevance. It is interesting in this case that the 'prejudice' being weighed against admitting the evidence was closely tied (in the barristers' mind) to the impact this would have on the deceased's family. This is something that we would not typically consider to be part of the relevance assessment. The role of 'external' factors of this kind is discussed further at Chapter 6.3 where moralistic influences upon decisions are explored through the lens of Hawkins' symbolic frame. Other barristers seemed to share the approach of B15 and B3 and, in particular, their commitment to an approach to relevance that included an assessment of probative value as an implicit consideration:

> B20: 'I think that when we discuss relevance we must always establish that there is a logical link between the evidence and a live issue in the case, whatever that issue may be … but thinking of only logic seems far too … it is narrow to me, I think it is correct to proceed to go and … ask the second question that you identified, legal relevance, and be satisfied that the evidence is sufficiently probative to the live issue in the case'.

B20's remark that a logical framing of relevance alone is 'narrow' is notable. A critique that can be applied to logical relevance is that it is too broad, in that it may provide an inadequate evidential filter. The inclusion of an additional threshold test, as with legal relevance, would narrow the scope of relevance and the evidence admissible under it. This is an interesting turn of phrase that obfuscates the point they are making. It is perhaps reasonable to infer that B20 is suggesting that a logical framing of relevance alone is inappropriate or ill-suited to the purpose of effectively filtering evidence. Other interviewees who suggested legal relevance was the appropriate framing of relevance did so in a less definitive way. B9, for instance, acknowledged that prior to being asked the specific question, they thought little about the mechanics of their approach to relevance:

> B9: 'On reflection, I suppose it would be [legal relevance] that I apply. To be honest I do not really think about it too much, I suppose what I generally do is I make a decision on the facts before me, but if I had to say which I think is the appropriate approach, I would say thinking about the probative value of evidence is necessary. I don't think you can take probative value out of the equation at least, relevance and probative value in the one sense … are inseparable'.

While this interviewee suggests they prefer a legal relevance framing, they do not specify how they measure or assess the probative value of evidence. That is, they do not identify the balancing exercise encompassed by the legal relevance framing. Instead, they highlight the relationship between relevance and probity in broader

terms, finding them ‘inseparable’. This framing of relevance could even account for an enhanced relevance framing, where substantial probative value is required of evidence before it will be considered relevant. That this account of relevance could encompass either a legal relevance framing or an enhanced relevance framing is instructive, as it highlights how the basis upon which relevance is adjudged is often obfuscated. Other barristers took a different view to B9, and two barristers went so far as to raise particular concerns over a legal relevance framing as an approach to decision-making, which places their view on legal relevance in opposition to the views posed above:

> B1: ‘I think there's a real danger in the second one (legal relevance) … I'm thinking more of an investigative aspect, the problem that you have, and this you see it in the most serious cases…you start applying a notional probative test to it (evidence), then that is ultimately subjective, and that's very much in the eye of the person who's applying that probative test … Now the difficulty is if you apply that probative test, that material will be in effect lost, because it won't even appear on the disclosure schedule and that creates a problem. Because then there's material that you didn't even know existed further down the line … So I would reject a probative test, I think. Is it logically, in common sense, relevant … I just think if you, if you start … subverting the second stage of any sort of evidential tests, first being relevance, the second is it evidence or unused material, the third is if it's unused material. Is it sensitive, disclosable? But all the rest of it and then probative. It's much far further down the line. I think it's a discrete test’.

The influence of disclosure on decisions on relevance had not come up in any part of the theoretical or doctrinal research. This is a useful practical insight that is discussed in section 5.5.3. For now, it suffices to say that the remarks of B1 illustrate that decision-making does not operate in a case contextual vacuum. Rather, B1's comments suggest that awareness of wider procedural and structural processes within the justice system influence specific individual decisions around relevance. In addition, the wider procedural awareness outlined by B1 infers that such considerations relating to the broader legal process may influence the approach taken to questions of relevance as a whole. The wider influence of legal processes and procedures on decision-makers are discussed at length in Chapter 7, with reference to Hawkins' framework.

B12 shared a similar position to that of B1, and not only supported an exclusively logical approach to relevance, but did so whilst expressing a particular concern over legal relevance as an overarching test for evidential relevance. Interestingly, B12 shared the view that any assessment of the probative value of evidence ought not form part of the preliminary question of relevance; B12 described legal relevance's inclusion of probative value as incorrect, in their view:

> B12: 'The difficulty with the [legal relevance] is that I think that it's applying the test at the wrong time. If something is relevant, then it's admissible. However, if its probative value is outweighed by its prejudicial impact then it should be excluded, pursuant to Section 78 of the Police and Criminal Evidence Act 1984. I think it's to conflate the two. The second … definition you gave relevance [legal relevance] has to be, in my view, given a very broad and wide scope, because

we have the other safety nets further along in order to exclude relevant evidence'.

This response suggests assessments of relevance and probative value ought not to be taken together, but considered sequentially and separately. B12 went on to clarify their comments and express some discomfort in a purely logical test of relevance, though nevertheless thought it preferable to the alternative academic framing of relevance that was posed, legal relevance:

B12: 'Judges use common sense when they can't think of a proper reason to explain something, and they use logic when they apply their own logic, which is very often not rational. So, I'm nervous about judicial comment about logic and common sense. But I sort of know what they mean that there has to be a wide discretion that the test has to be in, in my view, is this material? Could it be potentially relevant to a jury's determination of any fact or issue within the case, which is a very wide, very low bar for the Crown to get over, and once that bar is crossed, once that threshold is met … then we can look at probative value prejudicial effects… Of the two schools of thought that you've outlined, I would very much, in my experience, would support the former [logical relevance] rather than the latter [legal relevance]'.

Although this excerpt expresses support for a logical framing of relevance, it exemplifies some of the shortcomings of binary academic representations relevance. The academic framings of relevance present an either/or choice to barristers as to which framing of relevance they recognise and prefer, and the question was asked of

barristers in a way that encouraged an equally either/or response. Yet B12's response shows the nuance in decision-making on evidential relevance and frames the question of relevance in a different way, that asks is the evidence 'material'. It may be that in practice, neither the legal relevance nor logical relevance framing of relevance adequately captures the nuance and complexity of the decision-making process relating to relevance.

Another barrister expressed some support for a logical relevance framing of relevance, and alluded to the *location* of the assessment of probative value. B4 appeared to concur with the position of B12 and B1, that a logical assessment of the evidence is the preferred framing of relevance. They refer obliquely to the assessment of probative value being better placed *later* in criminal proceedings:

> B4: 'It is, I think, the … approach that centres on logic. You cannot really apply any hard and fast rules here, to relevance I mean, as it is always specific to the case. It is … for me to use my professional judgement, based on logic and fairness, that is how I decide what is relevant to my case. I don't think it would really work, at least in my experience, to say we have to start doing calculations around value or anything of that sort, at least at this stage … to answer your question, the answer is professional judgement here is based on logic. It has to be'.

This insight is interesting for several reasons. First, the support for logical relevance is again couched in language that projects a degree of certainty and simplicity around relevance. The use of the addendum 'at least at this stage' appears to suggest that an assessment of probative value is not part of relevance, but one that is considered at a

later stage in proceedings, this appearing to marry with B1 and B12's analysis around probative value being separate from relevance. Secondly, this exert is instructive as B4, had, earlier in their interview, linked relevance directly to probative value in stating the following:

> B4: 'I am looking to see whether the evidence has some probative value, if it has probative value it is relevant … that is the test I am applying'.

The difference in B4's response when discussing relevance in theory and relevance in practice is interesting, and may be indicative of a broader difficulty in reconciling the theory and practice in this context. Barristers approaches to legal and logical relevance appeared to differ within this sample. The approaches outlined above (B4, B12 and B1) contrast with some earlier comments from other barristers who regarded relevance and probative value as 'inseparable' (B9) and 'one and the same' (B19). Instead, the excerpts above specify that logical relevance is the appropriate test for relevance. That said, B4's statement that 'you cannot really apply any hard and fast rules' to relevance warrants consideration. This was a recurring theme in interviews, and several barristers indicated that relevance is not typically decided through adherence to defined proscriptive rules. One interviewee highlights the, at times, unconscious nature of decision-making on evidential relevance and rather than falling on one side or the other in relation to legal and logical relevance framings, suggested that in practice, neither answered the fundamental question as to the appropriate approach to questions of relevance. B2 shared their view that the correct test for relevance was something of a 'mish mash' between the two approaches:

B2: ‘I think it probably is just a mish-mash in practice … I think most people in daily practice just approach it without really thinking whether what they are using to decide that question was strictly speaking a question of logic or by reference a legal test … they’re only going to start focusing on specific legal definitions of relevance … if they’re obliged to assess a statutory gateway’.

This mixed view of relevance was reflected by other interviewees:

B10: In reality, I do not think that we trouble our minds with these sorts of academic questions and theories. I think we look at the case and say … OK what evidence is going to help the jury, what will help paint the picture of the case so to speak. There is logic involved … yes of course, but it isn’t only logic. We get on and make a decision based on our professional judgement. I don’t think … it can be reduced to definitions or theories of relevance … if you do not mind my saying so’.

This response rejects the two academic framings of relevance presented, as well as the notion that approaches to relevance might be reduced to *any* academic framing. This interviewee, instead, centres professional judgement at the heart of decision-making on relevance, presumably referring to the internalised and experiential knowledge which informs their evidential decisions. What informs that knowledge, and how it subsequently influences decisions on relevance, then becomes increasingly important to understand and Chapters 6 and 7 are dedicated to this task.

Other interviewees appeared to concur with B10's view that relevance could not necessarily be captured by an academic framing or definition, though this view was implied rather than expressly stated:

> B13: '… they are very interesting theories and … I must confess I have not thought about this in any such depth before. But what I might humbly suggest is that it is ... a bit of both of those that you outline. What I really did, I suppose ... I am looking to the issues in the case, and deciding on that … basis what is important and supports my arguments. I do think it is important how strong the evidence is, or how useful it might be, but so long as it assists my case it is relevant or, I suppose I would say that it is relevant. I would not generally think on such detailed meanings of relevance, or perhaps I did in ... some cases, but only when ... considering a particular statutory provision … the bad character rules … or such the like'.

Rather than demonstrating a particular relevance framing, this barrister also highlights the potential for elements of both framings of relevance to apply. Beyond this, they echo the views expressed by other barristers, and emphasise case contextual factors that may influence decision-making, as well as the importance of assisting the jury or communicating a narrative to the jury. Matters such as these are important elements of the legal field, as together they form the legally and organisationally defined setting[443] in which barristers operate. This organisational setting dictates what elements of the 'case context' will be important to the barrister and for what purpose.

[443] Keith Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (OUP 2002) 52.

For instance, the organisation of the Crown Court provides a myriad of 'mandates'[444] to barristers, that set the confines within which their decisions must be made. B10's previous suggestion that ask a key question "what evidence is going to help the jury?"' is an example of this. The remarks of B13 also highlight that relevance might be considered in more detail where it was embedded within a particularly statutory regime, their example being the bad character provisions. This suggests two things: first, that there is potential for a two-tiered approach to relevance decisions, based on whether the evidence is subject to a specific statutory exclusionary regime or otherwise. Second, it suggests that where relevance is not subject to a specific statutory regime, decisions on evidential relevance are not typically made with reference to a specific formula or framing. This contributes to a theme that emerged throughout a number of interviews, that decisions on relevance are often internalised and draw upon professional expertise and notions of professional judgement. How one forms and exercises professional judgement and makes internalised decisions is expanded upon and considered in the next chapter.

5.3. Conclusion

This chapter has explored barristers' broad views on relevance as an evidential device, and its operation in the criminal courts. The interview responses showed barristers generally regard relevance a matter of fundamental importance that 'should be in all our minds throughout the entirety of proceedings' (B19). No interviewees questioned the salience of relevance as an evidential matter, and the majority of interviewees regarded relevance as a matter that barristers typically approached

[444] ibid 50.

consistently in the criminal courts. On the whole, barristers shared their view that as a profession they were 'pretty clear' (B14) on what relevance means, with others opining that they 'don't see much difference in how we approach relevance' (B17). Others offered a slightly different analysis and shared experiences where they may not have necessarily agreed with an opposite numbers' decision as to evidential relevance. Those expressing this view, nevertheless, suggested this was not a result of a different approach or test for relevance, but merely a testament to the fact that the application of a test may legitimately lead to different outcomes.

On the whole, the interview responses painted a picture of relevance as an important, but largely uncontroversial evidential matter. That said, discussions with barristers about specific academic framings of relevance brought into question the view of relevance as a settled and uncontroversial evidential device. When asked specifically about logical and legal relevance framings, barristers provided a range of opposing views on what was the appropriate framing of relevance, and even whether relevance was capable of being framed in such specific academic terms. Equally, where some barristers expressed support for a particular framing of relevance, their rationale and justifications for doing so, at times, differed. An overarching theme emerged from the discussions of academic framings of relevance, whereby interviewees seemed to indicate that decisions on relevance a product of internalised decision-making. A distinction was drawn by several interviewees relating to whether relevance was being considered generally, or whether it was being considered in relation to a category of evidence subject to a specific exclusionary regime through statutory means.

A number of questions are raised by this emergent theme. Firstly, what guides barristers internalised decisions on relevance, the frames they employ and apply in

deciding, and the detail that lays beneath the elusive notion of ‘professional judgement’. This question is addressed and explored through the lens of Hawkins’ four dominant decision frames in Chapters 6 and 7. The second question these findings raise relates to the relationship between decision-making on relevance and exclusionary rules of evidence; as some barristers suggested the consideration and approach to relevance may differ depending on whether the evidence in question was subject to an exclusionary regime. This raises the question as to whether, in practice, there may be something of a two-tier approach to relevance based on the type or category of evidence in question. Chapter 8 is dedicated to exploring this theme, and considering the ways and extent to which the specific *type* of evidence may have a bearing on how legal professionals make decisions on relevance.

CHAPTER 6: LEGAL AND SYMBOLIC FRAMES

This chapter continues the review of interview data to interrogate how evidential relevance is understood and applied in the criminal courts. The previous chapter identified some common themes regarding how interviewees view and conceptualise relevance, highlighting how relevance was generally understood as a fundamental and important evidential matter. Interviewees regarded relevance as a device approached in broadly consistent ways by decision-makers, although it was acknowledged that these approaches may lead, legitimately, to different outcomes in practice. The data then suggested that those approaches may not be as consistent in practice as they are perceived to be in theory, and the analysis in Chapter 5 showed there to be scope for internalised decision-making on relevance that was informed by a significant degree of discretion.

The data shared in Chapter 5 affirmed some elements of academic and appellate framings of relevance, in the sense that barristers emphasised that the discretion in the relevance context rests heavily on notions of ‘common sense’ that were shown to be embedded and informed by the equally elusive matter of professional judgement. What informs those internalised decision-making processes, including the substance of ‘professional judgement’ or ‘common sense’ is investigated in more depth in this chapter. As such, this chapter continues addressing RQ3 ‘To

what extent are relevance 'tests' applied consistently in the criminal courts as per my respondents' experiences?' but goes beyond this question of consistency and both this and Chapter 7 explore the influences upon barristers' decision-making and the interpretive processes involved in framing their decisions. This chapter therefore contributes to answering RQ4: 'According to my respondents, what factors influence criminal barristers' decision-making on evidential relevance?'.

Hawkins' theoretical framework is used throughout both this Chapter and Chapter 7 to analyse and organise the factors that influence barristers' decision-making. Both chapters use Hawkins's conception of decision frames to make sense of the ways in which barristers' make decisions on relevance and the interpretive processes involved in assessing the relevance of evidence. As discussed in the Introduction to this thesis,[445] Hawkins' framework uses frames to denote 'the interpretive behaviour involved in decision-making',[446] with frames regarded 'as "working rules" or "assumptions" that guide understanding of what has happened, or is happening, and of how information can be made sense of'.[447] Hawkins identifies four dominant frames (legal, symbolic, instrumental, and organisational) and these frames form the basis of this chapter and Chapter 7. Using frames in this context allows for exploration of internalised decision-making on how barristers understand and approach decisions on evidential relevance. The specific frames are used here to unpack the different approaches barristers took to decision-making on relevance, particularly in relation to the factors that impact and inform their decisions on relevance.

[445] Introduction, Section V.
[446] Andrew Britton, 'Pressed for Sentence? An Examination of the New Zealand Crown Prosecutor's Role in Sentencing' (2018) 29(3) 377, 406.
[447] Carolyn Hoyle and Mai Santo, *Reasons to Doubt: Wrongful Convictions and the Criminal Cases Review Commission* (OUP 2019) 43.

This chapter considers the interpretive processes that inform relevance decisions through the lens of two of Hawkins' dominant frames: legal frames and symbolic frames. Chapter 7 then continues this investigation through use of the other two of Hawkins' dominant frames: instrumental and organisational frames. These frames are used in these chapters as evaluative tools, to aid and enhance the analysis of interview data. The four frames used are those that appeared dominant in the dataset but are not necessarily mutually exclusive from one another. Instead, frames are used here to artificially separate out factors relevant to decision-making on relevance, in full acknowledgement that there are layers to decision-making and those layers may, in places, interact with one another. As such, frames are to be seen as a useful heuristic device through which we can learn how barristers make decisions on relevance, and their rationales for doing so. The interaction of frames with the broader field and surround is considered in Chapter 9's concluding remarks.

The chapter shows that barristers understand and conceptualise relevance in a wide variety of ways. Across the sample of barristers, there was no single identifiable approach, test or threshold that was consistently associated with relevance. This is not necessarily surprising given what we already know about the open-textured nature of relevance, rather the focus in this chapter is on what *informs* those complex decision-making processes.

This chapter shows that recourse to legal frames was prevalent amongst interviewees, and a legalistic assessment of how the case could be made for relevance was routinely applied. That legal framing was prevalent amongst interviewees is not unexpected given the adversarial context in which decision-making on relevance occurs, but the nature of the legal frames applied is considered here. Though legal frames were often adopted by barristers when explaining their

approaches to relevance, there was also some limited evidence of symbolic framing in interviewee responses; showing the potential for decisions to be informed by extraneous social processes.

Section 6.1. sets out how frames are to be understood and how they are used in this chapter. Section 6.2. then explores the legal influences that bear upon barristers when making decisions on relevance. Legal framing – asking whether the legal case can be made for relevance - is used to explore interview responses which use legal principle/s, precedent, or materials to inform decision-making. Section 6.3. then discusses the extent to which social processes – captured by Hawkins' symbolic framing device – featured in barristers' decisions on relevance. Section 6.4. then offers some final reflections on the prevalence and form of legal framing where relevance decisions are concerned, and the potential for symbolic frames and other non-legal frames to be applied to relevance decisions.

6.1. Relevance, Frames and Factors that Influence Decision-Making

All barristers were asked to describe how they typically approach matters of evidential relevance, in terms of any key principles or tests that they apply in decision-making. Responses were wide ranging, and provide important insights into the different ways in which barristers may approach questions of relevance. The responses to this question shine a light on how and why barristers' approaches to decision-making may vary in particular circumstances, as well as detail on the different frames they may employ when deciding questions of relevance. Where section 5.2. considered interviewee responses around the relational aspect of relevance, this chapter considers interviewees broad approaches to relevance and the factors that influence

their decision-making on questions of relevance and how those relational determinations are made. Put another way, the analysis in this chapter is exploring the extent to which the legal test is at the fore of decision-makers minds when deciding matters of relevance. From the interview data, six key factors were identified as salient in terms of how barristers engage in decision-making on relevance. These six factors are discussed and explored throughout both this chapter and Chapter 7.

6.2. Legal frames

The Introduction to this thesis set out the concept of decision frames, as well as detail of the four dominant frames identified and used by Hawkins in his research on prosecutorial decision-making.[448] To briefly recap, legal frames apply where they rely on 'legal categories, conceptions, rules, and preoccupations',[449] to legally 'make the case' for their particular decision. Although legal frames were originally created and applied in this regulatory law context, this is not a barrier to legal frames being a useful tool for exploring decision-making around evidential matters in the criminal courts. Hawkins uses legal framing to capture when decision-making refers to legal materials and principles such as subsidiary regulations enforced by relevant legislation, reports to other agencies;[450] and decisions being made in anticipation of future criminal proceedings and any related evidential principles or norms.[451]

Legal frames have previously been used to great effect in a criminal evidence context, and Fairclough's doctoral work applied Hawkins' framework successfully in the context of special measures. Here, Fairclough used legal frames in reference to

[448] Introduction, Section V.
[449] Keith Hawkins*, Law as Last Resort: Prosecution Decision Making in a Regulatory Agency* (OUP 2002) 412.
[450] ibid 394.
[451] ibid 391.

an examination of legal decision-makers' approaches to the eligibility criteria of special measures, as contained within the relevant statutory regime, and relevant parts of the common law.[452] Both Hawkins and Fairclough's use of legal frames see those frames engaging with specific statutory regimes as one aspect of legal framing, but it is important to note that the legal frame does not apply exclusively where decision-makers engage with statute. The legal frame encompasses a wide range of legal sources including common law principles, and broader legal and quasi-legal materials and principles. In the context of relevance, there is no immediate legislative framework that requires direct and sole engagement from barristers when deciding whether a piece of evidence is relevant. Barristers, instead, are required to engage with common law principles, and a range of evidential principles and norms. It is each of those legal sources that encompass the legal frame in this research context.

Legal frames that emerged from the data are the first of the four dominant frames considered here, in reflection of relevance's existence and function within the adversarial trial. During criminal trials, the overarching task of barristers is to quite literally 'make the case' for their argument and therefore decisions on relevance must always be made through, and in conjunction with, an overarching legal framework. As such, it was expected that examples of legal framing would be prevalent barristers' practice. This expectation was confirmed in the interview data, which suggested that legal frames were at the forefront of barristers' decision-making on questions of relevance, and at times supplemented, supported and complemented by other framing devices. This diverged with Hawkins' findings which found instead that non-legal frames were dominant in decision-making in the regulatory context. He found that

[452] Samantha Fairclough, 'The Role of Equality in the Provision of Special Measures to Vulnerable and/or Intimidated Court Users Giving Evidence in Crown Court Trials' (PhD thesis, University of Birmingham 2017) 232.

decision-makers would in the first instance make decisions based on organisational concerns, potential deterrence of future health and safety breaches, and in consideration of the practical impact of their decisions. Only once a decision had been made on the basis of a non-legal influence would a legal frame be applied to determine how the case could be made for prosecution. The reverse was true of the relevance context, and legal frames were dominant throughout interview responses. That said, the data showed that a wide variety of other non-legal influences were present and complemented (and influenced) legal framing in practice.

Returning to the dominance of legal framing in barristers' decision-making processes, the interview data showed that two main legal frames were prevalent among interviewees. The first is a legal frame centred around legal analysis, and the second a legal frame accounting for the specifics of the offence and the case in question. Both forms of legal frames are discussed here in section 6.2.1. and 6.2.2. respectively.

6.2.1. Factors related to legal analysis

A significant number of barristers interviewed for this research used a legal frame to explain their decision-making on matters of relevance. When asked how they make decisions on evidential relevance, barristers were quick to draw on general *legal analysis* as a metric by which they adjudged relevance. A significant number of respondents framed their decision-making process in legalistic terms and, specifically, they drew a parallel between relevance and the probative value of evidence. As discussed in Chapter 3.3, the probative value of evidence is 'the extent to which it

tends to increase or decrease the probability of a fact in issue'.[453] The Law Commission elaborate slightly on this definition: 'the probative value of relevant evidence refers to the *weight* it carries in proving or disproving a fact'.[454] B2 provides a useful starting point for the discussion on relevance and probative value, when they set out their view on the 'guiding principle' in relation to relevance that encapsulated the law as they understood it:

> B2: 'The guiding principle is, certainly so far as I understand the law, is something is relevant if it is capable of being probative of something which is in issue. I think that's a relatively standard definition of what it means by those in practice, but it becomes more complicated where you are asked to decide whether something actually is or isn't probative'.

This is an example of a legal frame in that the barrister refers first and foremost to an overarching legal principle that guides their decision-making. That said, it is an abstract legal framing that is not practically instructive in terms of the mechanics of the approach to assessing whether X evidence is probative of Y fact. B2 acknowledges this complication, as they term it, but did elaborate on their approach to decision-making at this stage. Another barrister expressed a similarly abstract legal framing, which rests upon legal principles:

[453] Ian Dennis, *The Law of Evidence* (5th edn, Sweet & Maxwell 2013) 112.
[454] Law Commission, *Evidence in Sexual Offences Prosecutions*: *A Consultation Paper* (Law Com CP No 259, 2023) xix.

B11: ‘The overarching principle is this: the evidence must have a probative value attached to it, it must assist with something in your case. Now that obviously depends on the factual matrix before you. The evidence does not need to… prove or disprove a fact, most of the time it won’t conclusively do either, but it must be of assistance in that process of investigation’.

Both B11 and B2 are forthcoming in raising the issue of probative value. Before engaging in the discussions on probative value, it is worth first commenting on the language in which the responses of B11 and B2 are couched. Both use legalistic language, referring to ‘the law as I understand it’ or the ‘overarching principle’, the implication being that this it is a *legal* principle being applied. The language used by the barristers here reinforces that these barristers are applying a legal frame to relevance. Aside from the legalistic language of the responses both B2 and B11 appear to show interviewees employing a legal frame based on the application of legal analysis. The legal analysis sees barristers engaging with relevance as linked to the actual or potential probative value of evidence. Their legal analysis is, therefore, closely allied to an assessment of evidential probative value. Other barristers engaged in a similar process when asked about their general approach to deciding whether evidence is relevant, a sample of responses are included below, and analysed thereafter;

B15: ‘I want to know is it probative, or could it be probative given the facts of the case before me’.

B4: ‘I am looking to see whether the evidence has some probative value, if it has probative value it is relevant … that is the test I am applying’.

B19: ‘The test for relevance is one of probity, they are one in the same. Might the evidence have probative value, if yes then it is relevant. It is that simple’.

B16: ‘One's looking to probative value. One's looking to cogency, because I suppose that litmus test is whether the evidence is going to help the fact finders to determine where the truth of the matter lies. … it's going to be relevant if it's going to be probative of an issue to be determined in the case’.

B8: ‘I will … assess whether the evidence has any probative value, if it does it is relevant. Of course, this is subject to other evidential rules that may apply, but just speaking at this stage this is’.

Each of these responses show barristers approaching relevance using a legal frame based on legal analysis that draws upon the presence of probative value. Each of the responses discuss relevance approaches, again, in abstract terms based on principle, and appear united in the view that if evidence has probative value, it is relevant – as B19 states ‘It is that simple’. While it may be simple to express the principles at play in relevance decisions, interviewees indicated that it is less simple to show how those principles might be applied in practice. It appears from these

responses that barrister assessments of the probative value of evidence are based on inferential reasoning, that is presumably grounded in the now familiar notions of logic, common sense and professional judgement.

Most interviewees referred to the probative value of evidence when sharing their understanding of, and approaches to, relevance. While its inclusion in the discussion on relevance was clear, less so was the *amount* of probative value needed for the barrister to regard the evidence as relevant. It is not necessarily clear from interview responses how much probative value they regard as necessary before the evidence will be regarded as relevant. This speaks to the conceptual distinction between legal relevance and enhanced relevance framings, as explored in Chapter 3.3. The distinction between the two rests on the degree of probative value they each require. To remind the reader, legal relevance requires the probative value of evidence *outweighs* its potential prejudicial effects, and enhanced relevance demands *substantial* probative value. These neat academic framings of relevance do not necessarily translate well into the practical setting, and it is not necessarily clear from the interview excerpts included above which of those two tests each barrister may be closer to at a given time. It may be that legal professionals do not think on the 'test' of relevance in such scientific or prescriptive terms; they may well offer the response that such an assessment is not suited to a practical legal setting as was shown in section 5.3.

When discussing probative value, it is difficult to discern how much probative value is to be required. Recall the following expressions from the excerpts above, B8 suggested they would 'assess whether the evidence has *any* probative value'; B4 considering 'whether the evidence has *some* probative value' or B2 stating that 'something is relevant *if it is capable* of being probative of something which is in

issue'. None of these excerpts equate relevance with *substantial* probative value (an enhanced relevance test). On the contrary each engage in legal analysis centring on there being *some*, or any probative value attached to evidence. None of the labels above are indicative of a particularly high or stringent threshold being attached to relevance. This observation is made with the caveat that it was not expected that, when talking of general principles and approaches to relevance, barristers would refer to an elevated standard of relevance that is currently reserved (by statute) for specific categories of evidence. Nevertheless, it is important to note that substantial probative value was not referred or alluded to by interviewees. B2 refers to perhaps the lowest threshold of those shared in the excerpts above, that evidence should be 'capable' of being probative. Its probative value, on this view, need not be immediately clear or present, it must simply be capable of probity at some stage in proceedings. This implies *future* probative value may be sufficient to establish relevance.

This approach was implied by another barrister, recall B12's statement that 'it's going to be relevant if it's going to be probative of an issue in the case'. The use of the conditional future tense ('*it is going to be')* seems to echo the suggestion that probative value is something that can be established later in a case and reinforces the dynamic nature of relevance.

Some barristers expressed their legal framing of relevance in definitive language that implied there was something of a universal approach to, or universal understanding of, relevance. This resonates with the responses discussed in section 5.1. where barristers spoke of there being consistent approaches to relevance amongst the legal profession. Terms such as 'it is that simple', this is the 'standard definition', or the 'guiding principle', appear to reinforce the veneer of

simplicity that operates around relevance. Two barristers, in particular, reinforced this perception of simplicity around relevance, as is seen in the following responses:

> B12: 'It's just if something's not relevant, that is normally screaming out … whether or not it is relevant is rarely something that is balanced on a knife edge'.

> B17: 'It is usually a straight-forward exercise, and dare I say … quite … obvious whether something is relevant or not'.

> B8: 'Generally speaking, if it's not relevant, that is obvious to all sides and so one rarely needs to trouble the judge'.

Aside from reinforcing a theme of simplicity around relevance, these views use and highlight relevance's antithesis: irrelevance. Both B12 and B8 reflect upon the notion of evidential *irrelevance* typically being clear and easy to identify. This is a subtle but important distinction - between relevance and irrelevance – and it may be that irrelevance is easy to identify whereas relevance is less so. On one view, it could be that irrelevance is easily identifiable and understandings of irrelevance can be universally agreed upon. This view, if taken to its extreme conclusion, could lead to evidential relevance being assumed unless its irrelevance is obvious. B12's response is also interesting as it draws upon a knife analogy that has previously been used in the context of relevance and admissibility more broadly, in the House of Lords. In *A*, Lord Clyde discussed relevance and admissibility, and opined that 'a very sharp knife may be required to separate what may be admitted from what may not'.[455] Lord Clyde's

[455] *R v A (no 2) [*2001] UKHL 25 [138].

words appear to permit far more scope for nuance and difficulty than the words of B12 and B17 (although it must be noted that Lord Clyde is referring to admissibility, rather than the specific issue of relevance). Although Lord Clyde's qualification that a sharp knife *may* be required could imply this to be a potential or rare possibility, he nevertheless acknowledges that difficulties can arise in the context of relevance. The statements from B12 and B17 are not necessarily irreconcilable with the words of Lord Clyde, rather they differ in the emphasis placed on the nuance around relevance, assisted by the use of the same knife edge analogy. The potential for diverging approaches to relevance between barristers and judges will be discussed later in this chapter, and this anecdotal example will be used as a springboard for a deeper conversation around the different stakeholders in relation to decision-making around relevance in Chapter 7.

Other barristers used legal framing to explain their approach to decision-making around relevance, but rather than referring to legal analysis as an important factor in guiding their decision, they referred to the specifics of the case context and the specific offence in the case. This engages legal framing in a different way, where barristers detailed how the specific elements or components of the relevant crime, influenced their decision-making on relevance.

6.2.2. Case and offence specific factors

The previous section highlighted a fairly general and abstract legal framing based on the application of legal analysis, this section considers a more contextual legal framing device adopted by some interviewees to supplement the abstract legal frame. Section 4.2. set out how appellate framings of relevance often centre on the construction of criminal offences and defences, including the various conduct and mental elements of

those offences. As expected, this theme also arose in interview data where a legal frame based on the case of offence specifics was illustrated. While barristers invariably used different language to highlight the case contextual nature of relevance, all 20 interviewees referred to relevance as something that is linked to the context of the case before them. Barristers again used legalistic terms to discuss the case context and offence specificity:

> B20: 'You tend to know fairly early whether something might be probative and relevant to something in the case. It is really the facts, the facts of the case, that dictate to you whether evidence is relevant'.

> B9: 'It is difficult to say what it means for evidence to be relevant because it depends almost entirely on the case before me'.

These responses are again couched in relatively abstract and general terms, this itself is interesting as there appeared a tendency among interviewees to focus upon the contextual and dynamic nature of relevance, rather than engaging with substantive examples of those abstract principles and points. This means it is difficult to gauge the interpretive processes underlying their decision-making on relevance. This is interesting in and of itself, as a potential indicator of the extent of the internalisation of relevance decision-making. That is not to say barristers did not provide substantive examples of decision-making processes on relevance, a number did. One barrister provided a useful example that highlighted the fluid nature of relevance and the importance of the case context:

B16: ‘If, for example, in a case of let's say drug trafficking, and the issue is whether or not a person intended to supply a particular controlled drug, and evidence is going to be adduced of let's say a text message, I'm going to be looking to see whether or not the text message is relevant. Is it relevant to the case? In regard to the factual matrix? Is it relevant to a live issue in the case. So, for example, whether or not the person was in possession of a drug, whether a person intended to supply … the drug, or whether it helps to identify what the drug actually is’.

This, from B16, is instructive as it centralises the case context to determinations of evidential relevance, with reference to the ‘factual matrix’ of a case. The evidence must be, on B16’s view, relevant to a *live issue* in a case. The question as to what constitutes a live issue then follows, and B16 usefully elaborates to suggest that this relates to the specifics of the crime in question, which is an inherently legal consideration. In B16’s analysis, the example is a drug trafficking crime and the specifics of said crime (whether a person intended to supply a drug, whether the person was in possession of a drug etc) dictate what will or will not be relevant in that case.

That relevance is contextual and cannot be considered in an evidential vacuum is not a novel suggestion, and Chapter 3.2 set out the *relational* nature of relevance where relevance must be attached to something in a case, or to a contested fact. The relational aspect of relevance was also seen in Chapter 4’s doctrinal analysis where judges affirmed and engaged with the relational nature of relevance in case law.[456]

[456] Chapter 4.1.

When discussing the ‘case context’ or ‘factual matrix’ of a case, the actus reus and mens rea of the relevant crime or the required elements of a defence, invariably form an important part of this discussion. Several barristers shared a similar approach to B16 and highlighted the offence charged as an important influence over decision-making on relevance, with the added reference to the specifics of the crime/s charged:

> B18: ‘The facts of the case are key. So what is the crime? What are you trying to prove or disprove? If evidence is being adduced to prove a specific element of a particular crime, then I think it is undoubtedly relevant … The facts of the case are always key, though. I can’t say much more on that, it is all about the case, I mean the case you have before you’.

> B8: ‘It depends on the crime I am prosecuting, but, generally speaking, I will look at what I need to prove to the jury. Do I need to prove a defendant had some particular knowledge of something, of a matter. Once I know what I need to prove it is generally easy, relevance flows from there so to speak’.

The unspoken implication of this statement is that case context – obviously – varies depending on the types of cases barristers are typically involved with. While all barristers interviewed had experience in the criminal courts, their areas of typical practice varied much beyond whether they typically prosecuted or defended. Barristers practiced in different areas of criminal law, which may account for different views or experiences relating to evidential relevance. Barristers frequently involved in sexual offence cases, for instance, may become accustomed to informal

field-level practices and customs that influence their approaches to and decisions on relevance. As a hypothetical example, in drug cases it might be that decisions as to the household financial arrangements of the accused are routinely regarded as relevant, with little scrutiny beyond accepted practice in a particular Crown Court centre. The following excerpt considers the function of relevance and this barrister's approach to decision-making in relation to the specific offence of fraud:

> B7: 'You'll get it in fraud … where the issue may well be about accounting practices, and so forth; and if it's market fraud and the allegation may be that the defendants have misled the market by the way they've presented the accounts and made a commercial organisation seem more profitable and more attractive to investors than it would be. Then you are not just proving what happened, and the key element is whether they acted honestly and, for that, the market practices - the professional practices - can be relevant. Then you are going to argue between the experts as to what was some proper accounting practice, all of that'.

This response highlights the importance of the specific offence to which decisions on relevance relate, and how this may change barristers' decision-making processes on relevance. In relation to certain crimes, there may be varying scope for the exercise of discretion regarding evidential relevance. This could be based on the way a particular statute defines and constructs an offence (or defence) for example, that permits more or less scope for discretionary decision-making. B7's fraud example shows how the scope for relevance-based challenges is perhaps

enhanced where the offence in question is particularly complex, such as fraud offences.

Framing decisions in legalistic terms depicting the actus reus, mens rea or elements of a defence brings structure to decision-making around relevance, from which consistent approaches to decision-making are, ostensibly, more likely to flow. The question that invariably follows, however, is how strong a connection is needed between an element of the crime and the piece of evidence, and by implication, how stringent the threshold that ought to be applied in that regard is. Even so, this legalistic and structured approach to decision-making appears to reinforce the academic and judicial consensus that relevance is an inherently *relational* concept. Linking evidence to the specifics of a crime seems, therefore, a clear and tangible way in which that relational link can be established. Equally, it is an essential requirement of 'making the case' for relevance and whether to admit or omit evidence from a case.

Legal frames were prevalent in the interview data and appeared in the foreground of barristers' accounts of their decision-making on relevance. This was as expected given the function of relevance within the adversarial trial where barristers' first and primary task is to make their case to the jury. Legal frames based on legal analysis and case/offence specificity were present in interview responses, but they were not the only framing device employed by barristers when approach decisions on relevance. The interview data showed that a number of other frames were prominent and supplemented legal framing devices. The next section considers the social processes involved in interpretative decision-making processes, through the lens of Hawkins' symbolic frame.

6.3. Symbolic frames

Symbolic frames represent an approach to decision-making that centres on 'not legal, but social, processes'[457] that inform decision-making. In the regulatory context, Hawkins used symbolic frames to account for social and moralistic assessments within decision-making,[458] specifically relating to the ascription of blame upon individuals responsible for health and safety breaches.[459] In the context of evidential decision-making, decision-making on relevance does not accommodate the ascription of blame in such narrow terms. Instead, the symbolic frame is to be understood in this context as relating to broader notions of social conscience and 'personal feeling'[460] that can intersect with legal framing and inform barrister's decision-making.

This section explores the social processes that may influence barrister's decisions on relevance and concludes that symbolic framing has scope to influence barristers' decisions on relevance. Symbolic framing was not particularly prevalent in the interview data, but some limited references to social processes warrant discussion and highlight the potential for those social and moralistic considerations to intersect and interweave with other decision frames. Several possible explanations for the relative (in)frequency of symbolic frame examples in the data are explored below; including the suggestion that barristers may be reluctant to express moralistic views in what was an inherently legalistic discussion. It is concluded that notwithstanding an absence of symbolic framing in interview data, the breadth of relevance as a concept allows for social and moral influences to feature in decision-making; not least through the 'common-sense' understandings that inform the inferential thinking at the base of

[457] Keith Hawkins, *Law as Last Resort: Prosecution Decision Making in a Regulatory Agency* (OUP 2002) 333.
[458] ibid 334.
[459] ibid Chapter 11.
[460] ibid 333.

them. Crucially, however, it is posited that symbolic frames likely feature and feed into other decision frames; be they legal, organisational, or instrumental. It was striking in and of itself that interviewees tended to avoid references to matters of 'personal feeling' in relation to relevance and evidential matters. The exert included here hints at a limited example of symbolic framing:

> B3: 'In cases which are sensitive, for example in a murder case, if you've got the family of the deceased there and you want to make a point about the way in which the deceased was living their life - maybe they were a drug addict - and you know you have some evidence of money they spent on drugs in the previous month, you might think logically a jury should hear about that, but then again what are you proving? Because they still died in a fight'.

There appears to be a number of different framing processes at play in this excerpt. First and foremost, as highlighted in section 6.2., legal frames are at the foreground of this excerpt as expected. In conjunction with the legal frame and the legal art of 'making the case', is reference to a social aspect of the decision, specifically the presence of the deceased's family in the courtroom. In broad terms, this decision-maker is reflecting upon the potential for a range of legal, practical and social factors to feature – to varying extents – in their decision on evidential relevance. It exemplifies that there can be situations, potentially where evidence in question is of minimal probative value, where decision-makers may draw upon extraneous social influences to inform their decisions. This tallies with Hawkins' account that 'the decision-making of legal officials constantly reflects conceptions of right and

wrong, and the desire to do justice and be even-handed'.[461] That is not to say B3 is making a decision based on a moralistic desire to be even-handed, simply that there is *scope* for such matters to influence decisions on relevance. There is particular scope for social and/or moral influence on relevance decisions where relevance, by most accounts, is underpinned by logic and common sense – both of which are sufficiently open-textured to permit their influence.

It is also important to note that B3's account above shows something similar to a legal relevance framing, at least if legal relevance is to be understood in the academic terms that Choo describes it. He suggests that the 'plus value' assessment includes a mechanism for excluding evidence that ought not be admitted.[462] On a broad reading of this explanation of 'plus value', B3's remarks show something similar to, or characteristic of, a legal relevance test. This is salient as legal relevance as an academic framing of relevance has normative underpinnings, which support and invoke ideas about what should and should not be included as evidence. This feature of legal relevance, arguably, *encourages* social and moral assessments to be made around evidential relevance and admission. This then raises the question of what underpins those social and moralistic assessments, which are much akin to those of logic and common sense in that they differ and vary depending on the individual making them.

In terms of the factors that influence barrister decision-making on relevance, expressions such as B3's above show that individualistic assessments of 'personal feeling' have scope to influence the ways in which barristers engage with and make

[461] Keith Hawkins*, Law as Last Resort: Prosecution Decision Making in a Regulatory Agency* (OUP 2002) 334.
[462] Andrew Choo, *Evidence* (6th edn, OUP 2021) 3.

decisions on relevance. That said, this was not borne out in the data gathered for this research and this limited indication from B3 was the only instance, out of 20 interviews, in which an indication of symbolic framing was identified. The reason for this may well be that the interviews were with legal professionals who are routinely required to remove notions of social or moral matters from legal decision-making. Much has been written on the relationship between law and morality[463] but it is long accepted that the courts are to engage and apply law, not make moral assessments on any aspect of the case or personnel within it. This has been reinforced the courts[464] and in extra-judicial commentary.[465] Lord Bingham, in his extra-judicial writing, discussed the importance of decision-makers engaging *only* with the legal and factual merits of a case 'however unpopular or distasteful their case (and presumably their client) may be'.[466] While symbolic frames were mostly omitted from discussions with barristers, the following chapter considers other non-legal frames that may have significantly more scope to guide decision-making on matters of evidential relevance.

6.4. Conclusion

This chapter has explored interviewees views on the nature and operation of relevance as an evidential device in the criminal courts. It has shown that legal framing is a dominant and indeed prevalent way in which barristers engage with decision-making on relevance. Barristers used both legal analysis and the specifics of the case – including the elements of the relevant crime - to assist their determinations of

[463] HLA Hart, *Law, Liberty and Morality'* (Stanford University Press 1963); John Stuart Mill, *On Liberty* (Watts and Co 1929)
[464] *R v Brown* [1994] UKHL 19 [274] 'The issue before the House is not whether the appellants' conduct is morally right, but whether it is properly charged'
[465] Tom Bingham '*The Rule of Law'* (Penguin 2011) 93.
[466] ibid 93–94.

relevance. This chapter has also shown how there is scope for symbolic frames to be applied to relevance decisions, although this was not borne out of the data gathered for this research. One limited allusion to the symbolic framing was discussed and used to highlight that there remains potential for social and moralistic assessments to inform decisions on relevance through the vehicles of common sense and logic that are conceptually closely bound up with relevance. The next chapter continues the exploration of how barristers make decisions on relevance, including the factors that inform their decision-making processes on relevance. For this, the remaining two of Hawkins' dominant frames – instrumental and organisational frames – are used to conduct the analysis.

CHAPTER 7:

INSTRUMENTAL AND ORGANISATIONAL FRAMES

The previous chapter explored how barristers make decisions on relevance in a practical legal setting, and considered the legal and symbolic frames that barristers apply in their decision-making on relevance. This chapter continues the interrogation of relevance and probes RQ4: 'According to my respondents, what factors influence criminal barristers' decision-making on evidential relevance?'.[467] This chapter uses another two of Hawkins' dominant frames to further explore barristers' decision-making on relevance, these are instrumental frames and organisational frames. These frames were introduced in the Introduction to this thesis[468] and readers will recall that instrumental frames see decision-makers concerned with the practical impact/s of a decision, while organisational frames denote the influence of organisation-specific mandates, objectives, and interests[469] upon decision-makers. As with the previous

[467] Introduction, Section V.
[468] ibid.
[469] Keith Hawkins, *Law as Last Resort: Prosecution Decision Making in a Regulatory Agency* (OUP 2002) 305.

chapter, frames are used as heuristic devices[470] to assist exploration of complex and multi-faceted decision-making; they are not exclusive lenses through which to narrowly perceive decision-making, but devices for explaining the layers of influence upon discretionary decision-making.

This chapter shows the range of factors which may influence the ways in which barristers make decisions on relevance. These factors go beyond the legal and moralistic assessments that the previous chapter identified and, instead, show how practical and organisational matters can have a significant impact and influence upon the decision-making processes around relevance. Section 7.1.1. explores the ways in which the jury can feature in and inform barristers' decisions on relevance. Section 7.1.2. interrogates how other actors in the courtroom may inform and shape barristers' decisions, including through informal agreements, and section 7.1.3. considers how disclosure requirements may bear on the decision-making processes around relevance. Section 7.2. then considers they ways in which organisational mandates, customs, and expectations can influence and inform relevance decision-making in the trial context and the specific theme of 'reputational risk' is discussed in this regard.

Although legal frames are undoubtedly dominant in relation to relevance decision-making, section 7.3. concludes the chapter by highlighting the significant scope for both instrumental and organisational frames to inform barristers' decision-making on relevance, often in conjunction with one another. Notable findings relating to *informal* agreements between barristers are reflected upon and areas for future research are identified. The overarching theme that emerged from this review of decision-making was one of nuanced and dynamic decision-making processes that

[470] Amanda Coffey and Paul Atkinson, *Making Sense of Qualitative Data: Complementary Research Strategies* (Sage Publications 1996) 155–158.

goes much beyond a purely legalistic approach to decisions on relevance. The data discussed here goes a significant way in showing how relevance is capable of being understood and applied in a myriad of ways in the trial context, and to a number of different complex, contextual, and interrelated ends.

7.1. Instrumental frames

This section uses Hawkins' concept of instrumental frames to explore the ways barristers make decisions on relevance in practice, and the factors that inform those decisions in situ. Three specific factors with scope to influence barristers decisions on relevance are identified, they are 1) Factors related to jury assistance[471] 2) Factors related to other courtroom actors,[472] and 3) Factors related to disclosure requirements.[473] Before exploring these issues, this section first sets out what instrumental frames are, and how they are to be understood in this research context.

Instrumental frames are concerned with 'what impact or effect a particular intervention would have'[474] on a practical level. Hawkins developed instrumental frames in the regulatory context, to denote decision-maker concern with the impact of their decision on the relevant health and safety agencies.[475] Hawkins was, specifically, interested in the decisions of health and safety inspectors as to whether to prosecute an organisation for a health and safety breach. In this context, instrumental frames were then linked to the assumption that 'prosecution is employed instrumentally to

[471] Section 7.1.1.
[472] Section 7.1.2.
[473] Section 7.1.3.
[474] Samantha Fairclough, 'The Role of Equality in the Provision of Special Measures to Vulnerable and/or Intimidated Court Users Giving Evidence in Crown Court Trials' (PhD thesis, University of Birmingham 2017) 196.
[475] Keith Hawkins, *Law as Last Resort: Prosecution Decision Making in a Regulatory Agency* (OUP 2002) 282.

achieve a reduction in certain untoward events, undesired activities, or state of affairs.'[476] Transposing instrumental frames in an evidential setting requires, then, a slight adaptation. It is reconceptualised in this thesis by removing the deterrent focus, is understood in more general terms as relating to decision-makers considering the practical impact of their decision.

An important dimension of the instrumental frames is the reality that legal decision-making does not occur in a vacuum. Decisions are often taken by multiple parties within the justice process (the police, the CPS, for example). Instrumental frames then help situate decisions within a 'chain of events' or a 'chain of decisions' and see legal professionals considering their decision-making in response to, or in anticipation of, other decisions. In the wider justice context, McConville, Sanders and Leng have noted how legal decision-making is often contingent upon the decisions of others within the justice system.[477] They draw upon interview data to reflect upon the potential for the CPS, when making charging decisions, to defer to decisions taken by the police (to advance a prosecution).[478] This exemplifies the interrelationship between series of decisions within the wider justice process.

This section explores instrumental framing as it relates to barristers' concerns with the practical impact of their decision, as well as barrister reflections upon their decision-making within a broader sequence of decisions. In this section, barrister responses reveal the ways in which barristers make sense of and operationalise relevance in practice. The interview data shows extensive use of instrumental framing devices by barristers, and illustrates the ways legal frames – engaging with logical or

[476] Keith Hawkins*, Law as Last Resort: Prosecution Decision Making in a Regulatory Agency* (OUP 2002) 282.
[477] Mike McConville, Andrew Sanders and Roger Leng, *The Case for the Prosecution* (Routledge 1991).
[478] ibid 142-143.

legal relevance reasoning – can be supplemented and informed by instrumental considerations.

7.1.1. Factors related to jury assistance

This subsection explores barrister responses which indicated that decisions on relevance are closely related to the potential for evidence to assist the jury. Fundamentally, decisions on relevance are taken in an active trial context whereby barristers 'perform' in front of two key groups: judge and jury. It makes sense that barristers should, at least sometimes, account for those parties in their decisions on relevance given that judges have the final say on relevance (and the power to exclude evidence) and jurors make the factual determinations. The ways in which matters pertaining to the judge and jury impact barristers' decision-making on relevance are considered here.

A significant number of interviewees highlighted the importance of the jury in relation to their decision-making on relevance. It is appropriate and expected that barristers are thinking ahead about what material a jury needs to do its job and reach and a factually accurate verdict. What is striking, though, is that barristers refer to the jury to seemingly explain their approach to decisions on relevance:

> B19: 'When I talk about evidence being probative, it is really all about the jury, and I am asking what is going to play well with the jury at all times. What evidence is going to strengthen the case I am advancing? For me, relevance falls within those … questions and is decided in that … context'.

As well as centring the jury in their decisions on relevance and probative value, this response shows how 'forward looking' relevance decision-making can be. It suggests barristers look ahead to how powerful or persuasive evidence may be for a future jury. This raises an important question about how and upon what basis a barrister may make that judgement. Presumably, these assessments rest upon lay common sense projections or indeed assumptions about juries and indeed jurors.

Other barristers placed juries at the centre of their approach to relevance:

> B12: 'One can't consider relevance, and then consider the jury. It's only relevant to the tribunal of fact and their determination of the facts and issues in question. So one … simply can't separate it'.

Here, decisions on relevance are regarded inseparable from juries and B12 suggests that decisions on relevance should be made through the prism of evidence being important to the tribunal of the facts so that they can weigh it in relation to a contested fact. Other barristers show how the potential for jury assistance can be a key metric upon which decisions on relevance are made.

> B2: 'The process by which you decide, if there is a disagreement about it, is by hearing both sides of the argument … by saying how this actually can help a jury decide this point, if its not going to help them decide it then it's not relevant'.

> B8: 'Of course, I am always mindful of the jury, at all times, because it is they who are to decide … they are the triers of fact. Evidence is adduced to assist

their deliberations, no purpose is served by bombarding them with information that isn't relevant'.

On these views, the decision-making around relevance focuses on the potential for the evidence to assist the jury. B8 additionally refers to the need for relevance decisions to actively ensure juries are not overburdened with evidence that is not salient to their deliberations. Both the remarks of B2 and B8 reinforce the 'forward looking' nature of relevance decisions, in that they are both presupposing the extent to which the evidence will be useful to a jury. The responses of the barristers above suggest that if they believe the evidence will assist the jury in some way, then they will consider it relevant. This seems to set a relatively low bar for relevance and at the very least, it is one that is highly subjective and dependent upon the barrister's perception of what will be 'helpful' to a jury. A recurring theme across the data was that barristers use lay descriptors to denote evidence being 'helpful' or 'useful' to the jury, yet each involve the subjective ascription of meaning to those terms by the decision maker. What one barrister would accept as 'helpful' to the jury, another barrister may not. This reinforces the internalised nature of assessments of relevance, not only in the straightforward 'is this evidence relevant?' question. Other barristers discussed relevance in terms that highlighted its instrumental impact, but did so in more legalistic terms:

B14: 'In the first instance it is my, and my colleagues', job to decide what evidence is relevant, we must then make the case for its relevance before the jury. It is then for the jury to decide what weight to afford that evidence. That is the process'.

There is a subtle difference between this response from B14 and the responses detailed above. The difference is that, on B14's view, there is a more sequential 'process' to decision-making that, while it includes juries, it is not solely decided based on what will assist a jury. B14's view is that a barrister is to decide on relevance and communicate that decision to the jury. The jury is then required to decide how much weight to attach to a piece of evidence. Although B14 is discussing the role of the jury, they do not necessarily disengage from instrumental framing, but they refrain from using the jury as an instrumental tool by which to inform their decision on relevance. Instead, B14 alludes to a legal frame which considers the principled legal function of a jury as triers of fact. Another barrister alluded to the nuanced and complexity of relevance, and outlined the key questions that a barrister, in their view, must ask of evidence:

> B16: 'Does it have cogency? Does it have probative value? Does it have weight? And if so, how much weight would it have? Does it matter if the evidence has negligible weight, or is it even for the lawyer to just consider weight, which is ultimately a matter for fact finders?'

Each of these responses highlight the highly practical nature of decisions, that in varying ways use the potential for evidence to assist a jury within their internalised decision-making on relevance. A consequence of this approach is that decisions around relevance merge into pre-emptive and presumptive decisions as to the evidential weight a jury *may* attach to a piece of evidence. As B16 suggests, this could give rise to barristers 'appropriating' the key function of the jury, to decide what weight to afford evidence. Beyond this, both the responses of B14 and B16 show how instrumental frames can be supported by legal framings of relevance embedded in

notions such as probity. This echoes the discussion in the previous chapter[479] which regarded legal frames as the overarching and dominant frame applied to relevance decisions, largely but not exclusively due to the active trial context in which the decisions are made. Nevertheless, legal frames are necessarily supplemented and supported by other framing devices, including those that are instrumental in nature.

Despite these differences, references to the jury were brought within a large proportion of barristers' responses. Other barristers accounted for the jury in their decision-making around relevance and in their discussion of tests applied to relevance, but in more general terms:

> B6: 'Evidence must be probative to a fact which is in dispute in the case, is it going to be useful to the jury in some way'.

This response associates relevance with being 'useful' to the jury and only 'in some way'. Both expressions suggest there is significant scope for interpretative latitude as to what will be regarded useful to a jury and, equally, for what purpose. This echoes the aforementioned concern over the language used to 'measure' the assistance that evidence should provide to a jury. The terms used by barristers all permit a significant degree of discretionary decision-making and provide decision-makers with flexibility as to those assessments. Similarly wide-ranging terms were used by another barrister when sharing their approaches to relevance in light of the presence of juries:

[479] Chapter 6.1.

B2: ‘For it to become admissible it has to be something which is capable of being helpful to [the jury], but you will always have in mind, and this is part of the courtroom craft and courtroom advocacy, as to how the evidence actually comes out and what that’s actually going to mean for the jury who are sitting, and you’ll hear competing submissions about relevance. For example, if the Crown is not allowed to lead evidence of a defendant carrying a bladed article, in the context of a stabbing, and there’s a previous caution for having a weapon 10 years ago, the prosecution will be saying ‘well that is directly helpful to him saying he did not have a knife on this occasion’; [but] the defendant will say it has got nothing to fucking do with it’.

This barrister uses similarly broad language to describe the relationship between relevance and juries; to be relevant evidence must be ‘capable of being helpful’. Even where barristers say broadly the same thing regarding juries and relevance it is almost impossible to know, without direct observation, whether those same expressions promote consistent or even similar outcomes. This excerpt from B2 also highlights the interpretive and functional role of barristers themselves in identifying and making the legal case for relevance before a jury. Focusing on the ‘courtroom craft and courtroom advocacy’ illustrates how instrumental aims may well vary for different actors in the courtroom. In broad terms, the prosecution and defence will often have different objectives and instrumental aims (for example to either have evidence admitted, or to prevent admission of evidence) and can draw upon different legal rules or framings to make the legal case for relevance, or indeed irrelevance.[480]

[480] For example, Criminal Justice Act 2003 Section 78 provides an evidential restriction *only* to prosecution evidence.

This section has shown the different ways in which relevance decisions can be associated with juries and interview data suggests barristers often think instrumentally ahead to the potential *impact* of their decisions on relevance, in terms of whether the evidence may assist a future jury. All interviewees were forthcoming in associating relevance with the jury, and conceptualised that relationship in ways that often rested upon subjective language open to individualistic interpretation and inference.

7.1.2. Factors related to other courtroom actors

The previous section showed how the active trial environment sees barristers make decisions in consideration of the jury. Another way that we can see instrumental framing in operation in this context is where decision-makers consider the practical impact of their decisions on other actors in the courtroom. This section considers this in relation to the impact of barristers' decisions on relevance on judges and other barristers. Within this discussion, the role and prevalence of courtroom tactics is explored, as several interviewees raised professional tactics as influential within their decision-making on relevance.

The term 'tactics' is used broadly here to denote methods and techniques barristers use to achieve a desired result in the case before them. Interviewees referred to tactical decision-making in relation to both the judge presiding over the case, and other barristers involved in proceedings (typically, but not exclusively, their opposite number). Tactical decision-making shows barristers applying an instrumental frame to their decision-making by considering the future implications and impact that a decision may have on a particular third party (judges and/or barristers). Interviewees shared several ways in which they deploy instrumental frames and the different ways in which

tactics featured in their decision-making. Some barristers discussed how their evidential decisions were often made with reference to the judge that would preside over a particular case:

B11: ‘Although life as a barrister involves a lot of travel, and we work all over the country sometimes, you get to know the judges and you get to know how they operate … I know if I am defending in front of X judge then they might give me some latitude in terms of the evidence I want to include in the case, and give me the time and space to explain its value to the jury. Y judge might have a more brisk approach, so I know when I am before judge Y that I just need to get to the point and that might mean leaving out some bits that I might have otherwise included, if you see what I mean’.

B3: ‘Judges are all different, some judges are lazy and will just say “yeah get on with it” and others judges are very interventionist … but on occasion if a judge thinks you are making irrelevant points or trying to bring stuff in that is irrelevant, some judges will give you a fairly good bollocking, making sure you’re not to do it twice’.

B13: ‘Judges were thoughtful creatures and would often let you make the case for relevance ... and give space for you to develop arguments. Now that’s not to say they would … allow free reign and they didn’t all have the same approach of

course, some would give more time than others, some were quite quick to intervene and ask the question "where is this going?"'.[481]

These insights show barristers acknowledging different judicial styles and shows the potential for their own knowledge of such styles to inform their decisions on relevance. It shows, first of all, variation in approaches to relevance among Circuit judges. It also suggests that barristers approaches to relevance may equally vary depending upon which judge a barrister finds themselves appearing before. Barristers may apply a higher threshold to relevance when appearing before a 'brisk' judge, and a lower threshold to relevance when before a judge that they know will likely afford 'time and space'.

At this point it is necessary to note that this approach to relevance may apply in only *some* circumstances, as it relies upon barristers having knowledge of the judges before whom they will appear. Not all barristers will have this level of knowledge, or familiarity, with judges and will therefore not be able to use such knowledge to assist in their decision-making on relevance. Others may have this knowledge and yet argue with a judge over a piece of evidence anyway, because for instance they think it would be of use to the jury or simply see it as satisfying the legal test as properly understood. However, instances where barristers do alter their approach in anticipation of that of the judge before them bears resonance with observations discussed in Chapter 5[482] which saw barristers centre notions of 'professional judgement' as embedded with relevance decision-making. There it was noted that 'professional judgement' was a label of significant breadth with potential to be informed by a range of factors that are

[481] B13 is a retired barrister.
[482] Chapter 5.3.

not necessarily transparent. It may be that knowledge of trial actors and personnel in the courtroom – including judges – could be a component of professional judgement and informs its subsequent exercise. Illustratively, and in support of this supposition, another barrister expressed a similar sentiment and discussed how knowledge of the presiding judge may influence their evidential decisions. This barrister did so with specific reference to the extent of their professional experience:

> B15: 'You know other legal personnel well in this business, and I would be lying if I said I did not account for those different styles, at times, in my submissions. This is most pronounced in relation to the judge, some will let me challenge the relevance of prosecution evidence quite freely, others won't. You get to know their different styles and you adapt to them. This is something that takes time and is no doubt a consequence of being in practice for more years than I would care to admit'.

B15 shares a view similar to those expressed by other interviewees presented above, in suggesting that their decisions on relevance can vary depending on their knowledge of a judge in the case. Where they say 'I would be lying if I said I did not account for those different styles … in my submissions' (B15) they appear to suggest that they adapt their submissions – regarding relevance – in line with the different judicial personalities and styles. It is interesting that each of these barristers who shared this view, had a significant number of years post qualifying experience (ranging between 23-39 years). Having a significant number of years' post qualifying experience may render these barristers well-placed to make the observations that they do. One

explanation for this, as mentioned above, is that those barristers have become familiar with particular judges over a long period of time and are, therefore, well-placed to make a pre-emptive assessment of how a particular judge may respond to their evidential submissions. The important question as to why barristers may tailor their submissions according to the judge before them is returned to and discussed in detail in section 7.1.2.

It is important to reflect upon the pre-emptive aspect of these assessments, however, as these forward-looking assessments are based on assumptions and the *perceived* impact of a decision. This, again, engages a subjective and individualistic assessment as to how a barrister thinks another will respond or react to their evidential decision. Where barristers reflect upon their level of experience and the resulting knowledge of judges that they have acquired, they are implicitly reflecting upon aspects of the legal field and their placement within it. As the 'legally and organisationally defined setting in which decisions are made'[483] the legal field determines the structure and organisation of Crown Court trials, within which barristers become accustomed to this structure and familiar with the mandates that it places upon them. Where barristers refer to their level of professional experience, they do so to explain their ability to pre-empt decisions of judges. For instance, B15 remarks upon their tendency to account for the judicial personalities in their evidential decisions being 'no doubt a consequence of being in practice for more years than I would care to admit'. To reflect on professional experience and the nature of professional practice is to reflect of aspects of the legal field. This reinforces Hawkins' view of the surround, field, and frame as in mutual interaction with one another,[484] and shows how the legal

[483] Keith Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (OUP 2002) 27.
[484] Keith Hawkins, *Law as Last Resort: Prosecution Decision Making in a Regulatory Agency* (OUP 2002) 52.

field can influence and interact with the framing devices barristers used to make evidential decisions.

Barristers offered extensive insight and illuminating examples as to the judicial approaches to and involvement with relevance decisions. A general theme emerged whereby barristers, on the whole, regarded judges as fairly passive where relevance determinations were concerned and willing to give barristers autonomy to decide matters of relevance. That said, some interviewees reflected on the different approaches that judges can take on evidential relevance. The following exert sees a barrister reflect on their experience in a pre-trial hearing, where one judge laughed on their suggestion that a piece of evidence may be excluded. They explain how a different judge subsequently took a very different view:

> B12: The judges have no time and patience, and you get a different judge with every hearing, right. So my argument about the drug run … the first judge I was in front of, I mean, *laughed* when I even suggested excluding that evidence and sort of said “we’ll settle that next week, and we'll see how you do”. Then, when I finally turned up, it was it's a different judge who laughed at the prosecution for trying to put the evidence in!’

This is a salient illustration of the potential for inconsistency in judicial approaches to relevance, and is a practical example of the scope for different conclusions to be drawn on a concept informed by common sense and logic. As ever, the danger of common sense is plainly that it is not necessarily common nor shared, even amongst the judiciary. Other barristers spoke of judges in less individualistic terms and regarded

them collectively to be gratuitous in allowing barristers to ‘make the case’ for relevance:

> B17: ‘Even if a judge says well, look, I can't really see where this is going, or I can't really see how this is going to help. If I say, well, you'll see in the fullness of time, and it's important for us. Generally, judges will leave it there and allow the evidence to come forward unless there is some real fundamental prejudicial consequence either to the Crown's case, or to a co-defendant’

Interestingly, this example speaks to a situation whereby a barrister is seeking to communicate relevance and they suggest that judges will typically give barristers time and space to do this. It is not clear whether this approach would be true of judges in a situation whereby evidence appears to be irrelevant. B13 remarked of judges that ‘some were quite quick to intervene and ask the question “where is this going?’. Presumably, as the relevance of the evidence was not clear to that judge. It remains to be seen, then, whether judges are more likely to intervene where potentially *irrelevant* evidence is introduced in a trial.

The different perceptions of judges and judicial views of relevance could be due to various factors; the locality in which barristers practice (and the resultant range of judges they are exposed to); the type of cases a barrister typically takes and the types of evidential issues that arise in that context; or the professional standing of barristers may affect the way in which judges engage with them and visa versa. Nevertheless, interview responses set out above suggest that a barrister’s knowledge of judges (and the judges’ different approaches and views on relevance) has scope to inform their

decision-making around relevance. A barrister knowing which judge they will be appearing before may, therefore, encourage instrumental decision-making where they may make a decision on relevance based on what will likely 'play well' with that particular judge. B5 usefully described a case they had worked on in their capacity as prosecution barrister. This case involved a dispute around evidence from the defendant's internet search history and social media channels, that the prosecution wanted to use to suggest the defendant had a sexual interest in underage girls:

> B5: 'There is one judge, in particular, that if that trial is listed in front of it wouldn't surprise me if he said [the jury] shouldn't hear that, that wouldn't be fair, and I'd be expected to run the case without the jury knowing any of those things … If I'm in front of that judge I might water down my bad character application and say to the defence look, if you agree X, Y and I will leave out Z, then we will tell the judge it goes in by agreement. Because I'd rather have watered down bad character, than no bad character. Yeah, it's bonkers that you know, you have to do that'

This response illustrates instrumental framing in several interrelated ways. First, it shows this barrister reflecting upon the judge before which a trial is listed. They then predict how they envisage that particular judge will respond to their evidential decisions/requests. This is an instrumental frame as those discussed above, based on a forward-looking assessment of how they *think* a judge will react to a particular evidential decision. This example goes further and demonstrates another form of instrumental framing whereby, on the basis of what they believe a judge will do or not

do, they interact with other barristers to determine how decisions on relevance might be agreed. Crucially, they do so in such a way that will effectively bypass judicial oversight of relevance, and in a way that potentially subverts and avoids the aims of relevance 'rules'.

This statement emphasises the importance of courtroom relationships and the extent of the impact they can have on barrister decision-making in relation to evidential matters, including relevance. In this exert, B5 is making an evidential decision based on a pre-emptive judgement as to how a judge will approach that same evidential matter. B5's statement shows the dynamism of instrumental framing where it can relate to multiple third parties simultaneously; B5 is making their decision in anticipation of and in conjunction with both judge and defence counsel. At this stage, it is worth noting that B5 is referring, within this exert, to bad character evidence. The role of exclusionary rules of evidence are, in some respects, closely related to matters of relevance and warrant considered discussion.[485] The key takeaway from B5 comment, at this stage, relates to their statement about agreed facts and barristers reaching decisions on evidential relevance (and subsequent evidential admission) based on agreement with their opposite number. This shows barristers making an instrumental, pragmatic, and tactical assessment as to how best to have the evidence admitted. In these situations they may seek informal agreement to admit certain evidence with opposing counsel, and by so doing circumventing the judge and relevance rules. The instrumental frame applied therefore sees barristers consider first and foremost how they can have a piece of evidence admitted when they suspect a judge may prevent its admission. Their instrumental response to this question is to

[485] Chapter 8 is dedicated to exploring the relationship between relevance and exclusionary rules of evidence and gives space to that important discussion.

'make the case' informally to a different gatekeeper of relevance; their opposing barrister. It was striking that this illustration of informal agreement between barristers regarding relevance decisions was echoed by other barristers:

> B10: We do have a sizeable discretion in what we decide … is relevant to our case but it is constrained, considerably so, by judges. They aren't going to sit there and let me prattle on about something which is barely relevant. Oh no, they will be quick to ask what the relevance is if it isn't made clear pretty swiftly. In reality, I might push my luck a bit with some judges and try have things admitted that I know a stricter judge might not allow. It comes with experience, I suppose, you get to know what judges like and don't like. Some are incredibly strict when it comes to sexual offences in particular - they get a lot more training on that now, so maybe that is why – but there are certain bits of evidence I might think are relevant but I know I haven't got a hope in hell getting it past a particular judge. Sometimes, you try to be clever and, together with your opposing number, agree that you can have it admitted as agreed facts if I let them include something else say'.

That two interviewees shared similar experiences and approach to decision-making was an interesting finding, and one which reflects a growing body of literature which centres barrister co-operation and the increasing prevalence of evidential admission by agreement between barristers.[486] The mechanism referred to in these interviews

[486] Matt Thomason, 'Admitting Evidence by Agreement: Recalibrating Managerialism and Adversarialism in Crown Court Criminal Trials' (2021) CLR 727.

was ‘agreed facts’.[487] As the name suggests, this is the process where the prosecution and defence agree which evidence will be admitted. This is provided for by the Criminal Justice Act 1967,[488] and ‘reflect the pragmatic imperatives of expediting trial proceedings and minimizing avoidable costs, considerations which appear especially compelling where there is no material dispute between the parties about a particular matter’.[489] While the Criminal Justice Act provides formal means by which agreed facts are permitted, it is important to note that ‘formal admissions are not always necessary’[490] and agreed facts can occur ‘by a sort of ‘gentleman’s agreement’ or tacit understanding between the parties’ lawyers’.[491] Such facts are ‘ordinarily taken at face value’[492] by the court, without much difficulty.

While barristers use of agreed facts appears within the context of an instrumental frame, it is important to note that the statute that permits agreed facts is part of the legal field and the ‘seen-as-relevant-at-the-moment assemblage of facts and meanings within which a decision is located’.[493] Hawkins talked of the legal field awarding a ‘mandate’[494] to decision-makers which, for criminal barristers, sees them using procedural and substantive law as a guide for their decision-making. Both legislation (in the Criminal Justice Act 1967 Sections 9-10) and common law principles (that the court will accept evidence ‘at face value’ where both parties have agreed to its admission[495]) show the legal field informing barristers’ decisions on relevance. Another barrister referred to the same practice, of making evidential decisions in a

[487] Agreed facts is discussed later in this section.
[488] Criminal Justice Act 1967 Section 9; Criminal Justice Act 1967 Section 10.
[489] Paul Roberts, *Roberts and Zuckerman’s Criminal Evidence* (3rd edn OUP 2022) 202-203.
[490] ibid 203.
[491] Ibid.
[492] *Biplob Hossain Younus Akan v PP* [2011] 3 SLR 217, 223.
[493] Peter Manning, ‘The Big Bang Decisions: Notes on a Naturalistic Approach’ in Keith Hawkins (ed) *The Uses of Discretion* (OUP 1992) 261.
[494] Keith Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (OUP 2002) 50.
[495] *Biplob Hossain Younus Akan v PP* [2011] 3 SLR 217, 223.

tactical way, and the same method of having evidence admitted as an agreed fact through cooperation with other barristers. An important distinction appears to be drawn, where the barrister focuses on preventing the admission of evidence, or *keeping evidence out*. This contrasts with the previous responses detailed, that discussed agreed facts as a vehicle for having evidence admitted or *getting evidence in:*

> B1: 'I mean the classic is racist text messages…there might be a racist text message which contains within it an assertion made about someone that is relevant to the case, or something like that … you might think well this evidence is going to be admitted in some way. It's relevant … and I'm not going to be able to stop it coming in in some way, shape or form but I want to limit the damage. You may pre-empt it by saying, well I only want to get this aspect of in … I'll edit the material, or I'll present it in such a way, or I'll adduce other evidence which provides context to show that the prejudicial element isn't as bad as it looks. Really what we're asking you to concentrate on is the bit that assists the jury, as it were, and that'll be robing room discussions, that'll be a quiet voice across the courtroom. And it may be, you know, you'll do it as an agreed fact, or maybe that you'll neutralise it by choosing a form of words that says what the material is, without disclosing the precise context in how it was obtained'.

This extract highlights several interesting points and provides a rich account of the mechanics of counsel agreement on evidential matters, that goes beyond legal regimes and legal frames. First, it reiterates the approaches indicated by B5 and B10 above whereby agreed facts between opposing barristers can be used as a vehicle

through which to decide evidential relevance; but, crucially, in a way that facilitates tactical decision-making. This extract from B1 then elaborates on precisely *when* this form of informal cooperation can take place, either in 'robing room discussions' or 'a quiet voice across the courtroom'. This suggests that these collaborative efforts can take place in both a private or public setting (although it could be questioned whether a 'quiet' word across the courtroom is a public matter, it would depend on what is meant by 'quiet' in this context).

The increasing prevalence of evidential agreements between barristers was a phenomenon reported in Thomason's research, in which a particular courtroom observation saw a judge request that the prosecution and defence barristers met privately to discuss a character application.[496] Thomason noted that the judge in this case said they would only give any ruling on the relevant matter should those negotiations be unsuccessful[497] - this seems something akin to a *presumption* of cooperation. In interviews, judicial encouragement of private discussions was not referenced by any of the interviewees. Nevertheless, references to party cooperation and collaboration on relevance was a finding of great interest. As set out in Chapter 1,[498] party cooperation is encouraged, to some extent, by the Criminal Procedure Rules, and particularly by the overriding objective that criminal cases must be dealt with justly and *efficiently*.[499] Party cooperation seems an important way in which efficiency within the trial process can be promoted. This chimes with comments of other interviewees who touched upon the utility of cooperation with one another, and specifically related cooperation with the promotion of efficiency in proceedings.

[496] Matt Thomason, 'Admitting Evidence by Agreement: Recalibrating Managerialism and Adversarialism in Crown Court Criminal Trials' (2021) CLR 727, 738.
[497] ibid.
[498] Chapter 1.5.
[499] Criminal Procedure Rules 2020 Section 1.1.

B14: ‘Things tend to go smoothly where we cooperate with one another, it saves everyone time and as you no doubt know we don’t always have an abundance of time’

B2: ‘Things run their most efficiently when counsel coordinate and can narrow down what they genuinely disagree about, why its genuinely important, because it reduces the amount of time to spend on legal argument. There is … always a provision for character, for instance, for parties to agree whether something is admissible’

B2’s response refers explicitly to the potential for evidential decisions on admissibility to be agreed between counsel, the implication may well be that matter of relevance too may be encompassed within these agreements. Rather than informal agreements described above, the example they provide relates to the bad character provisions which provide a formal legal mechanism for this to be done.[500] That barristers are becoming increasingly familiar with the notion of agreed facts in a variety of contexts, and indeed are encouraged to agree matters between one another in some instances, means they may become predisposed to seeking out those agreements on evidential matters such as relevance.[501] That a fifth of the interviewees referred to informal and formal agreements between counsel was an

[500] Criminal Justice Act 2003 Section 101(1)(a).

[501] There is emerging evidence of this in the special measures context, where judges are slow to grant support to vulnerable defendants and so counsel agrees to ‘play fair’ and not ask certain types of questions in the absence of that support. See: Samantha Fairclough, John Taggart, and Paula Backen, ‘Lost in Translation? Perceptions of Defendant Intermediaries in the Legal Profession’ [2023] 7 CLR 44.

important finding, particularly given that it emerged unprompted. This more cooperative approach to the adversarial principle of party control is a phenomena that warrants further consideration in future research that can situate it within wider trends across the criminal justice system.

Notably, both B2 and B14's responses reinforce the view posed by B5 and B10 that barristers cooperating with one another is a positive feature of decision-making in the criminal courts. Their remarks are broader than those of B5 and B10, however, as they are focusing not on tactical advantages but on the overall efficiency of proceedings, and are explicitly (B3) and implicitly (B14) regarding barrister cooperation as an important way in which efficiency can be instilled in the justice process. Together, these responses show that barristers facilitate tactical decision-making around relevance through cooperation and use of formal and informal agreements with one another. In some instances, agreed facts may be the *vehicle* through which this form of tactical decision-making takes place. Mechanisms for counsel agreement are not a novel feature in the justice process, indeed it is legislatively mandated in the neighbouring jurisdiction of Scotland, where there is a requirement that counsel should agree uncontroversial evidence in advance of trial.[502]

Some interviewees applied an instrumental frame to their decisions on relevance in an equally forward-thinking way, but for a different tactical purpose that also seemed to use relevance as a vehicle for tactical advantages relating to *other* pieces of evidence in the case:

[502] Criminal Procedure (Scotland) Act 1995 s.257; on this topic more broadly see: Peter Duff 'The Agreement of Uncontroversial Evidence and the Presumption of Innocence: An Insoluble Dilemma?' (2002) 6(1) Edinburgh Law Review 25.

B12: ‘Sometimes it's good to run an argument that you are likely to lose, because that way a judge doesn't think he's giving you your own way all the time. There may be tactical reasons to run an argument on, for example, relevance that doesn't have very much chance of success for reasons other than the merit of the arguments itself’.

This extract from B12 exemplifies what appears to be an approach to relevance where relevance itself is used as a means to a tactical end and as a way of getting a judge to ostensibly ‘owe’ them a subsequent an evidential decision. The potential for relevance to be ‘hijacked’ or subsumed for ulterior purposes was discussed in brief in the introductory chapter to this thesis,[503] and this statement by B12 in an example of how relevance can potentially be appropriated for purposes not necessarily related to evidence relevance at all. No other interviewees referred to relevance being used in this way, but that is not to diminish the importance of this finding. It shows how the open-textured and contextual nature of relevance allows barristers to use relevance in a range of ways and for tactical ends.

This section has shown that there are multiple ways in which barristers engage in instrumental, impact-driven and, at times, tactical decision-making around relevance. These tactics pertain to both fellow barristers and occur in response to the judges before whom barristers appear. The prevalence of ‘agreed facts’ as a vehicle through which such tactics are channelled is an important finding and one which would benefit from wider research. The following section considers a final way in which barristers

[503] Introduction, Section III.

apply an instrumental frame to decision-making on relevance. It explores how barristers account for the decisions of others in their decisions on relevance in the context of disclosure requirements.

7.1.3. Factors related to disclosure requirements

Several interviewees adopted instrumental frames to approach relevance decisions, but in a very different way to the tactical decisions explored in the previous section. Interviewees were not asked about disclosure requirements at any point in the interview, but a number of barristers introduced the topic and discussed the role of disclosure as a potential influence upon relevance decision-making. Specifically, some barristers suggested that their decisions on relevance may be influenced by matters pertaining to disclosure regimes. Disclosure, in the criminal court context, refers to the obligation placed upon the prosecution to disclose details of the prosecution case to the defence. Disclosure obligations permeate throughout criminal proceedings and a number of disclosure duties are enforced on a range of decision-makers in the pre-trial stage of proceedings. For example, investigators and prosecution authorities (the CPS) have statutory obligations placed upon them by the Criminal Procedure and Investigations Act 1996[504] (as amended by Criminal Justice Act 2003).[505] Disclosure is widely regarded as being 'in the interest of ensuring that the defendant has a fair trial'[506] and is guaranteed by Article 6 of the European Convention on Human Rights and the right to a fair trial.[507] The European Court of Human Rights has also sought to clarify that 'the Court considers that it is a requirement of fairness under Article 6(1) …

[504] Criminal Procedure and Investigations Act 1996.
[505] Criminal Justice Act 2003 Sections 32-40.
[506] Nicola Monaghan, *Law of Evidence* (CUP 2015) 437.
[507] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) article 6(1).

that the prosecution authorities disclose to the defence all material evidence for or against the accused'.[508] One interviewee raised the issue of disclosure during the discussion on academic framings of relevance. They offered the following response as part of a critique of legal relevance and its inclusion of assessments of probative value.

> B1: Now the difficulty is if you apply that probative test, that material will be in effect lost, because it won't even appear on the disclosure schedule and that creates a problem. Because then there's material that you didn't even know existed further down the line … So I would reject a probative test, I think. Is it logically, in common sense, relevant … I just think if you, if you start … subverting the second stage of any sort of evidential tests, first being relevance, the second is it evidence or unused material, the third is if it's unused material, is it sensitive, disclosable, all the rest of it, and then probative. It's much far further down the line. I think it's a discrete test'.

Another interviewee introduced the topic of disclosure, in response to a question about their general approach to relevance:

> B6: 'The possible problem is that if *I* say something isn't relevant then there will be no evidence, so to speak, of it on the disclosure schedule and you never know what might be useful at a later stage, for whatever reason be it an appeal or something else. It is important that there is a record of it'.

[508] *Edwards v United Kingdom* (1992) 15 EHHR 417 [36].

Both B1 and B6 are focused on the retention of evidence and maintaining a record of evidence. The insinuation from both interviewees appears to be that applying a stringent threshold to relevance may lead to evidence being in effect 'lost'. This could result in a very low threshold being applied to relevance, in order to retain a wide range of evidence on the disclosure schedule. This seems to represent a 'better safe than sorry' approach to decision-making where barristers may be cautious to ensure they meet their disclosure obligations. This is, potentially, a reflection of the organisational importance attached to disclosure requirements, as seen by the many and various supplementary materials on disclosure provided by the Attorney General,[509] and the CPS,[510] along with policing bodies.[511] B1 and B6's concerns over disclosure requirements in relation to relevance adopts both legal and instrumental frames in conjunction with one another. They also seem to invoke a sense of *fairness* and *justice* within their considerations, however, which may speak to an element of symbolic framing in their decision-making in this regard. Another barrister referred explicitly to wider social concerns when referencing – obliquely – recent miscarriages of justice that have occurred as a result of disclosure failures:

> B2: 'The changes in disclosure are also relevant in that area, because you have assessments of relevance firstly by the police, and then by the CPS, with or without counsel, and then potentially by a judge ahead of the trial stage upon

[509] Attorney General's Office, Attorney General's Guidance on Disclosure 2020' <www.gov.uk/government/publications/attorney-generals-guidelines-on-disclosure-2020> accessed 1 June 2023.
[510] CPS, 'Disclosure Manual' <www.cps.gov.uk/legal-guidance/disclosure-manual> accessed 2 June 2023.
[511] NPCC, College of Policing and CPS, 'National Disclosure Improvement Plan' <www.cps.gov.uk/publication/national-disclosure-improvement-plan> accessed 2 June 2023.

application by the defence. And that is very much an area where you could have seen changes in the past 20/25 years, because of the 1996 Act [Criminal Procedure and Investigations Act 1996] before my time, but it was a profound change in approach that was taken to disclosure, and the obligations placed on the investigating authorities to assess relevance, and we've seen what can happen when that goes wrong'.

Aside from demonstrating an element of symbolic framing and the injustice of previous disclosure failings, this response also highlights the range of different parties that may also be making assessments on evidential relevance, prior to the evidence being passed on to barristers. Both the police and the CPS/barristers have a responsibility to assess the relevance of evidence in the first instance, and only that which they deem relevant will be given to barristers. B2 seems to suggest that the police and the CPS have a significant say on what is and what is not relevant, alongside barristers. Albeit each of those three parties engages with relevance at slightly different points in proceedings. Other barristers reflected on the sequential nature of decision-making in the criminal courts, and alluded to the potential for this to feed into their decision-making on relevance:

B13: 'The CPS also have a role to play in all of this, the CPS have enormous power in terms of deciding what they think is relevant and is to be disclosed, they now have a lot of guidance on this too.'

The implication of this is that barristers may, quite understandably, feel as if decisions on relevance have already been taken by previous decision-makers, for example. On one view, that may impact what barristers see as their role; rather than identifying what is or is not relevant to a case, they may consider their responsibility to be to make the case for relevance before the jury, rather than reaching a normative decision as to relevance/irrelevance. This sentiment may be reinforced by the extensive guidance now given to other decision-makers on relevance, that may contribute to barristers regarding decisions on relevance and their cases as 'preconstructed' in some respects. Illustratively, the Attorney General's Guidance on Disclosure applies to investigators and gives a clear instruction that 'all relevant material must be retained, whereas non-relevant material does not need to be retained'.[512] It then, usefully, provides a 'definition of relevant material':

> Material may be relevant to an investigation if it appears to an investigator, or to the officer in charge of an investigation, or to the disclosure officer, that it has some bearing on any offence under investigation or any person being investigated, or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case.[513]

[512] Attorney General's Office, Attorney General's Guidance on Disclosure 2020' <www.gov.uk/government/publications/attorney-generals-guidelines-on-disclosure-2020> accessed 1 June 2023, 8.

[513] Attorney General's Office, Attorney General's Guidance on Disclosure 2020' <www.gov.uk/government/publications/attorney-generals-guidelines-on-disclosure-2020> accessed 1 June 2023, 8.

This is a broad definition that gives investigators and disclosure officers wide parameters within which to decide whether something is relevant. Once those parties have made pre-trial decisions on relevance and disclosure this provides the parameters within which barristers decisions on relevance are to be made. Disclosure matters were raised by interviewees, then, in two distinct ways. First, suggesting that barristers may apply a low threshold to relevance to ensure evidential materials are not lost and that a record of the evidence remains. Secondly, barristers referred to disclosure to discuss the role of other decision-makers on relevance (the CPS and police investigators). The first issue relating to the retention of materials may have a direct influence on barristers' decision-making on relevance and shows instrumental and forward-thinking way that barristers may engage with the threshold of relevance. They are directing their mind to a potential outcome further down the line, or to the future impact of their decision (for example, whether there may be an appeal).

The second way barristers discussed disclosure – where other parties make decisions as to evidential relevance – is equally important but for a different reason. Barristers' decision-making on relevance can only operate in the confines of the decisions that have been taken by other authorities, prior to them receiving the case. Previous decisions of what is and what is not relevant to the case at hand are undoubtedly important and may shape a barrister's perception and understanding of relevance in the case context as it is presented to them. This is not, necessarily, an example of barristers applying an instrumental frame as there is no forward-thinking element to the impact of their decision. Nevertheless, they show how decisions on relevance taken earlier in proceedings and by other parties may practically affect how barristers subsequently construct and frames their decisions

on relevance. The responses included here highlight that a significant number of decisions on relevance take place prior to a barrister receiving the case file, and those decisions, and the way in which they are presented to barristers, may themselves impact how barristers approach questions of evidential relevance. An in-depth consideration of this sequence of decision-making and the impact it can have upon decisions taken during trial is unfortunately beyond the scope of the study. This more limited discussion was, however, still a necessary inclusion in this research context as some interviewees raised ways in which these earlier decisions framed, and indeed constrained, their own decision-making on relevance. Helpfully, the Law Commission's recent consultation paper,[514] discussing the complex matter of disclosure in sexual offence cases,[515] offers some suggestions to improve the disclosure regime and may be a useful springboard into research in this area.[516] Interestingly for present purposes, one such proposal from the Law Commission is the use of an 'enhanced relevance test' in relation to the disclosure of personal records held by a third party.[517]

Disclosure matters, invariably, have a close link with the professional environment in which barristers operate and, therefore, are an integral part of the legal field. The rules on disclosure set the parameters in which barristers make their decisions and this section has explored the different ways in which disclosure rules and culture may impact decisions on relevance. The following section considers in more depth the organisational environment within which barristers exist. This is with

[514] Law Commission, *Evidence in Sexual Offences Prosecutions*: *A Consultation Paper* (Law Com CP No 259, 2023).
[515] ibid 61-136.
[516] ibid 122.
[517] Law Commission, *Evidence in Sexual Offences Prosecutions*: *A Consultation Paper* (Law Com CP No 259, 2023) 122.

a view to exploring the ways in which decision-making around relevance can be influenced by barristers' professional interests and the broader organisational setting in which evidential decisions are taken.

7.2. Organisational frames

Hawkins uses 'organisational frames' to refer to the organisational mandates, customs, objectives, and interests within a specified organisation.[518] Organisational framing then denotes the way/s in which organisational – and institutional – values influence individuals' decision-making within that organisation. Interview data showed barristers drew upon aspects of their organisational setting when discussing their decision-making around relevance in the general sense. In some instances, barristers drew upon aspects of their organisational environment as a specific influence or relevant factor that informed their approach to relevance decisions.

When discussing the organisational setting in this chapter, it is important to clarify what is meant by that label. Fundamentally, barristers are members of the legal profession, and that is the overarching organisation of which they are an integral part. Within that, however, barristers may also hold other related organisational memberships. First, barristers practicing in the criminal courts may be members of the Criminal Bar Association or another association. Second, self-employed barristers may belong to a particular Chambers, which may well produce micro-organisational influences upon an individual. Alternatively, barristers may be employed by another organisation or institution, either in the public or private sector, such as the Crown Prosecution

[518] Keith Hawkins, *Law as Last Resort: Prosecution Decision Making in a Regulatory Agency* (OUP 2002) 305.

Service. Membership of the legal profession is, therefore, multi-faceted and there are different levels of organisational membership of barristers.

This section explores the different ways in which a barristers' organisational setting/s may impact and influence their approach to and understanding of relevance. To do this, it focuses on a key theme that emerged from interview data: the influence of professional reputation in decision-making. Many interviewees referred to their professional reputation, both explicitly and implicitly, within the context of decision-making around relevance. The theme of barristers avoiding 'reputational risk' is explored here, including the different ways in which reputational concerns interacted with decision-making on relevance. The different manifestations of reputational concerns are explored throughout this section using two key elements of organisational framing identified by Hawkins: organisational communication and organisational custom.[519] Both are introduced and explored in section 7.2.1. This analysis concludes by highlighting the interrelated nature of organisational framing with both instrumental and legal framing; it highlights that no one frame can accurately capture the dynamism and complexity of barristers' decision-making around relevance. Even so, organisational framing was prevalent among barristers and reputational concerns were a salient feature in some interviewees decision-making processes.

7.2.1. Factors related to reputational risk

In interviews, many barristers referred to the organisational setting to which they belonged. They did this in a variety of ways, and in response to different questions

[519] Keith Hawkins, *Law as Last Resort: Prosecution Decision Making in a Regulatory Agency* (OUP 2002) 313.

and topics in the interview. Some interviewees discussed the importance of maintaining their professional reputation in relation to their colleagues, and ostensibly used this as a guide by which to decide whether a piece of evidence would be regarded as relevant.

> B20: You definitely don't want to get a reputation among colleagues as someone who will take issue with every piece of evidence … that would be counter-intuitive and, tactically speaking, it isn't great to get on the wrong side of the judge for no good reason. I pick my battles very carefully and, generally speaking, try to stay on the good side of the judge.

This exert shows B20's concern for their reputation amongst colleagues. It is not specified whether, by colleagues, they are referring to fellow barristers or judges, or both those parties. Working on the assumption that this includes both fellow barristers and judges, this tallies with much of the literature on courtroom collegiality. The presence of a 'courtroom culture' and courtroom 'workgroups'[520] have been well-documented,[521] with court culture usefully characterised by its 'shared norms, routinized work habits, and informal influences … arising from continual interactions among the major courtroom actors'.[522] The importance of *continual* and repeated interactions between legal actors in the courtroom ought not be overlooked, as

[520] Richard Young, 'Exploring the Boundaries of the Criminal Courtroom Workgroup' (2013) 42(3) Common Law World Review 203.
[521] Anthea Hucklesby, 'Court Culture: An Explanation of Variations in the Use of Bail by Magistrates' Courts' (1997) 36(2) The Howard Journal 129; Amy Kirby, 'Effectively Engaging Victims, Witnesses, and Defendants in the Criminal Courts: A Question of "Court Culture"?' [2017] CLR 12, 949.
[522] Ronald Lippincott and Robert Stoker, 'Policy Design and Implementation Effectiveness: Structural Change in a County Court System' (1992) 20(3) 376, 380.

barristers and judges often become familiar with one another due to their, at times, recurring appearances before one another. A number of the barristers' responses in the previous section testified as to this familiarity with colleagues in the criminal courtroom.

On courtroom culture, Kirby's research found there was a presence of a 'them and us' relationship between legal professionals and other courtroom users, whereby courts users are regarded "them", and professionals are afforded the position of "us".[523] Divides such as this lend themselves to the conclusion that barristers occupy a profession in which collegiality and good relations with colleagues – with whom they interact with on a daily basis – are central to their working life. This collegial aspect of the organisational setting likely reinforces barristers' desire to maintain a good reputation among colleagues, be they barristers or judges. In terms of relevance, this may mean that barristers' approaches to relevance can differ based on the specific dynamics in the courtroom in a given moment in time; specifically relating to what will best serve a barristers' professional reputational interests at that time. B20's response above also links reputational concerns to trial tactics 'tactically speaking, it isn't great to get on the wrong side of the judge for no good reason'. This shows the interrelatedness of organisational framing and instrumental framing, showing that decision-making likely features both instrumental and organisational frames simultaneously. Tactics and reputation will go hand in hand in some instances, for example, when barristers associate a particular tactical decision with 'winning' their case, which may in turn reinforce their sense of professional standing (and reputation).

[523] Amy Kirby, 'Effectively Engaging Victims, Witnesses, and Defendants in the Criminal Courts: A Question of "Court Culture"?' [2017] 12 CLR, 949, 956.

The association between tactical decision-making and reputational concerns was expressed by other interviewees:

> B10: 'It does not do your case, and therefore your client, any good if you irritate the judge and question relevance at every opportunity'.

This expression shows a client-centred approach to decision-making that focuses on the way in which approaches to relevance may impact the case and, in particular, the individual that the barrister is representing (where defending). This expression is less overtly concerned with the way in which the decision affects their (B10's) professional reputation, but that of the outcome for their client. Of course, in practice these two things are likely to be inexplicably bound up with one another, but it is useful inclusion as it shows the interplay and interaction between instrumental and organisational frames. Decision-makers in the exerts above (B20 and B10) are both seemingly concerned about the impact of their decision/s on their reputational standing – an organisational frame - whilst also being concerned about the instrumental impact of their decision on a third party.

A barrister's reputation before a judge is important not just for tactical reasons, but potentially also in terms of a barrister's career progression. Though this may not be a salient concern for all barristers, particularly within individual decisions on relevance, Thomason has recently noted career aspirations to be an important reason why barristers may not want to 'annoy' judges.[524] Thomason reminds us that

[524] Matt Thomason, 'Admitting Evidence by Agreement: Recalibrating Managerialism and Adversarialism in Crown Court Criminal Trials' (2021) CLR 727, 738.

'applications to be appointed Queen's Counsel [now King's Counsel] or a member of the judiciary require judicial references, which may be difficult to acquire if one is not popular amongst the local judiciary'.[525] While no interviewees referred specifically to career progression as a reason for maintaining a good professional reputation among colleagues (including judges), it is not to say it was unimportant. Maintaining a good reputation before a judge for such a purpose could be regarded as a method of 'organisational communication'. This, Hawkins specifies, is where decision-making acts as 'an indicator by which their (the decision-maker) industry and competence *may* be evaluated by senior staff'.[526] In other words, barrister's decisions can be used as a communicative tool, to signal their competence to judges and to other actors within the courtroom. The ulterior purpose could potentially be to gain judicial support in any future application to a judicial post.

While Hawkins regards organisational communication an integral feature of organisational framing, it presents something of a cross-over with forward-thinking instrumental approach to decision-making. It reminds us of the complexity of barrister decision-making and that different decision frames are simultaneously and continuously being applied, to inform barrister's decisions on relevance. A significant number of interviewees stressed the importance of maintaining a good reputation in front of a judge, and may have done so for a whole host of other rationales:

[525] ibid.

[525] ibid 738; *Queen's Counsel Competition for England and Wales 2021 Guidance for Applicants* 34 <https://qcappointments.org/wp-content/uploads/2021/02/FINAL-Guidance-for-Applicants-2021.pdf> accessed 02 June 2023; for additional guidance for applicants to the judiciary, see: https://judicialappointments.gov.uk/guidance-on-the-application-process-2/ accessed 02 June 2023.

[526] Keith Hawkins, *Law as Last Resort: Prosecution Decision Making in a Regulatory Agency* (OUP 2002) 313.

B17: ‘Don’t forget that this is part of our professional training, it is a skill to know when and how to challenge the relevance of evidence. I certainly wouldn’t want a judge to think I make careless or baseless arguments simply for the sake of doing so’.

B3: ‘If you get a reputation for someone who takes crap points and will argue the toss and so everything has to go before a judge, for a judge to decide, then that is not a reputation you really want’.

Neither B17 nor B3 set out the precise reasons they wish to stay on the ‘good side’ of the judge, and it is unlikely any barrister could point to one specific reason. The reality is likely a nuanced cumulation of reasons, that may include, for some, elements of reasoning related to career progression. For others it may be related to matters of integrity, ego, respect for judicial office, public service, and likely a host of other reasons.

These specific reasons aside, barristers striving to uphold their professional reputation may also be as a result of wider organisational custom. Hawkins regards organisational customs as ‘a way of deciding particular cases which becomes routine within a group or area tends to create a series of precedents which coalesce into an organisational custom’.[527] The criminal justice process does, and has always, relied upon barristers and courtroom actors being respectful of judges and their determinations. This is important for several reasons, principally that the legitimacy of

[527] Keith Hawkins, *Law as Last Resort: Prosecution Decision Making in a Regulatory Agency* (OUP 2002) 325.

the justice process relies upon adherence to such customs and the maintenance of high standards of propriety in the courtroom. Organisational custom may be at its most prevalent where there are no proscriptive and rigid legislative guidelines to direct decision-making. Decisions on relevance may invite an enhanced reliance on organisational customs given its foundation on such broad and inherently legal conceptions of common sense and logic. Where such broad and individualistic qualities underpin an evidential matter, decision-makers may be inclined to draw upon and engage with organisational customs and practice more so than they might otherwise do.

This section has shown how a barrister's organisational setting can have a significant impact on the way in which decisions are made on evidential relevance. Barristers belong to a unique organisation that bears something of an elevated status in society. Being a member of the legal profession, particularly those working in the criminal courts, confers several important sub-memberships upon barristers; including membership of relevant associations, chambers, or organisations in either the public or private sector by which they are employed. Interview data showed that the organisational environment impacted barristers decision-making in several different ways. Principally, barristers considered professional reputation as an important factor in their decision-making on relevance, including their reputation before the judge and fellow barristers. Barristers appeared to value their professional reputations for different reasons, however, and considered it important for reasons related to tactics and positive case outcomes for their client. Some did not specify the reason why maintaining a good reputation before a judge was important, and potential reasons for this – including a barrister's future career progression – have been identified.

7.3. Conclusion

This chapter has explored interviewees' views on the nature and operation of relevance as an evidential device in the criminal courts. It has shown how multi-faceted decision-making on relevance can be, and Hawkins' frames provide a useful lens through which to explore the different forms of influence upon barrister's decision-making. The interview data show that barristers' approaches to decision-making on relevance engage heavily with both instrumental and organisational framing devices. Instrumental framing was prevalent amongst interview responses, with a significant number of barristers engaging in decision-making based upon projections and presumed decisions of other third parties, such as judges and juries. Particularly prevalent among the interviewees was the use of tactical decision-making, that saw relevance decisions being informed by what was tactically expedient to the decision-maker, and in turn to their client. What would be regarded as tactically expedient was highly contextual but included things such as other evidential matters in the case and the characteristics of the judge (as known to the decision-maker). Instrumental framing also saw barristers consider other influences upon their decision-making on relevance, the 'chain of events' style of thinking was seen where barristers considered disclosure requirements in other areas of the criminal process. Interviewees were not asked about disclosure requirements in interviews, but a number of interviewees introduced the topic as an important factor that may influence their decisions on relevance. This itself in an important finding and suggestive of the potential breadth and significance of ulterior evidential matters that may feature in decision-making on relevance.

This analysis of interview data started in Chapter 5 by setting out barristers' views on relevance and the consistency with which it was treated in the criminal courts. Section 5.1. saw barristers discuss relevance as a relatively straight-forward evidential

matter that was dealt with consistently and relatively uncontroversially in the criminal courts. This chapter has shown that the reality of decision-making around relevance is far more nuanced than this perception allows for. Interviewees highlighted the multi-layered and complex dynamics of decision-making on relevance and showed significant scope for decisions to be informed by a wide range of factors beyond purely legalistic ones. One barrister told me that barristers ‘are all pretty clear on what it means for evidence to be relevant’ (B14). This chapter ends by suggesting that this is not necessarily the case. Instead, this chapter has shown that the barristers interviewed understood and used relevance in a number of different ways and to a number of different complex, interrelated, and dynamic ends.

CHAPTER 8: RELEVANCE AND EXCLUSIONARY RULES OF EVIDENCE

One thing that the analysis in the previous chapters has subverted is the relationship between relevance and other exclusionary rules of evidence, instead focusing on decisions made about relevance in a more general sense This chapter is dedicated to exploring the relationship between relevance as a 'general' principle and its treatment within other exclusionary rules of evidence. A recurring theme in interview data saw barristers frequently link their relevance decision-making, in varying ways, to exclusionary evidential regimes. The analysis in this chapter bears specific relation to RQ5: 'How does evidential relevance interact with other rules of evidence?'.[528] Relevance and other specific exclusionary rules of evidence appear to bear a close relationship. In the most basic sense, both pertain to the admissibility of evidence, and both seek to perform a similar function of filtering evidence. As discussed in Chapter 1.1, however, relevance and exclusionary rules of evidence are distinct from one another. Relevance is a universal evidential requirement, where specific exclusionary rules are not (hereafter referred to simply as 'exclusionary rules'). Exclusionary rules

[528] Chapter 1.1.

relate only to specific categories, or types, of evidence.[529] It is this fundamental distinction between exclusionary rules and relevance generally that informs the decision to separate the analysis of exclusionary rules from the preceding empirical chapters, and deal with exclusionary rules as a discrete matter related to relevance in some, but not all, cases.

This chapter explores barristers' views on the evidential process, and sheds light on how exclusionary rules of evidence may impact barristers' decisions on, and approaches to, relevance as a standalone issue. During the interview process it became apparent that exclusionary rules of evidence may have an important bearing on relevance decision-making. Several barristers introduced the topic into the discussion on relevance, unprompted, and many barristers referred to specific exclusionary rules of evidence throughout interviews when discussing relevance as a standalone issue. Interview data suggests that barristers' approaches to relevance may vary based upon the category or type of evidence in question. Seemingly, there is scope for the presence of an additional exclusionary rule of evidence to impact and inform the ways barristers frame initial decisions on relevance.

The broader relationship between relevance and exclusionary rules of evidence is considered in this chapter through use of Hawkins' frames. Legal frames are the dominant frames identified in the interview data, as most barristers used legal frames and the language of 'legal rules' to justify their approach to relevance and exclusionary rules. Yet interview analysis shows a degree of inconsistency among barristers as to their approach to decision-making where relevance and exclusionary rules are concerned. Where barristers refer to legal rules and practices to support their decision-

[529] Such as bad character evidence, sexual history evidence, or hearsay evidence.

making, interviews showed scope for those rules to be understood (and applied) differently. In headline terms, some barristers regarded relevance and exclusionary rules as 'inseparable' from one another, while others took the opposite view and saw relevance and exclusionary rules of evidence as separate and distinct matters that ought not be conflated with one another.

Legal framing was the dominant frame barristers applied in this context, but legal frames were used in some cases in conjunction with instrumental framing devices. This occurred where barristers appeared to make decisions on relevance that adopted a legal frame but also engaged in a forward-looking assessment of exclusionary rules of evidence. The *complexity* of the exclusionary rule of evidence appeared an important factor that barristers considered in making those forward-looking assessments. This chapter suggests that the nature (and complexity) of exclusionary rules of evidence has significant scope to influence barristers' approaches to, and decisions on, relevance.

The chapter proceeds in the following way: section 8.1. explores the broad structure of evidential decision-making and sets out how relevance and exclusionary rules fit within that structure. Section 8.2. considers barristers' accounts of how they approach decision making on relevance when the evidence in question is also subject to an exclusionary regime. This part of the analysis is presented in two parts, section 8.2.1. discusses legal frames, and section 8.2.2. considers how legal and instrumental frames combine to inform barrister decision-making in this regard. Section 8.3. then offers some final reflections and conclusions on the relationship between relevance generally and other specific exclusionary rules of evidence. The chapter concludes by highlighting points of inconsistency in this area, which may contribute to the broader climate of inconsistent approaches to decision-making on relevance. This section

closes with a reflection on the recent Law Commission consultation paper which engages with some of the themes identified in this chapter. Following this, some thoughts on the future relationship between relevance and exclusionary rules of evidence are shared.

8.1. The decision-making process

For evidence to be admitted in the criminal courtroom, several hurdles must be surpassed. As we know, relevance is the first of those hurdles and the Introduction to this thesis set out the wider structure in which the question of evidential relevance sits. To briefly recap, the three key questions which must be addressed are:

1. Is the evidence relevant?
2. Is the evidence subject to any exclusionary rules?
3. Is the evidence subject to any inclusionary exceptions?[530]

The focus of this chapter is on the relationship between the first two questions, and how barristers' decisions on relevance are impacted by the presence of subsequent exclusionary rules of evidence. A benefit of using a structure to contextualise the discussion on relevance and admissibility is that it emphasises the theoretical distinction between relevance and admissibility. Equally, it emphasises the connection and proximity between relevance and exclusionary rules of evidence. On the first of those matters, the three-step approach to admissibility helps situate relevance within the broader issue of admissibility, and as separate from exclusionary rules and regimes. If evidence is irrelevant, it is inadmissible; if evidence is relevant it *may* be

[530] Paul Roberts, *Roberts and Zuckerman's Criminal Evidence* (3rd edn, OUP 2022) 181.

admissible if not subject to a further exclusionary rule of evidence. Exclusionary rules of evidence regulate whether evidence deemed relevance will be admissible, and are often predicated on ensuring fairness and preventing prejudice to the accused. Exclusionary rules typically relate to specific *categories* of evidence, for example bad character evidence pertains to evidence of a defendant or non-defendant's character and/or previous actions. It is this targeted and specific nature of exclusionary rules that render them distinct from relevance.

Where relevance is concerned with establishing a connection between evidence and facts in issue generally, exclusionary rules offer more specific and tailored guidance on when it would be appropriate to adduce such relevant evidence. Roberts captures this distinction stating that 'common law evidence has traditionally been viewed as a collection of exclusionary rules qualifying the general principle that all relevant evidence should be presented to the fact-finder'.[531] This is a helpful way of framing the discussion on exclusionary rules, emphasising their operation as a *qualification* on the general principle of relevance, that is nevertheless distinct from relevance on a conceptual level.

The previous chapters have explored some of the nuance associated with decision-making and the evidential process where relevance is concerned, and those findings need not be recounted here. Though the evidential process and determinations of relevance are nuanced and complex, the tripartite structure remains helpful for introducing and contextualising the relationship between evidential relevance and exclusionary rules of evidence. If evidence is relevant and subject to a further exclusionary rule of evidence, a third assessment is required as to whether it meets the requirements of an exception to the relevant exclusionary rule. An example

[531] Paul Roberts, *Roberts and Zuckermans Principles of Criminal Evidence* (3rd edn, OUP 2022).

of this is the exclusionary regime that operates in relation to sexual behaviour evidence. Section 41 of the Youth Justice and Criminal Evidence Act[532] prima facie prevents the admission of evidence pertaining to a complainant's[533] sexual behaviour, unless such evidence falls within an inclusionary exception or 'gateway' of admissibility.[534] Exclusionary rules of evidence are, theoretically speaking, distinct from matters of relevance, as they deal with the issue of admissibility. Evidence deemed relevant may nevertheless be inadmissible, by virtue of an exclusionary rule or an exclusionary discretion that rests with the judge.[535]

An important feature of the evidential process - as shown in the three-part structure - is that it makes clear the three questions it comprises are to be considered *sequentially.* That is, they follow on from one another; if a piece of evidence is not relevant it is inadmissible and therefore there need be no consideration of whether an exclusionary rule applies. If evidence is relevant to a fact in issue it must then be asked whether an exclusionary rule applies. If that question is answered in the affirmative, then the final question on inclusionary exceptions must be considered. In this sense, the questions are very much interrelated and dependent upon one another, but nevertheless require sequential and separate consideration.

The second benefit of using a structure to contextualise the discussion on relevance and admissibility is it shows the basic connection and proximity between relevance and exclusionary rules of evidence. They are connected in the sense that they both pertain to the same issue - evidential admissibility. More than this, they appear to perform a *similar* function in some respects, in that they both act to filter evidence and restrict admissibility where necessary. Though they seek to perform this

[532] Youth Justice and Criminal Evidence Act 1999 Section 41 and 42.
[533] As per s41(1) this does not apply only in rape trials but in all sexual offence cases.
[534] Youth Justice and Criminal Evidence Act 1999 Section 41(3) a-c; Section 41(5)b.
[535] Police and Criminal Evidence Act 1984 Section 78.

similar function they differ in the way that they do so, and relevance and admissibility remain conceptually and functionally distinct from one another. Exclusionary rules of evidence tend to provide detailed guidance on how practitioners should approach decision-making in relation to discrete categories of evidence, where relevance as a general test does not offer this same level of detail, guidance, or prescriptiveness. This is because exclusionary rules of evidence deal with matters much beyond evidential relevance. Exclusionary rules pertaining to bad character evidence are not solely concerned with whether the evidence in question is relevant to a fact in issue, they are concerned with extraneous matters of how evidence may influence jurors, for instance. That is not to say that relevance and exclusionary rules of evidence do not, in some areas, come functionally close to one another. There may be an argument to say that where the relevance of certain categories of evidence is notoriously difficult to assess – such as sexual behaviour evidence – then proscriptive and detailed exclusionary rules of evidence perform, in some respects, the function typically performed by relevance. That said, that may be more an indictment of the innate complexity of sexual behaviour evidence, rather than a reflection of the role/s of relevance and exclusionary rules.

It is maintained that relevance and exclusionary rules each perform distinct conceptual and functional purposes. That said, they bear an intimate and interwoven relationship, and the proximity between relevance and exclusionary rules of evidence is emphasised in the recent Law Commission Consultation Paper on evidence in sexual offence prosecutions.[536] Here, the Consultation Paper recommends a move away from exclusionary rules of evidence (in the context of sexual behaviour evidence) and suggests an enhanced relevance test would be a more appropriate means of

[536] Law Commission, *Evidence in Sexual Offences Prosecutions*: *A Consultation Paper* (Law Com CP No 259, 2023).

filtering this type of evidence.[537] This suggestion, from the Law Commission, reveals a recognition that relevance can, perhaps in some circumstances, be capable of performing the same function as exclusionary rules.

The Law Commission's proposal can also be seen as indicative of the broader shift *away* from exclusionary rules of evidence across the criminal law, in favour of the admissibility of more evidence at trial. Roberts shares this view and highlights that 'the power of exclusionary rules is not what it once was and their sphere of influence is constantly being eroded'.[538] This erosion has been seen in relation to evidence following reforms brought in by the Criminal Justice Act.[539] Following this legislative reform 'the trend has been to increase the amount of hearsay evidence available to the trier of fact'.[540] In the context of bad character evidence there has also been a shift away from the prima facie exclusion of a defendant's bad character evidence, with some limited exceptions, to a defendant's bad character being 'admissible if, but only if'[541] one of seven gateways are satisfied.[542] The Law Commission's proposals on sexual behaviour evidence, on one view, appear to follow this trend and advocate a move away from an exclusionary regime. Drawing this back to the tripartite structure of admissibility introduced above, it is notable that an erosion of exclusionary rules inevitably places greater emphasis on the role played by relevance in terms of evidential admissibility.

The distinction between relevance and other exclusionary rules of evidence is an important consideration and one that is returned to in both section 8.2.1. and section 8.2.2. For now, it suffices to say that there appears to be a connection and

[537] ibid xvii.
[538] Paul Roberts, *Roberts and Zuckerman's Criminal Evidence* (3rd edn, OUP 2022) 927.
[539] Criminal Justice Act 2003 Section 114-136.
[540] Andrew Choo, *Evidence* (6th edn, OUP 2021) 293.
[541] Criminal Justice Act 2003 Section 101(1).
[542] ibid Section 101(1)(a)-(g).

close relationship between relevance and exclusionary rules of evidence that warrants discussion and consideration. Interview data is explored and drawn upon to explore these themes throughout this chapter.

8.2. Barristers' views on relevance and exclusionary rules

To explore barristers' approaches to relevance and exclusionary rules, each interviewee was asked about the process they follow when faced with a type of evidence that was subject to an exclusionary regime. This question was asked towards the end of the interviews, and I asked participants if and how they would approach relevance where an exclusionary rule of evidence also applied to said evidence. I then provided interviewees with an example exclusionary rule, which related to sexual behaviour evidence and the exclusionary regime in Section 41 of the Youth Justice and Criminal Evidence Act[543] (hereafter referred to as 'Section 41'). I asked interviewees specifically whether they might consider relevance separately from the exclusionary rule or whether they would go straight to a consideration of the exclusionary rule in question.[544]

Responses to this question varied and, at times, significantly so. To unpack interviewee responses, Hawkins' conception of framing is used to explore how and, crucially, why interviewee approaches to relevance and exclusionary rules varied. Two decisions frames were prominent in interviewee responses: legal frames and instrumental frames. The forthcoming analysis is separated on these terms: section 8.2.1. explores the different legal frames barristers used to explain their decision-

[543] Youth Justice and Criminal Evidence Act 1999 Section 41.
[544] During the interview the example of Section 41 was used. As such, the responses refer to 'sexual behaviour' or 'sexual history'; these terms are used interchangeably and refer to the same category of evidence.

making; section 8.2.2. explores the instrumental frames that, at times, were used to supplement and support those legal frames.

8.2.1. Legal frames

Legal frames have been discussed at length in Chapter 6[545] which situated legal frames as 'a discourse organised around legal categories, conceptions, rules, and preoccupations'.[546] In an evidential context, legal framing is an interpretive and justificatory discourse that sees decision-makers refer to legislative and procedural frameworks and engage with statute, common law and legal principles to assist in decision-making. They emerge where barristers use legal justifications for their decisions or approaches to relevance decision-making. As this thesis is concerned with decision-making in the active trial context, it is expected that legal framing is at the forefront of barristers decision-making processes

When asking barristers how they approach relevance where a specific exclusionary rule of evidence applies to evidence, legal frames were prominent in a significant number of responses:

> B18: 'Without doubt you consider relevance first... this is the rule. To conflate the two is to confuse relevance and admissibility, I think'.

> B6: 'You always query relevance first, that is the first thing you do because if it isn't relevant then there is no need to worry about Section 41, or any other set

[545] Chapter 6.2.
[546] Keith Hawkins*, Law as Last Resort: Prosecution Decision Making in a Regulatory Agency* (OUP 2002) 412.

of subsequent rules for that matter … relevance needs to be established before any of that … yes that's right'.

B12: '[The] first question must always be is it relevant. Because if you cannot make that argument, then you don't need to pass any other thresholds whether it's Section 41, whether it's bad character, whether it's Section 78, or 76 in terms of confessions. As soon as it becomes irrelevant then it's not admissible, and it saves everybody a lot of time … Relevance is always, should always be, the first test. It should always be the first consideration'.

These interviewees apply a legal frame to this question, one that appears based on the explicit distinction between relevance and admissibility. This distinction was introduced in the Introduction to this thesis and subsequently discussed in Chapter 5.1. It is on this basis – the distinction between relevance and admissibility - that some barristers appear to justify an approach to decision-making that considers relevance as a standalone issue. That is, they consider relevance first before considering whether and how any exclusionary rules of evidence may subsequently apply. B18 presents the most explicit reference to this distinction, saying that to approach these matters in another way would be 'to conflate relevance and admissibility'. The other three responses included share the same sentiment and in definitive language which leaves little room for doubt as to the *correct* approach in their minds.

This sequential approach to admissibility matches the structure of decision-making expressed by the tripartite admissibility structure included at the start of this

chapter.[547] It separates out the different matters to which barristers must direct their minds. Neither B12 or B6 refer explicitly to a particular legal rule, but the discussion of legal processes and conceptions is an inherently legal one that rests on the distinction between the two legal conceptions of relevance and admissibility. B18 is more explicit in deploying a legal frame, in their referring to the separation of relevance and exclusionary rules as 'the rule'; the implication is that this is a *legal* rule. Presumably, the rule identified by B12 and B6 is the fundamental distinction between relevance and admissibility. The use of such definitive language here echoes one of the findings in Chapter 5.1, where many barristers confidently asserted that they knew what relevance means.[548] Consider B6's pronouncement that 'you *always* query relevance first' [emphasis my own]. This may suggest the barristers saw little room for discussion or disagreement as, from their perspective, they are merely recounting "the rule". Equally strong language was seen in another response:

> B2: 'I think my approach would be to consider relevance first, because the starting point is if it is not relevant at all then it is not admissible … particularly if you're trying to navigate your way through Section 41 which is a nightmare. If you are able to say as a starting point this is definitely relevant, now it is to be excluded for other reasons, or this definitely isn't relevant so [you] don't need to go there. So, I certainly would do it that way round.'

In common with B6, B12 and B18 above, B2 uses a legal frame to show that their decision-making is based on the application of a legal rule. This is seen in their

[547] Section 8.1.
[548] Chapter 5.1.

reference to what they call the ‘starting point’ – that if evidence is not relevant it is not admissible. This, in perhaps a less direct way than the other interviewee responses, is an acknowledgement (it seems) of the fundamental difference between relevance and admissibility. On one view, this is an interesting distinction to draw given that, in some ways, relevance and exclusionary rules perform a similar filtering function. It may be that B2 sees relevance as an inclusionary rule, used to justify inclusion of evidence, whereas exclusionary rules of evidence may be seen as mechanisms for excluding evidence and preventing admission. That is one possible justification for their different treatment by barristers. The response from B2 raises an additional issue, about the complexity of the exclusionary rule in question. This is an important issue and is discussed further in Section 8.2.2.

Returning to the remarks of B12 included above, while employing a legal frame, this barrister alludes to the link between evidential decisions and saving time in the courtroom: ‘as soon as it becomes irrelevant then it's not admissible, and it saves everybody a lot of time’. This could also be conceived of as the barrister applying an organisational frame to their decision-making; as it shows their consideration and reflection upon temporal pressures upon individuals across the professional organisation. Awareness of time constraints in the courtroom environment[549] and the use of an organisational frame thus complements legal framing devices. Other barristers also applied a legal frame to the question on the relationship between relevance and exclusionary rules of evidence and concurred with B2, B6, B12 and B18 that relevance and exclusionary rules are fundamentally separate from one another. Rather than referring to ‘the rule’ they discuss the role of the Criminal Procedure Rules on evidential matters:

[549] As per discussions in Chapter 1.2.

B7: ‘I think it should always remain that … first key question, I mean that that is the centre of case management, good case management, and I think one of the good reforms of the Runciman [Commission] here, as I put it, was the attempt to bring in case management with the use of case statements to … identify issues in the case, which, of course, is key to the concept of relevance.’

This view uses a legal frame, centred on the Criminal Procedure Rules,[550] to justify the separate consideration of relevance (as the ‘first key question’) from exclusionary rules. Rather than adherence to ‘the rule’ that distinguishes relevance and admissibility, B7 regards relevance a function of good case management. Another interviewee expressed the same view as those discussed above, but expressed a different rationale for doing so:

B10: ‘I know Section 41 fairly well and it still trips me up from time to time. So unless I can say the evidence is relevant it will not get to that stage, it will not get near to Section 41. Relevance comes first, because ultimately if it is irrelevant evidence it won’t be admissible, and … I mean you don’t need to contend with Section 41 to get to that same conclusion’.

B10 uses the same approach discussed earlier, where relevance and admissibility are dealt with separately and sequentially, but their justification for this approach is

[550] Criminal Procedure Rules 2020, Part 3.

different. It appears grounded in pragmatism rather than any stringent theoretical observance or adherence to 'the rule'. B10 refers to the complexity of the applicable exclusionary rule, as seen where they regard Section 41 something 'to contend with'. This exert shows a legal frame being supplemented by a forward-thinking assessment of other aspects of the evidential process, that other aspect being the presence of the exclusionary rule itself. This could be considered a form of instrumental framing, whereby the barrister is looking ahead to other evidential matters as part of their decision-making process on relevance. In this context, this could be a barrister trying to avoid the future time and effort that they know is associated with engagement of s41. The next section considers responses where legal frames occurred *alongside* instrumental frames. Section 8.2.2. explores the ways in which the *complexity* of an exclusionary rule has scope to impact barristers' decision-making on relevance.

8.2.2. Legal and Instrumental frames combined

Section 7.1. explored one of Hawkins' dominant frames, instrumental frames, to explain the ways in which barristers approach decision-making on the threshold question of relevance. Section 7.2. explored the holistic nature of instrumental frames and their capacity to allow decision-makers to situate decisions within a wider 'chain of decisions' that sees legal professionals considering their decision-making in light of, in response to, or in anticipation of, other actors within the criminal justice process, as well as decisions taken by others. When considering their approaches to relevance and exclusionary rules of evidence, some barristers used instrumental framing to justify an approach to decision-making that was more cumulative than sequential. Decisions on the first evidential question 'is the evidence relevant?' was in some cases impacted by the subsequent question of 'do any exclusionary rules apply?'. Some

interview responses suggested that instrumental framing facilitated decisions on relevance that took into account the subsequent matter of exclusionary rules.

As stated in the previous section, a key way this was shown in the interview data was in relation to the complexity of the exclusionary rule in question, Section 41.[551] Some interviewees regarded the complex nature of Section 41 as an important factor in their decision-making on relevance. B10's response in the previous section referred to the complexity of the relevant exclusionary rule when they stated 'I know Section 41 fairly well and it still trips me up from time to time. So, unless I can say the evidence is relevant it will not get to that stage'. This comment implies that the complex nature of an exclusionary rule may encourage barristers to compartmentalise evidential decisions as a means of simplifying complex decision-making processes. Reflections upon the complexity of exclusionary rules, though, were confined to Section 41 in this context. Nevertheless, other barristers also reflected on the complexity of the exclusionary rule in question, and suggested that the complexity may have an impact on their approach to relevance.

B2 also talked of Section 41 as 'a nightmare' and something to 'navigate through'. The responses of both B10 and B2 see the associated complexities of the exclusionary rule as a practical rationale for addressing relevance as a separate and discrete evidential question. The suggestion from these interviewees is that where a complex exclusionary rule applies, it is necessary to consider relevance first to simplify and organise decision-making. Beyond this, the presence of a complex and difficult exclusionary rule may make barristers *more* likely to focus their minds on relevance

[551] In interviews, I gave the example of Section 41 as an exclusionary rule; interviewee responses should be understood on this basis and responses relating to this particular exclusionary rule cannot necessarily be generalised to other exclusionary rules or exclusionary rules as a collective.

as an isolated consideration, to ensure that the engagement with exclusionary rules only occurs when strictly necessary. One other barrister alluded to this position and used legal and instrumental frames alongside one another, to take a pragmatic approach to decision-making:

> B17: 'Well you wouldn't need to go through the all the hassle of Section 41 and Section 42 [YJCEA] if the evidence wasn't relevant in the first place'.

This response again highlights the complex nature of the applicable exclusionary regime, referring to the 'hassle of Section 41 and Section 42'. This suggests that B17 would distinguish relevance from exclusionary rules and would consider it as a standalone issue. This theme was fairly common across interviews, the implication being that the more complex an exclusionary regime may be, the more prone decision-makers may be to adopting informal working practices, that potentially minimise some of the complexities of the evidential process.

Interview responses saw legal and instrumental frames often used in conjunction with one another, with the majority of interviewees referring to "the rule" of relevance and admissibility as being distinct considerations. Even so, instrumental frames supplemented legal considerations and some interviewees appeared to suggest that the complexity of the subsequent exclusionary rule was an important consideration that may impact their decision-making process (and their approach to the structure of that process) on relevance.

Legal and instrumental frames were seen in other interview responses but, interestingly, to justify different approaches to the structure of decision-making on

relevance and exclusionary rules. Where the analysis above saw interviewees use legal and instrumental frames to justify their *sequential* approach to evidential decisions, the following section sees instrumental and legal frames being used to justify a different approach. That is, some interviewees used the complexity of the exclusionary rule as justification for omitting a standalone consideration of relevance. Instead, they outlined the correct approach as one that focused solely on the substance of the specific exclusionary rule of evidence:

> B5: 'I would always go straight to Section 41, usually. Because it's so prohibitive on … what's admissible, and in fact … those of us that have been doing this for 20 years like I have, it's kind of scorched into your consciousness'.

This response shows how decision-making on relevance can be impacted by an instrumental and forward-looking assessment as to the exclusionary regime related to a particular category of evidence. B5 explains how they, in essence, bypass a distinct decision on relevance, in favour of going to Section 41 to see if the evidence would be excluded. This streamlines the evidential process somewhat, and must be viewed within both the surround and field and highly time-pressured environment that is the Crown Court.[552] It simultaneously highlights how decision-making can transition from deliberative to internalised, based on barristers' experience interacting with a particular legislative framework. The suggestion is that when familiar with a particular exclusionary regime – as a result of a significant number of years in criminal practice – decisions on relevance can be made based on

[552] See Introduction Section V.

internalised rules and practices. Another response shared a similar approach to decision-making, that regarded the exclusionary rules themselves as mechanisms for engaging with relevance decisions:

> B20: 'To my mind those rules [exclusionary rules of evidence] are there to dictate what will or will not be relevant, they are really dealing with relevance at their core. Yes, think of bad character for example, a defendant's bad character, [Section] 101 [Criminal Justice Act 2003] gives an indication of what may be relevant for the purpose of the court. I would say, from my perspective, it is prudent to think of relevance in the context of other rules. I would probably look to those rules for guidance … in the first instance. What example was it? Sexual history evidence? Then I go to Section 41 … first and foremost'.

Together the two responses included above show an approach to decision-making that differs from those shared by other barristers. Furthermore, their practical account also diverges from the conceptual representation of the evidential process represented by the tripartite structure of decision-making highlighted in section 8.1. Fundamentally, this approach sees relevance either collapse into assessments of exclusionary rules, or potentially bypassed in favour of the exclusive consideration of exclusionary regimes.

B20 explicitly regards exclusionary rules as a mechanism for questioning the relevance of evidence; suggesting such rules are 'dealing with relevance at their core' and 'are there to dictate what will or will not be relevant'. This barrister appears to be influenced by an instrumental calculation that, again, considers the subsequent evidential matter of exclusionary rules. On this approach, where an

exclusionary rule of evidence applies, the presence of that exclusionary rule determines how a barrister views and engages with the general requirement for evidence relevance. At the same time, a legal frame is being used and B20 is engaging directly with the relevant legal rules (the examples given being the bad character rules and the legislative framework that deal with sexual behaviour evidence).

There may be some mileage to the suggestion that exclusionary rules of evidence have typically appeared where relevance is highly contested, such as sexual behaviour evidence. Indeed, some exclusionary regimes include sections which could be interpreted as an effort to deal with the 'relevance question'.[553] B5 appears to take a similar approach to B20, as both B5 and B20 do not consider relevance as a standalone evidential matter where an exclusionary rule of evidence also applies. Their responses differ, however, as B5 does not explicitly regard relevance as a function of exclusionary rules; rather, they reflect on the 'restrictive' nature of Section 41 as justification for omitting a specific consideration of relevance. Of potential significance, is the language in which these responses are presented. Equivocal language such as 'I would probably' or 'I would always go straight to Section 41 *usually*' [my emphasis] appear in both responses above. These responses may imply there is less certainty around this approach to decision-making where relevance and exclusionary rules intersect. The complexity of decision-making here is seen in a further response, in which the barrister identified and acknowledged two different approaches to decision-making in the same response:

[553] Criminal Justice Act 2003 Section 101(a)-(g); Youth Justice and Criminal Evidence Act Section 41(3); Section 41(3) a-c; Section 41(5) a.

B19: ‘Oh I expect straight to Section 41, that’s where all the detail is. It is so very restrictive now as you will no doubt know, which is no bad thing [B19 pauses for thought] but … well of course if something is *completely* irrelevant to the case it would not get to that … no’. [B19 emphasised the word ‘completely’]

This response shows the difficulty and potential lack of certainty this interviewee had around the approach to relevance and exclusionary rules. B19 started to answer the question in one way, but then suggested that the opposite premise was correct and concluded that relevance remains an essential first question to be considered separately to, and in advance of, engagement with evidential rules. This is no criticism of B19, and their response may be a reflection of the difficulty in verbalising first what is likely a routinised matter in the abstract, rather than in the context of a specific case.

As discussed earlier in this chapter, academic theory tells us that the evidential process that applies to all criminal evidence can be summarised with the following broad questions: (1) is the evidence relevant; (2) If yes, is the evidence subject to any exclusionary rules of evidence?; and (3) If yes, is the evidence subjection to any inclusionary exception to that exclusionary rule?[554] The responses of B5, B20 and (partially) B19 outline an approach that does not appear to engage with the first key question (is the evidence relevant) but instead goes directly to questions 2 and 3. B19’s response neatly encapsulates some of the difficulty in reconciling theoretical knowledge around relevance with practical decision-making. Interestingly, barristers on both sides of the question referred to the complexity of the exclusionary rule

[554] Paul Roberts, *Roberts and Zuckerman’s Criminal Evidence* (3rd edn, OUP 2022) 181.

(Section 41) but used that to justify reaching their different respective decisions. On reflection, it would have been beneficial to probe the responses of B5, B20 and B19, who suggested they would consider exclusionary rules of evidence 'first and foremost'. It may have been beneficial to ask follow-up questions on this, or provide them with a case example and ask for their opinion on a hypothetical set of facts to clarify their commitments to the position/s they outlined.

Other interviewees shared an approach to decision-making in this context that situated the relevance question within a wider 'chain of events' but in specific response to decisions taken *before* the evidence reaches the barrister. When asked about the sequence they attached to the evidential process, and whether they would consider relevance and exclusionary rules *separately,* B1 replied in the following way:

> B13: 'I don't think it is necessarily such a formulaic approach… you can assume that by the time a case reaches me someone has already decided what the relevant information is. Once I am presented with that, I can then think about admissibility and deal with … any exclusionary rules that may apply'.

> B1: 'Yeah, I mean so much so ... and I can only talk for myself, but I would say it's almost instinctive, that you know it doesn't even get … on the table, as it were. It doesn't get on the desk unless it's relevant'.

These responses see barristers consider the previous decisions of third parties which, ostensibly, then feature in their decision-making on relevance. Both B1 and B13 seem

suggest that they would not consider relevance as a standalone matter when a specific exclusionary evidential rule applies. Instead, they reject a ‘formulaic approach’ on the assumption that a decision on evidential relevance has already been made by another party . B1’s response differs slightly from B13’s in one distinct way. B1 seems to affirm (although somewhat vaguely) that they may separate the decisions on relevance and exclusionary rules. They then go on to affirm their belief that assessments of relevance will have been made before the case gets to them, or ‘the desk’. This assumption, that relevance will be decided before a case is given to a barrister, may potentially serve to deter barristers from assessing or questioning relevance. B13, on the other hand, does not favour a consideration of relevance generally where an exclusionary rule applies. The assumption appears to be that relevance will likely have already been decided (presumably by police or the CPS). They appear to proceed, on that basis, to focus their decision-making solely on exclusionary rules, rather than considering the initial question of relevance.

Although this suggestion arose in relation to only two responses, it is nevertheless important to explore the different ways in which barristers may frame and approach decisions on relevance. It is particularly important to understand the decision-making process where relevance interacts with other complex evidential matters closely allied to it.

8.3. Conclusion

This chapter has explored the close and, at times, complex relationship between relevance and other exclusionary rules of evidence. Academic literature typically reduces the evidential process to three distinct questions: (1) is the evidence

relevance?; (2) Is it subject to an exclusionary rule?; and (3) is it subject to an inclusionary exception to that exclusionary rule?[555] While this structure is not designed, nor claims, to account for decision-making in a practical setting, it is helpful to understand the differences between barristers approaches to relevance, where an exclusionary rule of evidence also applies. This chapter provides evidence to suggest that the evidential process in practice is much more complex than this three-step academic structure would suggest.

While the academic representation of the evidential process artificially separates relevance and exclusionary rules from one another, the relationship between the two phenomena is nuanced, and the functions they each perform bear a close and important relationship. As discussed in the introduction to this chapter, exclusionary rules serve as a qualification on the general principle of relevance and address the issue of admissibility based on the specific category of evidence to which it pertains. That is not to say that exclusionary rules of evidence have not, at times, introduced a mechanism for dealing with matters closely bound up with questions of relevance. This is arguably the case where particularly challenging categories of evidence are concerned, such as sexual behaviour evidence. As a matter of social policy, there have been extensive discussions and debates around this type of evidence and the purposes of its admission in criminal trials. The exclusionary rules introduced by the Youth Justice and Criminal Evidence Act[556] arguably come very close to deal with matters of relevance and setting the parameters within which a complainant's sexual history evidence will be relevant. That is likely a reflection on the complexity and, at times, controversy related to the subject matter and nature of sexual

[555] Paul Roberts, *Roberts and Zuckerman's Criminal Evidence* (3rd edn, OUP 2022) 181.
[556] Youth Justice and Criminal Evidence Act 1999 section 41-42.

behaviour evidence, rather than a suggestion that relevance and exclusionary rules perform the same function. Relevance and exclusionary rules of evidence perform innately different functions, with exclusionary rules offering specific and much more tailored guidance on when it will be appropriate to admit the relevant evidence (or otherwise).

This chapter has shown how barristers took different approaches to decision-making on relevance where exclusionary rules of evidence also applied. Some barristers used legal frames to support and advocate 'the rule' that relevance and admissibility were separate issues deserving of sequential and distinct consideration. Proponents of this view used the complexity of exclusionary rules of evidence as justification for their separation. Other interviewees used a different type of legal frame to suggest that relevance was dealt with *within* exclusionary rules of evidence; arguing that exclusionary rules deal with relevance 'at their core'. Alongside legal framing, some interviewees approached their decisions on relevance instrumentally and appeared to allow the presence of exclusionary rules to impact their decision-making on relevance. Proponents of this view also discussed the complexity of the relevant exclusionary rule in support of their doing so. This was an interesting divergence in approach, where barristers used the same legal and instrumental frames but to reach different conclusions as to what they felt was the correct approach to the evidential process.

This chapter has also noted the evolution and, arguably, diminishment of exclusionary rules of evidence across the criminal law. The erosion of exclusionary rules in the context of bad character evidence and hearsay evidence was noted, and the Law Commission's proposal in relation to the use of an 'enhanced relevance' test for sexual behaviour evidence was regarded as consistent with this wider trend and

shift away from exclusionary rules. That the Law Commission seeks to use an enhanced relevance test at the heart of their proposals relating to sexual behaviour evidence[557] communicates a faith in relevance as a concept that is competent to do the work needed to protect complainants in sexual offence cases. It suggests that they have confidence in relevance to assist and guide decision-makers in some of the most complex and contested areas of evidence law. This research shows how this faith in relevance as a universally understood evidential device may potentially be misplaced; and this chapter has shown the different ways in which relevance can be conceived in relation to other rules of evidence.

In common with previous chapters that have explored interview data, this chapter suggests that a veneer of simplicity dominated the discussion around relevance and exclusionary rules of evidence. Individual barristers quoted showed little doubt as to the 'correct' approach to relevance where it interacts with exclusionary rules of evidence, and yet when compared against one another they were not consistent. It remains to be seen what the implications of these different views are, and whether or the extent to which it leads to substantive differences in decision-making. Equally, we cannot from the basis of these responses know whether the ways in which barristers describe their decision-making in an abstract situation maps clearly onto what happens in practice. The next chapter reflects further on these findings and offers some final reflections on the interview data as a whole, drawing out some of the broader themes and patterns that emerge from this research.

[557] In the 2023 Consultation Paper, the Law Commission also suggest using an enhanced relevance test in proposals relating to disclosure.

CHAPTER 9:

CONCLUDING REMARKS

This thesis has conducted an in-depth examination into evidential relevance and has considered what relevance means, and how it works, on an academic, appellate, and practical level in the criminal courts. Relevance has been situated as one of the most fundamental evidential requirements that permeates criminal proceedings, and does so with universal applicability. Despite being 'possibly the most basic concept in the law of evidence'[558] relevance had not, until this point, been the sole subject of a legal research endeavour. This research was the first of its kind to conduct an in-depth socio-legal examination of relevance, considering the academic framings of relevance tests,[559] the ways relevance is used and understood in the appellate courts,[560] and the ways that barristers understand and use relevance 'on the ground' in the Crown Court.[561] As part of this, it is, at present, the only research that has interviewed criminal barristers on the topic of evidential relevance.

This chapter discusses the research findings as a whole and the overarching themes that can be drawn from the review of relevance, before offering some reflections on the research process. Section 9.1. recalls the overarching aim of the thesis and the research questions that have informed and underpinned the research

[558] Andrew Choo *Evidence* (5th edn, OUP 2018) 2.
[559] Chapter 3.
[560] Chapter 4.
[561] Chapter 5, Chapter 6, Chapter 7, and Chapter 8.

throughout. It is through the lens of the research questions that the findings of each chapter are summarised and reflected upon. Section 9.2. then considers some of the limitations of the research, before section 9.3. offers some thoughts on the future of relevance, including some potential avenues for future research endeavours.

9.1. Research findings and themes

At the outset of the research project, I identified an overarching research question, and five specific secondary research questions. The overarching research question was: 'How is evidential relevance understood and applied in the criminal courts?'. This primary research question was then supported by five secondary research questions, to help answer and address the overarching research question. The secondary research questions were:

> RQ1. What are the possible tests for evidential relevance?
>
> RQ2. How are relevance tests applied in appellate courts?
>
> RQ3. To what extent are relevance 'tests' applied consistently in the criminal courts as per my respondents' experiences?
>
> RQ4. According to my respondents, what factors influence criminal barristers' decision-making on evidential relevance?
>
> RQ5. How does evidential relevance interact with other rules of evidence?

I have identified throughout the thesis where each of these research questions are engaged, and each of the five secondary research questions have contributed to enhancing knowledge of how evidential relevance operates in the criminal courts.

Chapter 1 began by drawing upon Hawkins' framework to explore 'Relevance in Context'. This chapter examined the context in which the evidential concept of relevance is decided, and situated relevance within its broader criminal justice environment. This allowed for relevance to be understood in light of its broader socio-legal and adversarial environment which informs the demands on legal professionals tasked with making decisions on evidential relevance. This chapter highlighted how the three 'layers' of Hawkins' theoretical framework interact and impinge upon one another, contributing to a dynamic and highly complex decision-making environment. Particular trends relating to the increasing emphasis upon managerial values in the justice system – and criminal courtroom - were traced and the implications of those shifts on relevance considered. It was argued that the open-textured nature of relevance rendered it particularly susceptible to shifts in the legal surround and field, which make it all the more important to understand how relevance is used and understood on the ground in the criminal courts.

Chapter 2 then set out the research methods and methodology adopted in this research, it justified the decision to use qualitative interviews as the primary tool for data collection, in conjunction with a desk-based analysis of relevance in theory and doctrine. It set out how the thematic analysis was conducted, and recounted some of the practicalities associated with the research process as a whole. I return to some reflections of the research design and methods in section 9.2.

Chapter 3 engaged with RQ1: 'What are the possible tests for evidential relevance?' and considered academic framings of relevance. Initially, this chapter identified two key facets of relevance: first, that relevance is an inherently relational concept. Second, it requires a threshold be attached to it to determine the stage at which evidence will be regarded as relevant, and where the relational link between

evidence and a contested fact is established. This analysis identified and explored three specific framings of relevance, two of which are prevalent in academic discourse and one of which has been endorsed and amplified by the Law Commission. The three framings of relevance were distinguished based on the different thresholds they appear to attach to relevance and the different formulations upon which they rely. A logical relevance framing of relevance relied upon decision-makers individualistic application of logic and common sense, legal relevance framings upon evidence being more probative than prejudicial, and enhanced relevance required that evidence have *substantial* probative value. The theoretically informed analysis in Chapter 3 highlighted how each academic framing of relevance rests on highly subjective foundations, that afford decision-makers extensive interpretive latitude based often on matters of semantics, which may make practical approaches to relevance difficult to measure and capture.

Chapter 4 went on to consider appellate framings of relevance, to assess how relevance has been used and understood in the appeal courts. In so doing, this chapter engaged specifically with RQ2. 'How are relevance tests applied in appellate courts?'. This chapter considered if and how the three academic framings of relevance identified in Chapter 3 manifested themselves in case law and judicial commentary. The doctrinal review found that few concerns were raised in appellate courts about the nature, scope, or operation of relevance as an evidential device.[562] Rather, the courts generally conceived of relevance as a straightforward matter, where they spoke of matters 'plainly relevant' and referred to the 'well established principles' of relevance. The doctrinal review found that logical relevance was the dominant approach to relevance, that was predominantly used and seemingly endorsed by the appellate

[562] Chapter 4.2.

courts. This is an important finding. It is a position previously alluded to by academics,[563] but it is beneficial to have doctrinal research in which to now ground this assertion. Although Chapter 4 found logical relevance to be the dominant relevance framing applied in appellate courts, it nevertheless identified the subtle differences in ways the courts have engaged with logical relevance and the threshold question of relevance. The overarching theme that began to emerge at this stage was one of complexity and nuance around relevance, where there is scope for divergence in the way in which relevance can understood and used by judges in an appellate setting. This is highly salient where it is the appellate courts that are responsible for setting the parameters and guidance around relevance that bind the lower courts, including barristers who work within them.

This theme became more prominent when it came to the empirical analysis. Chapters 5, 6, 7, and 8 engaged with my interview data, with a view to understanding how barristers understand and use relevance in practice. Chapter 5 was the first chapter to engage with the interview data and it sought to answer RQ3. 'To what extent are relevance 'tests' applied consistently in the criminal courts as per my respondents' experiences?'. This was an important supplement to the review of relevance in the appellate courts, and it sheds an important light on how relevance works 'on the ground' in the Crown Court. After exploring barristers' perceptions of relevance, I showed that most interviewees perceived relevance as widely understood by themselves and fellow barristers, and I identified a recurring theme among barristers where they generally regarded relevance as a matter treated consistently in the criminal courts. When questioned about their approaches to relevance, however,

[563] Matt Thomason, 'Previous Sexual History Evidence: A Gloss on Relevance and Relationship Evidence' (2018) 22(4) IJEP 343, 344.

barristers placed significant emphasis upon the *internalised* processes involved in relevance decision-making, and reinforced how decisions on relevance were often grounded in the notions of logic, common sense and professional judgement. The challenges of an evidential device being embedded within such interpretive and individualistic concepts were identified and it was this internalised nature of decision-making on relevance that was then probed in Chapters 6 and 7.

Both Chapter 6 and 7 used four of Hawkins' dominant frames to interrogate the influences upon barristers' decision-making on relevance. In so doing, they engaged with RQ4 to consider 'According to my respondents, what factors influence criminal barristers' decision-making on evidential relevance?'. Chapter 6 used the concepts of legal and symbolic frames to show how barristers draw upon legal and non-legal factors to inform the threshold they apply to relevance. As expected in an active trial context, interview data showed how barristers frequently used legal frames to make assessments of evidential value based on legal analysis, and based on the offence or specifics of the case at hand. Symbolic frames that emphasised the social processes that can inform decisions were not prevalent in the interview data but section 6.3. showed how the internalised nature of relevance decision-making meant symbolic frames could be applied alongside legal (and other) decision frames.

Chapter 7 continued interrogating RQ4, to examine other framing devices that could be applied to barristers' decisions on relevance. The remaining two of Hawkins' dominant frames – instrumental and organisational frames - were used to further probe this question. Analysis of interview data showed instrumental framing and forward-looking assessments as to the practical impact of a decision were prevalent among interviewees. Data showed barristers' decision-making was heavily informed by the presence of others in the courtroom, and how barristers predicted those others would

either make or respond to evidential decisions. Common themes from the interview data emerged, with decision-making on relevance being informed by tactical ends, a feature of formal and informal agreements between barristers, and in awareness or anticipation of wider disclosure requirements. Organisational frames were equally prominent in the interview data, and the data showed how barristers concern over their professional reputation may, at times, inform their decision-making, often in conjunction with other decision frames. Extrapolating the many and various influences upon relevance decisions through use of framing devices is an important step in understanding how relevance can be understood and used in the criminal court. Together, both Chapter 6 and 7 affirm how an evidential device governed largely by internalised decision-making is susceptible to being used to a wide variety of interrelated and dynamic ends.

Chapter 8 responded to a theme that emerged from interview data: that of a close relationship between relevance decision-making and exclusionary rules of evidence. This discussion engaged explicitly with RQ5: 'How does evidential relevance interact with other rules of evidence?'. It is difficult to offer any conclusive answer to this question based on the interview data, as it showed a significant degree of inconsistency among barristers, particularly in relation to the ways in which barristers approach relevance where said evidence is also subject to an exclusionary rule. This, of itself, is a salient finding and though barristers tended to apply legal and instrumental frames in this context, they often came to different conclusions on the correct approach or process to follow when considering evidential relevance and exclusionary rules.

Each chapter in this thesis contributes to a picture of relevance as a deceptively complex evidential device, due to its roots in both lay and legal discourse and its

foundations in nefarious notions of common sense, logic and professional judgement. Each of which, in slightly different ways, obfuscate the normative basis upon which decisions are made.

The empirical analysis concluded with the observation that barristers understood and used relevance in a number of different ways and to a number of different complex, interrelated, and dynamic ends.[564] This seems an understatement and drawing this all together, some overarching themes are identified in response to the overarching research question. First, that relevance is an evidential matter far more complex than is typically appreciated. The theme of relevance being relatively straightforward was one that emerged from academic and appellate discourse, and was echoed in and exemplified by barristers interviews. There seemed an assumption on each of these fronts that relevance was widely understood and its practical usage relatively unproblematic. This research has shown how this perception may be misplaced, as relevance is inextricably bound up in highly contestable notions of common sense, logic, and notions of professional judgement; all of which contribute to relevance decisions being internalised rather than deliberative. The implications have been considered throughout this research, but future research avenues on this front are discussed in section 9.3. Secondly, through application of Hawkins theoretical framework this thesis has highlighted the extent to which decision-making on relevance is influenced by broader concerns relating to the operation and management of the criminal justice system. Socio-political decisions on resource allocation in the justice system, changes to the legal field through managerial initiatives

[564] Chapter 7.3.

and efficiency drives within the justice process all have significant scope to impact the frames barristers employ when making decisions on evidential relevance.

This research is of an exploratory and investigatory nature, aiming to enhance and advance knowledge on evidential relevance. It does not, therefore, conclude with bold law reform proposals, but instead issues a call for further research and exploration of decision-making on relevance, and urges a note of caution to those who assume relevance to be a settled or straightforward evidential matter. This note of caution extends to the Law Commission when advocating for a particular relevance framing – enhanced relevance - as the solution to complex areas of evidence law and in relation to highly contested categories of evidence.[565] The research does, however, provide some limited support for the Law Commissions' decision to include specific guidance – including a definition - on the threshold they attach to enhanced relevance. In terms of promoting consistent approach to relevance, defining the threshold of relevance may go some way in alleviating some of conceptual uncertainty, but simply raising threshold of relevance in linguistic terms, does not necessarily alleviate the underlying tensions caused by subjective notions susceptible to the individual ascription of meaning. The following section considers and reflects upon the research process and some limitations of the research, before considering the future of relevance in the evidential context, and opportunities for future research on relevance.

9.2. Reflections and limitations of the research

As with all research, there are some limitations in the research that must be identified and reflected upon. Where empirical research relies upon interviews with members

[565] Such as in relation to sexual behaviour evidence.

from a particular group, care must be taken not to extrapolate or generalise findings beyond the sample itself. I was pleased to have secured interviews with 20 criminal barristers across both England and Wales, and the number of interviewees was appropriate for the research project. Yet it must be noted that this number is a small proportion of the overall criminal barrister population, and the findings do not extend beyond the interviewees. In relation to the interviews themselves, I was a first-time interviewer who had no previous experience of interviewing elites (or non-elites for that matter). Nevertheless, I found the experience to be an incredibly rewarding one and, as interviews progressed, I become more confident in interviewing and engaging with interviewees in a reflexive way. With the benefit of hindsight, though, I can see there are questions that I could have probed further with interviewees; for example relating to practical examples provided around relevance decisions, the differing perspectives on relevance based on a barrister acting for the prosecution or defence, and on the wider issue of relevance in relation to exclusionary rules of evidence. In some instances, where I did not probe interviewee responses as much as I can now see was necessary, I regard this primarily due to a lack of confidence in an elite interview setting. I have no doubt that this is all part of a learning process, however, and by virtue of experience the challenge of elite interviewing is something I shall be better-equipped for in future. Equally, questions that I can now see would have been beneficial to ask will, again, shape future practice. For example, a simple addition of asking interviewees at the close of the interview whether they have anything to add on the topic, or something they feel I may have missed, would be a helpful addition to future interview schedules. Furthermore, given its contemporary salience, I would wish to discuss enhanced relevance as an approach to decision-making on relevance.

It is also necessary to reflect on the method of data collection itself, and to consider some of the limitations on using interviews as the means of obtaining barristers insight on relevance. Some of these limitations have been identified throughout the thesis, in both Chapter 2.3, but are worth elaboration here. Using interviews without the accompaniment of courtroom observations, means barristers response may have been 'sanitised' in some respects. This is a common critique of interviews generally, whereby they can be akin to 'extractions of data rather than encounters in understanding'.[566] In the present research context, the potential for 'sanitised' responses and discussion may have meant barristers responding to questions in a way that they deemed to be the appropriate or legally-sound response. This may have been the case particularly where potentially sensitive topics arose, such as the use of professional tactics in the criminal courtroom for example. As such, in the interview context, barristers may be less likely to reflect the more creative ways they engage in relevance decision-making *in situ*, particularly where those methods may deviate from legal conventional practice.

Although legal framing was expected to be a dominant framing device for decision-making that occurs in the active trial context, barristers may have been predisposed to responding in legal terms and applying legal frames, given the level of accountability that being asked to answer questions on a legal topic invariably prompts. Supplementing interviews with trial observations may have provided a more comprehensive account of barristers approaches to relevance, in that it would show what barristers *say* vs what they *do*. Yet for reasons explained in Chapter 2,[567] trial observations were not possible in this research context. It may be that future research

[566] Tim May and Beth Perry, *Social Research: Issues, Methods and Processes* (5th edn, McGraw-Hill Education
[567] Chapter 2.3.

building upon the findings of this thesis may usefully expand upon relevance literature and use courtroom observations to examine how barristers and/or judges approach relevance in the practical trial context. This is discussed further below, in a fuller coverage of future research opportunities.

Reflections on the research process would not be complete without reference to the decision to adopt a theoretical framework throughout this thesis. The use of a theoretical framework in legal research was novel to me, but the more research I undertook, the more I felt Hawkins' framework was not only beneficial to the research project, but essential. It provided a structure to complex and interrelated decision-making processes, and provided a mechanism for organising and understanding information with much greater clarity than would have, I believe, otherwise been possible. The use of any theoretical framework undoubtedly requires considerable time and effort be spent acquainting oneself with said framework. I suggest that this is time well-spent and believe that this thesis is all the richer for Hawkins' theoretical contribution to it.

9.3. Future research opportunities and the future of relevance

As highlighted in the introduction to this chapter, this research is the first socio-legal exploration of relevance, as a topic in its own right. It is very much hoped that this is not the last research endeavour that considers evidential relevance. Rather, it is hoped that this research provides the essential *foundations* for future research on relevance, and acts as a springboard into further research that can build upon some of the themes identified throughout this thesis. It would be beneficial for future research to be more representative of the legal profession, both numerically and in terms of a wider geographical spread of participants.

First and foremost, I suggest that a future research project would do well to interview judges on relevance, and engage with their perspective on decision-making around relevance. Given that my permission to interview judges was deferred, rather than withdrawn, there is an excellent opportunity for me to interview judges that I plan to take up in the near future. Judicial interviews on relevance would build upon and complement the findings of this thesis, and undoubtedly contribute to continue developing knowledge and understanding of relevance in a more holistic way. In the spirit of optimism, it may even be beneficial that barristers and judges were not interviewed within this same research project, as I had originally envisaged. Both parties have important stories to tell about their decision-making on relevance and it is important that their interviews can receive the detailed and thoughtful consideration they deserve in that regard. As such, I intend that this research is not the last word on relevance, but the catalyst for further investigation of this fundamental and important evidential requirement.

This thesis has interrogated what relevance means, how it is used, as well as its development across the criminal law and in the criminal courts. However one views and conceptualises relevance, be it from an academic, appellate or practical perspective, evidential relevance undoubtedly has one of the most impactful and consequential roles in criminal evidence. It is, therefore, imperative that we have as comprehensive an account of relevance as is possible, and this thesis has provided context, substance, and detail to that important end.

APPENDICES

Appendix 1: Interview guide

Introductions

- Introductions/outline of the research
- Confirm recording permission

Section 1: broad discussion of relevance

1. Can you walk me through, in basic terms, how you decide whether a piece of evidence is relevant? Identifying any key principles you apply or tests you follow.

2. In your experience, is relevance often contested? (Can you provide any detail on how often?)

3. Can you give me any examples of when the relevance of a piece of evidence was contested by your opposing number?

4. Can you give me any examples of when the relevance of a piece of evidence was contested by either a judge?

5. Where the relevance of a piece of evidence is contested in a case, where does this normally happen? I.e., in pre-trial hearings, during the course of a trial?

6. Are there particular types of cases where evidential relevance is, in your experience, likely to be contested? For example, are there specific types of evidence which frequently invoke discussion around relevance (expert evidence for example)

7. In your experience, do you still consider evidential relevance where specific exclusionary rules apply to a piece of evidence? Or do you go straight to a consideration of the exclusionary rules? I.e.., where sexual behaviour evidence is an issue, would you go straight to s41 or consider relevance separately first?

Section 2: Relevance tests

1. [Outline specific definitions of relevance from academic literature; logical relevance and legal relevance]

   Do you recognise any of these definitions, in practice? Which, if any, conception of relevance do you think most aligns to your understanding of relevance?

2. Do you think relevance is treated consistently in the courts? Is there consistency in the way relevance is conceptualised and applied across cases and by different colleagues/judges? -
   If not, do you think it's a problem?

3. Do you have a view on how relevance *should* best be understood?

Appendix 2: Consent form

The Relevance of Criminal Evidence in Crown Court Trials

If you agree to participate in this doctoral research, please sign and date the consent form below.

- I (the participant) have read and understood the Information Sheet provided.
- I (the participant) understand that I can withdraw from the research project at any time before and during the interview, and up to 12 weeks after the interview has taken place. Should I withdraw, the researcher will destroy this data in a secure manner.
- I (the participant) understand that taking part in the research project is entirely voluntary.
- I (the participant) understand that my identity will be kept confidential and identifying features will be removed from the data in any subsequent publications, but that due to the way in which the sample is obtained, there may be colleagues who know I have taken part in the project and may be able to attribute quotes to me based on their knowledge of my work and experience.
- I (the participant) understand that I can request a copy of the draft research from the primary researcher.

Name of participant (block capitals): _____

Signature of Participant:_____-

_____ Date:_____

Signature of the Researcher:

_____

Date:_____

Appendix 3: Respondent questionnaire

The Relevance of Criminal Evidence in Crown Court Trials

QUESTIONNAIRE

It is requested that you complete this short questionnaire to help distinctions to be made between the opinions and experiences of professionals from different backgrounds. Your answers will be kept confidential.

Age: 20-30 ☐

30-40 ☐

40-50 ☐

50-60 ☐

60+ ☐

Gender: ……

Ethnicity: ……

Post-qualified Experience (PQE): …… years

Length of time practising criminal law: ……..

Judge (recorder) ☐

Barrister ☐

Defence solicitor ☐

CPS solicitor ☐

Do you prosecute and/or defend? (Please provide a rough estimation of the split between the two):

……..

What are the main types of cases you usually work on? (i.e., sex cases/fraud/murder etc.):

……

For completion by researcher:

Date of interview (*so that I can match up with the confidential transcript of your interview*):

……

Appendix 4: Information sheet

Research Title: The Relevance of Criminal Evidence in Crown Court Trials

Purpose of Research: This doctoral research is concerned with the concept of evidential relevance, and is seeking to improve knowledge around this 'foundational concept of criminal evidence'. Accordingly, this research explores relevance in three distinct ways:

1) Relevance in theory: an exploration of the theoretical notion of relevance; as it appears and is discussed in the academic literature.

2) Relevance in doctrine: an examination of case law, examining how relevance has been treated by judges in the Court of Appeal, House of Lords (as it was) and the Supreme Court.

3) Relevance in practice: empirical element of the research which draws upon interviews with barristers and judges to gain an insight into the way relevance is understood and used by practitioners.

Role as an interviewee

You will be interviewed for approximately one hour, in person. You will be asked a series of questions regarding the process of admitting evidence in criminal trials and how you decide whether evidence is relevant. Interviews will take place between May – November 2022 and will take place at a location of your choice (for example in chambers/meeting rooms/or a local coffee shop) or online via Zoom.

Use of interview data

The interview data will be used for the completion of the doctoral thesis and in future publications arising out of the thesis. All quotations from respondents will be identified by codename only (eg B1 – barrister 1, and J1 – judge 1) with the removal of your name and the names/locations of any people, cases or court centres you mention in the interview. There is a chance that you will remain identifiable to those whom you work closely with (or, for example, someone who recommended you to me as a participant), so full anonymity cannot be guaranteed, but your identity will remain confidential.

Withdrawal process

You can withdraw from the research at any point before or during the interview. You may also withdraw up to 12 weeks after the interview has taken place.

Data storage

Full ethical approval has been granted by the University of Birmingham, on the basis that all data protection considerations, including security, storage and processing have been considered. All interview transcripts and audio files will be anonymised, and a key relating to job title of the interviewee will be used. All interview data will be stored and encrypted on an external hard-drive and available only to the researcher. All interviews will be recorded and later transcribed. The storage of recordings and transcribed materials will be in line with data storage and protection principles as defined by the University of Birmingham.

Researcher information:

Polly Hernandez - Doctoral Researcher at the University of Birmingham

Email: [redacted]

Profile: www.birmingham.ac.uk/schools/law/research/postgraduateresearch/profiles/hern%C3%A1ndez-polly.aspx

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BIBLIOGRAPHY

Adler Z, 'Rape: The Intention of Parliament and the Practice of the Courts' (1982) 45 MLR 664;

Ashworth A, Redmayne M and Campbell L, *The Criminal Process* (5th edn, OUP 2019)

Attorney General's Office, Attorney General's Guidance on Disclosure 2020' <www.gov.uk/government/publications/attorney-generals-guidelines-on-disclosure-2020> accessed 1 June 2023

Baird V, 'Annual Report 2020/2021' (CP463,2021) <www.victimscommissioner.org.uk/document/annual-report-of-the-victims-commissioner-2020-to-2021/> accessed 16 September 2023

Bar Council, 'Access Denied: The state of the justice system in England and Wales in 2022' (Bar Council, November 2022) <www.barcouncil.org.uk/resource/access-denied-november-2022.html> accessed 6 January 2023

Bar Standards Board, *BSB Handbook* (BSB 2023) part 2-B. <www.barstandardsboard.org.uk/for-barristers/bsb-handbook-and-code-guidance.html> accessed 12 November 2023

Bingham T, 'The Rule of Law' (Speech at the Sixth Sir David Williams Lecture, Cambridge, 16 November 2006) <www.cpl.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.cpl.law.cam.ac.uk/legacy/Media/THE%20RULE%20OF%20LAW%202006.pdf> accessed 22 December 2023

—— '*The Rule of Law'* (Penguin 2011)

Blackstone's Criminal Practice 2024

Blyth M, *Austerity: The History of a Dangerous Idea* (OUP 2015)

Bowcott O, 'Crown Prosecution Service chief inspector signals concern over funding' The Guardian, 23 September 2015 available at

<https://www.theguardian.com/law/2015/sep/23/cps-chief-inspector-kevin-mcginty-cuts-can-leave-agencies-unable-to-function> accessed 23 March 2023

Bradney A, 'Law as a Parasitic Discipline' (1998) March 25(1) Journal of Law and Society 71

Braun V and Clarke V, *Successful Qualitative Research: A Practical Guide for Beginners* (SAGE 2013)

——*Thematic Analysis: A Practical Guide* (SAGE 2021)

Britton A, 'Pressed for Sentence? An Examination of the New Zealand Crown Prosecutor's Role in Sentencing' (2018) 29(3) 377

Bryman A, *Social Research Methods* (5th edn, OUP 2016)

Carter P, 'Hearsay, Relevance and Admissibility: Declarations as to State of Mind and Declarations Against Penal Interest' [1987] 103(Jan) LQR 106

Child J and others, *Semester and Sullivan*'s *Criminal Law: Theory and Doctrine* (8th edn, Hart 2022)

Choo A, 'The Notion of Relevance and Defence Evidence' [1993] CLR 114

——*Evidence* (6th edn, OUP 2021)

Clark T, Foster L, Sloan L and Bryman A, *Bryman's Social Research Methods* (6th edn, OUP 2021)

Coffey A and Atkinson P, *Making Sense of Qualitative Data: Complementary Research Strategies* (Sage Publications 1996)

Conaghan J and Russell Y, 'It's just common sense: sexual history and the failure of evidential relevance' (*London School of Economics* 23 November 2023) <https://legalresearch.blogs.bris.ac.uk/2023/11/its-just-common-sense-sexual-history-and-the-failure-of-evidential-relevance/> accessed 23 December 2023

Courts and Tribunals Judiciary 'About Magistrates' courts' <www.judiciary.uk/courts-and-tribunals/magistrates-courts/magistrates-court/> accessed 17 December 2023

Cownie F and Bradney A ‘Socio-Legal Studies: A Challenge to the Doctrinal Approach’ in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (2nd edn, Routledge 2017)

Cownie F, *Legal Academics: Cultures and Identities* (Bloomsbury Publishing Plc 2004)
CPS, ‘Disclosure Manual’ <www.cps.gov.uk/legal-guidance/disclosure-manual> accessed 2 June 2023

Criminal Procedure Rule Committee <www.gov.uk/government/organisations/criminal-procedure-rule-committee/about> accessed 21 November 2023

Della-Porter D and Keating M (eds), *Approaches and Methodologies in the Social Sciences* (Cambridge University Press 2012)

Dennis I, *The Law of Evidence* (Sweet & Maxwell 2017)

Diener E and Crandall R, *Ethics in Social and Behavioral Research* (University of Chicago Press 1978)

Doak J, McGourlay C and Thomas M, *Evidence: Law and Context* (5th edn, Routledge 2018)

Duff P ‘The Agreement of Uncontroversial Evidence and the Presumption of Innocence: An Insoluble Dilemma?’ (2002) 6(1) Edinburgh Law Review 25

Fairclough S, ‘The Role of Equality in the Provision of Special Measures to Vulnerable and/or Intimidated Court Users Giving Evidence in Crown Court Trials’ (PhD thesis, University of Birmingham 2017)

——— 'Using Hawkins's Surround, Field, and Frames Concepts to Understand the Complexities of Special Measures Decision Making in Crown Court Trials' (2018) 45 (3) Journal of Law and Society 457

Fairclough S, Taggart J, and Backen P, ‘Lost in Translation? Perceptions of Defendant Intermediaries in the Legal Profession’ [2023] 7 CLR 44.

Félix L Ntienjom Mbohou and Tomkinson S, ‘Rethinking Elite Interviews Through Moments of Discomfort: The Role of Information and Power’ (2022) 21 *International Journal of Qualitative Methods* 1

Field S and Thomas P, ‘Introduction: Justice and Efficiency? The Royal Commission on Criminal Justice’ (1994) 21(1) 1

Fitzjames Stephen J, *Digest of the Law of Evidence* (12th ed, Macmillan 1948)

Garland F and McEwan J, ‘Embracing the Overriding Objective: Difficulties and Dilemmas in the New Criminal Climate’ (2012) 16(3) International Journal of Evidence and Proof 233

Goffman E, *Frame Analysis: An Essay on the Organisation of Experience* (Penguin 1975)

Green P, ‘The Relevance of Relevance’ (MA Social Research Dissertation, University of Birmingham 2020)

Hallett LJ, ‘Trial by Jury – Past and Present’ 35th Blackstone Lecture 2017, Judiciary of England and Wales <www.judiciary.uk/announcements/35th-blackstone-lecture-by-lady-justice-hallett-trial-by-jury-past-and-present/> accessed 31 August 2021

Hawkins K, (ed) *The Uses of Discretion* (OUP 1992)

—— *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (OUP 2002)

Hernandez P, ‘The Relevance of Relevance: Overcoming Myths and Misconceptions’ (2024) 7(7) CLR 458

HLA Hart, *Law, Liberty and Morality’* (Stanford University Press 1963); John Stuart Mill, *On Liberty* (Watts and Co 1929)

HM Courts and Tribunals Service, ‘HMCTS Management Information – August 2023’ (HM Courts and Tribunals Service 12 October 2023) <www.gov.uk/government/statistical-data-sets/hmcts-management-information-august-2023> accessed 23 November 2023

Hodgson J, ‘The Future of Adversarial Criminal Justice in 21st Century Britain’ (2010) 35(2) North Carolina Journal of International Law and Commercial Regulation 319

Hood C ‘A Public Management for all Seasons?’ (1991) 69 (1) Public Administration 3

Howard M, Hochberg D, Mirfield P (eds), *Phipson on Evidence* (15th edn, Sweet and Maxwell 1999)

Hoyle C and Santo M, *Reasons to Doubt: Wrongful Convictions and the Criminal Cases Review Commission* (OUP 2019)

Hoyle C, ‘Forensic Science and Expert Testimony in Wrongful Convictions: A Study of Decision-Making at the Criminal Cases Review Commission’ (2019) British Journal of Criminology 59, 919

Hucklesby A, ‘Court Culture: An Explanation of Variations in the Use of Bail by Magistrates’ Courts’ (1997) 36(2) The Howard Journal 129

Hutchinson T, ‘Doctrinal Research: Researching the Jury’ in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (2nd edn, Routledge 2018)

Institute for Government, *The Criminal Justice System* (Institute for Government, April 2020) 18 <www.instituteforgovernment.org.uk/publications/criminal-justice-system> accessed 19 August 2021

Johnston E, 'The adversarial defence lawyer: myths, disclosure and efficiency - a contemporary analysis of the role in the era of the Criminal Procedure Rules' (2020) 24(1) IJEP 35

Jones I, ‘A Problem of the Past? The Politics of ‘Relevance’ in Evidential Reform (2012) 11(4) CIL 277

Joyce P, *Criminal Justice* (3rd edn, Taylor and Francis Group 2017)

Judicial College, ‘Crown Court Compendium Part I: Jury and Trial Management and Summing Up’ <www.judiciary.uk/guidance-and-resources/crown-court-compendium/> June 2023 accessed 13 October 2023

Kenyon E and Hawker S, ‘Once would be enough’: Some reflections on the issue of safety for lone researchers’ (1999) 2(4) International Journal of Social Research Methodology 313

Kirby A, ‘, ‘Effectively Engaging Victims, Witnesses, and Defendants in the Criminal Courts: A Question of “Court Culture”?’ [2017] 12 CLR, 949

Law Commission, *Evidence of Bad Character in Criminal Proceedings* (Law Com No 273, 2001)

—— *Evidence in Sexual Offences Prosecutions*: *A Consultation Paper* (Law Com CP No 259, 2023)

Leveson B, *Review of Efficiency in Criminal Proceedings* (Judiciary of England and Wales January 2015)

Lippincott R and Stoker R, ‘Policy Design and Implementation Effectiveness: Structural Change in a County Court System’ (1992) 20(3) 376

Luhmann N, *A Sociological Theory of Law* (Routledge 1985)

Mann T (ed), *Australian Law Dictionary* (OUP 2010)

Marsh L, ‘Leveson’s Narrow Pursuit of Justice: Efficiency and Outcomes in the Criminal Process’ (2016) 45(1) Common Law World Review 51

McConville M and Marsh L, ‘Adversarialism goes West: Case Management in Criminal Courts’ (2015) 19(3) IJEP 172

McConville M, Sanders A and Leng R, *The Case for the Prosecution* (Routledge 1991)

McEwan J and Garland F, ‘Embracing the Overriding Objective: Difficulties and Dilemmas in the New Criminal Climate’ (2012) 16(3) IJEP 233

Merriam S and Grenier R, *Qualitative Research in Practice: Examples for Discussion and Analysis* (2nd edn, John Wiley & Sons 2019)

Merriam S and Tisdell E, *Qualitive Research: A Guide to Design and Implementation* (4th edn, John Wiley and Sons 2015)

Ministry of Justice, ‘Criminal Court Statistics Quarterly, England and Wales, October to December 2020’ (MOJ 2021)

Monaghan N, *Law of Evidence* (Cambridge University Press 2015)

Munday R, *Evidence* (9th edn, OUP 2017)

Newman D and Dehaghani R, *Experiences of Criminal Justice* (Bristol University Press 2022)

Novick G, ‘Is there a bias against telephone interviews in qualitative research?’ (2008) Research in Nursing & Health 31, 391

Noy C, ‘Sampling Knowledge: The Hermeneutics of Snowball Sampling in Qualitative Research’ 11(4) (2008) International Journal of Social Research Methodology 327

NPCC, College of Policing and CPS, ‘National Disclosure Improvement Plan’ <www.cps.gov.uk/publication/national-disclosure-improvement-plan> accessed 2 June 2023

Oakley E ‘Policing the Missing: Negotiating Absence’ (PhD thesis, University of Bristol 2014)

Oxford English Dictionary (OUP 2021) <www.oed.com/view/Entry/66493> accessed 17 January 2021

Oxford English Dictionary, ‘fundamental, adj. and n.’ (OED Dec 2022) <www.oed.com/view/Entry/75497> accessed 29 January 2023

Oxford English Dictionary, ‘Relevant’ (OED) <www.oed.com/Entry/161893?redirectedFrom=relevant#eid> accessed 2 January 2022

Packer H, ‘Two Models of the Criminal Process’ (1964) 113(1) University of Pennsylvania Law Review 1

Peck T, ‘Interdisciplinary Methodological Approaches to Desk-Based Socio-Legal Human Rights Research’ Law and Method (2023) January, 3

Pivaty A and Johnston E, ‘The Move Towards Efficiency and Managerialism in Criminal Justice’ in ED Johnston and Anna Pivaty (eds), *Efficiency and Bureaucratisation of Criminal Justice: Global Trends* (Routledge 2023)

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> accessed 02 June 2023

Quinn Patton M, *Qualitative Research and Evaluation Methods* (4th edn, SAGE 2015)

Quirk H, *The Rise and Fall of the Right of Silence* (Routledge 2017)

Report of the Advisory Group of the Law of Rape (the Heilbron Committee) Cmnd.6352 (1975)

Richards D, ‘Elite Interviewing: Approaches and Pitfalls’ (1996) 16(3) Politics 199

Risjord M, *Philosophy of Social Science* (Routledge 2014)

Roberts P, *Roberts and Zuckerman’s Criminal Evidence* (3rd edn OUP 2022)

Robin Auld, *Review of the Criminal Courts of England and Wales* (2001) <www.criminal-courts-review.org.uk/auldconts.htm> accessed 12 August 2021

Robson C and McCartan K, *Real World Research* (4th edn, John Wiley & Sons Ltd 2016)

Saunders M, *Research Methods for Business Students* (6th edn, Pearson Education 2012)

Schauer S ‘The Role of Rules in the Law of Evidence’ in Christian Dahlman, Alex Stein, Giovanni Tuzet (eds) *Philosophical Foundations of Evidence Law* (OUP 2021)

Sharpe R, ‘How Judges Decide’ in Rabeea Assy and Andrew Higgins (eds) *Principles, Procedure, and Justice: Essays in Honour of Adrian Zuckerman* (OUP 2020)

Smits J ‘What is Legal Doctrine?’ in Rob Van Gestel, Hans Micklitz and Edward Rubin (eds) *Rethinking Legal Scholarship* (Cambridge University Pres 2017)

Solarinoa A and Aguinis H, ‘Challenges and Best-practice Recommendations for Designing and Conducting Interviews with Elite Informants’ (2021) 58(3) *Journal of Management Studies* 652

Stramignon I, ‘At the margins of the history of English law: the institutional, the socio-political and the ‘blotted-out’’ 2009 Legal Studies 22(3) 420

Stone J, ‘The Rule of Exclusion of Similar Fact Evidence: England’ (1933) 6 Harvard Law Review 954

Temkin J, ‘Regulating Sexual History Evidence – The Limits of Discretionary Legislation’ (1984) 33(4) International and Comparative Law Quarterly 942;

Thayer J, *A Preliminary Treatise on Evidence at the Common Law* (Little Brown 1898)

Thomason M, ‘Previous Sexual History Evidence: A Gloss on Relevance and Relationship Evidence’ (2018) 22(4) IJEP 343

——‘Admitting Evidence by Agreement: Recalibrating Managerialism and Adversarialism in Crown Court Criminal Trials’ [2021] CLR 9, 727

Viscount Runciman, *Royal Commission on Criminal Justice* (Runciman Report) (Cm 2263, 1993) <www.gov.uk/government/publications/report-of-the-royal-commission-on-criminal-justice> accessed 18 August 2021

Welsh L, Skinns L and Sanders A, *Sanders and Young’s Criminal Justice* (5th edn, OUP 2021)

Young R, ‘Exploring the Boundaries of the Criminal Courtroom Workgroup’ (2013) 42(3) Common Law World Review 203